

Attention is drawn to the
order prohibiting publication
of certain information in this
determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 151/07
5079862

BETWEEN TANIA MANSON
 Applicant

AND X LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Miriam Sinclair, Counsel for Applicant
 Simon Barr, Counsel for Respondent

Investigation Meeting: 10 October 2007

Submissions received: 19 October 2007 from Applicant
 26 October 2007 from Respondent

Determination: 14 December 2007

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] Following the investigation of this employment relationship problem on 10 October 2007, the director of the respondent company, Ian McDonald, wrote a letter to the Authority which was attached to Mr Barr's final submissions and served on Ms Sinclair.

[2] Mr McDonald asked that there be an order that the identity of the respondent not be published. He set out in his letter the reasons for the request which was based on difficulties he had had with previous employees. Mr McDonald made it clear that his concerns regarding the applicant were minor in comparison to what had happened with former disgruntled employees.

[3] Particularly persuasively he made submissions about the difficulties for his wife and children. Mr McDonald explained the effect that threats and telephone calls have had on his children. He has been required to keep one of his children away from the city at night following a threat to firebomb the family home. He said that the Police have been involved in some situations involving damage to business and vehicles at home. Mr McDonald is worried that any further publicity at all will provide an opportunity for further attacks on him and his family and business which includes current employees.

[4] I held a telephone conference with Ms Sinclair and Mr Barr shortly before releasing the determination. Ms Sinclair said that her instructions were to leave the decision about publication to the Authority and not consent or oppose the application.

[5] In the very unusual circumstances of this matter there is a real risk that any further publicity may impact on the ability of Mr McDonald's family to live a normal life. The Authority will make an order that the identity of the respondent and the identity of the city that the respondent operates its business from be prohibited from publication under clause 10 (1) of schedule 2 of the Employment Relations Act 2000. I want to make it clear that the order is not made on the basis that there is any concern whatsoever about the behaviour of Ms Manson or anyone else that she knows toward the respondent. I shall refer to the respondent in this determination where necessary as X Limited.

Employment Relationship Problem

[6] The applicant, Tania Manson says her employment relationship problem concerns her hours of work. Ms Manson's employment agreement with X Limited provided that she was to be rostered for a minimum of 40 hours per week.

[7] Ms Manson said that after some exploratory surgery she returned to work at the respondent's shop on 24 August 2006 and was told that she would not be rostered for 40 hours per week.

[8] Ms Manson went to see a solicitor who raised a personal grievance of unjustified action causing disadvantage by letter dated 30 August 2006.

[9] Ms Manson did not present for work after 24 August 2006 and says that she was unjustifiably disadvantaged or unjustifiably constructively dismissed.

[10] X Limited is a duly incorporated company. It trades as a food centre. Ian McDonald is the director of X Limited. Mr McDonald says that the change to Ms Manson's hours was only temporary for a two week roster period because he had already prepared the rosters and there was no intention to permanently change her hours.

[11] He says that after he received the letter from Ms Sinclair advising of a personal grievance he telephoned both Ms Sinclair and Ms Manson to advise that there were hours available during the two week period but he said Ms Manson would not talk to him about her availability for work.

[12] Mediation took place between the parties in late October 2006 but the matter was unresolved.

[13] Following mediation Mr Barr sent a letter dated 30 October 2006 to Ms Manson's representative. The letter provided that Mr McDonald had not permanently reduced Ms Manson's hours of work and was ready and willing to roster her on for 40 hours per week. Mr Barr asked in the letter for an indication of when Ms Manson could return to work.

[14] On 3 November 2006 Ms Sinclair wrote to Mr Barr and advised that due to the nature of the relationship and the current situation Ms Manson remained unable to return to work.

[15] The statement of problem dated 26 February 2007 was then lodged with the Authority. It said that the problem was that Ms Manson had been both unjustifiably disadvantaged in her employment and constructively dismissed.

The issues

[16] The issue for the Authority are:

- What were Ms Manson's terms and conditions of employment;
- What led up to and what was said, at the meeting on 24 August 2006;
- Was there an unjustified action causing disadvantage to Ms Manson on 24 August 2006;

- Was Ms Manson unjustifiably constructively dismissed;
- If Ms Manson was disadvantaged or unjustifiably constructively dismissed, what remedies is she entitled to and is there issues of contribution.

What were Ms Manson's terms and conditions of employment?

[17] Ms Manson had a written individual employment agreement with X Limited dated 22 June 2006. The rosters provided to the Authority at the investigation meeting support that her first day of work with X Limited was in all likelihood 26 June 2006.

[18] The individual employment agreement describes Ms Manson's position as shop assistant/lotto sales person/kitchen hand.

[19] Clause 5 of the employment agreement concerned hours of work. It provided that Ms Manson's hours of work were to be set by her employer in advance in accordance with a roster. Ms Manson was to be provided with a minimum of 40 hours per week.

What led up to and what was said at the meeting on 24 August 2006?

[20] Ms Manson wrote a letter of resignation dated 5 July 2006 in which she gave two weeks notice with her final day being 19 July 2006. Ms Manson said that she decided to resign because of the way she was treated by Mr McDonald. There were no reasons given for the resignation in the letter of 5 July 2006.

[21] After Ms Manson had handed in her notice of resignation, she said that she talked to Lynette Proctor, who was the assistant manager at the food centre about some difficulties she was having with Mr McDonald. Ms Proctor could not recall any particular issues that Ms Manson raised with her. Mr McDonald said that he organised a meeting towards the end of Ms Manson's notice period and it was agreed that there was a meeting on 17 July 2006 that involved Ms Proctor, Mr McDonald and Ms Manson.

[22] There was considerable dispute between Mr McDonald and Ms Manson about what was discussed during the meeting. Much of what was said in evidence about the discussion is not relevant to what I am required to determine.

[23] There was no dispute as to the outcome of the meeting which was that Ms Manson asked Mr McDonald to agree to her withdrawing her resignation. Mr McDonald did agree to that. Mr McDonald said that he agreed to this on the basis that Ms Manson's full attendance at work would follow.

[24] Ms Manson disagreed that this was a condition and said that there was no discussion about her non-attendance. I think it likely that Mr McDonald did raise a concern about Ms Manson's absences as it was an important issue for him in terms of preparation of the rosters. I think it less likely that it was clearly put forward as a condition of the withdrawal of resignation.

[25] Ms Manson did not talk to Mr McDonald about the reason for her resignation or for her unhappiness, although she said in her evidence at the investigation meeting that she hated going to work.

[26] On 3 August 2006 Ms Manson was admitted to hospital vomiting blood. She contacted Mr McDonald. He understood about the reason she was unable to work. Ms Manson again telephoned Mr McDonald on 6 August 2006 to advise him that she was still in hospital.

[27] Ms Manson was released from hospital on 7 August 2006 and telephoned Mr McDonald about returning to work.

[28] There was a meeting between Ms Manson, Mr McDonald and Ms Proctor on 9 August 2006. I find that Mr McDonald asked Ms Manson about her health. Ms Manson explained to Mr McDonald that she needed an endoscopy which was scheduled for 23 August 2006. Ms Manson showed him the letter about this from the hospital. Ms Manson also gave Mr McDonald a medical certificate until 14 August 2006. Ms Manson said in her evidence that she was prepared to return to work at that stage but the medical certificate does not support that she was fit to do so.

[29] I accept that Ms Manson told Mr McDonald during a telephone call on 15 August 2006 that she was fit to return to work. Mr McDonald told her to get the endoscopy procedure out of the way and then come back. Whilst that was unusual the period between 15 and 23 August 2006 does not form of Ms Manson's claim.

[30] On 24 August 2006 Ms Manson came into work at about 9am. She wanted to talk to Mr McDonald about returning to work having had the endoscopy procedure the

previous day. Ms Manson wanted to return to work as soon as possible to start earning money again after a period with no income.

[31] Mr McDonald said that Ms Manson appeared to be very unwell at the meeting and seemed severely affected by medication. He said that she was slurring her speech and appeared to be in considerable pain. Ms Proctor did not attend the meeting but did see Ms Manson when she first arrived at work and said that she also considered Ms Manson too unwell to be able to work. Ms Manson denied presenting in a state on that day that indicated she was clearly medical unfit to work.

[32] I find during the meeting that Mr McDonald had the rosters prepared for the next two weeks in front of him on the desk.

[33] Mr McDonald said that he advised Ms Manson that as the rosters had already been completed for the two weeks up to 10 September 2006 she could not be slotted in unless an existing employee was unable to work their shift. Mr McDonald said that he advised Ms Manson that after the two week roster ended she would get her 40 hours per week. Mr McDonald mentioned and this is supported by his own diary entries that he had had to employ other staff to cover absences of those on full time contracts.

[34] I was provided with Mr McDonald's diary as he had only produced a photocopy of what he had written in it during the investigation meeting. I found the entries somewhat confusing because Mr McDonald only produced at the investigation meeting an entry on 31 August 2006 that he said he had written on 24 August 2006. The original diary, somewhat surprisingly, also had an entry written on 24 August 2006. I have placed limited weight on the entries on the circumstances. Mr Donald said that the meeting ended on the basis that Ms Manson would contact him when she was well enough to work.

[35] Ms Manson did not accept that Mr McDonald told her that she would get 40 hours per week after the roster ended. Ms Manson said that Mr McDonald was very unhappy at the time of the meeting and told her that she would not get 40 hours again working at the store. Ms Manson said that she did not misunderstand that. Ms Manson said that it was agreed that Mr McDonald would contact her on 25 August 2006 about any available hours.

[36] Given that there is no dispute that Ms Manson was not going to get 40 hours work for at least two weeks the issue for me to determine is whether Mr McDonald told Ms Manson that he was not going to roster her on for 40 hours per week on a permanent basis.

[37] I conclude that Mr McDonald was not particularly happy when approached by Ms Manson on 24 August 2006 at the thought of rearranging his rosters. As a result of that, and quite possibly because he was frustrated at Ms Manson's absences, although they were for quite proper medical reasons, he communicated poorly with her. To the extent that I have relied on the diary entries they support that.

[38] I find it more probable that when Mr McDonald advised Ms Manson that there was not 40 hours work available, he was referring to the rosters that were in front of him on the desk. I have reached that view because the hours were set on a roster basis each fortnight in advance. It was more likely that the rosters for that two week period were what Mr McDonald was focusing on rather than rostering in the future.

[39] I find that the conversation about slotting Ms Manson in was for the two weeks roster that had been prepared as was the reference to the fact that she *might get 20 hours a week*. Even if other staff had to be employed to cover for absences it was unnecessary and unhelpful for Mr McDonald to have mentioned that.

[40] There was confusion I find about who was to telephone who. That is not surprising given Mr McDonald's poor communication. Communication difficulties are so often at the heart of employment relationship problems.

[41] I cannot rule out that the medication Ms Manson took at the time that she underwent the endoscopy procedure may have had some impact on how she recalled the conversation. A letter from a District Health Board about the medication dated 16 November 2006 provides *we tell patients not to make any important decisions for 24 hours after the administration of medication*.

[42] I am not satisfied from the evidence that Mr McDonald intended to or told Ms Manson that he would permanently reduce her hours, although it was clear, that Ms Manson would not be getting 40 hours work a week for the next two weeks.

[43] Ms Manson had presented ready to work. Whilst I can understand that preparation of the rosters is a difficult task and absences contribute to that a fair and

reasonable employer would have given Ms Manson some certainty about her rostered hours for the next week or two during the meeting on 24 August 2006. Mr McDonald said that he considered Ms Manson too unwell to work. If that had been the case then a fair and reasonable employer would have asked for Ms Manson to obtain a doctor's certificate that she was fit to return to work. The matter should not simply have left it on the basis of a future telephone call.

[44] Mr McDonald could still have altered the roster to have Ms Manson commence work in a day or so because he had not shown the roster to the other staff. Ms Manson had a contractual entitlement to 40 hours a week. I find having considered the evidence that Mr McDonald made a deliberate decision not to change the roster. Ms Manson had kept Mr McDonald fully informed as to the reason for, and duration of, her absences and deserved better treatment.

[45] Ms Manson went to see Ms Sinclair when there was no communication from Mr McDonald on 25 August 2006. Ms Sinclair wrote to Mr McDonald on 30 August 2006 and raised a personal grievance of unjustified disadvantage. She said amongst other matters in her letter:

We are instructed that you have since told our client that there are no openings on the roster, that she will be lucky to get 20 hours of work a week and that you have hired new staff to cover her hours.

Please send us copies of our client's full employment file including a record of her wage and time records and a copy of her Employment Agreement.

*Would you be willing to attend mediation of this matter at this time?
We can organise to have a mediator from the Employment Relations Service to mediate this matter.*

[46] Mr McDonald telephoned Ms Sinclair and then attempted to telephone Ms Manson on 1 September 2006. I accept that the purpose of the telephone call was to advise that there were hours of work available for Ms Manson.

[47] Ms Manson would not talk to Mr McDonald and he spoke to a male who answered the telephone. I accept having heard the evidence that that person was Ms Manson's then partner Brent. Brent provided a statement to the Authority for the investigation meeting but did not give evidence and I place no weight on his statement.

[48] Mr McDonald advised that Brent advised him that Ms Manson *would not be returning to work*.

[49] Mr McDonald's account that he advised that there were hours of work available for Ms Manson is supported by his communication on 4 September 2007 and 6 September 2007 to WINZ. He notes in that communication that there was work available for Ms Manson but that she had not made herself available.

[50] One of the requirements for a constructive dismissal claim is the need for communication that the repudiatory conduct, in this case the failure to roster on for 40 hours of work is accepted, and that it is that breach which is the reason for the resignation. In this way it is different from an employee requiring the employer to remedy a breach of an employment agreement.

[51] I was unclear in this matter as to when Ms Manson had resigned and on what basis.

[52] I asked Ms Manson when she advised Mr McDonald that she would not be returning to work. This did not occur on 24 August 2006. It was not set out in the letter from Ms Sinclair of 30 August 2006 which requested mediation.

[53] Ms Manson placed reliance on Brent's advice to Mr McDonald on 1 September 2006. I do not find that this was adequate because Mr McDonald would not have known that Brent was authorised to give him this advice on Ms Manson's behalf. Ms Manson's name was left on the rosters after this date.

[54] The next communication appears to be 3 November 2006 which is a letter sent by Ms Sinclair following the letter from Mr Barr that advised that 40 hours work per week was available for Ms Manson. It would appear that the hours were not the only reason for Ms Manson returning to work. The other reasons were not communicated to Mr McDonald.

[55] I also considered whether Ms Manson's failure to present for work after 1 September 2006 is sufficient in the circumstances. I do not consider it is. Ms Manson elected to pursue the matter of her hours of work as a disadvantage claim. I do not think that the steps between that time and Mr Barr's letter of 30 October 2006 were adequate to validly cancel the employment agreement between Ms Manson and X Limited in terms of a claim for constructive dismissal.

[56] I do not find that there is now a claim available to Ms Manson that she was unjustifiably constructive dismissed as a result of the situation about her hours.

[57] I do find that Ms Manson was disadvantaged when she was advised on 24 August 2006 that her hours would be reduced for the next two weeks. Ms Manson was entitled under her employment agreement to be rostered on for 40 hours of work a week and she was advised that she may only be slotted in for 20 hours. The way the matter was dealt with even if Mr McDonald did consider Ms Manson not fit enough to work was not justified. Mr McDonald could have changed the rosters. Ms Manson felt confused and upset following the discussion and did not know when she was going to work. Mr McDonald should have been responsive and communicative in terms of when work was available in all the circumstances of this case.

[58] Ms Manson is entitled to remedies in terms of a personal grievance that Mr McDonald's actions on 24 August 2006 disadvantaged her. Those actions were unjustified. They were not what a fair and reasonable employer would have done in all the circumstances.

[59] Mr McDonald placed emphasis in his evidence on the fact that X Limited received a subsidy from WINZ for employing Ms Manson. Ms Manson said that she was not aware of this. Following the meeting I wrote to WINZ about this matter. I was advised by WINZ that there was in fact no subsidy paid in respect of Ms Manson while she worked at X Limited.

[60] I copied the correspondence from WINZ to Ms Sinclair and Mr Barr. Mr Barr wrote back and said that his client was mistaken about that matter for various reasons. Whilst I accept that mistakes can happen it is important that those giving evidence before the Authority take care as to its accuracy.

Remedies

Contribution

[61] I do not find that Ms Manson contributed to the personal grievance that she was disadvantaged by the unjustified action of X Limited when she was not in accordance with her employment agreement rostered on for 40 hours of work a week.

Lost wages

[62] I find that Ms Manson is entitled to one week's lost wages from 24 August 2006 until 1 September 2006. This is on the basis that there was confusion as to whether there was any work available at all during that week as a result of Mr McDonald's poor communication about the matter. After that time Ms Manson did not present to work although was advised that there were hours and she could have confirmed her availability for the next roster. I do not find in those circumstances X Limited is liable for lost wages beyond 1 September 2006.

[63] I order X Limited to pay to Tania Manson the sum of \$410.00 gross being one weeks lost wages under s.123 (1) (b) of the Employment Relations Act 2000 on the basis of her hourly rate of \$10.25 per hour.

Compensation

[64] I accept that on 24 August 2006 Ms Manson was humiliated and distressed because she wanted to know what her rostered hours were so she could start earning money again. Ms Manson has claimed the sum of \$5,000. In assessing a suitable award in the circumstances I have taken into account that this was a very short employment relationship and that Ms Manson was already unhappy in her employment for reasons other than her hours.

[65] In all the circumstances I am of the view that a suitable award would be \$3,000.

[66] I order X Limited to pay to Tania Manson the sum of \$3,000 without deduction being compensation under s.123 (1) (c) (i) of the Employment Relations Act 2000.

Costs

[67] I reserve the issue of costs.

Summary of findings and orders made

[68] The following is a summary of findings and orders made:

- I have found that Ms Manson has a personal grievance that she was disadvantaged in her employment by the unjustified actions of her employer on 24 August 2006.
- I have not found that Ms Manson was unjustifiably constructively dismissed.
- I have ordered X Limited to pay to Tania Manson the sum of \$410.00 gross being one weeks lost wages under s.123(1)(b) of the Employment Relations Act 2000.
- I have ordered X Limited to pay to Tania Manson the sum of \$3,000 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.
- I have reserved the issue of costs.

Helen Doyle
Member of the Employment Relations Authority