IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 138
5361531

	BETWEEN	MAYSON BRADFORD Applicant
	A N D	ZAKS OF HALSWELL LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Anna Oberndorfer, Advocate for Applicant Paul Brown, Counsel for Respondent
Investigation meeting:	2 July 2012 at Christchurch
Date of Determination:	6 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Bradford) alleges that she was unjustifiably dismissed by the respondent (Zaks) and that she has also suffered disadvantage by unjustified actions of the employer and was the victim of bad faith by the employer. Zaks resists all of those claims.

[2] Ms Bradford was employed by Zaks as a hairdressing junior. She worked for Zaks for approximately a month before the termination of the employment, having completed a successful three day unpaid trial period. Ms Bradford was just 16 years old when the employment commenced; she had completed a training course in Dunedin prior to applying for the position.

[3] On Tuesday, 14 June 2011, Ms Bradford attended at work in the normal way notwithstanding that she had suffered damage to her hand in one of the two earthquakes that Christchurch had suffered the previous day.

[4] Ms Good, the co-owner of Zaks, and two other members of her staff promptly suggested to Ms Bradford that she should get her injured hand seen by a doctor. There was one nearby and in the result, Ms Bradford attended at the doctor and was given a certificate preventing her from working for 48 hours.

[5] The effect of the medical certificate would have been that she should have returned to duty on the morning of Thursday, 16 June 2011. One of Ms Bradford's duties, as the junior, was to open the salon first thing in the morning. Ms Good's evidence (which is disputed by Ms Bradford) is that she told Ms Bradford before she left work on Tuesday, 14 June 2011 that if she was unable to attend on Thursday, 16 June 2011 for any reason, she was to ring Ms Good and advise her of that fact by Wednesday evening. Ms Good's evidence (again disputed) is that she provided Ms Bradford with a card on which she had written both her home telephone number and her cellphone number. Ms Good's evidence was that her home number was in the telephone directory and that Ms Bradford had had occasion to use it in the past.

[6] It is common ground that while she was recovering from the injury to her hand occasioned by the earthquake, Ms Bradford developed further and more serious symptoms of ill health such that she did not attend at work as expected on the morning of Thursday, 16 June 2011. Nor did she ring the employer, as Zaks say she was instructed to do, to advise that she would not be in on Thursday. Of course, the employer expected that Ms Bradford would attend at the salon on Thursday morning and open up as this was part of her job description.

[7] When Ms Bradford did not appear on Thursday morning, and by common consent had not telephoned Ms Good at all over the preceding two days, Ms Good commenced to try to ring Ms Bradford and eventually got through to her on Ms Bradford's cellphone at about 9.10am on the morning of Thursday, 16 June 2011. Again it is common ground that Ms Good woke Ms Bradford when she made that telephone call and although there is dispute about what happened in that telephone discussion, it is agreed that the call was relatively short.

[8] Ms Good says simply that she sought an explanation from Ms Bradford as to where she was, reminded her of her obligation to keep her employer informed of her comings and goings, encouraged her to visit the doctor again and to contact the salon again once she had seen the doctor.

[9] Ms Bradford on the other hand remembers that telephone discussion in an entirely different light. She says that Ms Good rang her at about 9.10am on Thursday, 16 June and was *"very angry"* with her, referred to multiple customers waiting on the doorstep, said something to the effect that Ms Bradford's behaviour was unacceptable and her heart was not in the right place and concluded with a demand that Ms Bradford return the salon key as soon as she could. Ms Bradford took that telephone exchange, as she remembered it, as an indication that she had been dismissed and she reported that to her father immediately after the conversation. Mr Bradford confirmed in his evidence to the Authority that that was what his daughter had told him although he also made it clear that he had not heard the conversation that his daughter relied upon.

[10] The curious aspect of this case is that, on the evidence of Ms Bradford, that was the last exchange between the principal protagonists. Ms Bradford regarded herself as having been dismissed by the telephone call at 9.10am or thereabouts on 16 June 2011 and on her evidence she subsequently took the key back to Zaks and then in due course raised her personal grievance. Ms Bradford's evidence is that she made various attempts to engage with the employer after returning the key but was unsuccessful in getting any response from Ms Good. Her father, Mr Bradford, was more successful; he eventually got to speak to Ms Good, on his evidence, some weeks after the alleged dismissal and he was advised that the employment relationship had now come to an end but as a consequence of his daughter resigning her employment rather than being dismissed.

[11] Ms Good's evidence, and the evidence of two staff members who were with her at the relevant time, was that there was a second and subsequent call from Ms Bradford to Ms Good at about 1pm on Thursday, 16 June 2011. Ms Good said in her evidence that Ms Bradford had rung her on that occasion because Ms Good had asked her to report back by telephone once Ms Bradford had seen the doctor again. Ms Bradford denies there was any such conversation. But Ms Good's evidence is that the conversation took place, that she received the call at the salon, that it was overheard by two of her staff members, and that when Ms Good challenged Ms Bradford about the latter's failure to contact her to advise she would not be in that morning, Ms Good said that Ms Bradford flew into a rage, began swearing profusely and eventually concluded the exchange with the words *"don't fucking bother I quit"*.

[12] Ms Good indicated to Ms Bradford that if that was her position then she should bring in her keys and her uniform as soon as possible.

[13] Ms Good acknowledges speaking with Mr Bradford some weeks after the termination of Ms Bradford's employment, but was surprised by his claim that Ms Bradford had been dismissed. Furthermore, Ms Good complained about Ms Bradford talking to her father about the issue when her father had no involvement in the business and knew nothing of the circumstances surrounding Ms Bradford's departure from it.

Issues

[14] The only issue really in this case is whether there was a dismissal or resignation and in order to assess the evidence available to the Authority, it will be useful for the Authority to examine the following questions:

(a) What happened in the first conversation;

(b) Was there a second conversation;

(c) How did the employment relationship end?

What happened in the first conversation?

[15] This is a case where credibility ultimately determines the Authority's findings of fact. Both parties cannot be right in their respective recollections of what happened. Even on the evidence the Authority heard in respect of the first conversation, that is the telephone discussion between the principal protagonists, Ms Good and Ms Bradford at 9.10am or thereabouts on Thursday, 16 June 2011, there is little common ground save that the conversation took place.

[16] As the Authority has already identified, Ms Bradford was asleep in bed, ill, when she was awoken by the call from Ms Good on her cellphone. Ms Good's evidence is she had tried to ring Ms Bradford on her landline immediately prior to getting through on the cellphone.

[17] Ms Bradford's evidence is that Ms Good was angry when she rang because Ms Bradford had not turned up for work. Ms Bradford said that she did not get a chance to explain that she was ill and that Ms Good said that her heart was not in the

job, that it was unacceptable and why had she not rung in if she knew that she was not going to be able to get to work. Ms Bradford told the Authority that Ms Good concluded by saying that Ms Bradford was to bring in the salon key as soon as possible and then hung up.

[18] Some of that exchange is almost consistent with Ms Good's recollection of the discussion. She says that she asked Ms Bradford why she was not at work, was told that Ms Bradford was sick, asked her why she had not rung before to advise that, failed to get an answer to that question, but then Ms Good understood Ms Bradford to say that she would be in touch again when she had seen the doctor.

[19] Ms Good is adamant that she did not say anything to Ms Bradford which would lead the latter to understand that the employment relationship had come to an end. In particular, Ms Good denies saying to Ms Bradford that she was to bring in her key to the salon. Ms Good's evidence to the Authority was that she would not have said that because the issues between the two women were still in play. She at that point did not know what the doctor had to say about Ms Bradford's illness nor had she received any explanation as to why Ms Bradford had not rung her as she asked, if Ms Bradford had not been able to come in. Even on Ms Bradford's evidence, she was clear in her oral testimony before the Authority that the reason that she thought she had been dismissed was because Ms Good had allegedly referred to her returning the salon key. The Authority questioned her carefully about whether she remembered the use of words such as dismissal or expressions like "you're fired" but she was adamant that no such words were used. She relied exclusively on the claim that she had been told to bring the key in, which of course Ms Good denies having said at all.

[20] On balance, the Authority's considered view is that whatever the exchange between the parties, Ms Good was not intending to dismiss Ms Bradford in that telephone discussion and that whatever she said was misinterpreted by Ms Bradford who was both unwell and presumably also sleepy having just been woken up to take the call. The Authority does not think it likely that Ms Good told Ms Bradford to bring the key in, although Ms Bradford clearly understood that words to that effect were said to her. The Authority thinks it more likely than not that those words were not spoken in this conversation because, as the Authority noted above, Ms Good had yet to get any explanation for why her instructions had been disobeyed and was yet to get any clear idea about exactly what was wrong with Ms Bradford. Presumably, if

the doctor had considered that Ms Bradford was not particularly unwell at all, then that might have influenced Ms Good in a direction in terms of how she responded to the matter. In the result, the doctor confirmed that Ms Bradford was indeed unwell, having a streptococcal infection in the throat, so there was no suggestion, nor could there be, that Ms Bradford was not genuinely unwell.

[21] But all of that begs the question of the earlier issue which there was also no common ground about, namely whether Ms Good gave Ms Bradford her telephone numbers and instructed her to ring if she could not come in, or not. The Authority thinks it unlikely that Ms Good would have made that story up and given that Ms Bradford was taking a period of sick leave (initially because of her damaged hand) but was responsible for opening the salon first thing in the morning, it would be an entirely natural thing for an employer to ensure that arrangements were in place so that the salon could be opened in the normal way by the junior when she returned after a period of being unwell. Furthermore, Ms Good made the point in her evidence to the Authority that not only did she specifically remember giving Ms Bradford her cellphone number and her home number written on the back of a Zaks card, but she remembered that Ms Bradford had rung her at home on a previous occasion (about two weeks before), so she knew how to obtain Ms Good's telephone number, which in any event was in the telephone directory.

[22] The Authority thought Ms Bradford's evidence on the question of the telephone numbers was inherently implausible and much prefers Ms Good's recollection of that point, that she gave Ms Bradford the telephone numbers, and gave her an instruction to ring if she could not come in on Thursday morning. That instruction, as the Authority has already remarked, would be an absolutely expected incident of the employment relationship given that Ms Bradford was responsible for opening up the salon first thing in the morning. Ms Bradford did not dispute that that was her role, nor did she quarrel with the suggestion made in evidence by Ms Good that she had previously rung Ms Good at home. Rather, Ms Bradford relied on the evidence that she had spoken with her father about when to ring the employer and adopted his suggestion that she would not have to ring until 9.30 on the morning she was not able to come in.

[23] The Authority is not persuaded that Ms Bradford can shelter behind her father's advice in this matter. Her father's advice was, in the Authority's opinion,

misguided given that Ms Bradford knew full well that she was responsible for opening the salon, not at 9.30am but at 8.30am. That being the position, notifying the employer an hour after one was expected on duty is hardly going to avail. Ms Bradford knew or ought to have known that if she was unable to come to work on time and fulfil her responsibilities to her employer, then she should have let her employer know in plenty of time that she was feeling unwell and was likely not to be able to turn up the following morning. As Ms Good maintained in her evidence to the Authority, even if Ms Bradford had rung the salon (assuming the Authority accepted her evidence that she did not have Ms Good's home and cellphone numbers), Ms Bradford could have left a message at the salon during working hours on the Wednesday to say that she was still not feeling well and would probably not be coming in on Thursday morning. To choose to leave things until 9.30am on the morning when she was supposed to have started work an hour beforehand is not the action of an employee behaving in good faith and demonstrates that she has not, on that point alone, fulfilled her obligation to the employer in terms of that advice.

Was there a second telephone call?

[24] The Authority is satisfied on the evidence it heard that there was a second telephone discussion and that the terms of that discussion were broadly as conveyed to the Authority in the evidence of Ms Good. It is a relatively extraordinary state of affairs that a young employee would completely overlook a significant telephone discussion that she had had with her employer, but that appears to be the position in this case. It may be that Ms Bradford is embarrassed about the language that she used in the discussion, embarrassed about losing the job that she so valued as a consequence of a burst of bad temper, but whatever the reason, the Authority is persuaded that the weight of evidence suggests that the conversation did take place and that it took place broadly in the terms that Ms Good described.

[25] The two reasons that influence the Authority to reach the conclusion that it does on the second telephone call are first the fact that, from the first discussion, on Ms Good's evidence anyway, there was, as it were, unfinished business. Ms Good was seeking an indication from Ms Bradford about her medical prognosis and it seems more likely than not that, having preferred Ms Good's recollection of the detail of that first conversation, a second conversation on the telephone was inevitable because the Authority preferred Ms Good's evidence that in the first conversation in the morning,

she had asked to hear from Ms Bradford again once a further medical appointment had been completed.

[26] The second and more compelling reason for the Authority concluding that there was a second conversation is that Ms Good gave evidence to that effect and was persuasive in that regard, and equally importantly, she was supported in the evidence that she gave about not only the existence of the second telephone call, but also its content, by the evidence of two senior staff who overheard her part of the conversation and some of the significant observations made by Ms Bradford.

[27] Of course, the Authority has to consider the allegation that Ms Bradford made that the two staff members who supported Ms Good were colluding in the interests of saving their jobs. It was suggested on Ms Bradford's behalf that both Ms Good and her two co-workers simply made up the second telephone call in order to, as it were, complete the picture and deflect attention from the first telephone call presumably in case the Authority concluded that Ms Bradford's recollection of that call was to be preferred over Ms Good's.

[28] But even if the Authority had preferred Ms Bradford's recollection of that first telephone call, at best, Ms Bradford was alleging that she was told to take the key back to work and that that was sufficient to convey the meaning that she had been dismissed from her employment. She was adamant that no other words were used by Ms Good to suggest that she was dismissed or fired. It seems to the Authority to draw a very long bow to suggest that the second telephone call was manufactured to deal with the very slight risk that the Authority might conclude that Ms Bradford had been dismissed in the morning telephone discussion. It is of course axiomatic that employers regularly make mistakes in their engagement with employees, just as the converse is also true, but in the particular circumstances of this case, for reasons that the Authority has already enunciated, there is a preference for the view that Ms Good advanced about the terms of that first telephone discussion.

[29] The more substantial reason for concluding that the second conversation took place is that both Ms Good and her two staff members who overheard the conversation were persuasive witnesses. In the Authority's view, none of them was lying. All of them heard the call come into the salon and they all were aware of who Ms Good was speaking to, what Ms Good was saying, and some of what Ms Bradford said in response. They heard Ms Bradford because she was shouting and Ms Good

described to the Authority that by virtue of that alone, she was having to hold the phone away from her ear, thereby ensuring that her two colleagues heard some or all of what Ms Bradford was saying.

[30] The observations attributed to Ms Bradford in that telephone discussion included the use of swear words which might best be described as unladylike. Sadly, the evidence the Authority heard disclosed that Ms Bradford was not above using foul language and there were a number of occasions described in the evidence where she was heard to swear enthusiastically in relation, for instance, to buses being late and causing her to be late for work and in relation to her boyfriend's failure to pick her up on time after work.

[31] In all the circumstances then, the Authority is not persuaded that Ms Bradford has got things right in her evidence. The Authority prefers the evidence of Ms Good and Ms Stewart and Ms Tauki that Ms Bradford did ring the salon around 1pm on Thursday, 16 June 2011, that the call was taken initially by Ms Stewart who identified that the caller was Ms Bradford although she did not give her name, that the phone was handed to Ms Good, that the latter went out into the back room to take the call and that by virtue of the small area involved and perhaps also natural curiosity, both Ms Stewart and Ms Tauki overheard the thrust of the conversation.

[32] While the details of the conversation are in the end neither here nor there, the critical point is that it is common ground of the three witnesses for the employer that the conversation concluded with Ms Bradford saying words to the effect *"don't fucking bother"* and *"I quit"*.

How did the employment relationship come to an end?

[33] The Authority is satisfied that the employment relationship came to an end by virtue of Ms Bradford resigning her employment during a heated exchange with the employer and that Ms Bradford's temper got the better of her in the discussion and that she made it clear that she was resigning her position.

[34] It is interesting that there is dispute between the parties as to whether there was any attempt made by Ms Bradford to engage with the employer after 16 June 2011. Ms Bradford's evidence is that she made numerous attempts to contact the employer at the salon but that evidence is not supported by any evidence from the employer or the employer's other staff who were available to give their evidence to

the Authority. Indeed, the only contact between a member of the continuing staff of Zaks and Ms Bradford appears to have been some time after the termination of the employment when Ms Tauki attended on Ms Bradford to give her some property that belonged to her. Nothing from the substance of that conversation gave the Authority any inkling that Ms Bradford was seeking to reopen communication with the employer.

[35] Of course, Ms Bradford's case proceeds on the opposite tack. She says that it was inherently improbable that she would lose her temper and resign her employment when she was passionate about hairdressing and keen to make a good impression in her first job. But the evidence that Ms Bradford swore fluently was clearly given and not denied by Ms Bradford herself, although she sought to characterise her swearing as less voluminous than it actually was. The Authority does not accept that it was uncharacteristic then of Ms Bradford to swear; the evidence is otherwise. Nor does the Authority accept the submission that Ms Bradford was keen to make an impression in the early weeks of her employment when the evidence before the Authority was that she was regularly late for work causing inconvenience to the employer. Ms Bradford's contention that when Ms Tauki came to deliver her property to her and did not ask why she quit, is not, in the Authority's view, evidence to support her case that she was dismissed but may simply reflect Ms Tauki's unwillingness to pursue the subject matter. Certainly that view is consistent with Ms Tauki's evidence to the Authority, both in relation to the meeting where she delivered Ms Bradford's mail but also in respect of Ms Tauki's general conclusion that Ms Bradford's behaviour did her no credit. The Authority was impressed with Ms Tauki's evidence particularly, and thought her evidence sensible and measured.

Determination

[36] It follows from the foregoing analysis that the Authority's conclusions are that Ms Bradford resigned her position in a fit of temper and with the use of colourful language when she had the second telephone discussion with the employer around 1pm on Thursday, 16 June 2011. The only question for the Authority is whether, in taking no further steps in the matter, Zaks could properly rely on the resignation as evidence for Ms Bradford's determination to vacate the employment.

[37] In the particular circumstances of this case, the Authority is persuaded that it would have been a great deal more sensible, and less inherently risky, for Zaks to seek

to meet with Ms Bradford after the telephone conversation relied upon and give her the opportunity of reflecting on whether she wished to return to the employment or not. However, if there had been such a meeting, it would have been equally appropriate for Zaks to have engaged with Ms Bradford on a disciplinary basis to enable it to address Ms Bradford's entirely inappropriate language and tone in the communication that she had, on the Authority's finding, with the employer.

[38] Zaks encourage the Authority to rely on two recent decisions of the Authority to support its conclusion that it need do no more than accept the proffered resignation. The two decisions are *Hansen v. RDF & T Catering Ltd* CA88/07 and *Donaldson v. Adventure Travel Specialists* CA 120/09. However, both these decisions can be distinguished as each involved the relevant employer seeking to meet with the recalcitrant employee after the outburst and further discuss the future of the employment relationship. In the instant case there was no such meeting.

[39] The law is plain that both in terms of the obligation to behave in good faith and to meet the requirements of justification, a good and fair employer, seeking to behave with justification should not accept a resignation offered in the heat of the moment, without taking further steps to verify that that was indeed the employee's intention. In *Taylor v Milburn Lime Ltd* [2011] NZEmpC 164 the Court held that where an employer was faced with a walk off the good faith principle required an employer to investigate further and ensure that " *....its response is based on the employee's actual intentions.....*" Again, in *Kostic v. Dodd* NZEmpC CC14/07, the employee purportedly resigned after a heated argument but subsequently sought to discuss his continuing employment with the employer. His Honour Judge Couch observed: "*A fair and reasonable employer would not take at face value what was said (in the heat of the moment). Rather, such an employer would allow a cooling down period and then discuss with the employee what had occurred*."

[40] Applying that dictum to the present case, it will be immediately apparent that Zaks ought to have engaged with Ms Bradford after the second telephone call so as to ensure that, after a cooling off period, Ms Bradford still intended to resign her position. If she did, then the law would allow the employer to rely on the resignation borne as it was of a period of mature reflection. Fairness and equity demands such an approach, particularly for a young and inexperienced worker.

[41] It follows from the foregoing analysis that Ms Bradford has a personal grievance by reason of having suffered an unjustified action from the employer (the failure to allow a cooling off period) causing her disadvantage (the precipitate acceptance of her resignation).

[42] However, before the question of remedies can be considered, the Authority is required to reflect on whether Ms Bradford contributed in any way to the circumstances giving rise to the grievance : s 124 of the Act considered. The Authority's conclusion in the present case is that Ms Bradford was wholly responsible for the circumstances giving rise to the grievance. By virtue of the vehemence with which Ms Bradford expressed herself, the inappropriate nature of her language directed at her employer, and the very context in which the conversation took place where arguably she should have been more contrite about failing to meet fundamental obligations of the employment such as being reliable and turning up on time, Ms Bradford so transfixed the employer that they were led away from the correct path. The Authority is satisfied that if Ms Bradford had conducted herself with more decorum, Zaks would have likely done the right thing but Ms Bradford's behaviour was so inappropriate and uncompromising that she prevented that from happening.

[43] While the Authority has determined that Ms Bradford has a personal grievance, her complete contribution to its circumstances make her wholly responsible for it and deprives her of any remedies.

Costs

[44] Costs are reserved.

James Crichton
Member of the Employment Relations Authority