

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Julie Palmer (Applicant)
AND Otahuna Lodge Limited (Respondent)
REPRESENTATIVES Jeff Goldstein, Counsel for Applicant
No appearance for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 23 June 2005
DATE OF DETERMINATION 18 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Julie Palmer worked fulltime for Otahuna Lodge Limited as a housekeeper from 1 September 2003 until she resigned on 8 July 2004. Prior to her resignation, Ms Palmer had been on ACC following a non-work accident on 26 April 2004. Ms Palmer says that she was constructively and unjustifiably dismissed. To resolve her personal grievance, it will be necessary to determine the circumstances of her resignation and apply the law relating to constructive dismissal.

[2] Otahuna Lodge Limited is in receivership, the receiver having been appointed in February 2005. That might explain why the respondent did not lodge a statement in reply even though the statement of problem was served at the respondent's registered office prior to the receivership. No one appeared for the respondent at the investigation meeting but I am satisfied that the notice of investigation meeting was also served on the respondent at its registered office. Correspondence on the Authority file indicates that the receiver is aware of the proceedings but elected not to attend the investigation meeting. No good reason having been shown for the respondent's failures, I decided to proceed with the investigation meeting.

Why did Ms Palmer resign?

[3] Everything at work was fine for Ms Palmer until after her accident. On or about 5 May 2004, Ms Palmer's ACC case manager spoke with Otahuna's general manager (Steve Holmes) to discuss her returning to work on light duties doing office work for 15-20 hours per week. Mr Holmes said such work was available but, when Ms Palmer contacted him about when to start the light duties, he said that there were no light duties. Some time later, Ms Palmer spoke to the assistant general manager (Alan Forsdick) who said that Mr Holmes would contact her. A little later again, Ms Palmer became aware that Mr Holmes had left the business without contacting her. There was further contact between the ACC case manager and Otahuna, following which Ms Palmer received a series of phone calls from Mr Forsdick who told her that her return to full fitness was taking too

long and that Otahuna wanted her to resign. Ms Palmer eventually relented and wrote a letter of resignation in July 2004.

[4] The wording of the letter of resignation suggests that ACC and Ms Palmer agreed that she should terminate her employment but that is not correct. ACC and Ms Palmer sought her return to work on light duties shortly after the accident. Otahuna agreed to that but then put off Ms Palmer. She later resigned because of Otahuna's failure to take her back on light duties and the pressure applied by Mr Forsdick to secure her resignation.

Constructive dismissal

[5] In *Wellington etc Clerical etc IUOW v Greenwich* [1983] ACJ 965, the Arbitration Court held that, in considering whether a resignation amounts to a constructive dismissal, it is helpful to look at the true source of the initiative for termination of the employment. Later, in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal identified at least three types of constructive dismissals. They include cases where the employee is given the option of resignation or dismissal, or where the employer has followed a course of conduct with the deliberate and dominate purpose of coercing a resignation and where a breach of duty by the employer leads a worker to resign. The two later categories are relevant in the present case. Later, in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168, the Court of Appeal held that it is necessary to question whether the breach of duty on the part of the employer was sufficiently serious to make it reasonably foreseeable that the employee would resign.

[6] Ms Palmer was entitled to more considerate treatment than she received from Otahuna. They should have honoured the promise to ACC to provide light duties or at the very least explained what (if any) circumstances had changed to prevent that. The failure to do either is a breach of the implied obligation of fair and reasonable treatment. However, I find that the breach is not sufficiently serious for it to have been reasonably foreseeable that a resignation would follow. Then, Mr Forsdick set out to procure Ms Palmer's resignation which he achieved. Without evidence from the respondent, it would be speculative to connect his behaviour with the gathering financial difficulties that later resulted in the receivership. Taking the breach and Mr Forsdick's behaviour together, I find that Otahuna did conduct itself with the deliberate and dominate purpose of coercing Ms Palmer's resignation. The initiative for the termination came from Otahuna. Accordingly, I find that Ms Palmer was dismissed. There is no evidence of any justification for the dismissal. Ms Palmer has a personal grievance.

Remedies

[7] Ms Palmer was on ACC compensation from the date of her accident until 29 November 2004. Ms Palmer believes that she would have been fully fit for work much earlier if she had been provided light duties but there is not sufficient medical evidence to make that finding on the balance of probabilities. If Ms Palmer had been provided with light duties as promised, there would have been no other impact on her loss of remuneration as any income from light duties would have been offset from her ACC compensation. Accordingly, there is no loss of remuneration attributable to the grievance up to 29 November 2004. By 29 November 2004, Ms Palmer had found regular alternative employment, so there is no loss to compensate after the date her ACC payments ended.

[8] I find that Ms Palmer suffered humiliation, lost dignity and injured feelings as a result of her grievance. This employment was her first fulltime permanent position and it ended badly. Ms Palmer is understandably upset about that. However, the evidence establishes that only a

modest award of compensation is required to remedy her upset and distress. Otahuna Lodge Limited is to pay Ms Palmer \$2,500.00 compensation.

[9] I intend to make an award of costs in Ms Palmer's favour on the basis that Ms Palmer should receive a contribution to her costs reasonably incurred. At this point, given the default nature of the investigation meeting and the limited preparation required I consider an award of \$300.00 costs would be appropriate but as the matter was not argued at the investigation meeting, Ms Palmer may have an opportunity to lodge and serve any submissions within 21 days. If nothing is received from her, an award of \$300.00 costs will stand but if she does lodge and serve any submission, Otahuna Lodge Limited may lodge and serve any reply within 14 days.

Philip Cheyne
Member of Employment Relations Authority