

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 64/08
File Number:5096730

BETWEEN MARNIE HUNTER
 Applicant

AND STORE-IT LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Barbara Buckett for Applicant
 Hamish Kynaston for Respondent

Investigation Meeting: 26 and 27 February and 29 April 2008 at Wellington

Determination: 12 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Marnie Hunter, claims that she was treated unfairly in the course of her employment by the respondent (Store-It), which led to her becoming too ill to work. She also claims that she was subsequently unjustifiably dismissed when she could not return.

[2] In response Store-It considers that it treated Ms Hunter fairly throughout the course of her employment and had no option but to dismiss her when it appeared unlikely that she would be able to return to work within a reasonable period, having already been absent for several weeks.

Findings of Fact

[3] Store-It operates self storage facilities from its offices in the Ngauranga Gorge and is owned by Mr Michael Price, who is a hands-on operator. Store-It employs a handful of staff and operates Monday to Saturday. The key position within the business is that of facility manager. This person

is the key contact with Store-It's customers between Monday and Friday. In essence the facility manager is responsible for taking orders for storage facilities, dealing with customer inquiries and ensuring that customers are appropriately charged for the services they obtain. A key part of this was to log actions on Store-It's computer system, known as Storman.

[4] When its previous facility manager (Ms Sarah Siddells) gave notice of resignation, Mr Price engaged Hudson Recruitment to recruit a replacement. Ms Hunter had just sold out of a business she had developed with her partner, after two years as marketing manager of a realty company, and was looking for work. She was interviewed by Mr Price and Ms Siddells and then underwent psychometric testing with Store-It's human resources consultant, Ms Shirley Tracey. According to the tests Ms Hunter was assessed as suitable for the role.

[5] Ms Tracey had also got Mr Price to do a psychometric test. She combined the tests of the two in order to allow both of them to learn what they could from them. Ms Tracey's report highlighted a number of differences between Mr Price and Ms Hunter. Both scored highly in terms of reasoning, but there were significant differences in personal styles - in particular competitiveness, introversion/extraversion, openness to ideas, orderliness, self-confidence and tolerance.

[6] Ms Tracey made a number of recommendations, some quite prophetic. In particular she recommended the following:

Mike to be aware that he is likely to compete for the sake of it and understand and "own" that when he is relating to others ...

That an increased self confidence score is one of Marnie's personal development needs ...

Mike become aware of his low tolerance level in particular when he is charged with training or directing people. A combination of quick thinking, high reasoning capability and low tolerance does not bode well for learners who have different learning styles (eg hands on).

[7] Mr Price chose to employ Ms Hunter. Therefore on 27 December 2006 the parties signed an employment agreement and on 15 January 2007 Ms Hunter began her employment.

[8] Ms Hunter was taken through a three week induction programme conducted by Mr Price and Ms Siddells. She was given time during the course of this period to familiarise herself with Store-It's operations manual and the Storman computer system. It is fair to say, however, that Ms Hunter had difficulty with Store-It's systems and in particular Storman. On a number of occasions Mr Price raised concerns about problems and mistakes she was making. I accept that the training Ms

Hunter received from Store-It and in particular on the Storman computer system was as comprehensive as (if not more) than that received by any other employee.

[9] Because of these difficulties Mr Price arranged for another employee to create a document known as the Customer Journey, which detailed how a customer would interact with Store-It - from making an initial inquiry right up to closing their account. Ms Hunter went through this document with the creator over several hours towards the end of February.

[10] Unfortunately Ms Hunter, despite her best efforts, continued to have difficulties, particularly in relation to Storman. Mr Price offered to help by putting his job on hold for one month to focus on training Ms Hunter to his satisfaction. Ms Hunter preferred others' training styles to Mr Price and she therefore declined this proposal.

[11] Mr Price then asked Ms Hunter to complete a training check list, so that she could identify those areas of her performance where improvements could be made through further training. Despite requesting so several times, Ms Hunter did not complete this training check list until some two weeks after the deadline, despite prompting.

[12] Ms Hunter was to have a two month review on 23 March. At that review Ms Hunter expressed her frustration at what she saw as inadequate training. She was particularly concerned at the busyness of the office and the lack of time to undertake tasks such as training and even to have a lunch break. However, she now felt more comfortable because Mr Price had *let her go for it*.

[13] Mr Price noted his pleasure about Ms Hunter's customer service skills, but raised the issue of the training check list, which at that time had still not been completed. He also raised the issue of mistakes and his belief that Ms Hunter was not picking up the job as quickly or as accurately as he would have expected. Ms Hunter stated that she felt she was being spied on and requested that errors be highlighted immediately and advised to her by email. Ms Hunter also declined to go back and do her training all over again.

[14] Later that month a number of other actions were taken to try and improve Ms Hunter's performance in relation to reducing errors, including their immediate identification and discussion.

[15] Mr Price gave Ms Hunter some time off to produce the training check list but he had not received it as at 8.30am on 3 April. He therefore decided that he would institute a disciplinary investigation into the matter. While the disciplinary meeting letter seems to focus on the failure to provide the training check list, in fact the purpose of the meeting was wider than that, because Mr

Price wanted to cover the issue of what he saw as a large amount of unacceptable errors in Ms Hunter's work.

[16] In fact that check list had been completed by Ms Hunter, although it was clearly very late, and was handed to Mr Price the same day he sent out the disciplinary letter. This was also the same day as the disciplinary meeting.

[17] The meeting was attended by Mr Price, Ms Hunter and her partner and Ms Tracey in her role as Store-It's human resources consultant. The meeting focused on Mr Price's concerns about Ms Hunter making too many mistakes in her work. Examples of the errors were sought, but Mr Price was unable to provide the details of anything at that time, because they were in his office. They were, however, later supplied by Mr Price to Ms Hunter.

[18] At this point Ms Tracey stepped in to what was a tense meeting and suggested that a good way forward would be for to allow her to work with Ms Hunter to develop a training programme suitable for her. This was agreed to by all present, together with the continuation of the approach that Mr Price take up errors with Ms Hunter immediately.

[19] Mr Price and Ms Tracey also wished Ms Hunter to undergo further psychometric testing, to try and ascertain why Ms Hunter did not seem to be picking up the job as quickly as expected. This was agreed at a meeting between Mr Price, Ms Hunter and Ms Tracey on 10 April, but was never progressed.

[20] Ms Hunter was already extremely nervous in the job. She found Mr Price difficult to get on with, found the work itself very taxing (particularly dealing with Storman) and she did not have enough breaks, such as regularly not having a lunch hour. I accept, however, that it was incumbent on each staff member to take breaks and that Mr Price and/or Store-It's pager messaging service could be called upon during such breaks.

[21] All the above was draining on Ms Hunter, who suffers from a serious medical condition that is exacerbated by stress. Having had a successful career it was no doubt extremely stressful to Ms Hunter that she was not performing to her employer's expectation. She largely internalised her concerns, however, as exemplified by her partner's evidence that it was not until very near the end of her time on the job at Store-It that she told him what her concerns at work were.

[22] Ms Hunter did meet with Ms Tracey on a number of occasions, however, but she did not outline in any detail her concerns about Mr Price's treatment of her, or what particular deficiencies there were in her training that could be appropriately addressed, other than identifying the Storman

system as a problem. She certainly did not indicate to Ms Tracey, nor Mr Price, that she was under work place stress, although she did state that she felt picked on by Mr Price. Ms Tracey did take up these issues with Mr Price.

[23] Ms Hunter remained concerned about Mr Price's treatment of her, such as him getting angry about an error she believed she was not responsible for and treating her differently than other staff, such as excluding her from meetings and unfairly criticising her. I do not accept that Ms Hunter was singled out for unfair treatment, although I do accept that that was how she feels about the situation. If Ms Hunter was being treated differently from other staff I conclude it was because of Mr Price's unhappiness about her level of performance.

[24] As a result of the pressure she was under Ms Hunter went on sick leave from 13 until 27 April. During that period Store-It suggested that Ms Hunter's three month probationary period be extended, but this was not agreed to by Ms Hunter. Therefore this suggestion was not taken further.

[25] During Ms Hunter's absence Ms Siddells came down from Auckland to help out and stayed on for a couple of days after her return to assist her. During this latter period Ms Hunter made a number of mistakes, such as double crediting customers' payments and forgetting her own password.

[26] On her return from sick leave Ms Hunter was concerned she was not being sent to training on sales like other staff. Mr Price justified this on the basis that Ms Hunter's customer and sales skills were of the highest order.

[27] On Ms Hunter's return Mr Price also developed a set of error training templates in order to assist Ms Hunter with her training and assessment. On 3 May Mr Price reviewed the error template completed for the previous week. Mr Price was unhappy with Ms Hunter's performance, in particular that she had forgotten on one occasion that she was not to send out the daily billings until Mr Price had reviewed it, and that she had sent it out without his approval. From Mr Price's perspective Ms Hunter's error rate was still unacceptably high and she was invited to a disciplinary meeting to investigate those concerns. Ms Hunter then went on sick leave.

[28] Ms Hunter had by this time engaged Ms Buckett to act on her behalf. On 9 May Ms Buckett wrote to Mr Price stating that Store-It's efforts to discipline Ms Hunter were unjustifiable and would be disregarded. She noted that Ms Hunter believed she was blamed for mistakes she had not made and treated differently to other members of staff. In particular, Ms Buckett raised Ms Hunter's concerns that she was being picked on, and as such was a victim of trivial fault finding and

thus destructively criticised, alienated, targeted, ridiculed, had her input dismissed or ignored, and was embarrassed and humiliated. She also stated:

The consequence of this unfair and intolerable behaviour towards our client has had a serious impact and caused severe damage to her health. She is suffering from work place stress as a result of the 'toxic' environment she has been forced to work in ... Until constructive changes happen at the work place and the treatment of her and conduct towards her changes it remains a unsafe place for her to be.

[29] Mediation was therefore suggested. Mr Price then engaged a lawyer, not Mr Kynaston, who disputed the claims and stated that Ms Hunter would not be paid for her current period of sick leave. This was responded to by a threat to take the matter to the Employment Relations Authority.

[30] It was not clear when Ms Hunter would be returning to work and Mr Price therefore re-engaged Ms Siddells on a temporary basis. Store-It kept asking for a medical certificate for Ms Hunter throughout May and June. Eventually one was provided. Store-It then sought, at the end of June, for Ms Hunter to undertake an independent medical examination at its cost. This was declined by Ms Hunter.

[31] As this was a key position for Store-It, the situation was causing Mr Price a great deal of stress by this stage, as clearly was Ms Hunter. Mr Price was desperate to either get Ms Hunter back to work or to find a replacement. By early July Mr Price had gone to his employment agency, Hudson, for a replacement for Ms Hunter, allegedly on a fixed term basis. Mr Price was also looking to expand his Store-It business into Porirua and Paraparaumu and was seeking staff for roles that might exist in the future if he was able to buy and establish suitable premises in either place. I conclude that in order to maximise his options Mr Price allowed Hudson to recruit widely for an "Administrator" for an ongoing role at Ngauranga. Hudson's advertisement was misleading in that it sought to attract the widest range of people by mentioning only the possibility of permanent employment, with no reference to fixed term employment.

[32] Had Ms Hunter seen this advertisement she would have been justified in believing that this was in effect her job. That is not the same, however, as Mr Price having already determined that Ms Hunter had to be replaced. Had Mr Price been able to recruit anyone suitable that may well have been the case, but in fact no suitable appointees, whether on a short or long term basis, were identified at that time, despite interviews with two people on 23 July. Mr Price still had the issue of how to deal with Ms Hunter's absence and how to run the business in the meantime.

[33] On 6 July Mr Price, now acting without representation, wrote to Ms Hunter's doctor directly, without authorisation, seeking a prognosis on Ms Hunter's return. It was quite properly made very clear to him that this initiative was not to be repeated.

[34] On 11 July Mr Price wrote to Ms Buckett stating that because of the pressure upon him and his family and the business, Ms Hunter's continued employment at Store-It had to be urgently assessed and in particular by a specialist. Mr Price required Ms Hunter to provide the information by 16 July.

[35] A full report from Ms Hunter's general practitioner was provided to Store-It on that date. It stated, amongst other things, that Ms Hunter was being treated for anxiety and depression and had been referred to the Kapiti Community Mental Health Team for specialist input. Ms Hunter was also on the waiting list for a serious operation in Wellington Hospital later in July. The doctor concluded that she did not think it likely that Ms Hunter would be able to return to her position at Store-It for at least the next six weeks, but that this could be optimistic.

[36] By late July Ms Siddells informed Mr Price that she had a new position in Auckland and would not be continuing to cover for Ms Hunter.

[37] On 27 July Ms Buckett responded to Mr Price's request for further information from the specialist, and his notification that should the specialist not be confident that Ms Hunter would be able to return for duties within the next few weeks then he would seriously need to consider terminating her employment. Ms Buckett stated that she would not be asking for a report from the Mental Health Team but would be in contact before 19 August with updated information on Ms Hunter's condition. It was also noted that mediation was still seen as the best way forward.

[38] Instead, Mr Price wrote back on 30 July, stating that Store-It had reached the preliminary decision to terminate Ms Hunter's employment for incapacity because of the length of her absence, the unsuccessful attempts to secure temporary cover for her and the uncertainty as to when she may be able to return to work. Mediation was deferred by him pending a final decision on the incapacity issue.

[39] Ms Hunter was given a final opportunity, by 3 August, to state anything that might convince Store-It that her employment should be continued. Nothing was received by that time and so on 7 August Mr Price wrote to Ms Hunter, terminating her employment with 30 days notice.

[40] On the same day Ms Buckett replied on Ms Hunter's behalf seeking a retraction of the notice of dismissal and stating:

... we consider it an act of bad faith that our client's employment should be terminated given that the parties had agreed to mediate the matters at issue between them. There are a range of reasonable responses that could have been made in the circumstances and dismissal is not one of them.

[41] It was also noted that:

In the meantime, in order to allow our client to return to work at all, the employer needs to address the workplace difficulties that have caused the deterioration in our client's health and we look forward to mediation as a positive step in that regard.

[42] On 10 August Mr Price responded declining to lift the notice of termination:

...at this time.

We are, however, willing to reconsider our decision, should Ms Hunter provide us with information that would substantially change our view of the situation.

[43] Mr Price then formally invited Ms Buckett to propose dates for mediation. In fact over that period Ms Hunter was in hospital having a serious operation that required a minimum of four weeks recuperation.

[44] Ms Hunter was not paid bonuses for work during the period she was employed by Store-It because the financial performance targets set were not met over the relevant periods. I also accept that Ms Hunter was paid for sick leave for the correct period, after she became eligible for it.

[45] In the interim a suitable person for the facility manager role was contacted through Hudson on 24 August. That person was offered Ms Hunter's position the next week.

[46] Mediation did not occur until September. Unfortunately neither mediation nor discussions during the investigation meeting led to the matter in dispute between the parties being resolved.

Credibility

[47] There can be no certainty about disputed events that have occurred many months ago, but the Authority is required to determine what did happen on the balance of probabilities, i.e. what is more likely to have occurred than not. I have determined the facts as above on the following bases.

In relation to events after Ms Hunter ceased work there is a clear documentary trail. Unfortunately that does not apply to the same degree to events that occurred in the workplace. Mr Price's letters and file notes, which were not disputed at the time, were of some benefit. Furthermore, Ms Hunter acknowledged that her memory of many events was poor, whereas Mr Price had his documents to rely on. Finally, several witnesses with a connection to Store-It (even though not current, as with Ms Siddells) gave evidence that clashed with that of Ms Hunter in a number of key areas. I do not accept that they did so on oath simply to assist Store-It and Mr Price. I have therefore preferred the evidence of the witnesses for the respondent over that of Ms Hunter wherever there has been a conflict. These findings do not deny, however, the genuineness of Ms Hunter's evidence, or the continuing ordeal that she has been through with her health.

The Law

[48] The law in relation to an employer's duty to provide a health and safety work place was analysed by the Court of Appeal in *Attorney-General v. Gilbert* [2002] 1 ERNZ 31 where it stated that:

The duty to take reasonable steps to maintain a safe workplace is also a term laid now applied by common law and to employment contracts, in recognition of their special nature.

[49] It was found that an employer had to take all reasonable care to avoid exposing an employee to unnecessary risk of injury or further injury to his or her physical or psychological health and in particular would provide and maintain a safe system of work.

[50] The Court of Appeal went on to state that health and safety law provided for a balance between the interests of employees and employer, involving employers taking all practical steps to achieve a result that is reasonably practicable, and employees also having to do the same to ensure their own safety:

These are formidable obstacles which the potential plaintiff must overcome in establishing breach of a contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current stage of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether work place stress is unreasonable is a matter of judgment on the facts and may turn upon the nature of the job being performed as well as the work place conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

...The reasonableness of the employer's conduct must therefore be measured against knowledge, reasonably attained by employers mindful of their responsibilities.

... If a plaintiff is able to show that the employer failed to do what was reasonable at the time and was in breach of a contractual obligation, no reason of policy inhibits contractual liability for psychological injury.

... In some cases, a risk may not be apparent without the specific information about the vulnerability of a particular employee. That was the reason the plaintiff in Gillespie failed and why the plaintiff in Walker was successful only for injury suffered after the employer became aware that he had already suffered one breakdown.

[51] The issue of foreseeability was dealt with in *Edmonds v. Attorney-General* [1998] 1 ERNZ 1. The Employment Court held that it was unable to conclude on the evidence that the plaintiff was exposed in the job to a reasonably foreseeable risk to his mental health by the conduct of his supervisor. At page 24 the Court held:

I have held there was excessive verbal abuse which became a feature of his job and which led to his mental health and to his resignation. I do not think it reasonable, however, to hold, for the purposes which I am required to serve, that his depressive condition was a reasonably foreseeable risk. The conduct was, in the doctor's opinion the medical cause, and I accept that. For it to be the legal cause, however, it must be objectively reasonable and foreseeable. To me, that means it must have been foreseeable that any normal employee would have developed symptoms of mental illness if treated in the way that the plaintiff was here. I am unable to go that far.

[52] In that case, however, the applicant's resignation was a reasonably foreseeable response to his manager's methods, which materially exceeded the risks he anticipated in the ordinary course of the applicant's job. This case is, however, not for constructive dismissal but rather for dismissal for incapacity.

[53] The test for dismissal for incapacity is no different than the test for any dismissal, namely whether the employer's actions and how the employer acted, objectively assessed, were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[54] The matter can be assessed on the basis of whether it was reasonable for the employer to decide at the point he dismisses the worker that alternative and more permanent arrangements should be made - *Hosin v. Coastal Fish Supplies Ltd* [1985] ACJ 124, where the majority of the Court used the following pithy phrase:

There can come a point at which an employer (particularly in a small shop) can fairly cry halt.

[55] Clearly there is a need for open and honest communication between both parties, as the Court held in *Knigh v. Gates* unreported, Colgan J, AEC 71/97, 15 July 1997:

For the employee, this means periodic communication with the employer as to the employee's general state of capacity and prognosis for return to work, whether by way of resumption of previous duties, or on duties that might be appropriate or modified to suit the employee's ability to perform them. ...

For the employer, the cases clearly show that inquiries as to prognosis for a return to work can and should be made. Disclosed to the employee also be the employers honest assessment of the consequences of the employee's absence including, in appropriate cases, a reasonable time scale for a return to work and the fact and circumstances of a consequent dismissal in the event that the contract cannot continue to be performed.

Determination

[56] It is clear from the facts above that Ms Hunter was not required to work in an unsafe working environment. While Mr Price was demanding, he is entitled to be demanding as an employer, and his treatment of Ms Hunter was not overbearing, especially compared with that in *Edmonds*, and therefore was not of the type exemplified by *Edmonds*. Rather Mr Price had legitimate concerns, which he tried in a number of ways over a period of Ms Hunter's employment to address, including using other staff and engaging a human resources consultant. Given that Ms Hunter did not raise directly with her employer or its agents that she was suffering from work place stress, it could not have been foreseeable that Ms Hunter would have suffered the psychological difficulties she has. In any event, these were not the legal cause of Ms Hunter's difficulties, even although they may have been the medical cause, as there was no serious breach of duty by Store-It, or at least not one that was sustained.

[57] I accept that the decision to terminate Ms Hunter's employment for incapacity was what a reasonable employer would have done in all the circumstances at the time she was dismissed. This was because Store-It is a small business and the facility manager position is a key position. Ms Hunter had only been employed for seven months and at the time of termination she had had one absence for two weeks and another for three months, which was ongoing. Furthermore, Ms Hunter's prognosis for return was at least another month away, and even then the work place issues had to first be resolved to her satisfaction. In all these circumstances it was reasonable for Store-It to conclude that it could fairly cry halt to Ms Hunter's employment and replace her.

[58] The next issue is whether in coming to that conclusion, Store It acted as a fair and reasonable employer would have done in all the circumstances at the time. While Ms Hunter may not have been happy with Mr Price's management style, and his later insistence on having full

details of her prognosis and indeed assessment by a specialist, Store-It was entitled and indeed required to make inquiries into Ms Hunter's prognosis for a return to work. Mr Price also honestly assessed the consequences of her absence and clearly disclosed to her on behalf of Store-It that the situation was becoming intolerable and the reasons for this, including his wife's illness and the stress he was under. He also clearly informed her that her position could not continue to be held open.

[59] The key issues for assessment here are whether Store-It had already decided, while still corresponding with Ms Buckett, to terminate Ms Hunter's employment and replace her, and whether it should have done more to ensure mediation took place before it made the decision to replace Ms Hunter.

[60] While it was wrong of Mr Price to correspond directly with Ms Hunter's doctor without her approval, this is not so serious a breach as to vitiate the grounds for the dismissal in itself. Furthermore, given the intemperate tone of Ms Buckett's initial correspondence and the personal attacks on Mr Price contained therein, which have subsequently not been upheld on full investigation by the Authority, it is not surprising that his responses were somewhat tersely worded.

[61] It is clear that Mr Price was trying to cover his bases by advertising in a way that effectively would have allowed him to recruit either a fixed term employee, as a replacement for Ms Hunter, or as a permanent replacement for her, or a new employee to work with her or at a new site if one was opened (but this was not really a feasible option, in the near future anyway). I conclude, however, that there was no serious unfairness to Ms Hunter, if only because no contact with a replacement for her was made until after the termination and she was unable to return to work anyway.

[62] Similarly, while Store-it should have attended mediation before Ms Hunter's termination took effect, Ms Hunter was in no medical condition to do so earlier in any event. Mediation is very much a preferred method of problem resolution under the Act, but it is only compulsory if the employment agreement requires it (of which there was no evidence here), or it is directed by the Authority, which requires proceedings to be filed (which had not occurred at the relevant time).

[63] To find that Ms Hunter's termination for incapacity was unjustified on any of the procedural grounds identified above would therefore be to require too much of a fair and reasonable employer, given its size and the pressures it faced at the time. Thus I determine that the termination was justified and dismiss all of Ms Hunter's claims accordingly.

Costs

[64] Costs are reserved.

G J Wood
Member of the Employment Relations Authority