

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 147
3125880

BETWEEN HELEN HOFFMAN
Applicant

AND LEE 19 LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: William Chapman, counsel for the Applicant
Naoimh McAllister, counsel for the Respondent

Investigation Meeting: 25 January 2022

Submissions Received: 25 January 2022 from the Applicant
25 January 2022 from the Respondent

Date of Determination: 19 April 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lee 19 Limited provides catering services in Invercargill. This includes providing function catering and meal services at the Invercargill Working Men's Club (the Club); this being a contract Lee 19 purchased in July 2019.

[2] Helen Hoffman was employed by Lee 19 as an assistant supervisor and her role covered supervising staff and working on preparing meals at the Club, mainly for the weekday lunch time service.

[3] Mrs Hoffman had worked at the Club for many years with the majority of that work being prior to July 2019 when Mrs Hoffman's employment transferred to Lee 19.

[4] During the time she worked for Lee 19 at the Club, Mrs Hoffman says she was targeted and subjected to belittling and degrading behaviour such as being unfairly criticised in front of other staff, swearing both generally and specifically directed at her, being shouted at, and being told to lie about work practices.

[5] Matters came to a head for Mrs Hoffman in July 2020 when there was an altercation over carparking at the Club and then Mrs Hoffman was asked to clean up on her own after a Monday lunchtime meal service, which Mrs Hoffman believed to be punishment for not being available to work additional hours over the preceding weekend.

[6] Mrs Hoffman then resigned and raised personal grievances for unjustifiable action causing disadvantage to employment and unjustified dismissal.

The Authority's investigation

[7] The parties were unable to resolve Mrs Hoffman's personal grievances and Mrs Hoffman lodged a claim in the Authority. Lee 19 defended Mrs Hoffman's claims.

[8] It is Mrs Hoffman's claims that I have investigated being:

(a) The personal grievance for unjustifiable action causing disadvantage to employment arising out of Mrs Hoffman being made to clean up after the Monday lunchtime service on her own in punishment for not being available to work over the preceding weekend.

(b) The personal grievance for unjustified dismissal arising out of Mrs Hoffman's resignation; that resignation stemming from a breach of duty by Lee 19, which Mrs Hoffman says was Lee 19 requiring her to clean up after the Monday lunchtime service on her own in punishment for not being available to work over the preceding weekend

[9] I investigated these claims by receiving written evidence and documents, holding an investigation meeting on 25 January 2022, and assessing the oral and written submissions of the parties' representatives.

[10] As part of my investigation meeting, I received witness statements from Mrs Hoffman, Les Hoffman, Bailey Blomfield and Debra Monteith. In my investigation meeting, under oath or affirmation, these witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[11] As permitted by 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Issues

Unjustifiable action causing disadvantage

[12] An unjustifiable disadvantage personal grievance is set out in section 103(1)(b) of the Act. This states that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[13] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

- (a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?
- (b) If so, did the actions complained of cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions justified?

[14] In this case Mrs Hoffman's unjustifiable action personal grievance is limited to the single event she alleges occurred in relation to her being required to clean up after the Monday lunchtime meal service. This is because Mrs Hoffman did not raise separate personal grievances for the various matters she says amounted to belittling and degrading behaviour.

Unjustified dismissal

[15] Mrs Hoffman says her resignation is an unjustified dismissal because she resigned in response to a breach of duty by Lee 19, i.e., a constructive dismissal. Mrs Hoffman says the breach by Lee 19 was the requirement to clean up after the lunchtime meal service on her own, with that breach being the last straw for her in a series of breaches by Lee 19 relating to the allegations of belittling and degrading behaviour towards her at work.

[16] The relevant case law shows that in order to determine if Mrs Hoffman was constructively dismissed, I must consider: ¹

- (a) Was there a breach of duty by Lee 19?
- (b) Was that breach of duty sufficiently serious – including in circumstances where other breaches have occurred and the breach is the last straw - such that it was reasonably foreseeable that there was a substantial risk that Mrs Hoffman might resign in response to that?
- (c) Did Mrs Hoffman resign in response to that breach of duty?

[17] If I determine that Lee 19 did constructively dismiss Mrs Hoffman (because of the steps outlined above) I must then consider whether the dismissal was justified, with the onus falling to Lee 19 to show its actions were justified in line with the test for justification and the duty of good faith set out in the Act.

What happened?

[18] After Lee 19 took over the contract for providing function catering and meal services at the Club Mrs Hoffman's day to day work was managed by Debra Monteith, a director of Lee 19 and essentially the general manager of Lee 19's business.

[19] Mrs Hoffman says that Ms Monteith used foul language, such as swearing, regularly and this included swearing directly at her and raising her voice at her. Mrs Hoffman says Ms Monteith was critical of her work, often in front of other employees, and this criticism

¹ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

was unwarranted and belittling; these criticisms included telling her she was slow and not doing a good job.

[20] Ms Monteith denies the allegations made by Mrs Hoffman, she says she was fair in how she dealt with all employees, working with them to improve their performance and the overall service provided at the Club. Ms Monteith says she did tell employees if they were slow or not performing their work appropriately, but she says she did not do this in front of other employees nor did she do it in a hostile or aggressive way.

[21] Based on the evidence my conclusion is that from the commencement of Lee 19 managing the food service at the Club, Ms Monteith attempted to make changes to the way the team operated the mealtime service; these changes were in relation to deficiencies she perceived in the service and in response to criticism and requests for changes from the owners of the Club. These changes included changes to the menu and to the way of operating.

[22] In effecting changes Ms Monteith worked with Mrs Hoffman on how the mealtime service was operated, addressing in particular concerns over slowness of the service. Ms Monteith was direct in her conversations with Mrs Hoffman and other employees, but I am not satisfied that she was aggressive and/or belittling in her approach, nor did she swear at employees, nor was she unnecessarily or inappropriately critical of employees.

[23] I believe that in the end the changes to the way the mealtime service was carried out and the focus on improving service including the speed of the service and the change to the menus impacted on Mrs Hoffman and she did not embrace the new culture or way of operating. I believe that after several months of change and after returning to work from the first national COVID-19 lockdown in or around June 2020, Mrs Hoffman was unhappy at work and disillusioned.

[24] All of this came to a head for Mrs Hoffman over the period, Friday 10 July 2020 to Tuesday 14 July 2020.

[25] On 10 July 2020, Mrs Hoffman and two other employees parked their cars in the Club carpark, as they had always done when working. However, prior to 10 July 2020, the owners of the Club had advised Ms Monteith that employees could no longer use the Club carpark.

Ms Monteith had told employees of this, by putting a notice up in the kitchen and discussing it with staff.

[26] Whether Mrs Hoffman knew before 10 July 2020 that she was no longer allowed to use the Club carpark or not is not clear – it appears she should have known, given what Ms Monteith did to advise staff of the requirement. Either way, Mrs Hoffman parked her car and was then confronted by Ms Monteith and told to shift her car. There was a heated exchange as both Ms Monteith and Mrs Hoffman were frustrated by the carparking issue but in the end Mrs Hoffman and the two other employees moved their cars as they had been told to do.

[27] Later in the day on 10 July 2020, after the lunch service had been completed, Ms Monteith, another employee of Lee 19, and Mrs Hoffman met to discuss the timing of the lunchtime service, in essence bringing forward the service time. This was part of the ongoing discussions over improvements to the service and this meeting was led by the other employee who had been given the responsibility of looking into the issue.

[28] From Mrs Hoffman's perspective she saw this meeting as an extension of what she perceived to be ongoing unwarranted criticism and belittling of her work and unnecessary changes to the way she organised the work. And this culminated in this meeting with her being told she had to change the service times as that was what Ms Monteith wanted; Mrs Hoffman was angry and upset by this.

[29] On Saturday 11 July 2020, Lee 19 was catering a function and was short staffed. Ms Monteith called Mrs Hoffman to see if she could come in to work some extra shifts however, Mrs Hoffman was unable to take the call. In the end Ms Monteith worked the weekend with two additional employees, who also worked the lunchtime shifts at the Club.

[30] On Monday 13 July 2020, after the lunch service at the Club had been completed and there was just some clean up to complete, Ms Monteith told the two employees who had worked additional shifts in the weekend that they could finish early, leaving Mrs Hoffman to clean up on her own. Mrs Hoffman saw this as punishment for not being available to work the weekend. Ms Monteith says she did this for two reasons, to allow the two employees some time off and to give Mrs Hoffman some additional work as her hours were low for that pay cycle.

[31] On Tuesday 14 July 2020 Mrs Hoffman was absent from work as she was sick. That afternoon Mrs Hoffman's husband came to the Club and gave Ms Monteith a medical certificate and Mrs Hoffman's written resignation.

Analysis

Unjustifiable action causing disadvantage

[32] As set out above the first step in resolving the unjustifiable action causing disadvantage grievance is to determine whether the action complained of – requiring Mrs Hoffman to clean up after the Monday lunchtime service on her own – occurred.

[33] There is no dispute, this did occur, although I note that Mrs Hoffman did not, in fact, clean up on her own as the two other employees stayed and assisted her.

[34] The second step then is to ascertain if this caused a disadvantage to Mrs Hoffman's employment or a condition of her employment. The simple answer is, no it did not. Mrs Hoffman was required to complete tasks she would normally do, albeit on her own, but in a timeframe that she could be required to work in if there was sufficient work to be done. And in this case, she did not actually do that work on her own and so, did not have to work any harder than normal and she still finished her shift earlier than the scheduled time.

[35] So, as I have concluded there is no disadvantage, I do not need to consider whether Lee 19's actions were justified.

[36] The personal grievance for unjustifiable action causing disadvantage does not succeed because there was no disadvantage to Mrs Hoffman.

Unjustifiable dismissal

[37] The first step for the constructive dismissal personal grievance is to establish if there has been a breach of duty by Lee 19. There are two aspects to this:

- (a) The alleged behaviour in relation to belittling, critical and demeaning conduct toward Mrs Hoffman by Ms Monteith. This is relevant as Mrs Hoffman says she was subject to this ongoing course of behaviour that meant the incident in relation to cleaning up on Monday 13 July 2020 was the last straw.

(b) The requirement for Mrs Hoffman to clean up after the Monday lunchtime service on her own.

[38] I have already set out that I do not find Lee 19's conduct, particularly that of Ms Monteith in relation to working with Mrs Hoffman over the mealtime service at the Club, occurred in the way alleged. My conclusion is Lee 19 did not breach any duty in its management of Mrs Hoffman's work – Ms Monteith worked with Mrs Hoffman on issues and Lee 19's requirements for improvement to its service in an acceptable and justifiable way.

[39] I accept that the relationship between Mrs Hoffman and Ms Monteith may have been a little fraught at times given the conflict over how the Club's mealtime service was to operate and because Mrs Hoffman took any suggested or required changes personally as a reflection on her ability and worth to Lee 19. But in all of the circumstances I find that Lee 19 acted as a fair and reasonable employer could – thus meeting the test for justification under the Act.² And it did no more than it was entitled to do in terms of what it required Mrs Hoffman to do – the instructions fitting in with Mrs Hoffman's role and her duties set out in her job description.

[40] I also find that requiring Mrs Hoffman to clean up after the Monday lunchtime service on her own was not a breach of duty – it was a justifiable and reasonable instruction in the circumstances.

[41] On this basis there is no breach of duty, either an ongoing series of breaches or a one-off serious breach, that can inform a constructive dismissal claim.

[42] The personal grievance for unjustified dismissal does not succeed because there was no breach of duty by Lee 19 in relation to Mrs Hoffman.

Summary

[43] Mrs Hoffman's claims, based on personal grievances, are dismissed.

² Section 103A of the Employment Relations Act 2000.

Costs

[44] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Lee 19 may lodge with the Authority and serve on Mrs Hoffman, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mrs Hoffman will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[45] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.³

Peter van Keulen
Member of the Employment Relations Authority

³ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.