

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 371/09
5142194

BETWEEN CYNDYL TARAWA
Applicant

AND CLARE WADE & CRAIG
MORGAN TRADING AS
BODY AND SOUL
Respondent

Member of Authority: Vicki Campbell

Representatives: Nanette Bolstad for Applicant
 Stephen Clews for Respondent

Investigation Meeting: 1 July 2009 at Tauranga

Determination: 23 October 2009

DETERMINATION OF THE AUTHORITY

[1] Ms Cyndyl Tarawa was employed as a Beauty Therapist by Clare Wade and Craig Morgan trading as Body and Soul ("Body and Soul") from 23 March 2007 until she resigned from her employment on 4 July 2008. Ms Tarawa claims she was unjustifiably disadvantaged in her employment and constructively dismissed. Ms Tarawa also claims Body and Soul have breached the employment agreement between them. Body and Soul denies all the claims.

[2] The issues for determination are:

- Was Ms Tarawa disadvantaged in her employment?
- Was Ms Tarawa constructively dismissed?
- Did Body and Soul breach the employment agreement between the parties?

Unjustified disadvantage

[3] I am required to examine Body and Soul's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act.

The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an 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.

[4] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Body and Soul's actions disadvantaged Ms Tarawa in her employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[5] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Body and Soul establishes justification for its disadvantageous actions, there is no grievance.²

[6] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

[7] Ms Tarawa says the following actions by Body and Soul breached its duty towards her:

- Unilateral reduction in her days of work for reasons relating to performance;
- Unjustified criticisms of her performance;
- Blamed for not bringing in new clients and not retaining current clients;
- Unfair treatment while off work;
- Failing to show any concern regarding wellbeing despite being on sick leave due to work related stress;

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

- Meeting held on 30 June was unfair and then the respondent refused to record the 30 June meeting accurately;
- Timeframes for responses were unreasonable;
- Failing to advise of right to representative during disciplinary process;
- Limited support person's role at meeting.

Unilateral reduction in days of work for reasons relating to performance

[8] Ms Katrina Paget is the Manager of Body and Soul in Tauranga. On 13 June 2008 Ms Paget discussed with Ms Tarawa the fact that clinic figures were not looking good and wondered if Ms Tarawa would agree to reducing her hours on a Monday and making up the hours on a Tuesday and Saturday.

[9] Ms Paget also advised Ms Tarawa that there was an expectation that she would have a bigger client base given that she had been working at the salon for a year. Ms Paget offered to assist Ms Tarawa to build up her client base. At the end of their conversation Ms Paget understood Ms Tarawa had agreed to the reduction in her hours.

[10] Following her discussion with Ms Paget, Ms Tarawa wrote to Ms Wade and Mr Morgan and advised them she was not happy with the change to her hours of work and, without setting out any examples or providing any specificity, Ms Tarawa advised Ms Wade and Mr Morgan that she was concerned with the way they were treating her. Ms Tarawa requested a meeting to discuss the negative comments Ms Wade and Mr Morgan were relaying to her via Ms Paget.

[11] From 16 June Ms Tarawa was on sick leave with a return to work date of 20 June 2008.

[12] Mr Morgan and Ms Wade wrote to Ms Tarawa on 16 June expressing their surprise as to her unhappiness and advising Ms Tarawa that there had been a misunderstanding and that they were of the understanding that Ms Tarawa had agreed to reduce her hours during the discussion she had with Ms Paget. Ms Wade and Mr Morgan acknowledged that Ms Tarawa was obviously not in agreement with her hours of work changing and agreed to meet with her on her first day back at work to discuss the issue.

[13] Ms Wade and Mr Morgan took that opportunity to also advise Ms Tarawa that they were concerned with the amount of time she seemed to be spending on the

internet during work time and advised Ms Tarawa that they wished to meet with her at a later date to discuss this.

[14] The hours of work issue regarding not working on a Monday was discussed at a meeting on 30 June 2008. Mr Burr, who was Ms Tarawa's support person at the meeting confirmed in writing to Ms Wade and Mr Morgan that the issue was resolved in that meeting and confirmed that Ms Wade had offered options of picking up extra hours and working from Whakatane from time to time with expenses being met by Body and Soul.

[15] I am satisfied that on the balance of probabilities the communications between Ms Paget and Ms Tarawa on 13 June were unclear as to what, if any, agreements had been reached with respect to her hours of work. However, Ms Wade and Mr Morgan took immediate steps to clarify that there would be no reduction until such time as more discussion had taken place.

[16] Those discussions took place on 30 June and it was agreed that Ms Tarawa would, from Tuesday 8 July, no longer work on Mondays until the business picked up and Body and Soul would, where possible, make up the lost hours in other ways. I am supported in my conclusion from Mr Burr's evidence at the investigation meeting where he confirmed that the issues around not working Monday resolved by agreement with Ms Tarawa.

[17] I find there was no unilateral reduction of Ms Tarawa's hours. Before any action could be taken to implement the change Ms Paget understood had been agreed with Ms Tarawa, Ms Wade and Mr Morgan met with Ms Tarawa on 30 June and I am satisfied it is more likely than not that an agreement was made at that meeting that from 8 July 2008 Ms Tarawa would not work Monday's until business picked up.

Unjustified criticism of her performance

[18] Ms Paget agrees she discussed issues regarding her performance with Ms Tarawa at the meeting on 13 June. Ms Paget had been away on annual leave and when she returned Ms Wade had commented that in her absence the Tauranga salon had not looked clean. Ms Paget raised this with Ms Tarawa and required Ms Tarawa to be responsible for the cleaning in future.

[19] In her written evidence Ms Tarawa says she was okay with this as cleaning was in her job description, albeit she felt it could be a job shared.

[20] On the balance on probability I find that Ms Wade and Ms Paget were unhappy with the cleanliness of the store, however, raising the issue and requiring Ms Tarawa to take responsibility for something that was within her normal role does not constitute a disadvantage.

Unjustifiably blamed for not bringing in clients or retaining clients

[21] Ms Tarawa says she was blamed for not bringing in new clients or for not retaining clients. Both Ms Paget and Ms Wade raised concerns with Ms Tarawa that she did not appear to be expanding the client base and that this was an issue. However, on the basis of the evidence I have seen and heard I do not accept they went so far as to “blame” anyone for that.

[22] I do not understand Ms Tarawa to say that she was bringing in more clients than she was given credit for, neither do I understand her to say it wasn't part of her role to grow the client base. Body and Soul relies heavily on growing a strong client base in order to remain viable. I see no unfairness in Ms Wade or Ms Paget raising the matter with Ms Tarawa with a view to seeing some improvements.

[23] Indeed in the letter of 3 July setting out a summary of the meeting held on 30 June, Ms Wade and Mr Morgan express their understanding that Ms Tarawa acknowledged at the meeting that she understood the need to work on building and extending her database of clients.

Unfair treatment while she was off work

Attempting to contact and arrange meetings while Ms Tarawa was off work

[24] On 16 June Ms Wade and Mr Morgan responded to Ms Tarawa's letter of 13 June where she expresses her concerns over the reduction of her hours of work. They expressed their surprise at the contents of the letter and acknowledged that a meeting would be appropriate. It is suggested that they meet on Ms Tarawa's first day back from sick leave to discuss her concerns but leave it to her to advise them of a suitable time. Ms Wade and Mr Morgan also suggest Ms Tarawa bring a support person to the meeting with her.

[25] On that day Ms Tarawa left a message on the work answering machine indicating that she was sick and would not be in. Ms Tarawa's sister delivered a medical certificate that same day advising that Ms Tarawa would be absent for two weeks due to workplace stress.

[26] By 20 June Ms Wade and Mr Morgan, having had no further communication from Ms Tarawa, wrote to her to advise her that her sick leave entitlement had been exhausted but that they were happy to pay annual leave for the remainder of her sick leave if she was happy with that. Ms Wade and Mr Morgan asked Ms Tarawa to confirm in writing if she wished to take paid annual leave for the remainder of her absence.

[27] Ms Wade and Mr Morgan requested that all communications be in writing until such time as they had all had an opportunity to sit down and have a conversation about the issues.

[28] Ms Tarawa wrote to Ms Wade and Mr Morgan on 23 June advising that she would appreciate taking the time off as paid annual leave. I see nothing untoward in this communication exchange and don't consider it to be unfair.

[29] At the meeting on 30 June, it was agreed Ms Tarawa would take a further week's leave and return to work on Tuesday, 8 July. This was to enable appointments to be arranged in preparation for Ms Tarawa's return to work.

[30] While Ms Tarawa was on leave, on 4 July she emailed a letter of resignation to Ms Wade and Mr Morgan. That same day Ms Wade and Mr Morgan wrote setting out their concerns over the internet use and requesting Ms Tarawa to attend a disciplinary meeting before her return to work date.

[31] I accept that requiring an employee to attend any sort of meeting, let alone a disciplinary meeting where her job is in jeopardy, while that employee is on leave is an action which could lead to Ms Tarawa's disadvantage. However, I find Ms Tarawa's employment was not subject to disadvantage, because while the initial meeting was planned for while Ms Tarawa was on leave, it did not take place until after she returned to work.

[32] Ms Wade says she received Ms Tarawa's resignation at 1.53pm on 4 July and wrote the letter about the disciplinary meeting following receipt of the resignation. Ms Tarawa agrees that she never received Ms Wade's letter until very late on 4 July and never read the letter until the morning of 5 July.

[33] As events transpired the disciplinary meeting did not occur until Ms Tarawa's first day back at work, which was 8 July 2008. It was common ground that the

meeting took place and that the issue with the use of the internet was the focus of the meeting. Following an adjournment of the meeting to enable Ms Wade and Mr Morgan to consider Ms Tarawa's explanations, they were advised by Mr Burr that the meeting would not reconvene and that Ms Wade and Mr Morgan should advise the outcome by email.

[34] At the investigation meeting and in answer to questions Ms Tarawa accepted that trying to arrange a meeting to discuss the tentative decision and to seek Ms Tarawa's input into that decision was not unfair. She also accepted that there was nothing intimidating in that process.

[35] While not advisable to attempt to meet with employees who are absent on leave, in this case, Ms Wade and Mr Morgan did not force the issue and left the meeting until Ms Tarawa had returned to work. Their subsequent text messages attempting to reconvene the meeting did not constitute a disadvantage to Ms Tarawa.

[36] Indeed, if Ms Wade and Mr Morgan had not attempted to meet with Ms Tarawa to discuss their tentative findings then they may well have been in breach of their obligation to act in good faith towards her.

Requiring her to return her work key

[37] In her letter of 20 June Ms Wade and Mr Morgan asked Ms Tarawa to return her work key as they needed it for other commitments. At the investigation meeting I explored with Ms Wade the reason why she required the key to be returned, given that Ms Tarawa was absent on sick leave. I am not satisfied that there was any actual reason for the request, however, neither am I satisfied the request to return the key led to Ms Tarawa's terms and conditions of employment being subject to disadvantage.

Failing to show any concern regarding wellbeing despite being on sick leave due to work related stress.

[38] The evidence produced to the Authority and during the investigation meeting has failed to establish any support for this allegation.

Meeting held on 30 June was unfair and then respondent refused to record the 30 June meeting accurately

[39] The meeting on 30 June was to discuss the issues Ms Tarawa had raised in relation to the reduction of her hours of work. This was not a disciplinary meeting.

[40] Ms Tarawa says Ms Wade was aggressive and often spoke over Mr Burr and herself when they were speaking. Ms Wade says Ms Tarawa said very little and that

Mr Burr did most of the talking and that he was rude, arrogant, controlling and intimidating. Ms Wade says she asked Mr Burr to allow Ms Tarawa to speak on her own behalf but that he insisted on speaking and that Ms Tarawa would only speak from notes she had already prepared.

[41] I have two not so different accounts of the same meeting. I say not so different because both sides say the same things about the others conduct. While I am unable to state with any certainty how the parties conducted themselves in this meeting I am satisfied the meeting ended amicably enough with the agreement that Ms Tarawa would be on leave for a further week to enable appointments to be made ready for her return.

[42] I am satisfied it is more likely than not that both Ms Wade and Mr Burr attempted to take control of the meeting and that neither of them were successful in achieving that. They both must therefore, take responsibility for the way the meeting proceeded.

[43] The outcome of the meeting was set out in a letter dated 1 July 2008. By email on 3 July Ms Tarawa advised Ms Wade and Mr Morgan that she did not believe the summary provided by Ms Wade was complete. Of particular note there was nothing in Ms Wade's summary regarding the issue of the internet use or Ms Tarawa's apology and undertaking that it would not happen again.

[44] Following receipt of Ms Tarawa's letter Ms Wade and Mr Morgan revised their summary taking into account some of the points raised by Ms Tarawa. They continued to refuse to acknowledge the discussion about the internet use and Ms Tarawa's apology and undertaking that she would not do this again. Ms Wade says this is because she viewed the internet use as a disciplinary matter and the meeting was not intended as a disciplinary meeting.

[45] It is common ground that at the meeting on 8 July Mr Burr provided Ms Wade with a copy of his own notes taken at the meeting on 30 June. He says Ms Wade treated them indifferently.

[46] At the investigation meeting Ms Wade told me she felt the issues raised on 30 June were finished and the notes from Mr Burr irrelevant to the disciplinary issue being discussed.

[47] Ms Wade's evidence in this regard fails to acknowledge that on 30 June Ms Tarawa did attempt to discuss the matters relating to her internet use and did apologise and promise to be better in the future. However, Ms Wade did not wish to discuss that issue on 30 June as she considered it necessary to address the issue in a more formal disciplinary meeting where Ms Tarawa could be on notice of any likely consequences. That does not make the notes from 30 June irrelevant.

[48] I am satisfied that Ms Tarawa had an opportunity to, and did provide to Ms Wade, comprehensive feedback on the issues they had with regard to the notes taken by Ms Wade and their views of the inaccuracies. I am further satisfied that Ms Wade amended her summary of the meeting to reflect the issues raised, with the exception that Ms Wade did not summarise the matters raised with regards the internet use as Ms Wade considered that that issue needed to be dealt with more formally.

Timeframes for responses were unreasonable

[49] The evidence produced to the Authority and during the investigation meeting has failed to establish any support for this allegation.

Failing to advise Ms Tarawa of the right to representation during disciplinary process

[50] After receiving Ms Tarawa's resignation on 4 July Ms Wade wrote to Ms Tarawa accepting her resignation and advising her that they still wished to discuss the misuse of time and internet use issues.

[51] In a separate letter on that same day Ms Wade and Mr Morgan invited Ms Tarawa to attend a formal meeting to investigate the misuse of time and internet access. Ms Tarawa was advised that dismissal was a possibility and was told that a meeting should take place prior to her returning from work. The letter also invites Ms Tarawa to bring a support person for emotional support but points out that the support person is not to take control of the meeting and its format.

[52] I am satisfied that the invitation to Ms Tarawa meets the essential elements of procedural fairness. While there is nothing in the letter which specifically indicates Ms Tarawa can bring a representative, she was provided with the opportunity of having a support person with her, and she was on clear notice that dismissal was a possible outcome. The meeting took place on 8 July. From Ms Tarawa's evidence I am satisfied Ms Tarawa was not disadvantaged at the meeting. She had the benefit of

having Mr Burr attend the meeting with her and the correspondence shows that Mr Burr had been acting on behalf of Ms Tarawa throughout June and July.

[53] There is nothing in the evidence that leads me to conclude Ms Tarawa was disadvantaged in her employment as a result of Body and Soul's actions in not specifically offering Ms Tarawa the right to a representative at the 8 July meeting. This conclusion is reached in light of the fact that no disciplinary action was actually ever taken against Ms Tarawa as a result of that meeting.

Limited support person's role at meeting

[54] As set out earlier in this determination the meeting on 30 June was unsatisfactory for both parties from the point of view that both Mr Burr and Ms Wade attempted, unsuccessfully I find, to control the meeting. Understandably, Ms Wade was seeking to hear directly from her employee.

[55] In order to prevent a similar unsatisfactory result, Ms Wade and Mr Morgan set out clear parameters for the conduct of the 8 July meeting in that Ms Tarawa's support person was not to take control of the meeting, or the meeting would be adjourned or abandoned.

[56] Ms Tarawa has not established to my satisfaction how this action by Ms Wade and Mr Morgan disadvantaged her in her employment.

Conclusion – Unjustified Disadvantage

[57] Standing back and considering the evidence objectively I am satisfied Ms Tarawa was not disadvantaged in her employment by the actions of Body and Soul. I find that Ms Wade and Mr Morgan acted as a fair and reasonable employer would have acted in all the circumstances.

Constructive dismissal

[58] Ms Tarawa has claimed that she was forced to resign from her employment. The basis for Ms Tarawa's claim for constructive dismissal is that Body and Soul acted with the deliberate and dominant purpose of coercing a resignation from her or, in the alternative, that Body and Soul breached its duty to her.

[59] The totality of the evidence does not support Ms Tarawa's claim that Ms Wade and Mr Morgan acted with the deliberate and dominant purpose of coercing a resignation from her.

[60] Ms Tarawa resigned from her position on 4 July 2008. This was after the 30 June meeting where she agreed to reduce her hours of work due to limited client numbers and was on leave pending her return on 8 July. The evidence also shows that Ms Tarawa resigned before Ms Wade and Mr Morgan proceeded with the formal disciplinary process with regard to the allegations of misuse of time and internet use.

[61] With regard to the alternative claim under this heading, the conduct amounting to a breach must impinge on the relationship in the sense that looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.⁴

[62] In coming to my conclusions under this heading I must determine the following issues:

- did Ms Tarawa leave her employment as a result of a breach of duty on the part of Body and Soul? and
- if there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Ms Tarawa would leave her employment?⁵

Was the resignation caused by a breach of duty on the part of the respondent?

[63] After receiving Ms Tarawa's resignation, the parties met on 8 July in a disciplinary meeting regarding the allegations that Ms Tarawa had misused work time and the internet. That afternoon, after not receiving any response to requests for a follow up meeting, and as requested by Ms Tarawa, Mr Morgan emailed Ms Tarawa with the preliminary outcome of the meeting which was for Ms Tarawa to be dismissed. Ms Tarawa was invited to comment on this preliminary finding prior to a final decision being made.

[64] In response Ms Tarawa advised Ms Wade and Mr Morgan that she would not be returning to work from that day.

⁴ *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 2 All ER 1 (CA).

⁵ (*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168).

[65] Ms Tarawa has failed to establish a breach of duty on the part of the respondent which could be said to have repudiated the contract or was sufficiently serious to make it reasonably foreseeable that Ms Tarawa would resign.

Breach of employment agreement and Employment Relations Act 2000

[66] The claims under this heading relate to claims already addressed under the claim for disadvantage. I find there have been no breaches of either Ms Tarawa's employment agreement or the Employment Relations Act 2000 on the part of Body and Soul.

Costs

[67] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Body and Soul may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply being lodged with 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell

Vicki Campbell
Member of Employment Relations Authority



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