

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 40
3025851

BETWEEN

MARY JOY GARCIA
Applicant

A N D

SAXON APPLIANCES LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Anna Oberndorfer, advocate for the Applicant
Robert Thompson, advocate for the Respondent

Investigation Meeting: 14 September 2018

Submissions and further information received: 21 September 2018 and 5 October 2018 from the Applicant
1 October 2018, with further information received up to 22 January 2019 from the Respondent

Date of Determination: 30 January 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mary Garcia worked at Saxon Appliances Limited from 6 June 2016 until she resigned on 2 August 2017.

[2] Ms Garcia has a number of complaints about how Saxon treated her during her employment, much of which she says amounted to bullying or was carried out to make her resign.

[3] She says she resigned because of this treatment and because of Saxon's failure to address her concerns when she raised them. As a result, Ms Garcia claims her resignation is a constructive dismissal for which she seeks remedies including reimbursement of lost remuneration and compensation for injury to feelings.

[4] Ms Garcia has also raised a personal grievance for unjustified action causing disadvantage, largely in the alternative to the constructive dismissal claim, and expressed as being primarily based on an alleged removal of duties from Ms Garcia.

[5] In addition to the two personal grievances, Ms Garcia claims that Saxon's treatment of her amounts to a breach of the duty of good faith for which a penalty should be imposed.

[6] Saxon denies all of these matters.

Issues

[7] The issues to be resolved in respect of the constructive dismissal claim are:

- (a) Was Ms Garcia dismissed, applying the test for constructive dismissal; and
- (b) If so, was the dismissal justified, with the onus resting on Saxon to show its actions were justified in line with the test for justification and the duty of good faith set out in the Employment Relations Act 2000 (the Act)?

Dismissal

[8] A resignation can amount to a dismissal in certain circumstances. Ms Garcia alleges that her resignation is a dismissal because she resigned in response to Saxon's actions, and this is a constructive dismissal.

[9] In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*¹ the Court of Appeal set out three non-exhaustive categories of constructive dismissal, where an employee's resignation is in response to the employer's actions:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign;
- (c) Where a breach of duty by the employer leads an employee to resign.

[10] Ms Garcia relies on the second and third limb in *Woolworths*.

Course of conduct

[11] In order to determine if Ms Garcia has been constructively dismissed relying on the second limb of *Woolworths*, I must consider:

- (a) Did Saxon carry out a course of conduct with a deliberate and dominant purpose of coercing Ms Garcia into resigning; and if so
- (b) Did Ms Garcia resign in response to that course of conduct?

Breach of duty

[12] In *Wellington etc Clerical Workers etc IUOW v Greenwich*² the Court, when discussing constructive dismissal arising out of a breach of duty by an employer, stated:

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

¹ [1985] 2 NZLR 372 (CA) at 374-375

² [1983] ACJ 965

[13] The Court of Appeal elaborated on the third category of constructive dismissal in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc*³. The Court of Appeal stated at [172]:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[14] Therefore, in order to determine if Ms Garcia was constructively dismissed under the third limb of *Woolworths*, I must consider:

- (a) Was there a breach of duty by Saxon as alleged;
- (b) Was that breach of duty sufficiently serious - repudiatory or dismissive - such that it was reasonably foreseeable that there was a substantial risk that Ms Garcia might resign in response to that; and
- (c) Did Ms Garcia resign in response to that breach of duty?

Unjustified action causing disadvantage

[15] The issues to be resolved in respect of the unjustified disadvantage claim are:

- (a) Did Saxon act toward Ms Garcia as alleged;
- (b) If so, did these actions cause disadvantage to Ms Garcia's employment; and
- (c) If so, were Saxon's actions justifiable?

³ [1994] 2 NZLR 415 (CA)

Remedies

[16] If Ms Garcia is successful with any of her claims I must then consider what remedies, if any, she is entitled to. If she is entitled to any remedies, I must then consider whether she contributed to her grievances in such a way that I should reduce any remedies that I award or, whether in this case, as it has been raised by Saxon, Ms Garcia's conduct was such that she is not entitled to any remedies.

Background

[17] Saxon operates a business of servicing and fixing home appliances, much of this is work done under warranty for suppliers and retailers. Saxon employs four office based staff, two shop assistants, two in-house technicians and four on-road technicians.

[18] Barbara Allen is the owner and director of Saxon and she works in the business on a part-time basis as the Managing Director.

[19] Lesley Bracefield is one of the four office employees and is the Office Manager, managing the other three office employees and the two shop employees.

[20] Ms Garcia was one of the three other office employees and therefore she reported to Ms Bracefield.

[21] Essentially the office staff at Saxon are responsible for dealing with customers, largely by telephone, and organising and arranging the work for the technicians. This means Ms Garcia was required to speak to customers about the work to be undertaken and arrange a time for the on-road technician to attend. Two aspects of this role are important. First, recording the nature of the customer's problem so the technician can have an understanding of the work required - Saxon also uses this information in its invoicing once the work is complete. And, second, booking a time for the work to be undertaken that suits the customer and fits with the technicians' schedules.

[22] Saxon has a reasonably straightforward system for recording this information. This involves the use of a board that all office staff can see whilst speaking to customers that

records the appointments made for the technicians, Saxon's computer network (that technicians also have access to) that records the appointments and the details of work required, and a diary as a back up to the computer record of appointments. This means the necessary information is available to the technicians, so that they are fully informed, and to all office staff, so there should not be any conflicts in scheduling such as double booking or over booking a technician.

[23] In managing the office staff, Ms Bracefield was particularly concerned about the systems being used correctly. This included recording appointments on the board and in the diary and descriptions of the work being accurate and having correct spelling and grammar when entered into the computer system as often this record was copied directly into the invoice generated for the customer.

[24] It was also important to Saxon that the office staff were professional and courteous with all customers.

[25] It is against this background of the expectations and requirements that Saxon had for its office staff, which applied to Ms Garcia, that issues arose between Ms Garcia and Ms Bracewell and others.

[26] In terms of general complaints Ms Garcia says:

- (a) Ms Bracefield was often critical of her work including perceived spelling and grammatical errors, when this was not the case. And the other office staff were not criticised for their work.
- (b) Ms Bracefield stopped giving her appropriate work.
- (c) She was often required to clean the toilets, which was not part of her role and not something other staff were required to do.
- (d) Ms Allen treated her differently to other staff, for example not greeting her personally when she arrived at work.

[27] In terms of specific complaints Ms Garcia says:

- (a) Saxon refused to grant her bereavement leave and threatened to treat her as having abandoned her employment.
- (b) She was not provided with a copy of her employment agreement when she requested it.
- (c) In a discussion about aspects of her work, Ms Bracefield asked Ms Garcia - if she could not cope with the work why was she at Saxon?
- (d) On at least one occasion, Ms Bracefield threw the diary at her because it contained a mistake that needed fixing.
- (e) Ms Bracefield questioned her computer proficiency and in response Ms Garcia brought in her diploma in computer studies and her diploma in finance and accounting - Ms Bracefield's response was to suggest she must have slept with her tutor to pass.
- (f) Ms Bracefield told her off for speaking Filipino to a Filipino customer.
- (g) Ms Bracefield told her off for recording personal details regarding a customer's demeanour.

[28] Saxon says Ms Garcia's work was poor and no amount of assistance from Ms Bracewell or Ms Allen changed that. This included:

- (a) Not dealing with customers properly including a lack of professionalism and courtesy, not getting correct details of the work required, and not telling customers certain information such as pricing and how they would be charged.
- (b) Not recording details of work correctly including putting appointments on the board for everyone to track the technicians' schedules, not recording appointments in the diary and not recording the correct details of the work or using poor grammar and having spelling mistakes.

[29] Saxon accepts that when Ms Garcia failed to perform her job adequately she was told about it. Ms Bracefield in particular accepts that she did this but she says that she treated all staff the same way – if there were errors made then she preferred to raise them so the employee could fix them and learn from their mistakes.

[30] Saxon also says it was selective about the work it gave to Ms Garcia on some occasions, but this was consequent on her abilities or customer requests; Saxon was merely ensuring it gave Ms Garcia work she was able to do. Saxon says it always gave Ms Garcia work during her contracted hours and she was often busy answering the telephones, which was a large part of the office staffs' role and not something that could be allocated between staff.

[31] Saxon says on other occasions Ms Garcia was not as busy as the other office staff and Saxon asked her to clean the toilets. Saxon denies that this was some form of punishment or bullying but reflected the allocation of work that was required to be done, as Saxon did not have a cleaner, and other staff were asked to clean the toilets.

[32] Overall Saxon denies that it treated Ms Garcia differently from other staff. This includes the allocation of work, asking her to clean the toilets, bringing mistakes or other work errors to her attention or simply greeting her in the morning - in this regard, Ms Allen says she always greeted the whole team in the morning and there was no exclusion of Ms Garcia in this.

[33] Turning to the specific complaints made by Ms Garcia, Saxon says:

- (a) On one occasion, Ms Saxon sought bereavement leave and because of the circumstances surrounding the request, it initially declined. However, when Ms Saxon sought advice and her advisor informed Saxon of its obligations to Ms Garcia it promptly accepted her request for leave.
- (b) Saxon acknowledges that Ms Garcia was not provided with a copy of her employment agreement when she requested it by email. The email request was sent to Ms Bracefield but she says she does not recall receiving it and accepts

she must have overlooked it - for this reason the employment agreement was not provided.

- (c) Ms Bracefield does not recall asking Ms Garcia, if she could not cope with the work why was she at Saxon?
- (d) Ms Bracefield denies throwing a diary at Ms Garcia but accepts there were a couple of occasions where she dropped the diary on Ms Garcia's desk and told her to fix a mistake that was in it.
- (e) Ms Bracefield accepts that she had expressed some doubts about Ms Garcia's computer proficiency but this was based on her observations of Ms Garcia's computer work. When Ms Garcia brought in her diploma in computer studies and her diploma in finance and accounting, Ms Bracefield says she simply asked to take a copy and she denies making the comment alleged.
- (f) Ms Bracefield says she did tell Ms Garcia to speak in English on the telephone as a logical requirement within the office.
- (g) Ms Bracefield did tell Ms Garcia off for recording personal details regarding a customer's demeanour, but in Ms Bracefield's view, this was appropriate given that comments about customers should never be recorded.

Analysis of claims

[34] As will be clear from the overview of Ms Garcia's claims and the background, the claims turn on allegations of actions by Saxon, which are said to amount to a course of conduct, a breach of duty, and/or actions that caused disadvantage to Ms Garcia. Saxon says many of these alleged actions did not occur and then it says if they did occur then they do not support the claims as alleged.

[35] So, first I must determine which of the events or actions Ms Garcia complains about occurred. Then I will consider separately for each claim whether the events or actions that did occur are a course of conduct and/or a breach of duty, which amount to constructive dismissal

(based on an analysis of the issues outlined), or if the actions caused disadvantage to Ms Garcia and were unjustified.

[36] It is clear that the parties disagree on events that occurred during Ms Garcia's employment or they have a different view on how the events should be interpreted in terms of Saxon's intentions and objectives.

[37] In order to resolve the conflicting positions I must decide whose evidence I prefer and this necessarily involves assessing credibility.

[38] I have considered the factors that may be relevant to the assessment of credibility as discussed in a decision of Judge Harding in the District Court in *R v Biddle*⁴ that was cited with approval on appeal to the High Court⁵.

[39] In order to assess the credibility of the witnesses in this matter I have considered the following:

- (a) What each witness said, considering how each witnesses expressed their evidence both orally and in writing.
- (b) Whether the witness's evidence was consistent throughout and whether the witness's evidence was consistent with other evidence such as contemporaneous documents or agreed or known facts.
- (c) Whether the witness appeared reliable and was accurate in her perceptions and recall of events.
- (d) Whether the witness made appropriate concessions.
- (e) How plausible the witness was, looking at how reasonable, plausible or probable the witness's evidence was and considering overall, whether the witness's evidence hung together and had a degree of truth or was persuasive.

⁴ [2015] NZDC 8992

⁵ *Biddle v R* [2015] NZHC 2673 at [21]

[40] I have also considered the likelihood that witnesses might be mistaken and their recollection subject to confirmation bias or whether witnesses might, in fact, be lying under oath or affirmation.

[41] Applying these steps, I have decided that I prefer the evidence of Saxon and in particular the evidence of Ms Bracefield.

[42] My assessment of Ms Garcia was that she was not a credible witness; she could not remember some key events, she did not make any concessions, and held implausible positions such as Saxon altering her computer entries. Overall Ms Garcia appeared evasive when answering questions and events from her past call into question her reliability.

[43] I also consider that Ms Garcia's memory has been influenced by confirmation bias.

[44] My overall view of this matter is that primarily Ms Garcia was not good at her job. This meant Saxon, Ms Bracefield in particular, spent a large amount of time working with her to correct mistakes. At times Ms Bracefield became frustrated and may have been abrupt with Ms Garcia. In addition, it appears that Ms Garcia made more mistakes than the other office staff and so, from her perspective, she appeared to be treated differently.

[45] Ms Garcia does not accept, and could not accept when she was working at Saxon, that she was not a capable employee. So, I believe she interpreted the events that occurred to deflect any fault away from her - a form of confirmation bias, in which she interpreted actions against her as being bullying or disparate treatment. Ms Bracefield's occasional abruptness and frequent discussion about mistakes are examples of this. I believe Ms Garcia has amplified the occurrence and severity of these events in her recollection so as to validate her belief she was bullied.

[46] A further example is Ms Bracefield asking Ms Garcia to clean the toilets. Ms Garcia says she was told to clean the toilets on many occasions and often as a punishment for perceived mistakes, and she says other employees did not clean the toilets at all or as often as her. When I questioned the witnesses about the toilet cleaning it was clear that Ms Garcia was only asked to clean the toilets a few times and this was not excessive or disparate to other

employees, who were also asked to clean the toilets when their workload was quieter. Toilet cleaning was not a punishment but a necessary task that any staff member could have been asked to do - Ms Allen, the managing director, said that she would clean the toilets when required.

[47] Putting my assessment of the witnesses and all of the evidence together I conclude:

- (a) Saxon did fail to provide Ms Saxon with a copy of her employment agreement when requested but this was nothing more than oversight and not deliberate.
- (b) Saxon did initially deny Ms Saxon her request for bereavement leave but this was based on the circumstances and Saxon's view of its rights and Ms Garcia's obligations. It accepted it was wrong when this was brought to its attention and it immediately remedied it, with no consequences. I cannot attribute any improper motive to Saxon's actions in this regard.
- (c) Saxon allocated work as appropriate to Ms Garcia - it did not fail to give her enough or appropriate work and there was nothing inappropriate in Saxon's actions.
- (d) Ms Garcia was asked to clean the toilets as described above but there was nothing untoward in this and it was part of the normal office requirements.
- (e) Ms Garcia was told when her work included spelling and grammatical errors or when she made other mistakes, and she was told off for writing comments about a client on a report but this was all part of Ms Bracefield working with Ms Garcia to ensure standards of work were met.
- (f) Ms Garcia was told to only speak in English when dealing with clients but this reflected a requirement of the business.
- (g) Ms Allen did not single out Ms Garcia by not greeting or farewelling her on a daily basis.
- (h) Ms Bracefield did not throw the work diary at Ms Garcia as alleged.

- (i) I am not persuaded that Ms Bracefield asked Ms Garcia why she was working at Saxon nor that she made some derogatory comment about Ms Garcia's qualifications.

[48] Based on these findings my analysis of Ms Garcia's claims is relatively straightforward.

Course of conduct

[49] My inquiry in terms of this aspect of constructive dismissal is primarily focussed on whether Saxon acted as alleged and if so was this a course of conduct with the deliberate and dominant purpose of coercing Ms Garcia into resigning.

[50] Having reviewed all of the evidence and having reached the conclusions expressed above about what occurred during Ms Garcia's employment, I conclude further that Saxon's actions do not constitute a course of conduct that had a deliberate and dominant purpose of coercing Ms Garcia into resigning.

Breach of duty

[51] The breach of duty complained of by Ms Garcia is a failure to provide a safe workplace as Ms Garcia was bullied and Saxon failed to investigate Ms Garcia's complaints of bullying.

[52] Based on my conclusions on Ms Saxon's various complaints I do not find that the actions of Saxon amounted to bullying or some other breach of duty.

[53] There is a further aspect to Ms Garcia's allegations of breach of duty; Ms Garcia says Saxon failed to investigate her complaints of bullying when she raised them.

[54] There are three occasions where Ms Garcia says she raised her concerns about how she was treated, in a meeting with Ms Allen, in her appraisal in March 2017 and in a letter dated 22 July 2017.

[55] I have reviewed the evidence relating to the appraisal and conclude that Ms Garcia did not raise any concerns about bullying in her appraisal. There were two responses to questions that she recorded on the appraisal document that indicated she was not sure if she had blended into the Saxon workforce or felt valued as an employee. In the context of the appraisal, including the meeting and the rest of the appraisal document, I do not accept that this raises an issue of bullying or something similar, that Saxon was required to investigate or do any more with it other than what it did at the time.

[56] Turning to the meeting with Ms Allen this was a meeting which Alyson Smythe - an independent workplace support counsellor who attended the Saxon office regularly providing support to staff if they had any workplace issues they wished to discuss - also attended. Ms Garcia raised concerns about being told off by Ms Bracefield. This was not raised specifically as an issue of bullying but despite this Ms Allen responded appropriately to Ms Garcia and then discussed the matter with Ms Bracefield. Ms Allen's response was appropriate at the time, supported by Ms Smythe, and it does not constitute a breach of duty by Saxon.

[57] Then finally, in a letter dated 22 July 2017 Ms Garcia specifically raised issues of bullying and harassment.

[58] The issue with this letter is the timing of its presentation to Ms Allen. Ms Garcia says she placed it on Ms Allen's desk around the time it was typed. Ms Allen says that Ms Garcia handed her the letter on 1 August 2017 at the same time as she handed Ms Allen her resignation. In support of this, Ms Allen's corroborated evidence was that she was on holiday until the end of July 2017 and her office would have been locked whilst she was away, so it would not have been possible for Ms Garcia to put the letter on her desk when she says she did. I accept Ms Allen's evidence and therefore accept that the 22 July 2017 letter raising issues of bullying was received when Ms Garcia resigned on 1 August 2017.

[59] So, what follows from this is that in terms of the constructive dismissal claim any response by Saxon to the bullying complaints is not material; as Ms Garcia had already resigned any alleged failure to investigate the complaints cannot have caused Ms Garcia's resignation. This alleged breach cannot give rise to constructive dismissal as claimed.

Unjustified Action

[60] Based on my assessment of, and conclusions regarding, the events that Ms Garcia complains of, I do not accept that Saxon acted in an unjustified manner that caused disadvantage to Ms Garcia's employment.

Penalty

[61] I am not satisfied that the actions Saxon did take in respect of Ms Garcia's employment were a breach of the duty of good faith and there is no basis for a penalty to be imposed.

Orders

[62] Saxon did not constructively dismiss Ms Garcia.

[63] Saxon did not act in an unjustified manner causing disadvantage to Ms Garcia's employment.

[64] Saxon did not breach the duty of good faith and I will not impose a penalty against it.

Costs

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[66] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority