



# New Zealand Employment Relations Authority Decisions

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**Cowan v 900 Degrees NZ 2008 Limited (Wellington) [2017] NZERA 2016; [2017] NZERA Wellington 16 (16 March 2017)**

## New Zealand Employment Relations Authority

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**Cowan v 900 Degrees NZ 2008 Limited (Wellington) [2017] NZERA 2016 (16 March 2017); [2017] NZERA Wellington 16**

Last Updated: 10 April 2017

**IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON**

[2017] NZERA Wellington 16  
5638279

BETWEEN BERNADETTE MARIE COWAN Applicant

A N D 900 DEGREES NZ 2008

LIMITED Respondent

Member of Authority: T G Tetitaha

Representatives: J Grealley, Counsel for Applicant

P May, Counsel for Respondent Investigation Meeting: 1 March 2017 at Wellington Submissions Received: 1 March 2017 from both parties Date of Determination: 16 March 2017

**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

**A. Bernadette Cowan was unjustifiably disadvantaged by bullying by**

**900 Degrees NZ 2008 Limited.**

**B. 900 Degrees NZ 2008 Limited is to pay Bernadette Cowan lost remuneration comprising her unpaid leave taken**

between 2 to

25 August and 26 September 2016 to 2 January 2017 less PAYE

pursuant to ss.123(b), 128 and 124 of the Act.

**C. 900 Degrees NZ 2008 Limited is to pay Bernadette Cowan compensation of \$5,000 pursuant to sss.123(3)(c)(i) and 124 of the Act.**

**D. Costs are reserved.**

### **Employment relationship problem**

[1] Bernadette Marie Cowan alleges she was unjustifiably disadvantaged by actions of her employer 900 Degrees NZ 2008 Limited (the respondent) following a complaint she made. The complaint was about a co-worker. Ms Cowan alleges the co-worker and the respondent's managing director then engaged in a course of conduct of bullying and harassment. She seeks lost remuneration and compensation.

### **Relevant facts**

[2] Ms Cowan was employed as a telesales person in February 2013. Fran Barnett was her manager and the respondent business owner. Andrea Neville was a co-worker and Ms Barnett's daughter.

[3] On a Friday in early April 2016 Ms Cowan observed Ms Neville taking a parcel addressed to Rochelle Sanderson. Ms Sanderson worked elsewhere in the building. The package was a new cell phone she had ordered from China. She enquired with Ms Sanderson if she had received the parcel. She said no.

[4] At the following Monday staff meeting, Ms Cowan confronted Ms Neville. She asked Ms Neville if she had taken the parcel. Ms Neville denied it. Ms Cowan accused her of lying.

[5] Ms Barnett then got involved. She denied Ms Neville was at fault. Instead she stated she had seen Ms Cowan gambling when she had left work due to sickness. Matters remained tense and unresolved.

[6] A few days later Ms Sanderson received the parcel. It had been sent from the Lower Hutt Postbank. Ms Barnett overheard Ms Sanderson speaking to Ms Cowan about it. She made comment that Ms Neville could not have taken the parcel.

[7] At a later staff meeting Ms Barnett asked Ms Cowan to apologise to Ms Neville. Ms Cowan apologised for the manner in which she raised her complaint but maintained she had seen Ms Neville take the parcel. Ms Neville continued to deny this had occurred.

[8] However Ms Sanderson had become suspicious. She undertook her own investigation and complained to the Police. Video footage was recovered from the Lower Hutt Postbank. It showed Ms Neville posting the parcel.

[9] During this period Ms Neville started having loud telephone conversations with her lawyer during lunch hours. She was overheard referring to defamation action against Ms Cowan. Ms Cowan believed this was intended to intimidate her and complained.

[10] Ms Neville also made comments about Ms Cowan's financial status. She alleged Ms Cowan was the subject of a "no asset procedure" by the Official Assignee. When Ms Cowan complained Ms Barnett stated "it's general knowledge it's on Google".

[11] Eventually in an effort to diffuse tension Ms Cowan and Ms Neville met and

"agreed to disagree" to enable them to continue working together.

[12] The Police attended the respondent's offices in July 2016 to interview Ms Neville. She was not present at work. Ms Barnett gave her address and telephoned Ms Neville to inform her about the Police. It was not until the Police confronted Ms Neville with still photographs of the video footage that she accepted she had taken the parcel. The Police later informed Ms Sanderson that Ms Neville had accepted wrongdoing. Ms Sanderson asked she be formally warned but not charged. She also told Ms Cowan what had occurred.

