

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 26/08
File Number: 5102130

BETWEEN BROOKE RIDDELL
 Applicant

AND STANLEY ROAD LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Phil Mitchell for Applicant
 Matt Thomas for Respondent

Investigation Meeting: 14 February 2008 at Wellington

Further information Received by 21 February 2008

Determination: 6 March 2008

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Ms Brooke Riddell, claims that she was unjustifiably constructively dismissed by the respondent (Stanley Road) and that wages were unlawfully withheld from her when she resigned. Stanley Road consider that Ms Riddell resigned for her own reasons and that it withheld her final pay pursuant to the parties' employment agreement, which provided wages to be withheld in the absence of proper notice.

The Facts

[2] Stanley Road runs three cafés in Wellington, which are supplied by an associated company, Crumbs the Bakers. Stanley Road and Crumbs the Baker are owned by Mr Matt Thomas. He engaged Mr George Berry on a management contract to try and increase revenues and promote efficiencies in Stanley Road. By the time

Ms Riddell came to leave, Mr Berry was acting as General Manager of Stanley Road, while the previous General Manager was working out her notice.

[3] Ms Riddell had previously been employed by Stanley Road for a reasonable period. She left to take up other opportunities, but was re-employed in late March 2007 at the Thorndon café as a barista. She was paid \$12 an hour. During the course of her employment Ms Riddell worked an average of 44 hours per week.

[4] It appears that Ms Riddell signed an individual employment agreement on 26 March, although she does not have a copy of it and denies ever receiving it. This is surprising considering she signed an acknowledgement that it had been supplied to her and that she was given an opportunity to take independent advice before signing it.

[5] After a short period at Thorndon she was transferred to work as the sole full time employee at Stanley Road's café at the Port of Wellington. There she covered all of the work functions in the café for a period of more than 8 hours a day. She was only given part time assistance to cover busy periods. The quality of the staff was extremely patchy for extended periods, and this caused Ms Riddell and Stanley Road a great deal of concern.

[6] Mr Berry commenced his engagement on 1 July. He saw that there were problems with the Port café, not just in the quality of support for Ms Riddell, but also given her lack of experience.

[7] It appears that from the outset there was some tension between Ms Riddell and Mr Berry. For example, Ms Riddell objected to Mr Berry raising concerns about her not wearing her company uniform on one occasion. Mr Berry and Ms Riddell must have got on well at some level and at some time, however, because on 20 July they engaged in what they both described as an inappropriate sexual liaison. This occurred after they had left a work function and met with others (some not associated with Stanley Road) to have a night on the town. Whether it was from embarrassment, as Ms Riddell states, or for some other reason, matters between Mr Berry and Ms Riddell became more tense over the ensuing weeks.

[8] Mr Berry was concerned that the Port café was not making sufficient money, but he also believed that Ms Riddell was capable of turning the situation around, if she were given more training and became better focussed. Accordingly, they met on

31 July with a view to helping improve the situation by giving Ms Riddell further assistance and training, which could lead to her managing a Stanley Road café. This was to also assist Ms Riddell towards her goal of owning her own café at some time in the future. Stanley Road also agreed to try and have the café fully staffed with capable people at all times, in order to assist her. I accept Mr Berry's evidence that he had no desire to continue on as General Manager of the three cafés, but rather that he wanted each café to be managed separately and this was one reason why Ms Riddell was to be given training and other developmental opportunities.

[9] While this was not, as Ms Riddell claimed, a promotion, it was clearly an initiative by Stanley Road to try and improve the performance of the Port café by giving further incentives and support to Ms Riddell. I accept that no promotion was offered to Ms Riddell at this time because the promotion to management was prospective and not guaranteed and because no pay rise was given. Ms Riddell's pay had increased, however, at some previous point, to \$12.50 per hour.

[10] Ms Riddell claims that on 8 August she was assaulted by Mr Berry at work by him walking past and punching her on the hip. This is a very serious allegation and is denied by Mr Berry. I am not satisfied that there is sufficient proof for me to conclude that this serious allegation occurred. There was, for instance, no corroborating evidence and Ms Riddell declined to make a formal complaint, despite acknowledging that she had good relationships with Mr Thomas and could have raised a complaint with him. I note also that Ms Riddell stated that she did not want to bring a formal complaint against Mr Berry because she did not want to cause any trouble and because she enjoyed working at the café.

[11] Mr Thomas did get to hear of the complaint, however, and raised it with Mr Berry. He denied hitting Ms Riddell. Mr Thomas took the matter no further.

[12] On 13 August Mr Thomas received a letter of complaint from the employer of the bulk of the Port café's customers. It states –

Of late I have been getting regular complaints about the service and food at the café. I know that George is on board and trying to correct matters, but FYI ... the troops are really starting to get disgruntled.

[13] Also attached was a particular complaint from one of the employer's staff members about slow service, poor food standards and high prices. Mr Thomas

forwarded it to Mr Berry to deal with the matter. The latter decided in the first instance to get feedback from Ms Riddell. Mr Berry asked to speak to Ms Riddell in his office, without disclosing to her what it concerned, other than to say that it was a complaint about service at the Port café.

[14] At the meeting, held on 14 August, Mr Berry read the emails of complaint out and asked Ms Riddell for her response. Ms Riddell stated that she did not accept what was in the emails, that she was over worked and that she needed more staff to assist. I accept that Mr Berry told her that sales had dropped and that something needed to be done about the menu. I do not accept that Mr Berry said that he intended to reduce the staff, because staff levels were already minimal. I also do not accept that Mr Berry said that Ms Riddell was running the café into the ground and that other staff were *muppets and losers*, although I do accept, from the evidence of discussions on 31 July, that both parties had had concerns about the quality of staff.

[15] Mr Berry went on to highlight his management style as not praising anyone for doing a good job. If anyone was doing a bad job, however, he would *kick them in the arse* for it. Mr Berry then stated that things needed to improve at the café.

[16] By this time Ms Riddell was very upset. She asked if that was all and Mr Berry indicated that it was. After she had got up to leave Mr Berry asked her to wait and then asked whether she was okay. She said that she was fine and she left.

[17] Ms Riddell decided as a result of this meeting that she could no longer work at Stanley Road, because of the behaviour of Mr Berry and the general lack of support provided to her. She had previously considered resigning over the lack of support she felt was given to her at the Port café.

[18] The next day Ms Riddell phoned Mr Berry and told him that she wanted him to collect something from her at the café. Mr Berry instead required her to report to his office, because he was too busy to come down to the café. At the office Ms Riddell was questioned by another staff member about the banking and she replied that she had forgotten to do it. She left her notice of resignation on Mr Berry's desk. I accept that when Mr Berry came in and asked to talk to her she declined to do so, but that it was not until later that he saw that what she had left was her resignation letter.

[19] Ms Riddell then went off on sick leave. She was not paid, ostensibly because she had not provided a medical certificate, but was not entitled to paid sick leave under her employment agreement anyway, as she had not been in employment for 6 months. In any event on 22 August Mr Mitchell wrote on her behalf stating that she would not be returning to work and raising a personal grievance for unjustifiable constructive dismissal. Ms Riddell has remained extremely unwell.

[20] Stanley Road has refused to pay Ms Riddell her outstanding pay in reliance on the forfeiture clause in the employment agreement. Ms Riddell has also had a number of personal effects not returned by Stanley Road, despite several requests for it to do so, which have simply been ignored. The value of this property, including 12 CDs, an umbrella and a pair of shoes is approximately \$350, in my estimation.

[21] Whilst Stanley Road appeared to resist mediation, at some time mediation did occur, but it was unfortunately not successful. The parties have been unable to resolve the issues between them since and therefore the Authority is required to make a determination.

Credibility

[22] There can be no certainty as to what occurred several months ago. The Authority can only determine what is more likely or not on the balance of probabilities, taking into account the seriousness of the claims in issue. In those areas where I have made factual findings against Ms Riddell it is not because I doubt the evidence she gave to the Authority, but instead upon my analysis of what was more likely to have occurred. In particular, there are areas where documentation appears to be inconsistent with Ms Riddell's evidence, such as over the employment agreement and the letter of 31 July. In addition, some of Ms Riddell's evidence was somewhat inconsistent with the context of events that it was agreed had happened. For example, there was Ms Riddell's failure to pursue a complaint of assault against Mr Berry when she claimed that she held him in low esteem and that she was being picked on by him. Her claims of over work are also difficult to accept given the pay records, which do not show her working particularly excessive hours and her own evidence that she enjoyed working at the café. Furthermore, if Mr Berry had been as obnoxious in the final meeting as Ms Riddell claimed, it would have been unlikely that he would have asked her if she was okay, which it was agreed he had done.

