

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 75/09
5116089

BETWEEN LORRAINE TUTTY
 Applicant

AND GREEN DIAMOND
 INVESTMENTS LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Andrew McKenzie, Counsel for Applicant
 Peter Macdonald, Advocate for Respondent

Investigation Meeting: 10 February and 3 March 2009

Submissions received: 16 March 2009 from Applicant
 17 March and 4 June 2009 from Respondent

Determination: 5 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lorraine Tutty worked at Subway South City Christchurch from July 2007 as a sandwich artist. Subway stores are franchised. Ms Tutty was advised by letter dated 29 December 2007 from her then current employer that the Subway franchise at South City would have new owners from Thursday 3 January 2008. The new owners were described in the letter as Helen and Caleb.

[2] When Ms Tutty attended at work at Subway South City on Thursday 3 January 2008 she knew that her new employer was Green Diamond Investments Limited (Green Diamond). Helen Blanchard is a director of Green Diamond and under the franchise agreement the franchisee of Subway South City. Caleb Findlay was not an owner of the store but had been asked by Ms Blanchard to manage the Subway South

City store from 3 January 2008. Mr Findlay had worked with Ms Blanchard at another Subway store which she owned.

[3] Ms Tutty says that some difficulties arose between her and Mr Findlay on 3 January 2008 and that a dispute between the two culminated in Mr Findlay advising her to *get out you no longer have a job here*. Ms Tutty said that she was escorted from the Subway store by a security guard at Mr Findlay's request.

[4] Ms Tutty seeks a determination that she was unjustifiably dismissed, together with reimbursement of lost wages, an award of compensation and costs.

[5] Green Diamond does not accept that Ms Tutty was unjustifiably dismissed. It does not accept that Mr Findlay made a statement to Ms Tutty that she no longer had a job at the store and says that Ms Tutty left of her free will and walked out.

[6] The grievance was not lodged on the basis of a disadvantage claim but this was raised as a possible claim in Mr McKenzie's written submission. Section 122 of the Employment Relations Act 2000 does not prevent a finding that a personal grievance is of a type other than that alleged. Based on a consideration of the facts in this case I have given Mr Macdonald an opportunity to provide further submissions in terms of this matter. These have been taken into consideration.

The issue

[7] The Authority has to determine the following issues:

- What happened on 3 January 2008 and following that date;
- Was Ms Tutty unjustifiably dismissed or was there an unjustified action that caused Ms Tutty disadvantage on 3 July 2008;
- If Ms Tutty was unjustifiably dismissed or there was an unjustified action that caused disadvantage then what remedies is Ms Tutty entitled to and are there issues of contribution and mitigation.

What happened on 3 January 2008?

[8] Ms Tutty commenced work at Subway South City at 7am on 3 January 2008. Another employee Samantha had started work at 6am and was present when Ms Tutty

arrived. There was a dispute about how introductions were made between Ms Tutty and Mr Findlay. It is enough for my purposes that they were.

[9] As to what happened between 7am and when Ms Tutty left the store never to return at about 11.30am there is substantial dispute. From the evidence considered in its totality there were two substantial exchanges. One was about the employment agreement and the other about a lunch break. It was after the exchange about the lunch break that Ms Tutty left the store.

[10] Ms Tutty and Mr Findlay appeared from the evidence to have got off to an unfortunate start. Ms Tutty was putting chairs and tables out into a seating area when she considered Mr Findlay was staring at her. She asked him why he was doing that. Mr Findlay said that he apologised to Ms Tutty and told her that he was not observing her. Ms Tutty said that his response indicated to her that on the contrary he intended to observe her.

[11] Ms Tutty said that during the first part of her working day Mr Findlay picked on her about her uniform, food preparation and the way she was doing things and that he became cross when she questioned some of the changes.

[12] Samantha said that lots of things had changed in the store under the new ownership and that the store looked tidier. She did notice that there was tension between Ms Tutty and Mr Findlay and that Mr Findlay seemed a little short with his answers and clarification about what was required in terms of the changes he sought. Although Samantha described Mr Findlay as a bit blunt she did not consider he was rude. Samantha did not consider the changes required were unreasonable and she said in her evidence that she did not hear Ms Tutty shouting or yelling at Mr Findlay.

[13] Mr Findlay knew Ms Blanchard's requirements were to have a food layout that minimised the chances of food contamination. Ms Tutty did recall in her evidence at the investigation meeting that Mr Findlay did talk about cross contamination when he answered some of her questions. Mr Findlay felt that Ms Tutty became frustrated, angry and loud when he raised issues with her from time to time about changes and the requirements of the new owner. He said that he found her uncooperative and formed a view, which Ms Tutty disagrees with, that because he was younger than Ms Tutty she did not like him telling her what to do.

[14] During the early part of the morning a supplier, Darryl, a Director of the Naked Baker Limited (Orgazmik Coffee) was present in the Subway store installing a coffee machine. I heard evidence from Darryl about his view of the interactions that Ms Tutty was obviously upset with the changes and that created tension although Darryl recalled in his evidence that Samantha was not concerned. I am not satisfied from the evidence that Mr Findlay was unreasonable in terms of what was required of Ms Tutty. He had been working long hours on the new business and that may well have contributed to his responses in terms of the changes.

[15] Mr Findlay telephoned Helen Blanchard at some stage during the morning and told her that he was finding Ms Tutty difficult to deal with and uncooperative. I find that Ms Blanchard advised Mr Findlay during the telephone call to calm the situation down and take Ms Tutty away from any customers who could overhear. I do find from the evidence that it is more likely there were no customers in the store.

[16] Mr Findlay asked Ms Tutty to go to the outside area of the store and together they sat down at one of the tables. Mr Findlay presented Ms Tutty with an individual employment agreement which she was expecting to be given at some stage.

[17] When Darryl completed the installation of the coffee machine he went outside and waited for the mall to open. Darryl gave evidence that he overheard the discussion between Mr Findlay and Ms Tutty about the employment agreement as they sat outside at the table. He said that although originally not his intention he started listening on purpose to the discussion about the employment agreement because he described the situation in a email dated 30 March 2008 to Mr Findlay as *the lady going nuts at the manager and was out of control, not cooperating*. Darryl said that Mr Findlay initially made a mistake in the conversation when he told Ms Tutty that she had to sign the agreement.

[18] I find it likely from the evidence that Ms Tutty became upset about that and sat sideways in her chair. She did not accept in her evidence that she actually turned her back on Mr Findlay. Darryl said that he felt Ms Tutty needed to calm down and that her voice became higher and she would not listen. He said from his observation Mr Findlay remained calm and collected throughout the discussion.

[19] Darryl said he intervened at one stage and suggested that maybe Ms Tutty should go home. Ms Tutty did not accept that Darryl said that and said that Darryl

told her that Mr Findlay was *a good boss/good guy*. I find on balance that it is likely that Darryl having felt quite strongly about the matter may well have suggested that Ms Tutty go home together with making some statement about Mr Findlay.

[20] I have placed some weight on Darryl's evidence as an independent observer to what occurred. Darryl was not a friend as such of Mr Findlay and he did make a statement of evidence that was unhelpful to Mr Findlay.

[21] I find that at the end of the discussion about the employment agreement, things did become calmer between Ms Tutty and Mr Findlay. There was a discussion about the contents of the employment agreement and various issues like sick pay and holiday leave. I was provided with an envelope on which some of the matters agreed to were written down.

[22] It did seem to me that some of these earlier difficulties arose because the Subway store was under new ownership and both Ms Tutty and Mr Findlay were under different types of pressure as a result.

[23] Ms Tutty then returned inside the store to carry on with her normal work. Her 15 year old son Lane also worked at the Subway store on weekends and during the school holiday period. He had arrived at work that day at 10am. The other employee Samantha took a lunch break between 10.30am and 11am but was 10 minutes late returning from her lunch break and arrived back into the store about 11.10am.

[24] After Samantha returned Ms Tutty asked if she take her lunch break. Mr Findlay was not agreeable to this and said that Ms Tutty would have to wait until 1.30pm. This was because it was approaching the busy lunchtime period at the Subway store which commences at 11.30am. Ms Tutty agreed in her evidence that she was offered a 10 minute break. Ms Tutty advised Mr Findlay that she intended to ring the Department of Labour because she wanted and was entitled to her usual 30 minute break. Ms Tutty said that both her and Mr Findlay's voices were raised at that time but they were not screaming or yelling. Mr Findlay said in his evidence that when he tried to explain that the timing for a break was wrong Ms Tutty said that she would go the Department of Labour, Union or to the Court. He said that he was concerned because this was said in front of customers and that he asked Ms Tutty to go outside but she refused. Ms Tutty did not accept that there were customers in the store at the time of the exchange and did not accept that she refused to go outside. I

find that even if there were no customers in the store it was reasonable that Mr Findlay would be very apprehensive that a conversation of this nature could be overheard.

[25] Ms Tutty said that Mr Findlay advised her to *get outside or he would call security*. Ms Findlay said that she did go outside and continued the discussion with Mr Findlay. She told Mr Findlay that she was entitled to a break and that she was going to ring the Labour Department to sort it out. Ms Tutty said that she went back into the store to get her handbag to go and telephone the Department of Labour. Ms Tutty said that before she could get to her handbag Mr Findlay told her to *get out you no longer have a job*.

[26] Ms Tutty said at the investigation meeting that her son could give evidence that these words were used. I advised the parties that I was not prepared to hear from Lane and told them why that was. Mr McKenzie and Mr Macdonald agreed during a telephone conference with the Authority to a timetable for an exchange of statements of evidence. There was no statement of evidence provided by Lane which was obviously prejudicial to the respondent. Importantly too there was the issue of the weight I could give to Lane's evidence given his relationship to Ms Tutty. There was no one else who gave evidence that those words were said.

[27] Ms Tutty said that Mr Findlay asked for her and her son's hats back before she left the store with Lane. Mr Findlay said that was standard practice when an employee leaves the store.

[28] Shortly before 11.30am the Mall security officer was patrolling near the premises. Mr Findlay thought that the security officer had been attracted to the store by yelling and raised voices. I arranged for the security officer Mike to give evidence with Mr McKenzie and Mr Macdonald present at a date after my first investigation meeting. Mike said that his presence at the Subway store was simply the basis of a random call and was not as a response to Ms Tutty's raised voice. He said that he did not consider Ms Tutty to be aggressive but that she was upset about the situation but not too angry. Mr Findlay said that he asked the security officer to remove Ms Tutty from the premises to calm down. Mike did not recall what was said by Mr Findlay or the nature of the words said but he said that normally when being asked to remove people from premises in his experience the person doing the asking was pretty upset. He described Mr Findlay as someone *who didn't care and was a bit cold*.

[29] Ms Tutty said that she was very upset and crying and that the security guard took her to the Mall management office where she telephoned a friend for advice. Ms Tutty then returned to the shop to retrieve some personal belongings but there was nothing further said between her and Mr Findlay.

[30] Having heard all the evidence I consider it less likely that Mr Findlay told Ms Tutty to get out and that she did not have a job. I have reached that conclusion because had that statement been made there would have been no need for the security guard to have been asked to remove Ms Tutty. It would have been clear to her that there was no job for her at the Subway store. I am further strengthened in my view that it was not clear to Ms Tutty at that time that she had been dismissed, by her evidence that later that same day she telephoned someone at the Labour Department who advised her to confirm that she had in fact been dismissed. In the circumstances that was sensible advice and Ms Tutty tried to contact Ms Blanchard but there was no answer to her telephone call.

[31] In reaching this finding I accept that Ms Tutty, notwithstanding that I have not found the words *you no longer have a job* were said, may well have concluded that she had been dismissed.

[32] Mr Findlay spoke to Ms Blanchard by cell phone about the situation shortly after the interaction with the security guard. Ms Blanchard suggested that a meeting be organised with her and Ms Tutty to enable the parties to move forward. Mr Findlay said that by the time he went to look for Ms Tutty to talk to her about the meeting she had left the store and that he concluded that she had walked out.

What happened after 3 January 2008?

[33] Ms Blanchard was telephoned on Friday 4 January 2008 by Ms Tutty's previous employer at Subway. What was said by Ms Tutty to her previous employer was disputed and I did not find that I need to resolve that dispute. It is enough to record that Ms Blanchard asked Ms Tutty's previous employer to get Ms Tutty to give her a telephone call.

[34] Ms Tutty duly telephoned Ms Blanchard on Friday 4 January. I find that Ms Blanchard advised Ms Tutty that Mr Findlay had tried to arrange a meeting. Ms Tutty interrupted Ms Blanchard and said that she had not been told about a meeting. Ms Tutty then asked Ms Blanchard along the lines *did you know I was fired*.

Ms Blanchard responded that Mr Findlay had told her that Ms Tutty had walked off the job. Ms Tutty said that that was not true.

[35] Ms Blanchard suggested that she and Mr Findlay meet with Ms Tutty to discuss issues that existed between them and Ms Blanchard said she would telephone Ms Tutty back because things had got busy in the store.

[36] Ms Blanchard said that she did not get an opportunity to call Ms Tutty back until Tuesday 8 January when she suggested a meeting date for the following day, 9 January 2008. Ms Tutty advised that she could not meet the following day because she was going on holiday until Sunday 13 January.

[37] Ms Tutty and Ms Blanchard both agreed that Ms Blanchard would telephone Ms Tutty when she returned from her holiday to arrange a meeting. Ms Blanchard said in her evidence that as far as she was concerned Ms Tutty had not been dismissed and was still an employee.

[38] Ms Tutty said that whilst on holiday she decided she could not work with Mr Findlay again as he had lied about her walking off and she went to see Mr McKenzie who raised a personal grievance in writing on 11 January 2008. The meeting between Ms Blanchard and Ms Tutty never took place.

Was Ms Tutty unjustifiably dismissed or was there an unjustified action that caused disadvantage?

[39] The evidence does not support that it was clear that Ms Tutty was dismissed on 3 January 2008. In those circumstances the focus must be on the steps taken after 3 January 2008. When Ms Tutty contacted Ms Blanchard I find that Ms Blanchard was genuine in suggesting a meeting to discuss the situation and find a way forward. Both Ms Tutty and Ms Blanchard were agreeable to that. That approach is consistent with the duty of good faith in the Employment Relations Act 2000 which requires parties to an employment relationship to be active and constructive in maintaining a productive employment relationship in which they are both responsive and communicative. It was an approach and suggestion that was consistent with what a fair and reasonable employer would have done. An objective of the Employment Relations Act 2000 is that employment relationship problems are more likely to be resolved quickly and successfully if they are first raised and discussed directly between the parties to the relationship.

[40] After Mr McKenzie raised a personal grievance on Ms Tutty's behalf the suggestion to meet was put forward in a letter dated 16 January 2008 by Cathy Owen, who was then representing Green Diamond through the New Zealand Retailers Association. Ms Owen confirmed from her client's perspective that there was no dismissal. She then sent a follow up facsimile dated 24 January 2008 asking Mr McKenzie for a response as Ms Blanchard was still waiting to meeting with *your client to arrange her return to work, could you please advise your client's intentions?*

[41] Mr McKenzie said in his response to Ms Owen dated 29 January 2008 that in light of the outrageous way Ms Tutty was treated by Mr Findlay a return to work would be impracticable. He said in his letter that had the employer accepted in the heat of the pressure of setting up the new business dismissing Ms Tutty, immediately apologised and offered an olive branch then that may have been possible. I do not find however that that is a reason for the parties to not attend a meeting to see if the issues can be resolved where it was not clear there was a dismissal.

[42] I find that it was Ms Tutty's actions in not meeting and discussing the events of 3 January 2008 that contributed to the end of this employment relationship and consequent losses in terms of wages and the humiliation and hurt suffered as a result of not returning to Subway. I find that the decision not to attend the meeting was unreasonable in these circumstances. Had there been a meeting when all parties were calm there was a very good chance the relationship could have continued.

[43] I do find however that asking a security guard to remove Ms Tutty from the premises was not the action of a fair and reasonable employer in all the circumstances. I accept that Mr Findlay felt the situation was getting uncontrollable and that customers could overhear or may overhear but nevertheless it was rather heavy handed and somewhat over the top. In circumstances where Ms Tutty was insisting on taking a full lunch break and not compromising at all a fair and reasonable employer would have simply let her go and organised a meeting the following day to talk about the issue. As it turned out Ms Tutty, because she had been removed, was unavailable to be of any assistance anyway. I find the request to remove Ms Tutty was unjustified. Ms Tutty was disadvantaged by it because she was humiliated and unsure as to her continued employment status.

[44] Ms Tutty has a personal grievance that the request for her removal from her place of work by a security guard was an unjustified action that caused her disadvantage.

[45] I do find that Ms Tutty contributed to her personal grievance by her attitude and conduct. She quite properly in my view accepted that both her and Mr Findlay were at fault at different times.

[46] In all the circumstances and taking contribution into account I am of the view that a suitable award for compensation would be the sum of \$600.

[47] I order Green Diamond Investments Limited to pay to Lorraine Tutty the sum of \$600 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[48] I also award Ms Tutty three days lost wages for 4, 7 and 8 January 2008 because that was the passage of time that expired between the removal of her by the security guard and the first proposed meeting date on 9 January 2008 which Ms Tutty was unavailable for. Ms Tutty cannot be said to have contributed to the delay in arranging a meeting up to 9 January. I have taken it that Ms Tutty was paid for her work on 3 January 2008. I leave it for the parties to calculate that amount failing which leave is reserved to return to the Authority.

Costs

[49] I reserve the issue of costs. Ms Tutty has not been successful in her claim that she was unjustifiably dismissed. I note that Ms Tutty is legally aided for the purposes of her grievance.

[50] I would encourage the parties to discuss costs to see if an agreement can be reached, failing which Mr McKenzie has until 15 June 2009 to lodge and serve submissions as to costs and Mr Macdonald has until Monday 6 July 2009 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority