

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 322
3030829

BETWEEN MOANA SMITH
 Applicant

A N D FALCON BUILDING
 SOLUTIONS LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Michael Taia, Counsel for Applicant
 No appearance by or for the Respondent

Investigation Meeting: 16 October 2018 at Auckland

Date of Determination: 16 October 2018

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Ms Smith was unjustifiably disadvantaged by the actions of Mr Nick Khalesi and Mr Sam Khalesi acting on behalf of Falcon Building Solutions Limited (Falcon building).**
- B. Ms Smith was unjustifiably constructively dismissed by Falcon building.**
- C. Ms Smith was not paid back pay as agreed with Mr Nick Khalesi and Mr Sam Khalesi.**

D. Within 14 days of the date of this determination, Falcon building is to pay to Ms Smith the following sums:

- a. Compensation of \$6,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in respect of her unjustified disadvantage.**
- b. Compensation of \$20,000 pursuant to s.123(1)(c)(i) of the Act in respect of her unjustified dismissal.**
- c. Wage arrears of \$8,387.42 gross being the back pay owed to her by Falcon building.**
- d. Costs in the sum of \$2,250 together with the filing fee of \$71.56.**

Non-appearance of respondent

[1] Falcon Building Solutions Limited (Falcon building) through its former representative, Mr Danny Gelb filed a statement in reply to the applicant, Ms Moana Smith's statement of problem on 27 June 2018.

[2] A telephone conference was organised between the representatives of the parties for Monday 17 September 2018. On 14 September 2018, the Authority was informed by the respondent's advocate, Mr Gelb that he was no longer instructed to act in the matter. The Authority was informed to direct all future correspondence to Falcon building. Mr Gelb copied Falcon building into the email correspondence with the Authority and provided the Authority with the director of Falcon building, Mr Nasser (Nick) Khalesi's mobile phone number.

[3] On Monday 17 September 2018, the Authority Officer attempted to telephone Mr Nick Khalesi but there was no response to the phone call. A timetable for the filing by the applicant of her witness statement and for the date of the Investigation Meeting was discussed. Timetable directions and a Notice of Investigation meeting were sent from the Authority to both parties by email on 1 October 2018.

[4] The emails sent to Mr Nick Khalesi were not returned to the Authority. The Authority is satisfied that Falcon building was properly served with the notice of

timetable directions in respect of the matter between it and Ms Smith and with the Notice of Investigation Meeting to be held today, 16 October 2018 at Auckland.

[5] Mr Nick Khalesi was aware of the investigation meeting today but failed to attend. I am satisfied that Falcon building was aware of Ms Smith's employment relationship problem and of the investigation meeting taking place in the Authority today.

Investigation meeting

[6] Being satisfied that Falcon building was properly served and was aware of the timetable directions and the Notice of Investigation Meeting, the Authority proceeded to investigate the issues as to whether or not Ms Smith was owed back pay and outstanding wages, whether the withdrawal of agreed terms and conditions amounted to an unjustified disadvantage and whether her resignation amounted to an unjustifiable constructive dismissal.

[7] I conducted my investigation in the absence of Mr Khalesi or any other representative from Falcon building as they failed to appear.

[8] Ms Smith filed a witness statement and swore on oath that her evidence was true and correct. Ms Smith had the opportunity to provide any additional comments and information and did so.

[9] As permitted under s.174E of the Act, this determination has not set out all the evidence. The determination states findings, relevant facts and legal issues and makes conclusions on issues necessary to dispose of the matters.

Employment Relationship Problem

[10] Falcon building sells bathroom products. Ms Smith was employed by Falcon building in the role of sales person. Ms Smith's terms of employment were contained in an individual employment agreement dated 8 October 2015. This was signed by both Ms Smith and Mr Nick Khalesi. A new agreement with new terms and conditions was subsequently agreed to by the parties. This was withdrawn by Falcon building. Ms Smith says this amounted to an unjustifiable disadvantage.

[11] Ms Smith resigned on 16 January 2018. Ms Smith says she was forced to resign because of the unjustifiable actions of Mr Nick and Mr Sam Khalesi on behalf of Falcon building. Mr Nick Khalesi is the director and a shareholder of Falcon building. Mr Sam Khalesi is his son. Ms Smith says her forced resignation amounted to an unjustified constructive dismissal. Ms Smith seeks compensation in respect of both grievances.

Background facts – Employment agreement

[12] Ms Smith was employed pursuant to an employment agreement and her role was that of a salesperson, selling bathroom products from Falcon building's retail store in Lunn Avenue, Mt Wellington.

Job offer by another company

[13] In early 2017, Ms Smith was offered a role with another bathroom company also operating from premises in Lunn Avenue, Mt Wellington. The salary being offered was for substantially more money than what she was being paid by Falcon building. Ms Smith was also going to be given the opportunity to utilise her interior design skills.

[14] Following receipt of the offer Ms Smith spoke to both Mr Nick Khalesi and Mr Sam Khalesi about the job offer. Both Mr Nick and Mr Sam Khalesi did not want to lose Ms Smith. Ms Smith was also keen to stay with the Khalesis as she had worked with them for approximately 2 years and was loyal.

Offer of increased hours, salary and responsibilities by Falcon building

[15] Following their discussion, it was agreed that Falcon building would increase Ms Smith's hours of work, give her more responsibilities and pay her a salary close to the amount being offered by the company that made her the job offer. The increased salary was to be \$45,000 per annum and it was agreed to be paid as soon as Falcon building was in a position to do so. It was agreed that Ms Smith would be paid "back pay" at the new salary rate from 1 February 2017, until the date of implementation of the new salary. Ms Smith requested Falcon building to provide her with a new employment agreement with the new duties, hours and salary.

New employment agreement

[16] Ms Smith made a number of requests for her new employment agreement and was informed it would be provided to her. Mr Nick Khalesi told Ms Smith that he was not going to be involved with the negotiation and drafting of the new employment agreement. He told her that his son, Mr Sam Khalesi who was a lawyer would be responsible for the negotiations and drafting of the new employment agreement.

[17] Mr Sam Khalesi had always been very involved with, and was still very involved in the business. He regularly gave Ms Smith tasks to perform for the business. Ms Smith understood that Mr Sam Khalesi had the authority to negotiate and agree the new employment agreement with her, on behalf of Falcon building.

[18] The Authority was provided with copies of emails between Ms Smith and Mr Sam Khalesi regarding her requests for a revised employment agreement and salary. On Tuesday October 2017, Ms Smith received an email from Mr Sam Khalesi. The email states:

Draft Employment Agreement (sic). We are still working through some things but have a look at the draft for discussion purposes only.
Regards, Sam Khalesi.

[19] Ms Smith looked over the employment agreement and made a couple of minor amendments. Ms Smith and Mr Sam Khalesi met at the Hollywood café in Mt Wellington to discuss the agreement. Subject to the minor amendments, agreement was reached on Ms Smith's new employment conditions.

[20] On 7 November 2017, Mr Sam Khalesi sent an email to Ms Smith at 1.52pm saying:

... I will get your employment agreement signed off soon. Sorry I was off and came back to shit load of work! ☺ Thank G. Sam Khalesi.

[21] On 7 November 2017 at 6:45 p.m., Ms Smith sent an email to Mr Sam Khalesi saying:

Hi Sam, all is set up for 1st Nov with Pay roll with my new rate – thank you. Please advise Nick regarding my backpay from 1st Feb

2017. This needs to be done with Pay roll this week as well. I can email them if you like? Kind regards, Moana.

[22] There were further emails between Ms Smith and Mr Sam Khalesi about the issue of backpay. Backpay was not paid.

Meeting of 7 December 2017

[23] On 7 December 2017, Ms Smith was called in to a meeting. The meeting was with Mr Nick Khalesi. Ms Smith was not told the reason for meeting, nor was she offered the opportunity to have a support person present. At the meeting, Mr Nick Khalesi informed Ms Smith that her new employment agreement was not going to proceed. Ms Smith asked why not and was told it was because of her poor performance. Mr Nick Khalesi went through the duties in the new employment agreement which had become operative from 1 November 2017, as agreed with Mr Sam Khalesi. He informed Ms Smith that her performance was at best 50/50 or 20%.

[24] Ms Smith was shocked. She had always been a good performer and Mr Nick and Mr Sam Khalesi had made promises to her because she was good at her job.

[25] Ms Smith was not given any examples of her supposed non-performance and she was unaware that there had been any concerns about her performance. Ms Smith was told that the original terms of her employment were going to apply and not her new employment agreement.

[26] At the conclusion of the meeting, Ms Smith returned to her desk. She was in a state of shock. When she turned her computer on she saw that Mr Nick Khalesi had accessed it and was still logged on.

[27] There was an email thread between Mr Nick Khalesi and Mr Sam Khalesi about her. The email is as follows:

7 December 2017 at 12:18

Sam K To: Nick Khalesi Send me the how much Moana was making before her rise and how much she is getting now! i asked for this four days ago. Sam Khalesi

Nick Khalesi to Sam K 7 December 2017 at 12:30. Hi Sam please leave it to me you are dismissed from this case, mum said if we increase she will divorce us.

Sam K to: Nick Khalesi 7 December 2017 at 12:36. Nick you will run into some problems legally, don't talk shit please.... You will end up like Cameron with a 9K bill because you want the **SMARTMAN!!**

[28] At 12:37 p.m. on 7 December 2017 there was a further email from Mr Sam Khalesi to Mr Nick Khalesi as follows:

And please don't talk shit... You are dismissed from the case... There is no case.. only case is your Court case if you do stupid shit in which case you can go and spend 10K at a lawyer down the road!

[29] From the evidence, Ms Smith understood that she was to receive a new employment agreement and an increased salary from 1 November 2017. The discussions about a new employment agreement were ongoing but eventually agreed between the parties. Ms Smith was provided with a draft employment agreement, the terms of which she agreed to, following a couple of minor amendments. Falcon building began paying her the new salary in November 2017.

[30] On 7 December 2017, without prior knowledge or notice, Ms Smith was informed there were problems with her performance. Mr Nick Khalesi withdrew the new employment agreement.

[31] I consider this action to be unjustified. It was not the actions of a fair and reasonable employer pursuant to the test under s.103A of the Act. Ms Smith had received promises from both Mr Nick and Mr Sam Khalesi about a new employment agreement and had patiently waited for 8 months for it. Shortly after it was implemented Ms Smith was told she was a poor performer and the old employment agreement was to apply. This all occurred without any indication that there were issues about her performance. This was callous and led to Ms Smith's subsequent resignation.

[32] I consider that compensation in the sum of \$6,000 in respect of the unjustifiable disadvantage claim to be appropriate.

Unjustified constructive dismissal

[33] Ms Smith was so upset and distressed by the treatment from Mr Nick Khalesi she did not return to work after 7 December 2017. She did not hear from either Mr

Nick Khalesi or Mr Sam Khalesi following her departure. She went on stress leave and on 19 December 2017, went to the Doctor.

[34] Ms Smith has provided the Authority with her medical certificate. The medical certificate says:

Moana has presented today and is currently very stressed. She has symptoms of mood disorder indicating significant stress and anxiety. She is to start therapy to assist in her recovery process.

Yours faithfully,

Dr Umesh Parbhu

[35] During the period of her sick leave, Ms Smith did not receive sick pay. Rather, without her knowledge or consent she was paid her annual leave.

[36] On 16 January 2018, Ms Smith resigned as she felt she could not return to work. I consider that Ms Smith was forced to resign. I consider the actions taken by Mr Nick Khalesi at the meeting on 7 December 2017 and the subsequent actions in not paying her sick leave, instead paying her annual leave without her knowledge, amounted to a fundamental breach of her employment agreement. These actions forced her to resign.

[37] At the investigation meeting, Ms Smith spoke of her hurt and humiliation and the distress at being treated in the manner in which she had been treated. Ms Smith had been loyal to her employer for over 2 years, had waited patiently to be paid what had been agreed to and was then told shortly following the implementation of her new employment agreement that it was no longer going to apply.

[38] This was harsh and unjustifiable. In the circumstances I consider compensation of \$20,000 under s.123 of the Act to be appropriate.

Back pay

[39] Ms Smith was not paid back pay. She is entitled to back pay based on the agreement between the parties. The back pay amounts to \$8,387.42 gross comprising \$8,134.56 based on 189 working days from 1 February 2017 to 1 November 2017.

Together with \$252.86 based on 47 working days from 5 November 2017 to 16 January 2018.

[40] I do not consider there was any contribution by Ms Smith to the situation giving rise to her personal grievances. Therefore there will be no reduction of remedies under s124 of the Act.

Costs

[41] Costs are appropriate. This matter has taken a half day in the Authority. The Authority's daily tariff is \$4,500 for a day. Therefore, costs in the sum of \$2,250 are payable, together with the filing fee of \$71.56.

Orders

[42] All of the sums are payable by Falcon building to Ms Smith within 14 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority