

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 160
5393902

BETWEEN SHANNON O'BRIEN
Applicant

A N D DICK SMITH ELECTRONICS
NZ LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Susan Lewis, Counsel for Applicant
Adam Mapu, Advocate for Respondent

Investigation Meeting: 30 April 2013 at Christchurch

Submissions Received: 10 May 2013 and 24 May 2013 from Applicant
22 May 2013 from Respondent

Date of Determination: 8 August 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] When filed in December 2012, this was a claim the applicant, Ms O'Brien, had been unjustifiably disadvantaged in her employment with the respondent, Dick Smith Electronics NZ Limited (DSE). That said, she did then express a view she could no longer work for DSE and its actions amounted to constructive dismissal.

[2] Since then circumstances have changed and a resignation was formalised immediately the day after an unsuccessful mediation (13 February 2013). The claim has now become one of unjustified dismissed, albeit constructive.

[3] DSE denies either claim has merit.

Background

[4] Ms O'Brien claims:

Dick Smith Limited have continuously treated me in a way which makes me think they want me to leave. My ability, training and expertise in the field of computers and electronic devices is ignored and I no longer have any confidence in their ability to respect my competence and personal honesty. They have accused and subsequently punished me for something which was quite legitimate and I believe an employee to have gone through my personal possessions without justification or authority.

[5] She goes on to say:

I have been accused and found guilty of taking an action which did not occur and had my staff discount card removed indefinitely ... When I now arrive at work, I am treated as an incompetent, unskilled worker and singled out for demeaning an/or unnecessary jobs.

[6] She claims that when the Northwood, Christchurch, store at which she was normally engaged was temporarily closed for earthquake related repairs she was sent to Hornby, the store most distant from her residence and that her hours were less than those required by her employment agreement. She also says working at Hornby contradicted earlier promises she would be relocated to The Palms and when she raised the issue of hours she was told to use annual leave to make up the difference.

[7] Ms O'Brien also claims she became aware work was available at other DSE locations but when she asked about being given additional hours she was told she had *annoyed the Area Manager and been sent to Hornby as a punishment.*

[8] These claims are denied by DSE.

[9] The issues emanating from her transfer and a couple of others she raised are not, however, her prime concern. The concern central to both the initial disadvantage claim and the subsequent claim of constructive dismissal was the issuing of a warning for misuse of a staff purchase discount.

[10] Employees are issued with a staff discount card which has, as one of its terms and conditions of use, a requirement:

This staff discount card may only be used when presented by the person whose name and signature appears on the card. It cannot be used to obtain a discount for anyone other than the cardholder.

[11] The policy also provides staff discount cards can be confiscated if presented by an unauthorised person and misuse of a card could result in disciplinary consequences, including dismissal.

[12] Ms O'Brien says the family camera had ceased to operate and as a result her father researched comparable cameras on the internet and decided on a suitable replacement. He came into the store at which she worked and advised her of the model he thought best. Ms O'Brien recognised it as one currently on sale at a special rate. She told her father who decided to make the purchase.

[13] Ms O'Brien goes on to say she was aware she could not serve either herself or her family. She therefore passed the sale to a co-worker, Libbee, and the two of them stood at the till while Libbee processed the transaction, though she did not complete it for two reasons. First Mr O'Brien also wanted printer ink but was unsure of the exact product. He went home to check. Second, Ms O'Brien could not locate her staff discount card which she intended using for the purchase. The transaction was *parked* and the camera temporarily stored *out the back*.

[14] Upon Mr O'Brien's return, the process recommenced but as soon as Ms O'Brien produced her now found staff discount card she was challenged by the Assistant Store Manager, Mr Troy Gunning. He demanded the staff discount be removed as it was not Ms O'Brien but her father who was buying the camera.

[15] Ms O'Brien goes on to say she responded by advising the camera was for household use and she was therefore entitled to the discount. She claims Mr Gunning refused to listen and advised *you cannot put it through (use the staff discount) if your dad is buying it*.

[16] Ms O'Brien says Mr Gunning then left and she printed out the staff discount policy which, in her view, confirmed there was no breach. She says notwithstanding that conclusion, she chose to comply with Mr Gunning's instruction and decided she and not her father would buy the camera. Her father then passed her the money he had intended using and the sale was completed with Ms O'Brien now purporting to be

the purchaser. Mr O'Brien describes the money as a gift and says once passed it became his daughters to spend as she chose. She chose to spend it on the camera.

[17] Ms O'Brien then continued with her work but toward the end of the day she was approached by Mr Gunning and accused of misusing the discount.

[18] On 2 August 2012 Ms O'Brien received a letter advising her employer wished to meet with her over what it considered *potential serious misconduct*. The specific concerns were said to be:

- *Misuse of your staff discount card where you used your staff discount card to purchase items on behalf of another person who was not entitled to a staff discount. (See transaction 612-193893).*
- *You failed to follow the direction of your manager when you used your staff discount card for purchases on behalf of a person who is not entitled to staff discount and after being directly advised not to.*
- *You failed to get your manager to process and authorise a transaction that involved your staff discount card. (See transaction 612-193893.)*

[19] The letter advised Ms O'Brien seek representation and cautioned the meeting may result in disciplinary action up to and including dismissal.

[20] The meeting occurred on 5 August 2012 and Ms O'Brien was accompanied by her father. DSE alleges the meeting got off to a bad start with Mr O'Brien threatening legal action on the basis DSE did not have a leg to stand on and demanding an apology from the manager who was pursuing the issue. DSE, however, proceeded with its investigatory process and elicited various responses from Ms O'Brien. The meeting then adjourned and over the proceeding days DSE's representatives viewed CCTV footage and interviewed other relevant staff.

[21] There was also an issue concerning the price charged and whether or not the staff discount had been added to the sale price. This was not pursued, with DSE concluding there was no validity to its concerns in that respect.

[22] A further meeting occurred on 9 August and this time Ms O'Brien had legal representation. That meeting also adjourned to allow DSE to consider Ms O'Brien's responses. It resumed the following day and DSE advised that while it considered Ms O'Brien use of her staff discount constituted serious misconduct, it would apply the

lesser penalty of a final written warning. The warning was confirmed by letter dated 14 August 2012.

[23] Ms O'Brien subsequently voiced her dissatisfaction and demanded the warnings withdrawal. It is DSE's refusal to comply with that demand that ultimately led the resignation.

Determination

[24] As already said, Ms O'Brien claims she was constructively dismissed.

[25] In *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965 the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[26] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[27] There must also be a causal link between the employers conduct and the tendering of the resignation (*Z v A* [1993] 2 ERNZ 469).

[28] While a simplistic summary of significantly more complex law, the assumption underlying the concept of constructive dismissal is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation.

[29] The onus falls on Ms O'Brien to establish, prima facie, there was such a breach.

[30] For the following reasons, I conclude she has been unable to do so.

[31] The statement of claim indicated a multiplicity of events may have uninfluenced Ms O'Brien's decision to resign and this impression was supported by her giving evidence about these alleged incidents (refer paragraphs 3, 5 and 6 above). That these incidents influenced the decision to resign was, however, belied by answers Ms O'Brien gave when asked, more than once, why she resigned.

[32] The consistent answer was the resignation was wholly attributable to the warning for misuse of the staff purchase card which Ms O'Brien considers to be totally unjustified. She portrayed the other issues as illustrating DSE's negative perception of her and, in her view, it was that perception which led to the decision to an unjustified warning. More than once, and while using other words, she orally confirmed the other incidents she evidenced were minor inconsiderations which led to some happiness but that they did not influence her decision to resign and she did not consider them repudiatory. As said in *Greenwich* such incidents do not support a claim of constructive dismissal.

[33] Ms O'Brien confirmed, more than once, the decision to resign was wholly attributable to the issuing of, and subsequent refusal to remove, the warning.

[34] The argument as to why the warning was unjustified is convoluted but is based on a contention there two sales processes as a result of the interruption when Mr O'Brien went home. The first remained incomplete with no contract of sale between DSE and Mr O'Brien. A second and separate contract of sale was then completed with Ms O'Brien as the purchaser and the staff discount could be legitimately used as the camera for her use with her money (albeit recently gifted to her by Mr O'Brien who was still present and observing).

[35] The argument is implausible. It is implausible given Mr O'Brien's admission, when giving oral evidence, that the intention was he purchase the camera. At no time did he answer that intention actually changed and that he would not be a beneficiary of the purchase and discount. The policy clearly states the benefits of card use are limited to the person to whom it was issued. Mr O'Brien was not that person and here It should be noted the evidence suggests he was eligible to have his own card given he as domiciled in the same residence as his daughter but both decided he not avail himself of the opportunity.

[36] The evidence is clear. Ms O'Brien was given an instruction and chose to try and circumvent it in a blatant and unsophisticated way. DSE was, I conclude, entitled to investigate in the circumstances.

[37] To investigate in such circumstances does not constitute a breach, let alone one that could be considered repudiatory.

[38] Similarly I conclude the decision to issue a warning is not a repudiatory breach. Having heard the evidence, seen the CCTV and read notes of the various meetings, I find DSE's conclusion Ms O'Brien had transgressed was one a fair and reasonable employer could have reached. Even if I am wrong in this regard, I conclude this was a concern best met addressed by pursuing an unjustified disadvantage claim which was the path initially embarked upon. The evidence does not support a conclusion DSE's actions forced a resignation.

[39] For the above reasons I conclude Ms O'Brien has failed to convince me she as the victim of repudiatory conduct by DSE. Her claim of constructive dismissal therefore fails.

[40] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority