

Attention is drawn to paragraph 1 prohibiting publication of certain information contained in this determination

Determination Number: CA 128/06
File Number: CEA 360/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Leah Rose Scott (Applicant)
AND Quinns Fashions Limited (Respondent)
REPRESENTATIVES Jeff Goldstein, Counsel for Applicant
Neil McPhail, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 15 June 2006
23 June 2006 evidence Jan Smith
SUBMISSIONS APPLICANT 13 July 2006
RESPONDENT 19 July 2006
DATE OF DETERMINATION 24 August 2006

DETERMINATION OF THE AUTHORITY

Prohibition of publication

[1] I prohibit from publication under clause 10 (1) of Schedule 2 of the Employment Relations Act 2000 all medical evidence about the applicant provided to the Authority which is not referred to in this determination.

The Employment Relationship Problem

[2] The applicant, Leah Scott was employed by the respondent at its fashion store in Christchurch as a sales advisor

[3] The respondent, Quinns Fashion Limited (“Quinns”), is a duly incorporated company and carries on the business of a fashion store.

[4] Ms Scott was party to an individual employment agreement with Quinns. She signed her employment agreement prior to commencing employment on 22 July 2003. It was signed on behalf of Quinns on the date Ms Scott commenced her employment on 12 August 2003.

[5] Initially Ms Scott was placed on a three month trial period and, at the conclusion of that period, became a permanent part-time employee. The hours of work for Ms Scott were assigned by way of roster. Quinns was open seven days for trading.

[6] Ms Scott resigned from her employment. Her resignation letter was dated 26 January 2005 and provided:

Dear Pat and Margaret,

I wish to thank you both for employing me at Quinn's Fashion Merivale.

The knowledge and experience I have gained has been invaluable.

Unfortunately I need permanent full-time employment, and have been lucky enough to obtain this.

Phillipa has accepted my resignation today, but I would formally put this in writing. Please expect my written resignation. My last day of employment with Quinn's being two weeks from today, Wednesday 9th February 2005.

I respectfully request a work reference or documentation pertaining to my work history with you.

I wish you well in your business and hope the future is a prosperess (sic) and fulfilling one.

Yours respectfully

Leah Scott

[7] Ms Scott subsequently claimed that she was unjustifiably constructively dismissed by Quinns by breaches of its duty to her or, in the alternative, that she was disadvantaged in her employment by the unjustified treatment and actions of her employer.

[8] Ms Scott also claims that Quinns breached an express provision of her employment agreement that *no staff are required to work seven days per week* in that she was required to work seven days in a row on several occasions during her employment. Ms Scott further claims that Quinns breached an implied term to provide her with a safe workplace because of the excessive number of hours she was working.

[9] Ms Scott does not claim any lost wages as she left Quinns and went straight to another position.

[10] Ms Scott seeks damages for breach of the express term of her employment in the sum of \$20,000.00 and compensation for humiliation, loss of dignity and injury to feelings in the sum of \$20,000.00 sustained as a result of the constructive dismissal or alternatively the unjustified actions causing disadvantage.

[11] Quinns deny that Ms Scott was unjustifiably constructively dismissed or that is unjustifiably disadvantaged Ms Scott by its actions during her employment. It maintains that she resigned of her own accord and left her employment on amicable terms. Quinns further deny breaching any express or implied terms of Ms Scott's employment agreement.

The Issues

[12] The following issues require determination:

- (i) Was there a causal link between Ms Scott's resignation and Quinns actions?
- (ii) Was there a breach of duty express or implied by Quinns toward Ms Scott?
- (iii) If there was a breach of duty then was it of sufficient seriousness to make it reasonably foreseeable by Quinns that Ms Scott would not be prepared to continue to work?
- (iv) Were there unjustifiable actions by Quinns that caused Ms Scott disadvantage?

Did Ms Scott resign because of Quinns actions?

[13] Ms Scott said that the main reason she resigned was because of the way she was treated by Margaret Quinn. Mrs Quinn has operated Quinns along with her husband Patrick Quinn for 34 years.

[14] Ms Scott said that she was unhappy at Quinns and started looking for another job soon after she commenced employment there in August 2003.

[15] Ms Scott said that she was unhappy about the way Mrs Quinn spoke to her in that she would call her *dear, pet* or *love* but that she did not sound friendly when she addressed Ms Scott in that way.

[16] Ms Scott said that she was expected to do menial tasks during her employment like cleaning and wiping down. Ms Scott said that she felt like she had to do more of the *horrible jobs*. Ms Scott described a request to clean the fridge as *the last straw* and said that Mrs Quinn pulled her to do the cleaning of the fridge by her sleeve.

[17] Ms Scott said that she felt singled out by Mrs Quinn and a bit frightened of her. She said on occasion she would hide from Mrs Quinn and that Mrs Quinn was a strong business woman and very focussed. Ms Scott said that the situation and stress at Quinns was the reason for her poor health and depression.

[18] Ms Scott also said that she was unhappy about being rostered on during about 11 of the 80 weeks she worked at Quinns for seven days in a week. She said that she thought she had made it quite clear that she wanted more hours in the day not more days in the week.

[19] Ms Scott said that she suffered mental trauma as a result of the way that she was treated and that her workplace was not safe.

[20] Ms Scott recognised that her resignation letter was polite and did not convey that the reason for her resignation was that she had been badly treated. She said that she was concerned that if she put the true reasons for her resignation in the letter then she would not receive her holiday pay. As it happened the holiday pay was paid a little late on 22 February 2005. I am satisfied that the reason for payment in this manner was adequately explained by Mr Quinn as an error in the pay processing and that nothing more can be read into it.

[21] In her letter of resignation Ms Scott said that she gave Quinns what she thought was four weeks notice by agreeing to work two weeks and taking the other two weeks as annual leave. Mr Quinn who was holidaying with Mrs Quinn in the North Island telephoned Ms Scott when he received advice of her resignation.

[22] Although Mr Quinn probably did not intend to, he left Ms Scott with the impression that he was very displeased that she was going to take two weeks of her notice as annual leave. Mr Quinn wanted Ms Scott to work her notice out rather than taking annual leave. Ms Scott said that she felt cross about the conversation and it was at that point that she decided to pursue a claim against Quinns. As it turned out Ms Scott was able to take her annual leave instead of working her full notice period as Quinns was quickly able to secure a replacement.

[23] I find that Ms Scott resigned to go to another position because she was unhappy in her position at Quinns. She had been unhappy in her position from shortly after she started at Quinns. The new position that she successfully obtained was a full time position whereas Quinns had only been part-time.

[24] I need to consider whether there was conduct toward Ms Scott which was more than just inconsiderate conduct which caused unhappiness or resentment but was dismissive or repudiatory - *Wellington etc Clerical Workers IUW v Greenwich* [1983] ACJ 965.

Was there a breach of any express or implied duties owed to Ms Scott?

The rosters

[25] Ms Scott says that she was rostered on in express breach of her employment agreement which provides that *no staff are required to work seven days per week*.

[26] The best evidence about the days/hours Ms Scott worked during the 80 weeks of her employment is found in the timesheets. All of the rosters for the material period could not be found. I have carefully considered the timesheets and I agree with the evidence provided that Ms Scott worked on seven days during the week for 11 weeks out of the about 80 weeks she was employed. The first week Ms Scott worked seven days in a row was the week ending 16 November 2003 and from thereon about one week every one or two months. After October 2004 Ms Scott said that the rosters became a *bit more stable* and there is only one other week after that time when Ms Scott was working seven days in a row.

[27] From the commencement of Ms Scott's employment in August 2003 until March 2004 she worked downstairs in the *Things Shop*. During this period her hours were organised by Juliet Sullivan who is Mr and Mrs Quinn's daughter. The rosters were done in advance and Ms Scott accepted that Ms Sullivan would try to accommodate her if possible.

[28] From March 2004 Ms Scott went to work upstairs and the rosters were then done by Jan Smith. Ms Scott got on well with Ms Smith. I found Ms Smith to be a reliable and credible witness. As she is no longer employed by Quinns there can be no question of divided loyalties.

[29] Ms Smith would prepare a four weekly roster which was available at the start of each four week period. Ms Smith said that the roster was mainly just transposing from one month to the next. Rosters were occasionally changed at a later time. My understanding of Ms Scott's main concern was that she was sometimes asked by Mrs Quinn to stay and work on later than her rostered hours. Mrs Quinn said that she only asked Ms Scott to do this very rarely and that it was a request and there was agreement.

[30] Ms Scott said that she usually put on a happy face at work and made an effort for Quinns which supports in my view that it is more likely she did not express how she felt about being asked to work by Mrs Quinn longer than she was rostered on those occasions.

[31] What happened on Ms Scott's last day at work on 9 February 2005 is probably indicative of the fact that Ms Scott did not clearly articulate her unhappiness during her employment at Quinns. On that day Ms Scott asked Mrs Quinn if she could leave in the early afternoon. Mrs Quinn wanted to get Ms Scott a gift voucher and flowers and asked her to stay on for an hour or so to enable her to do so. Although Ms Scott was unhappy and had made other arrangements she stayed on and Mrs Quinn was quite oblivious to any unhappiness on Ms Scott's part at doing so.

[32] Ms Scott accepted that Ms Smith would write the rosters and discuss them. If there were changes that had to be made then they were done if possible. Ms Smith said that if someone had an appointment and was rostered on then they would endeavour to swap a shift. There was agreement that Ms Smith told Ms Scott that she should have a day off in the week and not work seven days in a row. I formed the view that there was some flexibility in the rosters.

[33] Ms Smith said that she did not understand Ms Scott to be unhappy with being rostered on for seven days work. It would be logical in my view if Ms Scott was not happy to be rostered on for seven days for her to complain to Ms Smith. The evidence is that she did not. I find that it is less likely that Ms Scott complained to Ms Quinn about the rosters in circumstances where Ms Smith who did the rostering was unaware of her unhappiness. I find, on the balance of probabilities, she did not complain to Ms Quinn and I accept Ms Sullivan's evidence, that Ms Scott never declined to work when asked.

[34] Throughout her employment Ms Scott averaged about 33 hours per week. Shortly after Ms Scott went to work upstairs, in or about April/May 2004, she commenced casual work in a bar for a maximum of 15 hours per week because of the fluctuating hours she was getting at Quinns.

[35] The evidence from all the respondent's witnesses was consistent in that they believed Ms Scott wanted to be rostered for as many hours as possible. Ms Scott did not disagree with that but she thought that she made it clear that she wanted more hours per week not more days per week. Ms Scott said though that her *health was getting bad – probably did not say enough*.

[36] In conclusion Ms Scott wanted to work more hours for Quinns and there was no objection from her to the rosters prepared. Ms Smith advised Ms Scott that she should have one day off and not work seven days in a row. I do not find in these circumstances that the evidence supports there was a breach of contract by Quinns in the rostering of Ms Scott for seven days in the week on occasion.

Duty to Provide a Safe Workplace

[37] Ms Scott wanted to be rostered for as many hours of work as possible at Quinns and averaged less than 35 hours per week. She also obtained secondary employment in April or May 2004 because of her fluctuating hours at Quinns. That appears inconsistent with a claim that Ms Scott was working excessive hours at Quinns. Quinns had to take reasonable steps to provide Ms Scott with a safe workplace in relation to known and avoidable risks. Ms Scott did not convey a concern about the hours she was working. To the contrary she was eager to obtain more hours of work. I do not conclude that Quinns acted unreasonably or failed to take reasonable steps to provide a safe workplace for Ms Scott.

[38] I do not find that there was a breach of duty to provide Ms Scott with a safe workplace by requiring her to work excessive hours.

Treatment by Mrs Quinn

[39] It was accepted that Mrs Quinn called all staff *dear, pet* and *love*. Mrs Quinn said that since Ms Scott had lodged her claim complaining of this she had tried to stop addressing staff in that way. Ms Scott was not singled out in this respect therefore or treated differently. Mrs Quinn did refer to Ms Scott's position as a *Girl Friday* and whilst that may have been interpreted as offensive I am not satisfied that it was meant to offend Ms Scott. Ms Scott did not tell Mrs Quinn that she was offended during her employment.

[40] On occasion Mrs Quinn would reprimand Ms Scott. There is evidence that Ms Scott was regarded as a satisfactory employee but could lose focus at time and would sometimes wander away from her counter and not be able to be located. Ms Scott felt that Mrs Quinn was picking on her and she talked about this with other employees. I do not find though that the evidence supports Mrs Quinn was bullying, harassing, or singling out Ms Scott. Ms Smith's evidence confirmed that Mrs Quinn was raising concerns with Ms Scott about taking too long on morning and afternoon tea and standing around or wandering off. Ms Smith said that she did not often overhear Mrs Quinn telling Ms Scott off and said that the tone used to do so was probably *an air of authority*.

[41] Ms Scott's mother, Heather Nielsen, was at her daughter's counter one day and overheard Mrs Quinn ask her daughter *why the boxes were still there?* Ms Neilson felt that Mrs Quinn had an abrupt tone and was demanding rather than asking. I accept it would be unpleasant for Ms Neilson to hear her daughter addressed in this way but sometimes an employer will have to address things with an employee using an authoritative tone. There was nothing to suggest to me though that the question itself was unreasonable and Mrs Quinn knew Ms Neilson was not a customer.

[42] In any event I am satisfied that Ms Scott did not raise her feelings and concerns about Mrs Quinn with her. Instead she put on a happy face most of the time. Ms Scott said in her evidence that she thought Mrs Quinn would have known that she was making her unhappy. I formed a clear view that she had no idea that was the case.

[43] Ms Scott was clearly unhappy about cleaning the fridge and performing other menial tasks. She made it known that she was not happy cleaning the fridge. I am not satisfied on the balance of probabilities that Mrs Quinn pulled Ms Scott by her sleeve to undertake the cleaning. Whilst I accept that Ms Scott was not happy to undertake some tasks I do not find that the request to perform them was unreasonable so as to amount to a breach of duty.

[44] Ms Scott had been diagnosed with depression before starting at Quinns. Ms Scott said that her condition deteriorated at Quinns but she accepted that she did not tell Mr or Mrs Quinn about her condition. I think it is likely, and in this respect I accept Mr McPhail's submission, that Ms Scott's depression may well have influenced the way that she felt about Quinns and viewed her interactions with Mrs Quinn. That was certainly the view of Ms Smith.

[45] Ms Scott had a major depressive episode in late May 2004. Quinns were not advised of this. The doctor did not mention a link between the episode and Ms Scott's work at Quinns in a referral letter at the time to the hospital. Ms Scott had about one week off work. In my view if Ms Scott had made mention of work being a significant factor to the doctor then it would have been recorded in the letter. I accept Mr McPhail's submission that Quinns cannot be held responsible for not dealing appropriately with Ms Scott's stress related illness when she had never advised them about it.

[46] Having carefully considered all the complaints about treatment I do not conclude that there are actions or inactions that could be seen as unreasonable or oppressive on the part of Mrs Quinn so as to amount to breaches of duty.

[47] I do not therefore need to consider whether any breach of duty was of sufficient seriousness to make it reasonably foreseeable by Quinns that Ms Scott would not be prepared to continue to work.

Were there unjustifiable actions by Quinns that caused Ms Scott disadvantage?

[48] I do not conclude that there were any unjustifiable actions by Quinns that caused Ms Scott disadvantage in her employment.

Determination

[49] Ms Scott was unhappy and at times felt resentment toward Mrs Quinn in her employment at Quinn's. Sensibly she looked for and eventually found other work that made her happier. Ms Scott needed something more though than unhappiness to establish a dismissal rather than a resignation which she offered at her own initiative.

[50] It is not easy to establish a constructive dismissal. In this case the evidence falls short of establishing that there was a substantial action or inaction or course of conduct on the part of Quinns that lead to Ms Scott's resignation. Ms Scott does not have a personal grievance that she was unjustifiably constructively dismissed or that there were unjustified actions that caused her disadvantage. I have not found that there was an express or implied breach of contract in terms of the rosters or work hours.

Costs

[51] I reserve the issue of costs.

[52] Ms Scott is legally aided. The parties may therefore be able to reach agreement about the contribution Ms Scott made toward her legal aid.

Helen Doyle
Member of Employment Relations Authority