

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 9
5389872

BETWEEN HEATHER BLAKELEY
Applicant
AND ACM NEW ZEALAND
LIMITED
Respondent

Member of Authority: M B Loftus
Representatives: Gregory Bennett, Advocate for Applicant
Claire Brown, Advocate for Respondent
Investigation Meeting: 6 December 2012 at Dunedin
Submissions Received: At the investigation
Date of Determination: 14 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Heather Blakeley, claims to have been unjustifiably dismissed, albeit constructively, from her employ with the respondent, ACM New Zealand Limited (ACM).

[2] ACM denies the claim.

[3] Ms Blakeley also claimed she was unjustifiably disadvantaged but the allegedly disadvantageous events are those which led her to resign. As a result the claim did not proceed with Mr Bennett accepting section 122 of the Act could deal with it should the dismissal claim fail.

Background

[4] Ms Blakeley was employed by ACM as its Dunedin Branch Manager.

[5] The chain of events which gave rise to the grievance would appear to have commenced on or about 28 June 2012. On that day Mr Jason Hutton, Regional Manager, and Ms Stephanie Rathburn, ACM's Human Resources Adviser, visited the Dunedin branch. They were there to discuss the branch's financial accomplishments or, more accurately given the evidence, under-accomplishments. Both gave evidence on what they saw as Ms Blakeley's disinterested and negative behaviour. That said, both accept no comment was made and they did not challenge the alleged behaviour.

[6] The next event was a Managers' meeting held in Auckland on 17 July 2012 with Ms Blakeley travelling north the preceding evening. After dinner she and a colleague from Queenstown went out. ACM's witnesses say Ms Blakeley's participation during the morning session was limited and she only spoke when specifically addressed. They concluded she was disinterested and only present *under sufferance*.

[7] During the lunch break there was a tour of the Auckland branch. There is some disagreement as to why this occurred. Mr Hutton says he suggested the tour as Auckland was ACM's largest and best performing branch and he wanted other managers to see various initiatives it was applying. Mr Peter Silk, ACM's Chief Operating Officer, goes further. He says the meeting was scheduled for Auckland instead of Wellington as normally occurred to facilitate the tour of the Auckland branch, though it was not mentioned on the agenda.

[8] Ms Blakeley did not participate. She attributes this to being busy answering messages from both the Dunedin branch and family. ACM saw it as a further exhibition of disinterest.

[9] According to the evidence of Ms Rathburn:

Jason asked me to have a word with Heather about participating in the tour because he thought that she was being disrespectful to him and Peter and to Scott and Martin who had made a lot of interesting successful changes in their Branch and were wanting to share their success with the other Managers.

[10] Ms Rathburn goes on to say:

I approached Heather and said 'hey, what's happened? I heard you didn't want to go on the Branch tour, what's going on?' Heather replied 'I thought it was optional, I didn't think I had to go'. I said

to Heather 'it is optional but everyone else has gone, and it doesn't look good that you haven't wanted to go and haven't wanted to see the flagship branch' Heather replied words to the effect of 'I was told once before that all the branches look the same, why would I want to see another one?' I said 'they are to a point, but this is brand new, it's the Auckland Branch, it's different to and a lot bigger than your branch. It's the flagship Branch, it's probably a bit disrespectful to Scott and Marty for you to not go'. Heather said words to the effect of 'fine, whatever, I'll go then'.

[11] Ms Blakeley accepts that as a reasonably accurate portrayal of the conversation but adds it commenced with Ms Rathburn making a comment along the lines of *where do you think you'll be working next week?* She says she considered that a threat concerning her future employment but notwithstanding did not join the tour.

[12] Ms Blakeley says shortly thereafter she was approached by Mr Hutton who asked her to go to a vacant office. She goes on to say that when inside:

Jason said to me that 'it looks like you don't want to be here' and I said no, I was listening to everything that was being said and answering any questions asked of me. Jason then said he was calling a taxi and that I was going home.

[13] There is no real disagreement about that with ACM's witnesses accepting Ms Blakeley was sent home. She departed forthwith. To use Mr Hutton's words, he felt she no longer deserved to be at the meeting.

[14] Mr Hutton subsequently sought advice from Ms Rathburn and asked her to write a script for a meeting he intended holding with Ms Blakeley. The meeting occurred on Monday 23 July 2012 but there is some disagreement about how it was arranged. Mr Hutton says he telephoned Ms Blakeley on the 19th. He told her the meeting was to discuss her behaviour and lack of contribution at the management meeting. Ms Blakeley says she was simply telephoned and told to attend without any advice as to the reason.

[15] Ms Blakeley telephoned Mr Hutton on the Friday (the 21st) to clarify the purpose of the meeting. Mr Hutton says he reiterated what he had said on the Wednesday but Ms Blakeley denies that occurred.

[16] Notwithstanding that disagreement there is, with one exception, consensus as to what occurred during the meeting. The parties agree Mr Hutton essentially followed the prepared script. Mr Hutton says he considered there was a genuine

dispute between ACM and Ms Blakeley about her attitude to the workplace and whether or not her behaviour was acceptable. He therefore sought to conduct the discussion on a *without prejudice* basis and make an offer to resolve the dispute.

[17] The script indicates introductory comments were followed by the identification of Ms Blakeley's support person (Mr Bennett). It records Mr Hutton as going on to say:

Heather, due to the nature of the discussion, please excuse me as I refer to my notes throughout the discussion.

Heather, I believe we are in a situation where there is a dispute between ACM and yourself in regards to the adequacy of your performance and your role with the Company.

We consider that your performance as Branch Manager in Dunedin has been so lacking that we consider the continuation of the employment relationship to be untenable.

On the basis of this dispute I would like to have a 'without prejudice' off the record discussion with you in a genuine attempt to settle our dispute.

This means that we could both discuss our respective positions on an off the record basis and there would be no capacity for either party to rely on these discussions in any formal matters.

Do you agree to have a discussion on this basis?

[18] The disagreement is over whether or not performance was mentioned but while Ms Blakeley has no recollection of it various answers she gave when answering oral questions would indicate it was. She accepted the proposal the meeting proceed on a *without prejudice* basis.

[19] The notes record Mr Hutton as going on to say:

Heather, as you have agreed to an off the record discussion I would now like to discuss with you the terms of what the Company is prepared to offer you to settle this dispute.

I need to be very frank with you and advise that your performance and the behaviours that you have been demonstrating in the role of Branch Manager Dunedin are unacceptable. The performance of the Dunedin branch whilst you have been Branch Manager has been woefully inadequate and manifestly lacking.

Accordingly the Company wishes to terminate your employment as we consider the continuation of the employment relationship to be untenable. If you are not prepared to accept an offer to settle this

matter, I need to inform you that the Company will be continuing with the formal disciplinary process and termination of your employment is a likely result.

I am prepared however to accept your resignation on the following terms: ...

[20] The notes then record a financial offer which was rejected by Ms Blakeley. She put a counter offer which was rejected by ACM. Mr Hutton then uttered words along the lines of it's back to work as normal, pending further discussions and a formal disciplinary process, which led to an exchange between himself and Mr Bennett. Ms Blakeley says Mr Bennett simply said the matter should proceed to mediation. Mr Hutton claims he was threatened with a constructive dismissal claim but Ms Blakeley denies that was said.

[21] Notwithstanding that disagreement, the mediation occurred four days later (on Friday, 27 July 2012). It failed to resolve the issue between the parties and was followed two days later by a letter that advised Ms Blakeley's resignation and raised the personal grievance.

Determination

[22] Ms Blakeley claims she was constructively dismissed. ACM denies that claim but it's primary defence is:

ACM submits that [the discussion of 23 July] was held on a 'without prejudice' basis, and that accordingly that the Authority should not have regard to the contents of that discussion (Closing submission at paragraph 5).

[23] There are, potentially, two issues to be determined. The first is whether or not Ms Blakeley was constructively dismissed. The second need only be answered if the first is answered in the affirmative and as a result of events of 23 July. It is whether or not I am precluded from considering the events of that day due to the *without prejudice* label applied to the meeting.

[24] In *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965 the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[25] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[26] Finally there must be a causal link between the employers conduct and the tendering of the resignation (*Z v A* [1993] 2 ERNZ 469).

[27] While a simplistic summary of significantly more complex law, the assumption underlying the concept of constructive dismissal is actions or words of the employer induced a subsequently proffered resignation.

[28] According to notes of the 23 July meeting, and having dealt with the preliminary issue of representation, Mr Hutton turned to the substantive issue. His opening comment was he considered there was a dispute over the adequacy of Ms Blakeley's performance which was followed by an observation ACM considered her retention untenable. That was uttered before he raised the question of conducting the conversation on a without prejudice basis.

[29] Once the question of prejudice had been discussed he reiterated the view ACM wished to terminate the employment. He advised if Ms Blakeley was not willing to accept the company's offer a disciplinary process would follow with termination a likely result.

[30] In essence Mr Hutton used the meeting to say you are going (and did so more than once) so lets do a deal to consummate the decision I've already made.

[31] This is almost a text book illustration of *Woolworths* (a) (25 above). Even if it were not, it is clearly conduct designed to procure a resignation (*Woolworths* (b)). That conduct means there is a causal link to the subsequent resignation and it was

foreseeable. Indeed, attainment of Ms Blakeley's departure was the object of the exercise.

[32] Given this evidence I have no qualms in concluding Ms Blakeley was constructively dismissed.

[33] That raises the question of whether or not I should disregard the conversation as urged by ACM. For the following reasons, the answer is no.

[34] Words confirming ACM's view the relationship was untenable and it wished to end the employment had, according to the notes, already been uttered before the discussion regarding prejudice. The damage was already done before the alleged restriction on its use in any subsequent claim had been applied and this, in itself, should be sufficient to undermine the defence.

[35] I also note the Employment Relations Act 2000 defines a dispute as a disagreement about the interpretation, application or operation of an employment agreement. It is about the meaning and application of words. This does not fit that definition – it is about Ms Blakeley's alleged performance and behaviour.

[36] Even if that is too narrow an interpretation I doubt ACM can legitimately argue there is a dispute. The Concise Oxford Dictionary defines *dispute* as a controversy, a debate and a disagreement between two parties. At the time Mr Hutton made his first announcement the relationship was effectively over, Ms Blakeley had not been allowed input. Mr Hutton could not therefore know whether she agreed or disagreed. He did not, at that point, have a foundation for his contention the parties were in dispute.

[37] Finally I note the convention you should apply an appropriate process. ACM's concern is documented as being about Ms Blakeley's performance. That should be addressed through a disciplinary process – not in a way such as this which is designed to avoid that requirement.

[38] Having considered the evidence I conclude Ms Blakeley was constructively dismissed on the basis of a conversation I am not precluded from considering. That the dismissal was unjustified goes without saying.

[39] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is 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 could have done in all the circumstances at the time the dismissal ... occurred.

[40] In applying that test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[41] The fact ACM chose not to apply a disciplinary process means it can not have complied with the above requirements. There was no putting of concerns before advice the relationship was untenable. There was therefore no ability to respond prior to a decision being made and an untendered response can not have been genuinely considered. Finally I note the issue of resources and the fact ACM can not have been prejudiced in this regard given access to an in-house human resource capability.

[42] Finally I turn to the fact the failure to conclude an agreed departure led to Ms Blakeley being told it's back to work as normal, pending further discussions and a formal disciplinary process (or words to that effect). That does not, I conclude, change the situation. She had already been told ACM considered the relationship untenable and the likely outcome of such an investigation – her dismissal. In these circumstances, she had no reason to consider it would be conducted fairly or with an open mind. ACM's intent had been clearly signalled.

Remedies

[43] The conclusion the dismissal was unjustified raises the issue of remedies.

[44] Ms Blakeley seeks wages lost as a result of the dismissal, interest on that amount, and compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act.

[45] Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Ms Blakeley seeks 12 weeks, which is slightly less than three months. The evidence is the loss was actually incurred. I therefore conclude, contribution aside, there is no reason why the amount claimed should not be awarded in full – by operation of law it must.

[46] Ms Blakeley seeks interest on the lost wages. Interest is to reimburse someone for use, by others, of money that is theirs. I decline the request given there was not, until the issuing of this determination, an establishment of entitlement.

[47] Turning to compensation. Ms Blakeley seeks \$15,000. She gave evidence in support but while it illustrated the hurt she felt, it was relatively sparse.

[48] Having considered her evidence, I conclude it appropriate to award \$6,000.

[49] The conclusion remedies accrue means I must, in accordance with the provisions of s.124, address whether or not Ms Blakeley contributed to her dismissal in any significant way. Clearly ACM contend her conduct was such the answer must be yes. I do not agree. The lack of a disciplinary investigation means there is no evidence upon which a finding of contribution can be safely based and if there was, no way of quantifying it.

Conclusion and Orders

[50] For the above reasons I conclude Ms Blakeley has a personal grievance in that she was unjustifiably dismissed.

[51] As a result the respondent, ACM New Zealand Limited, is ordered to pay the applicant, Ms Heather Blakeley, the following:

- i. Twelve weeks ordinary time pay (\$12,692.31 (twelve thousand, six hundred and ninety two dollars and thirty one cents)) gross as recompense for wages lost as a result of the dismissal; and

- ii. A further \$6,000.00 (six thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[52] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority