

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Gemma Russell (Applicant)
AND KB's Bakery Ltd (Respondent)
REPRESENTATIVES Peter Macdonald, Advocate for Applicant
Jeff Goldstein, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 29 March 2005
30 March 2005
DATE OF DETERMINATION 19 April 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

- [1] The applicant, Gemma Russell (Ms Russell) contends that she has a personal grievance by reason of constructive dismissal and/or unjustified action to her disadvantage.
- [2] The respondent employer, KB's Bakery Limited (KB's) denies those allegations.
- [3] The parties attended mediation but were unable to resolve their employment relationship problem.
- [4] Ms Russell was employed as a shop assistant by KB's from 12 February 2003 until 14 November 2003 and then again from 15 January 2004 down to 2 July 2004.
- [5] By all accounts the original engagement was uneventful. Ms Russell worked at the Gasson Street branch of KB's and seemed to enjoy herself there.
- [6] She was offered a position in a clothing retailer and left KB's in November 2003 to take this new position.
- [7] That employment did not work out and Ms Russell sought to return to KB's and was ultimately successful in getting a position at the Edgeware branch where, as I mentioned earlier, she started on 15 January 2004.
- [8] Her evidence was that the first few weeks of her employment were uneventful, but then she says that the manager, Treacy Brew, started *being mean* to her.

[9] Ms Russell could offer no explanation as to why there was, in her terms, a sudden change in the employer's attitude to her. For the employer's part, their explanation is that Ms Russell was treated the same as everybody else in the shop, but it was clear that she did not enjoy the work, particularly serving customers (a view Ms Russell disputed) and that she certainly did not enjoy being pulled up when she did something wrong.

[10] The employer's witnesses said that Ms Russell was shy and sensitive and not able to take criticism.

[11] What is certain is that, for whatever reason, Ms Russell's personality changed while she was working for KB's. Her father described her original personality as lively, silly, and spirited, but he says that after she had been at KB's in Edgeware for a reasonably short time she became withdrawn and started refusing to go to dancing classes which he described as her passion.

[12] There was evidence from Simon Sheffield who is Ms Russell's boyfriend (and an occasional co-worker at the Edgeware shop of KB's) which confirms Mr Russell's evidence that Ms Russell's personality changed during the time that she was working at KB's Edgeware. Mr Sheffield said in his evidence that she started to lose her confidence and *her smile got smaller and smaller*.

[13] It was difficult to get Ms Russell to be specific about the allegations she made against her employer's manager. She refers to Ms Brew (KB's manager) being *mean* to her, she refers to being picked up for mistakes that she made, she refers to *nasty comments* being made about her by Ms Brew and to comments about her personal life. She also refers to getting negative comment about taking time off, particularly in relation to sick leave and two issues where she made food products and was allegedly criticised for that.

[14] The first of these two issues involved making cream cheese icing; and the second involved making filled rolls.

[15] The evidence in relation to each of these complaints was sketchy, to say the least. It was difficult to identify when these events were supposed to have happened and in relation to the allegation that the employer's manager was mean, criticised her for making mistakes, made nasty comments about her, and commented on her personal life, there was no detail that would enable me to consider whether these events actually happened or not. All I had was the uncorroborated evidence of Ms Russell as to these matters and evidence from people who loved her that her personality had changed.

[16] In respect to the icing complaint and the lettuce incident, there was more detail, although even with these matters, there is no evidence as to when they are supposed to have happened.

[17] One of the respondent's witnesses, Libby Larson, gave evidence of having seen the episode involving the lettuce. Whereas Ms Russell says that she was abused for making filled rolls incorrectly and sworn at, Ms Larson's evidence is that Ms Russell was using brown lettuce and that the manager told Ms Russell to *take that lettuce* out of the rolls and that in the course of the discussion the manager held up a piece of the brown lettuce and asked Ms Russell whether she would eat the lettuce. Ms Russell is supposed to have said that she would and the manager then suggested that she should.

[18] The manager Treacy Brew also gave evidence about the lettuce incident, and while she only refers to the lettuce incident in passing and to the cream cheese icing incident even more sketchily, what she says is more consistent with the evidence of Ms Larson than with the evidence of Ms Russell.

[19] What all of the versions of the lettuce incident seem to agree about (including Ms Russell's evidence) is that Ms Russell was being coached by Ms Brew because her filled rolls (to use Ms Russell's own words) *were wrong*. Ms Brew says in her contemporaneous handwritten statement, prepared in response to Ms Russell's advocate's letter of 11 June 2004 *If Gemma feels I am picking on her constantly it is because she makes the same errors repeatedly and as manager I feel I am only doing my job*.

[20] It seems to be accepted that from about either May or June of 2004, Ms Russell was looking for another job. She resigned by letter dated 18 June and she worked out her notice such that her last day of work was 2 July 2004. It seems that the precipitating factor in her resigning when she did may well have been that she was accepted for a makeup course which she had been interested in being part of.

[21] Peter Macdonald, who acts for Ms Russell, wrote to KB's by letter dated 11 June 2004 in which he sets out with some degree of particularity the allegations he says KB's have to confront. Given the evidence that was subsequently given at the investigation meeting by Ms Russell and her witnesses, it might be thought that Mr Macdonald rather over-egged the pudding in his 11 June letter. Certainly, the allegations made in the letter are not born out by the subsequent evidence.

[22] In any event, the receipt of that letter seems to have galvanised the employer and within a matter of days, the employer had engaged Ian Thompson of Ian Thompson & Associates Limited to conduct some inquiries and had spoken with Ms Brew about the allegations made.

[23] However, despite the fact that Ms Russell must be taken to have known about the letter being forwarded from her advocate, she nonetheless tendered her resignation on 18 June, exactly a week after the date of Mr Macdonald's letter. Certainly the juxtaposition of those two dates would suggest that the employer had virtually no time to consider the matter before the resignation was notified.

[24] The applicant tried to suggest that KB's had known about this problem for some months. There was evidence given that Ms Russell had spoken with Kim Buckley, who is the managing director of KB's Bakery Limited, the respondent. Mr Buckley is a baker by trade and he happened to be baking at the Edgware shop, perhaps around February or March of 2004, and Ms Russell went to have a talk with him.

[25] Ms Russell's version of that discussion is that she told Mr Buckley that she was looking for another job and that she told him that the reason for that was because Ms Brew was picking on her.

[26] Mr Buckley's recollection of the discussion, which he says was very brief, was that Ms Russell said that she wanted to continue working for him but she wanted to work in another shop. So he says that his understanding was that Ms Russell simply wanted a change of location and he suggested that if she got her driving licence she would be much more flexible in terms of transport options.

[27] It seems to me that whatever version of this conversation was to be preferred, it is placing too great an onus on the employer that it should take notice of and act on what was clearly a short conversation when both parties to that conversation were engaged in doing something else at the time.

[28] Then there was evidence from Simon Sheffield, Ms Russell's boyfriend, that he had had conversations with Mr Buckley in which Mr Buckley disclosed his view about the problems that

Ms Russell was having. But Mr Buckley's evidence was that he did not know about the problems that Ms Russell was having although he recalls having several discussions with Mr Sheffield (whom it seems Mr Buckley regarded as something of a protégé).

[29] Looking at the matter in context, I think that it is more likely that Mr Buckley's recollection is correct and that Mr Sheffield is mistaken about the content of the conversations that he undoubtedly had with Mr Buckley.

[30] Finally, I need to deal with Ms Russell's father, Mr Russell, whose evidence was that on 26 May 2004 he made an attempt by email to engage with Mr Buckley in the issues that were of concern to his daughter. Mr Buckley referred him to Mr Alan Mehrtens, one of the management team at KB's who was responsible for employment matters. Mr Russell declined to be put off and sent another email to Mr Buckley seeking to deal with Mr Buckley personally.

[31] Mr Buckley did not respond to that second email and Mr Russell took no steps to talk with Mr Mehrtens as Mr Buckley had suggested, so it seems clear that this exchange did not result in any information being conveyed from the applicant to the respondent other than the fact that Ms Russell had a concerned parent.

Was Ms Russell constructively dismissed?

[32] In my opinion, there is no evidence whatever of a constructive dismissal. In order for Ms Russell to satisfy me that there is a constructive dismissal, she must prove on the balance of probabilities that her resignation has been caused by a breach of duty and that that breach is sufficiently serious to make her resignation reasonably foreseeable.

[33] The only possible evidence that can be taken as examples of breaches of the employer's duty is the evidence about the behaviour of Ms Brew, and as I have already indicated, I found that evidence to be sketchy and certainly lacking in the sort of substance that would be necessary to found an argument for constructive dismissal. There is limited corroboration of the allegations, little that will enable us to date the allegations with any particularity and alternative explanations available for those examples which are potentially the most serious.

[34] The icing complaint and the lettuce incident seem to be capable of explanation as criticism based on performance deficits.

[35] While I think it is axiomatic that none of these incidents in themselves could constitute a breach of duty, I need to consider whether the incidents, taken in their totality, could represent a course of conduct which was a breach of duty for the purposes of the law. Again, I answer that question in the negative. I am not persuaded that the level of detail that has been offered by way of evidence can ground a claim for a breach of duty. Indeed, there is not even sufficient evidence, in my judgement, to satisfactorily prove that all of the events complained of actually happened, let alone were serious enough to ground a breach of duty claim.

[36] Given that I find that there has been no breach of duty by the employer, it is not necessary to answer the question whether a resignation was reasonable foreseeable.

Was Ms Russell subject to an unjustifiable action to her disadvantage?

[37] The same factual matrix grounds the claim for an unjustifiable action as the claim for a constructive dismissal. The same criticisms of that factual matrix apply. There is insufficient evidence that all the events complained of happened and in my opinion equally insufficient evidence of the events, assuming they happened, being of such gravity as to ground a disadvantage claim. That employer and employee are not bosom companions is, of itself, not enough.

[38] Furthermore, alternative explanations advanced by the employer of simply correcting the employee's mistakes cannot be lightly dismissed.

[39] Moreover if Ms Russell was earnest about resolving the issues that she had with her employer, then it was incumbent upon her to give the employer a reasonable opportunity to resolve the issues that she claimed to have a concern about.

[40] I have found as a fact that Ms Russell did not advise KB's of her issues until the letter from Mr Macdonald dated 11 June 2004 was received by KB's, and given Ms Russell resigned from her employment seven days later, it follows that the employer did not have any opportunity to address the issues that she raised.

[41] Notwithstanding that, it is clear that as soon as the employer received Mr Macdonald's 11 June letter, it responded promptly and immediately commissioned an investigation, but that investigation had barely started by the time Ms Russell notified her resignation.

[42] In all those circumstances, it seems to me impossible to make a finding that the applicant has suffered a disadvantage in terms of the law.

Costs

[43] Costs are reserved.

James Crichton
Member of Employment Relations Authority