

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 384/08
5115799

BETWEEN MARIA ROSLYN MCGEE
 Applicant

AND THE WAREHOUSE LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Catherine Evans, for Applicant
 Penny Swarbrick, for Respondent

Investigation Meeting: Tuesday 29 July 2008

Submissions received: 2 and 23 September 2008

Determination: 10 November 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority's investigation of the personal grievance and penalty claims brought by Mrs Maria McGee began as usual with the lodging of a statement of problem on her behalf and a statement in reply on behalf of The Warehouse Limited ("TWL"), her former employer.

[2] Those commencement papers from the parties comprehensively covered the views and positions taken by them in respect of the multiple complaints comprising Mrs McGee's employment relationship problem. Her complaints were about the way the employment relationship with TWL terminated, and also various actions and conduct of TWL at different times over one or more years prior to that.

[3] To remedy the complaints nearly \$82,000 in total has been sought for lost remuneration and as compensation for hurt feelings, humiliation and distress.

Penalties have also been sought for breaches of the duty of good faith imposed by s 4 of the Employment Relations Act 2000.

[4] Before Mrs McGee brought her problem to the Authority it had been the subject of mediation but was not resolved through that process.

[5] At an investigation meeting evidence was given by Mrs McGee and a number of witnesses she called in support of her claims, and also by several management employees of TWL. All witnesses were questioned by the Authority and by counsel Ms Evans and Ms Swarbrick.

[6] After the meeting further information was supplied to the Authority by the parties and comprehensive submissions were provided by Ms Evans and Ms Swarbrick.

[7] As provided by s 157 of the Act, the role of the Authority in carrying out an investigation is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case without regard to technicalities.

Issues for determination

[8] All of the factual and legal issues for determination by the Authority have I find been identified by Ms Swarbrick in the submissions she made on behalf of TWL, and are as follows:

- (a) *Whether Mrs McGee has been disadvantaged in her employment because TWL made unjustified disciplinary allegations;*
- (b) *Whether TWL failed to act in good faith by:*
 - (i) *an unresolved disciplinary meeting in 2007;*
 - (ii) *abusive and intimidating conduct by a manager;*
 - (iii) *unilateral amendment of Employment Agreement (duties);*
- (c) *Whether Mrs McGee's resignation amounted to a constructive dismissal because of the cumulative effect of the breaches of good faith listed above.*

[9] TWL has denied it acted in any way unjustifiably or breached any of the obligations owed by it to Mrs McGee, whether under the Act or her employment agreement.

[10] TWL raised its own claim, to recover from Mrs McGee a sum equivalent to one month's salary. She has accepted that \$2,454.53 was paid by TWL to her bank account by mistake after her employment with the company had ended. She has acknowledged her responsibility to repay that amount and as part of this determination of her case I therefore order that she does so. Interest on that sum was not claimed by TWL.

[11] Mrs McGee's employment relationship problem arose out of separate events occurring in 2007 and 2008 at TWL's store in Te Awamutu, where she was employed as Team Leader Service. She had held that supervisory position for some 15 months from September 2006 and had been employed by TWL for about 13 years in total.

[12] The termination of Mrs McGee's employment was preceded by a disciplinary inquiry carried out by TWL. This had followed on after allegations had been made against Mrs McGee about her handling of a refund made to a customer in January 2008 for a refrigerator bought from the store.

[13] Mr Willie Hall, the Store Manager, in the course of the disciplinary inquiry interviewed Mrs McGee about the refund and then advised her of his conclusion that she had not followed store policy and procedure for handling refunds. The possibility of her being dismissed in consequence was not then raised by TWL with Mrs McGee but demotion was, as either an action TWL had decided to take or proposed to take.

[14] Mrs McGee through her representative Ms Evans then exchanged correspondence and had other communications with TWL about the company's intentions with regard to taking disciplinary action. Mediation was arranged at the request of Mrs McGee but shortly before it was to take place she tendered her resignation to TWL.

[15] The parties subsequently attended mediation a few days after the resignation but were unable to resolve the matters between them. After that a letter was sent on behalf of TWL to Mrs McGee's solicitors, repeating earlier advice given by the company that it wished to retain her as an employee. TWL did not confirm the resignation given by Mrs McGee but instead asked her to do that before it would action the resignation she had given on 4 March.

[16] TWL's letter made it clear that unless the company heard from Mrs McGee to the contrary it would record that she had resigned on 4 March and her notice period of one month would run from then until 3 April 2008.

[17] Mrs McGee did not change her mind about resigning and her employment duly ended on 3 April 2008 at the latest.

Earlier actions and conduct of TWL

[18] The actions or conduct of TWL which occurred before the customer refund disciplinary inquiry in early 2008 and which Mrs McGee has complained of in conjunction with her unjustified disadvantage and dismissal claims, were;

The implementation and carrying out of a performance management plan from July 2007,

Alleged abusive and intimidating conduct by the store manager Mr Hall on different occasions over several years,

A unilateral variation of her terms of employment, imposing additional duties on Mrs McGee during the Christmas shopping period.

These matters are the subject of the penalty claims for alleged breach of the duty of good faith.

Unjustified disadvantage and constructive dismissal claims

[19] I find from the evidence that TWL acted reasonably in commencing an investigation into the customer refund Mrs McGee had given on 10 January 2008. The employer clearly had a genuine reason for doing that, arising out of the way Mrs McGee had apparently handled a substantial cash sum in the course of her work. TWL was entitled to investigate her conduct as an employee and as a supervisor. The employer was entitled at any time to check whether its lawful and reasonable policies and procedures applying generally to employees had been followed.

[20] Further, I find that TWL acted reasonably in taking that investigation to the level of a disciplinary inquiry. That inquiry was conducted properly I find, as all aspects or matters of fairness were fully observed by the employer. Mrs McGee was advised in advance of the allegations against her and of her entitlement to have a

representative present at the inquiry. She was given an opportunity to answer the allegations by offering any explanations she had.

[21] I find that the conclusion reached by TWL from its inquiry that Mrs McGee had breached the policies and procedures applying to giving refunds to customers, was also a reasonable one in the circumstances. Important among those circumstances was the fact that during the inquiry Mrs McGee herself admitted or acknowledged that she had not followed the procedures or policies. What she gave the employer was not a denial of the alleged conduct but an explanation or excuse for it. This was that she had simply been trying to ensure that a customer was satisfied after a transaction where a fridge sold to that person by TWL had not worked properly and needed to be returned to the store and the customer's money refunded.

[22] Responding to questions on behalf of TWL during the disciplinary inquiry, Mrs McGee said that she had known that the way she handled the refund was not the way it was supposed to be done but that the deviation from procedure was warranted in the circumstances. Although Mrs McGee was well intentioned in acting as she did to help a customer, it was ultimately for TWL to balance the particular level of customer satisfaction it sought to achieve with the security measures it wanted for cash handling and stock accounting.

[23] I am further satisfied that at the point TWL reached the conclusion that Mrs McGee had breached the relevant procedures and policies it did not impose any disciplinary action against Mrs McGee but it did propose that she would be demoted to the position of Team Member.

[24] In answer to questions from the Authority, Mrs McGee confirmed it had been proposed that she would be demoted and she said she took it from Mr Hall that he was seeking that particular outcome. Mrs McGee also confirmed that Mr Hall had asked her to think about that proposal. She said that he had not mentioned what would happen to her remuneration if she was demoted, and she said it had been agreed that there would be a further meeting to discuss demotion.

[25] I am satisfied that TWL genuinely sought from Mrs McGee an opportunity to discuss its proposal further after she had had time to think about it. I am also satisfied that the proposal did not expressly extend to include change in her remuneration by reducing it, although that could have been inferred.

[26] Mrs McGee told the Authority she had anticipated that the final outcome would be her demotion and that her wages would also be reduced. She had also anticipated that TWL would resume the performance management plan implemented some months earlier, and she had thought that eventually a reason would be found to dismiss her.

[27] In answer to Ms Swarbrick she agreed that between the date when she had first heard of the proposal to demote her and 4 March when she had tendered her resignation, nothing in her employment changed and no action was actually taken against her during that period.

[28] The Authority concludes from all the evidence that the claims of unjustified disadvantage and constructive dismissal cannot succeed. I find that Mrs McGee was not disadvantaged in her employment or any term of it by TWL's investigation and the disciplinary inquiry that followed.

[29] I find that the resignation given by Mrs McGee was not induced or forced from her by any unlawful or unjustified action of the employer. I find that in the way the employer approached the investigation and disciplinary inquiry into the customer refund, there was no breach of the employment agreement, even at the point where the employer made its proposal to take the action of demoting Mrs McGee.

[30] It is arguable that under her employment agreement TWL did not have the ability to demote Mrs McGee, at least not without her consent. That, however, did not prevent it from discussing taking a certain action with her consent as an alternative to more serious forms of discipline such as dismissal which, arguably, was an action TWL could have justifiably taken.

[31] At its worst, the proposal to demote could only have amounted to a threatened or anticipatory breach, but it was clearly accompanied by an opportunity, genuinely offered I find, for Mrs McGee to consider it and to have a further discussion about it. There remained a possibility that either she might consent to the particular disciplinary action proposed by the employer or that TWL might abandon that proposal for another.

[32] I do not consider that the demotion proposal was put to Mrs McGee in a threatening or intimidating way in the sense that she was forced to agree to it. I find

that it was left as a matter to be discussed at a future time but that Mrs McGee pre-empted further consideration of the proposal by resigning.

[33] Even if a breach of the employment agreement by TWL in some way had already occurred when Mrs McGee resigned, I find in the circumstances that it would not have been a breach of sufficient seriousness to have made resignation a foreseeable consequence. Forseeability is an element required to be present before there can be a constructive dismissal of the type contended for on behalf of Mrs McGee; *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc.* [1994] 1 ERNZ 168 at 172.

[34] In the circumstances of this case the demotion proposal was responded to by the employee, through her legal representative Ms Evans, with a request for mediation. The employer was agreeable to that course and clearly acted with the intention of being co-operative, communicative and responsive with regard to the mediation process. TWL could expect that there would be discussion about the demotion and any alternatives that might be suggested by Mrs McGee, and that the discussion would be facilitated by the presence of a lawyer acting on behalf of Mrs McGee. In those circumstances the abrupt resignation was not reasonably foreseeable, whatever breach of duty by the employer there may previously have been.

[35] It is also the finding of the Authority that as well as being uninduced the resignation was premature, because Mrs McGee had wanted the opportunity to resolve the matter with mediation and TWL had been agreeable to that course. She did not finally use that opportunity but resigned instead. Mrs McGee had the right to raise a grievance if she was not satisfied with the outcome of the mediation. She had been the one who arranged the mediation, and TWL had responded positively to that initiative. In my view, it was doing nothing more than discharging its obligation of good faith under s 4(1)(a) of the Act in circumstances where a proposal had been made which, if carried out, might have adversely affected an employee.

[36] The reasonableness of the way TWL behaved with regard to possible or proposed disciplinary action and to the mediation arranged, must also be judged in the light of the admissions or acknowledgement made by Mrs McGee that she had not followed the employer's proposals or policies. At the very least the employer had grounds for taking some form of disciplinary action.

[37] The disciplinary action to be taken in the circumstances was ultimately a matter for TWL's choice, provided it acted as a fair and reasonable employer. There can be no criticism reasonably made of it for wanting to involve an employee in that exercise by consulting her about a proposal.

[38] For completeness, the Authority finds that this was not a situation where Mrs McGee had been given an ultimatum that if she did not resign she would be dismissed. Neither was it a situation where the employer followed a course of conduct for the predominant purpose of securing her resignation. Neither form of constructive dismissal has been contended on behalf of Mrs McGee as being present in this case.

[39] Mrs McGee chose to abandon the planned mediation and tender her resignation. Even then TWL did not confirm the resignation, as it could have done, but advised Mrs McGee that it was not seeking termination of her employment and wanted to keep her working for the company. That reassurance was rejected by her when she did not withdraw her resignation. She was not dismissed but resigned, I find.

Performance management

[40] I find from the evidence that the performance plan initiated against Mrs McGee cannot reasonably be viewed either on its own or cumulatively with other steps such as the disciplinary inquiry, as amounting to some unreasonable or unjustified action against Mrs McGee.

[41] I am satisfied that TWL had a reasonable basis for implementing the performance plan and that it acted reasonably in suspending it at the stage it did, when Mrs McGee was absent for medical reasons. After that the matter of the refund arose, taking greater priority for dealing with.

[42] I do not consider that there was anything threatening or intimidating about the performance plan. I also agree with the submission for TWL that the implementation of the plan and the conduct of it created no disadvantage to Mrs McGee in her employment. It may well have proved to be for her benefit ultimately. As with the proposal put forward to demote Mrs McGee, there was an effective remedy readily available to her in the event that the performance plan had led to disciplinary action taken against her without justification.

[43] Had Mrs McGee remained employed and had she been demoted and lost remuneration or status, she would also have been able to raise a personal grievance and again seek to have the matter resolved by mediation or, failing that, through an investigation in the Authority. Resignation in response to the implementation of a performance plan would also have been unforeseeable on employer's part.

[44] No disadvantage grievance arose from those circumstances and there was no breach of good faith, I find.

Disciplinary meeting in 2007

[45] This occasion was in fact the implementation of the performance plan and was not therefore 'disciplinary,' although if the process had been completed it might have become so later. The plan was suspended while Mrs McGee on medical leave, and the customer refund investigation also required it to be put on hold. No sustainable grievance or claim of bad faith therefore arises under his head, I find.

Abusive behaviour of manager

[46] Further, I find that the separate complaint made by Mrs McGee about abusive and intimidating conduct by her manager was vague and unsupported by the evidence. It also had the appearance of being raised as an afterthought and to add weight to the claims of unjustified dismissal and unjustified disadvantage.

[47] In any event the Authority cannot be satisfied from the evidence given to it that any grievance was raised about the alleged conduct, or that one was raised within 90 days of the conduct occurring. On its terms the communications by Mrs McGee with TWL's HR Manager, Ms Kura Poulava, about her dissatisfaction with Mr Hall, was not the raising of a grievance.

Unilateral amendment of employment agreement

[48] In relation to this allegation I find that Mrs McGee, at the time, accepted the need to change her work patterns because of the busy Christmas shopping period and that she did not protest or complain about that at the time.

[49] The employment agreement also made provision for TWL to vary Mrs McGee's hours and duties within her position. This claim also appeared very much to

be a matter thrown into the mix to boost the gravity of the claims of unjustified disadvantage and unjustified constructive dismissal. This claim is not upheld.

Determination

[50] I consider that although an unhappy one for her, the choice made by Mrs McGee to resign was not induced or forced from her by TWL in any of its actions. There was no dismissal, actual or constructive, of Mrs McGee and neither I find was she unjustifiably disadvantaged in her employment. When she resigned she had not at that time been disadvantaged at all, as demotion remained only a proposal about which she was then being consulted.

[51] I find that there was no breach of good faith in relation to any of the three specific complaints raised in this regard by Mrs McGee. Even if there had been, a penalty can only be awarded where the breach is so grave as to be deliberate, serious and sustained, or was intended to undermine the employment agreement or employment relationship; s 4A of the Act.

[52] For the above reasons, the Authority finds no basis for making any of the orders sought by Mrs McGee against TWL. The claims are to be resolved in favour of TWL in all respects.

[53] Mrs McGee is ordered to pay TWL \$2,454.53, the amount she has acknowledged was paid to her by mistake.

Costs

[54] Costs are reserved. If the parties are unable to resolve the issue themselves, memoranda may be filed in the usual way and a timetable will be given for response to be made to any such application.