

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 93/07
5038713

BETWEEN CINDY MARIE SCOLES
 Applicant

AND NGA CLARKE'S LIMITED
 TRADING AS BLACK SWAN
 TEA ROOMS AND MOTELS
 Respondent

Member of Authority: Paul Montgomery

Representatives: Jenny Guthrie, Counsel for Applicant
 Keri Kereru, Counsel for Respondent

Investigation Meeting: 30 April 2007 at Dunedin

Submissions received: 17 May 2007 for Applicant
 1 June 2007 for Respondent

Determination: 7 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, who had worked for the respondent previously, recommenced employment in November 2005 signing an individual employment agreement on 7 November 2005. The agreement was that she would be employed for 36 hours each week in the diner.

[2] The applicant says that she complained to the owners of a male fellow employee(s) staring at her breasts and that nothing was done in response to this matter. Ms Scoles also says she was unjustifiably disadvantaged by her hours being unilaterally reduced to 24 hours each week. Finally, the applicant says she was unjustifiably dismissed by Mr Richard Clarke, who with his wife Myra, is the owner and manager of the business, on 29 March 2006.

[3] Ms Scoles seeks the remedies of \$4,485 gross for loss remuneration, \$3,000 compensation for hurt and humiliation and a contribution to her legal costs.

[4] The respondent, by Mr and Mrs Clarke, says the applicant was not unjustifiably disadvantaged on either ground and was not unjustifiably dismissed as she failed to follow a lawful instruction to return to work on 29 March 2006. It resists the applicant's claim and declines to grant her the remedies she seeks.

How the problem arose

[5] Ms Scoles was employed in the diner preparing food and cooking. At the time she recommenced the applicant was pregnant, the baby being expected in June 2006. The respondent was aware of this at the time Ms Scoles was re-employed.

[6] The respondent says that the applicant initially approached Mr and Mrs Clarke on 31 October 2005 looking for work and it was agreed that she would have 36 hours each week. A month later, when Ms Scoles was struggling to meet those hours, it was agreed that she reduce her hours to 30. Mr and Mrs Clarke became aware in December that the applicant was finding the going difficult due to her pregnancy and offered in January to move Ms Scoles to the motels where the work was lighter and less pressured. The applicant agreed.

[7] The applicant says her hours were then dropped, without discussion, to 24 per week. The respondent says this is not correct, saying Ms Scoles' hours remained at 30 as earlier agreed and she continued to be paid for the hours she worked. The respondent says the applicant started in the motels on 13 January 2006 after being ill the previous day. The records indicate she worked 27 hours in the week 17 to 23 January and 27.5 hours in the week 24 to 30 January, as she went home sick several times.

[8] On 13 January 2006 the applicant discussed with the Clarkes her concern at one of the male cooks looking at her breasts and her discomfort at being around him while working. Ms Scoles made it clear she did not want her name mentioned to the cook. The applicant says the Clarke did not follow this complaint up with the cook, or alternatively they never informed her of any action taken to resolve her complaint.

[9] The respondent says it met with the cook without disclosing the source of the complaint. However, the cook identified the complainant, expressed some surprise

since they were rarely on the same shifts and complained to the Clarkes about the way Ms Scoles usually sat on the lawn during breaks which he found offensive. The respondent says that Mrs Clarke wrote to Ms Scoles informing her of the action they had taken over the complaint. The applicant says she never received this letter.

[10] Following the investigation meeting, an original carbon copy of this letter was provided to the Authority by the respondent. It makes clear what was discussed, relates the cook's complaint and points out the transfer of Ms Scoles to the motels and her doing only light duties in the diner should address the concerns of both employees.

[11] On 16 March 2006 the applicant approached Mrs Clarke stating that she was resigning, giving notice that her last working day would be 4 April 2006. This discussion took place in the storeroom and Mrs Clarke's diary notes were provided. Mrs Clarke asked the applicant to confirm in writing and also that Ms Scoles not inform other staff. The notes confirm that the applicant said she was leaving due to her not feeling well and as her partner had secured permanent employment.

[12] The following day Ms Scoles again approached Mrs Clarke and said she had now decided not to resign. Again, Ms Clarke's notes were provided. They record that the applicant's partner did not want her to finish work as he was unhappy in his job, and that because they were living together, Ms Scoles said she was not eligible for a sickness benefit. The notes make it clear that Mrs Clarke put it to the applicant that Ms Scoles had announced her resignation to diner staff and that Mrs Clarke had already made contact with a possible replacement. She also told Ms Scoles that after the birth, and when she was ready, the applicant could come back to work.

[13] On 29 March 2006 an incident occurred which is at the centre of the unjustified dismissal claim. There had been growing discontent over the staff supervisor and on that day it came to a head. Four staff in the kitchen were discussing their dissatisfaction with the supervisor and a range of other concerns. They went outside and sat on a table. Ms Lyon, who was one of the four, said in her evidence,

We got to the point where we'd all had enough of being fobbed off. On March 29th we all decided to take a stand because we just weren't being listened to. I'd already had my break and had gone back inside and Cindy had gone outside on her break. Adam then went outside and then I also went back out to where Cindy was sitting. I presume someone must have rung Richard (Clarke) because I was just taking

the coffee cups back inside and Richard called me over to where the others were sitting.

[14] There is considerable conflict regarding the exchange between Mr Clarke and the group. He said he came across the group some time after 11am.

It was not an assigned break for them. I said to them, what's going on here. The dining room is full and they are busy in there. Cindy said they couldn't work with Lizzie, as she does not know what she is doing ... I then said that Lizzie takes her instructions from us and I can't pay you for sitting out here, its busy in there so go back in there to work or you may as well go home. Cindy then asked me a second time, are you sending us home? I said, no, if you are not going back to work, you may as well go home. I did not send Cindy or Adam home. I gave them a clear instruction to go back to work, there was no point in paying them to sit around and do nothing. Cindy chose not to go back to work and she deliberately left the premises.

[15] Ms Scoles' evidence was,

Richard asked what our problem was and why we weren't working. I did most of the talking but the others felt the same as I did. I said we'd had enough and we were all tired of waiting for something to be done by them about our complaint. I don't think I got as far as actually mentioning S but I know I said about our problems with Lizzie. I wasn't the only one who had complaints. I don't think that Richard was even listening properly and he just wanted us to go back to work as if nothing was wrong. He then said that we couldn't sit our there and do nothing and we may as well go home. I asked him if he was telling us to go home, and he said yes. I still had a few hours to go on my shift but if Richard was telling me to go home then I would. I was feeling pretty frustrated that whatever happened they just wanted us to work and didn't really care if we had a problem with something. I did need to get away to calm down and Richard knew that. I wouldn't have expected to get paid for the rest of my hours that day but I certainly expected to go back to work the next day. I still would have wanted them to deal with the problems we were all having.

[16] In her evidence, Debbie Lyon says,

Richard asked what our problem was and why we weren't working. Cindy did start talking and said we'd had enough and something like she was sick of waiting for something to be done about her complaints. Richard just ignored it. I don't think he was even listening. He wasn't interested in any of it and just told Cindy to get back to work. We didn't do anything immediately and then he said that we couldn't sit out there and do nothing so we may as well go home. When Cindy asked him if he was telling her to go home, he definitely said yes. I am in no doubt about that at all.

[17] That evening, Adam who was one of the group, arrived at Ms Lyon's home. Ms Scoles arrived about 20 minutes later. Adam had heard from his father, who also worked for the respondent, that he, Adam, had been dismissed. When Ms Scoles arrived he told her about losing his job and the applicant then rang Mrs Clarke. Ms Lyon says she heard the applicant make the call and heard Ms Scoles ask Mrs Clarke two or three times if she still had a job. Ms Lyon told the Authority,

I heard her tell Myra (Clarke) that Richard had sent her home. When she got off the phone she said that Myra said she had sacked herself.

[18] At the investigation meeting Mrs Clarke's evidence on the telephone call was,

She (Ms Scoles) asked if she had been sacked. I replied, no one sacked you, you worked off and sacked yourself. Cindy replied that Richard sent us home. I then said, he did not send you home, the diner was busy and he wanted you to go back to work, he couldn't pay you for just sitting around. He asked you to go back to work, but you chose to go home.

The issues

[19] In order to resolve this employment relationship problem the Authority needs to decide the following issues:

- Were the applicant's hours unilaterally changed from 30 to 24 per week; and
- Did the respondent fail to address the applicant's harassment concerns; and
- Did the respondent fail to advise the applicant of the outcome of the inquiry into the applicant's complaint; and
- Was the respondent entitled to allow the applicant's verbal resignation to stand; and
- Was the applicant dismissed by the respondent on 29 March 2006; and
- Did the applicant contribute to the circumstances which gave rise to the personal grievance; and
- What, if any, remedies are due to the applicant?

The test

[20] 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 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

[21] The Authority was assisted by evidence from the applicant personally and from Ms Debbie Lyon. For the respondent, both Mr and Mrs Clarke gave evidence. In support of the respondent's position brief signed statements were received from Ms Yvonne Milne, the team leader at the diner, and from the cook whose actions were the subject of the applicant's complaint.

[22] The Authority thanks those who assisted and also records its appreciation of the efforts of counsel at the meeting and for their legal submissions.

Discussion and analysis

The harassment complaint

[23] Considering the evidence in its totality, it is clear that the matter was taken up with the cook in question, and that Mrs Clarke wrote to Ms Scoles about the outcome on 21 January 2006. The applicant says she did not receive it.

[24] I think it highly unlikely that Mrs Clarke wrote a brief letter to Ms Scoles and then failed to send it. However, it is possible. It is also possible that the letter was posted but not delivered. What is certain is that upon receiving the complaint, the respondent acted promptly to address it with the cook in question. In answer to a question from the Authority, Ms Clarke said she had not discussed the move from the diner to the motels in the context of the complaint made on that same day as the applicant moved to the motels. Mrs Clarke did say that she saw the move as assisting the applicant once they had addressed the complaint and so recorded that in her letter.

[25] I think that while Ms Scoles regrettably may not have received the letter, the respondent did address the issue appropriately and as required under the Act. However, by not confirming with the applicant that the matter had been dealt with and that she had received the letter, the respondent left Ms Scoles with a view that nothing had in fact been done.

Change of hours

[26] The evidence from the applicant was far from reassuring on this issue. Ms Scoles says,

*The job cleaning the motels was only 24 hours a week but I felt I had no option but to go along with what Myra was **suggesting**. They've said that I was working 27 ½ hours **and may be that's correct**, but my recollection is that on the roster is [sic] **was about 5 hours a day** and that I was rostered to work five days a week. I just did however long it took to clean the motels, but it was never going to take as long as the 30 hours that I would have been working in the tearooms.*

[27] Mrs Clarke's evidence was that the 30 hours was agreed to by the applicant, that she was to have those hours in the motels predominantly, but would make up the balance in light duties in the diner. This witness said that the only reason that Ms Scoles worked fewer hours was when she was ill and unable to work the full 30.

[28] I have no evidence before me which supports there was a unilateral change to the applicant's hours.

Unjustified dismissal

[29] The primary issue to be analysed is whether the applicant was sent away from the workplace on 29 March 2006, or whether she refused to follow the instruction of Mr Clarke to go back to work and chose to go home, thereby abandoning her employment.

[30] The employment agreement is of some assistance here.

16. Abandonment of employment

If the employee is absent from work without notice and is unable to be contacted by the employer for three continuous working days, the employee shall be deemed to have abandoned and terminated this employment unless acceptable reason for the absence can be given.

[31] From the evidence of the respondent it appears that it was the refusal to return to work that is the crux. Mrs Clarke's evidence was,

She was advised if she did not want to work she might as well go home. Cindy refused to carry out proper work instructions and deliberately chose to go home. This in my view was serious misconduct.

[32] Ms Scoles told the Authority,

I don't think Richard was even listening (to the staff's complaints) and that he just wanted us to go back to work as if nothing was wrong. He then said that we couldn't sit out there and do nothing and we may as well go home. I asked him if he was telling us to go home and he said yes.

[33] Ms Lyon, who was also present,

*He (Mr Clarke) just wasn't interested in any of it and just told Cindy to get back to work. **We didn't do anything immediately** and then he said we couldn't sit out there and do nothing so we may as well go home. When Cindy asked him if he was telling her to go home, **he definitely said yes**. I am in no doubt about that at all.*

[34] I cannot see how these events fall under the agreement's abandonment provisions. I say this because the employer, if it was to rely on this clause, needed to investigate the circumstances of the alleged abandonment. It did not do this. Mrs Clarke's evidence and what she said to Ms Scoles on the telephone was,

She asked if she had been sacked. I reply, no one sacked you, you walked off and sacked yourself.

[35] From this it is clear that on the evening of the incident, the respondent was relying on Ms Scoles walking rather than the later raised refusal to obey a lawful instruction.

[36] Ms Scoles said,

I was feeling pretty frustrated that whatever happened they just wanted us to work and didn't really care if we had a problem with something. I did need to get away to calm down and Richard knew that. I wouldn't have expected to get paid for the rest of my hours that day but I certainly expected to go back to work the next day.

[37] In such circumstances, a fair and reasonable employer would have contacted the employee, or in the event that the employee contacted the employer first, would have arranged to have convened an investigation to determine why the applicant left the premises and to hear her side of the story before considering any penalty that might have been able to be levied.

The resignation

[38] The applicant's evidence on this matter is *its true that I did say before Easter that I was thinking of leaving*. The notes of the meeting on 16 March 2006 make it clear that the exchange was far more definitive than that. I am satisfied that the applicant verbally handed her resignation to Mrs Clarke and soon after announced that resignation to staff in the kitchen. The evidence of Yvonne Milne is that

On 16 March 2006 I was ... in the kitchen when Cindy told everyone in there that she had resigned and was leaving before Easter.

The next day Cindy told me that she wanted her job back.

[39] Looking first at the verbal resignation, it is clear that the terms of the resignation were quite specific. The applicant approached Mrs Clarke, advised her that she was giving her notice of departure, specified the date on which she would work her last day and also gave the reasons for her resignation. Obviously this was not done in the heat of the moment, nor without some consideration. In those circumstances I find it difficult to see how the applicant could classify the exchange as her merely expressing an intention to resign. The fact that the resignation was not committed to writing is not relevant in these circumstances and the finality of the applicant's decision was communicated to other staff immediately following her meeting with Mrs Clarke. In such circumstances there was no obligation on the part of an employer to consent to a withdrawal of a considered verbal resignation.

The Determination

[40] Returning to the issues set out above:

- I find the respondent did not reduce the applicant's hours of work unilaterally from 30 hours a week.

- I find the respondent did address the applicant's complaint of sexual harassment.
- I find that it failed to ensure that the applicant received the letter detailing the outcome of the respondent's inquiry. This disadvantaged Ms Scoles to the extent that she remained under the misapprehension that her complaint had been ignored. I find the disadvantage falls short of being unjustifiable.
- I find the tendered verbal resignation on 16 March 2006 was valid. Further, I find that it was open to the respondent to decline the applicant's request to withdraw it.
- I find the applicant was unjustifiably dismissed on 29 March 2006.
- I find the applicant contributed to the events which resulted in her dismissal, specifically her delaying her return to work when directed. I assess her contribution at 20%.

Remedies

[41] Given the resignation which the respondent declined to allow Ms Scoles to rescind, the applicant's loss of remuneration was limited for the period up to 4 April 2006. Ms Scoles was paid until 4 April 2006 and her holiday pay was also given to her at that time. I therefore dismiss her claim for loss of remuneration.

[42] The applicant sought compensation of \$3,000 for her humiliation. While there was little evidence put before the Authority to establish the extent of the effects of the dismissal on Ms Scoles, I accept that the loss of her employment with the birth of her baby approaching caused her considerable hurt. I order the respondent to pay the applicant the sum of \$3,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000, less 20% for contribution.

Costs

[43] Costs are reserved. The parties are to attempt to resolve this matter between themselves. If that cannot be achieved, Ms Guthrie is to lodge and serve a

memorandum 30 days from the date of issue of this determination. Ms Kereru has a further 14 days in which to lodge and serve her memorandum in reply.

Paul Montgomery
Member of the Employment Relations Authority