

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 18
5166671

BETWEEN JOANNE HARRIS
Applicant

A N D HOMEPLUS OTAGO LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Robert Gillanders, Counsel for Applicant
Diane Hudson, Counsel for Respondent

Investigation Meeting: 12 October 2010

Submissions Received: 20 October 2010 from Applicant
18 October 2010 from Respondent

Date of Determination: 1 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Joanne Harris was employed by Homeplus Otago Limited (Homeplus Otago) from April 2006 until September 2009 as a salesperson selling home renovation products such as bathrooms, blinds and aluminium products. She also project managed new bathroom fit outs.

[2] Ms Harris says her problem is that she was unjustifiably constructively dismissed as a result of bullying and harassment during her employment at Homeplus Otago.

[3] She seeks the following remedies:

- Three months' lost wages on an average gross weekly income of \$824 in the sum of \$9,888;
- Legal fees in the sum of \$1,700 incurred during her employment;

- Compensation for humiliation and distress of \$3,000.
- Costs

[4] Homeplus Otago does not accept that Ms Harris was unjustifiably constructively dismissed or, that during her employment she was bullied or harassed. Homeplus Otago say that Ms Harris failed to follow work instructions and made frequent mistakes which led to Homeplus Otago becoming increasingly frustrated with her behaviour and lack of performance.

Date of resignation

[5] Ms Harris provided the Authority with a widely drafted statement of problem. It was generally accepted that the claim required an analysis of interactions from December 2008 until the date of resignation by Ms Harris, arguably one of two dates.

[6] The first date that it could be said Ms Harris resigned was when a letter was sent from Mr Gillanders on 4 September 2009 to HomePlus Otago. Mr Gillanders in that letter explained he was representing Ms Harris and said amongst other matters; *She has asked me to act as her advocate. Because of the way she has been treated she cannot carry on with her work, and feels she has been dismissed unfairly.* He asked in his letter that Homeplus Otago attend mediation.

[7] I find it likely that this letter crossed with one from the owner/manager of Homeplus Otago, Dennis Leeden, to Ms Harris also dated 4 September 2009 asking her to attend a disciplinary meeting on 7 September 2009 to discuss deletion of work files from her work laptop.

[8] The matter is then complicated because Ms Harris wrote to Homeplus Otago dated 7 September 2009 in response to the request from Mr Leeden to attend a disciplinary meeting. In the letter she apologised for the deletion of work documents from a work laptop and explained a computer expert had accidentally deleted them. She said in her letter that she could not attend the disciplinary meeting as she was still on sick leave and a doctor would forward a certificate that afternoon. She requested her annual leave start from 14 September 2009. That letter supports that at the date of that letter Ms Harris regarded the relationship as on foot.

[9] After the 4 September 2009 letter from Mr Leeden inviting Ms Harris to a disciplinary meeting there was no further communication to her from the company. A mediation then took place on 15 September 2009 between the parties.

[10] Ms Harris wrote a letter on 16 September 2009 following mediation on 15 September to Homeplus Otago in which she stated as part of the letter *I feel that I have been pressured into leaving and have been unfairly dismissed*. She also asked for her holiday pay.

[11] I find that Ms Harris confirmed in her letter of 7 September that she had not resigned and her employment was ongoing. This is supported by the supply to Homeplus Otago of a medical certificate for the period 7 to 14 September and the request for two weeks annual leave from 14 September 2009.

[12] I find that the date of resignation was in all likelihood 16 September 2009.

In what category of constructive dismissal do Ms Harris's allegations fall?

[13] The allegations in this case fall within two categories of constructive dismissal referred to by the Court of Appeal in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136. They are where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign and that a breach or breaches of duty have caused the employee to resign.

The Issues

[14] The Authority needs therefore to determine the following issues:

a. What caused Ms Harris to resign?

- Between December 2008 and 17 September 2009, were there breaches of duty or a course of conduct embarked on by the manager of Homeplus Otago with the dominant and deliberate purpose of coercing Ms Harris to resign;
- If there were breaches of duty, then were they of sufficient seriousness to make it reasonable foreseeable that Ms Harris would resign;

- If the Authority arrives at the conclusion that there were breaches of duty or a course of conduct embarked upon, then what remedies are available to Ms Harris and are there issues of contribution or mitigation?
- Is Ms Harris entitled to be reimbursed for legal fees incurred by her in relation to minimum wage issues and at a disciplinary meeting that resulted in a final warning?

An analysis of the employment relationship between December 2008 and September 2009

[15] Problems occurred in this employment relationship from December 2008. They arose after Ms Harris who was due to go on annual leave asked to be paid out her outstanding holiday pay. Mr Leeden obtained advice from his accountant who confirmed that payment should only be made for actual days taken as leave together with payment for public holidays over the Christmas period. Ms Harris was unhappy with this and went to see the Labour Inspector about holiday pay and minimum wage entitlements.

[16] Mr Leeden said that it subsequently came to his attention in February or March 2009 that during her holiday in Queenstown Ms Harris had used the company fuel card on three occasions in Queenstown to purchase petrol. He decided not to pursue it at that time with Ms Harris because by that time the Labour Inspector had commenced his Minimum Employment Standards Inquiry to deal with concerns about compliance by Homeplus Otago with the Minimum Wage Act 1983 and the Holidays Act 2003.

[17] Ms Harris said that the involvement of the Labour Inspector was the catalyst for the deterioration in Mr Leeden's behaviour towards her from after December 2008. She described the relationship until that time as relatively uneventful although said that there had been the odd time the owner/manager of Homeplus Otago Dennis Leeden had *put her down* or *been a bully*.

[18] After the Labour Inspector became involved Ms Harris said Mr Leeden became bullying, irritable, angry and at times abusive.

[19] Mr Leeden adamantly denies this behaviour and says that he found Ms Harris's work performance deteriorated over this period and he was frustrated by her

continued disobedience about such things such as cell phone and vehicle use. He described feeling quite powerless to do anything about the situation.

[20] Ms Harris was critical of the amount of time taken to resolve the issue of holidays and wages that were found to be owing by the Labour Inspector to Ms Harris. The period to resolve the matter was from about January/ February until July 2009 when payment was made to Ms Harris for wages and holiday pay owing to her.

[21] Mr Leeden obtained some legal advice about the Labour Inspector's assessment. Ms Harris says that the lawyer Mr Leeden instructed was very aggressive towards the Labour Inspector. Ms Harris said that she was led to believe by the Labour Inspector that Mr Leeden and his lawyer were using minimum wage and holiday pay issues as a bargaining lever to force her into signing an employment agreement. Ms Harris did not have a written employment agreement and as it transpired one was never signed. Mr Leeden, after the Labour Inspector and his solicitor became involved, realised that there should be a written employment agreement.

[22] An employment agreement was presented to Ms Harris by Mr Leeden under cover of letter dated 15 June 2009. In the letter Mr Leeden amongst other matters apologised for errors regarding calculation of pay and for not providing an employment agreement. He said in the letter that he was also having difficulty communicating with Ms Harris over issues such as cell phone use, car use, whereabouts at work, job errors and lunch hours and suggested mediation to talk about the issues.

[23] Ms Harris consulted a solicitor in or about June 2009 who wrote to Mr Leeden's solicitor and advised that Ms Harris was adamant that the Labour Inspector be left to finalise matters. Mediation did not take place. and payment was made to Ms Harris on the basis of the Labour Inspectors assessment.

[24] Ms Harris was asked when giving her evidence to provide details of alleged bullying, sarcastic, angry and at times abusive behaviour on the part of Mr Leeden for which she says involving the Labour Inspector was the catalyst.

[25] Ms Harris referred to Mr Leeden yelling at her about mistakes she had made, making sarcastic comments about her in the office in front of other staff and other actions that could be described as Mr Leeden picking on her. Ms Harris said that Mr

Leeden's conduct meant that she stayed out of the office and did not participate in morning or afternoon tea breaks.

[26] Ms Harris did have diary notes she took about exchanges that she said were harassing and bullying. There was not otherwise a lot of detail or specifics about exchanges. The diary notes were written about two dates in April and one in June 2009. The first April entry is about Mr Leeden yelling at Ms Harris about sales being down, using the car for other than work purposes, about having a sick day and his responsibility to pay. The other April entry states that Mr Leeden was cold toward Ms Harris and did not communicate all day. The 12 June entry refers to Mr Leeden yelling at Ms Harris when she came back after an appointment at the doctors in front of another staff member as to her whereabouts.

[27] Ms Harris in her statement of problem set out generally that Mr Leeden started to focus more intently on issues that previously were not of much concern i.e. *usage of car, cell phone and how much she sold etc.*

[28] Mr Leeden denied that his behaviour could be classified as bullying. He said that Ms Harris' performance deteriorated at the start of 2009 and although he had throughout the relationship raised matters with Ms Harris such as using the work vehicle for personal use and her large cell phone account for personal calls nothing would change.

[29] Mr Leeden said that Ms Harris simply kept using the work vehicle for personal use. He said that immediately after any discussion about cell phone usage the account would go down but then creep up again. Mr Leeden acknowledged that he would raise his voice on occasion and did not specifically disagree with the interactions as described by Ms Harris. He recognised that he was having difficulty communicating with Ms Harris and I note that only days after the 12 June exchange Mr Leeden in his 15 June 2009 letter suggested mediation.

[30] When the Labour Inspector matters had been finalised Mr Leeden wrote to Ms Harris inviting her to a disciplinary meeting at 8.30am on Tuesday, 4 August 2009 at Homeplus Otago's premises. The letter set out that the purpose of the meeting was to discuss the use of the Shell card, phone account, annual leave and new employment contract. The letter advised Ms Harris to bring someone with her to attend the

meeting and that depending on her explanations she faced disciplinary action up to and including dismissal.

[31] Ms Harris attended the disciplinary meeting with her then legal adviser, solicitor Susie Staley. Mr Leeden attended by himself. There was surprisingly little evidence before the Authority about that meeting. Mrs Harris and Mr Leeden had at best sketchy recollection what was said or discussed at the meeting. I accept for present purposes that the discussion covered matters set out in the letter inviting Ms Harris to the meeting.

[32] The most serious matter was the use of the fuel card during a holiday for personal use. The explanation was that the matter was historical and that Ms Harris needed to use the card because she had not been paid properly. The issue with the annual leave was that Ms Harris should give notice before taking leave. The cell phone issue was about personal use with the concern that Ms Harris' cell phone account was higher than other employees. There was no agreement to the written employment agreement although as Ms Harris correctly said this could not be a disciplinary issue. Mr Leeden said that Ms Staley controlled the meeting and he felt again quite powerless.

[33] Ms Harris left the meeting with the understanding that there would be a conclusion to follow. Mr Leeden agreed to Ms Harris having the rest of the day off after the disciplinary meeting. The evidence supports that Mr Leeden proposed timesheets to deal with his concern that he did not know where Ms Harris was at times during the work day. Ms Harris never used the timesheets although I note there was only a short time until she went off on sick leave.

[34] On 27 August, Mr Leeden was concerned to discover that Ms Harris had taken annual leave without requesting permission although that had been discussed on 4 August 2009 and that she had written in the diary that she would be on leave also on 4 September 2009. Mr Leeden advised that the leave for 4 September 2009 was not approved and Ms Harris, I find, was unhappy with this advice. Ms Harris then requested two weeks' annual leave from 7 September 2009 which was approved.

[35] On 27 August, Ms Harris received a final written warning for not obeying company policy with respect to the Shell card, company vehicle being for work-related purposes only, cell phone for work-related purposes and not requesting annual

leave before taking it. The company vehicle was not one of the matters referred to in the letter inviting Ms Harris to the disciplinary meeting.

[36] After Ms Harris had been provided with the final warning, she telephoned in sick and on 31 August 2009 provided a medical certificate for the period 29 August to 7 September 2009. On 7 September 2009 Ms Harris was due to go on her already approved two weeks' leave. A further medical certificate was then provided from 7 to 14 September 2009.

[37] There is a dispute surrounding the events that led to a request Ms Harris return the car, cell phone and her lap top whilst on sick leave. Mr Leeden says that he asked for these items on 1 September 2009 so that another employee could cover for Ms Harris until her return from annual leave on 21 September 2009. He said that Ms Harris advised him that he could have the car and cell phone but not the laptop as she had personal information on it.

[38] I prefer the evidence of Ms Harris that she did not talk to Mr Leeden this day but rather to Ms Jenkins who answered the telephone when Ms Harris returned a missed telephone call from Homeplus Otago. I prefer Ms Harris's evidence because Mr Leeden's evidence is inconsistent with the note he left the following day in Ms Harris's letter box in which he requested, not only the laptop be returned, but also the cell phone.

[39] I find that Ms Jenkins advised Ms Harris that Mr Leeden wanted the company car, telephone and laptop returned so another employee could carry out Ms Harris' role whilst she was sick. Ms Harris said something to the effect that she would not be returning the laptop because she had personal information on it. Logically Ms Jenkins must have told Mr Leeden what Ms Harris advised her because he then referred verbally and in writing to disciplinary outcomes if the items were not returned.

[40] Another dispute that requires resolution is about the cell phone. Mr Leeden said that he disconnected the cell phone in Ms Harris' possession because Ms Harris advised that she did not want to take calls when she was on sick leave. Ms Harris does not accept that was what she said. I find it unlikely that she made such a statement to him. There is a dispute as to when the cell phone was disconnected. Mr Leeden said around 31 August or 1 September 2009. I accept that. Ms Harris's notes

about the events suggest that it was not until the afternoon of 2 September 2009 after the cell phone had been picked up that Ms Harris realised it was disconnected.

[41] On 2 September 2009 someone from Homeplus picked up the car and the cell phone which Ms Harris had left in the car from outside her home and left the following letter in Ms Harris' mail box:

Re computer & cellphone

I require these by the end of the day (2 September 2009). If you disobey this request it could lead to termination of employment.

[42] On the evening of 2 September 2009, Ms Harris telephoned Homeplus Otago. Ms Harris says that she spoke to Mr Leeden and told him that she would return the laptop the following day after she had had someone remove her personal information. Ms Jenkins said in her evidence Ms Harris telephoned her and said that she was having the laptop wiped and she would be returning the laptop the next day and it would have a blue screen. I conclude that arrangements were made to return the computer the following day and accept Ms Jenkin's evidence about what was said as being more likely.

[43] When the laptop was returned to Homeplus Otago all information appeared to have been wiped from the computer. Ms Harris said that the computer technician was asked by her to clear her information from the laptop but instead of that he removed all items on the laptop.

What caused Ms Harris to resign?

[44] The letter of resignation dated 16 September 2009 is short. It provides the following *I feel that I have been pressured into leaving and have been unfairly dismissed.*

[45] Ms Harris said that there was bullying and harassment throughout the employment as well as pressure. In her written statement of evidence Ms Harris said about the mediation on 15 September 2009 - *we did not come to a settlement and I was forced to hand in my notice after this meeting.*

[46] I accept that part of the reason for Ms Harris's resignation was that she believed she had been poorly treated in her employment, was unhappy and felt

pressured into leaving. I am unable to hear any evidence about mediation. The chain of causation leading to resignation is important in this case and did involve this step. Ms Harris did refer to the matter remaining unresolved after mediation in her statement of problem. I find that is the other part of the reason for resignation.

Were there breaches of duty or a course of conduct embarked on with the dominant and deliberate purpose of coercing Ms Harris to resign?

[47] I have considered the matters firstly complained of with respect to the Labour Inspector issues. Mr Leeden was entitled to instruct a solicitor about the matters that the Labour Inspector was looking into and a robust exchange between legal counsel and a Labour Inspector does not amount to a breach of duty to Ms Harris.

[48] Whilst the time taken to make payment to Ms Harris of the amounts she was owed for holiday and minimum wage payments was quite lengthy the evidence does not support a deliberate attempt to pay Ms Harris other than in accordance with the legal requirements. Documentation supplied supports that discussions about those matters were in the main between the Labour Inspector and Mr Leeden or his solicitor. The evidence does not satisfy me that there was a deliberate delay on Homeplus Otago's part in making payment to Ms Harris but rather a disagreement in terms of the assessment and what was owing.

[49] Failure to pay Ms Harris correctly what she is owed is a breach of her employment agreement however Ms Harris left resolution in the hands of the Labour Inspector and payment was eventually made. Some interim steps prior to payment were taken to comply with the minimum wage requirements. I do not find a breach in offering a written employment agreement. There was opportunity for negotiation and discussion about that. Resignation for the reason of holiday pay and minimum wage issues would not have been foreseeable in the circumstances.

[50] I now turn to whether the involvement of the Labour Inspector was the reason for the deterioration that both Ms Harris and Mr Leeden accepted occurred in the relationship.

[51] Given the two different accounts about the conduct in the office and lack of specifics I have placed reliance on the evidence of Merryn Jenkins, the Office Manager at Homeplus about the relationship.

[52] Ms Jenkins was, I find, a straightforward and honest witness. She believed that the relationship between Ms Harris and Mr Leeden deteriorated in early 2009. She felt that Ms Harris' work standard declined and she described the relationship between Ms Harris and Mr Leeden as something that could become quite heated. She made the following statement: *one as bad as the other*.

[53] I find that the deterioration in the relationship from 2009 was due mainly to difficulties about issues and concerns that Mr Leeden had, many of which had been at least informally raised before with Ms Harris but were not to Mr Leeden's satisfaction resolved.

[54] Mr Leeden in his 15 June 2009 letter did attempt to separate out the Labour Inspector issues and the communication issues over work matters. The contents of that letter show some insight into why there may be difficulties in communicating. Mr Leeden said for example that he appreciated that the company had made errors and that these are probably the cause of the other issues he referred to in his letter but nevertheless he said he wanted to resolve them.

[55] There is an implied term of employment that employers will not without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with their employees. I accept Ms Hudson's submission that the nub of the issue is whether Mr Leeden's conduct crossed from inconsiderate conduct to dismissive or repudiatory conduct – *Wellington etc Clerical Workers etc IUOW v. Greenwich* [1983] ERNZ Sel Case 95.

[56] I find it likely that on occasions Mr Leeden's frustration got the better of him in the way he communicated with Ms Harris and he was inconsiderate, even rude. He raised his voice at Ms Harris and when he acted in that way did not deal appropriately with his concerns about Ms Harris. That is not to say that Ms Harris was without any blame in this relationship. Ms Harris had a tendency to take matters into her own hands on the basis that she was justified in doing so.

[57] Mr Leeden decided to leave dealing with performance concerns and other issues until matters had been resolved with the Labour Inspector. That is not unreasonable but I suspect led to an increase in tension and communication difficulties in the interim. He eventually after suggesting mediation decided to deal

with the performance concerns by way of a disciplinary meeting and issuing a final written warning. Ms Harris was given an opportunity whilst represented to comment on the Shell card, cellphone and annual leave matters.

[58] Even if there were some deficiencies about the warning a fair and reasonable employer would regard the use of a company card to fill a personal vehicle unacceptable conduct even with the explanation about being incorrectly paid. That matter on its own would justify a disciplinary outcome. Ms Harris did not challenge the warning because she was on sick leave within a day or so of its issue and then to take annual leave.

[59] I am not satisfied that prior to the commencement of the sick leave on 29 August 2009 the conduct on the part of Mr Leeden was designed to coerce Ms Harris to resign or crossed the line from inconsiderate to dismissive or repudiatory. Mr Leeden recognised that there were problems in the relationship and made some attempt to formally deal with and resolve them. I do not find that I am satisfied from the evidence considered carefully that his conduct amounted to bullying or harassment.

[60] It was not unreasonable for Mr Leeden to ask for the return of the items that belonged to the company and were needed by another employee to carry out the work of Ms Harris whilst she was firstly on sick and then annual leave. It would not be unreasonable for an employee to demand the return of his or her property from an employer and the law must be even handed.

[61] I then ask in a relationship as fragile and difficult as this one was Mr Leeden's approach in requesting the property back and disconnecting the cell phone a breach of duty or designed to coerce Ms Harris to resign whilst she was on sick leave.

[62] Ms Harris said that she took from the actions as she expressed in her written statement of evidence *I feel Dennis had already planned my not returning to my role at Home Plus.*

[63] I am not satisfied from the evidence that Mr Leeden was intending to replace Ms Harris permanently simply because he asked for the items to be returned. In short there was nothing to suggest that.

[64] Even if the disconnection and threats of termination could be seen as a step too far in that there was a breach of duty in recovering company property, there is an issue as to whether they make it reasonably foreseeable that Ms Harris would resign. Ms Hudson is correct that Ms Harris did not object to returning the items except initially the laptop. She then had the laptop cleared of her personal items and unfortunately the work files were also deleted. That was then returned.

[65] Ms Harris then provided a further medical certificate and asked for her annual leave to commence at a later time. That reduces in my view the strength of any link between the requests for the company property and her resignation. It was only after the mediation that Ms Harris decided to resign. I record that there was a prompt agreement to mediation by Mr Leeden as suggested by Mr Gillanders which took place within 12 days from 4 September 2009 before she took that step.

[66] I accept that Ms Harris was unhappy in her role. She was also faced with the prospect on her return to work of a disciplinary meeting about the laptop although her explanation, if supported by the computer expert, would be a complete answer to that matter. I accept as Ms Hudson submitted that Ms Harris could have rather than resign taken her annual leave as she had requested and taken time out to think things through.

[67] Ms Harris was entitled to resign from her employment but I do not find that the actions or omissions complained of convert that resignation from a voluntary resignation into a constructive dismissal.

Determination

[68] I am not satisfied that Ms Harris was unjustifiably constructively dismissed and I do not find that she has made out her bullying and harassment claim. I am not satisfied that she should be reimbursed for legal fees incurred during her employment. There is nothing further I can do to assist Ms Harris.

Costs

[69] Costs are reserved.

Helen Doyle
Member of the Employment Relations Authority