

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 449
3034136

BETWEEN JDN LIMITED
Applicant

A N D SARAH WATSON
Respondent

3043631

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Applicant

A N D JDN LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Neville Cant, representative for JDN Limited
Cindy Bragg, advocate for Sarah Watson

Investigation Meeting: 1 April 2019

Submissions Received: 1 April 2019, 17 May 2019 and 21 May 2019 from JDN
Limited
1 April 2019 and 7 June 2019 from Sarah Watson

Date of Determination: 31 July 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sarah Watson worked for JDN Ltd as a dairy farm worker, from the end of August 2017.

[2] During the time that JDN employed Ms Watson, JDN had cash flow problems, which affected its ability to pay Ms Watson. Initially JDN was able to make some wage payments to Ms Watson but after two months it did not pay Ms Watson any of her wages. Rather than paying Ms Watson her wages, JDN asked Ms Watson to use its credit card, effectively extending its credit to her to cover her wages. JDN expected this arrangement to operate until such time as its cashflow improved at which point it would resume paying wages correctly and assess if any wage arrears were owed to Ms Watson by reconciling purchases made by Ms Watson against wages that should have been paid during that time.

[3] Ms Watson accepted this.

[4] This arrangement operated for November 2017, December 2017 and the start of January 2018, up until Ms Watson resigned on 12 January.

[5] After Ms Watson had left JDN, JDN calculated the wages it owed to Ms Watson for the period worked and then deducted from that the purchases made by Ms Watson using the credit card. There was also a loan that had been made to Ms Watson in November 2017 of \$1,000.00 that JDN accounted for.

[6] As a result of the reconciliation undertaken by JDN, it calculated that Ms Watson actually owed it \$7,647.75. JDN requested payment of this amount and Ms Watson disputed it, refusing to pay.

[7] JDN subsequently lodged a statement of problem in the Authority seeking repayment of this amount from Ms Watson.

[8] In her statement in reply Ms Watson raised a number of allegations against JDN covering various breaches of minimum standards, privacy obligations and health and safety requirements. She also alleged duress and undue influence and she raised personal grievances for constructive dismissal, discrimination and harassment.

[9] It was not clear if Ms Watson was advancing these various allegations simply in reply to the claim by JDN or whether these formed separate claims against JDN that she wished the

Authority to investigate. So, in a case management conference she was asked to clarify her position, which she did by subsequently lodging a statement of problem against JDN.

[10] In her statement of problem Ms Watson raised three personal grievances:

- (a) Unjustified dismissal, arising out her resignation due to JDN's failure to pay her wages correctly, JDN continually changing her job requirements including the days and times she was required to work and JDN not providing a safe work environment for her including exposing her to mistreatment of livestock, sexual harassment and discrimination.
- (b) Discrimination based on alleged treatment by Neville Cant of JDN – the allegation being that Mr Cant yelled at Ms Watson and one other female employee but he did not yell at male employees.
- (c) Sexual harassment arising out of allegations of inappropriate comments made by Mr Cant which were made in Ms Watson's presence or directed at her.

[11] In response to the personal grievances, JDN denied that Mr Cant acted as alleged, except for the payment of wages which it said, did not form a basis for the constructive dismissal claim.

[12] I have now investigated each party's claim against the other. In the course of my investigation, I heard evidence from Mr Cant, Mr Cant's wife, Ms Watson and the one other female employee of JDN. These witnesses confirmed the statements they had made and provided to me and gave further oral evidence in answer to questions from the parties and me. The parties also provided written and oral submissions on the facts and law.

[13] As permitted by s 174E of the Employment Relations Act 2000 (the Act) my determination does not record all of the evidence and submissions received but I have set out findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Wage arrears and JDN credit card reconciliation

[14] Both Ms Watson and Mr Cant accept that Ms Watson was employed to work on the dairy farm that JDN operated, initially to assist with milking and this involved working two shifts of three hours, one in the morning and one late afternoon. These shifts were three hours long, although Ms Watson says that some of the afternoon shifts extended beyond three hours. JDN paid Ms Watson \$60.00 for each three hour shift.

[15] In the first two weeks of employment Ms Watson worked every day, as there were other employee absences to cover. After two weeks, she then primarily worked Tuesday to Friday.

[16] In October 2017, JDN offered Ms Watson an extra shift each day, between the two milking shifts, feeding calves. These extra shifts were also three hours long and JDN agreed to pay Ms Watson \$60.00 for each of these additional shifts.

[17] Mr Cant kept a record of the days Ms Watson worked and the number of shifts worked on each day. He then calculated Ms Watson's wages on a fortnightly basis and recorded this in a wage and time record book. Mr Cant's calculations also accounted for PAYE and recorded the net payment to be made to Ms Watson.

[18] Whilst Ms Watson does not accept JDN's record of work and the subsequent record of wages owed, she was unable to point to any discrepancies and in response to my questioning accepted that the entries reflected at least the general pattern of work outlined above.

[19] Having reflected on the evidence from Ms Watson and Mr Cant, and having reviewed the wage and time record entries made by Mr Cant, I accept that Mr Cant's records are accurate and reflect the wages that Ms Watson should have been paid. For the whole period that JDN employed Ms Watson she earned, and should have been paid, \$9,958.86 (net).

[20] From the wages earned, it is a relatively straightforward step to establish what Ms Watson was paid as Mr Cant produced statements of JDN's bank account, from which wage payments were made. These statements show that Ms Watson was paid \$2,566.07 (net) in

September 2017, October 2017 and November 2017. The statement also shows the loan advanced to Ms Watson of \$1,000.00.

[21] For the purposes of calculating how much Ms Watson was actually paid for her wages I have treated the loan as a wage payment. So Ms Watson was paid a total of \$3,566.07 (net).

[22] The difference between what Ms Watson earned during her employment and what she was paid is the wages she was owed. This was \$6,392.79 (net).

[23] JDN's claim is that Ms Watson owes it the balance of this amount for wages owed to her, offset against the money Ms Watson spent in lieu of wage payments on the JDN credit card.

[24] To calculate the amount Ms Watson spent in lieu of wages on the credit card, JDN reconciled all of the purchases made with the credit card in November 2017, December 2017 and January 2018, set out in the relevant credit card statements, against receipts it had for those purchases. Whilst this appears to be a relatively straight forward exercise there were a number of inherent problems with it, including:

- (a) Ms Watson and one other employee had access to the credit card and used it to purchase personal items lieu of wage payments.
- (b) Other employees had access to the credit card and used it to purchase work items.
- (c) JDN did not receive all of the receipts for all of the purchases made with the credit card during this time.

[25] After considering the credit card statements and making some investigation into the purchases for which it did not have receipts, JDN concluded that all of the purchases on its credit card for which there were no receipts were purchases made by Ms Watson. It calculated that Ms Watson had spent \$11,006.17 on the credit card in lieu of wage payments.

[26] So based on the calculations above, JDN's claim against Ms Watson for repayment of money spent on its credit card in excess of wages owed is for \$4,613.45, not \$7,647.75 as claimed¹.

[27] On one assessment, this seems a credible claim. Ms Watson did not receive any wage slips or other information setting out the wages she should have been receiving, which she could use to gauge her personal spending on the credit card. Therefore, there was always a risk Ms Watson might overspend on the credit card; Ms Watson might spend more in lieu of wages than the wages JDN owed her. Also, a large part of the period of time that Ms Watson used the credit card to make purchases in lieu of wages was the period leading up to Christmas; Ms Watson was more likely to have spent larger sums during this time of the year.

[28] However, the real problem with JDN's claim is that the assessment of spending by Ms Watson on the credit card is not reliable as it attributes all of the purchases on the credit card where receipts were not provided, to Ms Watson. A review of some of the purchases suggests this is probably correct but that cannot be said for all of them. So, for example, there are purchases of petrol attributed to Ms Watson where a large amount of petrol is purchased on consecutive days and it seems unlikely that Ms Watson would have used that much petrol over a short space of time.

[29] The other problem is that JDN failed to explain adequately why it ruled out other employees as being responsible for the purchases on the credit card where there were no receipts.

[30] On the balance of probabilities I am not satisfied that Ms Watson was responsible for all of the purchases on the credit card where there are no receipts. I think it is probable that Ms Watson was responsible for many of the credit card purchases where receipts were not provided. I also think it is possible, if not likely, that her total purchases using the credit card exceeded the amount of wages she earned and JDN owed to her.

¹ I note here that the incorrect amount has been claimed initially because JDN's calculations were incorrect not because its records were wrong.

[31] However, after my investigation, I cannot say, on the balance of probabilities, the amount of the purchases on the credit card that Ms Watson was responsible for and therefore JDN's claim against Ms Watson cannot succeed.

Personal grievances

[32] As outlined above, Ms Watson's statement of problem raises three personal grievances, unjustified dismissal based on constructive dismissal, discrimination and sexual harassment.

Constructive dismissal

[33] The issues to be resolved in respect of the constructive dismissal claim are:

- (a) Was Ms Watson dismissed, applying the test for constructive dismissal; and
- (b) If so, was the dismissal justified, with the onus resting on JDN to show its actions were justified in line with the test for justification and the duty of good faith set out in the Act?

Dismissal

[34] Ms Watson says her resignation is a constructive dismissal because she resigned in response to JDN's actions.

[35] In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*² the Court of Appeal set out three non-exhaustive categories of constructive dismissal:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign;
- (c) Where a breach of duty by the employer leads an employee to resign.

² [1985] 2 NZLR 372 (CA) at 374-375

[36] Ms Watson relies on the third limb in *Woolworths*.

Breach of duty

[37] In *Wellington etc Clerical Workers etc IUOW v Greenwich*³ the Court discussed constructive dismissal arising out of a breach of duty by an employer. Then the Court of Appeal elaborated on requirements for constructive dismissal based on a breach of duty, in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc.*⁴ Based on this case law, in order to determine if Ms Watson was constructively dismissed under the third limb of *Woolworths*, I must consider:

- (a) Was there a breach of duty by JDN as alleged;
- (b) Was that breach of duty sufficiently serious - repudiatory or dismissive - such that it was reasonably foreseeable that there was a substantial risk that Ms Watson might resign in response to that; and
- (c) Did Ms Watson resign in response to that breach of duty?

[38] In order to establish a breach of duty by JDN, Ms Watson relies on the following actions which she says were unjustified:

- (a) JDN's failure to pay wages correctly.
- (b) JDN continually, and without notice, changing her job requirements and her hours and days of work.
- (c) JDN failing to provide a safe work environment in relation to animal cruelty, discrimination and sexual harassment.

³ [1983] ACJ 965

⁴ [1994] 2 NZLR 415 (CA)

Failure to pay wages

[39] JDN failed to pay Ms Watson's wages correctly, relying on the arrangement whereby Ms Watson used JDN's credit card in lieu of being paid wages. This has been traversed in my analysis of JDN's claim against Ms Watson.

Changes to job requirements and hours of work

[40] Based on the evidence from Ms Watson and Mr Cant, I am satisfied that JDN altered Ms Watson's job requirements on one occasion and changed the shift pattern that she worked on two occasions:

- (a) The change to Ms Watson's job requirements was the addition of the calf feeding shift to the regular morning and late afternoon milking shifts that Ms Watson undertook. Both Ms Watson and Mr Cant gave evidence about this and I am satisfied that the change was done after discussion and with Ms Watson's agreement as she wanted additional work.
- (b) As set out in my analysis of JDN's claim against Ms Watson, when she started with JDN she worked consecutive days for two weeks. This was done to cover other employees who were unavailable to work and, I am satisfied that Ms Watson knew of this and agreed to it.

The first change to Ms Watson's shift pattern was a change from the initial work pattern to the standard pattern of work, being morning and late afternoon shifts on Tuesday to Friday. Again, I am satisfied that Ms Watson knew of this in advance and agreed with it.

Ms Watson's hours of work were then changed a second time when she accepted the additional calf feeding work.

[41] Based on my assessment of the changes to Ms Watson's job requirements and hours of work I am satisfied that this was done, as outlined above, with notice and consent and therefore is not an unjustified action as alleged.

Safe work environment

[42] Ms Watson's alleges that Mr Cant was abusive to cows, yelled at her at work and sexually harassed her by making inappropriate comments either directly to her or in her presence.

[43] Ms Watson gave evidence in support of her allegations.

[44] Mr Cant denied the allegations and gave evidence supporting those denials.

[45] I have assessed the evidence from the witnesses, the contemporaneous documents (text messages from Ms Watson referenced below) and the credibility of both witnesses⁵ and have determined that I prefer the evidence of Mr Cant. On this basis I am not satisfied that Mr Cant acted as alleged and therefore that JDN failed to provide a safe work environment.

Repudiatory breach

[46] So the only actions complained of that could give rise to a breach of duty is JDN's failure to pay Ms Watson's wages correctly. I am satisfied that a failure to pay wages correctly is a sufficiently serious breach of duty that could support a constructive dismissal claim.

Resignation

[47] The problem with Ms Watson's constructive dismissal claim is that I am not satisfied that she resigned in response to JDN's failure to pay her wages correctly.

[48] In a text exchange with Mr Cant about work, on 10 January 2018 Ms Watson stated:

Hey going to be late [EVX] still not home from work. Just Tryna [sic] get hold of him

⁵ Applying the principles set out in *R v Biddle* [2015] NZDC 8992 and *Biddle v R* [2015] NZHC 2673.

[49] And then later in the day, having not attended work as EVX had not turned up to look after her children, Ms Watson sent a further text stating:

Sorry, won't be in for the rest of the week. Too much drama right now sorry

[50] Then on 12 January 2018, Ms Watson sent another text which stated:

Hey so I don't think I will be able to come back. I would hate to become unreliable and I wish I could've worked out my notice. Appreciate everything you've done for me. Let me know how much I still owe you and I'll sort out getting it said [sic] asap. Sorry to be emerging [sic] this way but hopefully I've given you enough time to post a replacement.

[51] These text messages indicate that the reason Ms Watson was leaving was to do with "too much drama" in her personal life which appeared to be causing problems with, amongst other things, child care when she was working. There is no mention of failing to pay wages correctly, or any of the other allegations she subsequently made about Mr Cant. And, contrary to someone who was leaving because of the way she was treated, Ms Watson actually thanked Mr Cant for everything he had done for her.

[52] So, on balance I am not satisfied that Ms Watson resigned in response to the failure to pay her wages correctly.

[53] Further, what Ms Watson's actions, prior to her resignation, amount to is acceptance and affirmation of the breach (failure to pay wages correctly) before she resigned.

[54] For constructive dismissal, an employee need not resign immediately in response to a breach by an employer, but continuing to work after a breach may amount to affirmation. The Employment Court in *Premier Events Group Limited and Others v Malcolm James Beattie and others*⁶ stated (footnotes omitted):

[188] Dealing with a further contention that the employees concerned had affirmed their contracts by continuing to work for several weeks after rejection of their claims to tax liabilities and only resigned after that period had elapsed, the Court of Appeal relied on the observations of Browne-Wilkinson J (as he then was) in *WE Cox Toner (International) Ltd v Crook* as follows:

⁶ [2014] NZEmpC 231 at [188].

Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence with the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his right to accept the repudiation ... such further performance does not prejudice his right subsequently to accept the repudiation.

[55] In these circumstances, I believe Ms Watson accepted the breach and affirmed the employment relationship. Ms Watson continued to work, without protest over the wage payment arrangements and participated in the arrangement by using the credit card in lieu of being paid her wages.

[56] Therefore, because Ms Watson did not resign in response to the breach and because she accepted the breach and affirmed her continued employment, there is no dismissal for the purposes of the unjustified dismissal grievance.

[57] Ms Watson's claim for unjustified dismissal cannot succeed.

Discrimination

[58] As set out above, having assessed the evidence about discriminatory behaviour, I am not satisfied that Mr Cant acted as alleged and therefore I am not satisfied that he discriminated against Ms Watson. There is no basis for Ms Watson's discrimination claim.

Sexual harassment

[59] The same assessment applies to Ms Watson's sexual harassment claim as applies to the discrimination claim. Based on my assessment of the evidence I am not satisfied that Mr Cant acted as alleged. There is no basis for this claim.

Conclusion

[60] JDN's claim against Ms Watson for repayment of money spent in lieu of wages on its credit card is dismissed.

[61] Ms Watson's personal grievance claims are all dismissed.

Costs

[62] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[63] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority