

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 200
3107696

BETWEEN JANE WYLES
Applicant

A N D KAYLEE INVESTMENTS
LIMITED
Respondent

Member of Authority: Peter van Keulen
Representatives: Paul Mathews, advocate for the Applicant
No appearance for the Respondent
Investigation Meeting: 11 May 2021
Submissions Received: 11 May 2021 from the Applicant
Date of Determination: 12 May 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jane Wyles worked as a Delivery Driver and Operations Assistant for Victoria Food Service Catering, a business owned and operated by Kaylee Investments Ltd. Ms Wyles was employed by Kaylee Investments in this role from February 2019 until 13 February 2020 when she resigned.

[2] Ms Wyles resigned because she says Kaylee Investments made a number of unilateral changes to her role and then it would not engage properly with her over resolving this when she complained to it. Given the circumstances of her resignation, Ms Wyles claims this is an unjustified dismissal.

[3] Ms Wyles raised personal grievances with Kaylee Investments both at the time of the changes to her role and then following her resignation. Ms Wyles was unable to resolve these grievances with Kaylee Investments and lodged a statement of problem with the Authority advancing claims for unjustified action causing disadvantage and unjustified dismissal.

[4] Kaylee Investments responded to Ms Wyles' grievances and then the statement of problem. Kaylee Investments denied any wrong doing, claiming that Ms Wyles agreed to the changes to her role and then when she changed her mind and expressed dissatisfaction with the changes it tried to implement alternatives to enable her to return to her original role.

Preliminary matter

[5] Kaylee Investments responded to Ms Wyles' statement of problem by lodging and serving a statement in reply. Its counsel at the time then participated in a case management conference in which I made directions for the progression of this matter to an investigation meeting. These directions included a timetable for lodging and serving evidence and set the investigation meeting for 11 May 2021. The directions were recorded in a notice of direction and notice of investigation meeting and these were served on Kaylee Investments through its counsel.

[6] Then on 20 April 2021, counsel for Kaylee Investments advised that she was no longer acting for the company.

[7] Subsequently, after Ms Wyles had lodged and served witness evidence, Kaylee Investments failed to lodge and serve its evidence. When contacted by the Authority, Mark Cowan of Kaylee Investments advised, amongst other things, that it was no longer trading and

it was satisfied it had done everything right in respect of Ms Wyles but it was not going to spend more money confirming that. That communication was sent on 5 May 2021 and no further contact has been received from Kaylee Investments since then.

[8] So, Kaylee Investments received all of the relevant information in respect of Ms Wyles' claim, and it chose not to respond to that evidence and then indicated that it would not participate any further in the investigation – at least that is how I take the communication of 5 May 2021.

[9] Kaylee Investments was aware of the date, time and location of my investigation meeting and could have attended but it did not. It did not contact the Authority to explain why it could not or would not attend, other than its communication of 5 May 2021.

[10] The notice of investigation meeting advised Kaylee Investments that “*If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.*” So, Kaylee Investments was aware that I would proceed if they did not attend the investigation meeting.

[11] Considering all of the above, there was no apparent reason why the investigation meeting could not continue in Kaylee Investments' absence. I therefore proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

Unjustified dismissal

[12] The issues for the unjustified dismissal grievance are:

- (a) Was Ms Wyles dismissed; and
- (a) If so, was the dismissal justified?

[13] Ms Wyles alleges that her resignation is a constructive dismissal because she resigned in response to various breaches of duty by Kaylee Investments.

[14] The relevant case law¹ shows that in order to determine if Ms Wyles was constructively dismissed I must consider:

- (a) Was there a breach of duty by Kaylee Investments;
- (b) Was that breach of duty sufficiently serious such that it was reasonably foreseeable that Ms Wyles might resign in response to that; and
- (c) Did Ms Wyles resign in response to that breach of duty?

[15] If I determine that Kaylee Investments did constructively dismiss Ms Wyles, I must then consider the second issue for unjustified dismissal, that is, was the dismissal justified, with the onus falling to Kaylee Investments to show its actions were justified in line with the test for justification and the duty of good faith set out in the Act.

Dismissal

Was there a breach of duty by Kaylee Investments?

[16] Ms Wyles says Kaylee Investments' conduct over a period of four weeks comprised of various breaches of duty which culminated in her resigning.

[17] The first step in my investigation is therefore to determine what occurred in terms of the allegations made by Ms Wyles. I have done this by considering Ms Wyles' written and oral evidence of what occurred and various contemporaneous emails and letters. Whilst nobody from Kaylee Investments attended the investigation meeting to give evidence about

¹ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

its position set out in the statement in reply, I have used its stated position to test and assess the evidence.

[18] Having conducted this analysis I conclude that the following events occurred.

[19] On 16 January 2020, Ms Wyles returned from the Christmas, New Year holiday break. During the morning she was asked to meet with Mr Cowan. In that meeting Mr Cowan advised Ms Wyles that because of some mistakes with deliveries made prior to Christmas her role was being reduced to just cleaning and she would only be rostered on for 10 hours per week.

[20] Ms Wyles was shocked and upset by the meeting and the decision made by Kaylee Investments. She left work for the day and subsequently sent an email to Mr Cowan. In that email she stated:

As you know from my reaction to our meeting, I am very disappointed and upset with your decision about me no longer being a delivery driver. I feel this is a very unfair way to be treated as I did my very best for your the (sic) company.

[21] In the email Ms Wyles set out as best she could her view of the alleged delivery mistakes and she concluded by telling Mr Cowan that what he had done was insulting and a case of constructive dismissal.

[22] On 17 January 2020 there was a further meeting with Mr Cowan and also with Pip Cowan of Kaylee Investments. In that meeting there was a further discussion about the alleged issues with deliveries and a suggestion from either Mr Cowan or Ms Cowan that Ms Wyles might be able to return to delivery driving in a couple of months.

[23] Later on the 17 January 2020 Ms Wyles sent a second email to Mr Cowan. In that email she asked for information about the alleged complaints regarding her deliveries. She specifically asked to know what company rang to say her delivery was late. Mr Cowan

responded to this email by advising that two other employees received the calls so he would need to speak to them to obtain the information.

[24] There were some further emails exchanged about the work Ms Wyles would be rostered on for the upcoming week. This was essentially confirmation that Ms Wyles would be working in the kitchen, not driving and this would be 10 hours work, including work on a Tuesday which Ms Wyles had previously indicated she could not do.

[25] Ms Wyles then sought advice on what had happened and on 21 January 2020 her advocate raised a personal grievance for unjustified disadvantage arising out of Kaylee Investments actions in reducing Ms Wyles' role.

[26] On 23 January 2020 Ms Cowan met with Ms Wyles. Ms Wyles did not want to meet with Ms Cowan alone, given what had occurred, but she felt pressured into attending. In this meeting Ms Cowan advised Ms Wyles that she would have her role back within one month.

[27] On 27 January 2020 counsel for Kaylee Investments responded to the personal grievance asserting that any changes to Ms Wyles' role had been by agreement and that the changes were for only two months, which they had subsequently agreed to reduce to one month.

[28] On 4 February 2020 Ms Wyles' advocate responded and advised that Ms Wyles had not agreed to any changes in her role and that what had occurred was a demotion for Ms Wyles that had been imposed without any consultation or process. The advocate advised that in the circumstances Ms Wyles would only accept full reinstatement to her role prior to the demotion.

[29] On 6 February 2020 counsel for Kaylee Investments responded advising that Ms Wyles would get some delivery duties in the next week but subject to conditions, however she would also be required to do some operations work and the total work offered would be at least 10 hours.

[30] On 13 February 2020 Ms Wyles resigned because the response from Kaylee Investments was not acceptable and she believed it did not intend to put her back to her previous role including offering her more than 10 hours work which was usual for her. Ms Wyles was tired of fighting Kaylee Investments, she felt humiliated by the way she had been treated and felt that Kaylee Investments was not acknowledging it was wrong but rather just trying to remedy parts of its breaches to make it appear “less guilty”. Overall Ms Wyles had no confidence that Kaylee Investments would treat her with respect and honour her employment rights.

[31] Reflecting on these events I am satisfied that they show Kaylee Investments breached obligations it owed to Ms Wyles by:

- (a) Raising performance issues with Ms Wyles without properly investigating the alleged issues – it is clear that Mr Cowan did not even know the details of the complaints when Ms Wyles asked for more information.
- (b) Proceeding with a meeting on 16 January 2020 concerning performance issues without prior warning to Ms Wyles and without providing any of the relevant information to her so she could respond to it.
- (c) Making a decision to impose a sanction for the alleged performance issues without considering Ms Wyles response or even allowing a proper time frame for her to respond. This was effectively a unilateral decision to demote Ms Wyles without any process or justification for the decision.
- (d) Failing to respond appropriately when Ms Wyles complained about Kaylee Investments’ actions. And effectively “gas lighting” Ms Wyles account of what occurred by asserting that any changes to Ms Wyles’ role were agreed - the contemporaneous correspondence clearly shows Ms Wyles did not accept the changes to her role and these were imposed by Kaylee Investments.

- (e) Maintaining an aggressive and uncooperative position in respect of any reversal of its own decision, contrary to the duty of good faith.

[32] These breaches can be categorised as follows:

- (a) Various breaches relating to acting in an unjustified manner and not in good faith. The culmination of these breaches being Kaylee Investments' reluctance to reinstate Ms Wyles to her role. This being the last or final straw for Ms Wyles causing her to resign.
- (b) Collectively a breach of the duty owed to Ms Wyles to not, without proper cause, act in a manner calculated to, or likely to, destroy or seriously damage the relationship of trust and confidence.²

[33] So, I conclude there were breaches of duty by Kaylee Investments.

Was it reasonably foreseeable that Ms Wyles might resign in response to the breaches of duty?

[34] The issue of whether it is reasonably foreseeable that Ms Wyles might resign in response to the various breaches by Kaylee Investments is informed by two things. Objectively it is reasonably foreseeable that an employee might respond to various breaches in relation to a disciplinary or performance process and the imposition of a unilateral change to a role which was effectively a demotion. Subjectively Ms Wyles put Kaylee Investments on notice that its failings in the performance process and its unilateral decision to demote her was a case of constructive dismissal; that is a very clear message that the breaches, if left unresolved were a basis on which she would be forced to resign.

² The Court of Appeal and the Employment Court recognise this duty as being implied into the employment relationship, see *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA); *Rodkiss v Carter Holt Harvey Limited* [2015] NZEmpC 34.

[35] In the circumstances it was reasonably foreseeable that Ms Wyles would resign in response to Kaylee Investments' breaches.

Did Ms Wyles resign in response to the breach?

[36] Ms Wyles did resign because of Kaylee Investments' various breaches.

Conclusion on dismissal

[37] In all of the circumstances I am satisfied that Ms Wyles' resignation amounts to a constructive dismissal.

Justification

[38] Having decided that Ms Wyles was constructively dismissed I must now consider if that dismissal was justified, with the onus on Kaylee Investments to prove that the dismissal was justified.

[39] The test of justification is set out in s 103A of the Act. Based on my findings, I conclude that Kaylee Investments did not meet the requirements of the Act and therefore it did not act in a justified manner toward Ms Wyles.

[40] Ms Wyles' dismissal was unjustified.

Unjustified action causing disadvantage

[41] Section 103(1)(b) of the Act sets out that an employee may have a personal grievance against their employer where that employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.

[42] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustified action causing disadvantage personal grievance are:

- (a) What does Ms Wyles say that Kaylee Investments did and did it act as alleged?

(b) If so, did these actions cause any disadvantage to the Ms Wyles' employment or a condition of her employment?

(c) If so, were Kaylee Investments' actions justifiable?

[43] The events Ms Wyles complains of are the same events that form the unjustified dismissal grievance. Given my conclusion on the unjustified dismissal grievance it follows that I am satisfied that the events occurred, they did cause a disadvantage to Ms Wyles' employment and the actions were not justified.

Remedies

[44] As Ms Wyles was constructively dismissed and has a grievance for unjustified action causing disadvantage I may award any of the remedies provided for under s 123 of the Act. Ms Wyles seeks compensation and reimbursement.

Compensation

[45] Compensation is an award for the humiliation, loss of dignity and injury to feelings that an employee suffers as a result of the unjustified actions of the employer.

[46] In awarding compensation I must establish the humiliation, loss of dignity and injury to feelings that Ms Wyles suffered from as a result of Kaylee Investments unjustified actions. Then I must quantify that as harm and loss – I do this by assessing where that sits on the spectrum of compensation for harm and loss awarded to others.³

³ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[47] As a result of Kaylee Investments' actions Ms Wyles:

- (a) Was upset, emotional and tearful.
- (b) Suffered from anxiety and stress, worried about her future and her finances - with this worry, stress and anxiety manifesting in sleepless nights.
- (c) Doubted herself, suffered from low self-esteem and loss of confidence and was humiliated by how she was treated.

[48] I assess the level of harm and loss described to be below the middle of the spectrum, and consider that compensation should be \$19,000.00.

Reimbursement

[49] Ms Wyles also seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal pursuant to s 123(1)(b) of the Act.

[50] As I am satisfied that Ms Wyles has a personal grievance and she has lost remuneration as a result, then pursuant to s 128 of the Act I must award Ms Wyles at least the lesser of her lost remuneration or three months ordinary time remuneration.

[51] Ms Wyles claims \$1,270.30 as her actual loss. I am satisfied that this is correct and as it is less than three months ordinary time remuneration I award this amount to Ms Wyles.

Contribution

[52] As I have awarded remedies to Ms Wyles, I must now consider whether she contributed to the situation that gave rise to her dismissal.⁴ This requires me to determine if

⁴ Section 124 of the Act.

Ms Wyles behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievance.⁵

[53] I have reflected on what occurred and I am satisfied that Ms Wyles did not act in a blameworthy or culpable manner.

[54] So, in conclusion there was no contributory behaviour from Ms Wyles that warrants a reduction in remedies.

Conclusion

[55] Kaylee Investments unjustifiably dismissed Ms Wyles and it acted in an unjustified manner causing disadvantage to her employment. In settlement of these grievances Kaylee Investments must pay Ms Wyles:

- (a) \$19,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) \$1,270.30 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000.

Costs

[56] Ms Wyles is entitled to an award of costs as she has been successful with her claim.

[57] An award of costs is based on the daily tariff, which is a set amount of costs awarded for each day of the investigation meeting, i.e. a calculation of quantum based on the time spent in the investigation meeting applying the current rate. The current daily tariff is \$4,500.00 for the first day of an investigation meeting and \$3,500.00 for every subsequent day of an investigation meeting.

⁵ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

[58] I am prepared to award Ms Wyles costs for a half day investigation meeting. So, applying the daily tariff for one half day of an investigation meeting, the amount is \$2,250.00.

[59] Ms Wyles is also entitled to be reimbursed for the filing fee in this matter of \$71.56.

[60] Kaylee Investments must pay Ms Wyles \$2,250.00 plus \$71.56 as a contribution to the costs she has incurred in this matter.

Peter van Keulen
Member of the Employment Relations Authority