

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 71/08  
5091274**

BETWEEN      ROBYN MORGAN  
Applicant

AND            WATKINS YOUNG & COMPANY  
LIMITED      T/A      BRIARGATE  
DEMENTIA CARE RESIDENCE  
First Respondent

DONALD CHARLES WATKINS  
Second Respondent

Member of Authority:      Leon Robinson

Representatives:          Brian Spong for Applicant  
Muriel Kelly for Respondents

Investigation Meeting:    13 February 2008  
14 February 2008

Determination:            4 March 2008

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1] The applicant Mrs Robyn Morgan ("Mrs Morgan") says she was unjustifiably constructively dismissed from her employment as Accounts/Administrator at Briargate Dementia Care Residence, the trading name of Watkins Young & Company Limited ("Briargate"). Unusually, she asks that Briargate and its director Mr Donald Charles Watkins ("Mr Watkins") be held jointly and severally liable for any remedies awarded. Mrs Morgan also claims a penalty against Briargate and its director Mr Watkins because the terms of her employment were not recorded in writing.

[2] Briargate defends Mrs Morgan's claims and says Mrs Morgan resigned entirely of her own volition following an unsuccessful attempt to have her salary reviewed. Briargate further raises a counter-problem against Mrs Morgan claiming she is

indebted to it in the sum of \$1,542.84. The parties were unable to resolve the problems between them by the use of mediation and so the Authority has now determined the matter.

[3] The subject matter of this investigation involves conduct which is possibly criminal. It is not this Authority's task to make findings in relation to criminal conduct. No one is obliged to answer a question the answer to which might incriminate that person. In this instance I am satisfied that there is a real and appreciable peril. Having regard to that situation, I considered it prudent to advise those present at the investigation meeting that I would not require Mr Watkins to answer any question which might incriminate him.

### The facts

[4] Briargate is a residential care facility for persons suffering dementia.

[5] Mrs Morgan commenced employment with Briargate on 22 January 2007. The terms of the employment were not recorded in writing. As part of her induction training, Mrs Morgan was informed of a cheque account holding the personal portion of three residents' national superannuation/WINZ benefit. It was to be one of Mrs Morgan's duties to reconcile and account for this cheque account which was known by the parties as "the Trust account". Mrs Morgan was informed that there were withdrawals of about \$5,000.00 from the account made by Mr Watkins allegedly unlawfully. Mrs Morgan regarded Mr Watkins' withdrawals from the Trust account as highly unethical and improper. She was horrified at what she had learned. I find that thereafter she continued to communicate and discuss her disapproval with other staff members including the manager Ms Jackie Hodge ("Ms Hodge") and registered nurse Ms Pam Smith ("Ms Smith").

[6] On 2 February 2007, Mrs Morgan met with Mr Watkins and Briargate's external accountant Mr Michael Fisher. Mrs Morgan raised the Trust account and asked Mr Watkins directly about withdrawals he had made from the account. I find that Mr Watkins said he had borrowed money from the account and that the borrowing had been recorded in writing. I find, accepting Mrs Morgan's evidence, that he also said

the Residents didn't need the money. Mrs Morgan tells the Authority, and it is not disputed, that she then told Mr Watkins it was not his money and that he had no right to be using the funds for his own needs. I find that Mr Watkins told Mrs Morgan he wanted her to be happy in her work and that he would pay the money back. But he was no more specific than that.

[7] In mid February 2007 Mr Watkins asked Mrs Morgan if she would set up a general ledger for his wife's real estate operation. Mrs Morgan declined.

[8] On the evening of 15 March 2007 Mrs Morgan took the file relating to the Trust account home with her to prepare a reconciliation. She discovered that Mr Watkins had withdrawn \$30,500.00 from the Trust account allegedly unlawfully. She was horrified. She resolved that his conduct in doing so was highly improper and unlawful. In her own words she tells the Authority Mr Watkins alleged use of these funds "was dodgy to say the least".

[9] The following day on 16 March 2007, Mrs Morgan confronted Mr Watkins about what she had discovered of his apparent conduct concerning the Trust account. She told him she had found additional withdrawals. He told her that he had written all the transactions down. She asked if he had any intention of repaying the funds as he had earlier said on 2 February 2007. She showed him her notes of the withdrawals showing dates, amounts and cheque numbers.

[10] Mr Watkins told Mrs Morgan he would hand the Trust account file and the reconciliation task to the external accountants because she was making too big a deal of it. He said he did not want Mrs Morgan worrying about the situation, that she had to move on, she should let it go and forget about things she had no control over. Mrs Morgan remained dissatisfied and she was angry at Mr Watkins' attitude. She resolved that he was unlikely to repay the monies allegedly taken unlawfully and he that he was removing the task from her so that she would not continue to raise the matter with him.

[11] On Friday 23 March 2007, Mrs Morgan informed Ms Hodge in detail about the monies withdrawn from the Trust account. Ms Hodge informed Mr Watkins of this discussion.

[12] That same morning, Mrs Morgan obtained contact details for the Ministry of Health to which she intended to communicate with by telephone later that day. Mrs Morgan also met with Mr Watkins for a pre-arranged meeting. I accept that the items for discussion included the Trust account and Mrs Morgan's employment agreement. The discussion of these two items was delayed by the lunch breach.

[13] The meeting resumed after lunch. Mr Watkins told Mrs Morgan he was unhappy that she had discussed the Trust account with Ms Hodge. He said he was unhappy that Mrs Morgan had declined to attend to accounting duties for his wife's real estate agency. He said he was unhappy that Mrs Morgan would enquire of him whether various transactions were personal or business.

[14] Mrs Morgan responded. First she said there was an email which confirmed her salary would be reviewed on or before 90 days after her commencement. She said she was employed to do Briargate's accounts not those of the real estate agency and that to do her job correctly she needed to know whether items were personal or business for tax purposes.

[15] Mrs Morgan ended the conversation with these comments taken directly from her prepared witness statement to the Authority:-

*The last thing I said to him in this part of the conversation was that the use of other people's monies, in his position of Trust, was not right and felt I was justified in making his Manager aware of matters concerning her Residents.*

*His demeanour was very cold to me when he was speaking to me and then when I mentioned the Trust account he paused for a moment and then he told me in quite a deliberate and slow manner that if I didn't like it, I knew what I could do. His words seemed very carefully chosen when he said*

*this. This was very upsetting to me as I really felt he had made up his mind that he didn't want me to continue my employment.*

[16] Mrs Morgan told Mr Watkins *"Yes Don I know what I can do. I am leaving as you have given me no choice"*. She also told Mr Watkins she would report him to the Ministry of Health. With that, she left. She did not return to the employment.

## The merits

### *Unjustifiable constructive dismissal*

[17] Mrs Morgan's principal claim is that she was unjustifiably constructively dismissed. The well settled tests for constructive dismissal are:-

- (i) Did the employee resign?
- (ii) Was the resignation caused by a breach of duty on the part of the employer?
- (iii) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[18] It is not disputed that Mrs Morgan did resign.

[19] But I am not persuaded that there was a breach by her employer of a duty owed to her. That is not to be taken to condone in any way the allegedly improper conduct by Mr Watkins. But the alleged improper conduct in question does not go to any duty owed to Mrs Morgan.

[20] Nor do I appreciate any breach of duty arising out of events on 23 March 2007. I accept Mrs Morgan's evidence that Mr Watkins said to her that if she didn't like it, she knew what she could do. I am not inclined to view that statement as essentially repudiatory. Nor do I consider it a "sending away" and Mrs Morgan's claim that it was of that nature is inconsistent with her contention that she was unjustifiably constructively dismissed. It seems more to me as a statement of the reality of the situation. Mr Watkins had sought to placate Mrs Morgan. She had apparently, accepted his actions in respect of the situation. But when she raised the matter again

on 23 March 2007, I rather consider Mr Watkins resigned himself to her continuing dissatisfaction and the futility of what he had proposed by way of resolution. His stark comment in that context merely reflected the reality of the situation the parties were in at that time. So I do not accept the statement as being repudiatory in nature.

[21] Mrs Morgan explains that the statement that "*she knew what she could do*" and the statement that the residents did not need the money, indicated to her that Mr Watkins had no intention of repaying the residents' funds. She says in her prepared statement that "*there was just now way [she] could continue to work at Briargate and be responsible for the administration of accounts in these circumstances*". I do not agree that these matters are sufficiently repudiatory for Mrs Morgan to regard her employment at an end.

[22] Mr Watkins did not commit with any degree of precision as to when he would pay the money back. On 2 February 2007 Mr Watkins told Mrs Morgan he would "*pay the money back*". But he did not commit any further than that. On 16 March 2007 he told her he would hand the task of accounting for the Trust account to the external accountants. So Mrs Morgan was not required to have any involvement with the Trust account. I find that these steps were taken to placate Mrs Morgan. Mr Watkins said he wanted her to be happy in her work. I also further find that these steps were acceptable to her because she continued in the employment. In these circumstances I do not accept that Mrs Morgan could regard her employment at an end, and at her employer's initiative, such that she had no choice but to leave.

[23] So I conclude that there was no breach of a duty that was owed to Mrs Morgan. She was entitled to take a very dim view of what she had discovered of Mr Watkins' alleged conduct. Mr Watkins did not ask or require her to compromise her personal standards. She simply could not, in my view, accept what Mr Watkins had allegedly done. But she was not asked to do anything improper and she was not forced out of her job. It is unnecessary therefore for me to consider the final limb of the test. I conclude that Mrs Morgan was not unjustifiably constructively dismissed.

[24] Having reached this view, I make it clear that I do not accept Briargate's

evidence that Mrs Watkins resigned as a result of a refusal by it to review her salary. I prefer Mrs Morgan's denial on this point. I find the parties were both mistaken as to the nature of the apparent review.

[25] Even though I disagree with Mrs Morgan's assessment of the situation I record that I regard her as a very credible and consistent witness. Her evidence was consistent and unshaken. But more than that, she presents to me as a person of utmost integrity and as a very principled woman indeed. She absolutely abhorred the allegedly improper conduct she had discovered and I have no doubt whatsoever that she was and is, motivated by a very real, sincere and genuine affinity and passion for the care of aged persons and in particular, those resident at Briargate. She has the courage of her convictions too, because she has pursued matters further with the Authorities.

### ***Penalty***

[26] Mrs Morgan claims a penalty against Briargate in respect of its failure to provide her with a written employment agreement.

[27] Section 63A of *Employment Relations Act 2000* is as follows:-

63A *Bargaining for individual employment agreement or individual terms and conditions in employment agreement*

(1) *This section applies when bargaining for terms and conditions of employment in the following situations:*

(a) *under section 61(1), in relation to additional terms and conditions to the applicable collective agreement:*

(b) *under section 61(2), in relation to—*

(i) *additional terms and conditions to the collective agreement on which the individual employment agreement is based; and*

(ii) *variations to the individual employment agreement in subparagraph (i):*

(c) *under section 63(2), in relation to additional terms and conditions for the first 30 days of an individual employment agreement:*

(d) *under section 63(5), in relation to variations to terms and conditions of an individual employment agreement after the 30-day period:*

(e) *in relation to terms and conditions of an individual employment agreement for an employee if no collective agreement covers the work done, or to be done, by the employee:*

- (f) *where a fixed term of employment, or probationary or trial period of employment, is proposed:*
- (g) *under section 69M or section 69N in relation to employee protection provisions in individual employment agreements:*
- (h) *under section 69I in relation to redundancy entitlements with a new employer.*
- (2) *The employer must do at least the following things:*
- (a) *provide to the employee a copy of the intended agreement, or the part of the intended agreement, under discussion; and*
  - (b) *advise the employee that he or she is entitled to seek independent advice about the intended agreement or any part of the intended agreement; and*
  - (c) *give the employee a reasonable opportunity to seek that advice; and*
  - (d) *consider any issues that the employee raises and respond to them.*
- (3) *Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.*
- (4) *Failure to comply with this section does not affect the validity of the employment agreement between the employee and the employer.*
- (5) *The requirements imposed by this section are in addition to any requirements that may be imposed under any provision in this Act.*
- (6) *For the purpose of subsection (1)(e), a collective agreement that includes a coverage clause referring to named employees, or the work done by named employees, to whom the collective agreement applies, must be treated as covering the work or type of work done by the named employees (whether done by those employees or any other employees).*
- (7) *In this section, employee includes a prospective employee.*

[28] I am not convinced that the penalty prescribed at subsection (3) is properly imposed outside of bargaining for an individual employment agreement. The multiple use of the word "intended" throughout the section is a clue. The legislation prescribes a penalty for an employer's failure to provide a copy of an "intended" agreement to the employee during bargaining or the period before entry into the agreement<sup>1</sup>. The underlying policy is sound because there could not be meaningful or truly effective bargaining without one. This in my view is the purpose of the prescribed penalty. It is directed at compelling minimum standards of fair bargaining.

[29] But I do not comprehend the section, or any other in the Act, to prescribe any penalty at all in respect of a failure by the employer to provide a copy of the

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<sup>1</sup> I agree with the Authority's comments on the issue in *Nichols & Te Awamutu Wines & Spirits (1998) Limited t/a Super Liquor Te Awamutu*, unreported, AA388/05, 30 September 2005, A Dumbleton

"concluded" or final agreement to the employee once the bargaining has ended. This is the nature of the penalty I understand Mrs Morgan to now seek. I am not persuaded that I am authorised to impose such a penalty and I decline to do so.

### ***The counter-problem***

[30] Briargate has a counter-problem. It claims Mrs Morgan is indebted to it in the sum of \$1,542.84. Having heard the evidence, I remain unconvinced of the quantum claimed and record here the claim appeared to me to be unsound and confused. I am not persuaded at all of any loss by Briargate and nor am I persuaded that Mrs Morgan is liable to make good such loss had it been proven. I decline to make any orders in respect of this counter-problem.

### **The determination**

[31] I determine now that Mrs Morgan was not unjustifiably constructively dismissed and she does not have a personal grievance. I decline to order a penalty against Briargate and Mr Watkins. I am not persuaded there is any merit in the counter-problem raised against Mrs Morgan. **There will be no formal orders.**

### **Costs**

[32] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Kelly is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Spong is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson  
**Member of Employment Relations Authority**