

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 115/09
5127672

BETWEEN SHELLEY MARIE HANCOX
 Applicant

AND VICTORIA STREET CAFÉ &
 RESTAURANT LTD
 Respondent

Member of Authority: Paul Montgomery

Representatives: Gareth Abdinor, Counsel for Applicant
 Ian Thompson, Advocate for Respondent

Investigation Meeting: 10 March 2009 at Christchurch

Submissions Received 24 and 31 March 2009 from Applicant
 24 and 31 March 2009 from Respondent

Determination: 29 July 2009

DETERMINATION OF THE AUTHORITY

[1] The applicant, who was employed as a Duty Manager by the respondent, alleges she was unjustifiably dismissed following an altercation with Mr McCabe, a Director of the company, over a discrepancy in the till balance. Ms Hancox also alleges she was disadvantaged by the unjustifiable actions of her former employer.

[2] Ms Hancox seeks remedies of lost remuneration, arising from the dismissal, compensation for hurt and humiliation arising from the disadvantage and dismissal in the sum of \$8,500.00 and costs.

[3] The respondent agrees a verbal altercation took place over the till balance, an altercation involving raised voices. It says the applicant left the premises before completing her shift, telling a co-worker the employers could *stick their job up their arse* as she departed. The respondent denies disadvantaging or dismissing Ms Hancox saying she had resigned by leaving the premises prematurely and conveying her resignation through Ms Jamieson, whom the applicant knew to be Mrs McCabe's

sister and Mr McCabe's sister-in-law. Accordingly the respondents deny to offer the applicant the remedies she wants.

[4] The parties were unable to resolve their differences in mediation.

Essential facts

[5] Ms Hancox had been employed by the previous owners and upon the McCabe's purchasing the business in October 2006, they offered the applicant ongoing employment. It is clear they valued her experience and had her train incoming new staff in the front of house operations.

[6] The employment agreement sets 36 hours per week as a minimum but Ms Hancox very frequently exceeded these hours, usually working around 43 hours per week.

[7] On 29 May 2008 when taking her afternoon tea break Mr McCabe spoke to the applicant about the till being down by \$7.00 the previous day. Ms Hancox says Mr McCabe told her that if the till was down in future the shortfall would come out of *everyones wages*. After Mr McCabe went downstairs, the applicant realised she had processed a refund the previous afternoon and left a note of this on the docket placed in the back of the till. She had not balanced the till the previous evening as she was involved in installing a new coffee machine in the café.

[8] Ms Hancox approached Mr McCabe and attempted to explain how the error had occurred and how it had been documented. She heard Mrs McCabe telling two other staff that wages could be affected if the till was down in the future. Ms Hancox says she became frustrated at Mr McCabe's resistance to accepting her explanation and the suggestion wages would be docked in the future if the situation occurred again. Mr McCabe's evidence was that the documentation relating to the previous days till transactions were at the McCabe's home and that he would look into the matter and get back to her on it.

[9] The applicant then spoke to Mrs McCabe voicing her concern and alleging that Mr McCabe was calling her a liar. Mrs McCabe told her husband to *sort it out* at which point the applicant says Mr McCabe *lost his temper and started raising his voice* at her while standing close to her pointing his finger and repeating that wages would be docked.

[10] The applicant says his demeanour and gestures at her were intimidating so she left the kitchen with Mr McCabe calling out that she could *give it* but *not take it*. After collecting her coat and bag Ms Hancox told Mr McCabe she did not have to listen to him yelling at her and that she was going home. She said Mr McCabe said *good*.

[11] The applicant left the building through the side door in the restaurant area followed by Ms Lyn Jamieson. Ms Hancox says she was upset and crying and was trying to defuse the situation by retiring from the building. Ms Hancox says she did not stop to talk to Ms Jamieson *but said that I was going home and would see her later*.

[12] Ms Jamieson says that as the applicant left the restaurant she said *you are doing my head in* and *I am not putting up with this shit*. Ms Jamieson says that when she followed the applicant out, the applicant told her *they are doing my head in, you can tell them from me they can stick their job up their arse*. Ms Hancox is adamant she said no such thing.

[13] The following day Ms Hancox reported at work to begin her shift on 30 May 2008. She says Ms Jamieson had telephoned her the previous evening and asked the applicant if she was going to work the following day, and the applicant confirmed she was. Ms Jamieson said she never made the call.

[14] After a brief discussion with another staff member over a lunch payment matter, the applicant went into the restaurant to find Mrs McCabe who told her she (Mrs McCabe) wanted her to go upstairs for a talk. Ms Hancox obliged and was asked by Mrs McCabe why she had come to work. The applicant says she told Mrs McCabe she was rostered to work and thus had come in to do work.

[15] The applicant says Mrs McCabe then brought out a range of issues which had been giving her concern over a few months, none of which had been discussed with Ms Hancox previously. The incidents need not detain us at this point, but Ms Hancox says she was *very surprised by these allegations* given she had in recent past, been given a rise for the quality of her work and had been praised by both Mr and Mrs McCabe.

[16] Unsure of what was behind the airing of the allegations, Ms Hancox says she asked Mrs McCabe if she was *firing* her. The applicant says Mrs McCabe replied *I*

think you should resign. Shocked at this suggestion the applicant told Mrs McCabe she would need to discuss it with her then fiancée, now husband, Daryl.

[17] Ms Hancox says she did not resign at that meeting or at any time following it. Mr Daryl Hancox confirms he telephoned Mrs McCabe after being called by his fiancée, and advised Mrs McCabe Ms Hancox was not resigning.

[18] Ms Hancox briefed Cavell Leitch on the matter and her solicitor wrote to the respondent on 6 June 2008 advising of an alleged personal grievance and requesting mediation. He also confirmed that there had been no resignation. The matter remained unresolved and so was lodged with the Authority.

The issues

[19] To resolve this matter the Authority need to make findings on the following issues:

- Did the applicant resign; and
- Was the applicant dismissed; and
- If dismissed, was the dismissal unjustified; and
- If not justified, did the applicant contribute to the circumstances giving rise to her dismissal; and
- What, if any, remedy is the applicant entitled to.

The test

[20] The test of justification is set out at s.103A in the Employment Relations Act 2000 and its amendments. The section reads:

For the purposes of s.103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

The investigation meeting

[21] At the investigation meeting evidence for the applicant was presented by Ms Hancox and her husband Daryl, supported by Mr Grant Ball, a regular at the café. For the respondent the Authority heard from Mr and Mrs McCabe, Ms Lyn Jamieson, Mr Tim Catho, a chef, Ms Jessica Frost, Ms Katie Howie and Ms Sandra Dwyer, all employees at the café.

[22] I appreciated the assistance of the witnesses in helping the Authority to clarify the key issues in this matter and also record my thanks to Mr Abdinor and Mr Thompson for their assistance in submissions.

Discussion and analysis

(a) Resignation?

[23] At the centre of this case is whether the applicant, upon leaving the workplace on 29 May repudiated the employment agreement between the parties. Ms Jamieson's evidence was Ms Hancox told her to convey to her employers where to put their job. Ms Hancox said she did not use the expressions claimed nor convey any intention to resign to Ms Jamieson. Further her evidence was that in telling Mr McCabe she was leaving she was indicating she was simply leaving the premises.

[24] Several matters arise in this situation. The employment agreement requires written notice of two weeks (clause 9.1). The applicant was aware of this provision.

[25] Then there is the issue of the applicant's state of mind as she left the café after, in her view, being accused by her employer of lying over the till not balancing and being, again her in view, intimidated by Mr McCabe's raised voice and gestures at her. Ms Hancox's evidence was that she was upset and crying as she left. I am able to accept that in the circumstances.

[26] Whether Ms Hancox was sufficiently upset to utter the words Ms Jamieson said she heard and did not remember using them is a little more difficult to assess.

[27] However, the principles of natural justice must be applied here. Shaw J in *Monteith v. Hakansson* WC5/08 18 March 2008 quoted with approval the applicable principle set out in *Boobyer v. Good Health Wanganui*.

In the absence of a clear and unambiguous resignation, an employer is not entitled to seize on words not intended or capable of amounting to a resignation especially where the employee makes it clear that resignation was not intended. [19]

[28] What needed to be done upon the applicant's return to work on 30 May was to arrange a meeting with the offer or support or representation to Ms Hancox in order to clarify what her intentions were regarding her employment with the respondent. Instead, Mrs McCabe invited the applicant to a room for a talk and proceeded to refer to incidents or complaints never previously raised with the applicant, then invited her to resign.

[29] This proposition lacks some logic given the employer, at the investigation meeting, sought to rely on the words spoken to Ms Jamieson the previous afternoon as grounds for asserting the applicant had resigned. Mrs McCabe denied she made this suggestion to the applicant. However, the Authority has no reason to doubt the evidence of Mr Ball, who having originally been told by Mrs McCabe that Ms Hancox was not in the café because she was sick, later disclosed to him that she (Mrs McCabe) had asked Ms Hancox to resign.

[30] Either Ms Hancox had resigned during that exchange with Ms Jamieson or she had not. I think it highly unlikely, even if Ms Hancox had uttered the words indicated by Ms Jamieson, intended to resign. Given her upset state, I find it more likely that this was an expression of extreme frustration.

[31] The evidence regarding the meeting on 30 May and the invitation to resign following the raising of complaints and the like strongly indicate the respondent did not accept the applicant had resigned but was doing its best through Mrs McCabe, to see if she had every inducement to do so.

[32] In spite of this encouragement I am satisfied Ms Hancox's did not tender her resignation advising Mrs McCabe she needed to discuss the matter with her fiancée. Ms Hancox then secured a medical certificate putting her off work until 3 June and a further certificate stating she should be able to undergo her operation on 9 June 2008.

[33] By its failure to address in a balanced manner, the situation arising from the altercation between Mr McCabe and Ms Hancox and to attempt some agreed

outcome, the respondent effectively sat on its hands on the basis it had a resignation severing the relationship.

[34] Significant in this context is the evidence of Mr McCabe to the Authority saying they did not want Ms Hancox to leave and further the evidence to the Authority of Mrs McCabe who said that if Ms Hancox was to come back the respondent would have given her a formal warning over the incident.

[35] The failure of the respondent, whom I accept at that stage was not represented, to engage to resolve the situation, entitled the applicant to conclude she was no longer wanted. This was reinforced by her seeing an advertisement for her job in the local paper on 7 June 2008.

[36] In short, the respondent took no steps to allow the applicant to discuss the return to work in spite of confirmation from both Mr Hancox and from the applicant's solicitor that there was no resignation.

(b) *Constructive Dismissal*

[37] While I appreciate Mr Thompson's covering his client's resistance to any indication of a constructive dismissal in this matter, and appreciating that it arose in an early letter from counsel to his clients, for the avoidance of doubt this was not pleaded in the applicant's statement of problem.

(c) *Applying the test*

[38] In *Kostic v. Dodd CC14/07 11 July 2007*, Couch J when addressing heat of the moment resignation commented,

“a fair and reasonably employer would not take at face value what was said in such circumstances. Rather, such an employer would allow a cooling down period and then discuss with the employee what had occurred”

This is thoroughly consistent with Shaw J 's comments in *Monteith* [supra].

A fair and reasonable employer would not have assumed resignation but arranged a meeting to address the incident. Not only did it fail to do so, it advertised the applicant's position very promptly.

(d) *Applying the test*

[39] Section 124 of the Act requires the Authority, should it find that an employee has a personal grievance,

must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, -

- (a) *consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*
- (b) *if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[40] The central situation arose when Mr McCabe advised the applicant in the staff room of the matter of a shortfall in the previous days till balance and suggested deductions from staff wages might follow. Ms Hancox, having recalled the refund and her noting it on the docket she had placed in the till, went to Mr McCabe to advise him of this. He was in the kitchen at the time. Ms Hancox explained the situation and appears to have mistaken Mr McCabe's initial reaction as his evidence was he told her he would check it as the till information was at the McCabe's home, and would get back to her.

[41] Ms Hancox clearly took offence because she immediately complained to Mrs McCabe that her husband was calling her a liar, which prompted Mrs McCabe's instruction that Mr McCabe *sort it out*. It was at that point the confrontation escalated and descended into something of a shouting match. As Mr Cardno told the Authority, *they were both pretty wound up*.

[42] I think it fair to say that Ms Hancox took umbrage unnecessarily when Mr McCabe was simply indicating he would check the explanation the applicant had provided him. It was clear at the Authority's investigation meeting that there was some discussion around whether the training provided for staff using the new till, which was a touch screen till, had in fact covered off all necessary points. It also became clear that the \$7 deficit in the till balance on the previous evening was not the first that had occurred and when speaking with Ms Hancox in the staff room, Mr McCabe had also raised the issue of the possibility that one of the staff may have overlooked paying for a meal.

[43] I think it highly improbable that Mr McCabe was calling the applicant a liar, but I have no doubt that that is the way Ms Hancox interpreted what was said to her.

It was that accusation which I am satisfied triggered Mr McCabe retaliating and the situation deteriorated from there.

[44] In such circumstances where two protagonists are having a heated debate over an issue important to both of them, I am not prepared to find Ms Hancox contributed to the situation which gave rise to the ending of the employment relationship.

[45] Standing back and analysing the evidence on the altercation between Mr McCabe and the applicant, I view it as a relatively small issue which escalated beyond its objective importance. I think the applicant's decision to disengage in order to defuse Mr McCabe's agitation was a sensible approach.

Determination

[46] Returning to the issues set out above in this determination I find:

- The applicant did not resign; and
- The applicant was dismissed unjustifiably by reason of the respondent's failure to undertake any inquiry into the incident on 29 May 2008 which might have established, on the balance of probabilities, the applicant left the premises to defuse the altercation; and
- The applicant, while a participant in the altercation with Mr McCabe, was simply attempting to put her explanation to him. It is clear he was unreceptive and became aggressive. In such circumstances Ms Hancox did not contribute to the situation which gave rise to her dismissal; and
- Ms Hancox is entitled to remedies.

Remedies

[47] Ms Hancox had been a trustworthy and valued employee on any reading of the factual evidence before the Authority. I turn now to the matter of remedies.

Lost remuneration

[48] The minimum hours set out in the individual employment agreement was 36 hours per week. I accept the evidence of the applicant and reflected in the time and

wages record that she usually worked more and find that on average, Ms Hancox was employed for 43 hours per week for the purposes of calculation of lost remuneration.

[49] The respondent submits that at the time the employment relationship ceased Ms Hancox had an outstanding entitlement to six days of sick leave. She is entitled to be paid for those six days. Those days are 30 May to 6 June 2008 inclusive.

[50] The evidence which was uncontested was that the applicant commenced her new employment on 7 July 2008. The applicant underwent surgery in the week beginning Monday 9 June and was recuperating for a two week period. As she had exhausted her sick leave which I have referred to above, Ms Hancox would have needed to take either annual leave or unpaid leave for that period.

[51] I am obliged under the statute to award Ms Hancox lost remuneration for a period of 13 weeks. Working on the premise that the applicant's final pay from the respondent would have included any untaken annual leave, I think it just to deduct ten working days from the 13 weeks referred to above. The representatives of the parties are to confer and calculate the earnings lost on this basis.

[52] Ms Hancox has not received a refund for the return of her uniform in the sum of \$120.00. The respondent is to refund this sum to her without delay.

[53] Leave is reserved for the representatives to the Authority in the event they are unable to agree on the issue of lost remuneration.

Compensation

[54] The applicant sought \$8,500 in compensation for hurt and humiliation. Her claim was supported by her husband.

[55] Given the evidence of the respondent's reliance on the skills Ms Hancox brought to the business since the McCabe's purchased it and their appreciation of her efforts on their behalf and bearing in mind the evidence both of the applicant and of her husband, I am of the view \$6,000 is a fair and just award of compensation in all the circumstances.

[56] The respondent is to pay this sum without deduction as compensation under s.123(1)(c)(i) of the Act.

Costs

[57] Costs are reserved. The representatives are to attempt to resolve the matter of costs between them. They are to consider the Authority's investigation was a little short of a full day and the Authority, in this case, may consider the matter of costs if required on a tariff basis.

Paul Montgomery
Member of the Employment Relations Authority