

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**CA 82/07  
5071645**

BETWEEN

MELANIE LAPTHORN  
Applicant

AND

KATHRYN THERESE HAYES  
t/a WISTERIA COTTAGE  
DAY SPA  
Respondent

Member of Authority: James Crichton

Representatives: Phil James, Counsel for Applicant  
Owen Paulsen, Counsel for Respondent

Investigation Meeting: 20 February 2007  
19 April 2007 at Christchurch

Determination: 25 July 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant (Ms Laphorn) brings a personal grievance claim against the respondent (Ms Hayes) alleging both unjustified disadvantage and unjustified constructive dismissal.

[2] Ms Hayes resists both claims and brings a counterclaim of her own which she quantifies at the amount of \$960. Ms Hayes also claims a penalty against Ms Laphorn in the sum of \$5,000 for breach of the employment agreement.

[3] Both the counterclaim and the alleged breach of the employment agreement are resisted by Ms Laphorn.

[4] Ms Hayes operates a beauty treatment facility at Hanmer Springs north of Christchurch trading as Wisteria Cottage Day Spa. Ms Laphorn was employed to

work in that facility in December 2005. Ms Laphorn was initially provided with training by Ms Hayes and in particular trained in Ms Hayes' own way of dealing with beauty therapy applications. This was so despite the fact that Ms Laphorn was, at the point at which she joined Ms Hayes' business, already a fully trained and qualified beauty therapist.

[5] Ms Laphorn's evidence is that from the beginning of the relationship with Ms Hayes, she was "*berated*", treated in a demeaning way and generally belittled and made to feel inadequate.

[6] Ms Laphorn says that she was promised 35 hours a week of work in her initial job interview and when she started work properly on 9 January 2006, her initial hours roughly equated to that figure.

[7] In mid-winter 2006, Ms Hayes travelled extensively overseas and was away for almost a month. Her evidence is that she left sufficient money in the business bank account to pay for the wages of the staff (including Ms Laphorn), having allowed for the fact that the staff would continue to generate income during the period she was away, which income would be credited to the business's account.

[8] In the result, the payment to Ms Laphorn (and other staff presumably) was not made on 27 June 2006 as the staff expected, and on inquiry to Ms Hayes, it was discovered that the business bank account was significantly overdrawn. Ms Hayes took the view that this was because the therapists (including Ms Laphorn) had not been generating the revenue that she anticipated while she was overseas. There were various arguments between the parties about the responsibility for the shortfall.

[9] From mid-July 2006, Ms Laphorn's evidence is that she sought time off on a Saturday (12 August 2006) to enable her to attend a concert in Christchurch. Saturday was one of her normal working days and on Ms Hayes's evidence was one of the busiest days of the week.

[10] There is dispute between the principal protagonists as to the nature of the response from Ms Hayes on this request. Ms Laphorn says that Ms Hayes gave her the day off and subsequently reneged on that promise. For her part, Ms Hayes says that she never unconditionally agreed to the day off but did agree to try and accommodate Ms Laphorn's request subject to the bookings that were made for clinic services that day. Furthermore, there is dispute between the parties as to the nature of

Ms Laphorn's request; Ms Laphorn says she sought the time off to go to a concert and that Ms Hayes knew about that whereas Ms Hayes says that she never knew the time off was for the purposes of attending a concert and she always understood from Ms Laphorn that the time off was required to meet a family member (a cousin) who Ms Laphorn had not seen for some years.

[11] In the result, Ms Laphorn did not attend at work at all on 12 August 2006, and because there was no contact between Ms Laphorn and Ms Hayes immediately after this unexplained absence, Ms Hayes had to make arrangements to roster other staff to deal with the shifts that Ms Laphorn would otherwise have worked.

[12] When the parties finally met formally on 18 August, the meeting was disciplinary in nature to consider the explanation that Ms Laphorn might advance in respect of her unarranged absence on 12 August 2006. Ms Laphorn provided an explanation which was considered by Ms Hayes who subsequently issued a letter of warning.

[13] There were then further meetings between the parties to endeavour to resolve the employment relationship problems between them.

[14] The parties were unable to resolve their differences satisfactorily. In essence, Ms Laphorn sought agreement from Ms Hayes about time off that she would require to enable her to attend to other matters, including generate income from another source, basically providing make up work for weddings. Ms Hayes was unable to accommodate those requests which, on Ms Hayes' evidence, were extensive and would not meet the needs of her business.

[15] Ms Hayes says that the last occasion that she spoke to Ms Laphorn before engaging with her again as a result of Ms Laphorn's proceedings was 28 August 2006, that she spoke with Ms Laphorn's father by telephone on that evening and then on 30 August 2006 received the letter from Ms Laphorn's lawyers which raised the personal grievance, such letter being dated 29 August 2006.

## **Issues**

[16] The first issue chronologically is the question whether an unjustified disadvantage claim can lie. Ms Hayes says that it is not clear what disadvantage Ms Laphorn claims to have suffered and also raises the contention that, even if issues

of clarity can be resolved satisfactorily, Ms Laphorn is to a greater or lesser extent out of time in terms of the raising of such a grievance. Ms Laphorn, for her part, says that the important issues are within time and that, in any event, she is entitled to make a late application for an exercise of the Authority's discretion under s.115 of the Act to allow a late presentation of such a grievance on the basis of the "*exceptional circumstances*" rule.

[17] Having dealt with that issue, the Authority then needs to consider the circumstances which gave rise to the claim that Ms Laphorn was unjustifiably constructively dismissed. To that end, regard will need to be had to the events surrounding 12 August 2006 and then to the engagement between the parties after that date with a view to trying to resolve their apparent differences.

[18] Finally, the Authority needs to consider whether the counterclaim has merit. That issue can be considered along with Ms Hayes' claim for a penalty against Ms Laphorn for breach of her employment agreement.

### **The unjustified disadvantage claim**

[19] In the statement of problem, Ms Laphorn refers generally to matters which in her view justify the claim of an unjustified disadvantage. It is fair to say that the allegations which allegedly support the claimed disadvantage are generic in nature and not specific as to detail such as date, time or even the actual specific nature of the alleged wrong.

[20] Ms Hayes says that she is unable to respond to the allegations allegedly supporting the unjustified disadvantage claim because they lack particularity.

[21] Further, Ms Hayes says that anything outside the 90 day period cannot be in contention as there has been no proper application to pursue this grievance out of time.

[22] Ms Laphorn alleges that the unjustified disadvantages on which she relies occurred either in the 90 days immediately before the grievance was raised on 30 August 2006 or occurred before that period and insofar as the events complained of occurred before the 90 day period, leave is now sought to bring the proceedings "*out of time*". It is suggested that Ms Hayes is not prejudiced by this proposed process.

[23] I do not accept it is fair to Ms Hayes for leave to be sought in this way. If Ms Laphorn wished to rely upon matters which occurred prior to the 90 day period (as a matter of fact, before 2 June 2006), then she had ample opportunity to make the appropriate application. The statement of problem was filed in the Authority on 22 November 2006 and it is in my view inappropriate for Ms Laphorn to be arguing that she is entitled to have an application considered out of time as part of her closing submissions filed on 26 April 2007. By this time, all the evidence has been heard and, save for her closing submissions, Ms Hayes has not had an opportunity to be heard on the “*out of time*” application. Were the Authority minded to contemplate granting the application for the matter to be heard out of time, it would in my opinion be necessary for Ms Hayes to be given a formal opportunity to be heard on the matter before the Authority could contemplate making any decision.

[24] In all the circumstances, I am not persuaded that the process adopted by Ms Laphorn in progressing the matter is a proper one and accordingly I have decided that matters on which she might seek to rely which happened prior to 2 June 2006 are not available to be considered in relation to her claim that she has been unjustifiably disadvantaged by the actions of Ms Hayes.

[25] On that basis then, that leaves only matters that happened after 2 June 2006 to support Ms Laphorn’s contention that she was unjustifiably disadvantaged by Ms Hayes.

[26] On the evidence before me, the only matters which it seems Ms Laphorn seeks to rely upon and which happened after 2 June 2006 are the change in Ms Laphorn’s hours of employment and the allegation that Ms Hayes changed her mind in respect of Ms Laphorn’s right to take 12 August 2006 off from work.

[27] Dealing with the question of the hours of work change first, Ms Laphorn’s evidence relies on her contention that she was promised 35 hours work per week. However, that contention is challenged by Ms Hayes who says that there were no guaranteed hours, that the contract of employment between the parties specifically provided for variable hours of work, that as a matter of fact the hours of work varied during the course of the employment, partly for seasonal reasons and partly through changes in rosters and the like, and that all staff were treated similarly because of the unsuccessful winter trading period which put the whole business under financial pressure.

[28] In all the circumstances, it is difficult to see how Ms Laphorn's argument can be sustained. Whatever she thinks may have been agreed or indicated in the initial interview, Ms Hayes takes a different view and quite properly refers to the factors I have just referred to, including in particular the explicit provision in the employment agreement which Ms Laphorn signed.

[29] It follows that I do not consider that Ms Laphorn may rely upon her belief that she was "*guaranteed*" 35 hours per week and it also follows that, for the foregoing reasons, I am not persuaded that this issue constitutes an unjustified disadvantage on which Ms Laphorn may ground her personal grievance.

[30] The second issue that falls within time is the contention Ms Laphorn makes that Ms Hayes changed her mind about Ms Laphorn having time off on 12 August 2006. Here, as I have remarked earlier, there is an evidentiary difference between the parties' understanding of the position. Ms Laphorn says that she was promised the day off and Ms Hayes subsequently reneged on that promise while Ms Hayes says that she never unconditionally promised the day off and only promised it subject to certain conditions, one of which was that Ms Laphorn was not required to attend to work at the clinic on the day in question. I am satisfied on the balance of probabilities that on this point Ms Hayes' evidence is to be preferred. It follows that I do not think this issue either can ground Ms Laphorn's personal grievance alleging an unjustified disadvantage.

[31] In summary, then, I determine that Ms Laphorn has no personal grievance on any alleged disadvantage occasioned by unjustifiable actions of Ms Hayes.

### **12 August 2006 and its aftermath**

[32] The events of this day and the parties' responses to it effectively brought the employment relationship to an end. Ms Laphorn said in her evidence that she had an arrangement with Ms Hayes, the effect of which was that she was to have Saturday, 12 August 2006 off from work to enable her to attend the concert. She says that at the last minute, Ms Hayes reneged on that arrangement and required that she attend at work, albeit not for the full day.

[33] Ms Laphorn did not attend at work that day at all. The effect on the business, according to Ms Hayes, was to cause her significant disruption because of the need to alter bookings that had been made by clients for Ms Laphorn and in addition caused

her financial loss because the income which Ms Laphorn's work would have generated was not in fact available to her. It is this financial loss which Ms Hayes seeks to be compensated for in her counterclaim and which she also seeks to be responded to by the imposition of a penalty against Ms Laphorn for breach of her employment agreement.

[34] It is common ground that there was no contact between the parties until Wednesday, 16 August 2006 by which time Ms Hayes had decided that she needed to hold a disciplinary meeting with Ms Laphorn in respect of her unexplained absence. That meeting took place on 18 August 2006 at which Ms Laphorn was invited to provide an explanation of why she had absented herself from work without explanation or agreement.

[35] A written warning was the immediate consequence. Ms Laphorn remained absent from work.

[36] The parties continued to try to agree with each other a basis on which the employment relationship could continue. The focus of these discussions was around Ms Laphorn's requests for particular days off and Ms Hayes' attempts to control the extent of the time off that Ms Laphorn was seeking. Ms Hayes took the view that Ms Laphorn was simply making use of the break in the employment to endeavour to extract the maximum amount of benefit that she could whereas Ms Laphorn said that she was simply endeavouring to arrange a regime that she could tolerate and that would meet her economic needs.

[37] By 28 August 2006, there was still no agreement between the parties and Ms Laphorn had not returned to work at any stage since her departure on 12 August.

[38] On the evening of 28 August 2006, Ms Laphorn's father rang Ms Hayes. Ms Hayes had indicated to Mr Laphorn, who had attended the disciplinary meeting on 18 August 2006, that she was happy to talk with him about the employment relationship problems between her and Ms Laphorn and that is why Mr Laphorn made the call on the evening of 28 August.

[39] During that discussion, Mr Laphorn's evidence was that Ms Hayes was very clear that his daughter would have to work every weekend until April 2007 and would get no time off except the statutory holidays over the Christmas period.

[40] Further, Mr Laphorn's evidence was that Ms Hayes said that it would be preferable if Ms Laphorn resigned her position because, as a casual worker, Ms Laphorn would be able to work more hours than would be the case if she was a permanent part-time worker. Mr Laphorn's evidence was that he was so startled by this statement that he sought a repeat of it and Ms Hayes repeated what she had said.

[41] Mr Laphorn said in his oral evidence that the effect of this telephone discussion with Ms Hayes was to confirm the view that he had started to form, based on discussions with his daughter and another employee of Ms Hayes, Ms Carika De Jager, to the effect that Ms Hayes would make Ms Laphorn's life *a misery* if she returned to the workplace.

[42] Ms Hayes denied that any such conclusion could appropriately be reached and she also denied that she had told Mr Laphorn either that Ms Laphorn would have to work every weekend until April or that Ms Laphorn would be better to resign her position. Counsel for Ms Hayes sought to try to minimise the importance of Mr Laphorn's evidence but not, in my view, successfully. Mr Laphorn struck me as a straightforward and intelligent witness who gave truthful and thoughtful evidence and I have to say that I much prefer his recollection of that conversation to the recollection that Ms Hayes had. I cannot imagine why Mr Laphorn would make up such an extraordinary story and the evidence that he gave of asking Ms Hayes to repeat what she said about Ms Laphorn resigning seems to me to give more verisimilitude to the evidence than not.

[43] That brings me to a consideration of the evidence of Ms De Jager. The thrust of her evidence is that Ms Hayes *was hard* on Ms Laphorn. Ms De Jager, in evidence to the Authority, confirmed that it was her view that Ms Hayes did not want Ms Laphorn back in the workplace. This is essentially the view that she must have conveyed to Mr Laphorn and which obviously informed his conclusions about the future of his daughter's employment relationship with Ms Hayes.

[44] Another witness, Ms Pauline Sidon, who was also a former employee of Ms Hayes, gave evidence at the Authority as well and, like Ms De Jager, her considered view appeared to be that Ms Hayes was reluctant to have Ms Laphorn back after the 12 August incident and that, in the event that Ms Laphorn did return, it would be doubtful if the employment relationship would survive for any length of time because Ms Hayes would be "*vindictive and unreasonable*".

[45] The evidence of Ms Hayes, on the other hand, seeks to minimise the differences between her and Ms Laphorn. She acknowledges that Ms Laphorn was feisty, agrees that she once called Ms Laphorn “*a manipulative little shit*” but denies that she connived at her departing the workplace or that she sought actively to have Ms Laphorn leave the employment. Indeed, her written brief postulated an enthusiasm for Ms Laphorn to continue in employment but on the basis of meeting the employer’s reasonable needs in terms of hours of work and the like.

[46] Regrettably, there was something of a disjunct between the written evidence filed by Ms Hayes and her oral evidence at the investigation meeting. She did not impress as a witness and her bare denials of the evidence of some of Ms Laphorn’s witnesses and of Ms Laphorn’s own evidence did not satisfy me that her recollection of events was as accurate as the recollection of others. In responding to questions from me and from counsel, she regularly gave the impression of being either unsure or evasive, or both.

[47] Conversely, I was impressed with the evidence of Mr Laphorn who presented at the investigation meeting as a reliable and straightforward witness. His daughter, Ms Laphorn, was less impressive and I must say that I thought to some extent she was the architect of her own misfortunes.

[48] The question is whether, taken in its totality, the evidence supports a conclusion that Ms Laphorn has been constructively dismissed, either by a breach of duty from her employer, Ms Hayes, or whether there was a course of conduct followed by Ms Hayes with the deliberate and dominant purpose of extracting a resignation from Ms Laphorn. For the sake of completeness, I note that there was no evidence before the Authority that Ms Hayes had given Ms Laphorn the choice to resign or be dismissed so that category of constructive dismissal is not in issue here.

[49] I have reached the conclusion that the behaviour of Ms Hayes, properly construed, does have the effect of representing a course of conduct with the deliberate and dominant purpose of extracting Ms Laphorn’s resignation.

[50] I base this conclusion principally on the evidence given to the Authority by Ms Laphorn’s supporting witnesses and by the various differences that I have already identified between Ms Hayes’ own written evidence and her oral testimony.

[51] I think the evidence suggests that Ms Hayes formed the view, after the events of 12 August, that Ms Laphorn's continued employment on the same basis as before was not in her interests and I think that she set out to make it as difficult as possible for Ms Laphorn to continue in employment. The observations which I find as a fact she made to Mr Laphorn can hardly have any other effect. In my opinion, Mr Laphorn in particular is a pivotal figure because I consider that in all probability, his daughter relied on his advice to a greater extent than not and his impressions of the situation were coloured by that extraordinary telephone discussion which he had with Ms Hayes on 28 August 2006 and by the conversations that he had with Ms De Jager at around the same time.

[52] All of that intelligence would have encouraged Mr Laphorn to reach a conclusion that Ms Hayes did not want his daughter back on the job and no doubt that view was conveyed by Mr Laphorn to his daughter.

[53] The Authority needs to be cautious about attributing to Ms Hayes conclusions which other people (such as Ms Sidon and Ms De Jager) may make about her behaviour, but I think taken in its totality, I have accepted that Ms Sidon and Ms De Jager and Mr Laphorn all formed the view, based on their analysis of Ms Hayes' behaviour, that Ms Hayes actively sought to discourage Ms Laphorn from continuing in employment and Mr Laphorn anyway will have advised his daughter as to that.

### **The counterclaim**

[54] I am not satisfied that the counterclaim can be made out. It relies on events which the employer has already responded to by way of a disciplinary warning and it seems to me completely inappropriate for Ms Hayes to seek to add a further penalty to Ms Laphorn when she has already dealt with the matter as part of the ongoing employment relationship.

[55] It follows that I do not accept that the counterclaim is made out and for the same reasons also do not accept that it is appropriate to impose a penalty for the evident breach of the employment agreement which, as I say, has already been dealt with by Ms Hayes by way of a disciplinary warning.

[56] I remark for the sake of completeness that Ms Laphorn's behaviour is obviously a factor that I must take into account in terms of assessing the quantum of compensation that is able to be awarded to her for the personal grievance that I have

found. Ms Laphorn's contribution to the events complained of is a relevant factor and I will deal with that aspect shortly.

### **Determination**

[57] I have reached the conclusion that Ms Laphorn does not have a personal grievance by way of an unjustified action by Ms Hayes to Ms Laphorn's disadvantage.

[58] However, I do think that Ms Laphorn has been unjustifiably dismissed in a constructive dismissal of her by Ms Hayes, Ms Hayes having followed a course of conduct with the deliberate and dominant purpose of coercing Ms Laphorn to resign her employment.

[59] The next question is the issue of whether Ms Laphorn has, by her conduct, contributed to the events complained of and I reach the conclusion that she contributed to a very significant extent in the events complained of. Ms Laphorn's behaviour in failing to attend at the workplace on 12 August was plainly disgraceful and arguably, had she not failed absolutely in her obligations to the employer on that day, the constructive dismissal which I have now found proved, might never have happened.

[60] It follows that I must consider whether in fact the dominant reason for the constructive dismissal was the events of 12 August and, given that the events of 12 August were, on my finding, absolutely the responsibility of Ms Laphorn there has to be a possibility that contribution could be set at a very high figure indeed.

[61] Having considered all of these factors, I am disposed to rebate the award I would otherwise make by a figure of 75% and on that basis I award Ms Laphorn the sum of \$1,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

[62] Ms Laphorn claims lost income in the sum of \$5,466. I rebate that amount by the same percentage contribution figure and in consequence award Ms Laphorn the sum of \$1,366.50 gross as a contribution to her lost wages.

[63] Those two amounts are to be paid by Ms Hayes to Ms Laphorn.

**Costs**

[64] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority