

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 122
5609291

BETWEEN CHRISTINE MITCHELL
Applicant

A N D GENERAL BACK-UP
COMPANY LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Wayne Todd, Counsel for Applicant
Timothy Jackson, Counsel for Respondent

Investigation Meeting: 26 May 2017 at Timaru

Date of Determination: 10 July 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Mitchell) alleges that she was unjustifiably dismissed by the respondent (GBC) on 2 September 2015. That claim is resisted by GBC on the basis that Ms Mitchell was not dismissed but abandoned her employment.

[2] A preliminary issue was dealt with by my colleague, Member Appleton, in his decision of 9 September 2016 issued as [2016] NZERA Christchurch 152. In that decision, the Authority determined that Ms Mitchell had taken reasonable steps to raise her grievance within 90 days of the termination of the employment and that in consequence the Authority could investigate Ms Mitchell's personal grievance. I agree with Member Appleton's decision and need to say no more about that preliminary matter here. The present determination deals exclusively with the substantive claim for personal grievance brought by Ms Mitchell against GBC.

[3] Ms Mitchell was a permanent part time petrol station attendant at GBC's Waimate premises. She worked a defined pattern of shifts but there was no written employment agreement. There is dispute about why that was. GBC says they presented Ms Mitchell with an agreement at the commencement of the employment but that she refused to sign it, while Ms Mitchell denies one was ever proffered.

[4] Anyway, on 1 September 2015, Ms Mitchell was working a night shift and she was visited by Mr Lyall Davies, the director of GBC, and as a consequence of the discussion between these two principal protagonists, the employment relationship came to an end.

[5] Ms Mitchell says that Mr Davies came into the service station at 7.55pm (that is five minutes before closing time) and said "*we have got a problem, we have had two complaints that you smell of cannabis and that you have got to go*".

[6] Conversely, Mr Davies says that he arrived at the service station "*30 to 40 minutes prior to closing time*", that he raised with Ms Mitchell that he had received two complaints that she smelt of cannabis, that Mr Davies considered that he smelt cannabis on her when he spoke to her and that Ms Mitchell acknowledged that she smoked cannabis, denied that she had been smoking it that day, that she became defensive and angry, threw her work keys at him and despite Mr Davies' efforts to persuade her otherwise, she stormed out of the station and disappeared.

[7] The evidence is that initially, Mr Davies covered Ms Mitchell's dedicated shifts but within a matter of days had employed a replacement employee who had simply walked in off the street and said they understood there was a job going so that person was hired.

[8] Mr Davies also gave evidence that after Ms Mitchell had left the service station, he was unsure whether she was just leaving early because she was angry at the allegation or whether she was actually relinquishing her employment and he made several attempts to contact her on the telephone number that she had given him. He was unable to make contact with Ms Mitchell.

[9] For the avoidance of doubt, I observe that there is some confusion in the documents before the Authority as to what date the employment came to an end. It is variously described by both parties as either 1 or 2 September 2015. I am satisfied that the employment came to an end on 1 September 2015, not on 2 September 2015.

I reach this conclusion because 1 September 2015 is a scheduled work day for Ms Mitchell (a Tuesday) whereas the following day was one of the days that she had off from work.

The issues

[10] The only issue in the present case is whether Ms Mitchell resigned her employment as GBC maintains or whether she was dismissed.

[11] If I am to find that Ms Mitchell was dismissed then of course there is a subsidiary question of what remedies (if any) she is entitled to.

How did the employment relationship come to an end?

[12] I have not been persuaded by Ms Mitchell that GBC initiated the termination of the employment and it follows from that conclusion that Ms Mitchell does not have a personal grievance for unjustified dismissal.

[13] Put shortly, I found the evidence of Mr Davies more credible than the evidence of Ms Mitchell. There were no witnesses to the discussion between the two protagonists and in the end I have to make a choice about whose evidence is to be preferred.

[14] It is apparent that the employment came to an end as a consequence of the exchange between Ms Mitchell and Mr Davies and I am satisfied that the central question has to be whether anything that Mr Davies said could be interpreted by a reasonable person as being equivalent to a sending away.

[15] Mr Davies was adamant that he did no more than raise the issue, that is the issue that two persons had complained to him that they had smelt cannabis on Ms Mitchell. Mr Davies' evidence (which I have already indicated I prefer) was that Ms Mitchell, simply put, lost her temper, denied the wrongdoing alleged, threw the keys at him, and left the workplace.

[16] Mr Davies conceded that he did not know at that point whether Ms Mitchell intended to leave the employment permanently (that is whether he was to treat her sudden departure as an abandonment), or whether she had simply momentarily lost her temper and stumped off home early.

[17] In order to try to establish which of those two options was in play, Mr Davies said in his evidence that he tried to contact Ms Mitchell without success and that he filled her shifts himself for the next several days.

[18] It is not clear why Mr Davies could not contact Ms Mitchell; the evidence I heard at the investigation meeting suggested that the number that Mr Davies was calling Ms Mitchell on was the correct number and it seems Mr Davies did not know physically where his employee lived. No doubt that is unsatisfactory but for the purposes of the present dispute, I am satisfied that Mr Davies behaved consistently with his uncertainty about how to interpret Ms Mitchell's behaviour.

[19] If Mr Davies had dismissed Ms Mitchell by word or deed, then he certainly would not have made attempts to contact Ms Mitchell after the event. There would be no point. That means that his evidence that he did endeavour to contact Ms Mitchell (evidence which I accept as truthful) is inconsistent with Ms Mitchell's claim that she was indeed sent away. The only other alternative is that Mr Davies' evidence on his attempts to contact Ms Mitchell is perjured and as I have said, I thought his evidence was truthful.

[20] I am not attracted by submissions for Ms Mitchell based around the proposition that Mr Davies undertook a woefully inadequate investigation into the allegations that Ms Mitchell smelt of cannabis. Unless and until it can be established that the employment relationship has come to an end at the behest of the employer, the analysis of the employer's behaviour as being inconsistent with the tenets of employment law is neither here nor there.

[21] I have already made clear that I prefer the evidence of Mr Davies to the effect that the immediate response to his putting these two allegations to Ms Mitchell was her becoming defensive and aggressive, throwing the work keys at him and leaving the premises never to return. If that is the factual matrix, as I have indicated that on the balance of probabilities I prefer, then all that can be said of Mr Davies' conduct is that he sought to raise two matters he was entitled to raise with his employee and her response ended the relationship without any opportunity for GBC to take matters any further.

[22] Mr Davies was persuasive that he never did or said anything which could be construed as indicating a desire to bring the employment relationship to an end.

Indeed his evidence is that he had no chance to take any such step because immediately on him raising the cannabis issue, Ms Mitchell retaliated by becoming defensive and aggressive and leaving the workplace.

[23] While I would not want to put too much weight on this point, I thought Ms Mitchell's demeanour when giving evidence, and particularly when being cross-examined by counsel for GBC, was inclined to be truculent and showed flashes of the hostility and temper which Mr Davies' evidence referred to.

[24] Moreover, even on Ms Mitchell's own evidence, she acknowledged becoming hostile when Mr Davies raised the cannabis allegations and confirmed that she had used a number of uncharitable expressions during the discussion. That evidence is, I think, consistent with Mr Davies' recollection of how these events played out.

[25] A final issue that I need to comment on is the evidence from Mr Davies that the person who he subsequently engaged to fill Ms Mitchell's place had been told by Ms Mitchell that there was a job going at the service station and that that statement supported his contention that Ms Mitchell had terminated the employment herself.

[26] I do not think that the evidence that Mr Davies refers to does anything of the kind. Even if Ms Mitchell had said to this third party that there was a job vacancy at the service station, that could mean either that the vacancy had come about because of abandonment of employment (as Mr Davies maintains) or that it had come about by way of dismissal (as Ms Mitchell maintains). The only possibility that is excluded by this evidence is the possibility that Ms Mitchell had simply got cross with the allegations that were made against her and wandered off that night in a huff but was intending to return to the employment later.

[27] In any event, she did not do that, Mr Davies was unable to contact her to establish whether that was her intention or not, and in the absence of the evidence of the third party who could give evidence to me about precisely what that person was told by Ms Mitchell, I do not take that evidence any further.

Determination

[28] I have not been persuaded that Ms Mitchell was dismissed from her employment but rather I have concluded that she abandoned her employment having

been confronted by Mr Davies, the director of the employer, with allegations that she had smelt of cannabis while working.

[29] It follows from that conclusion that Ms Mitchell has no remedies in this Authority.

Costs

[30] Costs are reserved. The parties' counsel are urged to try to resolve matters on their own terms but if they are not successful then the successful party may file and serve a submission as to costs and the unsuccessful party will have 14 days from the receipt of that memorandum to file their own submissions on costs. I will then determine the matter on the papers.

James Crichton
Chief of the Employment Relations Authority