

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Diana Hamilton (Applicant)

AND Grace Retailing Limited t/a Glenview New World (Respondent)

REPRESENTATIVES Joanne Watson – For the Applicant
Roger Clark – For the Respondent

MEMBER OF AUTHORITY Ken Anderson

INVESTIGATION MEETING 29 October 2004

FINAL SUBMISSIONS 12 November 2004
26 November 2004

DATE OF DETERMINATION 28 February 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] Mrs Hamilton claims that the termination of her employment at the Glenview New World supermarket, Hamilton, was an unjustified constructive dismissal. Mrs Hamilton also claims that she has a further personal grievance, in that, during her employment, she was unjustifiably disadvantaged and/or a breach of privacy occurred.
- [2] The Respondent says that the claims of Mrs Hamilton are not valid and that she terminated her employment following the issuing of an ultimatum, to the effect that if another staff member was not dismissed she would resign. The Respondent also denies that Mrs Hamilton was unjustifiably disadvantaged during her employment.

Background Facts and Evidence

- [3] Mrs Hamilton commenced her employment as the Bakery Manager in June 2000, following an approach from Mr Chris Grace the owner/operator of the supermarket. Mrs Hamilton has some experience in the operation of supermarket bakeries and it appears to be generally recognised, that the products produced under her supervision, were of good quality. It also appears that up until the later stages of her employment, there was a very good working and personal relationship between Mrs Hamilton and Mr Grace.
- [4] The evidence of Mrs Hamilton is that some time about mid-December 2003, she was approached by a Manager from the Foodstuffs Group who asked her to consider applying for the newly created position of Bakery Apprenticeship Programme Coordinator/Mentor. Mrs Hamilton applied for the position on 6 January 2004. Sometime in December 2003, prior to

applying for the position, she discussed her intention with Mr Ewan Atherton and he agreed to act as a referee for her. Mr Atherton was present at the supermarket gaining some experience as a trainee owner operator. Mr Atherton also took the trouble to make a phone call to the Foodstuffs Training and Development Manager, Mr Mark Dunlop, and recommended Mrs Hamilton for the position.

- [5] The evidence of Mr Atherton is that almost immediately after agreeing to be a referee for Mrs Hamilton, Mr Grace informed him that the second in charge person in the bakery, Mr Chris Read, had indicated that he might be leaving to take up full time work. Mr Atherton felt obliged to tell Mr Grace that Mrs Hamilton had applied for another position and hence it may be wise for Mr Grace to retain Mr Read, as if Mrs Hamilton were to obtain a new position, the bakery operation could be compromised. Mr Atherton also advised Mrs Hamilton to tell Mr Grace of her application but she was unwilling to do that.
- [6] Mrs Hamilton says that she returned from her Christmas / New Year holiday break on 12 January 2004 and about this time, Mr Grace informed her that he had recommended her to the Foodstuff's office for the position in question. The evidence of Mrs Grace is that she: [*“felt humiliated that my employer had approached my prospective employer without my authorisation and appeared to be interfering with my job application. I was horrified that Mr Grace had known about my application and that he had proceeded to interfere without first discussing the matter with me.”*]
- [7] However, the evidence of Mr Grace is that he was uncomfortable with the knowledge that Mr Atherton had conveyed to him and when the position was formally advertised, he saw an opportunity to suggest to Mrs Hamilton that she could be interested in the position. Mr Grace says that he believed the new position would suit Mrs Hamilton's personal circumstances. It is the further evidence of Mr Grace that Mrs Hamilton subsequently approached him and asked if he knew that she had applied for the position and he confirmed that he did and that he would support her with her application.
- [8] The further evidence of Mr Grace is that he offered to contact Mr Dunlop and that Mrs Hamilton indicated that she would appreciate such a gesture. Subsequently, on 8 January 2004, Mr Grace sent an email to Mr Dunlop recommending Mrs Hamilton for the Foodstuffs position. Mr Grace says that he showed Mrs Hamilton the email and that she seemed “very pleased.”
- [9] Mrs Hamilton says that she had no knowledge of this email, until she saw it attached to Mr Grace's brief of evidence, but I find that the evidence of Mr Grace is more probable.
- [10] The further evidence of Mrs Hamilton is that from on or about mid-January 2004, she began to hear rumours that her position of Bakery Manager at the supermarket had been “promised” to Mr Read. Mrs Hamilton also says that her hairdresser made mention of the fact that Mrs Hamilton had applied for the position at Foodstuffs and that she would be “moving on” or would be demoted in order that Mr Read could be made the bakery manager. Apparently, Mrs Hamilton's hairdresser was told all of this by another bakery worker, Ms Mereana Bennett.
- [11] Mrs Hamilton spoke to Ms Bennett who confirmed that she had been told by Mr Read that he would was going to be the bakery manager and that Mrs Hamilton would have a part-time position.¹

¹ Upon being questioned by the Authority, Mr Read acknowledged that he did say these things but was being mischievous. Mr Read also acknowledged that he never received any undertakings from Mr Grace in regard to Mrs Hamilton's position.

- [12] Upon the receipt of this information, Mrs Hamilton approached Mr Grace. Mrs Hamilton says that Mr Grace informed her that because Mr Read had conveyed that he was going to resign as he only had part-time work and had an alternative full time position to go to, he had been offered full time work. I understand that this was in the supermarket generally and not solely the bakery. Mr Grace also conveyed that Mr Atherton had promised Mr Read a position as bakery manager if he purchased a supermarket.
- [13] Mrs Hamilton says that following her discussion with Mr Grace, she believed that Mr Read had been “*promised*” her job as bakery manager and that she was “*devastated and humiliated*”. Mrs Hamilton also says that she was also “*anxious*” that Mr Grace was continuing to interfere with her application to Foodstuffs.
- [14] Having assessed all of the available evidence, I fail to see how Mrs Hamilton could have possibly come to such conclusions and I accept the evidence of Mr Grace that he was doing all he could to assist Mrs Hamilton, with her full consent.
- [15] It subsequently transpired that Mrs Hamilton was unsuccessful in regard to the Foodstuffs position. This was conveyed to her on 13 February 2004.
- [16] During February and March 2004, there appears to have been some ongoing conflict between Mrs Hamilton and Mr Read. Mrs Hamilton raised her concerns about the overall work performance and attitude of Mr Read with Mr Grace and Mr Burr, the Personnel Manager. Some of the problems between Mr Read and Mrs Hamilton appear to have partly arisen due to Mr Read being responsible for the bakery in the weekends, while Mrs Hamilton was only present during week days. It also seems that Mr Read was somewhat inexperienced and prone to mistakes and Mrs Hamilton was of the view that under Mr Read’s supervision, the bakery was producing inferior products.
- [17] It was the further perception of Mrs Hamilton that she was not getting the support from Mr Grace and Mr Burr that she felt that she was entitled to. Mrs Hamilton also says that she was being ignored by Mr Grace, and his wife, whom I also understand was a partner in the business.
- [18] However, Mrs Hamilton concedes that subsequent to Mr Burr speaking to Mr Read about his attitude, there was a marked improvement, but she also says that Mr Read regressed again soon after.
- [19] It seems that matters came to a head for Mrs Hamilton on 8 March 2004. She says that she found the bakery in “a mess” following Mr Read’s weekend stint. The evidence of Mrs Hamilton is that:
“I had reached the end of my tether. I went up to Mr Grace’s office to talk to him about it and burst into tears. I showed him the unacceptable product that Chris Read had produced. I took off my hat and badge and said I could not take anymore.”
- [20] Mrs Hamilton says that at that point, Mr Grace left the office and shortly after called her to the training room along with Mr Read and Mr Burr. Mrs Hamilton says that Mr Burr saw the problems pertaining to Mr Read to be related to a requirement for further training and that as the manager, she had some responsibility for that. However, Mrs Hamilton was of the view that her complaints about Mr Read were not being sufficiently considered and so she presented her written resignation, effective from 19 March 2004.
- [21] Following a request from Mr Grace, Mrs Hamilton says that she agreed to withhold her resignation for a further two days in order to allow Mr Grace a further opportunity to resolve

matters. On 10 March 2004, Mrs Hamilton contacted Mr Grace – he was in Auckland. Mr Grace conveyed that he viewed the problem pertaining to Mr Read to be a training issue, he would get some advice from the Foodstuffs people, and would call back in a couple of hours. Unfortunately, for reasons that are in dispute, there was no further conversation that day.

- [22] On 11 March 2004, Mrs Hamilton confirmed her resignation to Mr Grace. His evidence is that Mrs Hamilton advised him that either Mr Read had to go or she would. Mr Grace said that he was placed in a difficult position as he had no good reason to dismiss Mr Read. Mrs Hamilton was on sick leave for the notice period but effectively her employment ceased on 19 March 2004.

Analysis and Conclusions

A. The Claim of Constructive Dismissal

- [23] Essentially the argument of Mrs Hamilton appears to be that Mr Grace failed to accord her fair and reasonable treatment and that he conducted himself in such a manner that it breached the requirement to be a good employer and seriously damaged the relationship of trust and confidence to such a degree, that she was forced to resign.
- [24] The law relating to constructive dismissal is well established. The onus of showing that a constructive dismissal has occurred rests on the employee. In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd (1985) ERNZ Sel Cas 136*, the Court of Appeal held that a constructive dismissal could include cases where a breach of duty by the employer causes an employee to resign.
- [25] The matter of a breach of duty on the part of the employer was expounded upon further by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW [1994] 1 ERNZ 168*. The Court held that:
- “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.”
- [26] Applying the above findings of the Court of Appeal to the circumstances surrounding Mrs Hamilton, the first question to ask is: Was her resignation caused by a breach of duty on the part of her employer?
- [27] It is submitted for Mrs Hamilton that there were breaches of the duty of fair and reasonable treatment on the part of her employer, of such degree, that she lost all trust and confidence in her employer, and also lost her own confidence, to such an extent, that she had no option but to resign. If that submission is to be accepted, then it would also have to be accepted, that all that Mrs Hamilton alleges against her employer, appears to have occurred in a very short time frame indeed. That is, from about 6 January 2003, when she made an application for the position with Foodstuffs, up to 8 March 2004, when she presented her resignation.

- [28] At first glance it would appear that Mrs Hamilton believes that the catalyst for her troubles was her application for the position with Foodstuffs, as there is no evidence from her that she was dissatisfied with her position prior to then. However, the evidence of Mr Grace is that Mrs Hamilton was having some difficulty coping with both personal health issues and the financial aspects of managing the bakery. The evidence of Mr Grace is that Mrs Hamilton often spoke of experiencing some stress when having to address financial management issues such as profitability targets. From the evidence of Mr Grace, which I accept, and it was unchallenged by Mrs Hamilton, I gained a distinct impression that although Mrs Hamilton was a competent and experienced baker, she was experiencing some difficulties in other areas.
- [29] On the matter of the application to Foodstuffs, while there is a substantial variance in the evidence of Mrs Hamilton and Mr Grace on that matter, I conclude that the evidence of Mr Grace is more probable. The alternative argument that Mr Grace had an ulterior motive in contacting Foodstuffs, without the knowledge of Mrs Hamilton, is not borne out by the overall evidence. It is my conclusion that Mr Grace was acting in the best interests of Mrs Hamilton at all times in regard to her job application to Foodstuffs and I have to say that I have struggled to understand why Mrs Hamilton should allege otherwise. While I would accept that because of the length of time involved in the appointment process conducted by Foodstuffs, Mr Grace probably became frustrated, due to the uncertainty as to whether he would still have a bakery manager, I do not find that there was anything inappropriate about his actions in regard to his contact with Foodstuffs. I also find that any contact with Foodstuffs by Mr Grace was with the knowledge and approval of Mrs Hamilton at the time.
- [30] The other matter that obviously weighed heavily on Mrs Hamilton's mind is the overall attitude and performance of Mr Read. As I understand it, Mr Read had worked in the bakery for more than a year prior to Mrs Hamilton raising any issues about him and I have to say that I found it odd that Mr Read should suddenly become so prominent, if not dominant, in Mrs Hamilton's mind. Indeed the diary entries of Mrs Hamilton from 18 January 2004 show something akin to a pre-occupation with the presence of Mr Read. Nonetheless, I accept that Mrs Hamilton had some genuine and justified concerns about Mr Read and his deficiencies, and his propensity towards being troublesome, and she correctly raised those concerns with Mr Grace and Mr Burr. It is also clear that Mr Read actively sought to make life difficult for Mrs Hamilton, even possibly to the extent of trying to undermine her role as manager of the bakery.
- [31] While it can be reasonably argued that more support and consideration could have been given to Mrs Hamilton by Mr Grace and Mr Burr in dealing with Mr Read, I conclude that any failure to adequately support her in regard to the actions of Mr Read was not a breach of any duty owed to her as an employee. As was held in *Wellington etc Clerical Workers IUW v Greenwich* [1983] ACJ 965:
- “It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing unhappiness or resentment to the employee from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.”
- [32] In conclusion, taking into account all of the circumstances and the overall weight of the evidence pertaining to the resignation of Mrs Hamilton, I find that her resignation was not brought about by any breach of duty on the part of her employer, hence I must conclude that there was not a constructive dismissal.

B. The Claim of Unjustified Disadvantage / Breach of Privacy

[33] It appears that the claim of unjustified disadvantage is really related to the overall summary of events that are alleged to have led to the resignation of Mrs Hamilton from her employment and these matters have been assessed above. However, in case there remains any doubt, it is my conclusion that Mrs Hamilton did not suffer an unjustified disadvantage in her employment and therefore she does not have a personal grievance that can be upheld.

[34] Finally, there is no evidence of any breach of privacy on the part of Mr Grace. As recorded earlier in this determination, I conclude that any communications to Foodstuffs, or any other party, was with the general knowledge and consent, either express or implied, of Mrs Hamilton.

Determination

1. I find that the resignation of Mrs Hamilton from her employment at the Glenview New World was not a constructive dismissal.
2. I find that Mrs Hamilton did not suffer an unjustified disadvantage in her employment, nor was there any breach of her privacy.
3. Mrs Hamilton does not have a personal grievance and hence the remedies that she seeks cannot be granted.

Costs

Costs are reserved. The parties are invited to attempt to reach a resolution of this matter. In the event that a resolution is not achieved, submissions can be made to the Authority for an order.

Ken Anderson
Member
Employment Relations Authority