

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 43/08  
5077243

BETWEEN                      SHEREE RUSBATCH  
   Applicant  
  
AND                              CORSTORPHINE      HOUSE  
   SERVICES LIMITED  
   Respondent

Member of Authority:      Paul Montgomery  
  
Representatives:              Quentin Stratford, Counsel for Applicant  
   Nico Francken, Advocate for Respondent  
  
Investigation Meeting:      29 November 2007 at Dunedin  
  
Determination:                17 April 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      The applicant originally claimed she was constructively dismissed by the respondent whose principals pursued a course of conduct with the deliberate intention of having her resign her position. This was later realigned to a claim of breach of duty on the part of the respondent giving rise to her resignation.

[2]      Ms Rusbatch seeks reimbursement of lost remuneration, compensation for hurt and humiliation in the sum of \$7,500, a penalty of up to \$10,000 in respect of breaches of implied contractual terms, a penalty of up to \$10,000 for an alleged breach of s.4 and/or s.63A(2) of the Employment Relations Act 2000, and costs.

[3]      The respondent denies it breached its duty to the applicant and declines to grant Ms Rusbatch the remedies she seeks.

[4] The respondent stoutly resisted attempting to resolve the matter in mediation so the matter was dealt with in the first instance by the Authority.

**What caused the problem?**

[5] The respondent operates a small, upmarket boutique hotel adjacent to Dunedin city. The applicant began employment with the Franckens in 2002, her principal task being that of a housekeeper. The parties seemed to get along harmoniously and in or about October 2004 Ms Rusbach was asked to take on the role of receptionist/assistant at the hotel. A letter dated 14 December 2005 from Mrs Irina Francken confirms this appointment commencing on 5 October 2004. The job description outlines the duties as:

*duties include answering the phone, passing incoming calls to other people, taking restaurant bookings (and other bookings as your skill level increases) meeting people at the door, assisting with checkins and meetings, assisting with stock control, some housekeeping duties including turn-down service, administration support to the house and whatever other related duties.*

[6] Despite the late formalising of the arrangement, it is clear that Ms Rusbach agreed to the proposal and things seemed to remain harmonious as she eased into the new role.

[7] The applicant said that she worked regular hours Monday to Friday between 9.30am and 5.30pm. However, she would work the occasional Saturday when she was required to fill in for absent staff. She said she had certainly developed a regular pattern of hours that lasted for almost two years.

[8] An apparent problem arose when in late June 2006 the applicant took five days leave. Upon her return she was advised by another staff member that in her absence another staff member was being trained to do stock ordering, a task the applicant had undertaken regularly on most Monday mornings for the previous two years.

[9] Upon her return to work, she also discovered that a new roster had been put in place which had the applicant working night service on Friday and Saturday and not working on Monday. Her start times for Tuesday and Thursday had also been adjusted.

[10] Her evidence was that nobody had discussed these matters with her prior to her going on leave and she was very surprised to discover them on her return.

[11] On the afternoon of 28 June 2006, the House Manager, Teressa Davies, spoke with the applicant about the changes. The applicant says that first of all she was told that Mr and Mrs Francken were happy with her work but that while the applicant had been on leave and Ms Davies was carrying out her tasks, she found the tasks boring and took the view that Ms Rusbatch had similar difficulties in the role and it was this that led to the change in Ms Rusbatch's hours. The applicant says that at the end of the meeting, Ms Davies told her that both Mr and Mrs Francken were not happy with her work which she says left her somewhat confused. She said she made it clear to Ms Davies that she did not like the changes or agree to them, to which she says Ms Davies replied that she had no choice and would have to live with it.

[12] Following this meeting with Ms Davies, the applicant wrote a letter to the respondent on 29 June 2006. Essentially, it covers off the issues referred to immediately above and clearly ends with the statement *I do not agree to these new conditions as being part of my employment agreement*. As a result of this letter, a meeting was called and the applicant's father attended with Ms Rusbatch as a support person. That meeting took place on Friday, 30 June 2006. However, the applicant says very little was discussed about her concerns regarding her change of hours and duties and that the meeting focused mainly on the respondent wanting to know how she had found out about another staff member being trained for the ordering role. She says they also said that they did not regard her as a team player. However, she says nothing was said at the meeting about any sort of warning. The applicant also says there was very little discussion regarding performance issues and that Ms Davies was taking notes throughout the meeting.

[13] On 2 July 2006, the respondent, through Irina Francken, provided a memorandum to the applicant in respect of her letter of 29 June and the meeting of 30 June 2006. There is little point in setting the memorandum out in full, but its primary focus is on not looking back but on trying to find solutions to resolve any difficulties in the relationships and misunderstandings between all involved for the future. Further, it reinforces the need for the applicant to understand that she now reports directly to Ms Davies and that any difficulties she is experiencing are to be brought to Ms Davies' attention. The letter finishes by saying:

*As I mentioned to you on many occasions, small businesses like ours can afford your position only if you combine your receptionist/assistant role with housekeeping and waiting duties.*

*From now on, I insist that you do your utmost to re-establish your position in the team. You will only succeed in this if you act like a real team member, assisting others as and when they need you. Naturally, your first responsibilities are the answering of the phone, making bookings and updating the various websites where we are listed.*

*Teressa is the guest services manager and, in the end, she has the overall view to decide the priorities. If you think you have no time when she asks you then you should say so. However, in the end it is still her decision what needs to be done first.*

*This memorandum should be regarded as a warning.*

*Naturally, both Nico and I hope that you will mend you [sic] ways and be seen to be part of the team from now on.*

[14] Ms Rusbatch, on receipt of the memorandum, says she immediately told Mrs Francken that this was not a true record of what had taken place at the meeting. She says *it wasn't even close. I certainly do not recall having been given a warning.* She says that Mrs Francken told her that the memo was not an actual record of her notes and the applicant asked to see the notes taken by Ms Davies but this request was declined by Mrs Francken. The applicant goes on to say that while she was not happy with the change that had been forced on her, *I tried to get on with my job and work in as best I could. I did not like making trouble and my attempts to address my concerns had just been shrugged off.*

[15] On Friday, 11 August 2006, the applicant felt unwell at work and left early advising that she would not be coming in the following day. She says she telephoned at around 11.30 the following morning to confirm her absence and spoke with Ms Davies who advised her that she believed a meeting would be needed to discuss this matter. On returning to work on the Tuesday as she was rostered off from Monday, she discovered an email from Ms Davies. The email is dated Monday, August 14 2006 at 5.54pm. It reads:

*Sheree*

*As discussed I think we need to have a meeting. Please make time in your schedule for 1730 Tuesday 15 August.*

*Many thanks,  
Teressa*

[16] In effect, as the applicant observed, she was unable to see this email until the day of the scheduled meeting. She took the view that neither her conversation with Ms Davies on the Saturday or the email indicated in any way that the meeting was to be of a disciplinary nature and as a result did not believe she needed support.

[17] The meeting was attended by the applicant, Mr Francken and Ms Davies. At the outset of the meeting, Mr Francken handed the applicant an envelope enclosing a letter dated 2006. The letter covers five typed pages on the respondent's letterhead and begins:

*Dear Sheree,*

*Re: Final warning*

[18] At the beginning the letter sets out five bullet points:

- *During the last few weeks, you have been asked by Nico to carry out certain jobs but you have not done so, claiming you were too busy. This included changing our prices on a website, amending the presentation and a number of other examples.*
- *We have asked you to work as a team supporting other team members as and when necessary: you consistently avoid these duties.*
- *You clearly show in words and attitude that you are not prepared to work outside the 9-5 (Monday to Friday) hours.*
- *You do not show any desire to provide our guests with proper service.*
- *Our guest services manager finds it impossible to work with you.*

[19] The letter goes on to detail examples of alleged poor performance, detailing some nine or 10 alleged instances of inadequate performance.

[20] The letter then goes on to state what the respondent expects from the applicant in the future.

- *You will work as the business requires: Saturdays and Sundays if need be. No more discussions and questions: whether you want to or not you will come back to work as rostered clearly as the business requires. The roster is made by Teresa.*
- *You will work more than 8 to 9 hours as need to be, but not more than 40-42 hours/week on average. This means you will work some weeks more and some weeks less. We can't promise you two days together as days off; the business may not allow it. We certainly will try to do our best if it can be done.*
- *The level of your performance has to be according of your job description and Teresa will train you and supervise you all the*

*time. This, I think, will give you the opportunity to improve your level of performance.*

- *I suggest that after four weeks Teresa, you and me have to talk together about your achievements.*

*This letter should be regarded as a final warning. If you do not adhere to the above then we will have no option but to terminate the employment relationship with you.*

*Finally, as before, we agree to discuss this matter with you in the presence of a person designated by you to support you in this.*

*Yours faithfully,  
Corstorphine House Services Limited  
Sgd Irina M. Francken  
Director*

[21] There was no dispute among the three present at the meeting that this letter was handed to Ms Rusbatch at the beginning and Ms Davies' evidence was *Nico gave the applicant the letter and suggested that she read the letter afterwards because we did not want to discuss Sheree's problems without her representative.* The applicant, for her part, says, *he (Nico) told me not to read now because it was too long. He told me "we are not at all happy with you and your work".* Further, her evidence recorded by way of notes in her diary that evening, make it clear that she was told by Mr Francken that she should find another job and that Irina and Teresa can no longer work with her having lost all confidence in the applicant. The notes go on:

*He told me I had four weeks to prove myself in the new changes to my roster. If I chose to fight this and make things right they would support me, but he said "I don't think you can do it and you should just leave and get another job". After the four weeks we would sit down and look at my achievements. If they were still not happy they would terminate my contract and give me two weeks notice. ... Nico said we are not firing you, yet.*

[22] Ms Rusbatch says she could not and did not really respond because she was astounded at what was being said to her and the way in which she was being spoken to, describing Mr Francken's manner as abrupt and rude. She says the meeting finished with Mr Francken saying *we are not firing you, yet.* The applicant in her evidence goes on to say:

*It certainly seemed to me that I was going to be fired no matter what and that the decision had already been made. Given Mr Francken's attitude and demeanour, I was left with no doubt that they wanted me gone and that there was little I could do to stop it.*

[23] Ms Rusbatch summed up her position by saying:

*They had given me a final warning letter without even giving me the chance to respond. A lot of the things in the letter were quite historical and wrong. After reading the letter I was so upset by the allegations that had been made against me (when I had not had the chance of any input) that I still wanted to write down my own responses. This was for my own peace of mind, so that I knew for myself that the allegations were wrong. ...*

*I wrote my resignation that night and handed it to the respondents the next day. I did not want to make a big deal about why I was leaving because I was intimidated by Mr Francken and did not want him going off at me again. I just wanted to work out my notice and get out of there with as little fuss as possible.*

[24] The applicant's resignation is addressed to Mrs Francken and is dated 16 August 2006. It reads:

*I hereby tender my resignation of employment with Corstorphine House Services Limited.*

*In accordance with my employment contract this is two weeks' notice from today (16 August 2006).*

*Yours faithfully,  
Sheree Rusbatch*

[25] The resignation apparently came as a considerable surprise to the Franckens as it appears they believed they were simply making clear the need for a considerable improvement in the applicant's performance and approach to her roles in the business.

### **The issues**

[26] In order to resolve this issue, the Authority needs to decide the following points:

- Was the respondent in breach of its obligations in changing the applicant's hours of work from fixed hours to rostered hours; and
- Was the procedure adopted by the respondent on 14/15 August 2006 in accord with its obligations as an employer; and
- Given what took place at the meeting, was the applicant entitled to repudiate the agreement between the parties; and
- Was the applicant constructively dismissed; and
- What, if any, remedies are due to the applicant?

**The test**

[27] The test to be applied in relation to these issues is set out in s.103A of the Employment Relations Act 2000 and its amendments. This requires the Authority to determine whether a dismissal or an action was justifiable 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 investigation meeting**

[28] At the investigation meeting, the Authority heard evidence from the applicant in person. On behalf of the respondent, evidence was provided by Mr Francken and Ms Davies. Mrs Francken was unable to attend in person and the Authority convened a teleconference call with her to receive her evidence on 11 December 2007. Representatives of both parties were also participants in the teleconference.

[29] The meeting proper proceeded without any undue difficulties although Mr Francken's occasional whimsical observations about the legal profession and its unusual ways proved a little irksome to counsel. To his credit, Mr Stratford declined to rise to the bait.

[30] I found all witnesses to be open and straightforward in their replies to questions. My view of the applicant was of a pleasant young woman with a somewhat retiring personality and modest experience in an employment setting. Overall, the meeting provided the Authority with the opportunity to evaluate the relationship between the parties prior to the severance of that relationship.

**Analysis and discussion**

[31] On the evidence, the relationship between the parties prior to the events that led to Ms Rusbatch's resignation was bordering on familial. The Franckens liked her and were dedicated to developing her skills in the hospitality industry. Both Mr and Mrs Francken said so and their evidence is accepted.

[32] Where some change may have occurred was with the applicant coming under the management of Ms Davies. That event was clearly in the interests of the business but may have unintentionally interposed on the relationship between the applicant and

her employers. That is no criticism of Ms Davies. She was required to arrange the hotel's affairs to ensure consistent, high quality service to its guests.

[33] To change the applicant's hours and days of work while she was on leave in June 2006 was a considerably high-handed action as there had been no discussion with Ms Rusbatch prior to that event occurring. The meeting that followed the applicant's letter of complaint seems poorly documented and in fact appears not to have resolved the difficulty. I conclude this is so because the applicant says in her evidence in chief *while I wasn't happy with the change that had been forced on me I tried to get on with my job and work as best as I could. I did not like making trouble and my attempts to address my concerns had just been shrugged off.*

[34] While it is clear to the Authority that the intention of the respondent was to provide it with greater flexibility in its operations, such changes cannot be made without consulting those affected. It was clear from the applicant's evidence that she was disadvantaged by this change.

[35] Close to the heart of this matter is the seriously inadequate communication between Ms Davies and Mr and Mrs Francken about what they sought to achieve in the meeting with Ms Rusbatch on 15 August 2006. The email advising the applicant of the meeting the same day as she arrived back at work was sparse on detail regarding the meeting and it is quite natural that Ms Rusbatch assumed it was to do with her having just taken sick leave.

[36] On attending the meeting, the applicant found that Mr Francken and Ms Davies were in attendance and she was told by Mr Francken not to open and read the letter as it was *too long*. That letter, handed to the applicant at the outset of the meeting, is headed *final warning*. It had been prepared by Mrs Francken who was not in attendance at the meeting. Significantly, in her evidence taken after the investigation meeting, Mrs Francken said *I never wanted to give Sheree any warning because she is a fragile girl*. Considering this meeting and the events which took place around it, it is not unfair to describe it as an ambush.

[37] A key question is why did Ms Rusbatch resign when she did? Her resignation letter is of little assistance as it avoids stating that the letter that she received on 15 August 2006 was her prime motive for leaving. That the applicant resigned on notice suggests Ms Rusbatch felt able to return, at least in the short term, and to keep her

head down during that time. Mr Stratford submits that it is not fatal to his client's case that she set out no reason for her resignation. That is so, but the resignation on notice without explaining the reason for it does not support the contention of total and immediate repudiation.

[38] What has been of assistance are the responses which Ms Rusbatch wrote on the evening of 15 August 2006. Had she been given fair notice of the issues to be raised at the meeting and therefore put her responses to the respondent, and if those were heard with an open mind, there was every possibility that no final warning would have been issued. I conclude that the applicant was seriously disadvantaged by the procedure adopted by the respondent because she was precluded from providing her input before the letter was drafted.

[39] However, it was still open to the applicant, even in the face of the final warning letter, to have returned to the issues with a representative present and, in all likelihood, have that letter and its contents adjusted or withdrawn. In short, there was still an opportunity to rebut the respondent's claims and to chart a way forward while remaining in the respondent's employment if that is what she chose to do.

[40] Mr Stratford has raised the question as to whether the applicant's resignation was reasonably foreseeable. See *Auckland Electric Power Board v. Auckland Provincial District Local Authority Officers' (IUOW)* [1994] 1 ERNZ 168. On balance, I think it was not. I say this because the respondent, with considerable clumsiness, brought a range of issues to the applicant's attention in the hope of securing changes. The approach was clumsy because the letter revisited historical matters and amalgamated these with more contemporary concerns. Despite this approach, the respondent provided a four week period in which the applicant could have sharpened her performance. Ms Rusbatch chose not to engage in that process and tendered her resignation to avoid the possibility of dismissal in the event that she did not make the grade. That was her election, but was without doubt coloured by her perception of Mr Francken's stern handling of the meeting. As she said in her evidence, she did not want Mr Francken *going off again at me*.

### **The determination**

[41] In coming to my findings on this matter, I have been mindful of s.122 of the Act. It reads:

*Nothing in this part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged.*

[42] I find that section relevant to the facts in this particular matter.

[43] Returning to the issues set out above:

- I find the applicant was unjustifiably disadvantaged in her employment by the respondent's changing her hours and days of work in June 2006.
- I find the process adopted by the respondent in bringing its concerns to the applicant on 15 August 2006 was seriously deficient and while that was unintended, it constituted an unjustifiable disadvantage to the applicant.
- I find that the applicant, in spite of the inadequacy of the respondent's process, was not entitled at that time to repudiate the agreement. That is because, at worst, the letter was a final warning and the relationship was still salvageable within the coming four weeks.
- I find that a fair and reasonable employer would have given formal notice of its intention to change Ms Rusbatch's hours and days of work and, in respect of the 15 August meeting, advise the applicant fully of the purpose of the meeting, the issues that were to be discussed, time to prepare an appropriate response and her entitlement to be represented. Further, a fair and reasonable employer would not have prepared, let alone presented, a final warning to the applicant without these preliminary steps having been taken and hearing the applicant's replies.

[44] Section 122 quoted above provides the latitude for the Authority to find the grievance to be other than that claimed by the applicant. I find that while the applicant's claim of constructive dismissal falls short for the reasons given above, the applicant has suffered two counts of disadvantage due to the unjustified actions of the respondent. Firstly, in relation to the unilateral alteration to Ms Rusbatch's hours and days of work. Secondly, with respect to the respondent's inept performance on 14 and 15 August 2006.

[45] I have considered the applicant's claim for penalties to be applied for breaches of the Act. Penalties are punitive and generally applied only in situations where an

employer's behaviour towards an employee is deliberate. This is not the case in this matter.

[46] Further, the allegations of breach arise from the same factual matrix as that which has given rise to my findings of unjustifiable disadvantage. On top of remedies to the applicant in this particular case, it would be manifestly unjust to order penalties.

[47] Accordingly, I decline to award penalties.

### **Remedies**

[48] Given the findings made in this determination, it follows that the applicant's claim for reimbursement of lost wages cannot succeed.

[49] Having found the applicant to have been disadvantaged by the unjustifiable actions of the respondent, I make the following order:

- The respondent is to pay to Ms Rusbatch the sum of \$5,000 without deduction under s.123(1)(c)(i) of the Act in compensation for hurt and humiliation.

### **Costs**

[50] Costs are reserved. The parties are to attempt to resolve this issue between themselves. If this is not achievable, leave is reserved for Mr Stratford to lodge and serve a memorandum as to costs and for Mr Francken to lodge and serve his response.

Paul Montgomery  
Member of the Employment Relations Authority