Determination Number: AA 255/02
File Number: AEA 390/02

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Tahirih Rose Maybe (Applicant)
AND	Diane Cooper (Respondent)
REPRESENTATIVES	Gerard A Walsh for Applicant Alex Hope for Respondent
MEMBER OF AUTHORITY	W R C Gardiner
INVESTIGATION MEETING	Hamilton, 21 August 2002
DATE OF DETERMINATION	26 August 2002

DETERMINATION OF THE AUTHORITY

Brief background

It is common ground that this employment was of very brief duration. Ms Maybe was employed as a Nanny. Her required work hours were 9am to 4.30pm Monday to Friday inclusive. The employment commenced on 26 November 2001 and ended on 10 January 2002.

Ms Maybe's problem

Ms Maybe's problem is one which the law describes as an unjustified dismissal personal grievance. Ms Maybe says she was dismissed from her employment on 10 January 2002. During the conference call I held with the representatives on 21 June, Mr Walsh advised that if not dismissed in the sense that word is usually taken to mean, it may be that in the alternative the dismissal was constructive.

The Respondent's position

The Respondent denies that there was any dismissal, actual or constructive. I use my words rather than those of Mrs Cooper when I say that in the Respondent's view, Ms Maybe got the stitch and walked out.

Remedies sought by Ms Maybe

Ms Maybe did not obtain a replacement position. She is currently in receipt of unemployment benefit. She seeks to recover lost remuneration. She claims $10,000 as compensation pursuant to section 123(c)(i) of the Employment Relations Act 2000. There is also a matter of three days' unpaid wages withheld in lieu of notice. The fate of that claim obviously is linked to the outcome in the main issue which is, "Was there a dismissal or did Ms Maybe walk out on her job?"

Constructive dismissal

In that Ms Maybe's representative suggests that if not actually dismissed, she was constructively dismissed, best then that I outline what the law says concerning constructive dismissal.

In Wellington Clerical Workers' Union v Barraud & Abraham Ltd [1970] 70 BA 347, Horn SM (as he then was) held that:

> *"An apparent resignation can also amount, notwithstanding the words used, to a dismissal. For example, if the employer's actions or words oblige or strongly tend to induce an employee to proffer a resignation, the result can still be a dismissal in reality."*

In Western Excavating Ltd v Sharp [1978] 1 All ER 713 at 717 per Lord Denning MR, Lawton and Everleigh LJJ concurring it was held that:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."*

In Wellington Clerical Workers' Union v Greenwich [1983] ACJ 965 Williamson J held that:

> *"It is essential to examine the actual facts of each case to see whether the conduct of the employer can be fairly and clearly said to have crossed the border line which separates inconsiderate conduct causing some unhappiness and resentment to the employee from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship."*

In NZ Woollen Workers' Union v Distinctive Knitwear NZ Ltd [1990] 2 NZILR 438 at 448 per Goddard CJ held that:

> *"But conduct falling short of a breach of a contractual term including any duty implied into it by law cannot entitle the worker to cancel the contract by resigning. For example, in this case there was evidence given by workers that Mrs Malcolm sometimes snapped at them or spoke to them in a manner which they regarded as inappropriate. That evidence if accepted, by itself, in the absence of any element of unfairness or oppressive conduct, is not enough. The law does not compel parties to a contract to do more than perform it and it does not require them to perform it politely, nor is this Court empowered to enforce courtesy in the workplace, no matter how desirable in that environment that quality undoubtedly is."*

In Auckland Shop Employees IUOW v Woolworths (NZ) Ltd [1985] ACJ 963 the Court of Appeal held that constructive dismissal included, but was not limited to, cases where:

(i) An employer gives an employee a choice between resigning or being dismissed;

(ii) An employer has followed a course of conduct with the dominant purpose of coercing an employee to resign;

(iii) A breach of duty by the employer leads an employee to resign.

In Auckland Electric Power Board v Auckland Local Authorities Officers Union [1994] 1 ERNZ 168 Cooke P in delivering the judgement of the Court of Appeal stated:

> *"In such a case as this we consider 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 has 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. As to the duties of an employer, there are a number potentially relevant in this field. How some should be defined precisely is a matter no doubt still open to debate: see the discussion in the Auckland Shop Employees case. But in our view it can now safely be said in New Zealand law that one relevant implied term is that stated in the judgment of the Employment Appeal Tribunal, delivered by Browne-Wilkinson J, in Woods v W M Car Services (Peterborough) Ltd quoted in the Auckland Shop Employees case. As the Judge put it:*
>
> *In our view it is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Courtaulds Northern Textiles Ltd v Andrew [1970] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see British Aircraft Corporation Ltd v Austin [1978] IRLR 322 and Post Office v Roberts [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: Post Office v Roberts."*

Constructive dismissal, seriousness of the breach

It is quite common for employees to leave jobs because they are not happy with one or more features of their job. They may feel that promotions they deserved went to others, that decisions were made which they disagreed with, that advice or proposals made by them had not been listened to or followed, that their boss was cold and demanding, that they were not personally liked by certain of their peers or superiors, or that some peers or supervisors spoke abruptly. All of that is simply the rub of the green of employment life and, while they may cause a worker to decide to look elsewhere, they cannot be said to have caused a constructive dismissal.

For a worker to sustainably claim to have been constructively dismissed there must be something more.

The matter(s) complained of must represent a breach by the employer of a contractual term, a breach of duty on the part of the employer.

Furthermore, the breach must be of sufficient seriousness that the employee could not reasonably be expected to put up with it. I illustrate this point by referring to a decision of Chief Judge Goddard Holley v Country Foods NZ Ltd unreported decision WEC 20/96 dated 24 April 1996. In that decision the Chief Judge was addressing circumstances in which an employer could justifiably dismiss an employee. The Chief Judge held that:

> *"It is not enough that the (worker) was in breach of her contract. The breach must be such a serious breach that the respondent employer could not reasonably be expected to put up with any continuation of the contractual arrangement."*

In a constructive dismissal situation the reverse must equally apply. That is to say that it is not enough that the employer was in breach of the worker's contract. The breach must be such a serious breach that the worker could not reasonably be expected to put up with any continuation of the contractual arrangement.

Constructive dismissal

I recorded previously that it was Mr Walsh who raised the possibility that a constructive dismissal may have occurred. He did so during the 21 June conference call.

Mr Walsh was entitled to do that but I record that it was never Ms Maybe's case that she had been constructively dismissed. Her position was clearly stated by her at the investigation meeting. She says she was dismissed in the normal sense of that word on 10 January 2002. Ms Maybe says the dismissal was summary. Indeed, Ms Maybe says she was dismissed successively (or in relay) first by Mr David Cooper, then (by phone) by Mrs Diane Cooper.

Ms Maybe said from her brief of evidence that:

> *"The employment relationship proceeded satisfactorily in my mind until early 2002."*

From that I am entitled to assume that in the November/December part of her employment, nothing had occurred which led Ms Maybe to feel inclined or obliged to walk away from her job in the sense of being constructively dismissed.

Referring once more to Ms Maybe's above evidence, the reality is that she was not required to work over the Christmas period. She resumed work on Monday 7 January. I asked Ms Maybe whether from her point of view there were problems on 7, 8 or 9 January. She said, "No." I asked her of her employment through to and including 9 January, *"You didn't want to pack it in?"* Ms Maybe answered "No."

So that leaves us with the 10th January when the employment ceased. Ms Maybe says that she was actually dismissed on that day. Ms Maybe does not contend that she was constructively dismissed. Indeed, for a worker to simultaneously claim to have been actually dismissed and constructively dismissed would be to expose immediate credibility issues as far as an applicant is concerned.

In my finding, Ms Maybe was not constructively dismissed. I reach that finding for two reasons.

(1) Ms Maybe herself did not claim to have been constructively dismissed.

(2) I have considered what occurred on 10 January. On the facts as I find them to be, no constructive dismissal occurred.

Who was the employer/status of Mr Cooper?

Ms Maybe was employed as a Nanny. Her employer was Mrs Diane Cooper. Mr David Cooper was not Ms Maybe's employer. There is an issue as to whether David Cooper, via agency or ostensible authority, was capable of giving instructions to Ms Maybe and indeed of dismissing Ms Maybe.

In examining the events of 10 January, I will do so from the standpoint that Mr Cooper was capable of dismissing Ms Maybe (via agency or ostensible authority). If I find that no dismissal occurred, I will not need to make an actual determination concerning Mr Cooper's status. If on the other hand I am satisfied that what occurred is capable of being seen as a dismissal, I will then have to determine the status (in such a setting) of Mr Cooper.

10 January 2002

Ms Maybe's assessment of her job performance across the employment appears at item 6 of her brief of evidence:

> *"The employment relationship proceeded satisfactorily in my mind until early 2002."*

In my finding, the relationship was not as satisfactory as the above evidence suggests, although tellingly, Ms Maybe qualifies her assessment as being "in my mind".

In my finding Mrs Cooper had concerns about both attitude and performance issues. Ms Maybe accepts that there was an occasion when she was told orally by Mrs Cooper that the children were not to be driven in a vehicle without seat restraints. Ms Maybe acknowledges that she was told that a further reoccurrence would result in instant dismissal. Ms Maybe claims, however, that this was not a warning because she says she wasn't told that it was an employment warning. Best I describe that particular piece of logic as "quaint" and move on.

In my finding, Ms Maybe is a young person who is capable of forming fixed, if self-serving views, and who is willing to advance those views assertively on her own behalf. Ms Maybe is entirely entitled to be her own person in this way, although the concomitant is that not everyone she meets in life will necessarily appreciate or respond warmly to her directness. Both Laurel Fisher and Karleen Hennessy of the Porse Nanny Agency gave evidence of how they were taken aback by what Ms Maybe would regard as making her views plain and which they both perceived as abrasiveness. It is apparent to me that Ms Maybe, in this brief employment, did not appreciate having perceived shortcomings pointed out to her by her employer and was capable of reacting tartly and inappropriately when faced with such situations. This, in my finding, is what occurred on 10 January.

On 9 January David Cooper had spoken to Ms Maybe (appropriately in my finding) about safety issues in the kitchen. Mrs Cooper then made reference to that and other issues in the Porse book so as to draw the matters to Ms Maybe's attention next morning.

In my finding the notations made by Mrs Cooper were entirely appropriate and were issues which a fair and reasonable employer was entitled to raise with the employee. Those notations were:

> *"The bathroom was flooded when I arrived home. How did this happen? When did Reina wet his pants? This was what was on the floor in the bathroom and his wet clothes were on the bedroom floor. Madison is not to go into the drawers and get changed without supervision as she pulls all the clothes out. Please don't have the children in the kitchen by the stove as it is dangerous and they may get burnt. Reina turned the jug on last night. It's alright to help prepare food but anything involving cooking, they are too young."*

On arrival at work on 10 January, Ms Maybe read the notations in the communication book (i.e. the Porse book) and offered the observation to Mr Cooper that, *"It would be nice to read a positive comment once in a while."*

In my finding that was inappropriate and provocative behaviour by Ms Maybe. Ms Maybe claims that, "*At this point Dave Cooper went off and started yelling at me*."

In my finding, Mr Cooper, who had raised safety concerns with Ms Maybe on the prior day, did not appreciate Ms Maybe's ill-chosen observation. I find that he spoke sharply to her about her manner and about his concerns of the prior day regarding safety of the children.

Ms Maybe uses the term "went off" which may be how she sees someone who disagrees with her or offers criticism. Ms Maybe advised that she intended going home. At Mr Cooper's instigation, she phoned Mrs Cooper at her work place. Ms Maybe says that prior to this phone call, Mr Cooper had told her that if she went home she was fired. Mr Cooper denies this. In speaking to Mrs Cooper, Ms Maybe explained that she intended going home but did not say (as would have been expected had it occurred) that Dave Cooper had told her that if she did so, she was fired.

I do not accept that Mr Cooper said anything to Ms Maybe about dismissal. Nor do I accept that Mrs Cooper said by phone that, "I'm going to ring Porse and get a new Nanny." Porse do not supply Nannies. Nor is such a comment consistent with the basis on which Ms Maybe and Mrs Cooper say the call was concluded. Nor, even if it were said, does it represent summary dismissal.

Following the telephone call, Ms Maybe proceeded on her already predetermined path. She went home. In doing so she removed the Porse book. There was an exchange between her and David Cooper over that. Ms Maybe is entirely responsible for that. On no good basis (other than that she had "got the pricker" over a reprimand) she walked off the job, adversely affecting the arrangements of both of the Coopers, and, without authority to do so, removed property which was not hers.

In my finding, Ms Maybe did not intend to return to her job following her walkout at approximately 9.30am on the 10th, and nor did she do so. That was her call. But it is not the case that either Mr Cooper or Mrs Cooper had brought that state of affairs about by dismissing her.

Finally, Mrs Cooper was entitled to seek immediate return of the Porse book for the reasons advanced at the investigation meeting and because it should never have been removed in the first place. It is not the case that she needed it so as to engage a replacement.

Disposition of the case

Ms Maybe was not dismissed either actually or constructively. Ms Maybe does not have a personal grievance.

Costs

Ms Maybe is legally aided. She was not required to pay a contribution. Mrs Cooper has applied for legal aid although a grant had not been approved by the day of the investigation meeting. To me there seems no prospect of any costs award, but if submissions are received, I will address them.

W R C Gardiner
Member
The Employment Relations Authority