Determination Number: AA 478/05
File Number: AEA 839/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Iris Smith (Applicant)
AND	Young Mens Christian Association of Auckland Inc (Respondent)
REPRESENTATIVES	Iris Smith In person Richard Harrison, for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	30 November 2005
DATE OF DETERMINATION	12 December 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant submits she was constructively dismissed from her employment with the respondent. To remedy her alleged grievance she seeks three months lost remuneration.

The respondent denies the claim and submits the applicant resigned on the first day of her employment with the respondent.

The Evidence

Ms Smith commenced working with the respondent on 3 July 2005. She was employed in the position of senior lifeguard. Ms Smith had previously been employed by Community Leisure Management (CLM), which ran the Lagoon Leisure and Fitness Centre at Panmure. The respondent took over the management of the facility with effect from 1 July 2005. Ms Smith had been interviewed for a position with the new managers of the facility and 3 July was her first day of work in her new employment.

There were three events that day which combined led Ms Smith to resign her employment.

In the first instance Ms Smith submits she was approached by the duty manager Shannon Whisker who, without introducing herself, asked if she was testing the pool. She replied she was. Ms Whisker asked if the pool was tested before swimmers used it. Ms Smith then replied that it was. Only then did Ms Whisker introduce herself. Then Ms Whisker explained in no uncertain terms that things were going to change now the YMCA had taken over. Ms Whisker's tone throughout this discussion was insulting and intimidating.

Ms Whisker also commented on the number of lifeguards on duty and on the practice of YMCA in this respect.

Then a lifeguard named Chris Pearson arrived at work. He was late. Ms Smith's evidence was that she was about to question Mr Pearson about why he was late when Ms Whisker interrupted her and started questioning Mr Pearson. Ms Smith said this was her responsibility.

Later in the morning Ms Whisker spoke to her in an insulting and domineering manner when she questioned her about cleaning duties in and around the pool.

That afternoon Ms Smith spoke to Ms Cormack, Interim Centre Manager, and verbally resigned her employment. Ms Cormack discussed Ms Smith's concerns with her and tried to change her mind about resigning. On 4 of July Ms Cormack again tried to get Ms Smith to change her mind about resigning and she offered Ms Smith alternative employment at the YMCA centre in Glen Innes. Ms Smith declined this offer. On 5 July Ms Cormack met again with Ms Smith and a support person. They presented her with a letter of complaint and for the third time Ms Cormack asked Ms Smith to reconsider her resignation and again Ms Smith was offered an alternative position at Glen Innes. It was Ms Cormack's evidence that Ms Smith said she wanted a month off. Ms Cormack could not hold the Glen Innes job for a month. Only then did the respondent accept Ms Smith's resignation.

Ms Whisker says she introduced herself prior to asking questions of Ms Smith that day. She admits she discussed the pool testing and cleaning with Ms Smith on 3 July. She also agrees they discussed the number of lifeguards on duty at any one time. Ms Whisker denies speaking to Ms Smith in an insulting or intimidating manner and said she was simply trying to glean information about the current operation of the complex. Ms Whisker's evidence was that Ms Smith seemed unhappy that day because it was her first day back from leave and she was unhappy that cleaning had not been done while she had been away, that equipment was missing and that no note had been left about the spa pool being out of order.

Ms Whisker said she did approach the lifeguard Chris Pearson to question him about why he was late. She explained to him that it was YMCA practice to call in on every occasion if he was running late. Ms Whisker said she was told later that day that Ms Smith had resigned. She was not told why. However, the next day she was told by the receptionist at the Centre that Ms Smith had been offended by the fact she had spoken to Chris Pearson rather than leaving it to her (Ms Smith). Ms Whisker said she sought out Ms Smith and apologised to her and said it had not been her intention to offend her but that at the YMCA it is the Duty Manager's responsibility to reprimand staff and she did not know that under CML management it had been Ms Smith's responsibility. It was Ms Whisker's evidence that Ms Smith was quite heated during this discussion but that she did confirm she had no problem with Ms Whisker discussing the operational matters they had discussed and said it didn't come across as "this is what we do at the YMCA".

The Legal Framework

As the applicant was an unrepresented party I include in this determination a full summary of the case law pertaining to constructive dismissal. Hopefully it will assist in explaining the determination I have arrived at.

The applicant bears the onus of proving (on the balance of probabilities) that the termination was, as matter of law, a dismissal and not a resignation. *NZ Amalgamated Engineering etc IUOW v Ritchies Transport Holding Limited* [1991] 2 ERNZ 267.

In *Wellington Clerical Workers' Union v Barraud & Abraham Ltd* [1970] 70 BA 347, Horn SM (as he then was) held that:

> *"An apparent resignation can also amount, notwithstanding the words used, to a dismissal. For example, if the employer's actions or words oblige or strongly tend to induce an employee to proffer a resignation, the result can still be a dismissal in reality."*

In *Western Excavating Ltd v Sharp* [1978] 1 All ER 713 at 717 per Lord Denning MR, Lawton and Everleigh LJJ concurring it was held that:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct which he complains of; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."*

This principle has been confirmed in this country by the full Court in *Para Franchising v Whyte* [2002] 2 ERNZ 120.

