

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 239/10
5291017

BETWEEN LISA McNABB
 Applicant

A N D STONES FABRIC
 INDUSTRIES LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Robbie Davidson, Counsel for Applicant
 Jeff Goldstein, Counsel for Respondent

Investigation Meeting: 9 November 2010 at Christchurch

Date of Determination: 22 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms McNabb) alleges that she was disadvantaged by unjustifiable actions of her employer and unjustifiably constructively dismissed by the employer. The respondent (Stones) denies both allegations.

[2] Ms McNabb was employed by Stones in March 2007 in terms of a written individual employment agreement. Her role was to sort used clothing.

[3] After an initial period of employment which was uneventful, Ms McNabb became troubled by a co-worker, Mr Remzi Gebregziabher. In the last six or seven months of Ms McNabb's employment, she alleges that Mr Gebregziabher made inappropriate remarks, often of a sexual nature, directed at her. Despite that contention, it was Ms McNabb who was spoken to by Stones at a meeting on 21 August 2009 in which Stones remonstrated with Ms McNabb about her offensive remarks (particularly of a racial nature) directed at Mr Gebregziabher.

[4] Despite the tenor of the 21 August meeting, it seems that Ms McNabb regularly went home and complained to her husband about the alleged behaviour of Mr Gebregziabher. On 24 October 2009, there was a particular exchange which Ms McNabb interpreted as insulting towards her which involved two co-workers, one of whom was Mr Gebregziabher. Ms McNabb spoke to her husband that evening and particularly drew his attention to Mr Gebregziabher's alleged wrongdoings on that day.

[5] On 25 October 2009, Ms McNabb's husband attended at the workplace and assaulted Mr Gebregziabher.

[6] There was a meeting between Stones and Ms McNabb on 11 November as a consequence of which Ms McNabb was issued with a formal written warning for inciting violence against Mr Gebregziabher. Ms McNabb resigned her employment on 24 November 2009, claiming that the workplace was unsafe.

Issues

[7] It will be convenient to consider first whether Ms McNabb has suffered disadvantage as a consequence of the unjustified actions of Stones and second whether she has been unjustifiably constructively dismissed from her employment.

Was Ms McNabb disadvantaged by unjustified actions?

[8] Ms McNabb complains that Stones' investigation into the assault on Mr Gebregziabher and the subsequent meeting between the parties disadvantaged her by a succession of unjustified actions of Stones.

[9] Although Ms McNabb's focus is obviously directed particularly at the final meeting between the parties, it is nonetheless relevant to look at the history of the exchanges between Stones and Ms McNabb leading up to those final events. The first issue that needs to be addressed is the events around the meeting between the parties on 21 August 2009. Ms McNabb's evidence is that the 21 August 2009 meeting was called by Stones to deal with Ms McNabb's concerns about the behaviour of Mr Gebregziabher. Conversely, Stones says it called the meeting in order to deal with Mr Gebregziabher's complaint about Ms McNabb. Indeed, further than that, Stones says that at no time did Ms McNabb complain to it about the behaviour of Mr Gebregziabher.

[10] I am satisfied Stones' evidence on that point is to be preferred. I am not satisfied that Ms McNabb ever complained about Mr Gebregziabher's behaviour towards her and that the only complaint about the workplace situation was Mr Gebregziabher's complaint about Ms McNabb which was the purpose of the employer's meeting on 21 August 2009. The transcript of that meeting is available to the Authority and clearly supports the conclusion that it was Ms McNabb who was being questioned about her behaviour rather than there being any issue about Mr Gebregziabher's behaviour towards Ms McNabb. Whether or not Ms McNabb had any basis for complaining about the behaviour of Mr Gebregziabher, I am absolutely satisfied that she never raised those concerns with the employer. Given that it did not know about her concerns (if any), it is inevitable that the employer would be in no position to deal with it.

[11] Certainly, on the evidence before the Authority, it is plain that there were no steps taken by Stones to confront Mr Gebregziabher on behalf of Ms McNabb; as I noted above, the only evidence supports the conviction that Stones was confronting Ms McNabb about her behaviour towards Mr Gebregziabher.

[12] It follows from the foregoing conclusion that I have great difficulty in accepting Ms McNabb's contention that she was bullied, intimidated or suffered crude remarks from Mr Gebregziabher. It seems to me inconceivable that if Ms McNabb was being harassed in the way that she claims, she would not have done something about it. She struck me, in giving her evidence, as being a woman who knew her own mind and who was not afraid of speaking out should that be necessary.

[13] There was nothing further of consequence in the relationship between the parties until the events of late October 2009. As I noted above, Ms McNabb claims that there was a discussion on 24 October 2009 that she overheard which she says referred, in uncharitable terms, to her. In fact, the evidence heard by the Authority suggests that Ms McNabb was quite mistaken about her assumption but whatever the position, it seems common ground that Ms McNabb went home to her husband and complained about Mr Gebregziabher's continuing bad behaviour, allegedly directed at her.

[14] The evidence of Tracey Edwards is important in relation to what happened next. Ms Edwards is a work colleague of Ms McNabb and she was aware of text messages between Ms McNabb and her husband on the morning that Mr McNabb

assaulted Mr Gebregziabher. She says that Ms McNabb received a text from her husband that morning to the effect *do you want me to come and sort the monkey out?*. Later that day, Mr McNabb attended at the workplace and beat Mr Gebregziabher up.

[15] Mr Gebregziabher subsequently complained to the employer. Stones referred the matter to the Police, Mr Gebregziabher subsequently laid a complaint of assault with the Police and Stones then commenced its investigation of the incident. Tina van der Geest, one of Stones' managers, provided me with her contemporaneous written notes. The portion relating to Ms van der Geest's discussion with Ms McNabb reads as follows:

After lunch I asked Lisa [Ms McNabb] what's going on? She says that Porie [Mr McNabb] must be sick of her going home and complaining about Renzi [Mr Gebregziabher]. She says she's warned Renzi lots of times.

She hasn't been able to tell me what Renzi has said today to get Porie down.

She has heard Renzi and Fiona say things about "big girls". She's not sure, but its probably about her.

She said she was sorry to me. She said Renzi called her a bitch before he left and Lisa says she can understand that comment.

[16] Ms van der Geest then proceeded to talk to the other staff who were present at the time of the assault and the majority claimed not to know what happened but also did not want to be dragged into the issue. However, Ms Edwards told Ms van der Geest that Ms McNabb knew that her husband was coming and what he was coming for. She said they had been texting earlier. That record from Ms van der Geest's handwritten notes on the day in question marries well to Ms Edwards' own evidence which I have already referred to.

[17] Insofar as Ms McNabb is complaining about the fairness of the initial investigation, I am satisfied that complaint is misplaced. Ms van der Geest's contemporaneous written notes evidence appropriate inquiries being made at the time and relevant evidence being collected about what Ms McNabb might have known about the assault on Mr Gebregziabher.

[18] Subsequently, on 11 November 2009, Ms McNabb was called to a meeting with Stones for the stated purpose of discussing the assault on Mr Gebregziabher. It is clear on the evidence that Ms McNabb was told what the meeting was to be about.

She protests that it was not clear to her that the meeting was disciplinary in nature and that she was not told that her job might be in jeopardy. I think there is force to the first argument but not the second. It seems to me clear on the facts that Stones did not spell out to Ms McNabb that the issue was potentially disciplinary and that may well have been for the very straightforward reason that, given the nature of the issues confronting the parties, it may not have had a clear notion of where the meeting might end. However, Ms McNabb's protest that she was not told her job was in jeopardy is a claim that I reject completely; on the facts, her job was not in jeopardy and the only eventual response of Stones was to issue her with a warning. An argument to simply bolster up a subsequent claim for constructive dismissal by alleging her job was in jeopardy is no argument at all.

[19] Of more concern is Ms McNabb's contention that the eventual conclusion of Stones, that she had incited her husband, Mr McNabb, to assault Mr Gebregziabher was not an inference capable of being drawn from the facts before the employer.

[20] Certainly the transcript of the interview between the parties on 11 November 2009 does not seem to traverse the issue of whether Ms McNabb incited her husband or not. That said, it is clear from Ms van der Geest's earlier investigation that there was tangible evidence that Ms McNabb had in fact incited her husband to assault Mr Gebregziabher, but on the face of it, the matter was not further discussed at the meeting on 11 November 2009.

[21] Looked at in a commonsense way, as counsel for Stones encourages me to, it is difficult to see why Mr McNabb would have taken the trouble to come down to the Stones' workplace in his lunch hour and specifically assault Mr Gebregziabher then depart again, for no reason at all. Mr McNabb must have been activated in some way in order to take that step. He says that he had never met Mr Gebregziabher or, if he had, it was only fleetingly. So why assault him? The only plausible explanation is that Ms McNabb had been coming home and complaining to him about the alleged behaviour of Mr Gebregziabher and in the end he decided to act. That analysis is absolutely consistent with what Ms McNabb told Ms van der Geest on the day of the assault and it is also consistent with the evidence of Ms Edwards who, it will be remembered, overheard the text exchange on the morning of the assault.

[22] However, there is a clear deficit in the employer's process in its failure to put to Ms McNabb the evidence around her inciting her husband. In closing submissions

on her behalf, Ms McNabb records that she was ... *unable to reconcile how sharing her concerns with her husband about the ongoing harassment she was receiving from him [Mr Gebregziabher] her increasing frustrations and distress could be construed as inciting her husband to assault Mr Gebregziabher.*

[23] Ms McNabb's counsel directs me to the case of *Alliance Freezing Company (Southland) Ltd v. NZ Amalgamated Engineering IUW* [1989] 3 NZILR 785 which is authority for the proposition that a final written warning, where issued as a consequence of an unfair process, was capable of being disadvantageous to the employee because it rendered their employment less secure. It is suggested that that case is in point in the present matter and I agree. Disadvantage may come in a number of forms, monetary disadvantage being only one such form. In the present case, the disadvantage to Ms McNabb was in her feeling less secure in her employment than she ought to have felt.

[24] Furthermore, because it seems that Stones relied on factual matters to make its conclusion, which it never asked Ms McNabb to comment about, that it is reasonable to conclude that Stones has taken actions which are, in principle, unjustified.

[25] Mr Goldstein, counsel for Stones, urges on me the precept that I should not subject Stones' process to minute or pedantic scrutiny. While that undoubtedly is the law, the problem in the present case is that Stones does not appear to have put to Ms McNabb the central facts upon which it relied to reach its conclusion to issue her with a final written warning. In reaching that conclusion, I am not persuaded by Ms McNabb's argument that the meeting itself on 11 November 2009 was deficient in any material respect or that she was failed to be warned about its subject matter. My only concern is with the apparent failure of Stones to put to Ms McNabb the central facts on which it appears to have relied in issuing her with a final written warning.

[26] A transcript of the 11 November 2009 meeting has been made available to the Authority and a careful perusal of that reflects the discursive discussion, much of it clearly conducted with good humour on both parties' parts, but no reference to the link between Mr McNabb's assault on Mr Gebregziabher and his wife's alleged incitement of that assault. It is, I consider, drawing too long a bow to contend that Ms McNabb was responsible for incitement because there was no other explanation for the assault. Ms McNabb still ought to have been confronted with the evidence available to Stones, in particular her own observations to Ms van der Geest

immediately after the assault, and the corroborating evidence of Ms Edwards, who told Stones about the text message exchange between Mr and Ms McNabb on the morning of the assault. It may be that the reason those matters were not traversed specifically in the meeting between the parties is that the meeting, from Stones' perspective, was effectively conducted by Mr van der Geest, not by Ms van der Geest; Ms van der Geest was not present in the early part of the meeting and was only invited to join proceedings about half way through. Perhaps if she had been involved from the beginning, she might have put those matters directly to Ms McNabb.

[27] The letter of warning dated 12 November 2009, while carefully setting out the various parts of the employment agreement which it is contended Ms McNabb has breached, still fails to address the fundamental nexus between the assault and Ms McNabb's alleged part in it. The letter appears to rely on observations made by Mr van der Geest in the meeting of 11 November 2009 in reaching the conclusion that Ms McNabb had incited Mr McNabb to commit the assault. In the first paragraph of the letter, the following observation is made:

On Wednesday 28 October a physical assault causing physical injury was inflicted upon Remzi Gebregziabher, an employee of Stones Fabric Industries Limited by your husband, Porie McNabb, such action being incited by you, the inquiry meeting on 11 November 2009 was told by your husband.

[28] As I note above, this quotation appears to assert that Mr McNabb was incited by Ms McNabb and that Mr McNabb said as much at the 11 November meeting. But having studied the transcript of the 11 November meeting, I think that puts the matter far too strongly. It is true that Mr McNabb said that his wife came home on a regular basis and complained about Mr Gebregziabher and complained also about the employer not addressing her concerns about Mr Gebregziabher. But there is nothing in what Mr McNabb told the employer that would suggest, or even imply, that his wife had incited him to assault Mr Gebregziabher. That is simply an implication which the employer chooses to draw from an individual who is not its employee, albeit a person intimately involved.

[29] Two paragraphs further down, Stones goes on to recite that during the course of the 11 November meeting, Ms McNabb had every opportunity to explain herself but had not done so. The following sentence from that paragraph illustrates the point:

However, despite being given the opportunity during the meeting you have been unable to give any reasonable explanation for inciting this assault in our workplace.

[30] But that puts the cart before the horse because the employer still has not, in my judgment, properly connected Ms McNabb to the assault. It may be, as Mr Goldstein urges on me, that commonsense would suggest the assault could not have taken place without Ms McNabb's constant grumbling at home about Mr Gebregziabher, but I am satisfied the only evidence of her connection to the assault comes from her own mouth on the day of the assault itself and from the evidence of Ms Edwards and neither of those matters was put to her unequivocally in the disciplinary meeting. Had she been asked to reflect and comment on her earlier statement or to comment on the statement obtained from Ms Edwards, then, dependent on that reply, Stones might properly have concluded that it could infer incitement. As it is, that inference is simply drawn from the conclusion that there would have been no assault if Mr McNabb had not been constantly subjected to complaint from his wife; and Ms McNabb is absolutely entitled to have those matters put to her directly for response and not just assumed.

Was Ms McNabb constructively dismissed?

[31] The final written warning was dated 12 November 2009 and Ms McNabb tendered her resignation in writing on 24 November 2009. In fact, after the disciplinary meeting on 11 November 2009, Ms McNabb had little further work time at Stones taking most of the intervening period, from the disciplinary meeting to her subsequent resignation, as sick leave.

[32] The resignation letter makes clear that the resignation is occasioned by the failure of Stones to provide *a safe and secure working environment, a complete disregard to me and my feelings regarding the altercation between my husband and Renzi Gebregziabher and lastly I take exception to your grossly unfair serious misconduct final warning in writing.* Stones could not be in any doubt about the reasons that Ms McNabb was tendering her resignation. The question for the Authority is whether it is reasonable to conclude that this resignation and its avowed basis constitutes one of the elements of a constructive dismissal or not. Ms McNabb contends that she was subjected to a course of conduct by Stones which left her with no reasonable option but to resign her employment and that her resignation was reasonably foreseeable.

[33] Ms McNabb refers me to a number of authorities to justify her view that the employer's behaviour was such as to be dismissive or repudiatory. For instance, in the well known passage in *Wellington Clerical IUW v. Greenwich* [1984] ACJ 347, Williamson J said in relation to the justification of the claim of constructive dismissal:

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

[34] Applying that dicta to the present case, it seems to me difficult to categorise Stones' behaviour as either dismissive or repudiatory. While it is true that it issued a final written warning to Ms McNabb after failing to properly put to her the basis on which it concluded that Ms McNabb had incited her husband to beat up a co-worker, it did that in the context of what seemed to the Authority to be a genuine and well meaning attempt to preserve and restore the employment relationship. The disciplinary meeting on 11 November 2009 spends considerable time in discussing the various options that might be available to restore relationships within the employment. In particular, Stones consistently proposed active mediation in the workplace with an independent mediator to try to resolve the issues between the parties. That is a sensible and practical approach to workplace conflict and it is interesting that in the 11 November meeting, before the final written warning had been issued of course, Ms McNabb was entirely dismissive of the mediation proposal, ably abetted by her husband.

[35] It follows that in my judgment, there simply is no evidence to justify the conclusion that Stones sought to bring about an end to the employment relationship or was so careless in its approach to the employment relationship that it became guilty of dismissive or repudiatory conduct. Yes it is true, in the Authority's view, it made a mistake in the process it used to reach the conclusion that a final written warning should issue, but I am satisfied that that of itself was not enough to ground a constructive dismissal.

[36] Furthermore, given Stones' efforts to try to repair the damaged work relationships, and its vigorous advocacy of mediation as a way forward, it seems on the evidence before the Authority highly unlikely that an impartial observer in Stones' position would have been able to foresee Ms McNabb's resignation. The whole

direction of Stones' behaviour was towards dealing with a disgraceful episode as well as it could and then try to fix the damage that that episode had caused.

Determination

[37] Ms McNabb has satisfied me that she has a personal grievance by reason of having suffered a disadvantage as a consequence of an unjustified action by her employer Stones and she is entitled to have remedies considered as a consequence.

[38] Conversely, I have not been persuaded that Ms McNabb was constructively dismissed from her employment. I do not think that the behaviour of Stones can be characterised as dismissive or repudiatory and I do not think that her resignation was reasonably foreseeable. It follows that I am satisfied that her resignation was, in truth, just that, a resignation.

[39] In order to consider remedies for the unjustified disadvantage grievance that I have found proved, I must first decide whether contribution is a factor. Section 124 of the Employment Relations Act 2000 requires the Authority or the Court to consider whether the actions of the employee have contributed to the situation giving rise to the personal grievance and to reduce the remedies accordingly if that is required.

[40] In the present case, it is difficult to escape the conclusion that Ms McNabb is entirely the architect of her own misfortunes. While she has satisfied me that she should have had put to her by Stones the explicit evidence linking her to the assault (specifically her own remarks on the day of the assault and the evidence obtained at the same time from the co-worker, Ms Edwards), it is clear, on Ms McNabb's own evidence, that she regularly complained to her husband about Mr Gebregziabher and, on a commonsense analysis of the position, Mr Gebregziabher would not have been assaulted if Ms McNabb had not kept grumbling to her husband. If the assault had not taken place, then there would have been no warning and had there been no warning, there would have been no basis for Ms McNabb to claim constructive dismissal.

[41] Ms McNabb gave evidence that she had complained to the employer about the alleged harassment from Mr Gebregziabher, but that claim was stoutly resisted by Stones and I prefer its evidence to Ms McNabb's. I do not think that she ever complained explicitly about Mr Gebregziabher, although it is very clear that he complained about her and that complaint of Mr Gebregziabher about Ms McNabb was dealt with promptly and effectively by Stones.

[42] Looked at another way, if Ms McNabb had done what she ought to have done and complained to her manager about her alleged problems with Mr Gebregziabher, based on the evidence already before the Authority, Stones would have promptly engaged with the parties and resolved the issue. That would have precluded the assault, and the subsequent warning, and the subsequent resignation which Ms McNabb wishes me to see as an unjustified dismissal.

[43] On either basis, the analysis shows that Ms McNabb is the architect of her own misfortunes. I think the proper course of action is to attribute her contribution to 100% because it is difficult to avoid the conclusion that if Ms McNabb had behaved properly by, for instance, addressing whatever concerns she had with the employer, or by failing to grumble to her husband, or both, none of these unhappy events would have happened.

[44] I am satisfied then that Ms McNabb has a personal grievance by reason of having suffered a disadvantage because of an unjustified action by Stones, but given the finding of 100% contribution that I have just reached, she is not entitled to any remedies.

Costs

[45] Costs are reserved.

James Crichton
Member of the Employment Relations Authority