

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 66
5590140

BETWEEN FRANCES RICHARDS
 Applicant

A N D FRESH FLOWER WHOLESALER
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Wi Pere Mita and Jesse Tata, Counsel for Applicant
 Greg Presland, Counsel for Respondent

Investigation Meeting: 01 March 2016 at Auckland

Date of Determination: 02 March 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Ms Richards was originally employed on 12 June 2007 by Auckland Hospital Florist as a Florist and Store Manager on a permanent full-time basis. On 31 January 2015 Fresh Flower Wholesaler Limited (Fresh Flower) purchased the Auckland Hospital Florist business and by agreement Ms Richards' employment transferred to Fresh Flower.

[2] Ms Richards continued her employment with Fresh Flower under the same terms and conditions she had with her previous employer, Auckland Hospital Florist. A new employment agreement was not issued or executed in respect of the change in employment relationship and employer.

[3] On 11 March 2015 Ms Richards claimed she was unjustifiably dismissed. The parties attended mediation with a mediator from Mediation Services and as a result of that entered into a Record of Settlement pursuant to s.149 of the Employment Relations Act 2000 (the Act).

[4] As part of this settlement Ms Richards was reinstated to her former employment with Fresh Flower to take effect on 15 June 2015. The parties subsequently agreed that Ms Richards would spend her first three weeks back at work at the Onehunga florist so she could learn the systems of that shop. She had not previously worked at that location.

[5] Ms Richards says that Fresh Flower did not comply with all of the terms of the Record of Settlement. For example she was not given her roster a week in advance, her settlement payments was not paid on time and she did not receive a written employment agreement before returning to work. Ms Richards say this resulted in her terms of employment and duties being unclear.

[6] I find that Fresh Flower did not meet all of its obligations under the Record of Settlement and I consider that was a catalyst for the subsequent problems that developed when Ms Richards returned to work.

[7] There were problems from the outset of Ms Richards' reinstatement. Although she reported to work at 9am Fresh Flower became concerned because it alleged Ms Richards had spent the first 45 minutes on the phone to her lawyer which it considered inappropriate and unacceptable. Ms Richards says she had to speak to her lawyer about the breaches of the agreed settlement that were continuing to occur.

[8] Ms Richards says she did not receive any induction or training but was expected to commence working immediately. Fresh Flower disputes that but I have preferred Ms Richards' evidence. I consider it more likely than not that there was not an orderly or appropriate re-assimilation of Ms Richards into the Onehunga work place.

[9] Because staff knew that Ms Richards had previously worked for Fresh Flower they assumed she knew what to do so expected her to just get on with it. This assumption left Ms Richards feeling unwelcome and unsupported.

[10] I also consider there was a lack of clarity around what Ms Richards could and should be doing. She was to be reinstated as a Shop Manager but was told to do menial jobs such as cleaning up decaying wet vegetation outside, scrubbing out the chiller, making up boxes and scrubbing out buckets.

[11] This allocation of duties led Ms Richards to perceive that she was being given “*dogs jobs*” and I consider that perception adversely coloured her view of her return to work. The evidence established that Fresh Flower had a flat management structure and that Ms Richards was not asked to do anything that every other employee was already required to do. However she did not know that at the time because it had not been communicated to her.

[12] Things did not go smoothly with the work that Ms Richards was asked to do. There is a conflict between the parties about what occurred and why. However there is no dispute that an incident occurred on 15 June 2015 involving the unloading of flowers from the work van. I consider this incident escalated the unhappiness already being experienced by both parties.

[13] Another area of conflict is over the date on which Ms Richards was given her written individual employment agreement. Fresh Flower says Ms Richards was given her employment agreement as soon as she reported to work on 15 June. Ms Richards says it was not given to her until her second day back which was a bone of contention because under s.63A(2) of the Act she should have received it before starting work.

[14] I have preferred Ms Richards’ evidence that she received it on 16 June because that date is corroborated by emails between the parties’ lawyers.

[15] Further tension was created when Ms Richards left work at around 1.30pm on her first day back then failed to return to work that day. Ms Richards did not tell anyone she was leaving for the day or why she was leaving work on her first day back an hour and a half early. Ms Richards called a colleague around 4.45pm that day to say that she had a family medical emergency but would be back at work the next day.

