

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 116/08
5076810

BETWEEN	CHRISTINE HUGHES Applicant	FRANCES
AND	LIVING LIMITED Respondent	CORPORATION

Member of Authority: Paul Montgomery

Representatives: Janie Kilkelly, Counsel for Applicant
Michael Guest, Advocate for Respondent

Investigation Meeting: 12 March 2008 at Dunedin

Submissions received: 27 March 2008

Determination: 12 August 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant was employed by the respondent as a hostess/office administrator in its real estate offices in Dunedin from September 2005 until 30 November 2006. Ms Hughes says she was unjustifiably disadvantaged and unjustifiably constructively dismissed from her employment. In regard to the latter, the applicant alleges a serious breach of her terms of employment entitling her to repudiate the agreement. Ms Hughes seeks remedies of lost remuneration, loss of the benefit of OSCAR fees in the sum of \$180, compensation of \$10,000, a penalty for unauthorised deduction from her final pay and costs.

[2] For its part, the respondent denies the applicant's claims saying the breach alleged to have given rise to the resignation was remedied and Ms Hughes advised of

the action being taken by the respondent to rectify the breach. It says the remedy was provided prior to the applicant tendering her resignation.

What caused the problem?

[3] Two issues which surfaced in the exchange of evidence and aired at the Authority's investigation meeting were whether the applicant had assisted Martin Jenkins set up his business in the company's time and using the company's equipment. The other was whether, following agreement over providing an hour for lunch to Ms Hughes, her salary was to be adjusted. After hearing the evidence on both matters, I have dismissed them as having no substantial bearing on the case.

[4] To return to the primary focus of matters, Ms Hughes was not provided with a written individual employment agreement for her consideration until September 2006. She did, however, have a letter of offer setting out the basic details of the role, the hours of work and the remuneration to be paid. The letter did not define lunch or break times nor did it detail sick leave entitlements.

[5] All, apart from the lunch break and salary issue which was resolved, appears to have gone harmoniously. There had been discussions between the parties on Ms Hughes' undertaking her real estate examinations with a view to her eventually moving into a sales role with the respondent, although no definite timeline was established. This objective is set out in a document recording the goals she had set for herself. Ms Hughes had successfully passed three papers at the time she went on a week's annual leave in September 2006. The applicant says that on her return she found both directors, Mr de la Roche and Ms Carol Williamson, *distant* in their manner with her, saying *I was at a loss to understand why the atmosphere had become so cold and nothing was ever said to me to explain this sudden change of behaviour. This was distressing for me.*

[6] Further, adding to her concerns, was the discovery of several emails sent between Mr de la Roche and Ms Williamson on the reception computer used by the applicant. As well, there were several emails to and from Shoz Wheeler, another employee of the respondent. As all emails were sent from or received at that computer, the name Chris Hughes appears on both outgoing and incoming traffic. Ms Williamson was deputising for the applicant during the latter's period of leave.

[7] Several emails contained comments Ms Hughes says she found *derogatory by implication about me and I felt they were a totally inappropriate discussion about one employee to another. These emails were very hurtful, embarrassing and distressing for me.*

[8] The applicant continued:

It was clear to me from all these emails that my employer had decided I was to go and that they were going to come up with something to ensure that occurred. I did not know what to do. I was shocked and feeling powerless and betrayed, not only by the callously expressed intention to construct my dismissal but also because I was being discussed with other employees in such a way as was obvious from the email with Shoz. I therefore didn't do anything about this for a while hoping to calm down and think of what to do.

[9] There is little to be gained by traversing all the emails discovered however, ones relevant to Ms Hughes are set out below. The first is an exchange between Ms Wheeler and Ms Williamson.

*From: Shoz Wheeler
Sent: Monday 25 September 2006 10:39am
To: Chris Hughes*

I don't know why Chris didn't load the pics for real estate.co as I have nearly finished them, it doesn't take that long. Also Jellicoe Crescent wasn't on there, the owners will spu if they find out its not on there as they are so fussy.

*From: Chris Hughes
Sent: Monday 25 September 2006 11:40am
To: Shoz Wheeler*

Its obviously that big C word, well two C words, capacity and commitment.

[10] The following involves communication between the two directors.

*From: Chris Hughes
Sent: Monday 25 September 2006 9:24am
To: Judd de la Roche*

... this place is dirty. The floor is a disgrace.

*From: Judd de la Roche
Sent: Monday 25 September 2006 9:39am
To: Chris Hughes*

We must handle this the best way for us ... The instinct is to fire her of course, but it will simply be too disruptive in what is a critical month for us. We will talk about it and come up with something. Just move on to something that will make us money in the interim. ...

PS Remove this email – we do not know if she will come in after hours and read the mail ... might be a good thing!!

[11] There is another email exchange between Shoz Wheeler and Ms Williamson which relates predominantly to business cards for one of the sales agents. Within that exchange is one:

*From: Chris Hughes
Sent: Thursday 28 September 2006 2:33pm
To: Shoz Wheeler
Subject: Re Bills Cards*

Great, isn't it. Two steps forward, three back. Who the hell next?

Well, they can take their bloody secretary with them.

[12] While Ms Hughes may have considered this a reference to herself, the context of the exchange makes it highly probable that she was not the secretary being referred to given her role as hostess/office administrator.

[13] On 21 November 2006, Mr Derek Smith, the sales manager, handed Ms Hughes a draft employment agreement and a letter. The letter reads:

Dear Chris,

Our apologies for not providing you with this contract sooner.

You will note there have been no changes to the contract as such. However after discussion with Derek recently and yourself dating back to your commencement we would like to draw your attention to the following points.

- 1. You will recall when you started with us that we always intended that you would eventually relinquish your administration role for a sales consultancy position.*
- 2. With this in mind we paid for your Polytech course and we understand you have completed the first assignment.*
- 3. We feel that you should continue to pursue your sales consultant certificate with the intention of starting with us in this role no later than 5 of March 2007.*
- 4. We would be happy to engage you on a retainer type remuneration package for the first (three) 3 months from that date with your commissions to offset such agreed amount.*
- 5. Should you decide that you don't want to pursue this direction could you please provide us with the two weeks notice in writing under 15.1 of the attached contract effective from 17/2/2007.*

Finally, thank you once again for your dedication and commitment to your position.

We greatly appreciate you as part of the Living Corporation team and look forward to seeing you become very successful in the sales division.

*Yours faithfully,
Judd and Carol
Business Owners
Living Corporation Limited MREINZ
cc Derek Smith*

[14] Ms Hughes' evidence of her reaction to the letter was:

The letter was the last straw. It said (1) it was always intended I would go into sales. That is not true. (2) there were no changes to my terms of employment in the attached contract. That is not true.

The biggest blow however was the last paragraph of the letter which said if I did not agree to change my job to a sales position that I was required to give two weeks notice of my resignation.

I believe this was the "something" the emails refer to, to construct my dismissal. My employer was aware that while I was still contemplating the distant future possibility of a sales position, I was not in a position to take on the financial uncertainty and therefore insecurity of a sales position as a solo mother. I also did not have a driver's licence and they were aware of that. Without a licence I would not have been able to take a sales position. I was deeply distressed by this "take it or go" ultimatum which because of all those matters of which they were aware making it impossible for me to take, in reality it was a "go" demand. I was told to sign the agreement as soon as possible or give my resignation. I was distraught and no longer trusted my employer to conduct the relationship between me and them fairly.

[15] The applicant consulted a solicitor and made an appointment to see her on Monday, 27 November 2006 at 10am. When she asked Mr Smith to cover for her absence, he declined. Mr Smith said that it was a particularly busy day with all staff tied up in company orientation and thus no one available to cover the reception area. He says, given the short notice, he asked if she wouldn't mind arranging the appointment during her lunch hour. He says Ms Hughes agreed.

[16] Mr Smith says that the next thing he knew, at around 12.30pm, he received a phone call from Ms Kilkelly advising that Ms Hughes was not well and was not returning that day. Mr Smith communicated this to Mr de la Roche who said in his evidence:

As soon as I realised that she had gone to lengths of leaving work, seeing a solicitor and then a doctor and not returning to work all as a result of the letter, I went straight to her house that day and told her that I was sorry about the letter upsetting her and that she could

certainly keep the receptionist's job and not to worry about the salesperson position, which I had generally seen as an upgrading of pay and status. I had not realised that she did not want it. The firm was therefore willing and able immediately to allow her to keep the receptionist's job and this was conveyed to her within hours of her receiving the letter.

I accept that this was not handled well but I believe my firm always acted in good faith and immediately took steps to address the concerns when we discovered she did not want the position.

[17] Mr de la Roche also says that after receipt of the letter, the applicant did not discuss it with him or with Mr Smith but opted to see a solicitor instead.

[18] Ms Hughes resigned her employment with the respondent on 30 November 2006 and it is evident from the correspondence between Ms Hughes' solicitor and Mr de la Roche that Ms Hughes herself did not address the matters of concern with her employer prior to the resignation being tendered.

The issues

[19] In order to resolve this matter, the Authority needs to make findings on the following issues:

- Was the applicant unjustifiably disadvantaged in her employment with the respondent;
- Did the letter of 21 November 2006 constitute a breach of the applicant's terms of employment;
- If so, was the breach of sufficient seriousness to entitle the applicant to treat it as a repudiation of the employment relationship;
- Was the deduction of overpaid sick leave from the applicant's final pay unlawful and if so, does it warrant the imposition of a penalty;
- Was the applicant unjustifiably constructively dismissed;
- If so, what, if any, remedies are due to her?

The investigation meeting

[20] At the investigation meeting the Authority heard evidence from Ms Hughes in person and on behalf of the respondent evidence was produced by Mr de la Roche, Ms Williamson and Mr Smith. All witnesses were open and straightforward in their answers to questions put by the Authority and by respective counsel. The focused approach of both counsel ensured that the meeting proceeded efficiently and was completed in approximately 5½ hours.

Analysis and discussion

[21] As submitted by both counsel, the governing principles in a case of alleged constructive dismissal are set out in *Auckland Shop Employees' IUOW v. Woolworths (New Zealand) Ltd* [1985] NZLR 372 (CA) and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities IUOW* [1994] 1 ERNZ 368 (CA).

[22] Ms Kilkelly refers to the letter of 21 November 2006 as a *take it or be dismissed* option, and a breach of duty on the respondent's part. Mr Guest submits the letter needs to be viewed in the context of earlier discussions regarding Ms Hughes' goal of moving to a sales role and the respondent paying the fees for her to complete the requisite papers. Further, he submits *the letter is the only basis on which a complaint can be laid*. He, as did the respondent's witnesses, accepts the letter was badly constructed but submits it does not amount to *the most heinous of wrongs*.

[23] Standing back from the events, I am of the view that the discovered emails were not the initial part of a plan to rid the respondent of Ms Hughes' services. Seen in the context of the material relating to font types and business card layout the applicant had assisted Mr Jenkins in designing discovered on the reception computer, those between the directors are understandably expressing concern. The fact that the directors became aware of this material in late September and by late November had not raised the matter with Ms Hughes, strongly suggests they subsequently decided to let the matter rest.

[24] The exchange between Ms Williamson and Ms Wheeler in regard to *capacity and commitment* I accept would have been offensive to the applicant, but it is clear she never raised this matter with Ms Williamson to clarify what was meant or if it was thought she was not meeting expectations in her role. The exchange was, at best, unprofessional.

[25] To be blunt, the letter of 21 November was ill-considered, heavy handed and arrogant. It was an ultimatum, not a proposal inviting discussion and it engendered very considerable worry in Ms Hughes' mind, given her personal situation.

[26] The letter was given to Ms Hughes on Wednesday, 22 November 2006. Ms Hughes attended an appointment with her legal adviser the following Monday. No discussion or interaction between the parties took place in the interim on the contents of the letter. At some point in the meeting between counsel and Ms Hughes, Ms Kilkelly telephoned Mr Smith and advised him the applicant was unwell and would not be returning to work that day. Mr Smith in turn notified Mr de la Roche of the situation.

[27] The action of Mr de la Roche once advised of the position by Mr Smith, was appropriately swift. He drove to the applicant's home, apologised unreservedly for the letter and withdrew it. Further, he confirmed to Ms Hughes she could remain in her existing role if that is what she wanted.

[28] The applicant's evidence was that she did not believe Mr de la Roche was genuine and that he made this approach in an endeavour to effect some damage control. I am of the view that he was genuine although I do not for a moment rule out that the seriousness of the matter had dawned on him and he was attempting to remedy the situation as it stood. It is also significant that at this time the applicant was still in an employment relationship with the respondent. At this point, the situation was certainly salvageable, particularly given Mr de la Roche's undertaking to the applicant that he would *work it all out*.

[29] In spite of this offer, the apology and the withdrawal of the letter, Ms Hughes tendered her resignation on 30 November 2006.

[30] In her evidence, Ms Hughes says:

I was forced to resign just before Christmas and go on a benefit. This was deeply distressing to me and placed me in a position of financial strain.

[31] I do not take the view, given the above circumstances, that the applicant was forced to resign. Here was the ideal setting to involve the Mediation Service and embark on the process of collaboratively rebuilding the relationship. I accept Ms Hughes's evidence that she sought a settlement short of raising a personal

grievance but that this was not successful. It appears this may have been due in part to the refusal of the respondent to pay the applicant's final wages and holiday pay as it had deducted from that payment the excess sick leave taken by the applicant. In my view, what began as a tidal surge in a demitasse was fanned to a tempest in a tureen. No one seems to have had the insight to take a pause, evaluate the issues calmly and enlist the assistance of an independent third party. It is clear from the interchange of email and correspondence between counsel for the applicant and Mr de la Roche that the longer the interchanges persisted, the less a resolution was likely.

[32] In considering the breach of good faith dealing occasioned by the letter, I am not satisfied, for the reasons I have given above, that it was of such a serious nature as to allow Ms Hughes to repudiate the agreement. Had she tackled the issue of the letter with the respondent immediately after receiving it and had she been faced with a refusal on the part of the company to engage in discussion or consultation, the matter would have been very different. Rather, she continued to work a further two days before taking legal advice. It was then a further three days before she tendered her resignation.

[33] In his final submissions on behalf of the respondent, Mr Guest respectfully submitted that this was a case not about disadvantage. He says:

The applicant did not frame or present her case on the basis of disadvantage and that possibility was raised informally by the Authority only at the end of the applicant's evidence and after cross-examination.

[34] I observe that had Mr Guest read the statement of problem served on his client he would have realised para.1.1 of that document reads: *Personal grievance for unjustified actions and/or constructive dismissal.*

[35] Even in the event that that had not been pleaded, the Authority is empowered under s.122 of the Act which reads:

Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged.

The determination

[36] Returning to the questions posed above in this determination, I find:

- The applicant was disadvantaged by the unjustifiable actions of the respondent, first in respect of the letter of 21 November 2006 which was a breach of its obligations to deal with the applicant in good faith, and also by the email in which Ms Williamson questioned the applicant's capacity and commitment.
- The breach, but for the actions of Mr de la Roche including withdrawal of the letter and assuring the applicant of her security in the receptionist position, may have reached the threshold of justifying repudiation. I find, however, in the present case, it does not.
- In the light of there being no written agreement between the applicant and the respondent, it is clear the respondent cannot have met its obligations under the Wages Protection Act to have had written authorisation for any form of deduction from the remuneration of the applicant. It follows these deductions were unlawful.
- I decline to award a penalty in respect of those deductions.

Remedies

[37] Given the finding that Ms Hughes was not constructively dismissed, I am unable to make an award in respect of remuneration lost as a result of what I find to have been a grievance resulting from the unjustified action of the respondent.

[38] The Authority accepts that the applicant, as a result, has suffered considerable hurt and humiliation and I order the respondent to pay the applicant the compensatory sum of \$4,000 without deduction.

[39] In respect of the unlawful deductions from the applicant's final pay, I order the respondent to pay to the applicant that sum to which she would have been entitled at the time of her resignation for holiday pay. To require the respondent to refund the sum relating to excess paid sick leave would, in effect, be requiring the respondent to pay Ms Hughes for unauthorised absences. This is manifestly unjust and so I restrict the payment to holiday pay alone. In the event the parties are unable to agree on the quantum of holiday pay due to the applicant at the date of resignation, leave is reserved to approach the Authority to determine this issue.

Costs

[40] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority