

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 58/09
5125432

BETWEEN NATASHA BLACKBOURN
 Applicant

AND C F SCHURR LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Lucin Fraser for the Applicant
 Christopher Schurr and Kelly Marinner for the
 Respondent

Investigation Meeting: 3 February 2009 at New Plymouth

Submissions Received: By 31 March 2009

Determination: 8 May 2009

DETERMINATION OF THE AUTHORITY

[1] The respondent, C F Schurr, is an accounting practice operating in both New Plymouth and Eltham. Its principal, Mr Christopher Schurr, works in the New Plymouth office Mondays and Thursday. His full time office manager in the New Plymouth office was, until April 2008, the applicant, Ms Natasha Blackbourn.

[2] There were a number of difficulties in the New Plymouth office between Ms Blackbourn and other staff. This became particularly apparent upon the appointment by Mr Schurr of two senior contract staff, at the end of 2007, as joint practice managers. Ms Blackbourn had recently become pregnant and this was to cause difficulties for her as well, particularly towards the latter stages of her employment and pregnancy.

[3] Matters reached a head when Ms Blackburn was informed that contract work was to be provided to other staff that she felt she could have done while on maternity leave. She considered she had been unfairly bypassed for these positions and, when told of the decision, abused the joint practice managers in a staff meeting. The practice managers insist that Ms Blackburn had previously told them she was not interested in contract work.

[4] Following this meeting Ms Blackburn made a formal complaint about the practice managers, which was responded to by formal counter complaints against her. As a result Mr Schurr took legal advice. A meeting was then held between him and his lawyer and Ms Blackburn, which resulted in the heads of agreement for a variation to the parties' employment contract. Basically, this involved Ms Blackburn taking leave without pay until her parental leave was up and then resigning, together with the payment of compensation to her.

[5] Subsequently, Ms Blackburn and Mr Schurr's lawyer reached agreement on the terms of the variation. Mr Schurr claims that final agreement was conditional on both parties signing the agreement, with him being the last to sign and having a final right of veto.

[6] As a result of information Mr Schurr subsequently received, involving Ms Blackburn allegedly coming and going as she pleased, divulging parts of the settlement agreement and expressing a future intention to undertake private work by undercutting the company's clients, Mr Schurr exercised what he saw as his right to veto. Accordingly, he refused to sign the agreement. Instead, he instructed his lawyer to conduct a disciplinary interview in relation to Ms Blackburn's time keeping on three particular days and the abusive comments made by Ms Blackburn to the practice managers at the meeting referred to earlier.

[7] A very short disciplinary meeting was then held, where Ms Blackburn denied the time keeping claims, but admitted the abusive comments at the meeting. Mr Schurr's lawyer then told Ms Blackburn that he was to recommend that she be dismissed, at which point Ms Blackburn reacted angrily by telling him that Mr Schurr could stick his job and also allegedly making other abusive comments about Mr Schurr and the practice managers.

[8] The lawyer later informed Mr Schurr that the meeting had resulted in Ms Blackburn's resignation and that Mr Schurr need not therefore make any decisions about whether Ms Blackburn should be dismissed. Mr Schurr accepted this advice, but stated that he would have dismissed Ms Blackburn anyway. Ms Blackburn was so informed and now claims unjustified dismissal. The remedies she seeks are based, in the alternative, on the variation to the employment agreement and on the general statutory grounds for loss of remuneration and other remedies.

Issues

[9] The issues for determination are:

- Is the variation enforceable, and if so is C F Schurr in breach;
- If not, was this in law a resignation or a dismissal. If a dismissal (and therefore a constructive dismissal) was that dismissal justifiable;
- If a personal grievance is found, what remedies should Ms Blackburn be entitled to, taking into account any contributory fault.

Facts and Findings

[10] There can be no certainty about events which occurred many months ago. In coming to my findings of fact, I have relied particularly on the documentary evidence when deciding what, on the balance of probability, the facts are, i.e. what is more likely to be true than not. Where there is no documentary evidence, I have preferred the evidence of Mr Schurr, his lawyer and his contract managers over that of Ms Blackburn over events to which they were all directly parties because their positions seemed inherently more likely and also because of Ms Blackburn's known volatile nature and her being very close to the issues.

[11] Where serious allegations are made without direct evidence, such as Ms Blackburn being in dereliction of duty and also competing with her employer I have, however, required proof at a higher level (because of the seriousness of such accusations) before I would be prepared to conclude that Ms Blackburn has been guilty of such serious misconduct.

[12] Ms Blackburn started working for C F Schurr Limited at its Eltham office as an accounting technician. She was promoted to Office Manager in the New Plymouth

office as from 1 September 2006. While there were a number of concerns held by Mr Schurr about Ms Blackburn's interactions with other staff from 2006, his approach to her on interpersonal issues was always a conciliatory one, until the very end when the allegations against Ms Blackburn became more and more serious.

[13] In 2007 Mr Schurr appointed two new contractors, Mr Valdimar Einarsson and Mr David Harrop, as joint practice managers. His intention was to sell the practice to them. Ms Blackburn appeared to resent their involvement in the practice and she did not get on well with either of them. By the end of her employment she was refusing to communicate with either of them, but instead insisted on dealing with Mr Schurr directly.

[14] Ms Blackburn had two particular ongoing areas of concern at work. The first was that the office was extremely hot and she and another pregnant woman were finding it very difficult to work in those conditions during the Summer. She raised a number of complaints, which resulted in the temperature being monitored by thermometer. Approaches to the Department of Labour were made. Following Ms Blackburn leaving early, because of the heat on one or more occasions, an agreement was reached that if the temperature were to reach 30 degrees she was to approach the practice managers to seek approval to leave, which would probably be granted. Because of her pregnancy and resulting heat concerns and regular pregnancy-related commitments and perhaps also because of her abrasive personality, Ms Blackburn was resented by a number of other staff, because of her regular comings and goings. On the other hand, there was no compelling evidence that Ms Blackburn ever failed to work the hours for which she was actually paid.

[15] Ms Blackburn's other concern was about the appointment of contract staff to do certain work offsite, on an as and when required basis. A number of staff were approached but Ms Blackburn stated that she wanted regular part time work rather than casual contract work. Ms Blackburn raised the issue again with the contract managers on the basis of her preference for part time work, but was told that no such work was available and that a trial would be held to see how the contracting worked.

[16] Ms Blackburn told the managers that she would not accept such work unless she was given further information. She approached Mr Schurr but his position was no different from that of the managers.

[17] A meeting was held on 8 January 2008 of all staff in the practice. Ms Blackburn raised the issue of the contract work and was informed it had been trialled by one staff member and a meeting was to be held later that day to review that trial. Staff were told that four positions may be available for the four staff who had previously expressed an interest in the work. Ms Blackburn wanted to know where she stood and was told that she would be next in line.

[18] Ms Blackburn, who is known to speak first and often reflect on the consequences of so doing later, accused the managers of shafting her when they responded that the jobs had been given to those who had expressed an interest in them. She said they were a bunch of wankers and walked out of the meeting.

[19] I therefore accept that Ms Blackburn had no cause for legitimate complaint over her treatment over contract positions. Nevertheless, Ms Blackburn made a formal complaint about the practice managers because of their treatment of her over those issues. The contract managers responded with a counter-complaint about Ms Blackburn's behaviour at the meeting. Because Mr Schurr was away over January, it was not until his return that he was able to address the matter through his lawyer, Mr Neal Harding. His advice was to hold a meeting between all parties.

[20] The parties were unable to meet until 17 March to discuss the complaints, but Ms Blackburn refused to continue the meeting in the presence of the contract managers. The meeting was therefore held between Mr Schurr, his lawyer, and Ms Blackburn. I accept that Ms Blackburn was offered representation at this meeting, as the letter inviting her so states.

[21] Discussions moved towards Mr Schurr's suggestion that an exit arrangement could be agreed with Ms Blackburn. I do not accept that Ms Blackburn was faced with an ultimatum to agree to it or be disciplined, although no doubt the meeting had a disciplinary context to it. The time that followed before any final agreement was prepared demonstrates that Ms Blackburn was not unfairly pressured to reach a settlement of that nature.

[22] A heads of agreement was reached at that meeting and subsequently followed up by email to Ms Blackburn by the lawyer. He stated therein that he had spoken to Mr Schurr that morning and that he was happy for him to write up an agreement containing certain terms, including the ending of Ms Blackburn's employment at the

end of her parental leave, plus certain payments. Mr Schurr would not, however, agree to any provision relating to the contract managers. The email finishes –

This constitutes Chris's final position with respect to this matter. Further he wants your response today. Assuming your response is favourable I can have it to you by Tuesday.

[23] Ms Blackbourn rang the lawyer's firm that day and confirmed that she did agree. As a result, he drew up a settlement agreement, which was designed as a variation to the employment agreement. It was not a settlement that was expected to involve the mediation service, but simply a private agreement, except that it was full and final, and that neither party could bring any issues before the Authority. The lawyer drew up the agreement on the basis that there was nothing left to agree between the parties. All matters had been resolved.

[24] Ms Blackbourn signed the agreement and sent it back to Mr Schurr. Unfortunately Mr Schurr had had a change of heart. This is because other staff had come to him and told him that Ms Blackbourn had been falsifying timesheets, running down other staff, been coming and going as she had pleased and been offering to do GST returns in competition with CF Schurr, and in particular by trying to poach their clients. He also believed that Ms Blackbourn had been telling others about the settlement. The 'straw that broke the camel's back' and what changed Mr Schurr's approach to Ms Blackbourn fundamentally was the allegation about working in competition with his firm. Mr Schurr spoke to his lawyer about now not wanting to sign the agreement and was told that, if so, the best way to proceed was to not sign it and convene a disciplinary meeting instead. The meeting was to be run by the lawyer, who would then make a recommendation to Mr Schurr.

[25] The disciplinary meeting was said to cover leaving work early on two dates as well as removing client's files from the workplace without authority on the second date, and also her abuse of the contract managers at the meeting of 8 January and subsequently leaving the meeting and taking an extended lunch break without authority.

[26] Ms Blackbourn confirmed that she knew what the areas of concern were and that there could be disciplinary consequences. Ms Blackbourn was then asked whether she had filed a timesheet with more hours than she had actually worked, and if so, why. She said that she had not. She then confirmed her abuse of the contract

managers at the meeting. When asked for an explanation for her conduct that day, Ms Blackburn said that it was in the email already sent to Mr Schurr, and the lawyer already had a copy.

[27] The lawyer then raised the issue of doing work for clients of CS Schurr, which he said was not part of the meeting. Ms Blackburn denied that she had done so, or contacted any clients, or endeavoured to pick up private work.

[28] The lawyer then said that he had to make a recommendation from that point and that based on the answers, his recommendation would be that Ms Blackburn be dismissed. Ms Blackburn then asked whether she would get a chance to say her part. The lawyer's response was that he had already put to her CF Schurr's specific concerns and she had already confirmed those concerns. He also said that her explanation had already been given. When asked if there was anything further she wanted to say that had not already been said, Ms Blackburn replied that he could tell Chris to *stick his job up his arse* and that she would go to the Labour Department. She then made further rude comments about Mr Schurr and the contract managers, using swear words. The meeting had lasted around 10 minutes.

[29] Mr Schurr caught up with the lawyer before he left CF Schurr's premises and asked him if he had a recommendation. The lawyer told him not to worry as Ms Blackburn had resigned. In particular, he said that she had resigned by asking him to tell Mr Schurr to *stick his job up his arse*. The lawyer then sent a letter on 4 April telling Ms Blackburn that she had resigned without notice by using the words aforementioned. It was also stated that

Notwithstanding your resignation the writer took the formality of passing his recommendation that you be dismissed to Mr Schurr. Mr Schurr would have accepted it – and you would have been dismissed from today's date. Although it is not now important, the reason for the recommendation is that the language you freely admit to having used in a staff meeting earlier in the year ... is unacceptable – and in the writer's view capable of warranting dismissal.

[30] A personal grievance was raised on Ms Blackburn's behalf two weeks later, seeking remedies similar to those sought at the investigation meeting.

The Law

[31] Accord and satisfaction is one way in which an employment relationship problem may be settled or resolved. Once the problem is settled or resolved between

the parties then the Authority is entitled to enforce the settlement or resolution on the agreed terms, rather than investigating an employment relationship problem and determine remedies accordingly if necessary.

[32] In legal terms, accord and satisfaction is the purchase of a release from an obligation that is arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. Satisfaction is the consideration which makes the agreement operative.

There must first be a genuine dispute between the parties. Secondly, whether accord and satisfaction has been made is a question of fact requiring a finding of a meeting of the parties' minds or that one of them must act in such way as to induce the other to think that money (or other consideration) taken in satisfaction of the claim.

Graham v. Crestline Ltd [2006] ERNZ 848 at para.[49]

[33] Whether an apparent resignation may be classified as a dismissal depends on whether or not the termination occurs at the initiative of the employer. *Boobyer v. Good Health Wanganui* (unreported, Goddard CJ, WC3/94, 24 February 1994) contains a comprehensive discussion of resignation. In the absence of a clear and unambiguous resignation, an employer is not entitled to seize on words not intended or capable of amounting to a resignation, especially where an employee makes it clear that resignation is not intended - *Montieth v. Hakansson* (unreported, Shaw J, WC5/08, 18 March 2008). For instance, *emotional outbursts in moments of stress can only sometimes be treated as definitive statements of position or intention* (*Xu v. McIntosh* (unreported, Goddard CJ, WC13A/04, 18 November 2004)).

[34] If an employer treats his employee as having resigned when in fact the employee has not done so, the effect is a dismissal - *Birthright (Palmerston North) Inc v. Maraki* (unreported, Shaw J, WC24/04, 17 December 2004).

Determination

[35] I am satisfied from the correspondence and oral evidence that the parties did have a meeting of minds over the variation to the employment agreement. I do not accept Mr Schurr's claim that he had reserved to himself the right to withdraw from the agreement, for the reasons set out above. In particular, such a claim is inconsistent with written evidence of the final offer being made and the lawyer's

evidence that all matters had been agreed. There was nothing left to agree. A failure to sign an already agreed variation does not change the situation at law. In this respect, I find, on the balance of probabilities, that there was an accord and satisfaction.

[36] It therefore follows that Ms Blackburn is entitled to be paid the \$5,000 set out in the agreement in exchange for her leaving. She also seeks an additional \$7,500 for injury to feelings about the way she was treated in the disciplinary process that followed to see if she had had a change of heart. I conclude that Ms Blackburn's employment ended early and that she was disadvantaged accordingly, in particular by the way that the disciplinary process was unfairly imposed on her given the agreement for her to leave.

[37] I do not accept that Ms Blackburn had breached any part of the agreement, allowing C F Schurr to cancel it. The matters relied on by C F Schurr as breaches were all known to it before the agreement was reached, and therefore could not constitute a breach, with the exception of picking up work from clients of C F Schurr, in competition with it. In this regard, there was insufficient evidence for me to conclude that Ms Blackburn intended to take up such work. Even if it was true that she did, there was no evidence that she intended to do so before her employment ended by agreement in August. Given that there was no restraint of trade clause in Ms Blackburn's employment agreement, she would have been entitled to compete with C F Schurr from that date anyway, without breaching any of the obligations to it. It therefore follows that there was no fundamental breach of the settlement agreement by Ms Blackburn.

[38] Ms Blackburn was disadvantaged by the fact she was forced to go to a disciplinary meeting on historical issues, when an agreement had already been reached for her to leave her employment voluntarily. I accept that this did upset her, as evidenced by her entirely intemperate remarks towards the company's officers, which simply can not be condoned in any way. Whether such comments constitute contributory actions, or whether they simply limit any compensation Ms Blackburn should receive for the disadvantage through the disciplinary process is not important. However, that factor must be taken into account in setting remedies. In all the circumstances of the case I therefore conclude that additional compensation of \$3,000 should be awarded.

[39] I also note, for completeness, that were I required to go beyond the settlement agreement, the result was likely to be a finding of unjustified dismissal, because of the historical nature of the allegations (most if not all of which appear to have been condoned already), because of the limited opportunity given to Ms Blackburn to fully explain her position in the disciplinary meeting, her inability to make submissions to the decision maker, and because of the seizing of words not intended to constitute resignation. The result in terms of remedies would be unlikely to have been greatly different, although there would be more room for findings of contributory conduct by Ms Blackburn.

[40] I therefore order the respondent, C F Schurr Limited, to pay to the applicant, Natasha Blackburn, the sum of \$3,000 in compensation under s.123(1)(c)(i) and a \$5,000 cash payment under the terms of the parties' variation agreement.

Costs

[41] Costs are reserved.

G J Wood
Member of the Employment Relations Authority