

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 154
5303666

BETWEEN GLENDA FELTS
 Applicant

A N D McCAIN FOODS (NZ) LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: James Firth, Counsel for Applicant
 Raewyn Gibson, Advocate for Respondent

Investigation Meeting 24 November 2010 at Timaru

Submissions Received: On the day

Date of Determination: 11 October 2011

DETERMINATION OF THE AUTHORITY

Acknowledgment

[1] I would like to express my sadness at the passing away of Mr James Firth, counsel for Glenda Felts. I would also like to thank the parties for the patience and understanding in the delay in the issue of this determination. It was only recently that the files and notes taken of evidence at the Authority's investigation meeting were able to be retrieved from the earthquake-damaged building that the Authority used to occupy in Kilmore Street, Christchurch. I sincerely regret any inconvenience that this caused to the parties.

Employment relationship problem

[2] Glenda Felts worked at McCain Foods (NZ) Limited (McCain Foods) for about 10 years before she resigned on 26 January 2010. Ms Felts was a regular seasonal worker until February 2008 when she became a permanent full time employee.

[3] Ms Felts says that her resignation was in the nature of an unjustified constructive dismissal.

[4] She alleges that there were breaches by McCain Foods of implied terms of trust and confidence and the statutory obligations of good faith and that the manner in which the company acted in investigating a complaint about her during the night shift on 29 November 2009 was such that, together with historical matters, it seriously damaged or significantly undermined the relationship of confidence and trust that she needed to have in her employer. Ms Felts says that she had no option but to resign from the company.

[5] Mr Firth confirmed at a telephone conference with the Authority that Ms Felts was no longer seeking reinstatement and the remedies that she is seeking are compensation, lost wages and costs.

[6] McCain Foods does not accept that Ms Felts was dismissed from her employment, constructively or otherwise. It denies that it breached the express or implied terms of Ms Felts' employment agreement and/or obligations of good faith that it had to her. It says that it conducted a full and fair investigation prior to reaching a decision to issue Ms Felts with a first written warning. It says it had no knowledge of any earlier historical matters that may have influenced Ms Felts to resign.

Issues

[7] The Court of Appeal in *Auckland Shop Employees' Union v. Woolworths (NZ) Ltd* [1985] 2 ACJ 963 examined the concept of constructive dismissal in personal grievance cases and set out three types of cases where it could arise. The allegations in this case fall into the category where it is alleged there were breaches of duty by the employer.

[8] The Court of Appeal judgment in *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] 1 ERNZ 168 provides the issues for the Authority to determine where there are alleged breaches of duty as follows:

- Was the resignation caused by a breach of duty on the part of McCain Foods?

- If the answer to that is yes, then was the breach of duty of sufficient seriousness that a substantial risk of resignation was reasonably foreseeable?

Terms and conditions of employment

[9] Ms Felts was party to an individual employment agreement that she signed on 26 November 2009 with McCain Foods. Clause 17 of the agreement provided for warning procedures that the employer may implement for matters other than serious misconduct. These involved a verbal warning, first written warning, final written warning and then possible dismissal.

[10] Clause 17.2 of the employment agreement provided that, before warnings are issued, consultation will be held between the employee, employer and supervisor/team leader/manager. The employer will explain to the employee that they have a right to have a support person present. The employer will explain to the employee what the allegation of misconduct is and the employee will then have an opportunity to present his/her explanation. The employer will advise the employee what, if anything, is required to satisfy the employer's concerns. If necessary, a warning will be issued.

[11] There was also an employee handbook that contained amongst other matters company rules and a guide to behaviour. There was a description within the handbook of what amounted to serious misconduct and misconduct and the disciplinary process was set out in the handbook for serious misconduct and misconduct.

Was the reason for resignation caused by a breach of duty on the part of McCain Foods?

[12] Ms Felts provided notice of resignation in writing by letter dated 26 January 2010. The letter of resignation provided as follows:

I refer to the outcome of the meeting on 25th January 2010 and to your letter recording your determination.

I am left with no alternative but to tender my resignation effective from today 26th January 2010.

I have been with the McCain Foods for nearly 10 years and it is with some regret that I now resign, however I believe that the relationship of confidence and trust which should exist between employer and

employee has been so damaged over the last several months that I am unable to continue.

This last matter arising from the incident on 29th November 2009 has been the critical incident for me because it continues the partiality and the sustained pressure I have endured over the past several months.

