

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 145/08
5074326

BETWEEN

WENDY THOMSON
Applicant

AND

METROS PUBLISHING
GROUP LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Rob Davidson, Counsel for Applicant
Peter Zwart, Advocate for Respondent
Investigation Meeting: 4 August 2008 at Christchurch
Determination: 26 September 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Thomson) was engaged as Area Manager – Advertising on 20 January 2006 by the respondent (Metros). There was a written individual employment agreement providing for full time permanent employment. Ms Thomson's remuneration consisted of a salary of \$40,000 per annum plus bonuses based on sales.

[2] The relationship between Ms Thomson and the Managing Director of Metros (Mr Laplanche) was described by Ms Thomson as troubled. Notwithstanding that description, Ms Thomson acknowledges that Mr Laplanche and other senior members of the staff of Metros had dramatic personal difficulties to overcome during her employment.

[3] There was a meeting between Metros and Ms Thomson on 24 November 2006 in which Ms Thomson alleges that Mr Laplanche performed a *character assassination*

of her. Towards the end of the meeting, there was an exchange about future directions of the relationship concluding with Ms Thomson saying Mr Laplanche had made it very clear that she was not wanted. In consequence Ms Thomson advised that she was resigning her employment. Ms Thomson subsequently confirmed that intelligence by email, but also confirmed that the resignation was a consequence of Mr Laplanche having destroyed the *trust and confidence* in the employment relationship.

[4] A personal grievance was then raised by Ms Thomson in which she alleges that she was unjustifiably constructively dismissed from her employment. Metros denies both Ms Thomson's description of the 24 November meeting and her contention that she was constructively dismissed.

Issues

[5] It will be useful to consider the following issues:

- (a) Was the relationship between Ms Thomson and Mr Laplanche a relevant factor in the termination of Ms Thomson's employment?
- (b) What did happen at the meeting on 24 November 2006?
- (c) Has Ms Thomson been constructively dismissed?

Relationship issues

[6] Ms Thomson complains about Mr Laplanche's behaviour during the employment. In particular, Ms Thomson alleges that Mr Laplanche was *manipulative and dismissive* of her and she described *bullying* behaviour from Mr Laplanche directed at her.

[7] Conversely, Ms Thomson readily conceded that Mr Laplanche had some grave personal issues to cope with; his house was destroyed by fire during her employment and more importantly, his wife was terminally ill and subsequently died during the employment.

[8] Mr John Fitzgerald was the Sales Manager of Metros for much of the period that Ms Thomson was employed there and it seems that Ms Thomson had a good relationship with Mr Fitzgerald. Mr Fitzgerald's wife was also ill with cancer and

Mr Fitzgerald's wife also died during Ms Thomson's employment. The relevance of Mr Fitzgerald's distressing personal circumstances will become evident shortly.

[9] Mr Laplanche's evidence is that, as a consequence of his wife's terminal illness, he spent a significant amount of time away from work during his wife's final illness and that he did not return to full time work at Metros until sometime in the week ending 17 November 2006.

[10] Because Mr Fitzgerald had been left with two young children when his wife died in July 2006, Mr Fitzgerald ultimately resigned his position as Sales Manager. In his evidence, Mr Laplanche alludes to the fact that some staff (and on the evidence this included Ms Thomson) thought that he had treated Mr Fitzgerald badly because Mr Fitzgerald had apparently been prepared to work part time (so that he could spend time looking after his children), but Mr Laplanche had required a full time commitment.

[11] Mr Laplanche acknowledged that he saw Ms Thomson as *a leader in the negative stakes*. By this he meant that Ms Thomson, in his view, was always very busy but was driven by negativity rather than a positive outlook about the workplace. Ms Thomson, for her part, acknowledged that she *got involved in office politics* and she said that it was her nature to get involved and to *go for the underdog*.

[12] Mr Fitzgerald, in his evidence, described Mr Laplanche as *a very focused individual* who could be *very direct in his manner* and who some staff *found ... to be domineering and intimidating*.

[13] I am satisfied that the evidence about the relationship between Ms Thomson and Metros prior to the 24 November 2006 meeting does not assist me in determining whether Ms Thomson was unjustifiably constructively dismissed. It is clear that the relationship between Mr Laplanche and Ms Thomson was not perfect, but I accept Mr Fitzgerald's evidence that Mr Laplanche did not have a perfect relationship with other staff members as well, and I also accept Mr Fitzgerald's evidence on the hours that Mr Laplanche would work in the business when he was not distracted by his wife's tragic illness. Mr Fitzgerald indicated that Mr Laplanche would at best work three days a week in the office so he was simply not there every day of the week.

[14] The law is clear that staff do not have to like the personality or behaviour of their employer; the issue is whether their employer treats them fairly and in

accordance with the well-established legal principles and I find no evidence whatever that Mr Laplanche or Metros has failed in its obligations to Ms Thomson up to the point at which she had her meeting with Metros on 24 November 2006.

The meeting

[15] The meeting was not called especially to deal with any particular issues between Metros and Ms Thomson. It was a regular performance meeting which happened at roughly this time each year and involved all staff. Mr Laplanche's evidence is quite clear on this point and I accept it; his practice was to convene an individual *one-on-one* meeting with each member of staff to look at the achievements over the previous year and plan for the new one. It was in that context that Ms Thomson was asked to attend her meeting. It follows that her complaint that she was not advised of the nature of the meeting and of the particular issues which she says Mr Laplanche in fact brought up is somewhat misplaced. The meeting was an ordinary operational meeting as happened with all staff every year and it was not a disciplinary meeting in the sense that Ms Thomson wants me to believe.

[16] A number of the witnesses before the Authority gave evidence about the nature of the meeting, and there is much common ground. Mr Laplanche gave evidence of his concern about a number of complaints that he had received from staff about their difficulties in working with Ms Thomson. Other staff allegedly found Ms Thomson *uncooperative* and Mr Laplanche was aware that Ms Thomson was critical of the way in which he had dealt with Mr Fitzgerald's request to work part time. In his oral evidence, Mr Laplanche told me that he *kept hearing from Wendy* (Ms Thomson) *that I was unprofessional* and that he *needed to start there* when he commenced the meeting with Ms Thomson.

[17] Mr Fitzgerald said in his evidence that Mr Laplanche *had a number of issues of concern regarding her* (Ms Thomson) *and that one of those was her participation in what he referred to as the culture of gossip*. Mr Fitzgerald then went on to specifically refer to Ms Thomson's criticism of Mr Laplanche for failing to agree to Mr Fitzgerald's request to work part time after his wife had died. Mr Laplanche told me in his oral evidence that Mr Fitzgerald's analysis of the whole meeting, in his written evidence, was *pretty close*.

[18] It seems more rather than less likely then that the meeting commenced with Mr Laplanche drawing Ms Thomson's attention to the problems that other staff seemed to have with her, including the business of *the culture of gossip*.

[19] The particular example of the *culture of gossip* which Mr Laplanche seemed to be especially concerned about was Ms Thomson's criticism of him for failing to agree to Mr Fitzgerald's proposal that the latter work part time after the death of his wife.

[20] Ms Thomson regarded the discussion led by Mr Laplanche as *a character assassination*. She says that he called her a troublemaker and indicated that she was impossible to work with. Mr Fitzgerald refers to Mr Laplanche as having an aggressive demeanour at the meeting, and he also uses the description *hostile* of Mr Laplanche's manner towards Ms Thomson.

[21] Mr Laplanche said that his intention was to try to get Ms Thomson to stop being negative and secondly to try to get her to concentrate on her selling work rather than other aspects of her activities because he considered that her sales were not as good as they should be.

[22] Although there is dispute about the order in which the issues were raised, it seems common ground that Mr Laplanche dealt with both his concerns about other staff complaining about working with Ms Thomson on the one hand and, on the other, his concerns about Ms Thomson's support for Mr Fitzgerald and his request to work part time.

[23] As to the second of those, there seems to be an acceptance by all the witnesses who comment on this aspect that Mr Laplanche sought an explanation about whether Ms Thomson had discussed Mr Fitzgerald's circumstances with Mr Fitzgerald. If she had Mr Laplanche *demand*ed to know the details of the calls (he means telephone calls) to Mr Fitzgerald. Mr Laplanche says that Ms Thomson denied speaking with Mr Fitzgerald (although she had), but then subsequently admitted that she had spoken to Mr Fitzgerald and it seems as if Mr Laplanche persevered with this issue until, in the end, Mr Fitzgerald told Mr Laplanche that it was not a matter that ought to be discussed in that forum and that he (Mr Fitzgerald) would speak to Mr Laplanche later on.

[24] Mr Fitzgerald's evidence is that Mr Laplanche then moved on to talk about the other matters of concern to Mr Laplanche and that in the end, Ms Thomson became

increasingly distressed. In Mr Fitzgerald's view, Mr Laplanche should have terminated the meeting to enable Ms Thomson to compose herself and then reschedule the meeting for a later occasion. Mr Fitzgerald recalls that Ms Thomson eventually indicated that she would resign.

[25] I am satisfied on the balance of probabilities that Ms Thomson's resignation was a direct consequence of the hectoring and aggressive tone adopted by Mr Laplanche in the 24 November 2006 meeting. Ms Thomson refers to Mr Laplanche's approach as aggressive and Mr Fitzgerald does as well. Indeed, Mr Fitzgerald uses the word *aggressive* three times in his brief to describe Mr Laplanche's behaviour and on one of those occasions he adds to the description by referring to Mr Laplanche as being *hostile* as well.

[26] While I am satisfied that Mr Laplanche did not attend that meeting with the dominant purpose of forcing Ms Thomson out of the employment (so this is not, in my judgement, a course of conduct example of a constructive dismissal), I do think that it is a clear example of a breach of duty by the employer creating the inevitable and foreseeable consequence that the employee will terminate the engagement.

[27] There is no good reason why Mr Laplanche behaved in the way that he did. Certainly he is perfectly entitled to remonstrate with Ms Thomson and point out to her her shortcomings, and I accept on the evidence that those shortcomings were real enough. What he is not entitled to do, in my judgement, is to adopt such a tone with an employee as to literally satisfy her that there is nothing more that she can do in the employment and that she must terminate it forthwith. By adopting his unpleasant, aggressive tone (and I am absolutely satisfied that is precisely what Mr Laplanche did), Metros breached its obligation to Ms Thomson to treat her fairly and decently, irrespective of her shortcomings.

Determination

[28] It follows that I am satisfied that Ms Thomson has a personal grievance by reason of having been unjustifiably constructively dismissed from her employment with Metros and accordingly she is entitled to the consideration of remedies.

[29] I need first to consider the question of contribution. Ms Thomson alleges that her health problems subsequent to the employment were a direct result of having lost her position, and the palpable evidence of her loss of confidence as a consequence of

her failure to remain in employment and the subsequent decline into a depressive state, was clear enough.

[30] Indeed, Ms Thomson's evidence that her depressive illness was exacerbated by the employer's subsequent behaviour was, if anything, even more disturbing. Ms Thomson gave evidence (which was not denied by Metros) that after her employment ceased, she received an invoice from Metros for the amount of notice that she had allegedly failed to give when she summarily terminated her employment. Given that when she received this invoice she was out of work, the receipt of another significant bill from her former employment was yet another blow.

[31] However, the question that I must address is whether Ms Thomson contributed, by her own behaviour, to her own misfortunes. I am satisfied that she did. The evidence is clear that Ms Thomson gossiped in the workplace and took particular delight in bad-mouthing Mr Laplanche. There is ample evidence before the Authority that Ms Thomson made her views about Mr Laplanche well known and I do not think that does her any credit. Mr Laplanche quite properly was offended by that, and sought to address that matter in the 24 November 2006 meeting. The Authority's objection to Mr Laplanche's performance at the meeting is not about his right to address those issues, which is plain, but about the tone in which he did so.

[32] However, in my view, if Ms Thomson had been more focused on positive outputs in her job and less focused on trying to undermine Mr Laplanche by negative commentary then the distressing outcome of the 24 November 2006 meeting may have been avoided.

[33] I fix Ms Thomson's level of contribution at 30%.

[34] For six months after Ms Thomson's employment ended she was unable to work by reason of ill health and she lived on a sickness benefit. Ms Thomson attributes that ill health to the employer and asks that the Authority reflect those circumstances in the awards it makes. It follows that Ms Thomson quite properly concedes that she cannot claim lost wages for the period that she was unwell because of course she was not actually capable of working during that time. However, it is suggested that the Authority could look at the compensation issue in a global way so as to reflect those rather unusual circumstances.

[35] I have given consideration to that submission and, in the result, reached the conclusion that a proper response to Ms Thomson's grievance is a compensatory payment under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$6,000 which figure includes the 30% contribution.

Costs

[36] Costs are reserved.

James Crichton
Member of the Employment Relations Authority