

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 71/10  
5150595

BETWEEN

NICOLE WARD  
Applicant

A N D

SOUTH PACIFIC MEATS  
LIMITED  
Respondent

Member of Authority: Philip Cheyne

Representatives: Mark Henderson, Counsel for Applicant  
Graeme Malone, Counsel for Respondent

Investigation Meeting: 22 December 2009 at Christchurch

Determination: 17 March 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Nicole Ward worked for South Pacific Meats Limited (SPML) as a knife hand from about June 2007 until she resigned in November 2008. In her statement of problem, Ms Ward says she was unjustifiably disadvantaged by SPML as a result of SPML's failure to deal with her complaints about being bullied by her supervisor. Things came to a head in November 2008 and Ms Ward resigned. Ms Ward also says that she was constructively dismissed because her resignation resulted from SPML's failure to deal with the bullying.

[2] SPML says that it was made aware by Ms Ward of concerns she had about her supervisor which it investigated and found to be lacking in substance. It says that Ms Ward declined the opportunity to meet to discuss matters further. In November, when the supervisor spoke to Ms Ward about several compliance issues, she again complained about bullying and refused to resume work under the supervisor and quit when she could not be deployed elsewhere. SPML offered to meet the next day to

discuss the matter further but Ms Ward refused. SPML says that there can be no sustainable personal grievances as a result.

[3] There are some conflicts in the evidence which I will resolve before applying the law to the facts as found. It is useful however to first deal with what Ms Ward says motivated the supervisor (Richard Crossan) to commence bullying her when he had been supportive and helpful towards her previously.

### **Motivation for bullying?**

[4] Ms Ward's partner is Desmond Wirangi. He worked at SPML for several years then left in November 2007.

[5] In January 2008, Ms Ward asked Mr Crossan if there was a vacancy for her partner as he wanted to return to SPML. There was no vacancy and Mr Crossan said so. David Henderson is SPML's senior site supervisor. In February 2008, Mr Henderson re-hired Mr Wirangi. Ms Ward says that Mr Crossan's attitude towards her changed in February 2008 after Mr Wirangi was re-hired. Before then Mr Crossan was positive about her work and gave her early starts and overtime so she could earn more money. To explain the change in Mr Crossan's attitude towards her, Ms Ward says that Mr Crossan resented her and Mr Wirangi going behind his back to get Mr Henderson to re-employ Mr Wirangi.

[6] Mr Henderson started work at SPML after November 2007 so he did not know Mr Wirangi. Mr Henderson's evidence, which I accept, is that Mr Crossan recommended Mr Wirangi to him in February 2008 when SPML needed more staff. But for Mr Crossan's recommendation, Mr Henderson would not have offered further employment to Mr Wirangi because he did not know anything about him.

[7] I find that Ms Ward is wrong to think that the re-hiring of Mr Wirangi motivated Mr Crossan to change his attitude towards her.

[8] In June 2008, mutton floor staffing reduced from 18 to 9 because of a decrease in sheep numbers. SPML was not bound to apply last on first off as a principle so it had some discretion in selecting who was made redundant. Mr Henderson makes the point that if Mr Crossan did not like Ms Ward it would have been easy for him at that time to suggest that she should be laid off but he did not. There is merit in Mr Henderson's point.

[9] No other reasons were proffered to explain the alleged change in Mr Crossan's attitude.

### **Bullying allegations**

[10] Ms Ward makes allegations about being bullied by Mr Crossan between January and July 2008. She says that Mr Crossan yelled at her and put her down by being unnecessarily critical of her work in front of others. She also says that she was constantly moved to different parts of the plant causing her to be paid less for doing lower graded work. Ms Ward says that she heard Mr Crossan tell a meat inspector that she was a *bitch* and he often swore at her such as calling her a *bloody idiot*. She says that Mr Crossan voiced exasperation with her when she asked for aprons and cut proof gloves.

[11] Ms Ward says that she spoke to Union representatives about these problems but the first one was quite friendly with Mr Crossan and gave her the impression that he was not interested while the second one apparently did nothing about it because she had no power. It is not suggested that either Union representative said anything to SPML about Ms Ward's complaints. I infer that the incidents mentioned above and Ms Ward's exchanges with the Union representatives all happened prior to July 2008.

[12] On 10 July 2008, Ms Ward spoke to Mr Henderson and the plant manager (Mark Kelly) about her concerns. The essence of the complaint was that Ms Ward did not like the way Mr Crossan yelled at her and she felt that she was being picked on by him. Mr Henderson's evidence is that he told Ms Ward that he would speak to Mr Crossan about her concerns. Mr Kelly's evidence is to similar effect. Ms Ward's evidence is that she was told that Mr Henderson would speak to Mr Crossan about his attitude. The difference is immaterial for the present. Mr Henderson did speak to Mr Crossan. Mr Crossan apparently denied treating Ms Ward differently from anyone else. Mr Henderson's evidence, which I accept, is that he thereafter paid closer attention to Mr Crossan's interactions on the floor with staff including Ms Ward and saw nothing of concern.

[13] There is a dispute in the evidence about whether Mr Henderson reported back to Ms Ward about his observations and Mr Crossan's denials. Ms Ward says that he did not, while Mr Henderson said that he did on three occasions (July, September and October). Mr Henderson says that he also offered to arrange a meeting for Ms Ward

with the Union delegate and Mr Crossan to discuss the matter further. Ms Ward says no such offer was ever made. I will return to this conflict later.

[14] It is common ground that Ms Ward spoke to Mr Henderson again about the issues in September 2008. Ms Ward's evidence is that Mr Henderson told her that she could take a personal grievance claim if she wanted; that she told him she wanted him to do something about it; that he was really not that interested but said he would speak to Mr Crossan again. Mr Henderson denies telling Ms Ward that she could take a personal grievance claim. On balance, I prefer Mr Henderson's evidence on this point. A person in Mr Henderson's position is unlikely to encourage an employee to take a personal grievance. It might be that Ms Ward misunderstood the offer to arrange a meeting involving the Union. There is no dispute that Mr Henderson said that he would speak again to Mr Crossan. Again, Ms Ward denies receiving any report back.

[15] It is common ground that Ms Ward spoke to Mr Henderson again in October. Ms Ward's evidence is that Mr Henderson told her he just wanted to be left alone to do his job. Part of Mr Henderson's job is to deal with matters such as Ms Ward's concerns so I find it unlikely that he would say such a thing to her and I prefer his evidence that he did not. I accept Mr Henderson's evidence that he made it clear that there would need to be a meeting as earlier proposed if Ms Ward wanted to take the matter any further. I accept Mr Henderson's evidence that Ms Ward refused a meeting. Ms Ward simply wanted Mr Henderson to tell Mr Crossan to leave her alone. That was not an option because Mr Crossan had to speak to Ms Ward regularly for production reasons.

### **Termination of the employment**

[16] As it transpired, SPML shifted Ms Ward away from the mutton room for several weeks after the October discussion. I accept Mr Henderson's evidence that this was because of production requirements rather than the result of Ms Ward's complaints. After several weeks, Ms Ward was returned to the mutton room, again for production reasons.

[17] Ms Ward says that on 12 November 2008, a few minutes after she had been transferred from the beef room to the mutton room, Mr Crossan started yelling at her that she had left some fat on a lamb skirt. She says that he dug down into a bag,

picked up a skirt with some fat on and held it up to show everybody. Ms Ward says that she felt humiliated. She then went to grade a lamb. Mr Crossan came over to her and then started yelling at her for not sterilising her knife. Ms Ward says another worker alongside her did not sterilise her knife either but was not yelled at.

[18] Ms Ward's evidence is that Mr Henderson was not present in the mutton room at the time of these incidents. She continued with the work, then at morning smoko went to speak to Mr Henderson. Ms Ward says that she told Mr Henderson what happened, said that it was like being at school with a bully and that she would resign if she was put back in the mutton room with Mr Crossan. Ms Ward says that Mr Henderson went away, then came back and told her that she had to go back into the mutton room and that she would be alright. Ms Ward then said she was quitting. She went and collected her gear from her locker and left. Ms Ward says that no one from SPML contacted her to talk about the reasons for her resignation.

[19] In some significant respects, Mr Henderson's evidence about events on 12 November differs from Ms Ward's. Mr Henderson says that he was present in the mutton room when Mr Crossan spoke to Ms Ward about the fat on the skirts so he does not accept her account of that incident. He says that Mr Crossan took a skirt from a bag and spoke about the fat on it to everyone, not just Ms Ward, because it was an ongoing customer issue. He says that Ms Ward came to him soon afterwards while he was still on the floor and he told her that Mr Crossan's comments had been reasonable because of the customer complaint and that she was needed on the mutton floor because of short staffing. In a letter dated 16 December 2008 replying to Ms Ward's solicitor's letter, there is a similar account of this incident from Mr Henderson's perspective.

[20] In response to my questions, Mr Henderson first told me that he was about 7 metres away from Mr Crossan and Ms Ward at the time, then he told me he was about 15 metres away. Mr Henderson elaborated in his oral evidence by saying that when Ms Ward first came to see him after the incidents, saying that she had been blamed for leaving fat on the skirt and for not sterilising her knife, he told her that he would speak to Mr Crossan and then come back and see her. Mr Henderson said that he did speak to Mr Crossan who denied picking on Ms Ward, admitted pulling the skirt from a bag and confirmed speaking to Ms Ward about sterilising her knife. Mr Henderson then went and spoke again to Ms Ward. The effect of Mr Henderson's

oral evidence is that both he and Ms Ward now say that they had two discussions on 12 November about the incident. If Mr Henderson had personally witnessed the incident as is claimed in his written evidence, he would have been able to personally refute (or accept) her allegations. There would have been no need first to speak to Mr Crossan. I find that Mr Henderson either was not present or did not see and hear the exchanges so his evidence of what happened is hearsay.

[21] SPML did not provide any evidence from Mr Crossan. I therefore accept Ms Ward's evidence that Mr Crossan did yell at her about fat on a skirt and hold it up. However, I accept that his purpose in holding up the skirt was to make the point to employees generally about the customer requirement. It is common ground that Mr Crossan spoke to Ms Ward about not sterilising her knife and Ms Ward accepts that she had not sterilised it. Mr Crossan was entitled to raise the matter with Ms Ward. Although it was not known to Ms Ward at the time, the evidence is that Mr Crossan was hard of hearing. Apparently, by August, Mr Crossan had started to use hearing aids but it may have taken some time for him to adjust a longstanding habit of communication. That and the background noise in a production facility probably help explain the yelling.

[22] Only Ms Ward and Mr Henderson were present for their second discussion which occurred a short time later. Mr Henderson said they were short staffed, that Ms Ward would have to continue in the mutton room and that she would be alright. I accept Mr Henderson's evidence that he was not able to reallocate Ms Ward at that time because of production requirements. Ms Ward said that she was quitting and left to clear out her locker.

[23] Mr Henderson then went to speak to Mr Wirangi about the situation. He explained to Mr Wirangi what had happened. Mr Wirangi said that it was no use speaking to Ms Ward when she was like that. Mr Henderson told Mr Wirangi that he should take her home and that Ms Ward should come back the next day to speak with him and Mr Kelly. Mr Wirangi left early and took Ms Ward home.

[24] Ms Ward's evidence is emphatic that the offer of talking the next day to Mr Kelly *was definitely not relayed to me by Des or anyone else*. However, Ms Ward did say in evidence that *Des told me that Dave had said I could still have my job*. Mr Wirangi's evidence is that he was told by Mr Henderson *she can have her job back if she comes and sees me* which he relayed to Ms Ward. His evidence is that

Ms Ward's response was that she was *not going to even bother*. I find that SPML's offer to meet was conveyed to Ms Ward but she rejected it.

[25] The next day (13 November), Mr Wirangi returned Ms Ward's locker key and confirmed that she would not be back. Mr Wirangi finished work the same day, having given proper notice to resign well before the incident on 12 November.

### **Unjustified disadvantage**

[26] Counsel for Ms Ward accepted that his letter received by SPML on 9 December 2008 was the first point at which any grievance was raised by Ms Ward. It follows that a disadvantage grievance based on Mr Crossan's conduct up to July would be out of time and cannot be dealt with further by the Authority without leave. There is no application for leave. What can form the basis of a justiciable complaint at present is any ongoing failure by SPML to adequately investigate Ms Ward's complaint.

[27] I am referred to *Clear v Waikato DHB* [2008] ERNZ 646 for guidance about an employer's obligations in a case such as this. There, the Court cited *Sloggett v Taranaki Health Care Limited* [1995] 1 ERNZ 553 as authority for the propositions that the employer must undertake a full and fair investigation into the complaint, advise the complainant of the outcome and, if satisfied of any merit to the complaint, tell the complainant of steps to prevent any reoccurrence. *Sloggett* was a sexual harassment complaint so there was an overlay of specific statutory obligations that does not arise in the present case. However, *Clear* is a bullying case so the principles expressed there are applicable here.

[28] I have accepted Mr Henderson's evidence that he offered to arrange a meeting involving the union to deal with Ms Ward's concerns. The offer or offers of a meeting must have followed the September and/or October complaints. When questioned he admitted that he could not recall having responded to Ms Ward following the July discussion. Ms Ward's evidence is that he did not respond to her after she raised her concerns in July and I find that to be so. Mr Henderson may have satisfied himself that there was no merit in Ms Ward's July complaint but he should have reported that back to Ms Ward and given her the opportunity to take the matter further at that stage if she wished.

[29] The disadvantage affecting Ms Ward's employment caused by Mr Henderson's failure to report back is that it left the matter unresolved with her thinking that Mr Crossan had been bullying her. Her belief about Mr Crossan's attitude towards her affected her view of later events. It also caused her some distress and upset that could have been avoided.

[30] There is limited evidence about the specifics of any bullying following her July complaint. Ms Ward says that by September she was very sick and tired of the continual harassment and in October she was constantly made the centre of attention, laughed and joked about and made to feel really small. However, Mr Henderson did respond to these complaints from Ms Ward by checking the allegations with Mr Crossan, conveying his denial and offering a meeting if Ms Ward wanted to take the matters any further. I find that no disadvantage grievance arises with respect to these later matters.

[31] Most of the evidence of distress was predicated on the basis of the unjustified dismissal grievance. I will return to an assessment of compensation for the established disadvantage grievance once I have resolved that grievance claim.

### **Unjustified Dismissal**

[32] In *Auckland etc Shop Employees' etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases where the employer gives the employee a choice between resigning or being fired, or the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign. The third category is in issue here. Not every breach of duty is sufficiently serious to give rise to a personal grievance of constructive dismissal. In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] 1 ERNZ 168 the Court of Appeal said:

*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.*

[33] I turn first to what caused the resignation. SPML says that Ms Ward resigned to avoid having to incur the costs and inconvenience of travelling some distance to work each day following Mr Wirangi's resignation. That may have been part of the reason why, having resigned, Ms Ward was not interested in discussing with SPML the possibility of resuming her employment. However I do not accept that it was the cause of the resignation at first. Ms Ward had no other work and there remained the usual need to derive an income for herself and her family. I find that Ms Ward resigned because she backed herself into a corner where she had nowhere else to go. Ms Ward told Mr Henderson, probably during their first exchange on 12 November, that she would rather quit than return to work with Mr Crossan. In doing that she sought to force SPML's hand to move her away from the mutton room. When Mr Henderson came back saying that she could not be moved, Ms Ward had to back down or make good on her threat. Ms Ward is not someone to back down so she quit.

[34] It is necessary to consider whether SPML breached any obligation owed to Ms Ward on 12 November. To summarise, Mr Crossan yelled at Ms Ward and made a point to her and others about fat on a lamb skirt and then yelled at her because she did not sterilise her knife. In both circumstances he was entitled to point out these shortcomings. I do not accept that this was part of any ongoing, vindictive targeting of Ms Ward. It was simply the way Mr Crossan supervised employees, contributed to over time by his apparent deafness and reflective perhaps of a style of supervision in this industry. I do not accept that Mr Crossan by his words and manner was abusive and offensive as was the case in *Edmonds v Attorney-General* [1998] 1 ERNZ 1.

[35] In *NZ Wollen Workers IUOW v Distinctive Knitwear NZ Ltd* [1990] 2 NZILR 438 at 448 the Labour Court said:

*But conduct falling short of a breach of a contractual term including any duty implied into it by law cannot entitle the employee 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 than 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.*

[36] Following this passage the Court went on to explain that any breach must be of sufficient seriousness to bring a reasonable employee to the conclusion that the employer no longer intended to be bound by the employment contract and could not

be relied on to perform it fully or consistently in the future. I am satisfied that Mr Crossan's conduct falls comfortably within the sort of impolite or inconsiderate conduct that the Court had in mind in the *Distinctive Knitwear* case. Even if his behaviour amounted to a breach of duty, it was not a breach of sufficient seriousness to permit a reasonable conclusion that the employer no longer intended to be bound by the contract. Accordingly, Ms Ward has not established that there was a dismissal so her personal grievance claim of unjustified dismissal must fail.

### **Remedies**

[37] Ms Ward did not lose any remuneration as a result of her proven disadvantage grievance. As noted, most of the evidence about distress related to her claim of unjustified dismissal. However I accept that Mr Henderson's failure to revert to her following her July complaint did cause her a measure of upset. I fix compensation to remedy that at \$1,500.00.

[38] Ms Ward did not contribute to the established grievance.

### **Summary**

[39] Ms Ward was unjustifiably disadvantaged in her employment. To remedy that grievance, South Pacific Meats Limited must pay Ms Ward compensation of \$1,500.00 pursuant to s.123(1)(c)(i) of the Act.

[40] Ms Ward resigned and was not constructively dismissed.

[41] Costs are reserved. I note Ms Ward's advice about legal aid. If any party thinks there should be an award of costs in their favour they must lodge and serve a memorandum within 28 days and the other party may lodge and serve a reply within a further 14 days.

Philip Cheyne  
Member of the Employment Relations Authority