

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 133
5407254

BETWEEN

DENISE JOY JUSTICE
Applicant

A N D

FMS (2009) LIMITED Trading
As FASTWAY NELSON
Respondent

Member of Authority: M B Loftus

Representatives: Denise Justice on her own behalf
Stephen Power and Theresa Power for the respondent

Investigation meeting: 28 June 2013 at Blenheim

Submissions Received: At the investigation meeting

Date of Determination: 2 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Denise Justice, claims to have been unjustifiably dismissed, albeit constructively, from her employ with the respondent, FMS (2009) Limited.

[2] FMS claims Ms Justice left on her own volition.

Background

[3] Ms Justice commenced working as a courier driver operating from FMS's Blenheim depot on 6 August 2012. The employment was fraught with tension between Ms Justice and both her manager, Ms Bryce, and colleagues.

[4] The difficulties with Ms Bryce arose from three letters criticising aspects of Ms Justice's performance. These had been passed on the instruction of Mr Stephen Power, a shareholder and director of FMS based in its Nelson office.

[5] Ms Justice responded with various complaints about Mr Bryce and on one occasion at the end of October and having received the third performance admonition claims to have done so in writing. FMS denies receiving the document in question and, accordingly, there was no response. Ms Justice did not pursue the lack of a response.

[6] Similarly there were issues between Ms Justice and one of her colleagues, Mel. Ms Justice says Mel's behaviour and comments amounted to bullying. She claims she complained frequently but FMS failed to address the situation.

[7] FMS has a differing view. It accepts it was common to receive phone calls from all of the Blenheim staff *whinging* about one or other of their colleagues. The consistent answer was *put it in writing* so FMS could both identify a pattern and have something concrete upon which to base an investigation. FMS claims it never received a written complaint from any of those involved.

[8] The chain of events which, from Ms Justice's perspective, constituted the final straw and brought about her resignation, commenced on Friday 7 December 2012. As she was leaving work Mel handed her an envelope. Ms Justice did not read the contents until given cause to do so by the comments of another colleague she met in a shop later that day. The colleague advised concern as Mel had told her Ms Justice had been dismissed.

[9] The letter, which was unsigned, purported to come from both owners, Mr Power and his wife Theresa. It advised Ms Justice of her immediate dismissal for three alleged transgressions.

[10] Ms Justice says that as the letter was not signed she tried to get hold of the Powers. She claims they ignored a number of messages until she left one advising she would be returning to work the following Monday as she did not consider an unsigned letter to have any status. She says, in her statement of problem, Mrs Power responded and advised *I would receive an official letter next week*.

[11] Ms Justice says she then challenged the rationale for her alleged dismissal and a conversation ensued during which Ms Power offered Ms Justice the following week off on pay. Ms Justice says she declined.

[12] Again FMS disagrees. It says there was a phone conversation between Ms Justice and Mrs Power on the Saturday. Mr Power was also present though only heard one side of the conversation. They say Ms Justice raised the alleged dismissal and Mrs Power, not knowing anything about it, said *not us, take a week off while we investigate* or words to that effect. They claim the conversation went no further and there was no discussion about the alleged deficiencies which had led to the purported dismissal.

[13] The following Monday, 10 December 2012, Ms Justice was absent due to illness. She returned on Tuesday 11 December. She says she was subjected to derogatory comments from Mel and told to give her phone, an essential work tool, to a relief driver. That, to her, was the final straw. She says she could not do her job without a phone as she would have no contact with either depot, Blenheim or Nelson.

[14] Ms Justice says she decided to resign, went home, wrote a letter of resignation and posted it. There was no response and she was not paid the contractual notice period of two weeks. That led to the initiation of a grievance on 23 December though that letter also failed to elicit a response.

[15] Again FMS has a different view. It says it received none of the above correspondence. It did, however, receive a text at 6.48am from the phone issued to Ms Justice. It reads:

U will receive a copy of my resignation letter in the post. Due 2 reasons 4 my resigning. I can not wrk out my 2 weeks notice there4 i expect that and my holiday pay 2 b in ac this thursday 13 Dec 2012

[16] Ms Justice denies sending the text. She denies even having the phone from which it was sent at the time as it had been confiscated the previous Friday when Mel passed the letter. Ms Justice's oral evidence was Mel then advised protocols had changed and both keys and phones had to be returned when not required during work hours.

[17] That said, the key points of the text are reflected in the letter. Ms Justice was leaving immediately but sought both her holiday pay and two weeks' notice. FMS paid the holiday pay but continued to try and contact Ms Justice asking that she return. It claims it was unable to contact her and left a couple of messages advising

she could return to her job if she so wished but there was no response. Ms Justice denies receiving the messages.

Determination

[18] As already said, Ms Justice claims she was constructively dismissed.

[19] However, before considering the claim comment is required about the possibility the resignation was preceded by an overt dismissal conveyed via the letter of 7 December.

[20] Having considered the evidence I conclude Ms Justice was not dismissed on 7 December. I reach this conclusion for the following reasons:

- a. Ms Justice never claimed FMS dismissed her on 7 December. When I raised this possibility, and notwithstanding oral evidence she gave suggesting Mrs Power indicated knowledge of the letters content during the telephone conversation of 8 December, she stated no. She was not suggesting she was dismissed that day and gave an unprompted concession she originally thought the letter was written by Mel and that was one reason for disregarding it;
- b. The evidence suggesting Mrs Power knew the letters content when they discussed it on 8 December, was confused and inconsistent but, for reason outlined in 32 below, I prefer Mrs Power's recollection; and
- c. I had the opportunity of seeing both Mr and Mrs Power when they read the letter. Given their reactions, initial comments and subsequent evidence I accept their denial of authorship.

[21] Returning to the claim of constructive dismissal. In *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965 the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[22] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[23] There must also be a causal link between the employers conduct and the tendering of the resignation (*Z v A* [1993] 2 ERNZ 469).

[24] While a simplistic summary of significantly more complex law, the assumption underlying the concept of constructive dismissal is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Ms Justice to establish, *prima facie*, there was such a breach.

[25] Ms Justice claims she could no longer remain in FMS's employ due to bullying by Mel and the fact FMS's breached its duty by failing to address her concerns when she brought them to its attention.

[26] I conclude she has been unable to do so and reach the conclusion for the following reasons.

[27] As already said, Ms Justice's evidence was confused and there was an inability to identify when key events occurred. Examples include three instances of alleged bullying by Mel, the telephone conversation with Mrs Power (which Ms Justice variously said it occurred on both the Saturday and the Sunday) and the question of whether the phone was removed from her possession on Friday 7 December or the following Tuesday.

[28] There were also a number of instances upon which she was unable to answer a question about pertinent events. Too often she admitted she *did not know* or *could not really remember what was said*. That makes it difficult to discharge the onus she has of establishing a *prima facie* case.

[29] Ms Justice also relied upon accusations which she should have known to be incorrect. For example she alleged her position was affected by Mel having been made Blenheim depot manager yet concedes that in November Mr Power expressly told staff he was seeking a self-managing team and there was to be no manager in the future. I also find it improbable the resignation text was sent by someone other than Ms Justice given similarity to the content of the resignation letter and the fact it was sent before Ms Justice says she left to go home and write the letter.

[30] Various documents Ms Justice says she sent to FMS as e-mails are simply not e-mails. They are word documents and there is no evidence they were ever actually sent. The evidence is further weakened by the fact there is no documentary allegation against Mel – the only documented complaint targeted Ms Bryce. The effect of the absence of a complaint against Mel is magnified by the fact Ms Justice concedes Mr Power probably did tell staff to put their complaints in writing.

[31] Finally there is Ms Justice's own concession a significant part of the conduct she complains about was minor and nothing more than an inconvenience. That would seem an admission the alleged conduct may have been inconsiderate and caused some unhappiness but as was said in *Greenwich* that is an inadequate base upon which to found a claim of constructive dismissal.

[32] There is then the final chain of events and there another issue arises. Ms Justice's prime assertion is her resignation was ultimately caused by FMS's failure to address her concerns. The evidence of Mr and Mrs Power was not afflicted by the deficiencies described above. I therefore prefer it when considering the telephone conversation of Saturday 8 December and accept the assertion Ms Justice was told to take a week off, on pay, while FMS investigated. It was Ms Justice who chose to ignore the instruction thus triggering a final showdown with Mel on 11 December but, in any event I conclude FMS had commenced a process aimed at addressing Ms Justice's concerns. The rationale for tendering the resignation is severely undermined.

[33] Given the above and as already said, I conclude Ms Justice has been unable to convince me she was forced to resign as a result of her employer actions. Her claim is therefore dismissed.

Costs

[34] FMS has successfully defended the claim. It is therefore entitled to a contribution toward the cost of pursuing it. However both Mr and Mrs Power are officers of the company and there are no legal costs. Reimbursable costs are therefore limited, if not non-existent.

[35] As a result, and given a costs determination can be revisited, my preliminary conclusion is they lie where they fall.

M B Loftus
Member of the Employment Relations Authority