

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 88/07
5046102

BETWEEN AMANDA HANSEN
 Applicant

AND RDF and F CATERING
 LIMITED t/a RAINBOW
 DAIRY AND CAFE
 Respondent

Member of Authority: Paul Montgomery

Representatives: Maarten Dirkzwager, Counsel for Applicant
 Dean Gregory, Counsel for Respondent

Investigation Meeting: 3 April 2007 at Timaru

Submissions received: 24 April and 16 May 2007 from Applicant
 10 May 2007 from Respondent

Determination: 31 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Hansen, was employed in the respondent's diary and café in Waimate as a Counter Staff member. Ms Hansen claims that she was unjustifiably dismissed from her employment on 3 April 2006 following two incidents in the workplace on 1 April 2006. The applicant seeks reimbursement of remuneration lost between 3 April and 20 November 2006 when she obtained further employment, compensation of \$10,000 for hurt and humiliation and costs on a solicitor/client basis including the filing fee.

[2] The respondent says Ms Hansen was not dismissed by resigned by handing her apron to Mrs James and saying "*I don't want to work here anymore*". She then left the café some 2 ½ hours before her shift was to finish. The respondent says that at a

meeting with the applicant and the lady with whom Ms Hansen was boarding, Lynn Boswell, the applicant asked if she could have her job back. Ms and Mrs James, the proprietors, say they interpreted this as Ms Hansen asking if she could withdraw her resignation. The respondent declines to grant the remedies sought by the applicant.

[3] The parties attempted to resolve their differences in mediation. However, they were unable to do so.

How the problem arose

[4] Ms Hansen says she began at the café on or about 9 March 2006, working a trial day for about 4 hours. The following day she worked her first full rostered day. Ms Hansen says this was her first job, she was paid an hourly rate of \$10 and was told that she would be rostered on for 40 hours each week, but worked 37 and 38.5 hours in her first two weeks. Ms Hansen says that in week three there was criticism of her over the use of correct cleaning clothes and in the fourth week an issue arose over her wearing jeans while her black trousers were being repaired.

[5] On Saturday 1 April Ms Hansen was doing some dishes around 8.30am when she says Mrs James *reprimanded* her over the delay in her trouser repairs being done and over her not using the correct cloths for certain tasks. Around 2pm Mr James came into the café. Ms Hansen says he spoke to the three staff about not putting burnt chips in the bain marie. She says his approach was reasonable, but then changed when he said to her in an abrupt and aggressive manner, “*take that jacket off, I don’t like it*”. The reference was to the applicant’s polar fleece jacket and there is little dispute that there were customers in the shop at the time.

[6] Ms Hansen says she became very upset, went to the back of the shop to get herself together, then returned to prepare a milkshake for a customer. When topping it up she knocked it over. Another staff member told her to “*take five and collect yourself, I will finish off here for you*”. The applicant says she went to the back of the shop but was still upset after five minutes and wanted to avoid meeting Mr James again. She said she did not tell another staff member that she was going to quit, as was later alleged. Ms Hansen then says,

I chose to leave as I thought this was the best approach given the situation at the time. I handed my apron to Mrs James. I was still upset and said that I had not snapped at Mr James when I explained why I had put my jacket on. Mrs James simply shrugged her

shoulders. She made no attempt to find out what happened, or to rectify the situation or to stop me from leaving the shop or to get an explanation. I did not tell her that I quit. I handed my apron to her and said thank you as she took it from me.

[7] On Monday 3 April 2006 Ms Hansen and Ms Boswell went to the café to speak to Mr and Mrs James. What transpired at this meeting is the subject of significant conflicting evidence to which I will return. In essence, the respondents were of the view that Ms Hansen was asking if she could withdraw her *resignation*, while the applicant's view was that she had not resigned but simply left the café because she was upset over the alleged behaviour of Mr James. The meeting ended with Mr and Mrs James telling Ms Hansen they would consider the matter and would telephone her that evening with their decision. During that telephone call Mrs James told the applicant that the respondent had decided to *leave things as they are*. Ms Hansen says this was said and she took this to mean that she was being dismissed.

The issues

[8] To determine this matter the Authority needs to decide the following issues:

- What took place at the café on 1 April 2006 which led to Ms Hansen leaving the workplace; and
- Did the events lead the applicant to take actions which, objectively viewed, can be construed as a resignation; and
- What occurred in the meeting at the café on 3 April 2006; and
- If the applicant has a personal grievance, did she contribute to the circumstances; and
- What remedies are due to her?

The test

[9] The appropriate test in this case is set out in s.103A of the Employment Relations Act 2000.

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer

would have done in all the circumstances at the time the dismissal or action occurred.

The investigation meeting

[10] At the investigation meeting evidence for the applicant was given by Ms Hansen and her parents, Mrs Heather Hansen and Mr Brett Hansen. For the respondent the Authority heard evidence from both Mr and Mrs James, Ms Jacqui Shaw, Ms Jan Lines and Ms Lynn Boswell, the latter three were employed by the respondents at the relevant time.

[11] The Authority thanks all who gave evidence and also thanks counsel for their assistance at the investigation meeting and in their final submissions.

Discussion and analysis

[12] The question of what occurred at the café at 1 April 2006 is central. Ms Hansen said Mr James told her to take her jacket off in an

abrupt and aggressive manner ... He stood directly in front of me and was very close. I felt very intimidated and was unsure as to what other action he might take. It frightened me as I had never been placed in that position before. I took off my jacket and said I am sorry I was cold.

[13] A little later in the evidence the applicant said

Mr James' outburst, his aggressive tone and intimidating body language were totally unexpected. I became very upset.

[14] On questioning, Ms Hansen said that Mr James spoke quite loudly and was standing close to her.

[15] Mr James says in his evidence

While I was doing duties around the store, I noticed Amanda wearing her polar fleece. We do not really have a uniform, there are some promotional shirts that employees can wear, but we do not insist. We also prefer black pants but are not really fussed if our employees are not wearing them. I was concerned that bits of Amanda's polar fleece could flake off and fall into the food so I asked her to take it off. I did not make a big deal about it, but I may have had to ask her twice. I definitely did not say that Amanda had to start respecting me – its just not something that I would say. Nor did I stand over Amanda, as I remember I said it as I was leaving the shop to go upstairs. I must have been at least 5 metres away from her.

[16] On the face of the applicant's evidence she was subject to an aggressive outburst and intimidating body language from Mr James. Jacqui Shaw's evidence on this matter is

Amanda immediately went out the back and put her polar fleece on, despite it being a beautiful hot day. Mr James spotted her with it on and asked her to take it off. Mr James used his usual tone and demeanour, direct but not unreasonable. Amanda refused to remove her polar fleece and Mr James repeated his direction. Amanda was being defiant and unreasonable. I witnessed the whole short incident and cannot see how anyone could offence at, or be intimidated by, Mr James' actions. Amanda went to the back of the shop to take off her polar fleece. Although she was crying, she was angry and wound up.

[17] In her evidence, Jan Lines says

During my lunch break, I was in the very back of the shop eating my lunch. I don't know what time it was, but it must have been a couple of hours before my shift ended at 1pm. Amanda came out to where I was, she was visibly enraged. Amanda was very angry and mumbled a few things. I recall her saying "I do not have to put up with this". I ignored Amanda, as it is not unusual for her to get into such a state and vent her frustrations out the back of the shop. After talking to others, I have concluded that I must have seen Amanda around the time when she was asked to take her polar fleece off.

[18] Further on in her evidence, she expresses the following view:

In the time that I worked for Mr and Mrs James, I found them to be great employers. Neither of them were ever intimidating and both were very good natured. I have never found Mr James specifically intimidating, nor have I seen him give cause to anybody else to feel intimidated. From what I have seen of Mr James' character, I cannot accept that he would intimidate or bully anyone, let alone his own staff.

[19] On this matter I am minded to give considerable weight to the evidence of Ms Boswell who said in her evidence to the Authority

1 April 2006 was my day off. I received a call from Amanda around lunchtime that day. Amanda did not seem upset or distressed when she spoke to her. Amanda simply said "I've quit can you pick me up". I specifically recall Amanda saying that she had quit. I went to pick Amanda up. When I got there I asked Amanda what had happened. Amanda was quite angry as she described the incidents. Amanda was of the view that Mr James had acted unreasonably towards her. Amanda retold her "storm out" in detail and said that she had handed her apron to Mrs James and said to her "I don't want to work here any more".

[20] On the balance of probabilities, I find it highly likely that the applicant did resign her position. I am further convinced by the evidence of Mrs James who said

On 1 April 2006 I was upstairs attending to some paperwork. I came down round about 12pm or 1pm. As soon as I got to the front of the shop, Amanda stormed up to me and handed me her apron. She did not appear to be upset or frightened, but angry. As Amanda handed me her apron, she said "I do not want to work here any more". ... I took Amanda's actions and words to mean that she was resigning. The only thing I could think to say was to thank her for her time to date. The shop was full of customers due to the lunch rush and Amanda was not stopping so I could not inquire further.

[21] Turning now to the meeting held at the café on 3 April 2006. The meeting was not pre-arranged and Ms Boswell makes it clear that she persuaded the applicant that she and Ms Hansen should go down to the café and speak with Mr and Mrs James. She told the Authority

In the days that followed, I encouraged Amanda to reflect on what had happened. I suggested that she go down and talk to Mr and Mrs James with a view to asking them to accept a retraction of her resignation. Amanda begrudgingly agreed to go.

On 3 April 2006 I took Amanda down to the Rainbow Dairy to have a talk to Mr and Mrs James. They did not know that we were coming down. We all sat out the back of the shop and discussed what had happened.

Mrs James asked what Amanda wanted, by saying "Are you asking for your job back?". Amanda replied that she was. Mrs James talked firstly about her general attitude and how Amanda had managed to get offside with every employee at the shop. Amanda was very quiet and did not really offer an explanation.

Mr James then talked about the walk out and how it left the shop one employee down in the middle of the lunch rush.

[22] Ms Hansen explained her behaviours by telling the meeting that it was because she was having her period. Mr Boswell goes on

I suggested to Amanda that she might want to apologise to Mr and Mrs James for her behaviour and attitude. Amanda refused to apologise. Instead she said "Am I finished then?". Mrs James then said "Are you asking us for your job back?". Amanda replied "Yes". Mrs James said that she would think about things and call Amanda that evening.

[23] In her evidence, Mrs James says of the meeting

I was very careful to ask Amanda what she wanted to talk about. Amanda said she had come to ask for her job back. ... I thought that Amanda was asking if we would accept a retracting of her resignation. I was careful to clarify the nature of the conversation at the very start. When Amanda said that she was asking for her job back, I took it to mean that she acknowledged she had quit the other day.

Before I would consider re-hiring Amanda, I wanted an assurance that Amanda would make an attempt to get on with the other employees better. I told Amanda that I had never had an employee who got offside with the entire staff. Amanda did not respond to this. ... Lynn then suggested to Amanda that she should apologise to me and Darryl for how she had acted. Amanda did not seem to like the suggestion and did not apologise. Instead, Amanda said "Am I finished then?". I did not like the terminology so I said "well are you asking for your job back?", to which Amanda replied "yes". I told Amanda that we would think about it and call her later that night.

[24] Mrs James goes on to say that the meeting was in no way a disciplinary meeting. She says

Amanda had quit unequivocally on 1 April 2006. Amanda said at the meeting that she wanted her job back, indicating that she accepted she was not employed at that stage.

I telephoned Amanda that evening and told her we would leave things as they are. I meant by this that we would not re-hire her or accept the retraction of her resignation. Amanda accepted this and asked for her final pay and holiday pay. I told that would be no problem and she could pick it up at lunchtime the next day.

[25] The following day the applicant, accompanied by her father, went to the café. There was clearly an altercation as to what payment was due and in particular regarding payment of an alleged notice period.

[26] The parties had not signed an individual employment agreement so no period of notice either way was defined in writing. Had Ms Hansen been constructively dismissed the Authority would need to turn its mind to determining what a reasonable period of notice might have been in the circumstances. From the evidence before the Authority it is clear to me that the disagreement regarding the applicant's wearing the polar fleece is too light evidentially to bear the weight of a constructive dismissal claim.

The Determination

[27] Returning to the issues as set out above in this determination;

- I find that the applicant took exception to Mr James asking her to remove her polar fleece and became unreasonably angry at Mr James. In that state of mind she took off her apron and handed it to Mrs James. I find on the balance of probabilities that the applicant told Mrs James that she did not wish to work there anymore.

- I find that the action of handing the apron to Mrs James by the applicant is the culinary equivalent of a rugby player hanging up his boots. When that action is accompanied by the words *I don't want to work here anymore*", there is little doubt of the intentions at that time in the applicant's mind. I find the respondent was entitled to take these actions as a resignation.
- I find that the purpose of the meeting on 3 April 2006, which was instigated by Ms Boswell, not by the employers, was to attempt to have the respondent reconsider the situation and permit the applicant to withdraw her resignation. I accept the evidence of Mrs James who told the Authority that the meeting was not a disciplinary meeting as Ms Hansen had already resigned. I agree with that view and confirm that given Ms Hansen's actions on 1 April 2006 it was open to the respondent to permit the rescinding of the resignation or decline to do so.
- For the avoidance of doubt, I find that the applicant, Ms Hansen, resigned from her employment with the respondent on 1 April 2006.
- Ms Hansen does not have a personal grievance and the Authority is unable to assist her further.

[28] As I have found that Ms Hansen resigned and was not dismissed, there is no need to apply the test for justification as set out in s.103A of the Employment Relations Act 2000.

Costs

[29] Costs are reserved. The parties are encouraged to attempt to resolve this issue between themselves. If that is not possible, Mr Gregory is to have 28 days from the date of the issue of this determination to lodge and serve his memorandum. Mr Dirkzwager is to have a further 14 days in which to issue his reply.

Paul Montgomery
Member of the Employment Relations Authority