[13] I asked Ms Felts to expand on the reasons for resignation in her evidence at the investigation meeting. Ms Felts said she was feeling devastated because she had been through a *tortuous* process and felt she could not trust the safeguards in place and had lost trust in the company. She said that the focus by McCain Foods was on her having caused the problem (during the shift on 29 November 2010) and that no attention was given to systemic issues. Ms Felts said that the meeting that was held at the end of the night shift on 29 November at which she was handed the letter requiring her to attend an investigation meeting seemed exaggerated and there was no substance provided to the allegations.

[14] I asked Ms Felts to expand on what she meant in her letter by referring to matters over the previous several months. The evidence about earlier matters preceding the investigation process and disciplinary outcome from 29 November was extremely limited. Ms Felts did explain to me that there had been an earlier matter about the inconsistent supply of aprons that had been in her mind at the time that she had made the decision to resign.

[15] I accept Ms Gibson's submission and, record it was not inconsistent with Mr Firth's, that the facts relied on principally as the reason for resignation are alleged breaches arising between 29 November 2009 through to the disciplinary outcome of a first written warning on 25 January 2010. In accepting that submission though, I will in my determination also give consideration to whether there could be said to be breaches in terms of any earlier events.

29 and 30 November 2009

[16] At the material time, Ms Felts worked as a trimmer on the potato trim table. Leon Swanepoel was the shift manager for the shift at that time. The potato trim table is a conveyer line which delivers potatoes after they have been washed and peeled into the chopping process at a constant rate of between 10 and 20 tonne per hour.

[17] On 29 November 2009, Ms Felts was working the second night of a three night roster. A night shift is 12 hours' duration. Earmuffs are mandatory on the conveyer line as a result of the noise and trimmers use small paring knives to cut away defective parts in the potatoes. Mr Milward, the personnel manager at McCain Foods, explained that there had been work undertaken successfully to reduce the noise levels in the area and that whilst earmuffs were still required to be worn, such a requirement was borderline.

[18] During the particular shift on 29 November, another employee Ramona complained to Mr Swanepoel that Ms Felts had been verbally abusive and had remonstrated holding a trim knife.

[19] As a result of the complaint, Mr Swanepoel arranged for a team leader, Peter McCallum, to meet individually with staff working in the areas of zone 2 and 3 to find out what they had seen or heard in respect of the complaint by Ramona. Mr Swanepoel sat in when the interviews took place with each staff member and the notes from the interviews with the six employees were then inserted into an incident report. I have summarised these below:

Employee 1 heard banging of metal on metal/looked in the direction of noise and heard Ms Felts yelling at Employee 5 as well as seeing her waving her right arm. Unsure if knife in hand at that time. Formed opinion that Ms Felts unhappy with person 5 taking break.

Employee 2 heard a noise looked in the direction and saw Ms Felts run over yelling something and then saw her talking to employee 1.

Employee 3 heard noise, looked up and saw Ms Felts shouting and storming off towards employee 1. Did not hear what she said. Ms Felts told employee 3 this is what I get for working with dickheads or dickos.

Employee 4 not aware of any incident until return from weigh room. Understood that there may have been an issue over break times.

Employee 5 said Ms Felts motioned her hand and understood for her to go on scheduled break which did but heard on return that Ms Felts intended her to go to weigh room. Person 5 stated that person 1 had checked that she was aware of her break time while she was having a break and she was told about the incident by person 1.

Employee 6 informed employees in location their break roster. Later asked Ms Felts if she had a problem and what was wrong. Ms Felts muttered something that that employee did not hear.

[20] Ms Felts said that when she returned to the trim table after her break, she noticed that one by one staff on the shift were being taken off the line to go to Mr Swanepoel's office and that she was the only one who was not taken off the line to speak to him.

[21] At about 6.15am on 30 November 2009, Ms Felts was called to the office where team leader Mr McCallum and a trainee team leader, Lance Clayton, were present. She was advised of a disciplinary meeting to be held at 11.30pm on 30 November.

[22] Ms Felts was handed an envelope containing a letter requiring her to attend the meeting and explain her behaviour on Sunday, 29 November 2009. The purpose of the meeting was to answer questions regarding an allegation of misconduct on her part. She was advised to bring a representative and referred to the employee handbook and the company rules regarding behaviour. The letter advised Ms Felts that at the conclusion of the investigation process, the company may engage in a formal disciplinary process. She was asked in the letter that if she or her representative were unable to attend the meeting at that time, they notify Mr Swanepoel in the first instance so an alternative meeting could be scheduled.

