

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 82/09
5120817

BETWEEN LARYANNE MOIR
 Applicant

AND COLES MYER NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Rachel Brazil, Counsel for Applicant
 Penny Swarbrick, Counsel for Respondent

Investigation Meeting: 8 October 2008

Submissions received: 1 December 2008 from Applicant
 2 December and 8 December 2008 from Respondent

Determination: 16 June 2009

DETERMINATION OF THE AUTHORITY

[1] Ms Moir claims she was unjustifiably dismissed from her position as administrative assistant at the respondent's Kmart store in Dunedin. She began her employment on 16 May 2006 and was dismissed on 20 March 2007 for refusal to carry out *a reasonable request by management*. *That request being that you fulfil your role of check scanning within the Dunedin store*. Ms Moir was paid one week's notice on termination.

[2] She seeks remuneration lost as a result of her reduction of pay on 12 February 2007; remuneration lost as a result of the alleged personal grievance; compensation for humiliation, loss of dignity and injury to feelings; penalties for a breach of s.136(2) of the Employment Relations Act 2000; and costs.

[3] In an amended statement in reply, the respondent denies the applicant was unjustifiably dismissed but that her employment was terminated after proper process

for repeatedly failing to follow reasonable directions. Further, the respondent denies it breached its obligations to Ms Moir under its Health and Safety policy or under s.4 of the Act. Accordingly, it declines to meet the remedies claimed by the applicant.

What caused the problem?

[4] Ms Moir's tasks involved significant data entry when she began working for the respondent and she says a combination of poor induction and substandard office equipment gave rise to ongoing difficulties in doing her job. Ms Moir accepts she had little experience in this field of work but says the respondent knew that prior to her appointment. She took her concerns to store management and says, after some two months and getting no response, she took the issues to the health and safety committee in August 2006. Nothing changed says the applicant, but she persisted in her work tasks as best she could until she approached the acting store manager, Mr Ivory, in October 2006.

[5] About this time, Ms Moir began experiencing pain in her wrists, neck, shoulder and upper arms. Her general practitioner suspected carpal tunnel syndrome likely to have links to her work duties. At the same time, the applicant suffered a bout of bronchitis and took sick leave, returning to work on 31 October 2006.

[6] When returning to work, Ms Moir took a NODS form from the Occupational Safety and Health division of the Department of Labour. The form required some sections to be completed by the employee and some by the employer so the applicant approached the new store manager, Mr Coles, who declined to fill out the employer section on the form.

[7] Mr Coles said he declined on the grounds he was unfamiliar with the form and the OSH protocols as this was his first store manager appointment, having come from a sales manager role in Christchurch. He says he was not refusing, but needed more information on any relevant company policy regarding such matters. Accordingly, he forwarded the form to the respondent's health and safety adviser who briefed him and Mr Coles duly completed the form and returned it to the Department of Labour. An Improvement Notice was duly issued on 10 November 2006 and was actioned by the company promptly, although the redesigned furniture for the work stations did not arrive until January 2007.

[8] The applicant points to the improvement notice citing s.3 which quotes *Laryanne Moir sustained a serious harm injury from hazards in the workplace*. Later, this view was contradicted by ACC which declined to accept the damage as a work-related injury.

[9] As the new store manager, Mr Coles set about meeting with key administration and service staff in order to understand their roles in the store. As part of that process, he approached Ms Moir in the office on 1 November 2006 asking her to meet with him and briefly outlining the purpose of the meeting. A time was arranged for later that day. However, when Ms Moir failed to arrive at his office, he went and located her. He says he was told she *did not attend because I had not sought her out and invited her to my office*. When he suggested they go to his office and hold the meeting at that time, Ms Moir refused. She told her manager that she needed more notice and also to have the opportunity to bring a witness to be present at the meeting.

[10] Mr Coles suggested meeting the following day and said that the meeting was not disciplinary but she could bring a witness if she chose. They met the following day with a Wendy Davis as support for the applicant and Mr Nigel McCleery present to take notes. Mr Coles outlined that the key purpose of the meeting was to clarify Ms Moir's role in the Dunedin store and he went on to discuss *a couple of tasks* he noticed were not being completed, some of which were necessary for audit purposes. He asked the applicant why these tasks had not been completed and was told she did not have the time. She also told him she needed a detailed list of the tasks she was to perform and said her training was insufficient for the job she was expected to do.

[11] Mr Coles said he did not have such a detailed document available. He asked Ms Moir to advise him if she did not know how to do a particular task and he would ensure she had training. He said Ms Moir told him that she would not come to him if she had problems with a given task.

[12] The company code of conduct was raised by Mr Coles in the meeting also. The applicant said he accused her of inappropriate behaviour. However, Mr Coles says that this was not the case but centred on the general principles of being courteous, patient and respectful when dealing with staff, customers, suppliers and contractors. He says his comments were general and not pointed at Ms Moir.

[13] Mr Coles summed the meeting up as being *quite difficult*. *Laryanne challenged me on every topic we discussed. She was not prepared to accept any of the direction I was giving her and was also not prepared to participate in any training.* He denies there was any issue raised regarding her injuries, nor any reference to a visit to her doctor. Mr McCleery's notes, which are reasonably comprehensive, do not refer to either of these topics, nor do they refer to any forms provided to the applicant at that time. The same is true of Ms Davis's notes

[14] On 6 November 2006, the applicant gave the company the medical certificate relating to suspected carpal tunnel. The certificate indicated the applicant would be unfit for work until 13 November. Ms Moir continued to present medical certificates and, apart from a brief period of some 45 minutes, did not work for the respondent until 15 January 2007. The company continued to pay her full wages until it notified her on 12 January 2007 that her sick leave entitlement had been exhausted and that as from early February it would be able to pay her only for the hours actually worked.

[15] In mid-November 2006, the applicant presented another medical certificate saying that she would be fit to begin a gradual return to work on 20 November. Mr Coles discussed this with Ms Moir, saying he needed a full time person in administration but suggested he look for another role she could undertake. Mr Coles said he was reluctant to allow the applicant to return to work until fully fit and was trying to balance his need for a full time administration person and accommodate the employee's return to the store.

[16] Ms Moir came to the store briefly on 22 November 2006 and asked for a letter to assist her and her doctor have ACC accept her claim as it did not accept she was unable to work part time. The letter says:

To whom it may concern

It is the position of Kmart that we do not wish to have Laryanne Moir in the business until she is 100% fit and capable of resuming full time work.

*Sincerely,
Jamie Coles
Store Manager
Kmart Dunedin*

[17] At a meeting between Mr Coles and Ms Moir on 29 December 2006, Mr Coles explained the company could not continue to pay her wages without her returning to

work, that she could not return to her administration role until medically cleared for full time work, and he suggested the role of Door Greeter, a level 2 position, as an alternative position.

[18] Ms Moir told Mr Coles she would not return to her administration position because of the lack of training, a statement that clearly surprised the store manager given the applicant's refusal of assistance at their earlier meeting. She also asked Mr Coles what would happen if she declined the door greeter position. He replied he was unsure, but asked her to consider it over the weekend and give him her answer on the following Monday. Ms Moir inquired about two other specific roles but was told there were no vacancies in the areas concerned.

[19] On the following day, Mr Coles said he entered his office to find Ms Moir sitting in his chair. She advised him that she would not accept the door greeter role and debated its grade status in the store, refusing to accept it was a designated grade 2 position. Prior to departing, Ms Moir told her manager she expected her wages to be paid until he had sorted matters out.

[20] Another meeting took place between the pair on 12 January 2007 to discuss again the applicant's return to work. A new role had become available in the lay-by department. It was full time and seemed well suited to Ms Moir's ability and the current staff member in that department would train the applicant for two weeks. Mr Coles said the applicant appeared keen at this prospect and returned to work on Monday, 15 January 2007.

[21] The following day, Ms Moir handed her manager another medical certificate clearing her for part time work only from 16-29 January. Mr Coles said that was workable for the two week training period, but that following training Ms Moir would need to work full time in the lay-by department.

[22] The pair met again on 1 February 2007 when Mr Coles wanted to make sure the applicant's return to full time work was on track. He says Ms Moir told him *nothing had changed*. He further advised the applicant that as from 12 February 2007 the company would pay her for the hours she worked if she was not working full time hours. He says he also reminded Ms Moir the lay-by position was full time and that if she was not in a position to work full time he would need to find a part time position in the store.

[23] He then described the part time role available at the time, that of a check scanning position, and assured Ms Moir she would be fully trained for that role. Mr Coles said the applicant's employment would be on a part time basis until she was able to return to full time employment.

[24] On 13 February, the applicant telephoned another store employee and told her she was not coming to work as she was stressed. On 19 February, Ms Moir handed Mr McCleery a letter addressed to Mr Coles, who was absent at a manager's meeting in Auckland. When contacted, Mr Coles instructed Mr McCleery to open and read the letter to him. The letter raised a personal grievance against the respondent.

[25] The letter reads:

Personal grievance

Jamie,

This is my personal grievance:

1. *I feel that Kmart has changed the terms of my employment contract – cl 23.6, by advising me on the 1st of February 2007, that Kmart would not be paying my full wages from 12 February.*

I object to this and I have not been consulted in any capacity leading up to this decision by Kmart New Zealand – effective 12 January 2007.

2. *I feel that Kmart NZ initially accepted my injury, but are now questioning this for months later.*
3. *I feel that Kmart has hindered my return to the workplace in their actions with ACC and not allowing my early gradual return.*
4. *I feel that Kmart is exerting adverse pressure on me to return to full time work, despite and contrary to medical evidence. I feel that Kmart are bullying me.*

I would like Kmart to find a solution to my grievances.

Laryanne Moir

[26] To cut to the issue, Mr Coles proposed solutions available to him on the terms set out in the (usually vague) medical certificates provided to him. Ms Moir was unable to return to full time work and she was offered the only part time role available in the store at that time.

[27] Mr Coles attempted to discuss the position on 27 February 2007 at 10.30am. The applicant alleges Mr Coles took her grievance letter, screwed it up and threw it in the rubbish bin. Mr Coles denies this. When reminded of the discussion of the check

scanning position offered to her, Mr Coles said Ms Moir told him she did not recall any such discussion.

[28] Ms Moir left her manager's office. She was asked to return. Ms Moir refused and went to the lay-by counter. Mr Coles went to the counter and asked her to return to his office to continue the discussion. She refused. Mr Coles said *I explained to her that a continued refusal to pick up the check scanning role or discuss the matter with me would have serious consequences. Laryanne told me she did not want to speak to me, I was to go away and leave her alone, her voice was raised to the point of yelling. I suggested we meet the next day to discuss the issues when we were both calmer. Laryanne again refused and kept repeating I was stressing her out and I was to leave. I did not yell or raise my voice at Laryanne.*

[29] Mr Coles decided to walk away from the situation rather than continue on the shop floor.

[30] Before the meeting took place between Mr Coles and Ms Moir on 28 February 2007 to discuss the check scanning role, he advised the applicant that the request she undertake this role was reasonable in the circumstances. He also told her that her continued refusal could affect her ongoing employment, and if she continued to refuse to undertake the role, he would suspend her for the rest of that day. After advising Mr Coles that he would hear from *her lawyer*, the applicant left the building.

[31] Yet another meeting took place on 1 March 2007. Mr Coles again explained the check scanning role and the equipment used and the training to be provided to her. Ms Moir refused, saying she would not be uplifting the role but gave no reason for her decision. Mr Coles told Ms Moir that, if she was not prepared to take on this position, she would need to go home. Eventually, after challenging Mr Coles on a number of issues, Ms Moir went home.

[32] On 20 March 2007, Mr Coles telephoned Ms Moir. He inquired whether her position had changed regarding a return to work. He said Ms Moir said *nothing had changed* but would return when she could secure a position in the office or in lay-by. Mr Coles said he then attempted to discuss the check scanning role but was told by Ms Moir she would not be taking that position.

[33] Mr Coles told the Authority *I advised that if she was not going to come in and discuss the situation and she was not going to pick up the check scanning role I would*

have no choice but to terminate her employment. Laryanne said that was fine and she would like that in writing together with her final pay ... I sent confirmation of the termination on 27 March 2007.

The issues

[34] To resolve this matter the Authority needs to make findings on the following issues:

- Did the respondent breach its obligations to the applicant in respect of s.4 of the Employment Relations Act 2000; and
- Did the respondent breach its health and safety policies by failing to provide a safe working environment; and
- Was the applicant unjustifiably dismissed; and
- If so, what, if any, remedies are due to her; and
- Did the applicant contribute to the circumstances which gave rise to her dismissal?

The investigation meeting

[35] At the investigation meeting, the Authority heard from the applicant, from Ms Lara Elliot, Ms Megan Hall and Ms Meg Reid. For the respondent, Mr Coles gave evidence and helpfully provided his contemporaneous notes of various events and also Mr McCleery's handwritten notes of the meeting on 2 November 2006. These have materially assisted the Authority in analysing contemporary events and interactions between the key players.

[36] I took note of the interaction of witnesses in the course of the investigation. In particular, I observed the applicant's dismissive attitude when I was questioning Mr Coles on his evidence and of her overstatement at times of her own position and on occasions, without accurate recall.

[37] While I have no doubt Ms Moir has a staunch belief that she was handed a raw deal by the respondent, I believe her recall was significantly flawed on key issues and her attitude was unduly and unnecessarily pugnacious in the course of the meeting.

[38] The Authority also received an affidavit from a solicitor engaged earlier in this matter, Janet Shirley Marquet. The document is brief but was not particularly helpful in that her recollection was that Ms Moir told her Mr Coles was insisting on her working FULL TIME in the check scanning role and at the request of Ms Moir, the witness says she sent a letter to Mr Coles setting out her client's concern and *in particular the insistence that she take on the check scanning position on a full time basis*. Mr Coles says he never received a letter or fax from Ms Marquet and no copy of this was presented to the Authority on behalf of the applicant. Ms Marquet also says she later spoke with Mr Coles by phone *but he seemed unable or unwilling to change the situation*. Mr Coles strenuously challenges this statement saying he does not recall such a telephone conversation and, in addition, it is not referred to in his comprehensive notes he was maintaining from 2 November 2006 through until the dismissal.

[39] In general, where a conflict of evidence occurs in the matter before the Authority, I have generally favoured the credibility of Mr Coles, supported by both his and Mr Mcleery's notes

The test

[40] The test to be applied in respect of the alleged unjustified dismissal is set out in s.103 of the Employment Relations Act 2000.

The question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

Analysis and discussion

[41] Above, I have set out the circumstances leading to the matter before the Authority relatively fully. The purpose is to outline the positions taken by each party as the problem developed, in particular, the efforts made to keep the applicant in suitable employment having regard to her health.

[42] Several conflicts in evidence emerged from the evidential statements provided to the Authority. One such conflict was the assertion Mr Coles had screwed up Ms Moir's grievance letter in the course of their 27 February meeting and thrown it into the wastepaper bin. Mr Coles strenuously denied this and produced the original

to the Authority. The original has two fold lines across it consistent with having been folded in three for placing in an envelope. There are no other creases on the document consistent with it having been screwed up. This letter raises four issues and finishes with *I would like Kmart to find a solution to my grievances.*

[43] The first complaint was the allegation that the respondent breached clause 23.6 of the agreement. This clause states:

You shall be paid 100% of normal weekly earnings when on accident compensation (ACC) due to a work related accident up to a maximum period of six months from the date of the injury.

[44] Two issues arise. On 22 November 2006 at Ms Moir's insistence, a letter was written by Mr Coles to assist her and her doctor in their dealings with ACC. A further aspect is that, as Ms Moir was unable to work full time and her sick leave entitlements had expired, Mr Coles was entitled to advise her that she would be entitled for payment for the hours she worked. He advised her of this on 1 February 2007. However, this was in the then context of the applicant taking on a full time role in lay-by. By my calculation, the applicant would have commenced that role on the Monday following 12 February, so in fact would not have had her wages adjusted had she commenced in that role. It was simply Ms Moir's statement that *nothing had changed* which led to Mr Coles raising the check scanning position on a part time basis. It is noted at this time Ms Moir did not refuse this position.

[45] The second issue was the applicant's view that, having initially accepted her injury, the respondent was now questioning it four months later. There was scant evidence to support this view and the attempts by Mr Coles to find Ms Moir a suitable position which would enable her to continue her employment were commendable, if unfruitful.

[46] The third complaint was that Kmart had *hindered her return to work through its actions with ACC* in not allowing her gradual return to work. The evidence in respect of the lay-by position was that Mr Coles was pleased to accommodate reduced hours during the two week training period. That was a gradual return to work.

[47] Finally, there is the allegation that Kmart was *bullying me*, by exerting pressure on the applicant to return to full time work. The actions of Mr Coles as outlined above simply do not support this thesis. Mr Coles, in the face of a difficult situation, made every effort to find an alternative role for the employee whose

behaviour, at times, was uncooperative and, at others, intransigent in the face of his efforts.

[48] Turning to the actual dismissal in the telephone conversation on 20 March 2007, the applicant cries foul over the method of her dismissal. However, Mr Coles' actions must be viewed in the round. As is clear from the facts and the evidence, Mr Coles met with Ms Moir on 28 February 2007 to discuss the check scanning position, the only part time position available at the time. His evidence was that his request to undertake this role was reasonable and that continued refusal could affect her ongoing employment. He said he asked Ms Moir to seriously consider her position and if she continued her refusal, he would suspend her for the remainder of that day. His evidence was that the applicant told him he would hear from her lawyer and she promptly left the office.

[49] An issue arose from the applicant not having her bag checked as she left the store that day, a requirement of all departing employees. The matter is moderately minor and although Ms Moir was upset by the incident, Mr Coles was entitled to require the applicant to have her bag checked as she left the store. Having said that, I set the matter to one side.

[50] Mr Coles telephoned Ms Moir and asked her to come into his office when she arrived for work on 1 March. The applicant went to work but did not go to Mr Coles' as requested. He sought her out, asking that she go to his office with him so he could run through the role and the training to be undertaken. He says he spent 10 minutes explaining things to Ms Moir. That done, he asked Ms Moir to come on to the shop floor where he would *team her up* with another employee for her training. Ms Moir refused and told Mr Coles she would not be doing the job but did not say why. Mr Coles told the applicant that if she was not going to do the training for the role, she would need to go home. She refused but said she would sit out her shift in Mr Coles' office. He said she could do this but would not be paid.

[51] Ms Moir then told her manager she was now ready to go back to the administration position. Mr Coles explained again this was a full time position and had been filled as Ms Moir was aware, and was not available to the applicant. Ms Moir asked Mr Coles if he was firing her. He said no, but he would not pay her for doing nothing. Ms Moir then left the office and returned home.

[52] Ms Moir told the Authority she knew she could not do the job. That appears not to have been raised with Mr Coles whose evidence was he asked her *to at least give the role a go* to see whether it was safe for her after doing the training and the tasks for a period of time. Clearly, Ms Moir refused to take up the role. Mr Coles rang her on 20 March 2007 and asked if she was returning to work only to be told she was not returning to work until he could offer her a position in the office or in lay-by. Once again, Mr Coles asked her to come in and discuss the check scanning position. However, Ms Moir told him there was no point and she would only repeat what had been said earlier and she would not fill that position.

[53] Mr Coles told the Authority *I asked her again if we could meet ... I advised her that if she was not going to come in and discuss the situation and she was not going to pick up the check scanning role I would have no choice but to terminate her employment. Laryanne said that was fine and she would like that in writing together with her final pay. By this stage I was in no doubt that Laryanne had no intention of doing what I had asked. She had not provided any reasons why she would not undertake the role and she had not provided any updated information about when she could return to full time work. I sent the confirmation of the termination on 27 March 2007.* The letter confirms payment of a week in lieu of notice which appears consistent with the employment agreement.

Alleged breach of good faith

[54] The statement of problem alleges breaches of s.4 of the Employment Relations Act 2000. Ms Brazil addresses this issue in her submissions correctly, that the parties to an employment relationship are required to be active and constructive in establishing and maintaining a productive relationship *in which the parties are among other things responsive and communicative.*

[55] The breaches are said to lie in the respondent's insistence that *no injury in fact occurred in ACC's decision to decline Ms Moir cover.* The fact is that the respondent was more than somewhat in the dark regarding the cause and extent of Ms Moir's injury. The decision of ACC conveyed to Ms Moir on 14 June 2007 assists neither party materially.

[56] What does assist is the persistence of Mr Coles, in spite of the difficulties he faced, to attempt to find Ms Moir a role he believed met her physical capacity at the

time. Neither he nor Ms Moir had any objective confirmation as to the genesis of the injury. I think it fair to say Mr Coles was responsive but given the applicant's reluctance to be communicative, did what he could to assist Ms Moir.

[57] In respect of the alleged breach by Mr Coles' behaviour over Ms Moir's personal grievance letter and the submission that there is *a very real possibility that Mr Coles had in fact crunched the letter up and threw it in the rubbish bin*, I do not accept that submission as the document is in front of me as I write. Its condition is as described above.

[58] On the matter that Ms Moir was working *successfully in the lay-by department*, the submission put to the Authority that this *was only days from being medically cleared for full time work* is simply unproven. There is no probative evidence before the Authority that her medical adviser(s) had stated to either the applicant or the respondent that this timetable was certain.

[59] In considering the evidence before the Authority, I cannot accept Ms Moir was subjected to a breach of the respondent's obligations to her under s.4 of the Act. While it may be that the interchanges between Mr Coles and Ms Moir were at time testy, that in itself does not constitute a breach.

All practicable steps taken for applicant's safety

[60] Ms Moir's evidence was that she took her work station concerns to three managers. The allegation is that none took her concerns *seriously*.

[61] There is some merit in this. When questioned by the Authority, Mr Coles accepted that no assessment of the applicant's work station was undertaken as to its suitability for Ms Moir. Ms Moir took her unanswered concerns to the health and safety committee. Mr Coles accepted, under questioning, the health and safety committee minutes were deficient as they made no reference to the site visit by an OSH inspector nor receipt of the improvement notice.

[62] While I accept improvements were made, including the prompt replacement of the applicant's chair at her work station, Mr Coles accepted that, upon the employing of an administration or data entry person, work stations were not assessed for suitability for the incoming employee.

[63] Some may say that this requirement is an undue burden on an employer or that it simply represents best practice. The answer to those propositions is found in Kmart's response which included the redesign of the administration work stations and its prompt acceptance of the improvement notice. Not all matters included in that notice were matters put to the company by the applicant.

[64] Having considered the issues in relation to this claim, I am of the view there is some merit in the applicant's position. However, it needs to be said, I do not accept the suggestion Ms Moir's condition resulted solely from the inadequate set up of her work station alone.

[65] In considering all the evidence, I think the applicant was disadvantaged by the respondent's delay in attending to what is, in fact, a relatively serious matter.

Determination

[66] Applying s.103A to this very particular matter in which the employer, having done all that could have been expected of it, and in the face of yet another refusal on the part of the applicant and having no alternative part time work available for her, that is, in *all the circumstances*, was justified in dismissing the applicant.

[67] Returning to the issues set out above in this determination, I find:

- The applicant was justifiably dismissed and there was no prejudice to the applicant, given her behaviours, in being dismissed in the course of a telephone call. I stress this is a factor specific to this case and its circumstances.
- The applicant was not subjected to breaches of s.4A of the Employment Relations Act 2000 on the part of the respondent.
- The applicant has been disadvantaged unjustifiably by the respondent's dilatory response to what I find are its obligations under its health and safety policy. This is not a finding that the applicant's injury arose solely from this issue.
- The applicant is entitled to a remedy on the basis of the finding of disadvantage only.

- Ms Moir in no way contributed to the respondent's failure to address the safety of her work station.

Remedies

[68] The respondent is to pay the applicant the sum of \$4,000 without deduction under s.123(1)(c)(i) of the Act in respect of the disadvantage found under s.122 of the Act.

Costs

[69] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority