

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 186/09
5145601

BETWEEN MARGARET BENNETT
Applicant
AND BRIGHT WOOD NEW
ZEALAND LIMITED
Respondent

Member of Authority: Paul Montgomery

Representatives: Janet Copeland, Counsel for Applicant
Don Rhodes and Alastair McIntosh, Advocates for
Respondent

Investigation Meeting: 17 and 18 June 2009 at Invercargill

Submissions received: 18 June and 20 July 2009 from Applicant
8 July from Respondent

Determination: 28 October 2009

DETERMINATION OF THE AUTHORITY

[1] In an amended statement of problem lodged with the Authority on 8 December 2008, the applicant claims she was unjustifiably disadvantaged by the respondent taking allegedly unwarranted disciplinary action against her. Further, Ms Bennett alleges she was unjustifiably, constructively dismissed from her position as a product wrapper by reason of the employer *embarking on a course of conduct with the deliberate and dominant purpose of coercing her to resign*.

[2] Ms Bennett seeks orders requiring the respondent to apologise for initiating unwarranted disciplinary action; removal of all references to a complaint and the disciplinary action from her personal file; compensation for hurt and humiliation; a penalty for breach of the respondent's obligations of good faith; reimbursement of legal costs and a determination the applicant was unjustifiably, constructively dismissed.

[3] The respondent, by way of an amended statement in reply, says the applicant resigned, worked out her notice and rejects the applicant's claims in their entirety.

[4] The parties attempted to resolve their differences in mediation but were unable to do so.

Essential facts

[5] The applicant began her employment with the respondent in January 2005 as a wrapper and was engaged under an individual employment agreement which was signed by the parties on 17 January that year.

[6] The incidents triggering this problem occurred on 27 August 2008 when Ms Bennett was strapping packs on the line and heard an exchange between two fellow workers. Ms Bennett said to Ms Lynne Hawkins *why didn't you let Leah finish it? She was nearly finished.* Ms Hawkins left the area immediately and went into the staff room where employees keep their bags and personal effects. Ms Bennett followed Ms Hawkins and said to her *this is silly Lynne, it was only a question.* Ms Hawkins did not reply but left to go to the main office in an attempt to speak to Mr Bruce Burson, the Dry-End Manager at the mill, but he was not in his office so Ms Hawkins left the site.

[7] Ms Hawkins then dispatched a series of text messages to Mr Burson telling him she had left the site and explaining *sorry Bruce walked off the job at 8am, have no need to be subjected to the constant needling from Margaret that I've tolerated since I started – stress in the workplace.*

[8] This was followed by another message *stress in the workplace is something I can't deal with on day-to-day basis.*

[9] Mr Burson replied asking Ms Hawkins if she wanted to talk to him and suggested they meet at 8am the following day. Ms Hawkins replied saying she would like to talk but had uplifted her belongings from her daughter's home and returned to her farm at Owaka. She added *like the job but am not tough enough to cope with Margaret's PR skills – I will come down out of respect to you and to apologise for my rude exit.* Arrangements were made around the time Mr Burson had suggested.

[10] Mr Burson, who was also the health and safety manager at the mill, says he was concerned about the situation and approached the Head Clerk to see whether he had witnessed the incident. The employee said he had not been *on the spot* but he could hear Margaret Bennett *yelling*.

[11] The meeting between Mr Burson and Ms Hawkins took place at 8am as scheduled. Ms Angela Blair, Head Clerk in the main office of the mill, was also present. Ms Blair had actually witnessed Ms Hawkins' walkout and had called her back but without success. Ms Blair's evidence was she heard Ms Hawkins say *someone's got to do something about that bitch*, as Ms Hawkins brushed past her.

[12] Further, Ms Blair says she saw Ms Hawkins' safety gear in the office and that, with the information from another person in the office who told her Ms Hawkins was *quitting*, led her to try and call Ms Hawkins back.

[13] At the meeting, Ms Hawkins told Mr Burson part of the problem between her and the applicant *could be with me personally*, but said the applicant was *abrasive and rude* and she felt she had to walk on eggshells when dealing with Ms Bennett.

[14] Mr Burson asked Ms Hawkins if she wished to continue her employment with Bright Wood. Ms Hawkins told him she did. Mr Burson told her walking off the site was serious and he needed to investigate the incident in a disciplinary setting. Ms Hawkins said she understood that, but said she did not feel up to working the rest of that day. Mr Burson told her she could have the rest of the week off and it was agreed Ms Hawkins would return to work on 1 September 2008.

[15] Later that day, Mr Burson said he was sitting in the planer office when Ms Bennett walked in and asked him why she had not been interviewed and given the opportunity to defend herself. Mr Burson said that would happen in due course and told Ms Bennett Ms Hawkins felt *needled* by her. Ms Bennett denied she was needling Ms Hawkins and Mr Burson told the applicant he would attend to the matter fully once he had dealt with the situation with Ms Hawkins. Ms Bennett then left the office.

[16] Mr Burson later spoke to two staff members who work in the same area as Ms Bennett. One said she had had one *run in* with the applicant, the other said she left the pack and strap area because of the applicant's behaviour to fellow staff.

[17] Mr Burson then recalled he had allowed Ms Bennett to withdraw her resignation tendered in May 2008 when her plans to go to Australia had changed. Mr Burson said he spoke to the applicant at the time about previous incidents of abrasive and difficult relationships in the plant. He allowed her to withdraw her resignation but made it clear she needed to be more tolerant of new employees, more understanding of people working in different ways and to do her work and allow him to handle any problems that arose.

[18] Mr Burson says he gave Ms Bennett a notice of disciplinary meeting to investigate the incident on 29 August with a date of 1 September set for an 8am meeting. On receiving this notice, the applicant wrote to Mr John Crane, the Site Manager, on 31 August 2008:

Dear Sir,

I feel that the incident on Wednesday 27 Au 208 [sic] has totally blown out of proportion, in no way was it an act of bullying on my part, as a work related question, obviously to me Lyn overreacted.

Other employees were called to Bruce's office regarding this incident, which I find unexceptable [sic] as it involved me and I feel I should have been able to justify my actions first. I feel Bruce was trying to build a case against me (making it personal) to see if my version of the incident was same as the other employee's.

I feel Bruce has victimised me and mishandled a minor situation because of one casual employee, who finds it hard to become a team player.

Also, I am appalled that a situation that I trust management to be kept confidential has not been.

Ie, Bruce's wife discussing this incident with others.

*Yours faithfully,
M T Bennett*

[19] The meeting proceeded as scheduled. Mr Burson and Ms Blair attended for the respondent while Ms Bennett was accompanied by Mr Murray Christie as a support person.

[20] Mr Burson says Ms Bennett said there was no complaint against her. He says he told the applicant there had been a complaint and he needed to investigate it. Ms Bennett insisted there was a letter of complaint and was told there was no such letter. Mr Burson says Ms Bennett and Mr Christie seemed unprepared to listen nor to explain events on the day of the incident and became belligerent. Ms Bennett and

Mr Christie says Mr Burson was *aggressive and accusatory* during the meeting. Ms Blair says he was not.

[21] In fact very little turns on who was belligerent and who was not. Mr Burson made it clear before the end of the meeting the company would be taking no action in respect of Ms Bennett. The minutes record *I told Margaret that although no action was to be taken at this time in the form of a written warning, any further bullying could be construed as serious misconduct and disciplinary action may result.*

[22] In a memo to Ms Bennett confirming the decisions at the meeting, Mr Burson said, among other things:

Employers have a well recognised duty to maintain the relationship of trust and confidence with their employees and this can be undermined by serious and sustained acts of workplace bullying. If an allegation of workplace bullying is made, we have an obligation to treat it seriously, investigate and take steps to address the situation.

While I feel no further steps are necessary in the form of a written warning, it is my duty to inform you that any more acts of workplace bullying may be construed as serious misconduct and may result in further disciplinary action.

[23] Following that meeting, several incidents occurred. On 17 October 2008 the applicant filed a complaint that she had been abused by a fork lift driver. Mr Burson dealt promptly with the matter by issuing the offender with a caution and an instruction to watch his language. He advised Ms Bennett of this on the same day.

[24] On 13 November, another employee, Teri Mitchell, in the mill's Dry-End, lodged a complaint alleging the applicant had yelled at and abused him. Mr Burson interviewed Ms Bennett that day with Mr Blair present. The following day, another employee, Ms Eekels, spoke to Mr Burson in the carpark telling him someone needed to do something about Margaret Bennett. Mr Burson said he would speak to her later on the matter. He called the applicant to his office telling her he had received a complaint. Ms Bennett admitted she had called the employee *a psycho* and Mr Burson advised he would have to investigate the incident.

[25] Mr Burson says Ms Bennett said *do your worst. I'm getting fed up with the whole mess*, then left the office. Mr Burson then spoke with Ms Eekels who while not prepared to lay a complaint, told Mr Burson the applicant *picks on people*.

[26] Mr Burson gave the applicant notice of another meeting on 17 November, the meeting to take place on 19 November. On 18 November Ms Bennett lodged a complaint saying Teri Mitchell had snapped at her when she told him not to use a cellphone in company time.

[27] The 19 November meeting went ahead as planned, Ms Bennett put her side of the story and the meeting was adjourned to allow her manager to consider the matter. He concluded Ms Bennett had verbally abused Mr Mitchell.

[28] The end result of this was the applicant was issued with a memo stating the inquiry had established Ms Bennett had abused Mr Mitchell and the memo contained a warning for the applicant. No formal warning document was written but Ms Bennett took a copy of the memo when she left the meeting.

[29] Around lunch time on 27 November 2008 Ms Bennett walked off the job without permission. On 29 November, Ms Bennett was advised of a disciplinary meeting on that issue. Mr Philip Cordes, the respondent's Human Resources and Health and Safety Manager, issued a final written warning to Ms Bennett. The warning stated it was reviewable in six weeks when, if there were no "*further breaches*," the warning would lapse. It appears that around this time the Applicant took legal advice.

[30] Several other incidents offended Ms Bennett. She, along with other Dry-End staff, were invited to a Christmas barbecue at a fellow worker's home in Otautau. Mr Burson provided food and some drinks. The applicant says she was ignored by Mr Burson and his wife. Further, she says she knew *many staff received a Christmas letter from Bright Wood thanking them for their work however I did not*. Mr Crane said only one member of the staff received a letter and there were particular circumstances surrounding that.

[31] Then there was an issue over work boots which Ms Bennett says she had to contribute part of the purchase price as they were not regular issue. The company says she was never asked, nor did she, pay the difference in price between the two boot types.

[32] By this time, Ms Bennett's representative and the company were in communication in attempting to resolve the difficulties between the parties. On 22 December 2008, the company received a letter from Ms Copeland which enclosed

a medical certificate. The medical certificate is in the name of the applicant and is dated 5 December 2008. The text reads:

The above patient was seen and examined by me on today and in my opinion has been medically unfit multiple days from August for various medical problems and stress related to work.

[33] Ms Bennett complains the company did not investigate this notification nor took any steps to eliminate stress within the workplace.

[34] The company says the applicant returned to work with everyone else on 12 January 2009. Mr Burson told the Authority:

Margaret did not at any stage either complain of stress, or take sick days related to stress, or advise management of any difficulties. The note from her legal adviser came after she had applied to have surgery for her finger and had in fact left work for that reason. The matter was never raised by her again after she came back to work, although I made a point of checking with her on 12 January. ... We were certainly not aware of any such condition, and Margaret did not raise the matter with me or anyone else that I am aware.

[35] Ms Bennett said she resigned by letter on 20 February 2009 *because I was under so much stress and felt so unhappy.*

[36] Mr Crane, in accepting the resignation, pointed out between 27 August 2008 and 2 February 2009, no health issues apart from surgery to the finger had been brought to the company's attention.

The issues

[37] To resolve this employment relationship problem, the Authority needs to make findings on the following issues:

- Did the respondent's actions unjustifiably disadvantage the applicant in her employment; and
- Has the respondent breached its duty to act in good faith in its dealings with the applicant; and
- Did the respondent adopt a course of action with the predominant objective of having the applicant resign; and
- Does the applicant have a personal grievance; and

- If so, what remedies are appropriate; and
- If found to have a personal grievance, to what, if any, extent did the applicant contribute to the circumstances giving rise to the grievance?

The test

[38] The test as to justification is set out in s.103A of the Employment Relations Act 2000 and its amendments. The question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

The investigation meeting

[39] At the investigation meeting, evidence was presented in person by the applicant, Ms Bennett, Mr Murray Christie and Ms Lynne Hawkins. Ms Daphne Simpson provided a statement in reply to the respondent's evidence.

[40] For the respondent, the Authority heard from Mr John Crane, Mr Bruce Burson, Mr Shaun Proudfoot, the Dry-End Supervisor at the sawmill, Ms Vicky McWilliam, a clerk in the main office, Ms Monique Eekels, employed in the same area as the applicant, Mr Owen Thomas, a manager at the mill, and Ms Angela Blair.

[41] The Authority wishes to record its thanks to all those who gave evidence at the investigation and for the open and honest way they answered questions put to them by the Authority and by the respective representatives. I also record my thanks to the representatives for their assistance in the course of the investigation meeting and for their submissions which I have considered in coming to this determination.

Analysis and discussion

[42] In her closing submissions, Ms Copeland sets out the relevant case law governing the issue of unjustified action giving rise to a disadvantage fully. The two major cases, *Alliance Freezing Co (Southland) Ltd v. NZ Amalgamated Engineering IUOW* [1989] ERNZ Sel Cas 575 (CA) and *Van der Sluis v. Health Waikato Ltd* [1996] 1 ERNZ 514, relate to circumstances in which unjustifiable warnings were

placed on employees, thus rendering them more liable to dismissal in the event of further misdemeanours.

[43] Essentially, both judgments found for employees because, but for the unjustified action by the employer in placing the warning on their record, the employees in question would not have had to suffer the heightened liability of dismissal. Counsel refers me to a range of other precedents. However, I regard the two cases cited above as the most relevant in this matter.

[44] The applicant argues that the respondent initiated unwarranted disciplinary action against her in respect of the incident between the applicant and Ms Hawkins on the morning of 27 August 2008. It is alleged Mr Burson fabricated the existence of a written letter of complaint that he refused to show Ms Bennett and then proceeded to take disciplinary action on the insufficient basis of a series of text messages that were later retracted.

[45] I do not accept Mr Burson fabricated a letter of complaint. I am satisfied he told Ms Bennett he had received a complaint which was in the form of text messages sent to him by Ms Hawkins on the morning of 27 August 2008. While those text messages were later withdrawn by Ms Hawkins, this issue needs to be seen in the context of Mr Burson's primary concern being to establish the reasons why Ms Hawkins walked off the job, indicating to office staff that she was quitting. Regardless of the later withdrawal of Ms Hawkins' complaint, that did not, in my view, resolve the issue as to what led to Ms Hawkins' walkout.

[46] It was clear from the evidence in front of the Authority that Mr Burson, having cautioned the applicant on a previous occasion when she sought to withdraw a resignation, simply reinforced the respondent's requirement that the applicant take care in her relationships with those in the plant around her. That, in my view, does not equate to a formal warning of any type.

[47] Ms Bennett seems to take umbrage at the thought Ms Hawkins was spoken to before she was. Again, it is plain on the evidence Mr Burson's concern was establishing the reasons for Ms Hawkins' leaving the site. There is no requirement for a respondent to take a particular line or precedent in speaking to people involved in a particular incident. In this case, Mr Burson addressed what he regarded as the more important matter and then, having spoken with Ms Hawkins, proceeded to interview

the applicant and others in order to establish what it was that gave rise to Ms Hawkins' departure.

[48] The applicant objects to Mr Burson making references to her bullying others. I am unsure where any boundary between intimidation and bullying might lie. In the course of the applicant's employment with the respondent, there had been a number of occasions where Ms Bennett exhibited over-assertiveness in relation to work colleagues yet, in the current context, no formal warning was given to Ms Bennett in respect of this behaviour until that issued in relation to the Teri Mitchell incident.

[49] I do not accept Ms Bennett was detailed to the fillet packing task following the meeting on 1 September 2008 as a punishment. Ms Eekels gave evidence to the Authority saying *those of us who worked in the dry-end would be assigned to wherever there was a need and so could end up strapping or packing or loading irrespective of what our main job might be*. On the evidence in front of the Authority, the applicant did not challenge that placement at the time.

[50] Turning to the claim of unjustified constructive dismissal, both representatives have identified the appropriate precedent cases, namely, *Auckland Shop Employees' IUOW v. Woolworths (NZ) Ltd* [1985] ERNZ Sel Cas 136 and *Auckland Electric Power Board v. Auckland Provincial District Local Authority Officers' IUOW Inc* [1994] 1 ERNZ 168. Ms Copeland also referred the Authority to *Gilbert v. Attorney-General in respect of the Chief Executive of the Department of Corrections* [2000] 1 ERNZ 332.

[51] The primary plank of the applicant's case is that the respondent pursued a course of action with the predominant objection of eliciting a resignation from her. In her closing submissions, counsel for the applicant raises the issue of breach both in respect of the alleged disadvantage and the alleged dismissal. Having considered the matter, I have taken the submission to refer to the breach of good faith referred to in the statement of problem rather than an underpinning of the claim of constructive dismissal.

[52] In respect of the claim of constructive dismissal, the initial onus lies on the applicant. While the evidence before the Authority confirms there were incidents the company needed to investigate, at least one of those complaints originated with Ms Bennett. The other matters were investigated by the company as required, the

issue around Teri Mitchell resulted in a warning being issued, and a final warning given for the applicant's 27 November walkout..

[53] The applicant visited a doctor in Otautau on 5 December 2008 and was provided with a medical certificate as referred to above. For a reason not made plain, Ms Bennett chose not to present that certificate to her employer and until Bright Wood received a copy of that certificate with Ms Copeland's letter on 22 December 2008, just prior to the Christmas closedown, the respondent was totally unaware of its existence. Further, the evidence is that even on her return to work on 12 January 2009, Ms Bennett did not raise the matter with her immediate superior, Mr Burson. Mr Burson's evidence was he inquired how the applicant's health was to be told that she had no concerns. That request by Mr Burson provided her with the opportunity to arrange a discussion with the company's management around the matters raised by the medical certificate. For whatever reason, Ms Bennett did not take that opportunity.

[54] In tendering her resignation, Ms Bennett wrote:

*As from today Friday 20th-2nd-09 I wish to advise you that I am resigning from my position as Wrapper and Strapper in Bright Wood's dry end department. Reason being – my health is suffering from ongoing issues with Management since 27th 8th-208 [sic]. Last day employment 27th-2nd-09.
Signed
Margaret Bennett*

[55] The letter of resignation refers to the applicant's health suffering and this, it is said, stemmed from the incident involving Ms Hawkins. Standing back, it is difficult not to infer the medical certificate is based on self-reporting by Ms Bennett. The applicant visited a doctor in Otautau on 5 December 2008 and the certificate issued states:

In my opinion (Ms Bennett) has been medically unfit multiple days from August for various medical problems and stress related to work.

[56] Leaving aside the applicant's failure to present the certificate to her employer promptly and perhaps have it address its contents, the certificate falls well short on detail which would support a claim of constructive dismissal. It raises the obvious question: on which of the multiple days was Ms Bennett medically unfit because of medical problems and on which unfit because of stress related to work? Clearly, part

of the period covered relates to the surgery undertaken on Ms Bennett's finger but the rest is far from clear.

[57] No doctor's notes were provided to the Authority to back the certificate, let alone any specialist report providing clinical assessment of the applicant's condition and causation. The doctor's rooms in Otautau are only a short distance from the mill and Ms Bennett had the opportunity to present that to her employer prior to the shut down on 11 December 2008. For whatever reason, she failed to do this.

[58] In para.2.24 of her submissions, counsel for the applicant raises nine points, said to support the applicant's view the respondent was following a course of action deliberately designed to elicit a resignation from the applicant. The final four relate to issues following the resignation and the previous five I have covered in this section of the determination.

[59] At para.2.25, counsel submits *by medical certificate dated 5 December 2008 Ms Bennett advised Bright Wood that she was suffering stress related to her work. ... Bright Wood failed to investigate this notification or take steps to isolate, minimise or eliminate that stress experienced by Ms Bennett.* I do not accept this submission for the reasons outlined above.

[60] Ms Bennett says she felt she had no option but to resign and counsel submits that she did so citing her reasons including that she had suffered work-related stress and this, coupled with ongoing issues with managers at Bright Wood, caused her to feel this way. The copy of the resignation letter provided to the Authority at the investigation meeting makes no mention of stress, simply *reason being – my health is suffering from ongoing issues with management since 27th 8-208.*

Determination

[61] Returning to the issues set out above, I find:

- The respondent's actions in terms of its investigation of the incident involving Ms Hawkins on 27 August 2008 did not unjustifiably disadvantage the applicant in her employment. No warning was issued in respect of this incident and given the two later incidents, the employer was entitled to issue warnings.

- On the evidence before the Authority, the respondent acted at all times in good faith in its dealings with the applicant;
- The respondent did not adopt a course of action with the predominant objective of having the applicant resign, nor was the applicant's resignation foreseeable to the company.
- The applicant does not have a personal grievance and the Authority is unable to assist her further;
- For the avoidance of doubt, had I found for the applicant on any of the heads of claim, Ms Bennett's contribution in all the circumstances would have led to a significant impact on any compensation awarded her.

Costs

[62] Costs are reserved. The parties are to attempt this matter between themselves. If that cannot be achieved, Mr Rhodes is to have his memorandum lodged and served within 30 days of the date of this determination. Ms Copeland is to have a further 14 days to lodge and serve her memorandum in reply.

Paul Montgomery
Member of the Employment Relations Authority