In *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 the Court of Appeal held that constructive dismissal included, but was not limited to, cases where:

> *(i) An employer gives an employee a choice between resigning or being dismissed;*
>
> *(ii) An employer has followed a course of conduct with the dominant purpose of coercing an employee to resign;*
>
> *(iii) A breach of duty by the employer leads an employee to resign.*

There was no claim here that Ms Smith was asked to resign under threat of dismissal. Therefore, for Ms Smith to establish that her resignation was in fact and law a dismissal she needs to show there was a course of conduct which had the dominate purpose of forcing her to resign or a breach of duty by the respondent of such magnitude that it entitled her to terminate the contract of employment. She could, if the employer's conduct was sufficiently reprehensible, terminate her employment immediately or on notice but she must have acted in timely manner to avoid affirming the conduct knowing of the breach.

In *Auckland Electric Power Board v Auckland Local Authorities Officers Union* [1994] 1 ERNZ 168 Cooke P in delivering the judgement of the Court of Appeal stated:

> *"In such a case as this we consider 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. As to the duties of an employer, there are a number potentially relevant in this field. How some should be defined precisely is a matter no doubt still open to debate: see the discussion in the Auckland Shop Employees case. But in our view it can now safely be said in New Zealand law that one relevant implied term is that stated in the judgment of the Employment Appeal Tribunal, delivered by Browne-Wilkinson J, in Woods v W M Car Services (Peterborough) Ltd quoted in the Auckland Shop Employees case. As the Judge put it:

In our view it is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Courtaulds Northern Textiles Ltd v Andrew [1970] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see British Aircraft Corporation Ltd v Austin [1978] IRLR 322 and Post Office v Roberts [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: Post Office v Roberts."

However, case law also dictates that it is necessary to be satisfied that the conduct complained of is repudiatory in nature and not simply inconsiderate behaviour, which cases the worker unhappiness. Such circumstances were discussed by Judge Williamson in *Wellington etc Clerical Workers IUW v Greenwich* [1983] ACJ 965:

"It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing unhappiness or resentment to the employee from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship".

Also relevant in this case are the findings of the Chief Judge in *NZ Woollen Workers v Distinctive Knitwear NZ Ltd* [1990] ERNZ Sel Cas 791, 803.

"…..conduct falling short of a breach of contractual term including any duty implied into it by law cannot entitle the worker to cancel the contract by resigning. For example, in this case there was evidence given by workers that Mrs Malcolm sometimes snapped at them or spoke to them in a manner which they regarded as inappropriate. That evidence if accepted, by itself, in the absence of any element of unfairness or oppressive conduct, is not enough. The law does not compel parties to a contract to do more that perform it and it does not require them to perform it politely, nor is this Court empowered to enforce courtesy in the workplace, no matter how desirable in that environment that quality undoubtedly is"

Issues to Be Decided

The questions to be answered here are:

- Did the respondent follow a course of conduct the dominant purpose of which was to force Ms Smith to resign?

- Was there a serious breach of duty by the respondent that left Ms Smith with no option but to resign her employment?

Discussion and Findings

On the evidence before me Ms Smith fails to establish that there was repudiatory conduct by the respondent that entitled her to terminate her employment and succeed in a claim of constructive dismissal.

All the evidence in this case points to a situation of new management feeling its way in managing an established complex with established staff and attempting to assess current operational practices with a view to addressing changes necessary to bring the operation of the centre within the management standards and protocols operated by the Y. It would also be the case there would be some anxiety among staff facing new employment with a new employer albeit they were experienced in their roles and had been confirmed in their roles with the new management of the centre.

I accept that Ms Whisker did get off on the wrong foot with Ms Smith. Nevertheless I find Ms Whisker was at worst business like in her discussions with Ms Smith that day. She was entitled to discuss operational issues with Ms Smith and I find contrary to the interpretation that Ms Smith put on their discussions there was nothing intimidatory, insulting or oppressive in Ms Whisker's manner.

In particular I note the findings in *Greenwich* and *Distinctive Knitwear* (cited above). *Greenwich* dictates that the conduct complained about must go further than conduct that causes unhappiness to being conduct that is repudiatory in nature (showing the employer does not intend to be bound by one or more of the terms essential to the contract). In *Distinctive Knitwear* the former Chief Judge commented on a claim that an employer had been said to snap at her employees or to speak to them in a manner that was considered inappropriate. The Chief Judge said that such behaviour (in the absence of oppressive conduct or unfairness) is not enough to found a successful claim of constructive dismissal as the law does not compel the parties to an employment contract to perform it politely however desirable that quality may be.

I have found there was nothing unfair or oppressive about Ms Whisker's approaches to Ms Smith on 3 July. Ms Whisker was simply going about her new role in a business like manner. For reasons I won't guess Ms Smith was particularly sensitive that day and resigned over her interpretation of events.

The employer did not just allow the resignation to stand on its face. Strenuous efforts were made by Ms Cormack to have Ms Smith change her mind and withdraw her resignation and the respondent even went to the lengths of offering Ms Smith alternative work in another complex close by. This is what would be expected of a good employer in such circumstances and the respondent cannot be faulted in the approach it took to resolving Ms Smith's complaints. Sadly the applicant did not change her mind and eventually the respondent accepted her resignation.

Determination

The applicant resigned her employment with the respondent. She was not constructively dismissed and her application must be declined.

Note: Had the applicant established that she had been constructively dismissed then it is unlikely on the evidence before me that lost remuneration would have been awarded. This is because the applicant did not mitigate her loss. She took time out to assist her daughter who was having a baby and then had operations on her foot and was unavailable for work for some time.

Costs

The hearing occupied one half day. The applicant is directed to pay to the respondent the sum of $750 to reimburse it for costs incurred in defending this matter.

Janet Scott
Member of Employment Relations Authority