[16] It came out at the Authority’s investigation meeting that Ms Richards had gone to see her lawyer that afternoon and did not go to the hospital to visit her family member until later that evening.

[17] Ms Richards alleges that on 16 June 2015 Ms Shirley Ann Sharpe, Fresh Flower Manager, told her (Ms Richards) in front of all the other staff that her performance was poor. Ms Sharp denies that and says she just asked Ms Richards if she had any issues with the workplace to which Ms Richards responded by walking out of the meeting.

[18] I have preferred Ms Richards account of this incident. The meeting was called as a response to Fresh Flower's concerns about Ms Richards's performance. It was obvious to all that Ms Richards first day of work had not gone well so calling her out for poor performance in front of all of the other staff was inappropriate and inflamed the bad feelings that had been developing over the preceding 24 hours.

[19] Things deteriorated from there because after the staff meeting Ms Sharpe unilaterally issued Ms Richards with two letters that Ms Richards says were written warnings and which Fresh Flower says were merely "*staff instructions*." Ms Richards was required to sign these two warning letters and after some pressure reluctantly did so.

[20] Ms Sharp says she also gave Ms Richards an invitation to a disciplinary meeting letter at the same time as the two written warning letter but I consider that unlikely. Ms Richards did not sign that letter and she says she was never given it. Ms Tugaga (who is Ms Sharp's sister in law) says she (Ms Tugaga) gave the disciplinary invitation letter to Ms Richards.

[21] I consider it odd that Fresh Flower issued two written warnings at the same time as it says it invited Ms Richards to a disciplinary meeting. I do not accept Fresh Flowers submission that the two warning letters were "*staff instructions*" only, not warnings.

[22] Both documents expressly refer to the fact that they are "*warnings*" and one of the warnings states that "*another warning*" may follow, implying at least one warning had already been given. The Statement in Reply also acknowledges that Ms Richards was issued with two written "*warnings*".

[23] I find that both warnings were unjustified because they were unilaterally imposed without any disciplinary process having been undertaken and without Fresh Flower having complied with its good faith obligations.

[24] Ms Richards was further upset because she says the Record of Settlement was attached to the proposed employment agreement which was left on a shelf for anyone to read.

[25] Fresh Flower says that the amount of time spent by Ms Richards on the phone to her lawyer is an example of her poor performance. However this misses the point that it was because of the breaches by Fresh Flower of the Record of Settlement and the problems arising from Ms Richards' reinstatement that she felt the need to obtain legal advice on how to respond to issues as they arose.

[26] Fresh Flower is very critical of Ms Richards' performance. Ms Richards denies being a poor performer and says the problems arose due to a lack of clarity and confusion around her return to work. I consider there is merit in that submission. My view is that had Fresh Flower complied with the settlement and handled Ms Richards return to work more sensitively a large amount of the problems that occurred would likely have been avoided or vastly reduced.

[27] The relationship deteriorated to the point that on 17 June 2015 (Ms Richards' third day back at work) she claims Ms Sharp pushed her (Ms Richards) aside with her arm and tried to snatch a flower bucket from Ms Richards because she (Ms Sharp) didn't think Ms Richards was working fast enough.

[28] Ms Sharp denies this allegation. I do not consider the incident is as serious as Ms Richards believed it to be, but I do consider it is another example of the deterioration in working relationships that was rapidly developing in the Onehunga shop and which Fresh Flower was failing to appropriately address.

[29] Ms Richards claims that later that day Ms Nanette Best, who is the Senior Florist at the Onehunga florist shop, asked aggressively why she (Ms Richards) even wanted to be at work. Ms Richards says she was asked similar questions throughout the day. Ms Best says that she asked Ms Richards that because it was clear she (Ms Richards) was very unhappy.

[30] There is a conflict in the evidence regarding the intention behind, and content of, the discussions between Ms Richards and Ms Best on 17 June. Ms Richards claims that over the course of that day Ms Best asked her (Ms Richards) a number of times whether she wanted to leave. Ms Richards says she replied "no" but that she did not want to work in a hostile workplace.

[31] Ms Richards claims that Ms Best told her she should leave early to go and see her lawyer and that “*you may as well just clock out and go home*” and “*we can’t afford to keep you.*” Ms Best denies this – she says that Ms Richards said she was leaving then just walked out.

[32] Ms Best’s evidence about the discussions on 17 June was contradictory. Ms Best told the Authority she was not sure whether or not Ms Richards had resigned but an apparent file note made around the time of these events says she told Ms Richards she (Ms Best) would take her (Ms Richards’) leaving to be her resignation.

[33] Ms Richards denies she was told that she would be considered as having resigned if she left work. Ms Richards says she only left work early at Ms Best’s encouragement so she (Ms Richards) could get legal advice on her situation. Ms Richards says she went home that evening and called her lawyer and on her lawyer’s advice she did not resign or make any statements to that effect.

[34] There is another significant and material conflict between Ms Richards and Ms Best regarding what (if anything) occurred on Thursday 18 June. Ms Richards claims that when she turned up at work on 18 June Ms Best met her in the carpark and told her (Ms Richards) not to enter the premises because her resignation had been accepted.

[35] Ms Richards claims she told Ms Best she had not resigned but Ms Best told her that Fresh Flower’s lawyer said if Ms Richards went onto the premises she would have a trespass order issued against her. Ms Richards says she considered she had been dismissed by Ms Best because she (Ms Richards) had attended work ready and willing to work but had been prevented from working and was told she would be trespassed if she went inside.

[36] Ms Best denies ever seeing or speaking to Ms Richards on 18 June. Ms Best claims she had a migraine so was late to work that day. Ms Best says she didn’t know what was going on with Ms Richards and never threatened her with a trespass order.

[37] Ms Richards says she went to her lawyer and instructed him to raise a dismissal grievance. However her grievance was not raised until 21 August 2015 because her lawyer advised her to focus on getting the money she was owed under the Record of Settlement resolved before they pursued the dismissal grievance. Ms

Tugaga says she never saw the grievance letter but that was not referred to in the Statement in Reply or in her witness statement.

[38] Fresh Flower says that Ms Richards' attitude was poor when she returned to work after mediation. It claims that Ms Richards did not return her signed employment agreement, left the shop during work hours and did not return, she used her mobile phone during work hours, her performance was inadequate, she was not doing what she was asked to do and she was disrupting other staff and putting them behind schedule.

[39] Ms Richards denies these allegations. She claims that Ms Best followed her (Ms Richards) around trying to hurry her up and criticising her performance. Ms Best denies that but admits she considered Ms Richards was working too slowly and that her standard of work was very poor, especially for someone with her experience.

[40] I accept Ms Richards' evidence about this. Fresh Flower was obviously very unhappy with Ms Richards' work and Ms Best was tasked with trying to address those concerns so it is unsurprising Ms Richards felt under some pressure.

[41] Fresh Flower has given differing accounts as to why Ms Richards' employment ended. The Statement in Reply says Ms Richards elected to "*give verbal notice of her resignation on June 17.*" Ms Tugaga in her statement said that Ms Richards walked out and did not return.

[42] At the Authority's investigation meeting Fresh Flower acknowledged that Ms Richards had not resigned (the proposed employment agreement required two week's written resignation). Instead Fresh Flower claimed that Ms Richards abandoned her employment which then ended pursuant to clause 9.1 of the proposed employment agreement.

Issues

[43] The following issues are to be determined:

- (a) Did Fresh Flower breach its duty of good faith?
- (b) If so, should a penalty be imposed?
- (c) If so, should some or all of any penalty be paid to Ms Richards?

- (d) Was Ms Richards dismissed?
- (e) If so, was her dismissal justified?
- (f) If not, what if any remedies should be awarded?
- (g) What if any costs should be awarded?

Did Fresh Flower breach its duty of good faith?

[44] Section 4 of the Employment Relations Act (the Act) imposes mutual good faith obligations on parties who are in an employment relationship.

[45] Section 4(1A)(b) requires parties to be “*active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*”

[46] I find that Fresh Flower’s actions fell short of this standard and amount to a breach of s.4(1A)(b) of the Act.

[47] Under s.4(1A) of the Act Fresh Flower is required to provide Ms Richards with information relevant to her ongoing employment and an opportunity to comment on that information before she was dismissed. I find that did not occur.

[48] I consider the unilateral imposition of two written warnings on Ms Richards less than 24 hours after she had returned to work was also another breach of good faith.

[49] I also find that Ms Richards was not given a reasonable opportunity to adequately or appropriately respond to Fresh Flower’s view that she had abandoned her employment. Fresh Flower had a good faith obligation to make appropriate inquiries before concluding that Ms Richards had abandoned her employment. I am not satisfied it did so.

[50] I find that Fresh Flower breached its s4(1A) good faith obligations to Ms Richards.

Should a penalty be imposed?

[51] I am not satisfied that this is an appropriate case in which to award a penalty. I consider these breaches form part of Ms Richards' dismissal grievance so I consider they will be adequately addressed as part of the dismissal claim. I therefore decline to impose a separate penalty.

Was Ms Richards dismissed?

[52] Ms Richards bears the onus of establishing on the balance of probabilities that her employment ended because she was dismissed. Dismissal involves an ending of an employee's employment at the initiative of the employer. A voluntary resignation is not a dismissal.

[53] An employer does not have to actually use the words "*you are dismissed*" or "*we are terminating (or ending) your employment*" for there to be a dismissal in law. If the employment ends at the employer's initiative (as a result of acts or omissions taken by the employer) then that may amount to a dismissal.

[54] The application of a valid abandonment clause in an employment agreement is not a dismissal because the employment ends as per the material contractual provision, not at the initiative of the employer.

Constructive dismissal

[55] I have been unable to resolve the conflict in the evidence about the alleged events in the carpark so I therefore find that Ms Richards has not proved that evidence on the balance of probabilities.

[56] I am however satisfied on the balance of probabilities that Ms Best told Ms Richards on 17 June that she (Ms Best) had accepted her (Ms Richards') resignation despite Ms Richards not having resigned. I find that amounts to a constructive dismissal.

[57] I consider this view is supported by the note Ms Best produced to the Authority dated 17 June which records that Ms Best had advised Ms Richards that she (Ms Best) had accepted her (Ms Richards) leaving as quitting her job. Although this note is dated the day before the alleged carpark exchange I consider it sheds light on

Ms Best's view around the material time and that such view is significant given Ms Best was Ms Richards' manager.

[58] I consider that Fresh Flower fundamentally breached its implied duty of trust and confidence to Ms Richards and that it was reasonably foreseeable that Ms Richards would not continue working under such circumstances.

[59] Fresh Flower breached the Record of Settlement, it failed to comply with its obligations under s.63(2) of the Act to provide Ms Richards with a copy of her proposed employment agreement or an opportunity to take advice on it before she returned to work. Fresh Flower considered Ms Richards' actions in seeking legal advice from her lawyer about the breaches that were occurring to be poor performance.

[60] Ms Richards had her performance criticised in front of other staff and Ms Sharp challenged her (Ms Richards) at a staff meeting to raise her issues with the workplace (this was at the beginning of Ms Richards' second day back and occurred after the first day had gone badly from both parties' perspectives). I consider this was unnecessarily confrontational and added to Ms Richards' belief that she was not welcome back.

[61] Ms Richards had two written warnings unilaterally imposed on her on the morning of her second day back at work. These warnings made highly critical adverse comments about her and stated that she had caused disruption and dissatisfaction within the whole workplace. These warnings were prepared after Ms Richards had only worked four and a half hours on her first day.

[62] Ms Richards was forced to sign both of these letters in front of other staff who could see what was happening. Her confidential Record of Settlement was left out in the workplace so others (who had not been involved in the mediation) could easily see it. She had been given low level manual unpleasant cleaning work to do instead of being treated like the Shop Manager she had been employed as.

[63] There was confusion about Ms Richards' hours of work. For example Ms Tugaga criticised Ms Richards for not being at work when Ms Tugaga turned up unannounced on Tuesday afternoon to speak with her but that was unfair criticism because Ms Richards' work day had officially ended half an hour before Ms Tugaga arrived.

[64] I also accept Ms Richards' evidence that she had been pressured a week after the Record of Settlement had been signed to change her days of work from what had been agreed at mediation. I consider it more likely than not that Ms Best was overly critical of Ms Richards' work and that she had repeatedly asked her why she was working for Fresh Flower and whether she wanted to leave.

[65] I accept Ms Richards' evidence that she found the work environment hostile and unpleasant which caused her considerable stress and anxiety.

[66] I am therefore satisfied that Ms Richards was constructively dismissed. I do not accept that she resigned or abandoned her employment.

Was dismissal justified?

[67] Now that Ms Richards has established that she was dismissed, the onus passes to Fresh Flower to establish on the balance of probabilities that her dismissal was justified.

[68] Justification is to be assessed in accordance with the justification test in s.103A of the Act. This requires the Authority to objectively assess whether how Fresh Flower acted, and its actions were what a fair and reasonable employer could have done in all the circumstances at the time Ms Richards was dismissed.

[69] A fair and reasonable employer is expected to comply with its good faith obligations and with each of the four procedural fairness tests in s.103A(3) of the Act. Failure to do so is likely to fundamentally undermine its ability to justify its actions and/or dismissal.

Good faith

[70] I have found that Fresh Flower breached its good faith obligations to Ms Richards. I consider that Fresh Flower's breach of good faith fundamentally undermined its ability to justify Ms Richards' dismissal.

Section 103A(3) procedural fairness tests

[71] I find that Fresh Flower did not comply with any of the four procedural fairness tests in s.103A(3) of the Act. This failure fundamentally undermines its ability to justify Ms Richards' dismissal.

Section 103A(5) of the Act

[72] Section 103A(5) of the Act precludes the Authority from finding that Ms Richards was dismissed merely because of minor procedural errors that did not result in unfairness to her.

[73] I consider that the breaches of good faith and of minimum procedural fairness requirements were serious breaches which did result in considerable unfairness to Ms Richards. I therefore find that s.103A(5) does not apply.

Outcome

[74] I consider that Ms Richards' dismissal was substantively and procedurally unjustified.

What, if any, remedies should be awarded?

Mitigation

[75] Ms Richards is under an obligation to mitigate her loss. I find that she took adequate steps to do so by applying for a range of jobs in the months following her dismissal.

Lost remuneration

[76] Ms Richards says she had not worked since her dismissal. I consider it appropriate to award her six months' lost remuneration under s.128(3) of the Act.

Distress compensation

[77] Ms Richards claims \$5,000 distress compensation. She gave evidence about the distress her dismissal has caused her. I order Fresh Flower to pay Ms Richards \$5,000 under s.123(1)(c)(i) of the Act to compensate her for the humiliation, loss of dignity, and injury to feelings she has suffered as a result of her unjustified dismissal.

Contribution

[78] Having determined that Ms Richards' has a personal grievance claim, s.124 of the Act requires the Authority to assess contribution and if appropriate to reduce

remedies accordingly. Contribution denotes blameworthy conduct which is proven on the balance of probabilities.

[79] I find that Ms Richards' decision to leave work at 1.30pm on her first day back without telling anyone (until she phoned at 4.45pm that day) she would not be returning is blameworthy conduct which contributed to the situation which gave rise to her dismissal grievance. I find that her distress compensation should be reduced by 10% to reflect her contribution.

[80] In terms of the other alleged contributory conduct Fresh Flower sought to rely on, I find it has not been proven to the required standard. I also consider that Fresh Flower appears to have been responsible for many of these problems because of the way in which it mishandled Ms Richards reinstatement so Ms Richards is not to be held blameworthy for such matters.

What, if any, costs should be awarded?

[81] Ms Richards, as the successful party, is entitled to a contribution towards her actual costs. The parties are encouraged to resolve costs by agreement.

[82] If that is not possible then Ms Richards has 14 days within which to file a costs application, Fresh Flower has 14 days within which to reply, and Ms Richards has a further seven days within which to file her response costs submissions.

[83] This timetable will be strictly enforced so any departure from it requires the prior leave of the Authority.

[84] The Authority is likely to adopt its usual notional daily tariff based approach to costs so the parties are invited to identify any factors which they say should result in the notional daily tariff being adjusted.

Other

[85] Fresh Flower is ordered to pay Ms Richards the amounts she has been awarded under this determination within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority

