

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 157/10  
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BETWEEN	LIUBOV TROPOTOVA Applicant
AND	NATALIA TROPOTOVA Applicant
A N D	OCS LIMITED Respondent

Member of Authority: James Crichton

Representatives: Andrew McKenzie, Counsel for Applicant  
Paul McBride, Counsel for Respondent

Investigation Meeting: 22 February 2010 and 19 May 2010 at Christchurch

Determination: 6 August 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicants (the applicants or Natalia or Liubov) allege that they were unjustifiably dismissed by their employer, OCS Limited (OCS). OCS resists that contention.

[2] The applicants are Russian nationals and at the relevant time worked for OCS as cleaners at Christchurch Public Hospital. The applicants are mother and daughter.

[3] There is dispute about the nature of the employment. OCS maintains that both Natalia and Liubov were casual employees while the applicants maintain that while their employment was labelled casual, it was not in fact casual at all.

[4] Whatever the status of the employment, it is clear that the employment of the applicants came to an end on 14 March 2007 at least to the extent that neither

applicant provided services to OCS after that date. On that date, the applicants both turned up to work their usual shift at 5.30pm where they were approached by Ms Barbara Brunton, their supervisor, who instructed them to accompany her to the office where, after some preliminaries, Ms Brunton indicated there had been a complaint about the standard of the cleaning performed by the applicants and that in relation to Natalia, there was an allegation that she had been *sleeping on the job*.

[5] Ms Brunton proposed to conduct an investigation as she had not personally witnessed the alleged wrongdoing. The meeting then progressively deteriorated and there was allegedly some shouting in Russian by Liubov and an allegation by Ms Brunton that Liubov had assaulted her and made as if to spit at her. Then, Mr Tropotova (Liubov's husband and Natalia's father) attended, assisted Ms Brunton to restore order and the Tropotovas were escorted from the hospital by the Canterbury District Health Board's security guards.

[6] On 16 March 2007, Natalia asked a Russian friend to find out what was happening. The friend talked to another OCS manager who said that the applicants had been dismissed.

[7] On 19 March 2007, Natalia received a telephone call from yet another OCS manager wanting confirmation of her address so that certain documents could be forwarded. Natalia arrived home at noon on 19 March 2007 to find a courier driver who presented her with a package containing two trespass notices, one for her and one for her mother. There was no further contact with OCS.

[8] Statements of problem were filed in the Authority by Natalia and Liubov on 12 October 2007. The applicants' then representative also lodged a variety of other specious claims for which the Authority had no jurisdiction and then, after participating in the initial telephone conference the Authority convened on 28 January 2008, went *off line* such that by 18 November that year, I had decided that the files should be closed for want of prosecution. That decision, of course, was conveyed to both parties and then, by an undated letter received in the Authority on 12 January 2009 (nearly 12 months after the last contact with the applicants' representative) a request was received to reopen the file.

[9] The Authority agreed to that request on the basis that the applicants' representative would properly engage with the Authority's process and it was agreed

that the Authority would deal first of all with the claims made by the applicants which were outside the normal ambit of the employment jurisdiction. A determination on those matters issued on 25 May 2009.

[10] In that determination, the Authority struck out all of the claims brought on the applicants' behalf except the *ordinary* employment claims. Costs were reserved. In a subsequent determination dated 17 July 2009, costs were fixed against the applicants and as they had by then approached fresh counsel, the way was clear for them to finally proceed with their claim that they were unjustifiably dismissed.

[11] For the avoidance of doubt, the Authority desires to be very clear that the applicants' counsel in this substantive matter has performed creditably such that, since the change of representative, the file has not been beset with the bewildering confusion generated by the applicants' first representative.

### **Issues**

[12] There are really two issues that the Authority needs to investigate. The first is whether the applicants were casual employees or not, and the second is whether there was a dismissal. As to the second, it is clear on the facts that work by the applicants for OCS ceased on a particular day (14 March 2007), but what is not clear without further inquiry is whether the employment relationship ended then or later, and whether it ended through the agency of OCS or not. Without addressing those questions, it will be impossible to determine whether an unjustified dismissal has taken place.

### **Were the applicants casual employees?**

[13] I am satisfied that the applicants were not casual employees. I have been greatly assisted in determining this question by carefully reviewing the very thorough examination of this question in the decision of the Employment Court *Jinkinson v. Oceana Gold (New Zealand) Limited*, CC9/09, 13 August 2009, a decision of His Honour Judge Couch.

[14] In that judgment, the learned Judge carefully analyses the line of authority in the English Courts, in our Courts and in both the Canadian and Australian jurisdictions. Overlaying those common law principles is the statutory framework in

this country and the elements of the Employment Relations Act 2000 which particularly bear on the issue.

[15] A key determinant of the distinction is whether or not there are obligations subsisting between the parties to the employment relationship even during periods when work is not actually being performed. If there are such obligations, then that will tend to indicate a continuing employment relationship rather than a casual employment relationship which, by law, effectively contemplates a series of discrete engagements each complete in itself.

[16] Judge Couch also contemplated the prospect that the nature of the employment relationship could change over time, and even where the parties had determined on a relationship which was casual to begin with, it was conceivable that the continuation of the relationship and the changes that the parties agreed to organically, resulted in fundamental changes to the status of the relationship.

[17] His Honour also refers with approval to three Canadian decisions, one of which contains this definition of *casual employment*:

*Casual employment is therefore the product of a given employer's unforeseen need to have work performed and the chance, random and voluntary availability of a given employee.*

*Bank of Montreal v. United Steelworkers of America* 87 CLLC 16,044.

[18] The Canadian decisions emphasise the importance of a legitimate expectation of further work which I am satisfied is an important aspect of the decision-making matrix. Whereas casual work, properly speaking, contemplates discrete engagements complete in themselves, continuing employment contemplates an ongoing commitment each party has to the other, the one to provide work and the other to perform it.

[19] Judge Couch also refers in his judgment to Australian authorities which have formulated a list of factors which are designed to assist the Courts to make decisions about casual employment. These factors include the number of hours worked per week, whether work is allocated by roster, whether there is a regular pattern of work, whether there is a mutual expectation of continuity of employment (a factor as I mentioned above particularly emphasised in the Canadian decisions), whether the

employee has to give notice when going on leave and whether there are consistent start/finish times.

[20] As I have already indicated, I am satisfied that this employment is not casual. Although it is clear that the number of hours fluctuate, work is allocated by a roster, there is generally a regular pattern of work, there is certainly a regular start time but perhaps most importantly the nature of the employment relationship seems to be one contemplating continuity such that the applicants could legitimately expect to continue to be required for work on a basis not dissimilar to the basis they had been employed on hitherto.

[21] In that regard, Mr McKenzie for the applicants points out, sensibly I think, that the nature of the cleaning obligations in a hospital are such as to require continuity of service and save for the prospect that the employer might decide to put other cleaners on the roster instead of the applicants, there is no sense in which the work would suddenly cease to be needed.

[22] Furthermore, both the applicants worked on a roster that had been prepared and notified in advance and they cleaned a particular part of the hospital.

[23] While it is true that the meagre documentation available generally suggests or at least labels the employment *casual*, that, of course, is not determinative, and even if it were true at the beginning of the relationship, as Judge Couch points out in *Jinkinson*, the nature of the employment can change with time and the point at which the inquiry has to be made is the point at which the status of the employment becomes an issue, in this case, the end of the relationship.

### **Were the applicants dismissed by OCS?**

[24] The applicants say that they were *sent away* by OCS and that that is a fundamental indicator of a dismissal. Certainly, the cases support the submission that *a sending away* is a fundamental element of the termination of the employment relationship, although it might be better to express it as *a permanent sending away* as some of the earlier cases do. Perhaps the most elegant expression of the definition of a dismissal is that contained in the decision of Williamson J in *Wellington Clerical IUOW v. Greenwich* (1983) ERNZ Sel Cas 95 at p.103 where dismissal is defined as *the termination of employment at the initiative of the employer*.

[25] The question in the present case is whether OCS brought the relationship to an end of its motion on 14 March 2007. I am satisfied on the evidence before the Authority that it did not. There is nothing in the factual matrix that would support the contention that OCS had made a determination to conclude the employment relationship and that it had acted on that. All that the facts disclose is that there was a disciplinary meeting which seems likely to have been no more than the beginning of an investigatory process, and that when that meeting terminated (albeit in disarray) there was no settled intention on the part of OCS to do anything other than continue to investigate the allegations against the applicants.

[26] I do not accept the submission from the applicants that the action of OCS on 14 March 2007 constituted a *sending away* in the way that the cases describe. All that happened was that an initial disciplinary meeting broke up and because of the way that that disciplinary meeting broke up, the applicants left the site (Christchurch Hospital) rather than returned to their duties.

[27] Of course, if the applicants had simply returned to work as might have been expected if the meeting had been less dramatic, then the present issue would not have arisen. But the fact was that the turbulent nature of the meeting rather determined what happened next. Ms Barbara Brunton, the supervisor whose meeting it was, told me in her evidence that she had been pushed by Liubov on the shoulder and that Liubov had also made as if to spit at her. In those circumstances, Ms Brunton was clear that her duty was to have the applicants removed by Christchurch Hospital security people (employees of the Canterbury District Health Board) *because there had been an assault*. Ms Brunton told me that she wanted the security people to remove the applicants *from her office* not from the hospital entirely, but it was in fact the latter which happened.

[28] A consequence of the fact that the applicants were escorted from the hospital grounds by security people was that they were subsequently issued with Trespass Act notices by the Canterbury District Health Board. Again, Ms Brunton told me that this was an inevitable consequence of persons being escorted from the hospital site and was a function of District Health Board policy, having nothing whatever to do with OCS. Ms Brunton told me that she did not have the authority to execute Trespass Act notices in respect of staff, including the applicants, and had not done so. Indeed, Ms Brunton's evidence was that the very last thing she had to do with the applicants

was when they left her office on 14 March 2007. She was clear that she had no further engagement with the issue thereafter. She was equally clear that she did not dismiss the applicants, either then or later, and was never told by any other manager at OCS that the applicants had been dismissed. She advanced her own view to me that Natalia anyway ought not to have been dismissed. Her view of Liubov's conduct was different of course, because of the alleged assault during the office meeting.

[29] Indeed, there is no evidence from any OCS witness that a decision was taken by OCS to dismiss the applicants. What the applicants rely upon to ground their dismissal allegation is the contention that the applicants were *sent away* on 14 March 2007 and then two other events which followed that date. The first was the information via a Russian co-worker that an OCS manager had indicated the applicants were dismissed and the second was the receipt on 19 March 2007 of Trespass Act notices forbidding the applicants from returning to the site.

[30] OCS says (correctly) that it did not issue the Trespass Act notices and that is true as far as it goes. However, I consider that OCS knew that the Trespass Act notices had been issued. An OCS manager rang Natalia to confirm her address because there were *some documents* to be sent to her. Perhaps the documents the OCS manager referred to were not the Trespass Act notices but it is interesting that this call was in the morning of the same day the Trespass Notices were served, and no other documents were ever received by the applicants. Further, it is clear from Ms Brunton's evidence, for instance, that she was aware that the applicants had been *trespassed* off the Canterbury District Health Board's property.

[31] It is illustrative to consider the nature of the Trespass Act notice. First, it is in the clearest terms and prohibits the applicants attending at any of the premises occupied by the Board and for any purpose. Even if the applicants were ill, their ability to access the services provided by the Board purport to be limited by the effect of the Trespass Act notice. Next, the notice is unlimited as to time. There is no evident mechanism by which the notice could be revoked and nothing on it explains to the recipient how they might engage with the creator of the notice to have it reviewed. In fact, the applicant Natalia visited the Board's security office with a support person to try to get a sense of what the notice actually meant. The Authority has been supplied with a statement from the support person who did not give evidence before the Authority. However, I am satisfied the conversation took place and, based

on Natalia's evidence, am satisfied with the conclusions that she reached from that discussion, namely that the Trespass Act notice created onerous obligations on her which were not negotiable.

[32] In particular, I am satisfied that Natalia established from this discussion with the security officer that she could not engage with her employer face-to-face, because of the Trespass Act notice.

[33] Ms Maria Il'ina told me in evidence that she had been contacted by Natalia on 15 March 2007 and asked to find out what had happened between the applicants and OCS. Ms Il'ina was also an employee of OCS at that time. Ms Il'ina contacted an OCS manager called Sharon Stack who told her that both the applicants had been dismissed the night before. Ms Il'ina said that she conveyed that information to Natalia. While I find no difficulty in believing Ms Il'ina's evidence before the Authority, I am not persuaded that the message can be relied upon. It is difficult to know precisely what happened, but I should have thought it was unreasonable for an employee to rely upon a third party to obtain information about a matter as important as the future of one's employment. Accordingly, I do not think it was reasonable for the applicants to rely on what Ms Il'ina told them, although I emphasise that in reaching that conclusion, I am not determining that Ms Il'ina lied, simply that somehow the message from OCS got garbled or that the person consulted at OCS was mistaken in what she told Ms Il'ina. OCS points out (and I accept) that both the applicants continued, over this period, to retain their access cards and their uniforms. The applicants say through Natalia that they were not asked to return the company's property at the meeting on 14 March 2007 and therefore had not done so.

[34] In the end, the question for determination has to be, whose responsibility it was to re-establish contact between the parties to the employment relationship after the abortive meeting of 14 March 2007. I am satisfied on the evidence before the Authority that there was no dismissal on 14 March 2007 and I am also satisfied that a reasonable employee would not rely upon the information conveyed by a third party (no matter how well intentioned) that the employment relationship had been ended by dismissal. On the face of it then, with the employment relationship still extant at close of business on 14 March 2007, the effect of the Trespass Act notice which is dated 19 March 2007, must be factored into the proceedings. First, it is clear on the evidence that that document was issued by the Canterbury District Health Board.

Second, I am satisfied on the evidence I heard that the issuance of the two Trespass Act notices was a function not of a request from OCS but an automatic response to the unpleasantness in the meeting between the applicants and OCS's Ms Brunton. It follows that it cannot be said that OCS caused the breach in the employment relationship by requiring the Board to issue Trespass Act notices because I am satisfied that that is simply not what happened.

[35] However, I am also satisfied that OCS knew or ought to have known that the Trespass Act notices had been issued and I think it more rather than less likely that it knew that they were going to be issued before they were in fact issued. I base this conclusion on the fact that I think it likely that Natalia's recollection of a telephone call from Sharon Luke, a manager at OCS, is likely to be accurate. She said in her evidence that about 10am on 19 March 2007 she was at her studies at Canterbury University and got a call from Ms Luke on her cellphone asking for confirmation of her postal address which she readily gave. Having accepted that piece of evidence, it seems evident that OCS's Ms Luke anyway knew that Trespass Act notices were about to issue. Although Natalia is clear in her evidence that the nature of the material that was to be sent to her by mail was not discussed in the telephone call, the fact that it happened on the very day that she subsequently had the Trespass Act notices delivered suggests the telephone call was about the Trespass Act notices and not about other attempts which OCS claimed it was making to contact the applicants. I comment further on this aspect shortly.

[36] My conclusion that OCS knew about the Trespass Act notices being issued is further supported by the evidence of Ms Brunton who denied being responsible for issuing the Trespass Act notices but who certainly knew about them. In any event, it seems inconceivable that OCS would not have been aware of Canterbury District Health Board policy in respect of Trespass Act notices. If, as I am satisfied is the case, the Board automatically issue Trespass Act notices where there was violence or the threat of violence on its premises, then a large employer with significant work on the site ought to have known that that was the Board's policy. Amongst other things, OCS ought to have know that that was the Board's policy (assuming that it was) because of OCS's obligation as a good and fair employer to arrange its affairs appropriately in respect of its obligation to its employees. Clearly, if there was a risk that on occasions OCS employees could be *trespassed off* Board property, then the employment law consequences of that state of affairs ought to have been evident to

OCS in advance so that a proper procedure for dealing with the matter could be enunciated.

[37] Having concluded that OCS knew or ought to have known about the Board's policy in respect of Trespass Act notices, it seems to follow that, in circumstances such as the ones that befell the applicants, both parties (OCS and the applicants) had an obligation to be *active, constructive, responsive, and communicative* in their dealings the one with the other. As counsel for OCS correctly observed in his closing submissions, *good faith cuts both ways*.

[38] OCS says that after the abortive meeting on 14 March 2007, it made a number of attempts to contact the applicants with a view to progressing matters. There is no evidence that this happened at all. But to be fair to OCS, it says it was prejudiced by the unreasonable delay in the prosecution of the applicants' claim and I accept that submission. Sadly, the applicants were not assisted by their original advocate whose approach to their claim was both misguided and dilatory.

[39] On the other hand, there is also no evidence that the applicants took any steps to establish the position with the employer. They seem to have been satisfied by the receipt of the information from Ms Il'ina (that they had been dismissed) and the effect of the Trespass Act notices which precluded them from going onto the site. But I would have thought that Natalia anyway (whose English is better than her mother's), would have thought it appropriate to contact the employer directly by telephone and establish the position. I am satisfied that the meeting on 14 March 2007 concluded on the basis that OCS was intent upon making further inquiries in relation to the allegations against the applicants. As I have held, there was no dismissal. So it would be reasonable for an employee to pursue the employer if there had been no contact.

[40] OCS says there was difficulty about contacting the applicants. I do not accept this claim at all. Natalia's evidence (which I have accepted on this point) was that she was rung by an OCS manager to get her address confirmed so that the Trespass Act notices could be delivered to her. Even if I am mistaken in accepting that evidence, the fact of the matter is that the Trespass Act notices were served, at the right address, so OCS did know what address the applicants lived at. There was no follow up to the disciplinary issues raised on 14 March 2007 and it seems as if both parties want to blame the other for their own failure to fulfil their good faith obligations.

[41] I am satisfied that the effect of the Trespass Act notices was to make it practically difficult (although not impossible) for the applicants to engage with their employer and that the onus was on the employer to progress matters appropriately. Clearly, it did not do that on the evidence available to the Authority at this stage. There is no evidence before the Authority that OCS took any steps to engage with the applicants save for establishing their address for the purpose of the Board sending Trespass Act notices to them. I am not satisfied that OCS can shelter behind the proposition that it took no active steps to bring the relationship to an end when the practical reality is that the Trespass Act notice was as plain a way of bringing the employment relationship to an end as an actual dismissal. After all, the Trespass Act notice forbade either applicant from entering onto any site occupied by the Board so it is difficult to see how the applicants could have continued with their duties in those circumstances. If OCS was not aware of that self-evident consequence of the Trespass Act notices, then it ought to have been.

[42] On OCS's own evidence, the employment relationship was still ongoing after the 14 March 2007 meeting and OCS was to undertake an investigation into the complaints made against the applicants. There was no suggestion that the applicants could not have returned to their duties while that investigation was being undertaken, but the effect of the Trespass Act notices was to completely preclude that and also to make it difficult for the applicants to engage with their employer to find out what was going on. The applicants told me (and I accept) that when they left the meeting, Ms Brunton told them that OCS would be in touch with them and they were not to come back to work until that happened. There was no contact from OCS with the applicants after that discussion save for the single telephone call to Natalia to confirm the applicants' address so that Trespass Act notices could be sent by the District Health Board. Nor was there any evidence presented to the Authority that OCS made any attempt to contact the applicants as it claimed it did. It follows inevitably that the Authority must conclude that the practical effect of the Trespass Act notices and the failure of OCS to satisfy the Authority that it assertively promoted engagement with the applicants, is that the applicants were unjustifiably dismissed from their employment.

**Determination**

[43] I have concluded that the applicants were not casual employees but were in fact permanently employed by OCS and that both applicants were effectively unjustifiably dismissed from their employment by OCS as a consequence of OCS's failure to appropriately engage with the applicants after the applicants' received Trespass Act notices from the Canterbury District Health Board. It follows that the applicants are entitled to have remedies considered to put right OCS's defaults.

[44] However, before considering remedies, I need to address the issue of any contribution that might impact on remedies. In the present case, I think contribution falls into three distinct categories. First, I accept the submission of OCS that the delay in prosecuting the applicants' claims has materially prejudiced OCS in its ability to respond appropriately to the applicants' allegations. Further, the same default by the applicants has made it more difficult for the Authority to reach robust conclusions because of the inability of OCS in particular to find witnesses who might be able to assist it in responding to the applicants' various claims.

[45] Of course, it is not the applicants themselves who have defeated the process, but their inadequate and unresponsive first representative who failed absolutely in his obligations to his client and in his obligations to the Authority. It is regrettable that the applicants have been materially affected by the inadequacies of the person they chose to represent them, but it is not fair or just for OCS to bear the brunt of the deficiencies which the applicants' first representative had.

[46] The second form of contribution is the contention that Liubov, by her actions at the meeting on 14 March 2007, contributed to the circumstances giving rise to her personal grievance by reason of her behaviour at that meeting. For the avoidance of doubt, I am satisfied that Liubov did in fact assault Ms Brunton and did make as if to spit in her direction. I heard Ms Brunton's evidence on this point and she satisfied me that those events happened.

[47] The third form of contribution is the failure of the applicants to engage with OCS by telephone to establish the position after the abortive meeting. Placing reliance on a third party in such circumstances is, I hold, unsatisfactory.

[48] Accordingly, what the Authority must determine is whether those events contributed to the personal grievance. Given that I have concluded that the personal

grievance exists because of the practical effect of the issue of the Trespass Act notice and the subsequent inaction of OCS, it seems unavoidable that I conclude that Liubov's behaviour materially contributed to the personal grievances. If she had not pushed Ms Brunton on the shoulder and made to spit at her, there would have been no basis whatever for Ms Brunton to have the security people remove the applicants from her office and perhaps none of the distressing consequences would have happened.

[49] Looking at the three different forms of contribution then, it is inevitable that I find that there was significant contribution in the general behaviour of the applicants, both in terms of the matters that I have just canvassed and in terms of their failure to engage with the employer. Just as I have concluded that the employer failed in its obligations to the applicants, by amongst other things failing to appropriately engage with the applicants, exactly the same charge can be levelled at the applicants who, although language issues were in play, chose not to engage directly by telephone with either their manager or their supervisor. That, coupled with their failure to prosecute their claim appropriately and urgently (particularly in the first instance) and Liubov's behaviour in the assault on Ms Brunton, all need to be taken into account. In respect of Natalia's level of contribution, I fix that at 50% and in respect of Liubov's level of contribution, I fix that at 75%.

[50] To remedy the personal grievance of Natalia, reflecting the contribution percentage I have just determined, I make the following awards:

- (a) A payment under s.123(1)(c)(i) of the Employment Relations Act 2000 for hurt, humiliation and injury to feelings in the sum of \$4,000;
- (b) As a contribution to lost wages, in the sum of \$1,500 gross;

[51] To remedy the personal grievance for Liubov, reflecting the contribution percentage I have just determined, I make the following awards:

- (a) A payment under s.123(1)(c)(i) of the Employment Relations Act 2000 for hurt, humiliation and injury to feelings in the sum of \$2,000;
- (b) As a contribution to lost wages in the sum of \$1,000 gross.

[52] The applicants have consistently claimed lost wages for a period of 22 hours. OCS has consistently maintained that once evidence is produced of that unpaid time,

it will be paid. Counsel are to engage with each other with a view to resolving that issue. If the matter remains unresolved after that engagement by counsel, leave is reserved for the Authority to make orders.

[53] The applicants are directed to return to their counsel any access cards or property of OCS that they retain and counsel for the applicants is to make that property available to counsel for OCS.

**Costs**

[54] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority