

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Teresa McDonald (Applicant)
AND Bayliss Sharr & Hansen Chartered Accountants (Respondent)
REPRESENTATIVES Timothy J Twomey, Counsel for Applicant
Keith Owen, Advocate for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 25 May 2005
DATE OF DETERMINATION 19 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

- [1] The applicant (Ms McDonald) alleges that either –
- (a) An agreement was reached between her representative and the respondent's representatives on the termination of the employment relationship between the parties and that agreement was breached by the respondent; or
 - (b) That she was unjustifiably dismissed by way of a constructive dismissal.
- [2] The respondent, Bayliss Sharr & Hansen, an accounting firm (BSH) deny that an enforceable agreement was ever reached to bring Ms McDonald's employment to an end and also deny any unjustified dismissal or disadvantage claim.
- [3] The parties attended mediation but were unsuccessful in resolving their differences.
- [4] In accordance with the requirements of the Legal Services Act, the former representative of Ms McDonald advised the Authority and the representative of BSH that Ms McDonald had received a grant of legal aid in respect of this proceeding.
- [5] Ms McDonald was employed as an office junior by the employer but her employment was arranged as part of her course of study at the Christchurch Polytechnic. In essence the arrangement was that Ms McDonald worked for BSH for four days a week and then attended classes at the Polytechnic on the fifth day.
- [6] The employment relationship was unsatisfactory. BSH said they had serious concerns about the standard of work being provided by Ms McDonald. Indeed, BSH through its partner Mr Hansen gave evidence that the effect of Ms McDonald's work was to leave the office "in chaos".

[7] There were a number of pressure points for BSH, but matters came to a head in July 2004 and BSH determined to have a disciplinary meeting with Ms McDonald which was eventually organised for 20 July 2004.

[8] This meeting took the usual course for meetings of this kind, but of particular importance for the purposes of this determination is a subset of that 20 July meeting, namely a private meeting between the then representatives of the parties, Mr Davidson who then acted for Ms McDonald and Mr Owen who acted for BSH.

[9] What happened at that private meeting between the parties' representatives and indeed whether the Authority could hear what happened at that private meeting given its confidential nature is the subject of further analysis in this determination.

[10] Although a number of matters are in dispute from this meeting between the representatives, it is clear that there was discussion about an exit package for Ms McDonald and the terms under which that might be agreed.

[11] Within days of the meeting between the representatives, there had been a settlement agreement prepared by BSH's representative and this document was faxed to Ms McDonald's then representative who immediately discerned that the settlement parameters were different from what he considered he had previously been authorised to agree to and so there was then discussion and debate about that issue.

[12] The representatives were unable to resolve their differences. BSH's position was that the offered agreement having not been accepted, then Ms McDonald was to return to work.

[13] Ms McDonald refused on the basis that she understood that she had accepted a settlement package and had left the employ of BSH and had in fact removed all her personal belongings at the suggestion of her then representative.

[14] Even if she had not in fact left the workplace by agreement, her view was that she had been "driven out" by the actions of BSH.

[15] BSH then attempted to have Ms McDonald return to the workplace by ringing her at home until asked to desist from this practice by Ms McDonald's then representative.

[16] Ms McDonald then sought to have the settlement agreement performed by writing to BSH and giving a further opportunity to accept the terms of the agreement as she understood it and that initiative was rejected.

[17] For its part, BSH then wrote to Ms McDonald indicating that it accepted her resignation and provided her final pay.

Issues

[18] The issues for the Authority to determine are as follows –

- (a) Can the Authority hear evidence about without prejudice discussions that were involved in the meeting between the representatives on 20 July 2004?
- (b) Was there a concluded agreement between the representatives of the parties on 20 July 2004?

- (c) Does Ms McDonald have any other cause of action?

Receipt of without prejudice communications

[19] There are well-established rules about the reference to without prejudice communications before Authority proceedings. The general rule is that without prejudice communications whether orally as in this case, or by way of a written offer for instance, are not to be made available to the Authority in an open investigation meeting unless they are communications which are expressly excluded from the general rule such as “without prejudice except as to costs” letters.

[20] There is, however, another exception to the general rule which applies in this case. It is clear law that the Authority is entitled to hear evidence of “without prejudice” discussions between parties or their representatives to prove the existence or otherwise of an agreement.

[21] To that extent then, I have been prepared in the instant matter to hear evidence designed to persuade me of the existence or otherwise of an agreement between the parties.

[22] In the course of hearing that evidence, I have also been invited to consider other evidence of the detail of what was said in the without prejudice communications. Insofar as that other evidence has not been on the point of whether in fact there was an agreement between the parties, I have chosen to ignore it and have not referred to it in this determination.

[23] The only basis on which I could consider such evidence is where it is in a situation where both parties agree to waive the “without prejudice” tag. In the present circumstances, BSH seek to have me exclude all of the without prejudice evidence on the basis of their contention, (erroneous as I now find), that the Authority has no right to hear such evidence in any circumstances.

The meeting between the representatives

[24] It is common ground that the parties and their representatives were present at a disciplinary meeting at the premises of BSH on 20 July.

[25] The disciplinary meeting commenced with the usual introductions and Ms McDonald’s then representative raising issues about the propriety of the meeting being focused on discipline rather than performance and some time towards 5 o’clock, perhaps about 4.45 pm, BSH’s representative suggested to Ms McDonald’s then representative that they might have a private “off the record” chat. The two representatives then left the meeting room and the recollection of the witnesses was that they actually went outside (one of them being a smoker).

[26] It is clear that BSH’s representative suggested this meeting. Mr Hansen a partner in BSH gave evidence that the meeting outside took barely 10 minutes and that BSH’s representative then returned to the building and found Mr Hansen.

The employer’s view

[27] Mr Hansen’s evidence was that his representative then told him that Ms McDonald’s representative wanted “\$5,000” by way of an exit package.

[28] Mr Hansen said that he told his representative that the partners had already discussed matters and that they would pay a total of \$4,000 but “*not a cent more*”. This \$4,000 was expressly stated to include wages and holiday pay.

[29] Mr Hansen's evidence then was that his representative conveyed that offer to Ms McDonald's representative and was told that Ms McDonald would consider the matter over night in conjunction with her father and that a response would be forwarded thereafter. Mr Hansen said that he expected to have a response the following morning.

[30] When there was no response from Ms McDonald's advocate the following morning or indeed the following day, Mr Hansen instructed his advocate to forward by facsimile the settlement agreement on the terms that they understood had been agreed and it was this document that was promptly rejected by Ms McDonald's then representative.

[31] Critically, Mr Hansen told me that at no time was he ever told that the offer made by his firm as employer was accepted either finally or provisionally.

The employee's view

[32] The other source of evidence about this important meeting comes from one of the representatives who was actually present, Mr Davidson, who previously was Ms McDonald's representative but who relinquished that responsibility in order that he could give evidence before the Authority.

[33] His evidence was different in a number of material respects from the evidence offered by Mr Hansen. Of necessity Mr Hansen's evidence was second hand evidence because of course Mr Hansen was not present at the meeting between the representatives. He could only give me evidence about what he was told about that meeting by his representative.

[34] Mr Davidson:

- (a) Agrees that the meeting was initiated by BSH's representative.
- (b) Denies asking for \$5,000.00.
- (c) Claims that the discussion was always about a \$4,000.00 figure.
- (d) Says that after the discussion between the two representatives about the \$4,000.00 settlement both representatives agreed to discuss the matter further with their clients.
- (e) Notes that he did in fact brief Ms McDonald about the proposal.
- (f) Said that Ms McDonald told him to accept the offer which was understood to be \$4,000.00 compensation plus wages and holiday pay on top.
- (g) Claims he provisionally advised BSH's representative that the offer was accepted subject only to discussing the proposal with Ms McDonald's father who according to Mr Davidson's evidence was outside in the car.
- (h) Says he then spoke directly with Ms McDonald's father and then immediately thereafter returned to the building where he spoke with BSH's representative on the fire escape of the building and told the latter that there was a concluded deal.

My conclusions

[35] There are a number of critical differences between the evidence of Mr Davidson and Mr Hansen. Of most importance is the fact that Mr Davidson is quite clear that he gave BSH's representative both a provisional acceptance of the arrangement and a final acceptance of the

arrangement, whereas Mr Hansen is equally clear that he was never told either provisionally or finally that there was a deal.

[36] Further, Mr Davidson's evidence is that the deal that he thinks he accepted was for \$4,000.00 plus wages and holiday pay, whereas Mr Hansen is equally explicit that he and his partners had determined that they would pay a maximum of \$4,000.00 all up (ie including holiday pay and wages) and not a penny more.

[37] There are numerous other differences between the evidence offered by the two principal protagonists (including the number of meetings that the two representatives actually had to try and stitch this deal together) and whether or not Mr Davidson was to confirm an agreement that night or the following morning (depending on where Ms McDonald's father was perceived to be at the relevant time) and so on.

[38] The differences are so stark and the matters in dispute so important that I find it quite impossible to make any judgment about whether there was an agreement or not at the meeting or meetings between the representatives on 20 July 2004. Not only is it not clear what the offer was, it is also not clear whether that offer (whatever it was) was accepted. In those circumstances, any determination of the question whether there was a concluded agreement can be no more than an inspired guess and that is not good enough.

Are there other causes of action?

[39] In my view, although I have found it impossible to discern whether Ms McDonald's representative did in fact make an agreement with BSH's representative on 20 July 2004, I do think that Ms McDonald can advance an alternative claim.

[40] It is unchallenged evidence that the meeting between the representatives on 20 July was initiated by BSH's representative. Whatever the outcome of that meeting (and I have already decided that I cannot be sure what if anything was decided at that meeting) it is clear the meeting was initiated by BSH's representative on behalf of his client with a view to exploring an exit strategy.

[41] The applicant's counsel submits that such a strategy is improper and should be discouraged. I do not agree. The whole process of resolving employment issues is redolent with these kinds of without prejudice discussions and to seek to penalise parties when those discussions go wrong is in my view wrong headed.

[42] This is a situation where BSH seeks to explore an exit strategy for Ms McDonald and whatever was agreed, certainly it is clear that she was advised and well aware that her employer had sought to explore whether she might leave on certain terms and conditions.

[43] BSH want me to find that initiation was simply the first step in a lengthy process which might or might not result in Ms McDonald leaving the employment and I accept that that is in fact the position. However, it does not alter the fact that the employer has signalled an intention and the employee has received the message. Whether that message was encased in other negative observations about Ms McDonald's future is simply not clear.

[44] The short point is that at the end of the day on 20 July it seems that Ms McDonald believed that she was leaving the workplace at the behest of her employer. Ms McDonald's own evidence was that she was told by her then representative, Mr Davidson, that BSH did not want her to

continue with her employment. In her evidence she said “*I was quite depressed at hearing this news although I had already gained the impression that I was not wanted.*”

[45] Based on this intelligence, Ms McDonald decided it was best to go. No doubt she relied on Mr Davidson’s advice in that regard but the fact was that certainly, on her evidence which was not challenged by BSH, Ms McDonald got a very clear message that she was not wanted by the employer.

[46] What happened next of course was that the purported agreement which would have allowed Ms McDonald to leave the workplace on terms and conditions which certainly, on her evidence, she thought was concluded, fell apart.

[47] In the meantime, Ms McDonald had left the workplace taking her personal effects with her and it was not until 48 hours later that she was to learn that the arrangement that she thought had been made was not in fact agreed.

[48] In those circumstances, I frankly think it inconceivable that an inexperienced young woman in her first job having been subjected to a disciplinary process (whether justified or not) and then having gone through what appeared to be an employer-initiated exit strategy which subsequently fell apart, should then be expected to take a deep breath and return to the workplace as if nothing had happened.

[49] In my opinion, the employment relationship had irretrievably broken down by this stage and it is quite unreasonable to have expected Ms McDonald to put that all behind her and return to the workplace.

[50] The question I must decide however is whether that factual matrix constitutes the elements of a constructive dismissal. I have reached the conclusion that it does.

[51] In my view, Ms McDonald’s resignation or perhaps more accurately her refusal to return to the workplace was a reasonably foreseeable consequence of the course of conduct which the employer initiated by its promoting of an exit strategy for Ms McDonald in the context of a major disciplinary meeting.

[52] In effect, it is my considered view that the employment relationship was effectively brought to an end by the employer’s inducement of her departing with the promise of some compensation. When that compensation was not forthcoming, it seems to me the spell was broken and the relationship effectively at an end.

Determination

[53] I have reached the conclusion that it is impossible to discern if there was a concluded agreement between the parties at the meeting between the representatives on 20 July 2004.

[54] However, I am persuaded that Ms McDonald has been unjustifiably constructively dismissed and accordingly I award her the following in remedies :

- (a) Compensation under section 123 c (i) in the sum of \$4,000.00.
- (b) Lost wages attributable to the dismissal in the sum of \$4,387.50.

[55] Costs are reserved.

James Crichton
Member of Employment Relations Authority