

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 125/07
5054966

BETWEEN BRYAN McGILLIVRAY
 Applicant

AND GODFREYS BAKERY
 Respondent

Member of Authority: James Crichton

Representatives: Jennifer Guthrie, Counsel for Applicant
 Rachel Brazil, Counsel for Respondent

Investigation Meeting: 20 June 2007 at Dunedin

Determination: 29 October 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By a statement of problem filed on 22 May 2007 the applicant (Mr McGillivray) alleged personal grievances on the grounds of unjustified disadvantage and unjustified constructive dismissal and alleged there were wages due and owing to him as well.

[2] The respondent (Godfreys Bakery) denied disadvantaging the applicant by any unjustified actions on its part and also contend that the Mr McGillivray's resignation was entirely voluntary.

[3] It is appropriate for the Authority to record that this matter is the subject also of an interim determination which was issued on 14 May 2007. That interim determination came about as a consequence of the original statement of problem filed on 15 January 2007 which, at paras.(p) and (q) of the statement of problem referred to matters which were traversed in the mediation in relation to this matter. Godfreys Bakery took the view that the matters referred to in the two abovementioned paragraphs of the statement of problem ought not to be before the Authority and by reason of their confidential

nature, could not appropriately be responded by Godfreys Bakery without, as it were, *compounded the felony*.

[4] The Authority directed that that matter would be the subject of submissions from the parties and an interim determination was issued on an urgent basis, the effect of which was to strike out the offending paragraphs which, in terms of the drafting of the original statement of problem in which those paragraphs appeared, formed the sole basis for the constructive dismissal allegation.

[5] The interim determination, in consequence, indicated that unless the parties (and especially the applicant) reformatted the claim so as to include the constructive dismissal allegation on some different footing, the already timetabled investigation meeting would proceed only on the basis of the alleged disadvantage claim.

[6] In the result, the parties did reformat their claim and a fresh statement of problem was filed on 22 May 2007. That fresh statement of problem perseveres with the constructive dismissal claim but on a different basis.

[7] Mr McGillivray worked for Godfreys Bakery as a baker and he had worked in the business under more than one owner for a period of some 26 years. The business was sold to the respondent in these proceedings in September 2005.

[8] The relationship between Mr McGillivray and the new owners commenced well enough but, by all accounts, to use Mr Daniel Thom's words, Mr McGillivray ...*did find the transition to us as the new employer hard,* Mr McGillivray said that the principal problem was in fact Mr Thom himself who, as one of the incoming purchasers, was apparently put in charge of the bakehouse, Mr McGillivray's work area, notwithstanding that Mr Thom had no experience of baking previously.

[9] Mr McGillivray complained that Mr Thom would ring him regularly to ask him questions (often when he was off work and trying to sleep) and that Mr McGillivray lost his seniority to Mr Thom as a consequence of the management changes. Both those claims are contested by Godfreys Bakery; Mr Thom says that he did ring Mr McGillivray but not incessantly and *I absolutely did not ring him in the manner he implies ...*, and Mr McGillivray himself accepts that he lost nothing in financial terms by his alleged loss of seniority.

[10] Mr McGillivray also complains that the way he was paid changed after the

change of ownership. Whereas he had previously been paid by direct credit, the respondent's paid him by cheque and he had to call to the workplace to obtain his cheque and then take it to the bank to cash it. Despite making much of this in his brief of evidence, Mr McGillivray agreed in response to my question, that he never raised it as a problem with Godfreys Bakery so they were unaware that their process was inconvenient to him.

[11] There is dispute between the parties about how many hours Mr McGillivray was to be paid for each week and while the start and finish times of his shift do seem to be agreed, the spread of hours within those hours for which Mr McGillivray could expect payment were disputed, as between the parties. Certainly, the pay slips which Mr McGillivray tabled in evidence at the investigation meeting suggest a range of hours from 41 hours down to 31¼ hours but with a mathematical average of around 38 hours per week.

[12] There was argument also about bereavement leave with Mr McGillivray complaining that he was not given an adequate opportunity to attend funerals of close family members and Godfreys Bakery deny that any such thing was in any way true. Indeed, Godfreys Bakery contend that, far from denying Mr McGillivray the opportunity to attend funerals of close family members, they actively encouraged him to do so, but that he declined saying he preferred to work for the maximum amount of time available.

[13] Godfreys Bakery gave evidence that Mr McGillivray had persistent financial problems during his employment which included Court fines and child support payments. Ms Leonie Douglas, who, together with her husband and Mr Thom, were the new purchasers of Godfreys Bakery and thus the respondent in the present matter, indicated in her evidence that she offered to pay the total amount that Mr McGillivray owed and allowed him to pay Godfreys Bakery back over time, and that is in fact what happened.

[14] During the course of calendar 2006, Godfreys Bakery's evidence is that Mr McGillivray's work behaviour and actual hours of attendance decreased markedly as did his production and performance. Ms Douglas attributes that in the main to Mr McGillivray's difficult personal circumstances and in particular to the behaviour of his former partner and his former partner's new boyfriend.

[15] Whatever the cause, Ms Douglas determined to talk with Mr McGillivray about his performance and the evidence is that she had a number of attempts to engage with Mr McGillivray about his performance and his production in the bakery but that those discussions were fundamentally fruitless because Mr McGillivray refused to change his ways and denied that there was any difficulty with the product that he was producing for sale. For instance, Mr McGillivray told me that *I never saw any proof that there was anything wrong with my products. They (Godfreys Bakery) were just trying to brass me off so I left. It was getting me down. I would think I was doing everything the same as I had always done so what was wrong?.*

[16] Despite Ms Douglas's clear evidence that she spoke with Mr McGillivray and tried to get him to improve his performance, Mr McGillivray denies that they ever had a conversation of that sort.

[17] In February 2006, Godfreys Bakery purchased another bakery called Pixies Pastries and Mr McGillivray's evidence is that his employers started doing baking work at the new bakery rather than having him do it, so in effect his contention is that his employers were deliberately taking work from him which he ought to have been allowed to do. Godfreys Bakery, on the other hand, gave evidence that the reason that they commenced baking in their new bakery was because they simply could not get Mr McGillivray to address his deficits as a baker and deal with their concerns.

[18] There were a number of specific examples referred to at the investigation meeting about the quality of Mr McGillivray's work. Ms Douglas said that Mr McGillivray's pies were *absolutely disgusting*. Mr McGillivray agreed that he had been asked by his employer to *put more meat in the pies* and he said that he did that but that then *the tops of the pies burst* allegedly because there was too much meat in them. Ms Douglas said that her attempts to engage with Mr McGillivray about the quality of his baking were often occasioned by complaints from customers and that that was certainly the case in relation to the issue about the meat in the pies. For his part, Mr Thom indicated that Mr McGillivray's fellow workers constantly complained to Mr Thom about having to clean up after Mr McGillivray. This was so despite Mr McGillivray's persistent complaints (Mr Thom called it *moaning*) about other staff and in particular about his (Mr McGillivray's) need to have a baker's assistant to assist him in his work.

[19] By letter dated 9 October 2006, Mr McGillivray, acting through his counsel,

raised a personal grievance exclusively on the grounds of an unjustified disadvantage relying on the sort of conduct just described. The letter from Mr McGillivray's lawyer sought mediation assistance from the Mediation Service of the Department of Labour and that mediation took place on Friday 17 November 2006.

[20] The nature of the discussions in mediation, according to Mr McGillivray, were so *confrontational* that Mr McGillivray felt worse than he had felt prior to the mediation. Accordingly, Mr McGillivray visited his doctor on Monday 20 November 2006, obtained a medical certificate to excuse him from work, returned to the workplace and resigned his position, handing in his keys at the same time.

Issues

[21] It will be convenient to analyse the factual matrix by looking at the two bases on which Mr McGillivray claims a personal grievance, first whether he has satisfied the Authority that a personal grievance lies by reason of a disadvantage or a series of disadvantages that he has suffered as a consequence of an unjustified action or actions by his employer; and secondly whether in fact he has been unjustifiably constructively dismissed from his employment.

The disadvantage claim

[22] I am satisfied on the balance of probabilities that Mr McGillivray has no claim for having suffered a personal grievance by reason of a disadvantaged occasioned by an unjustified action or actions of Godfreys Bakery.

[23] I reach that conclusion because it seems to me that each of the episodes that Mr McGillivray seeks to rely upon are contested by Godfreys Bakery's witnesses and on each occasion where there is that competing testimony, I preferred the evidence of Godfreys Bakery to that of Mr McGillivray.

[24] I reached the conclusion in listening to Mr McGillivray give his evidence that he had experienced difficult personal circumstances during the period of his employment with the new owners of Godfreys Bakery and that the stresses in his private life were undoubtedly causative of some of the deficiencies in his work performance. I was unable to find any evidence that the behaviour of Godfreys Bakery was in any way a contributing factor to Mr McGillivray's feelings of distress and anxiety and certainly I could not find evidence that there was any unjustified action by Godfreys Bakery in

relation to any of the matters complained of by Mr McGillivray.

[25] If we look at each of the matters that Mr McGillivray raises in turn, it will be helpful to confirm that general finding. First, Mr McGillivray said that he had a problem with Mr Thom and that Mr Thom caused him to *lose seniority*. Mr Thom was one of the new owners and was entitled to have some management control over Mr McGillivray. The employer is entitled to manage its business in whatever way it sees fit subject to not treating its employees in an unfair or legally inappropriate way. Mr McGillivray confirmed that he did not lose any income as a consequence of the reorganisation of the business so it is difficult to see how he has suffered any disadvantage by Godfreys Bakery's action. Further, it is difficult to see what unjustifiable action Godfreys Bakery had performed to create any concern on Mr McGillivray's part. As I say, Godfreys Bakery are entitled to run their business in whatever way they see fit consistent with meeting the obligations under employment law.

[26] Next, Mr McGillivray claims that Mr Thom rang him incessantly asking for information. Mr Thom denies this and as I have already noted, made it very plain that he did not ring Mr McGillivray obsessively as Mr McGillivray seeks to have the Authority believe. I heard both men give evidence and I prefer Mr Thom's recollection of events.

[27] Next, Mr McGillivray complains about the way he was paid, noting that he used to be paid by direct credit but once the change of ownership went through, was paid by cheque and that that was inconvenient. The difficulty with this argument from the point of view of the present proceedings is that Mr McGillivray never made clear (by his own admission) to Godfreys Bakery that this was a problem and the evidence from Godfreys Bakery was that if they had known it was a problem they would have changed it.

[28] Next, Mr McGillivray complains about the bonus that he got as being less than what he had previously received. Again, that is a matter for the employer to decide. By definition, by bonuses are discretionary amounts and the fact that a new employer may pay a different kind of bonus or a different amount of bonus to the bonus paid by a previous employer is not something that an employee can rely upon as a ground for claiming disadvantage. There is nothing unjustifiable about an employer taking this stance.

[29] The suggestion that Mr McGillivray was disadvantaged during periods of bereavement is hotly contested by Godfreys Bakery who say that they tried to encourage Mr McGillivray to take appropriate time off when he had family bereavements but that he was very difficult to get to leave work and take the appropriate leave. They say that Mr McGillivray preferred to work rather than take time off and I prefer their evidence to Mr McGillivray's.

[30] Mr McGillivray says that his pay was down on what he was promised and was less than what he received when employed by the previous owners. Neither statement is capable of being supported by the evidence. The evidence discloses that Mr McGillivray in fact was paid more by the new owners of Godfreys Bakery than he was by the old, both in terms of hours and even in terms of hourly rate. Further, I accept the evidence of Ms Douglas that Mr McGillivray was promised between 35 and 38 hours each week (as it happens more than the previous owners promised) and that on average in most weeks, he would have been paid for 40 hours. Certainly it is true that on the pay sheets presented to the Authority on Mr McGillivray, there are a range of hours specified including some much lower than either 35 to 38 hours or indeed 40 hours. However, Ms Douglas gave evidence that she regularly had to wrestle with Mr McGillivray to get him to attend at work for the hours that he was required to attend and that notwithstanding his attendance behaviour, she invariably paid him for more hours than he actually worked. I accept that evidence as truthful and accordingly reject Mr McGillivray's contention in relation to hours of work.

[31] Mr McGillivray contends that when Godfreys Bakery purchased Pixies Pastries they set about in effect stealing his work by attending to baking requirements at Pixies Pastries so as to disadvantage him. I do not accept that contention. I prefer the evidence of Godfreys Bakery to the effect that they were unable to get Mr McGillivray to address deficits in his baking performance and therefore had little option but to try to produce some product elsewhere to keep the business going.

[32] It follows that I am not persuaded that Mr McGillivray has any personal grievance as a consequence of an unjustifiable action by his employer to his disadvantage.

Constructive dismissal

[33] Mr McGillivray says in his evidence that *the last straw* was when Ms Douglas

swore at him and abused him for doing baking work which she had directed in writing she should do. Ms Douglas agrees that there was an altercation and she readily agrees that she was in the wrong. She had got the dates wrong; Mr McGillivray had done what he was asked to do but what he was asked to do was not what he should have been asked to do. In any event, Mr McGillivray was it seems so unnerved by this exchange which happened approximately ten days before the mediation, that when the mediation itself also had an unnerving effect on him, he felt constrained to resign his position the working day next following the mediation fixture.

[34] Constructive dismissal is frequently analysed under three heads, the most graphic of which is the kind of situation where an employer gives an employee an ultimatum to resign or else be dismissed. That is not the situation here.

[35] The other two kinds of constructive dismissal the Courts have regularly referred to involve either a situation where a course of conduct is designed to, as it were, drive an employee out of his or her position, and finally cases where a breach of duty by the employer has the foreseeable consequence of resignation of the employee.

[36] It seems to me that, on the facts properly analysed, there can be no reasonable basis on which Mr McGillivray can claim to have been constructively dismissed. As I have already made clear, there is no basis on which any of Mr McGillivray's contentions about the nature of the relationship between himself and Godfreys Bakery could ground a claim for disadvantage by reason of any unjustifiable action of the employer. So it follows that the same facts cannot also support any improper action of the employer to ground a constructive dismissal allegation.

[37] The immediate facts surrounding the termination of the employment are not in issue. There was a mediation at which the employer quite properly sought to address with Mr McGillivray issues that it thought were pertinent to the continuation of the employment relationship on a proper basis given that there, according to their testimony which I have accepted, were continuing difficulties with Mr McGillivray's performance. As I have mentioned, Mr McGillivray was unnerved by the employer's wish to engage with him on those matters and almost immediately thereafter sought to terminate the employment relationship, apparently because of the employer's behaviour.

[38] I cannot reach the conclusion that it is inappropriate for an employer party to seek to address performance deficits of an employee in the sheltered environment of a

mediation conducted by the Mediation Service of the Department of Labour. Nor is it proper for me to inquire into the behaviour of the parties at that mediation given it is properly a confidential environment. All that is available for me to do is to say that as a matter of principle, it must be competent for an employer to raise matters with an employee in that protective environment and to not be subject to the threat of a finding of constructive dismissal exclusively for that reason.

Determination

[39] Given those findings, the Authority reaches the conclusion that Mr McGillivray does not have a personal grievance and the Authority is unable to assist him any further.

Costs

[40] Costs are reserved.

James Crichton
Member of the Employment Relations Authority