

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 153/08
5116914

BETWEEN SANDRA McCULLOUGH
 Applicant

AND OTAGO SHEETMETAL AND
 ENGINEERING LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Janet Copeland, Counsel for Applicant
 Jen Wilson, Counsel for Respondent

Investigation Meeting: 6 August 2008 at Dunedin

Determination: 14 October 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms McCullough) was employed by the respondent (Otago Sheetmetal) as an office administrator and she started work with Otago Sheetmetal on 23 January 2006. She was engaged to work 28 hours per week.

[2] Ms McCullough acknowledges some initial performance concerns of Otago Sheetmetal which were dealt with consensually, but she says that as time went on, she became increasingly anxious about the attitude of Otago Sheetmetal's foreman, Mr Hurring, who she said had *taken a dislike* to her.

[3] Ms McCullough says that she raised this issue with Otago Sheetmetal's manager, Mr Ian Moran, but the matter was not rectified.

[4] Ms McCullough formed the view that she was losing her position because there were aspects of her job which she believed were being allocated to another person in the office.

[5] Ms McCullough thought that she was being told to take annual leave over the Christmas period without pay and this caused her further stress. She was due to return to work on 21 January 2008 after the Christmas break but concluded that Otago Sheetmetal had still not considered a letter written by her which she says led to her tendering her resignation on 29 January 2008. That resignation, Ms McCullough contended, was forced on her by Otago Sheetmetal's failure to address her concerns.

[6] Ms McCullough contends that she suffered disadvantage as a consequence of unjustified actions of her employer, that she was constructively dismissed from her employment, and that Otago Sheetmetal failed to provide her with a safe working environment and breached its obligation of good faith.

[7] Otago Sheetmetal resists all of those allegations and says that at all times Ms McCullough was fairly and properly treated, that all of the allegations which she brought to the attention of the employer were properly and carefully considered, and that her fundamental contentions were in fact baseless.

Issues

[8] It will be helpful if the Authority analyses the various factual issues which ground Ms McCullough's claim. To that end, I intend to consider the following questions:

- (a) Was Ms McCullough bullied?
- (b) Did Ms McCullough ask for help?
- (c) Did Otago Sheetmetal deal properly with Ms McCullough's complaint?
- (d) Was Ms McCullough denied annual leave?
- (e) What happened about Ms McCullough's 21 December 2007 letter?

Was Ms McCullough bullied?

[9] It will be recalled that Ms McCullough's central complaint under this head was that she was bullied by Otago Sheetmetal's foreman, Mr Hurring

[10] Ms McCullough, in her evidence before the Authority, identified a number of examples of alleged bullying by Mr Hurring. She says that Mr Hurring would generally speak to her *in a rude manner*, that Mr Hurring would be unhelpful in responding to appropriate work inquiries that Ms McCullough had to make, that Mr Hurring referred to her as *the dragon*, that Mr Hurring called her *useless*, and that on one occasion Mr Hurring said that he would *plant me one* or words to that effect. Ms McCullough says that on several occasions she heard Mr Hurring tell other staff that she would not last long in employment, or words to that effect.

[11] Finally, Ms McCullough refers to an occasion when she alleges that her son rang up to speak with her but Mr Hurring refused to allow her to speak with her son.

[12] Mr Hurring flatly denies bullying Ms McCullough or treating her badly. He admits that he had a poor relationship with her but says that was because she was incompetent and unfocused, preferring to gossip about social matters rather than dealing appropriately with her work. Mr Hurring also said that Ms McCullough was completely unwilling to take direction from anyone else in the business, notwithstanding the fact that she made regular mistakes.

[13] Mr Hurring talks in his evidence about Ms McCullough's *constant queries about my home and social life* as being *intrusive*. He went on to refer particularly to an episode where Ms McCullough allegedly said that she could not understand why Mr Hurring's wife stayed with him.

[14] It was clear from Mr Hurring's evidence before the Authority that he was passionately committed to the business of the employer, but equally clear and I find as a fact that he was completely intolerant of people he regarded as being less able than they ought to be. Clearly Mr Hurring had very high standards, but there is ample evidence before the Authority to confirm the view that Mr Hurring would not suffer fools at all, and that he would say precisely what he thought if given any opportunity.

[15] Two younger staff members, one a continuing staff member and one a younger staff member who worked at the business during university holidays, both gave

evidence of the difficulties of dealing with Mr Hurring and I accept that evidence as truthful. I was impressed with the candour of both those witnesses and had no reason to doubt the veracity of what they told me. One of them, Mr Colbert, confirmed that Mr Hurring referred to Ms McCullough as *the dragon* and also confirmed that he had seen instances of Mr Hurring *telling off* Ms McCullough. Mr Colbert said that Mr Hurring *had no idea how to tell you you had not done something well*. Mr Colbert also said that Mr Hurring used to pick on people on the staff and that, for a time, he (Mr Colbert) was *Mr Hurring's victim of choice*.

[16] The other witness who gave evidence before me was Mr Hoffman. He was an apprentice in light fabrication in Otago Sheetmetal and he was most anxious that, in giving his evidence before the Authority, he would be setting himself up to be victimised by Mr Hurring. Mr Hoffman also confirmed Mr Colbert's view that Mr Hurring *picked on people*. Mr Hoffman said that Mr Hurring regularly raised his voice, that Mr Hurring's swearing at people was commonplace, and that on one occasion Mr Hoffman said Mr Hurring called him *a stupid fucking idiot*.

[17] Mr Hoffman also saw the tail end of a conversation between Mr Hurring and Ms McCullough in which Mr Hurring was aggressive towards Ms McCullough and swore at her. He says Mr Hurring called Ms McCullough *useless* and referred to her as *the dragon*.

[18] Mr Hoffman said that Mr Hurring would describe Ms McCullough as useless to anyone who was listening. Mr Hoffman described Mr Hurring as *a bully* and agreed with Mr Colbert that Mr Hurring tended to have one particular person that he would *ride*. Mr Hoffman said that Mr Hurring's behaviour to staff was *unreasonable* and that staff members had left because of him.

[19] He also told me that in his own case, he had had to see his lawyer about Mr Hurring's bullying behaviour which only ceased after Mr Hoffman's lawyer wrote to Otago Sheetmetal to complain about the way Mr Hoffman was being treated by Mr Hurring.

[20] I am satisfied on the balance of probabilities that, despite Mr Hurring's denials, he did in fact bully Ms McCullough. I was impressed with Mr Hurring's commitment to his work and devotion to his employer, but all the evidence before me suggests that his people skills are poor indeed. I was impressed by the evidence of

Mr Colbert and Mr Hoffman, both of whom gave evidence of having been victims of Mr Hurring's bullying behaviour. Neither gave their evidence with any great enthusiasm, but in my view neither had any reason to embellish their testimony, particularly as in Mr Hoffman's case, his was a continuing employment relationship with the respondent employer.

[21] Both Mr Colbert and Mr Hoffman saw examples of Mr Hurring swearing at Ms McCullough or telling her off, both confirmed Mr Hurring called her *the dragon* and, critically, both referred to Mr Hurring's selection of a person to *ride* or bully.

[22] I am satisfied then that Mr Hurring is indeed a bully and I accept the evidence from Ms McCullough's witnesses that she herself was a particular victim of Mr Hurring's bullying activities.

Did Ms McCullough ask for help?

[23] Ms McCullough's evidence is that she raised Mr Hurring's behaviour with Otago Sheetmetal (Mr Moran) *on numerous occasions*. When pushed about that in giving her oral evidence before the Authority, Ms McCullough was adamant that she had raised the matter with Mr Moran on numerous occasions but she confirmed that she did not use the word *bullying* in any of those communications with Mr Moran.

[24] Ms McCullough's evidence is that, in order to crystallise the matter, she wrote a letter to Mr Moran dated 21 August 2007 in which she set out in writing her concern about Mr Hurring's behaviour. The letter refers specifically to Mr Hurring's *tone of voice*, a threat of physical violence and a reference by Mr Hurring that Ms McCullough was *useless*. Ms McCullough concludes by saying that the matter needs *to be rectified immediately*.

[25] The letter could not be clearer, but the difficulty with it is that Mr Moran says that he never received it. Ms McCullough doubts the veracity of that evidence because she placed it in the place where Mr Moran's correspondence would always go, but nonetheless Mr Moran was steadfast in his view that he did not see the letter until the present proceedings were commenced. Mr Moran was seriously ill and absent from the workplace at about this time, so he may not have seen the letter.

[26] Ms McCullough was anxious about putting too much pressure on Mr Moran as he had been absent with his serious health issue which had necessitated surgery.

Mr Moran returned to the workplace after his surgery but worked reduced hours for some time.

[27] Ms McCullough's evidence was that she was frustrated about the lack of response to her letter. Her explanation for not following the matter up promptly with Mr Moran was her anxiety about his health. I am satisfied that the evidence discloses that Ms McCullough was not particularly good at managing conflicts and her failure to assertively follow up her correspondence is an example of this behaviour pattern.

[28] In any event, Ms McCullough says that she sought a meeting with Mr Moran and that this meeting finally took place on 17 October 2007. Mr Moran's evidence, on the other hand, is that he called a meeting to raise with Ms McCullough an error that she had made in relation to a particular account.

[29] Who called the meeting is neither here nor there because both Mr Moran and Ms McCullough agree that Ms McCullough raised the question of Mr Hurring's behaviour and Mr Moran undertook to investigate it. However, there is dispute between the parties as to just what was being complained about.

[30] Mr Moran talked in his written brief about being told by Ms McCullough that Mr Hurring had *abused and threatened* her. Ms McCullough says she never used the word *bullying* but that she described what was happening to her. Counsel for Otago Sheetmetal sought to limit the extent of Mr Moran's enquiries, on the basis that Mr Moran had only been given notice by Ms McCullough of the threatened physical assault by Mr Hurring and that was all Mr Moran enquired about. I do not accept that approach. I asked Mr Moran what he enquired about. His response was that he asked Mr Hurring if he was *bullying* Ms McCullough and Mr Hurring denied it. Ms Jones, the contractor and Mr Moran himself had seen no evidence of bullying behaviour either.

[31] Mr Moran says that he told Ms McCullough about the results of his inquiries but Ms McCullough has no recollection of that happening. I prefer Ms McCullough's evidence on this point; Mr Moran told me that he did not like conflict and as a witness he presented as a very soft spoken man so I incline to the view that if he went back to Ms McCullough at all, his message may not have been clearly expressed.

[32] It follows from the foregoing analysis that I am absolutely satisfied that Ms McCullough did everything that she reasonably could have to seek the help of her

employer in resolving the bullying issue. It is unfortunate that Mr Moran did not receive (or did not respond to) Ms McCullough's letter of 21 August 2007, but nothing turns on that failure. It is common ground that Ms McCullough raised the matter with Mr Moran when the pair met on 17 October 2007 and I am satisfied that Mr Moran knew perfectly well what he was investigating particularly because he used the word *bullying* himself in answering one of my questions at the investigation meeting.

Did Otago Sheetmetal deal properly with Ms McCullough's complaint?

[33] As I have just recited, Mr Moran's evidence is that, when he was apprised of Ms McCullough's complaint, he spoke to Mr Hurring and to Ms Jones who, although a contractor, worked in the business from time to time and might have seen some of the behaviour complained of. Mr Hurring denied the allegation and Ms Jones said that she had not seen anything untoward either. Mr Moran himself gave evidence that he had never seen anything out of the ordinary himself.

[34] The question remains whether that inquiry is sufficient to discharge the employer's obligation. I have already found as a fact that Mr Hurring was indeed a bully, and that the evidence for that fact is actually quite widespread. I would have thought Mr Moran might already have been on notice that there were difficulties with Mr Hurring's interpersonal skills, given the pretty graphic evidence provided both by Mr Hoffman and Mr Colbert.

[35] It may be that Mr Moran was disinclined to think ill of a foreman who was a very skilled and able tradesman and who was absolutely committed to the business, but those facts of themselves do not prevent Mr Hurring also being guilty of quite significant interpersonal excesses.

[36] On balance, I think it more rather than less likely that Mr Moran ought to have been on notice about Mr Hurring's behaviour from previous complaints brought by other staff.

[37] While Mr Hoffman's particular problem with Mr Hurring would have post-dated Ms McCullough's employment, Mr Colbert's employment ceased in February 2007 and his evidence was similar to Mr Hoffman's in respect of Mr Hurring's behaviour. Further Mr Hoffman gave evidence (which was not challenged) that some staff had left their employment because of Mr Hurring's behaviour.

[38] I am satisfied then, on the balance of probabilities, that Mr Moran either knew or ought to have known that Mr Hurring created interpersonal difficulties with his behaviour patterns because the unchallenged evidence of the applicant was that there were previous unrelated examples of Mr Hurring doing the same kind of thing to other staff. It follows that when Mr Moran was required to investigate Ms McCullough's complaint about being bullied by Mr Hurring, he ought to have done more than simply put to Mr Hurring that there was a complaint and accept Mr Hurring's denial of wrongdoing at face value.

[39] Indeed, one would have expected that Mr Moran would have been much more assertive in trying to uncover just what was going on and what he could do to make his workplace safer for the people who worked there. Plainly, on the evidence I heard, this was not an isolated example of bullying involving two work mates who did not get on. This was an example of bullying in a particular workplace where there had been previous examples of bullying inflicted on other employees by the same perpetrator.

[40] I find that Mr Moran must have known that there was something amiss with Mr Hurring's behaviour, but sadly I fear that he may have been unreasonably influenced by Mr Hurring's obvious talent as a tradesman and by Ms McCullough's equally obvious difficulties in delivering quality outcomes in her work.

[41] However, the fact that Ms McCullough was having some difficulty in providing the sort of outcomes that the employer sought is no excuse for treating her badly and failing to provide her with a safe workplace. No one should be confronted by bullying in their work environment.

[42] I am encouraged in the view that I have reached by Mr Moran's own admission that he had spoken to Mr Hurring earlier about the latter's references to Ms McCullough as *the dragon*. Further, Mr Hoffman's evidence that Mr Hurring would tell anybody that would listen that Ms McCullough was *useless* and that this kind of conversation would regularly take place in the smoko room can hardly have been overlooked by Mr Moran as the manager.

[43] I conclude then that Otago Sheetmetal did not deal properly with Ms McCullough's complaint, that its investigation was fatally flawed and that in

particular Mr Moran knew or ought to have known that Mr Hurring's interpersonal skills were gravely deficient.

Was Ms McCullough denied paid annual leave?

[44] Ms McCullough is adamant that Mr Moran told her that the firm would close for the Christmas recess and that she would be required to take time off work over that period without being paid, because she had no annual leave entitlement.

[45] Obviously, Ms McCullough was absolutely convinced that she was not to be paid over that period because it is a matter that she raised with her lawyer, Ms Brazil. The irony is that by the time she raised the matter with Ms Brazil she had already been paid her holiday pay. The evidence is unequivocal that she was paid her holiday pay in the usual way by direct credit to her account on 19 December 2007.

[46] It follows that whatever Ms McCullough thought was the position, there can be no doubt that she was paid her holiday pay in accordance with Otago Sheetmetal's statutory obligation.

What happened about Ms McCullough's 21 December 2007 letter?

[47] Ms McCullough went to see Ms Brazil, her lawyer, in December 2007, driven to do so it seems partly because of her mistaken belief about not being paid holiday pay and partly because of the failure to resolve the bullying allegation which she had made against Mr Hurring.

[48] The 21 December 2007 letter, I am satisfied, was written immediately after Ms McCullough and Mr Moran had met together on 17 October 2007. Indeed, the file copy that was made available to the Authority is dated 24 October 2007 and that date has been crossed out and, in handwriting, amended to 21 December 2007.

[49] The evidence the Authority heard was that Ms McCullough had prepared the letter immediately after the meeting in October and, to some extent, in response to a raft of complaints which Mr Moran made against Ms McCullough at that meeting.

[50] Mr Moran's evidence is full of examples of Ms McCullough's inadequacies in the workplace. I accept that evidence as truthful, but wonder where it takes us because it is plain that Mr Moran made no attempt whatever to have Ms McCullough address these deficiencies save for the single meeting on 17 October 2007. There is

absolutely no evidence before the Authority of any other occasion on which Mr Moran has given Ms McCullough a proper opportunity to remedy her deficiencies. It was clear to me in hearing the evidence of the parties that Ms McCullough was genuinely bewildered by the plethora of complaints about her work from her employer and, in my considered view, that bewilderment was a function of the fact that she had not had any proper opportunity to be advised of these deficiencies and to have the opportunity to put them right.

[51] In those circumstances, the fact that Ms McCullough was deficient in the performance of her duties is, I find, not relevant to the present employment relationship problem. What is relevant is Ms McCullough's complaint to the employer about bullying by Mr Hurring which, as I have already made clear, I do not think Otago Sheetmetal handled properly in the early stages.

[52] What I must now do is consider whether Otago Sheetmetal dealt appropriately with the 21 December 2007 letter sent to it by Ms McCullough. Ms McCullough's letter, as well as responding to the allegations that Mr Moran made about her work, contains a passionate denunciation of the employer's inaction in relation to her safety in the workplace. For example, Ms McCullough says:

The environment that I am working in is becoming more and more untenable. ... You have not only continued to treat me terribly but you are now hardly acknowledging my existence. ... It now seems that you are getting rid of me and I can hardly hold it together. Something has to be done about all of this as I don't believe I can handle much more, either from yourself or your foreman. I may not be able to return on January 21 2008 due to stress caused by the workplace. ... In the meantime I need desperately some assurance from you that measures will be taken to improve my working environment in the immediate future or I will have no other choice than to resign due to an inability to cope with the matters raised in this letter. ...

[53] The meaning of those phrases that I have extracted from Ms McCullough's letter and others like them, could not be clearer. The letter makes absolutely clear what she is feeling and how vulnerable she feels in the face of what she perceives to be the inaction of the employer.

[54] The evidence is clear that the letter was given to Mr Moran on the last day of the working year in 2007 and at least on this occasion, he did not deny receiving it.

[55] However, Mr Moran's evidence is that he did not read the letter until 7 January 2008. I accept that Mr Moran sought advice on Ms McCullough's letter,

but that, because of the time of year, that advice was less timely than it might otherwise have been.

[56] Ms McCullough had her lawyer contact Mr Moran on a number of occasions in January, starting with a call to Mr Moran on 17 January 2008 (that is, 10 days after Mr Moran's evidence is that he first read the letter). According to Ms McCullough's lawyer who gave evidence before me, Mr Moran undertook to have a response to the letter by the end of that week. As 17 January was a Thursday, Mr Moran's undertaking may have been optimistic. In any event, Ms McCullough's lawyer rang him again on the Friday of the following week, that is effectively eight days later on 25 January, when there was still no response.

[57] Ms McCullough's lawyer indicated in her evidence that Mr Moran then said that he had put Ms McCullough's letter in the *too hard basket* and he then promised to have a response by Monday, 28 January 2008. Mr Moran, in his evidence, vehemently denies that he said that he had put Ms McCullough's letter in the *too hard basket*. Whatever he said, the delay in response was, by this stage, I hold completely unreasonable, notwithstanding the time of year. In the course of business, whatever the season, it seems to me reasonable to expect a response to a letter within four weeks. This letter was clearly a cry for help and it cannot be the action of a fair and reasonable employer to defer response to such a letter for the period of time Mr Moran delayed.

[58] There was no response from Mr Moran by the date he had indicated (28 January 2008), and by this stage, Ms McCullough's lawyer had been advised that the Otago Southland Employers' Association was acting for Mr Moran and so she rang the Otago Southland Employers' Association on Tuesday, 29 January 2008 asking that it call her. By the time the responding call was received later that day, Ms McCullough had resigned her employment. The Otago Southland Employers' Association sought to explain the delay by indicating that a letter in response was coming and would be available shortly.

[59] It is not for the advocate to cover up the unreasonable delay of the employer. It is the employer's obligation to respond to employees' requests, however difficult or distasteful they may seem to be. That is what a good and fair employer does, and what Otago Sheetmetal absolutely failed to do in this case.

Determination

[60] I am satisfied Ms McCullough has suffered disadvantage as a consequence of unjustified actions of Otago Sheetmetal, first by the unchecked bullying by the foreman and secondly by the failure of Otago Sheetmetal to deal properly with her complaint and take steps to resolve it.

[61] Furthermore, I consider Ms McCullough has been constructively dismissed from her employment in that she has raised the unresolved bullying matter again by letter, indicated clearly the impact that is having on her and in particular, her ability to continue working for the employer and despite the receipt of that letter Otago Sheetmetal failed to respond at all in a timely fashion. In my opinion, the action of the employer is as clear a breach of duty causing the foreseeable consequence of a forced resignation as it is possible to imagine.

[62] Ms McCullough's letter of 21 December 2007 sets out in the plainest terms, the effect of the bullying on her wellbeing and her ability to continue in the workplace. Ms McCullough makes clear that she may not be able to return to work after the holiday break if the problem has not been addressed. Despite the receipt of a letter I have already described as a cry for help, Otago Sheetmetal simply did not respond. I hold that, in not dealing with the matter promptly, Otago Sheetmetal breached their duty to Ms McCullough and her resignation in those circumstances was absolutely predictable. Indeed, she foreshadowed that action herself in her unanswered letter.

[63] Before turning to consider remedies, it is appropriate that I assess whether Ms McCullough's behaviour contributed in any way to the circumstances giving rise to either personal grievance. I do not think there is any evidence that Ms McCullough contributed to her own misfortunes. She clearly was the victim of bullying and, in my judgement, nothing that she did entitled the response which she seemed to attract in that regard. There are issues, I accept, about Ms McCullough's competence and standard of work. I accept the employer's evidence in that regard. However, I am satisfied on the evidence I heard that none of those matters were properly put to Ms McCullough and she was given no reasonable opportunity to make good on her defaults. That being the position, those issues can have no bearing on the present grievances.

[64] In relation to the constructive dismissal, in my judgement, Ms McCullough is the victim of the clearest kind of constructive dismissal where she had again raised an issue which was causing her significant unhappiness in the workplace and again the employer failed absolutely to deal with the matter in a timely and professional fashion. None of that can be sheeted home to Ms McCullough in terms of contribution.

[65] Ms McCullough seeks a penalty for breaches of both s 4 and s 134(1) of the Act for breaching good faith and failing to provide a safe workplace. The law on penalties is clear. A penalty is imposed to punish wrongdoing. The Authority must distinguish inadvertence from flagrancy. I am satisfied there has been no flagrancy and the breaches are inadvertent. I do not think Otago Sheetmetal has been deliberately wrongful in its behaviour and accordingly I decline to award penalties.

[66] Ms McCullough also seeks a significant contribution to lost wages. I think this is a case where such a step is justified. The evidence of the loss of confidence Ms McCullough suffered after the collapse of her employment relationship with Otago Sheetmetal is graphic. She has suffered significant financial loss as a consequence of that loss of confidence and I attribute that loss of confidence directly to the failed employment relationship with Otago Sheetmetal and in particular their failure to deal with her final communication in a timely way.

[67] I direct that Otago Sheetmetal is to pay to Ms McCullough as remedies for her grievances the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$7,500 for the disadvantage grievance;
- (b) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$12,000 for the unjustified dismissal;
- (c) A contribution to lost wages in the sum of \$13,000 gross;

Costs

[68] Costs are reserved.

James Crichton
Member of the Employment Relations Authority