The Law

[23] The law on constructive dismissal is clearly set out in *Auckland Shop Employees OUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA), where it was held that a resignation can constitute a dismissal in different circumstances, including where an employer has followed a course of conduct with the deliberate and more dominant purpose of coercing an employee to resign, or where a breach of duty by the employer causes an employee to resign. In respect of the latter the Court of Appeal found in *Auckland Electric Power Board v Auckland Provincial District Local Authority Officers' IUOW Inc.* [1994] 1 ERNZ 168 at 172 that –

...the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

Determination

[24] It is clear from the above, particularly the fact that Stanley Road was working with Ms Riddell to improve her performance and try and establish her as a manager at one of its cafés in time, that it was not trying to obtain her resignation.

[25] I accept that Ms Riddell resigned because she believed her position at the Port café had become untenable, principally because of a lack of support by way of staff to assist in the busy periods and her treatment by Mr Berry.

[26] Although Ms Riddell may have been stretched from time to time I do not accept, however, that she was seriously over worked when she worked an average of 44 hours per week. I also do not consider that the meeting of 14 August was or should have been considered or treated as a disciplinary meeting. No warning or dismissal of Ms Riddell was in prospect. Matters simply never progressed beyond the point of a preliminary enquiry into the facts.

[27] I therefore do not accept that any breach of duty by Stanley Road was of sufficient seriousness to make it foreseeable by Stanley Road that Ms Riddell would

not be prepared to work under the prevailing conditions. In particular, I am satisfied that Stanley Road were putting in efforts, including the use of the General Manager (who was working out her notice) and another experienced employee to assist Ms Riddell at the Port café. Most importantly, I do not accept that Mr Berry's handling of the customer complaint constituted an unjustifiable use of disciplinary processes. An employer is entitled to conduct a preliminary investigation into complaints before any formal disciplinary process is invoked. Otherwise employers would never be able to get information with a sufficient degree of certainty to decide whether an employee should be burdened with the seriousness of a formal disciplinary investigation.

[28] In this case it was therefore entirely appropriate for Mr Berry to get Ms Riddell's views about the complaint before deciding what action should be taken, if any. While Mr Berry's approach can be seen as lacking subtlety, and demonstrated his lack of experience, I conclude that there was no breach of duty serious enough for there to be a substantial risk that Ms Riddell would resign as a result.

[29] The type of management style espoused by Mr Berry, known in the literature as "Theory X", has been discredited for many decades. The main reason for this is because it does not provide encouragement for staff to perform well. All staff need feedback, but it needs to be positive as well as negative, not just negative as Mr Berry would have it. It is not appropriate for the Authority, however, to intervene in such a management style unless it is so authoritarian and uncaring as to constitute a breach of duty to an employee in a particular situation. That situation has not arisen here on the facts as determined. This would not have been the case were I able to conclude that Mr Berry had in fact assaulted Ms Riddell on 8 August. Furthermore, Stanley Road may have been under a duty to investigate with Ms Riddell exactly why she was resigning before accepting her resignation if it were not for Ms Riddell's subsequent absence and Mr Mitchell's letter claiming constructive dismissal. In any event, it is clear from Ms Riddell's medical reports that she would not have been well enough to return to Stanley Road anyway.

[30] Given that Ms Riddell did not work out her notice it is clear under the employment agreement that Stanley Road may deduct up to one week's pay, which is what occurred.

[31] Stanley Road has simply ignored Ms Riddell's reasonable requests for the return of her property. Given that it has ignored requests to date, then rather than require Stanley Road to do so, it is more appropriate, I conclude, for the Authority to order Stanley Road to pay Ms Riddell the approximate dollar value of the property withheld. I therefore order the respondent, Stanley Road Limited, to pay to the applicant, Ms Brooke Riddell, the sum of \$350 without deduction. Ms Riddell's claims for a personal grievance and compensation for withholding her final pay are, however, dismissed.

Costs

[32] Costs are reserved.

G J Wood
Member of the Employment Relations Authority