[23] Ms Felts said in her evidence at the Authority investigation meeting that she was concerned the letter may have been informing her of instant dismissal. Although it was not, Ms Felts said that she was devastated to receive it and was not able to focus on its contents properly. She said that she could not work out what she was meant to have done and that she was concerned particularly about the absence of any specifics about the allegation and she felt stressed and anxious. She felt there had been an element of predetermination about her actions with respect to the incident.

[24] Ms Felts alleges that it was a breach of McCain Food's obligation not to talk to her directly on 29 November 2009 about the incident. She said she would have felt more comfortable with such a process. I can understand why Ms Felts thought it unfair that all the other employees were spoken to about the incident on 29 November 2009, but she was not given an opportunity to do so shortly after the incident. Ms Felts expressed feelings of being isolated and she suspected that she was being talked about when she saw individuals leave the workplace to go to Mr Swanepoel's office.

[25] I have had regard, though, to the process in the employment agreement and employee handbook together with general procedural fairness and good faith. Ms Felts, unlike the other employees spoken to, was at risk that the conduct complained of by her co-workers could lead to a disciplinary investigation and outcome. Both the handbook and agreement provide the need for the employee in that situation to have a support person present at any meeting and also an understanding of the allegation or allegations and an opportunity to present an explanation.

[26] In those circumstances, I do not find that a breach occurred because Ms Felts was not informally asked to comment on what had occurred. It may well have been, as Ms Gibson submits, that the company would have been the subject of greater criticism if it had informally talked to Ms Felts although I cannot speculate on that. All I can say is that the employment agreement did support a more formal approach if there were allegations that could have led to a finding of misconduct.

[27] There was also some disquiet from Ms Felts about being given the letter inviting her to a disciplinary meeting in a meeting with two male team leaders whom she did not know well. The letter had to be given to her, however, in some manner. It was handed over appropriately in a private setting and I am not satisfied that there was a breach in that regard.

[28] It was not procedurally fair though for McCain Foods to invite Ms Felts to the meeting on 30 November 2009 to discuss an incident but not set out the allegation she was facing. Even if it was a meeting that preceded a formal investigation meeting, it was still necessary for Ms Felts to have some idea in advance of what exactly she was responding to. The allegations that were later provided to Mr Firth were the sorts of allegations that could have been quite simply put. The employee handbook provides an employee will be given an opportunity early in the investigation process to present their explanation and this, in my view, supports that details of the allegation be given at an equally early stage.

[29] That said, as I will go on to set out, Ms Felts was represented and had sufficient particulars and a copy of the notes taken from interviews with other employees before she was required to give an explanation on 22 December 2009. That is a matter that goes to the seriousness of any breach in that early part of the process.

[30] There were several exchanges about obtaining the particulars of the allegations – in this case the interview notes. These were eventually provided to Mr Firth before Ms Felts gave any explanation. I agree with Ms Felts they should have ideally been provided earlier. Ms Felts did agree under questioning at the Authority investigation meeting that by 22 December she did have the information and did not indicate that any further information was required. She also accepted that she was able, through Mr Firth, to provide an explanation.

[31] Some emphasis was placed on Ms Felts' on 30 November 2009 not returning to complete her shift that did not finish until 7am after she was given the letter and instead going to her locker and removing all her personal effects. Ms Felts said in her evidence at the investigation meeting that she probably just removed the usual personal items from her locker and I do not find too much turns on that matter.

[32] Ms Felts went to see her doctor on 30 November 2009 and received a medical certificate that placed her off work until 8 December 2009. She remained on sick leave supported by a medical certificate until her resignation.

[33] Mr Swanepoel said that although Ms Felts sent the medical certificate to McCain Foods in the usual manner, he did not hear from her specifically in relation to the meeting and whether she wished to adjourn it. It was not until 8 December 2009 when Mr Milward received both a telephone call and a letter from Mr Firth advising that he was now representing Ms Felts in relation to the disciplinary matter and he asked for particulars of allegations of serious misconduct and a copy of Ms Felts' personal file.

[34] Mr Milward emailed Mr Firth on 10 December 2009 and set out three points that Mr Swanepoel wanted to ask Ms Felts about. These were as follows:

- (a) Potentially she was being abusive to co-workers – verbal abuse/yelling/swearing;
- (b) Potentially she was damaging equipment by banging a knife against the equipment;
- (c) Potentially she was acting in an unsafe manner in the way she handled the knife.

[35] Although it was left unclear from the email what happened in relation to the personnel file, Mr Firth must have requested Mr Milward to check the file on Ms Felts for a particular item because he sets out in the email:

Have checked the file back to Jan 07 and there's nothing of the nature requested in her file.

Meeting 14 December 2009

[36] A meeting involving Ms Felts, Mr Firth, Mr Swanepoel and Mr Milward took place on 14 December 2009. Mr Swanepoel read out a script at the start of the meeting – document 9 in the respondent's bundle.

[37] The focus at that meeting was that the company had not provided specific details of the complaint earlier to Ms Felts. In the evidence that I heard, there were concerns on both sides that the other was interrupting during the meeting. Whilst no doubt unsatisfactory I am not satisfied that there was any impact on overall fairness as a result. That is because it was agreed at that meeting that before any explanation was given by Ms Felts to the allegations, the notes taken from the interviews with the six employees would be provided to Mr Firth with the individuals' referred to by number.

[38] It was arranged for a further meeting to be held for 22 December 2009.

Meeting 22 December 2009

[39] Ms Felts attended this meeting with Mr Firth and another support person, Deborah Reid. Before this meeting, Mr Firth and Ms Felts had been provided with typed notes from each of the six employees interviewed. Mr Swanepoel and Mr Milward both took notes at this meeting. Mr Milward's handwritten notes were provided in the respondent's bundle. Mr Milward's typed notes were provided. The notes assume some importance because Ms Felts' explanation as to the conduct in her statement of evidence differed from Mr Swanepoel and Mr Milward recall of that given at the disciplinary meeting.

[40] One of the principal differences was that in her statement of evidence Ms Felts said she was not holding the knife and that it was on a cabinet. Mr Swanepoel and Mr Milward both recalled, and this appears to be consistent with the notes, that the action of the banging of a knife by Ms Felts on the metal of the conveyor belt was not

denied, but there was an issue as to whether there was any damage. Neither could recall any mention of a cabinet.

[41] I questioned Ms Felts about this at the investigation meeting and she accepted that she *“may have agreed that she had been banging the knife”* but she had had no specific memory of that [banging the knife]. The notes record that Ms Felts explained that on the night there were two fill-in casual workers and confusion over numbers for breaks and frozen inspection. There was reference to it being a noisy environment and some people having radio headphones on and that therefore it was necessary to shout above the noise. It was explained on behalf of Ms Felts that she could not recall what words she had used, but that she did deny using the word dickhead/dickos and that a wide range of language was tolerated. There was discussion during the meeting about a memorandum issued by the company about bullying on 13 August 2009 that referred to company rules about workplace bullying and harassment.

[42] Although Ms Felts expanded on her explanation in her statement of evidence, the issue for me is whether she had an opportunity for an explanation to be given of that nature on 22 December 2009. I am satisfied that she did have an opportunity whilst represented to do that. Where there is a difference between the evidence about the explanation and what was said on 22 December 2009 and her statement, then I prefer the evidence of Mr Swanepoel and Mr Milward which is consistent with the notes taken. The meeting of 22 December was adjourned on the understanding there would be consideration of the explanation given.

[43] Mr Swanepoel said that he then met with Mr Milward to consider Ms Felts' explanation. He also met with two of the employees spoken to on 29 November to follow up their original statements and they both confirmed the contents.

[44] Mr Swanepoel reached the view in discussion with Mr Milward that Ms Felts had shouted at co-workers although he did not consider it could be established that she was verbally abusive toward them. It was also considered that her manner in handling the knife was careless and this could have caused a food safety concern.

[45] As a result of the plant closing and availability of the participants in earlier meetings, there was no opportunity for a further meeting until 25 January 2010. Neither party made an issue of this delay.

[46] Mr Swanepoel as the decision-maker decided that, in terms of the behaviour he had concluded had taken place, a first written warning should be issued.

Meeting 25 January 2010

[47] The outcome of the first written warning was delivered at this meeting. It was set out in a letter of the same date and whilst Ms Felts signed the letter I find she advised she did not accept the outcome.

[48] The substantive reason for the warning is provided in a paragraph at the top of the second page of the letter of 25 January 2010 and provides:

The company feels you have breached the company rules under s.2 of the employee handbook. There was sufficient evidence to establish that the person who laid the complaint did experience your behaviour as inappropriate and demeaning. We are also convinced the way in which you handled the knife in the situation was careless that could have resulted in harm to yourself or fellow employees and it could have caused a food safety concern.

[49] Although predetermination was alleged by Ms Felts, I am not satisfied there was predetermination about what conduct had occurred or the disciplinary outcome. There is little to suggest that Mr Swanepoel had a predetermined view on the matter. The company, for example, in the letter containing the first written warning, acknowledged there were grounds for potential confusion and that there were conflicting views.

[50] Ms Felts did not separately challenge the justification of the warning, but there is sufficient evidence before the Authority to conclude that she did take issue with the substance of the warning. Indeed, Mr Firth's submission was to the effect that there was an abundance of form and process but a failure to offer any particulars.

[51] Objectively assessed I find a fair and reasonable employer would have concluded certain conduct took place on 29 November 2009. There was an admitted level of frustration on the part of Ms Felts. A consequence of that is that she interacted with an employee in a manner that that employee felt was inappropriate. There was also conduct in banging the knife against the metal conveyor belt in a food preparation area where there was concern that the blade could have snapped off, contaminating the product or there could have been harm to Ms Felts or another worker as a result.

[52] Mr Swanepoel had recently within the workplace raised the importance of respect and dignity in the way workers treated each other – see team meeting notes 13 October 2009. That meeting followed a discussion he had had with Ms Felts on 8 October 2009 where another employee had complained that Ms Felts had sworn at her. Mr Swanepoel advised Ms Felts that she should stay calm and if she did get frustrated she should discuss it with her team leader and, if the team leader was not available, with Mr Swanepoel.

[53] I am satisfied there was conduct on the part of Ms Felts largely the conduct with the knife for which a fair and reasonable employer in all the circumstances would issue a warning.

[54] I am not satisfied that there was any breach of good faith by the company throughout the process. I am further not satisfied that the company was otherwise aware of any historical matters that may have been of concern to Ms Felts. Mr Swanepoel said, and I have no reason not to accept this, that there were no times during his period of employment that Ms Felts told him she had any issues of trust. The first time those matters were raised was in the letter of resignation.

Conclusions as to whether there was a breach or breaches during the disciplinary process

[55] In conclusion, therefore, there was only one part of the process that I find was unfair and that was in relation to the failure to disclose allegations at an early stage. In terms of that matter then, I will go on to consider whether a substantial risk of resignation was reasonably foreseeable.

Was the breach of duty of sufficient seriousness that substantial risk of resignation was reasonably foreseeable?

[56] Mr Milward was surprised to receive the letter of resignation the day after the disciplinary outcome meeting on 25 January 2010. I am satisfied no mention of resignation was made at that meeting.

[57] I do not find that in circumstances where sufficient particulars of the allegations were provided before Ms Felts was required to give an explanation; it was a sufficiently serious breach by McCain Foods that it would be reasonably foreseeable that Ms Felts would resign.

[58] The following steps were also taken in good faith by the company on receipt of the resignation letter. On 27 January 2010, Mr Milward telephoned Ms Felts to advise her that he needed to talk to her about the resignation letter and he left a message with Mr Firth as well. When no response was received to those messages, a further message was left with Ms Felts on 28 January 2010. Mr Firth then telephoned Mr Milward and Mr Milward indicated the company had not accepted Ms Felts' resignation and also pointed out that one week's notice was required and also a medical exit. Ms Felts and Mr Firth agreed to meet on 1 February with Mr Milward and Sonya Tulett, the human resource and health and safety officer. Mr Milward and Ms Tulett listened to a number of concerns that Mr Firth raised with respect to Mr Swanepoel's conduct and Mr Milward offered support on an ongoing basis to Ms Felts and said that he would have been happy to work through any issues that Ms Felts had with Mr Swanepoel.

[59] Notwithstanding these matters, Ms Felts still wanted to resign. In hearing the evidence from Mr Swanepoel and Mr Milward, I consider that they were genuinely disappointed that Ms Felts had chosen to resign and they did not want that outcome and had not indeed anticipated it. Ms Felts did have other options to resignation.

Determination

[60] Ms Felts has not made out her claim that she was unjustifiably constructively dismissed from her employment. I find that she resigned from her employment with McCain Foods and there is nothing I can do to assist her further.

Costs

[61] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority