

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 175/09
5133107

BETWEEN RHONDA KAY BOWKETT
 Applicant

AND GREYMOUTH DENTAL
 CENTRE LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Bev Connors, Counsel for Applicant
 Mark Henderson, Counsel for Respondent

Investigation Meeting: 9 June 2009 at Greymouth

Submissions received: 24 June and 6 July 2009 from Applicant
 23 and 30 June 2009 from Respondent

Determination: 13 October 2009

DETERMINATION OF THE AUTHORITY

[1] Ms Bowkett was employed by the respondent in April 2006 as a Chairside Dental Assistant with some reception duties. The applicant says over time she undertook broader and higher responsibilities for the practice which she says commenced in late 2006. Ms Bowkett says she was unjustifiably disadvantaged by the respondent issuing her with a letter on 4 February 2008 regarding her performance and issuing her with a written warning for closing the practice between 9am and 9.30am to attend a work colleague's wedding and for opening the practice late on one other occasion.

[2] Ms Bowkett says the advice in the letter that the respondent was about to advertise for a Practice Manager was *the last straw* and she tendered her resignation

in writing on 21 February 2008. The applicant says in her view the respondent was attempting to make her resign *is further evidenced by the respondent not requiring me to work out my notice period*. Ms Bowkett says she was constructively dismissed.

[3] Remedies Ms Bowkett seeks are compensation for humiliation and injury to feelings and costs. Her initial claim of reimbursement of remuneration lost was withdrawn at the investigation meeting.

[4] The respondent declines to meet the remedies. Its view of matters is quite different. It denies Ms Bowkett ever held a position of Practice Manager, says the closure of the surgery was a serious matter as no permission to do this was obtained from management, and poor time keeping affecting the surgery at the start of the day is significantly disruptive.

[5] The respondent says the warning was justified and was designed to correct a situation it found unacceptable. Further, it strongly refutes the allegation it adopted a course of action with the intention of having Ms Bowkett resign.

[6] In its statement in reply, the respondent counterclaims seeking reimbursement for cost of personal toll calls and for magazines and stationery ordered for her own or other co-workers' use.

[7] The parties attempted to resolve the issues in mediation but were unsuccessful.

The essential facts

[8] There is no dispute the applicant was hired as a Chairside Dental Assistant, as is confirmed by the individual employment agreement signed between the parties. Nor is there any dispute over the increased reception duties to be undertaken by Ms Bowkett. As part of the latter duties, she was required to order basic stationery and associated supplies for the surgery through the respondent's account at Paper Plus.

[9] Ms Bowkett's hours of work were 8.30am to 5.30pm although her finishing time varied depending on the length of her lunch break on any given day.

[10] Mrs Rahiman, a director of the respondent, worked in the Greymouth practice as a dentist. When she purchased a practice in Christchurch, she intended to relocate and asked a fellow dentist at the Greymouth practice, Paul Vickery, to join her there.

Ms Rahiman also asked Vicky Quenalt, who had been the Greymouth practice receptionist, to move to Christchurch and take up the reception role there. Ms Quenalt agreed and duly moved.

[11] By the time Ms Rahiman moved to Christchurch, Ms Bowkett was working mainly as the receptionist and Ms Rahiman says that was the role she wanted the applicant to fulfil. In that position, Ms Bowkett was to manage the appointment book, order supplies, fill out timesheets for the dentist, answer the telephone and do the banking. All accounts for the practice were paid by Ms Rahiman who managed the practice from Christchurch.

[12] Before leaving for Christchurch, Ms Rahiman asked her sister, Irene Manuel, to help in the practice as a Dental Assistant on a part time basis for a few weeks as a new dentist, Mr Gautam, was settling in. Ms Manuel had previously worked part time at the surgery and was familiar with its operation and systems. She also prepared the wages and accounts payable calculations for Ms Rahiman until she returned to her full time studies in teaching.

[13] In late February 2008, Mr Gautam and another dentist at the practice, Lilly Raj, were married, Ms Bowkett was invited to the ceremony and failed to advise Ms Rahiman she had not booked patients for the time of the wedding. She also failed to ask her employer for time off to attend and yet recorded a full 40 hour week in her timesheet.

[14] Ms Rahiman became concerned when Ms Manuel reported Ms Bowkett was, at times, away from the surgery attending to personal matters and doing errands for Mr Gautam and Ms Raj.

[15] When Ms Rahiman contacted Ms Bowkett to inquire why the practice had been closed, the applicant told her the reason was *confidential*. However, she later told her it was to attend the wedding. Ms Rahiman said she gave Ms Bowkett a *gentle but firm reminder* about her duties to her employer and told the applicant that she did not want to hear of such matters again. Ms Rahiman says this was not a formal verbal disciplinary warning.

[16] On 4 February 2008, a trainee dental assistant, Jenny, arrived at the surgery at 8.30am for a training session. The arrangement had previously been confirmed with the applicant who, when contacted by Ms Rahiman, said she had been *side tracked*.

Ms Rahiman told her to open the surgery without further delay and that she (Ms Rahiman) would consider the matter and how to respond to it. Later that day, Ms Rahiman wrote to Ms Bowkett:

I am very concerned about this practice not being open for patients during the opening hours advertised. I have been made aware that you have been away from work attending to personal duties, leaving the surgery closed.

I have already had cause to speak to you regarding this a week ago when I learned that you were at Rahul Gautam and Lily Raj's wedding surgery in a morning when my business was supposed to be operating. The fact that you closed my business without permission or requesting leave is far from acceptable.

This morning when I tried to get in touch with you at 8.30am there was no answer and when I spoke to you at 9am you said that you came in at 10.40am. This is a breach of your contractual hours and as you have already received a verbal warning this is in the form of a written warning. This as [sic] a serious reminder that the premises have to be open and operating as per the business hours stated. If for any reason you are not able to comply with this I must be made aware of the circumstances. While you are getting paid by the company, you will only carry out duties for the company and not for any other business or any other person.

You have the right to respond in writing and any communication will be kept on your file.

Please do your banking and messages from 11.30am-12pm daily. You must be available to attend to patients at the practice at all other times between 8.30am to 5.30pm, with an hour lunch break as stated in your contract, unless otherwise instructed. Please note that we have signed a contract with you as a dental assistant and a receptionist. I know that you have fulfilled some management duties in the past but I feel the practice needs a full time Practice Manager to ensure my business is run in a professional manner. I have advertised for a manager, whom you will be responsible to and your position will be as a part time receptionist and part time dental assistant as per original agreement.

I will notify of this duty change closer to the time it takes effect.

*Yours faithfully,
Rozeleen Rahiman*

[17] During this time, Ms Rahiman had been reviewing the operation of the Greymouth practice and saw the possibilities of expansion to employ at least two but possibly up to three dentists. Such a move would require a Practice Manager and Ms Rahiman had advised Ms Bowkett of this.

[18] Ms Bowkett tendered her resignation by fax on 21 February 2008. Ms Rahiman says she was surprised to get it as Ms Bowkett had raised no issues with her about the intended changes to the practice which had been discussed with her and confirmed in her letter of 4 February.

[19] Ms Bowkett says, after Ms Manuel left, she took over the tasks Ms Manuel had done including PAYE, wage calculations etc, and forwarded these to Ms Rahiman. The applicant says Ms Manuel was *sacked* as was another person, Nisha, who worked in Christchurch. The respondent says Ms Bowkett is incorrect on both counts.

[20] Ms Bowkett also says that at a 2006 staff Christmas party in Christchurch, she was introduced as the Greymouth practice manager and this occurred again in November 2007 at another staff party. Her primary complaint is the respondent advertised *her job* without reference to her and she was not prepared to accept a demotion and thus tendered her resignation.

The test

[21] The question of whether a dismissal or 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 issues

[22] To resolve this matter, the Authority needs to make findings on the following issues:

- Did the applicant's role develop into one of a practice manager; and
- Did the respondent foster the view Ms Bowkett was in fact the practice manager; and
- Was the behaviour of the respondent towards the applicant undertaken with the predominant objective of having her resign; and
- Does the 4 February 2008 letter from Ms Rahiman give rise to an unjustified disadvantage; and

- Does the applicant have a personal grievance; and
- If so, to what remedies is she entitled?

[23] In respect of the counterclaim:

- Has the respondent established beyond reasonable doubt the applicant has used practice funds for her own or others' benefit; and
- If so, what remedies are appropriate?

The investigation meeting

[24] At the investigation meeting, the Authority heard evidence in person from the applicant and from her husband, Mr Patrick Bowkett. It also received a statement from Mr Gautam who did not attend the meeting.

[25] For the respondent, Ms Rahiman and Ms Manuel gave evidence and a statement was received from Mr Vickery who also did not attend.

[26] The Authority expresses its appreciation to those who gave evidence and also to counsel for both parties for their assistance and submissions which I have considered in coming to this determination.

Analysis and discussion

The role

[27] The employment agreement clearly establishes the applicant's initial position was that of Chairside or Dental Assistant with some reception duties. For a range of reasons, largely centring around dentists' preferences for dental assistants, there was some movement in the duties of ancillary staff, but at no time was the agreement between Ms Bowkett and the respondent varied to give the applicant ground to assume she was, in fact, managing the practice. The ordering of a badge with the title of Practice Manager was without authority and was undertaken without the knowledge of Ms Rahiman. On the evidence before the Authority, there is little doubt that Ms Bowkett promoted herself as the person managing the Greymouth surgery. Such behaviour is presumptuous in the extreme.

[28] The introducing of Ms Bowkett to Christchurch staff as the Greymouth practice manager is disputed by the respondent and I believe highly improbable given she, and latterly Mr Gautam, to have considered her to be fulfilling this role.

The letter

[29] The applicant's position is the 4 February 2008 email from Ms Rahiman constituted a demotion from the role of practice manager and was an unjustified action on the part of her employer.

[30] Ms Rahiman was adamant the letter was not the first time the expansion of the practice had been discussed with Ms Bowkett. Those discussions prompted no objection or even questions from the applicant. It is difficult to see then how the letter can amount to a disadvantage in such circumstances. It is also clear on the evidence that Ms Rahiman was not aware of this self-promotion and further, it is relevant Ms Bowkett, following receipt of the letter from Ms Rahiman, failed to raise any objection to its contents with her employer but tendered her resignation some 17 days later.

General

[31] On the evidence before the Authority, there is no basis for the allegation Ms Rahiman was put out over not being invited to Mr Gautam and Ms Raj's wedding or over the wedding taking place without her knowledge. I accept her concern was for the operation of the practice and the fact that within a short space of time Ms Bowkett failed to open the surgery on time and attended the wedding without seeking leave and then claiming a full 40 hours for the week in question. Ms Bowkett's position is further eroded by her attempt to tell her employer the reason for her absence was *confidential*.

[32] There is no probative evidence before the Authority supporting the main plank of Ms Bowkett's complaint that her employer undertook a course of action with the deliberate purpose of wringing a resignation from her. The evidence clearly establishes Ms Rahiman was frequently in touch with the applicant after she herself relocated to Christchurch, and dealt with issues in the Greymouth practice, such as Mr Gautam's preference to have Ms Bowkett as his chairside assistant rather than Ms Manuel. Further, the evidence confirms Ms Rahiman was definitely managing the practice. While some accounts and wages documentation was prepared in

Greymouth, it was Ms Rahiman who authorised and made all payments in relation to that business.

[33] A wage increase given to Ms Bowkett was not on the basis of promotion, but because Ms Rahiman was giving an increase to another staff member and considered it just to give a similar increase to the applicant. I think it highly improbable that the increase could have done more than assure Ms Bowkett her employer was satisfied with her work. To have concluded it related to a promotion to the role of practice manager is fanciful in the extreme.

The counterclaim

[34] The preference of Mr Gautam to have Ms Bowkett rather than Ms Manuel work as his chairside assistant led to the applicant's transferring to that role and the bulk of the receptionist and administrative tasks being taken over by Ms Manuel. In the course of doing these tasks, Ms Manuel came across some discrepancies in a number of suppliers' invoices.

[35] These related to personal toll calls made by Ms Bowkett in a personal capacity from the surgery. They amounted to \$27.71. The undertaking to repay this sum was notified at the Authority's investigation meeting. There appears to have been some delay in making this payment and the respondent claims interest on this princely sum from the date of resignation until 22 June 2009 when it was eventually received.

[36] A toll bar had been placed on the surgery's Telecom account but the calls were made using the company's Call Plus account. The evidence is that Ms Rahiman had made it clear to all staff that no personal toll calls were to be made from the surgery.

[37] The purchase of an ink cartridge for Mr Gautam's personal fax machine, which he preferred to the surgery machine, was also discovered. The claim is for \$74.98.

[38] Also at issue is the purchase of magazines ordered by Ms Bowkett, and which, the respondent says, were not found in the patient reception area when Ms Manuel arrived. The sum in question here is \$216.49. The applicant says these magazines were purchased for the surgery but were discarded when they became tatty and worn.

[39] The respondent seeks reimbursement of these sums with interest and further seeks a penalty from Ms Bowkett for breach of the implied term in the agreement not to use company resources for personal purposes without prior approval. It asks the penalty be payable to the respondent.

Analysis and discussion

[40] The concern on the ink cartridge issue is the applicant knew or ought to have known the cartridge was for Mr Gautam's machine and thus she was purchasing it without authorisation. Ms Rahiman made it plain that Mr Gautam was in fact an independent contractor and not an employee and would be responsible for the purchase of such items as this.

[41] Ms Manuel's scrutiny was not confined to the misuse of supplier accounts. She discovered Ms Bowkett had entered into time payment arrangements with patients when the clear policy of the practice was to ensure that all dental treatments were paid for by patients on completion of the appointment. This is again an instance of the applicant undertaking a course of action without authorisation from her employer.

[42] It is difficult to assess the magazine issue. Magazines, subject to reasonably heavy use, can deteriorate relatively quickly. While not doubting the evidence of the respondent's witness that these magazines were not in the practice at the time she arrived, I decline to make a finding on this particular point.

[43] The use of the company resources to purchase toll calls and the cartridge is more clear cut. They breach Ms Bowkett's obligations under her employment agreement and in particular the trust and confidence her employer was entitled to have in one authorised to purchase legitimate needs for the practice from the company's suppliers.

[44] It is unclear to the Authority whether the respondent has sought repayment of the sum involved in the cartridge purchase from Mr Gautam, who clearly had a use for it. If the company is determined to recoup this purchase, it seems more equitable to pursue Mr Gautam rather than Ms Bowkett.

The determination

[45] Returning to the issues set out above in this determination, I make the following findings:

- The applicant was never appointed to, nor did her role as chairside assistant/receptionist develop into one of practice manager; and
- In no way did the respondent foster or encourage the view Ms Bowkett was the practice manager; and
- The behaviour of the respondent towards Ms Bowkett and in particular the 4 February 2008 letter, was intended to correct some performance concerns and were not undertaken with the predominant aim of having the applicant resign; and
- The applicant does not have a personal grievance in respect of her claim of unjustified disadvantage nor does she have a claim of constructive dismissal as the evidence clearly establishes she has not met the onus of proof required for such a claim to succeed.

[46] In respect of the counterclaim:

- I am satisfied the applicant has finally repaid the outstanding money in relation to the toll calls. I decline to award any interest on such a small sum.
- As the toner cartridge was purchased for the use of Mr Gautam and not for the applicant's personal use, I encourage the respondent to pursue recompense from that gentleman but decline to order Ms Bowkett to pay that amount.
- I make no order in respect of the magazines because, as indicated above, I do not find the requisite standard of proof is met by the evidence in this case.

[47] Ms Bowkett does not have a personal grievance and the Authority is unable to assist her further.

[48] The respondent's counter claim for a penalty for the applicant's breach of the implied term of her employment agreement that she have authorisation for such purchases, has been considered. While breaching Ms Bowkett's obligations of trust and confidence, the behaviour falls short of that requiring further punishment.

Costs

[49] Costs are reserved. Counsel for both parties are to confer in an attempt to resolve this matter between them. Should this be unachievable, Mr Henderson is to lodge and serve his memorandum and Ms Connors is to have a further 21 days from the date of receipt of that memorandum to file a memorandum in reply.

Paul Montgomery
Member of the Employment Relations Authority