[13] On 1 August 2016 Ms Cowan confronted Ms Neville at work. She advised Ms Sanderson had told her that she had accepted wrongdoing to the Police. She sought an apology from Ms Neville for lying. She believed Ms Neville had cast doubt on her honesty. Both Ms Neville and Ms Barnett continued to deny any wrongdoing.

[14] On 2 August 2016 Ms Cowan delivered a personal grievance letter to Ms Barnett. The same day Ms Neville was sent a formal warning by the Police relating to her taking Ms Sanderson's parcel. Ms Barnett sought a meeting with Ms Cowan without her lawyer. Ms Cowan refused. Matters became tense and Ms Cowan left work that day and did not return until 25 August 2016.

[15] When Ms Cowan attended work on 26 September 2016 she was called into a performance review meeting. Ms Barnett issued her with four "verbal warnings" for poor sales performance, absenteeism, using her personal cellphone at work and her attitude including dress code violations. During the day she would come out of her office and stand near Ms Cowan while she was working. Ms Cowan asked her to go away but Ms Barnett would either refuse or return. While at lunch Ms Barnett moved Ms Cowan's desk to a position near her office. Ms Cowan left work that day and did not return. She provided a medical certificate stating she was medically unfit for work and "*does not expect to be able to return to current position.*"

[16] Ms Cowan filed a statement of problem with the Employment Relations

Authority on 28 September 2016.

[17] Correspondence was exchanged between the parties over her health status and her return to work. She resigned on or about 2 January 2017. The parties attempted mediation but were unsuccessful in resolving this matter.

## **The issues**

[18] The issue for determination is whether the applicant was disadvantaged by the following actions:

- the respondent's handling of Ms Cowan's complaint about Ms Neville;
- comments made by Ms Barnett (*the workplace was happier before she arrived and the respondent would have to close down*); and
- general bullying behaviours by Ms Barnett and Ms Neville.

## The law

[19] For a personal grievance for unjustified disadvantage Ms Cowan must show that one or more conditions of her employment were affected to her disadvantage by some unjustifiable action by the respondent employer. The onus is on the employee to establish a disadvantaging action occurred before an employer must show

justification for it.<sup>1</sup>

[20] Justification requires the respondent to prove its actions were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.<sup>2</sup> This requires proof an employer having regard to the resources available, sufficiently investigated, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely consider the employee's explanation prior to taking action.<sup>3</sup>

[21] There is an implied term of every employment contract that an employee is entitled to a safe workplace free from bullying behaviour. Bullying is about behaviours that are repeated and carried out with a desire to exert dominance and intention to cause fear and distress. The behaviours usually include elements of personal denigration and disdain of the person subject to it. It is intended to control the behaviour and actions of its target in particular ways. Criticism or feedback from an employer is not bullying, although it may become so because of the manner and

purpose of its deliver or a particular vulnerability of the recipient.<sup>4</sup>

[22] A manager acting outside management norms with harmful effects on the employee may mean the employer gives an employee less than their contractual rights and obligations under their employment contract.<sup>5</sup>

## Was Ms Cowan bullied?

[23] Ms Cowan alleges she was bullied by Ms Neville and Ms Barnett. The respondent denies this occurred or if it did it was by Ms Neville only and the respondent was unaware of her dishonesty and acted as best it could in those circumstances. Ms Barnett was the respondent's business owner and Ms Cowan's manager.

## April 2016

[24] When she was told by Ms Cowan that Ms Neville had taken the parcel Ms

Barnett stated she believed Ms Neville *because she had no evidence to the contrary*. She then proceeded to accuse Ms Cowan of dishonesty. Ms Barnett accepted under

<sup>1</sup> *Clark v. Northland Polytech Council* [1999] NZEmpC 37; [1999] 1 ERNZ 270 at 280

<sup>2</sup> Section 103A(2) of the Act

<sup>3</sup> Section 103A(3) of the Act

<sup>4</sup> *Isaac v. Chief Executive of the Ministry of Social Development* ERA Auckland AA200/08,

<sup>5</sup> June 2008 at [55] to [56].

<sup>5</sup> *Edmonds v Attorney General* [1998] 1 ERNZ 1, 16.

examination that when the complaint was raised she accused Ms Cowan of dishonesty around her sick leave.

[25] Ms Barnett accepts she said to Ms Cowan *the workplace was much happier before this happened and I needed to think about what was happening and that I was not sure I wanted to run the business anymore*. These comments were negative and clearly directed at Ms Cowan.

[26] Ms Barnett's actions towards Ms Cowan were bullying. This is because:

- All of the comments were intended to intimidate Ms Cowan into stopping her allegations about her daughter. During examination she accepted the comment about Ms Cowan's dishonesty was in retaliation for her accusation against her daughter;
- They were said in a public place in front of Ms Cowan's work colleagues and

Ms Sanderson;

- The comments belittled Ms Cowan and unfairly blamed her for creating workplace tension and possible business closure; and
- Such actions were outside of the normal behaviour expected of a manager.

### ***April to July/August 2016***

[27] Ms Neville accepted she was at the time *on a lot of medication*. This did not excuse her behaviour towards Ms Cowan. It also does not deflect the respondent's responsibilities to its employees.

[28] Ms Barnett acknowledged Ms Cowan complained about Ms Neville's behaviour. Ms Barnett alleged she had issued Ms Neville with warnings about her behaviour. None of that evidence was in the respondent's sworn briefs. I have some doubt she took any action or any action that prevented bullying. The evidence of co-workers and Ms Sanderson confirmed Ms Neville's behaviour continued unabated over this period.

[29] Ms Neville accepted she made false telephone calls to her lawyer alleging she was taking defamation action against Ms Cowan. This was done deliberately within

Ms Cowan's hearing. Ms Cowan complained, but as witnesses confirmed this

behaviour continued for some months.

[30] Ms Neville told co-workers Ms Cowan was about to be bankrupted because she was the subject of a *no asset* procedure by the Official Assignee. Ms Barnett took no action to stop Ms Neville's behaviour. She stated *it's public knowledge, it's on Google*. This suggests Ms Barnett was aware of what Ms Neville was doing.

[31] During examination Ms Barnett accepted either she or Andrea may have said *what are you going to do, burst into tears and go home; that is what you always do*. This is similar to the evidence of a co-worker Cassie Rowley that Ms Cowan *had been given a hard time one day Fran said to her, "now you're gonna cry and go home"*. Andrea added – *"do you need another box of tissues?"*

[32] Ms Rowley's evidence was highly credible. She is still employed by the respondent. She got on well with both parties. She was a reluctant but truthful witness. She was required to give evidence that was possibly against her interests to do so. Most importantly she confirmed what Ms Cowan alleged Ms Barnett and Ms Neville were doing.

[33] When the personal grievance was raised Ms Cowan alleges she was belittled by Ms Barnett – asked how she could afford a lawyer and told her personal grievance was a joke. Given Ms Barnett's previous behaviour and its similarity, I accept this did occur.

[34] Ms Barnett and Ms Neville's behaviour towards Ms Cowan was bullying. It

was:

- intended to intimidate and belittle Ms Cowan;
- occurring in a public place in front of Ms Cowan's work colleagues;
- clear the respondent through Ms Barnett was complicit in this bullying. It was not solely being undertaken by Ms Neville; and
- outside of the normal behaviour expected of a manager and respondent employer.

### **September 2016**

[35] Ms Barnett accepted she gave four 'verbal warnings' to Ms Cowan that day for using her cellphone at work, absenteeism, swearing and poor performance. This occurred during a 'performance review' meeting. Under examination it was apparent Ms Barnett did not have any understanding of what a "verbal warning" was. She then tried to resile from the "warning" being disciplinary. However Ms Barnett's own evidence left no doubt Ms Cowan believed the warnings were intended to be disciplinary.

[36] Ms Barnett alleges Ms Cowan was trying to "bait her" that day into firing her. Her evidence was Ms Cowan asked *why give me warnings – why not fire me?* Her reply was *if you don't want to be here why not resign*. This evidence gave the impression Ms Cowan was being asked to resign.

[37] Ms Cowan complains Ms Barnett then moved her desk to outside her door without consulting her. She also treated another co-worker (Cassie Rowley) with similar performance issues more favourably. Ms Rowley confirmed she had similar performance issues but did not suffer the same consequences.

[38] Ms Barnett accepts she moved the desk and stood near Ms Cowan 4 times to monitor her performance. This is despite being told to leave by Ms Cowan. Ms Cowan eventually left and did not return to work.

[39] This conduct was bullying because:

- The previous bullying behaviour that had occurred;
- The timing of this conduct within hours of Ms Cowan's return to work and

following the raising of a personal grievance;

- I do not accept Ms Barnett's evidence at hearing she had previously "raised" these issues with Ms Cowan. She never addressed this in her evidence in chief and gave Ms Cowan no opportunity to comment;
- The lack of understanding by Ms Barnett of the disciplinary nature of the verbal warnings and her subsequent conduct towards Ms Cowan;
- The evidence of the co-workers that Ms Cowan alone was being given a "hard time" especially when Ms Barnett stood near or over her at her desk;
- The disparate treatment of Ms Cowan compared to Ms Rowley for similar

performance issues. This suggested Ms Cowan was being "singled out"; and

- This behaviour was outside of the normal behaviours of a manager.

[40] All of the above bullying conduct disadvantaged Ms Cowan. It breached Ms Cowan's implied terms of employment included the right to a safe workplace free of bullying. There was no justification shown for the respondent's actions. Ms Barnett at times appeared surprised this behaviour was of concern at all.

[41] Ms Cowan has proved she was disadvantaged by the above actions of Ms

Barnett and Ms Neville. None of those actions met the tests of justification.

[42] Ms Cowan was unjustifiably disadvantaged by bullying by 900 Degrees NZ

## **Remedies**

[43] Ms Cowan has proven she has a personal grievance. She seeks remedies of lost remuneration and compensation of \$5,000.

### *Lost remuneration*

[44] Ms Cowan accepts she has not looked for any jobs. Therefore, she has failed to mitigate any remuneration lost following termination. She only seeks to recover her lost remuneration for unpaid leave up until 2 January 2017.

[45] In my view, Ms Cowan is entitled to recover any unpaid leave that she used between the period of 2 to 25 August 2016 and 26 September to 2 January 2017. This is subject to reduction for any contributory behaviour.

### *Compensation*

[46] There was evidence from all witnesses of the effect of bullying upon Ms Cowan. She was at times angry, frustrated and crying at work during this period. She had a diagnosis of “reactive depression”, lacked self-confidence refused to see friends and kept to herself. It has negatively affected her young daughter by making her

protective of her mother to others. I have no hesitation accepting it had a dire and direct effect for Ms Cowan.

[47] This bullying continued over the course of several months. There is also a need to deter this type of behaviour occurring within the workplace. I remain concerned at the respondent’s apparent lack of remorse. Even when asked whether she apologised to Ms Cowan for her handling of the complaints, Ms Barnett appeared surprised this would be required at all. Although this is not an unjustified dismissal case, it could well have been. The evidence would have warranted a higher award of compensation of \$10,000.

[48] However compensation of \$5,000 only is sought and shall be awarded subject to any reduction for contributory conduct.

## **Contributory conduct**

[49] I am required to consider the extent to which the actions of Ms Cowan contributed towards the situation that gave rise to the personal grievance. If there is contributing behaviour, I am required to reduce the remedies provided.

[50] Contributing behaviour may be taken into account if it is both causative of the outcome and blameworthy.<sup>6</sup>

[51] Ms Cowan admitted that at times she swore at Ms Neville regarding the allegation about the stolen parcel but later apologised. She also admitted she had been absent on a number of occasions and was not meeting sales targets. None of this behaviour can be said to have caused the bullying. It may be blameworthy but that is insufficient to warrant reduction.

[52] Accordingly, the following orders are now made:

- a. 900 Degrees NZ 2008 Limited is to pay Bernadette Cowan lost remuneration comprising her unpaid leave taken between 2 to 25 August and 26 September

2016 to 2 January 2017 less PAYE pursuant to ss.123(b), 128 and 124 of the

Act.

6. *Goodfellow v. Building Connexion Ltd trading as ITM Building Centre* [\[2010\] NZEmpC 82](#) at [\[49\]](#)

b) 900 Degrees NZ 2008 Limited is to pay Bernadette Cowan compensation of

\$5,000 pursuant to sss.123(3)(c)(i) and 124 of the Act.

[53] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall

have 14 days to file and serve a reply.

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**T G Tetitaha**

**Member of the Employment Relations Authority**

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