

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2022] NZERA 585
3163921

BETWEEN

SEEMA SHANDIL
Applicant

AND

MASSAM TRANSPORT
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: John Wood, advocate for Applicant
Joan Watson, advocate for Respondent

Investigation Meeting: 10 and 11 August 2022

Determination: 10 November 2022

DETERMINATION OF THE AUTHORITY

A. No orders are made against Massam Transport Ltd.

B. Costs are reserved.

Employment Relationship Problem

[1] Seema Shandil has applied to the Authority for an investigation and determination of claims arising from her employment by Massam Transport Ltd (MTL).

[2] The claims include unjustified disadvantage and dismissal personal grievances. Underpayments of remuneration including sick pay and holiday pay, and penalties, are also claimed.

[3] At an investigation meeting of the Authority, Ms Shandil, Vijendra Lal her boyfriend, Shilo Roberts, MTL General-Manager, and Krystal Steenland, Accounts Administrator, gave evidence. Submissions were addressed by the parties' advocates Mr Wood and Ms Watson.

[4] This determination of the Authority is given in accordance with s 174E of the Employment Relations Act 2000 (the ER Act) and does not therefore fully record all the evidence or information considered by the Authority, or the submissions received.

Employment

[5] MTL operates a business transporting containers by road.

[6] Ms Shandil was employed under an individual employment agreement (the IEA), in a senior management position of HR & H&S Advisor. She began work on 15 February 2021.

[7] Less clear is when and how she finished her employment. Following or during a period when Ms Shandil was on sick leave, without the knowledge of MTL she obtained new employment which she started on 28 February 2022. Her employment with MTL can be taken to have ended at around the beginning of March 2022.

Disciplinary action

[8] The date of 28 February is significant for another reason. MTL had given Ms Shandil until then to respond to a preliminary decision made by the company to dismiss her without notice for serious misconduct. Following an investigation and the commencement of a disciplinary procedure, in both of which Ms Shandil declined to participate, MTL concluded she had breached the terms of her employment by the repeated and unauthorised disclosure of confidential information about MTL and its operations.

[9] It was an express term of the IEA that Ms Shandil was not at any time to disclose to any person any confidential information relating to the affairs of her employer.

[10] A company Handbook containing policies applying to MTL employees, forbade the use of the employer's email system to send, without authorisation, confidential information including company, financial or personnel information. Upon her induction to MTL, Ms Shandil had undertaken to respect the confidentiality of material relating to the business affairs of her employer.

[11] MTL found from its investigation that throughout her employment she had consistently blind copied or forwarded, MTL work related emails to Mr Lal her boyfriend.

[12] The examples shown to the Authority suggest the emails were chosen at random and not because of interest in any particular subject matter. One concerned a medical emergency suffered by an employee while at work. The employee's name and details of her medical condition and treatment were in the email. Other emails concerned named workers or contractors engaged by MTL, one headed 'Vaccination Certificate'.

[13] The Authority accepts as well founded the conclusion of Ms Roberts that Ms Shandil's conduct was a clear breach of privacy, as many of the emails she shared outside MTL contained confidential information about the company and its employees, whose names were communicated.

[14] All the many emails were about the business affairs of MTL, great or small, which Ms Shandil had undertaken not to disclose outside her employment except to the extent necessary for her to do her job. Mr Lal her boyfriend had no legitimate interest in knowing any of the information he was copied into.

[15] As well failing to comply with the terms and conditions of her employment, Ms Shandil had exposed MTL to liability by breaches of this kind.

[16] The explanation offered, that she had been given a dispensation by Ms Roberts to blind copy her boyfriend into company emails, is not credible, the more so because Ms Shandil had been employed as a senior HR advisor. Ms Roberts denied the truth of this explanation and it is rejected by the Authority which finds that the practice was not condoned by Ms Roberts, MTL's general manager. MTL did not employ Mr Lal to

help Ms Shandil do her job, as she suggested was the purpose of his being sent the emails.

[17] Her claim that she needed his input for support on 'operational' matters, makes it understandable why later Ms Roberts began to question Ms Shandil's competence as an HR advisor. She had demonstrated a serious flaw of her judgement which an employer such as MTL could reasonably expect a senior management employee and HR specialist to exercise.

Dismissal was justified

[18] The Authority concludes that MTL's investigation of the alleged serious misconduct was both thorough and fair, and left it open to MTL to reach a preliminary decision to instantly dismiss Ms Shandil. Her response to that proposal was to suggest that a warning would be an appropriate sanction. That suggestion failed to acknowledge the gravity of the misconduct and trifled with the situation. MTL rejected it and confirmed the dismissal with effect from 1 March 2022.

[19] The degree of disclosure, the regular repetition of it over many months, the express prohibitions against the conduct, and the deliberateness of it by someone in Ms Shandil's position, were all matters an employer could conclude warranted dismissal rather than some lesser form of discipline.

[20] The Authority finds MTL's final decision satisfied the test of s 103A of the ER Act; MTL's actions and how MTL acted were what a fair and reasonable employer could have done in all the circumstances. Ms Shandil as an experienced HR practitioner should not have been at all surprised by that result.

[21] At about the same time as MTL was concluding its disciplinary investigation, Ms Shandil departed from the company, without fulfilling her notice obligations, and commenced new employment.

[22] In whatever way the employment might be considered to have terminated, by 1 March 2022 both parties to the relationship were of a common mind to end it.

Constructive dismissal

[23] Ms Shandil claimed she had not freely resigned but had been constructively dismissed when she gave three months' notice on 28 January 2022.

[24] The Employment Court has recently reviewed the principles of constructive dismissal in *Ngawaka v Global Security Solutions Ltd*¹, at paragraphs [7] to [10]. The situations where a constructive dismissal might occur include

- (a) Where the employee is given a choice of resigning or being dismissed.
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to leave.
- (c) Where a breach of duty by the employer leads the employee to resign.

[25] It is not contended for Ms Shandil that her situation was that in (a) above. Instead, she relies principally on (b) but also on (c).

[26] Constructive dismissal can occur even without the employer wanting the employee to resign or intending to bring about that result.

[27] As explained by the Court, not every breach of duty will support a claim of constructive dismissal. The breach must be of sufficient seriousness that a substantial risk of resignation is foreseeable. The conduct of the employer must be serious enough to amount to a repudiation of the employment contract. Conduct that is just unreasonable will not be sufficient.

Issues during the employment

[28] The Authority does not consider that glitches with paying Ms Shandil the correct amount or entitlement were such as to lead to a constructive dismissal. They were everyday payroll errors not serious or frequent enough to make a risk of resignation foreseeable. Dissatisfaction and annoyance on the part of Ms Shandil were predictable

¹ [2022] NZEmpC 40

enough, but not resignation. MTL took appropriate steps to rectify the problems when they occurred.

[29] Similarly, misunderstandings that arose about Ms Shjandil's intentions towards resigning when she had not in fact resigned, were disconcerting to her but not the stuff of constructive dismissal. There has been no suggestion that MTL displayed an overt wish for her to leave and tried to induce that outcome by encouraging talk of her resigning among MTL staff.

[30] The evidence shows there was genuine confusion and misunderstanding following an enquiry Ms Shandil made of Ms Roberts as to whether she could resign to go to a new job and do so on less than the 3 months' notice required to be given under the IEA. Talk or gossip among MTL staff that she had resigned did not start from Ms Roberts, in the Authority's view.

[31] Ms Shandil resigned in writing on 28 January 2022 by giving three months' notice. Within three or four weeks she had found and commenced new employment, but without telling MTL.

[32] The evidence shows that in relation to MTL's attempts to gain access to Ms Shandil's work laptop she was uncooperative, both in giving the device back and providing the necessary password to allow MTL to access its information. The Authority finds MTL did not act unreasonably in trying to recover the laptop and the company files it held. It remained the property of her employer and MTL should not have been put in a position of having to contemplate spending \$2,500 to replace it if she would not give it back. Ms Shandil eventually returned the laptop.

[33] Ms Shandil was pestered and physically accosted in her workplace at MTL by a contractor who worked on the site. She claims MTL acted unreasonably by not giving her proper support to address the harassment and the effects it had.

[34] MTL did not become aware of what had happened for some five months, until Ms Shandil told Ms Roberts about it. MTL then tried to facilitate attempts to address the serious problem, an approach which Ms Shandil did not reject. MTL could do nothing when it was excluded from a mediation between Ms Shandil and the perpetrator, when it could have offered support to Ms Shandil in that process.

[35] When Ross Massam the owner and director of MTL learned about the assault on Ms Shandil, some words he communicated to her unintentionally caused her distress, but in the end his actions spoke louder than words. He severed the long-term business relationship MTL had had with the offending contractor.

[36] The Authority finds that once it learned of the problem MTL took reasonable steps to protect Ms Shandil from similar conduct.

Ms Shandil departed to pre-empt dismissal

[37] In the circumstances the Authority finds, as a matter of reasonable inference, that the predominant reason for her leaving MTL without fulfilling her notice obligations, was Ms Shandil's knowledge that she was likely to be dismissed for the serious misconduct MTL had alleged against her and commenced investigating on 9 February 2022.

[38] Ms Shandil lodged her application to the Authority, in which she alleged constructive dismissal, on 17 February 2022. She failed to work out her notice when she accepted new employment on about 22 February, about a week before she started on 28 February 2022.

[39] Ms Shandil the Authority finds, did not leave because of any course of conduct against her carried on by MTL, nor any serious breach of duty by her employer.

[40] The Authority does not accept that any of MTL's actions were so unreasonable as to be repudiatory of the employment agreement. The evidence shows that Ms Roberts patiently and professionally endeavoured to deal with several trying issues as they arose out of Ms Shandil's employment.

[41] As in most cases, there were aspects of the employer's dealing with an employee that could have been done better. MTL was not a perfect employer. Ms Shandil seems to have become focussed on leaving MTL and enhancing her departure with a generous payment which MTL declined to give.

[42] The Authority finds an air of cynicism surrounding her claims which, although they might look tenable on the surface, lack solid and genuine grounding. She has

distorted the objectives of MTL and the tolerant spirit with which it persevered with Ms Shandil in the relationship until her misconduct was uncovered.

[43] The Authority finds that MTL cannot be held accountable in a personal grievance claim, whether dismissal or disadvantage, for the termination of the employment or any glitches with pay that occurred from time to time.

All that is due has been paid

[44] There also appears to be no basis remaining for any of the claims to recover underpayments of sick leave or annual leave. It seems from the evidence these have all now been met.

[45] The Authority finds that such breaches that did occur were unintentional and have been rectified. Also, there was room for confusion about Ms Shandil's pay entitlements arising from her attempts to negotiate an exit from her employment, on attractive terms.

[46] Penalties are not warranted in the circumstances.

Conclusion

[47] In summary, no orders are made against MTL.

Costs

[48] MTL is entitled to a contribution to its advocacy costs. If Ms Watson and Mr Wood cannot agree on the amount, the Authority will determine it based on the usual daily rate awarded in cases such as this one.

[49] If an application becomes necessary, it is to be made within 14 days of the date of this determination, and any reply within a further 14 days.

Alastair Dumbleton
Member of the Employment Relations Authority