

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Jeanne Hyde (Applicant)
AND Hospitality Services Limited (Respondent)
REPRESENTATIVES Jol Bates for Applicant
Andrew Scott-Howman for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION Wellington
MEETING 7 and 20 March 2006
DATE OF 31 May 2006
DETERMINATION

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Ms Hyde claims that she was unjustifiably constructively dismissed as a result of her employer being dismissive of her abilities, restructuring its operations so as to remove a significant portion of her job, and subsequently treating her unfairly in order that she would leave.
2. The respondent (HSL) considers that it treated Ms Hyde fairly throughout her employment and noted that she did not pursue her concerns in any formal manner until after she resigned.

The Facts

3. The applicant, Ms Jeanne Hyde, is an experienced training professional with a great deal of expertise in the hospitality industry, focused particularly on food and beverages. She was employed by the respondent, HSL, which operates 21 hotels

under the Millennium, Copthorne, and Kingsgate brands throughout New Zealand, in May 2001. She was originally appointed as the North Island Training Manager.

4. Ms Hyde initially had some concerns about the attitude of the then Chief Operating Officer of HSL, Mr Gordon Wilson, but these were not a focus of the investigation because they were not the reason Ms Hyde left HSL's employment. Mr Wilson's general views of Ms Hyde certainly resulted, however, in Mr Wilson giving Ms Frances McLean, the General Manager Human Resources, a negative view of Ms Hyde upon Ms McLean's appointment in October 2003.
5. Despite these views, when the South Island Training Manager had earlier resigned, Ms Hyde was simply told that she would be taking over the role on a national basis. She was formally appointed as National Training and Development Manager and wrote her own position description for the role. In that new role Ms Hyde sought to develop a proposal whereby HSL would be able to introduce unit standards and national qualifications to almost all of its training. Ms Hyde developed this proposal into a formal one, which was put to the HSL Training Committee, which was made up of hotel managers and other senior management. The Committee rejected this proposal, apparently on the dual grounds that it would be too much work for the hotels and that Ms Hyde might not be a suitable person for implementing such a proposal.
6. On commencing her employment, Ms McLean considered that the lapsed proposal was a good one. She took it further by discussing the matter with two Otago Polytechnic staff, who had been doing training work with HSL and were now setting up their own business. At Ms McLean's suggestion, they put forward their own training proposal, including linking training to formal qualifications, but operating through them as external consultants.
7. Between them, Ms McLean and Mr Wilson determined instead that HSL should take on another trainer to develop and manage this process, being one of the Otago Polytechnic staff, Ms Hilary Connors. Ms Hyde's key accountabilities included, however, designing, developing and implementing training programmes and managing external training and development resources. When determining to implement the new training proposals, Ms McLean did not refer to Ms Hyde's position description, or the

employee performance feedback records, which clearly showed that Ms McLean could not implement the proposal in the way she wanted to without significantly affecting Ms Hyde's employment. Furthermore, no consideration was given to the prospect of Ms Connor reporting to Ms Hyde as the National Training and Development Manager.

8. The proposal was forwarded to Ms Hyde by Ms McLean for comment on 12 February 2004. Ms Hyde responded on 17 February with a number of comments, particularly about cost, but also emphasising the work she had already done in this area. She made no comment on the potential appointment of Ms Hilary Connors to the staff.
9. Being based in different centres, Ms Hyde and Ms McLean did not meet in person that often. As Ms Hyde was going to be in Auckland on 4 March, Ms McLean suggested they meet that day. She wanted to discuss the training proposal and various ancillary matters. I note here that the unit standards training proposal was still in development. For instance, Ms Connors had not been approached about taking up employment with HSL. Another topic that was to be discussed was Ms Hyde's application to attend the Hotel Industry awards. Ms Hyde was not told, however, of what the meeting was to be about.
10. The meeting did not go well. Ms Hyde was denied the opportunity to judge the awards, which she had been invited to do, although HSL was under no obligation to even allow her to attend.
11. Ms McLean informed Ms Hyde of more details on the proposal to employ Ms Connors to write the unit standards courses. In response to a question as to why Ms Hyde could not do the job, she was told she did not have the credibility within the organisation. She was also told that Ms Connors could, in time, take a more senior position within the training initiative. She was also told that once course development was completed, delivery of the training role could be reverted back to North Island and South Island trainers. Ms McLean also noted that, given their respective expertise, Ms Connors might concentrate on front of house training, while Ms Hyde might concentrate on food and beverage training.
12. Discussion was also held about other perceived difficulties with Ms Hyde's performance. In particular her appearance was considered to not be of a professional

standard. Ms McLean noted here that some general managers considered that her personal presentation was not of a sufficient standard to run that sort of course for HSL. A particular focus for discussion here was the standard of Ms Hyde's attire.

13. Ms McLean also made the comment that Ms Hyde had gone as far as she could with HSL. This comment was made in the context of options for development for Ms Hyde.
14. Ms Hyde set out her concerns about the conversation in an email soon afterwards. She stated, among other things, that she saw the proposal as a major demotion and wanted to know whether it would require a move back to Auckland for her, and whether she would have to work under Ms Connors. She also wondered whether Mr Wilson wanted her to leave. In her response, Ms McLean noted that she was reflecting feedback she had received about Ms Hyde from hotel managers, not Mr Wilson. In relation to Mr Wilson wanting Ms Hyde to resign, Ms McLean responded that she made the comments on Ms Hyde's future on her own behalf, not on Mr Wilson's. She stated that Ms Hyde was already in a managerial position and there are times when people reach their level of "promotability" in an organisation, as she indeed had done herself within HSL.
15. Most importantly, Ms McLean responded to many of Ms Hyde's concerns about the unit training course and the potential employment of Ms Connors. Ms McLean stated that she wanted a fresh approach to the unit training issue, as Ms Hyde's proposal had been knocked back. She noted that her comments on what might occur under the proposal were speculation on her own part and that it had not yet been fully developed, or formally approved by Mr Wilson. Ms McLean noted that she did not believe that Ms Hyde had the credibility to take on a more senior role, but she did not answer Ms Hyde's concern that the new proposal would in effect be a major demotion for Ms Hyde. Rather she concentrated on assuring Ms Hyde that she would not be required to move back to Auckland.
16. I find that effectively there were subsequently no communications from Ms Hyde to Ms McLean on this issue of Ms Connors taking over the development of the unit standards work until after Ms Hyde left. There was certainly no documentary

evidence of any such communication. For example, Ms Hyde made no comment in her regular written reports about concerns over any particular issue.

17. Although I accept that it was clear that there were tensions between Ms Hyde and Ms McLean, at least from March onwards, Ms Hyde co-operated fully with Ms Connor once she was appointed in April, which followed Mr Wilson approving the training proposal. It was Ms Hyde's decision, no doubt a sound one for economic reasons, to keep her head down, co-operate with Ms Connors and try and find a new job.
18. I note here that I do not accept that Ms Hyde was required to report to Ms Connors during this period as this was against the weight of evidence. Rather Ms Hyde was required to co-operate with her to ensure the success of the training initiative, a task she adhered to admirably in the circumstances. For instance, Ms Connors sensed no animosity whatsoever from Ms Hyde, such was Ms Hyde's professionalism.
19. In the period that it took her to find a new job, I accept that Ms Hyde did raise concerns about whether her appearance was now at an acceptable standard for HSL and that she was not invited to a dinner that many other staff were. I accept that Ms McLean reiterated at that time that if Ms Hyde was concerned about her position, Ms McLean would help her find another job. Neither issue, however, could constitute grounds for a constructive dismissal in and of itself, nor was this argued. While Ms Hyde was concerned about the matters, they were not the reason she later left.
20. Having obtained another position with better prospects and better remuneration, Ms Hyde resigned in writing on 23 August 2004, stating, verbatim:

"It is with regret that I tender my resignation ... however, following our meeting in March and the many rather negative comments made at the time regarding my suitability for the role and overall credibility. Followed by the many changes to the team dynamic instituted since that time, I feel that I have been left no alternative if I wish to retain my professional reputation and self esteem."
21. Ms McLean later telephoned Ms Hyde about her resignation, which she accepted.
22. Ms Hyde was also concerned about Ms McLean's treatment of other staff as well as herself. She did not believe she could take matters up with more senior managers than Ms McLean, however, because of their reputation.

23. I note that even when Ms Hyde had secured another position she did not take her concerns any further. It was only when her notice period of one month had finished that she started to believe that someone had to speak up about Ms McLean's behaviour. She believed that a number of staff were similarly unhappy, but they had done nothing about it. Ms Hyde felt that she was doing exactly the same thing and therefore determined to seek advice. She felt that if she stood up against Ms McLean, then it might help others who were being treated inappropriately by her.
24. Ms Hyde formally raised a grievance on 19 November. HSL responded through its company solicitor stating that it was out of time and that the applicant had resigned from her employment voluntarily. Mediation was not attended until directed by the Authority. Unfortunately, despite mediation services and attempts by the Authority to resolve matters, the issues between the parties remained unresolved. The Authority therefore must make a determination on this employment relationship problem.

The Law

25. The law on constructive dismissal is clearly set out in *Auckland Shop Employees IUOW v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372, where it was held that a resignation can constitute a dismissal in different circumstances, including where an employer has followed a course of conduct with a deliberate and more dominant purpose of coercing an employee to resign, or a breach of duty by the employer causes an employee to resign.
26. In respect of the latter head, the Court of Appeal found in *Auckland Electric Power Board v. Auckland Provincial District Local Authority Officers IUOW Inc* [1994] 1 ERNZ 168, at 172, 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 had 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.”

27. Also relevant in this case is the issue of acquiescence by Ms Hyde in the changes that were imposed on her. In *Fouad Kamel Abdalla v. Chief Executive Officer of the Southern Institute of Technology* (unreported, Colgan J, CC4/06, 5 May 2006) the Court held at para.31:

“Of more significance in the legal sense were what may arguably have been contractual breaches by SIT that were, nonetheless, accepted by Dr Kamel in the sense that although he disagreed with what his employer did, he nevertheless affirmed the contract by continuing to work under it as it was performed by SIT ...

So it is necessary for Dr Kamel ... to prove to the Court that there was a breach or breaches of the contract of employment going sufficiently to its core, and/or illustrating an intention by the employer not to be bound by the contract, and which had not been affirmed by the employee, that caused his recognition to be a constructive dismissal ...

... So Dr Kamel must show an act or acts, or omission or omissions by the employer, sufficiently proximate to the resignation, that constituted a breach or breaches of the employment contract by SIT entitling Dr Kamel to say that his employer had repudiated it and, therefore, that he had been constructively dismissed.

That is not to say that such events that occurred in the performance earlier in the performance of the contract, and may have been breaches by the employer accepted by the plaintiff, are irrelevant. Even if acts or omissions in breach were confirmed by Dr Kamel and he continued to perform the contract so that these cannot of themselves constitute or contribute to a constructive dismissal, they may nevertheless contribute to a relevant background in which other acts or omissions did so.”

28. In that case, ultimatums given by SIT to Dr Kamel were agreed to “under protest”. Those ultimatums were found not to constitute a constructive dismissal, even although Dr Kamel had gone so far as to take those issues to an ongoing mediation. Rather it was subsequent actions by SIT which founded a constructive dismissal, taking into account the background of the series of ultimatums which were found to be breaches of contract.
29. *Salmon Smith Biolab Ltd v. NZ (with exceptions) Food Processing etc IUOW* [1989] 2 NZILR 939, involved an employee resigning his position four months after an unjustifiable demotion and successfully raising a dispute over the application of the parties’ redundancy agreement. This was despite the worker working in the position for four months. In that case the worker had continued to work, pending a decision from his employer on his protest, which never came. Furthermore, that decision was brought as a dispute, not a personal grievance, under the Labour Relations Act 1987, under which there were no 90 day time limits for raising personal grievances.

30. Finally, it is clear law that a personal grievance, of whatever nature, should be raised within 90 days of the action alleged to amount to a personal grievance occurring. Mr Bates relied on *Brown v. New Zealand Tourism Board* [2000] 2 ERNZ 43 for the proposition that from the time Ms Hyde's position was disestablished she was "in a state of being dismissed". Therefore, the disadvantage was ongoing and no issue of 90 days could arise.

Determination

31. I find that HSL did not follow a course of conduct with the deliberate and more dominant purpose of coercing Ms Hyde to resign. While Mr Wilson clearly had a negative view of Ms Hyde's abilities and passed this perception on to Ms McLean, he did not take any active steps to try and get her to leave.
32. I accept that Ms McLean's actions on behalf of HSL did have the effect of greatly diminishing Ms Hyde's confidence, particularly by removing significant portions of her position. Furthermore, Ms McLean's actions did lead to a significant tension in the relationship between them, as evidenced by other staff. These are matters on which Ms McLean might well reflect closely. However, while it was clear that Ms McLean had negative views on a number of Ms Hyde's abilities, I am satisfied that she intended to keep her on with HSL as a trainer, albeit in a different role than National Training and Development Manager.
33. I find that in developing its unit standards proposals, HSL did breach a number of significant duties to Ms Hyde. In particular, I find that despite HSL's ability under the employment agreement to vary her duties, the removal of all management responsibilities in terms of designing, developing and implementing training programmes and managing external training and development resources, constituted significant change to her terms of employment. While it might be argued that Ms Hyde was consulted over this in a very informal way, even then Ms McLean did not address Ms Hyde's questions as to whether she was being demoted directly.
34. Removal of these significant managerial responsibilities was effectively sufficient difference to break the essential continuity of Ms Hyde's employment at that time (*Auckland Regional Council v. Sanson* [1999] 2 ERNZ 597 applied). In other words,

the changes imposed with the appointment of Ms Connors in April 2004 constituted a demotion of Ms Hyde and also a breach of duty of significant seriousness to make it reasonably foreseeable by HSL that Ms Hyde would not be prepared to work under the conditions prevailing at that time. However, Ms Hyde, for her own sensible reasons, determined in effect to accept those changes while she looked for another job. She made no complaint, but instead, to her credit, worked professionally with Ms Connors and others in implementing the new programme.

35. I find that Ms Hyde's email of March 2004 did not constitute the raising of a personal grievance. She was raising legitimate concerns rather than presenting to HSL for consideration any grievance Ms Hyde had against it under the Act (*Reube-Donaldson v. Sky Network Television Ltd (No 1)* [2004] 2 ERNZ 83 applied.)
36. Ms Hyde, I find, did not raise her concerns over her effective demotion again with her employer after the March meeting and therefore *Salmon Smith Biolab* is distinguishable. Furthermore, that case was brought as a dispute and no compensation was sought by the worker for the way in which the employer had breached the agreement, i.e. for not allowing him to be made redundant and be paid redundancy compensation. Rather under the Employment Relations Act, the emphasis is on the promotion of mediation as the primary problem solving mechanism and on reducing the need for judicial intervention (s.3); to recognise that in resolving employment relationship problems, access to both information and mediation service is more important than adherence to rigid formal procedures (s.101); and to recognise that employment relationships are more likely to be successful if problems in those relationships are solved promptly by the parties themselves (s.143).
37. Similarly, *Brown* involved a claim for disadvantage over a failure by the employer to comply with consultation provisions in the employment contract. In that case, however, Mr Brown was under an ongoing threat of redundancy during the relevant period. Had he in fact been made redundant, the position would have been different. The change to Ms Hyde's responsibilities that she objected to and in fact later resigned over, occurred some months before and therefore *Brown* can be distinguished, I hold.

38. Thus, where a problem such as the one Ms Hyde faces occurs, she is under some responsibility to raise the matter quickly and directly so that it may be resolved promptly and without unnecessary loss of employment.
39. I accept that upper management appeared unapproachable to Ms Hyde, but that is one of the reasons why mediation services are freely accessible. Ms Hyde was aware of the range of employment relationship problem resolution methods available to her as she was an experienced trainer and had access to professional human resources advice. Instead, Ms Hyde chose to resign once she had found another job. No doubt this was a wise choice economically, and I accept that she was under economic pressure to secure a new position instead of resigning. That did not mean, however, that she was unable to raise an employment relationship problem. It therefore follows that the fundamental change to her position did not occur sufficiently proximate to the resignation to found a claim for unjustifiable constructive dismissal.
40. The reason Ms Hyde resigned when she did was that she had obtained another job with better future prospects and a higher salary. That was the reason for the timing of her resignation and for the timing of her raising the claim of constructive dismissal. This is clear despite the fact that the underlying reason for Ms Hyde looking for another job was her unfair treatment by HSL. In this context it is clear that HSL's decision to effectively require Ms Hyde to carry out a lesser position was clearly unfair and unjustifiable. As a result Ms Hyde was unjustifiably disadvantaged in her employment.
41. The delay in her raising matters was of such a length, however, as noted above, that I find that she acquiesced in the changes imposed on her. As I have already found that the extremely limited number of issues raised subsequently by Ms Hyde about her employment were not sufficiently serious to constitute a breach of agreement leading to a constructive dismissal, and they were not closely associated with her effective demotion, then I must find against her claim for constructive dismissal.
42. I have considered whether I might apply my power under s.122 to find a disadvantaged personal grievance, but unfortunately such a grievance would have had

to have been raised within 90 days of the removal of Ms Hyde's managerial responsibilities, and it was not.

43. I therefore find against all of Ms Hyde's claims against HSL.

Costs

44. Costs are reserved.

G J Wood
Member of Employment Relations Authority