

**An order prohibiting publication
of certain parts of the evidence is
recorded at paragraph [13]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 350
5327599

BETWEEN

JOSEPHINE HAURARO
Applicant

AND

D & J GRINDLEY
SUPERMARKET LIMITED
T/A RIVERSLEA MALL
SUPERVALUE
Respondent

Member of Authority: Robin Arthur
Representatives: Stan Austin for Applicant
Mike Kyne for Respondent
Investigation Meeting: 4 May 2011 in Whakatane
Determination: 8 August 2011

DETERMINATION OF THE AUTHORITY

- A. Josie Hauraro has a personal grievance for unjustified disadvantage arising from how D & J Grindley Supermarket Limited (DJGSL) dealt with concerns she raised on the day of her resignation.**
- B. DJGSL must settle the grievance by paying Ms Hauraro \$4000 as compensation for injury to her feelings, an amount reduced by one third for her contribution to the situation giving rise to her grievance.**

Employment Relationship Problem

[1] Josie Hauraro worked from January 2009 to November 2010 in the Edgumbe Supervalu store operated by D & J Grindley Supermarket Limited (DJGSL). She began as part-time bakery and deli assistant and became a checkout operator in September 2010.

[2] On 17 November 2010 Josie handed the store manager Taane Hale a letter of resignation giving two weeks notice. The letter complained that store team leader Kym Hale had breached Josie's privacy by "*exposing my mental illness to the staff*" and that Josie should not have had to find someone else to cover her shift in order to attend a funeral on the previous day.

[3] Josie had rung her husband Jason Hauraro at home during the morning of 17 November and had him prepare the letter of resignation and bring it to the store for her to sign. She made that telephone call after a heated discussion with Kym in the storeroom earlier that morning.

[4] Taane Hale handed the letter over to David Grindley when he arrived at the store soon after. David and his wife Julie Grindley are the store owners and directors of DJGSL.

[5] David promptly went and spoke with Josie where she was working in the store. While the exact details of the conversation are disputed, both concur that David proposed Josie finish work without serving out two weeks notice and she agreed.

[6] On 18 November Jason delivered a letter from Josie to David which said "*I have accepted your alternative selection, to allow me to leave Riverslea SuperValue immediately*" and that she would return uniform items within 48 hours.

[7] Earlier that morning Jason had spoken by telephone with David and told him Josie was not happy about the circumstances of her resignation. David responded with a letter referring to Josie's letters of 17 and 18 November and his conversation with Jason. It continued:

I appreciate the views outlined in your letter. Regretfully, you have resigned and not given me the chance to look into your grievance with the other party/parties concerned.

I now see this as a personal matter, and do not wish to involve myself or my business. In summarising I have no interest in being involved in mediation between yourself and the other party/parties concerned.

Whatever action you decide on from here, Jason and yourself are welcome in SuperValue and all courtesies will be expected from staff to you as a valued customer.

[8] Josie then lodged a personal grievance application in the Authority alleging she was constructively dismissed. She sought remedies of lost wages, compensation for hurt and humiliation, reimbursement of medical costs, and her costs of representation.

[9] DJGSL, in its statement in reply, denied Josie's allegation. It stated Josie's letter of resignation had "*indicated a possible issue with a fellow team member of which the Respondent has no knowledge*". It stated Taane and David had asked for details of the two matters Josie raised in her letter of resignation but she had not wanted to discuss or elaborate on them.

The investigation

[10] Josie's claim was not resolved in mediation and the Authority proceeded with an investigation. Written witness statements were provided by Josie, Jason, Taane, David, Julie, Kym and store assistant Barnes Kepa. Store assistant Jo Jenkins also attended the investigation meeting and gave oral evidence.

[11] Each witness, under oath or affirmation, confirmed their written statement (where she or he had provided one) and answered questions from the Authority member and the parties' representatives. The representatives had the opportunity to provide oral closing submissions.

[12] In preparing this determination I reviewed the parties' statements and submissions, the written and oral evidence of witnesses, and relevant documents provided by the parties. As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions

received but sets out findings of fact and law and expresses conclusions on matters for determination.

Order prohibiting publication of certain evidence

[13] I record the order made orally at the close of the investigation meeting and confirmed in writing by Minute to the parties on 5 May 2011 that the following parts of the evidence given in this matter must not be published (that is in writing or by being repeated orally):

- (i) Paragraph 4a ii and 6a of the witness statement in reply of Josephine Hauraro; and
- (ii) Paragraph 29d of the witness statement of David Grindley; and
- (iii) Paragraph 3 of the witness statement in reply of Jason Hauraro; and
- (iv) All oral evidence given by witnesses regarding the facts or allegations referred to in those paragraphs.

[14] This order was made under clause 10 of Schedule 2 of the Act. The evidence to which the order applies is not repeated or referred to in this determination.

Issues

[15] The issues for investigation and determination by the Authority were:

- (i) whether Josie's resignation was a constructive dismissal because:
 - a. there were sufficiently serious breaches of her terms of employment which the employer would reasonably foresee would result in a substantial risk of resignation (with the breaches being the alleged breach of privacy, ridicule, and denial of bereavement leave); and/or
 - b. her resignation was coerced (by options allegedly put to her); and
- (ii) whether DJGSL, through David's actions, dealt with her resignation as a fair and reasonable employer would have done.

The onus of proof

[16] Having claimed she was constructively dismissed, Josie bore the burden of proving the allegation about the serious breaches of her terms of employment and that

she had options put to her that induced her resignation.

[17] DJGSL bore the burden of proving it did not unjustifiably disadvantage Josie through how David dealt with her resignation and the complaint she made at the time of giving it.

[18] The Authority must decide these matters on the balance of probabilities – that is whether the evidence established that facts alleged by a party or witness were more likely than not to be true.

How the problem arose

[19] On 8 June 2010 David called Josie to a meeting about her conduct at work. He was unhappy that she had bluntly refused to follow a direction from him earlier that day. At Josie's request Taane also attended the meeting.

[20] Josie said her working environment was difficult because she did not get along with the bakery supervisor Raewyn Gooch. She had got a verbal warning three months earlier for swearing at Raewyn.

[21] Although Josie did not say so, David and Taane both formed the impression that Josie had pressures at home which contributed to her coming to work in a stressed state. Josie asked for a week's leave and was asked to see a doctor to provide a medical certificate.

[22] She provided the certificate the next day and did not return to work until the following week. The certificate did not state the reason for Josie being medically unfit for work. On her return to work Josie told Taane that she had been "*depressed*", was "*on a bit of medication*" and asked Taane not to tell anyone else except David and Julie.

[23] Josie had experienced previous periods of feeling depressed through her life. On this occasion she was prescribed a month-long course of the anti-depressant medication Fluoxetine.

[24] Taane did relay the information given to her by Josie to David and Julie but said she did not tell Kym. While I accept that evidence I also find it more likely than not that Kym and other staff were aware Josie was feeling depressed or was unwell in some way, from seeing her at work and through contact outside work, such as at the Edgecumbe Sports Club where Kym, Josie and Jason were members and socialised. Kym, co-workers such as Jo and Barnes, and David and Julie were also aware of some instances of angry or emotional outbursts by Josie at work from which she usually calmed down within a short time.

[25] One such incident occurred on 30 September 2010 when David and Julie were away from the store on leave. Josie began yelling when Kym passed on an order from Taane not to put certain stock on the shelves because a double order had been sent and needed to be checked. Taane said that when she went to check what was wrong, Josie said Taane did not trust her. When Taane asked Josie to come to the office she responded by yelling “*boring, boring, boring*” and put her hands over her ears.

[26] When Josie was persuaded to come to the upstairs office, she refused to discuss the problem. Taane warned Josie she could face disciplinary consequences, including dismissal, for her actions and asked her to go home. About an hour later Josie came to see Taane and apologised. Taane described Josie’s work and demeanour after that day as “*excellent*”. She said Josie was a capable worker whom she called “*Miss Reliable*”. Although Taane reported the incident to David and Julie on their return from leave three weeks later, nothing further was done about it.

[27] On 15 November 2010 Kym spoke with Josie about news of a motor accident near Ruatoki. During that conversation Josie realised the 14-year-old boy who died was the son of her half-brother. Josie did not have frequent contact with that family but told Kym she had a special connection with her nephew and needed to attend the tangi due to be held on the next day. During the Authority investigation Josie admitted she did not have a special connection with the deceased youth but had said so to make sure she could get the time off to attend the tangi.

[28] Shortly after talking to Josie, Kym told Taane that Josie might need to be off work the next day to go to the tangi. Kym was asked to tell Josie to talk to Taane about arrangements if she wanted the day off and to suggest Josie ask Barnes to swap

a shift with her. When Kym conveyed this information to Josie, Josie was annoyed she had to make arrangements for work cover.

[29] However Josie did contact Barnes by telephone that evening and arranged for her shift to be covered. Josie did not attend work on 16 November and went to her nephew's tangi in Ruatoki.

[30] On the evening of 16 November Josie rang Barnes and talked about the tangi. Josie thanked Barnes for covering her shift. Barnes said she was in trouble because there had been no-one to cover her own shift while she covered for Josie.

[31] While talking to Josie on the phone Barnes mentioned a recent conversation she had with Jo. She said she and Jo had talked about Josie having a mental illness and used the phrase "*You know, that John Kirwan thing*". That was a reference to a Ministry of Health-funded public awareness campaign which included television advertisements in which former All Black John Kirwan talked about his experience of depression.

[32] From this point the evidence of Josie and Barnes differs about what was said during the rest of the telephone conversation. Josie's evidence was that Barnes had said Jo told her that Kym had said Josie had a mental illness and Kym had mocked Josie by saying "*Don't judge me until you know me*". That was a catchphrase used in another Ministry of Health-funded public awareness campaign about mental health.

[33] According to Josie, Barnes said she had seen Kym make those comments, Kym was laughing about it, and customers and staff could hear what Kym said.

[34] However in her evidence to the Authority Barnes insisted she did not mention Kym during the telephone call and Jo had not mentioned any such comments from Kym. Jo agreed she and Barnes had talked about whether Josie had a mental illness but also insisted she had not heard Kym make any of the alleged comments about Josie.

[35] On the following morning, 17 November, Josie confronted Kym and accused her of telling people she had a mental illness. Kym denied the allegation. Again the

accounts of that conversation differ.

[36] Kym said Josie was agitated and yelling and talked about resigning. Kym said she encouraged Josie to go home and think about it first but when Josie continued yelling, Kym told Josie to calm down or she would have to escort her off the premises.

[37] Josie said she asked to speak to Kym in the storeroom and had asked why Kym had said Josie had a mental illness. Kym denied the allegation and the two then argued about whether Josie should have found cover when she was away on the previous day. Josie then returned to her work in the store and shortly afterwards rang Jason at home. She arranged for him to type a letter of resignation which he brought to her in the store.

[38] Taane had been out of the store but arrived after 2pm. After speaking briefly to Kym, Taane went and asked to speak to Josie. She recalled Josie saying words to the effect that she knew what Taane wanted and she had it ready. Josie handed Taane an envelope containing two copies of the resignation letter. Taane attempted to speak with Josie about what was happening but her efforts were rebuffed and Taane returned to the office.

[39] David arrived at the store soon after – he said around 2.35pm. Taane told him Josie had resigned, gave him Josie's letter, and said Josie and Kym had "*a run in*".

[40] David then went and spoke to Josie where she was working in the store and due to finish work around 3pm. Again there is a dispute in the evidence. David said he asked Josie whether there was anything she wanted to talk about and when she refused to discuss the resignation or the issues giving rise to it, he suggested Josie could leave without having to work out her notice. He said she accepted the proposal, thanked him for it and left the store at 3pm.

[41] Josie agreed David had begun the conversation by asking if she had a rough day but also said he had told her that what she had said in her letter of resignation was true, a point emphatically denied by David. She said it was David who did not want to go into details but suggested she could get a good reference, her holiday pay and

“call it quits”.

[42] Before Josie left the store Taane came to where Josie and David were standing. Taane told David he should not talk to Josie on his own but David said everything was already sorted out.

[43] Subsequent correspondence and the raising of the grievance are set out earlier in this determination.

Was there a constructive dismissal?

[44] Whether Josie’s resignation was really a constructive dismissal depends on the answers to two questions:

- (i) firstly, whether the incident which caused upset and offence to Josie did happen as – based on second or third hand information – she believed it had; and
- (ii) secondly, whether whatever happened was a breach by the employer of Josie’s terms of employment which DJGSL should reasonably have foreseen would result in her finding the situation so intolerable that she would leave the job?

[45] There is no dispute that Barnes and Jo talked to one another at work about Josie’s well-being because they admit it and Barnes told Josie about that conversation while speaking by telephone on the evening of 16 November.

[46] However I do not accept the evidence established to a sufficient degree that Kym made the alleged comments in the store about Josie’s mental health. Barnes, Jo and Kym each gave sworn evidence that no such comments were made, and, in the case of Barnes, that she relayed no such comments to Josie.

[47] Both Barnes and Jo gave evidence of earlier incidents with Josie at work. Jo described Josie as having *“nutted out”* at her soon after she started work at the store. Barnes described one incident where Josie *“went all out swearing at me”*. However both said Josie was otherwise *“normal”* and *“happy”* with them. Jo’s evidence was that, while working together on 16 November, she and Barnes had talked about Josie

and “*said to ourselves, does she have a split personality or the John Kirwan thing*”. It was, I find, simply gossip between co-workers for which DJGSL was not responsible. There was nothing to indicate any one in a position of responsibility was aware of it at the time or, being aware that it might be harmful, did not to stop it.

[48] Barnes said she told Josie about the conversation with Jo as a way of expressing concern about Josie’s health and being open with her rather than talking behind her back. This went awry because Josie concluded from their conversation that confidences about her health that she had shared with Taane had been passed on to other employees. Josie believed this included Kym but there was nothing to confirm that assumption. It is just as likely, I find, that Kym, Barnes and Jo had drawn their own conclusions from what they saw of Josie both at work and elsewhere in their relatively small town.

[49] In considering Kym’s actions, I do not accept DJGSL’s submissions that it was not responsible for whatever Kym did because she did not hold a management role. The reality was that as team leader Kym was regularly left in sole charge of the store and its staff, and, at other times, she often passed on instructions from Taane to Josie. In both such circumstances she was the representative of the employer and DJGSL was liable for her actions. However I find Kym’s actions on the morning of 17 November did not encourage, induce or require the resignation of Josie. Rather Kym counselled Josie about making a rash decision and did not act unreasonably in suggesting that Josie would be made to leave the store and go home for the day if she could not calm herself down.

[50] Josie was annoyed at being questioned about the arrangements for taking the previous day as bereavement leave. It is clear from the evidence of Taane and Kym that there was never any intention to deny Josie the opportunity to take the leave. The employment agreement required Josie to notify her manager as early as possible. It was not unreasonable for Taane to ask Josie to check whether someone could cover her shift but it was misleading of Josie to overstate the closeness of her connection with the deceased, as she accepted in her evidence that she had. While she may have been dissatisfied, there was nothing to suggest that taking the leave put her job in any real jeopardy or questions about it were so overbearing that she reasonably believed she needed to or was required to resign.

[51] I have also considered whether the resignation was made in the heat of the moment and unfairly seized upon by DJGSL in a way that might then make the end of Josie's employment a constructive dismissal. However I do not consider that was so for two reasons. Firstly, Jason's evidence was that he and Josie had "*a general discussion*" about the prospect of resigning from her job on the evening of 16 November after the phone conversation with Barnes. Secondly, on 17 November, several hours passed between Josie confronting Kym and handing over her resignation letter to Taane. In that time she had a letter prepared setting out her reasons so the words of resignation were not hurried or unconsidered.

[52] Accordingly I find Josie's resignation was not forced by actions of any representative of DJGSL – by whom I mean David, Taane and Kym. As a result of this conclusion I do not need to consider the foreseeability question.

Unjustified disadvantage

[53] I accept Josie was disadvantaged by how David dealt with her resignation and the circumstances leading to her giving notice.

[54] While I accept it was more likely than not that Josie was mistaken in her belief that Taane had betrayed confidences and that Kym had mocked Josie's health, David could not have known the true state of affairs at the time he spoke with Josie on 17 November. He had spoken only momentarily to Taane on arriving at the store and had not discussed any of the background with Kym before speaking with Josie.

[55] The letter of resignation made a serious complaint about the actions of Kym who was a DJGSL supervisor. It claimed "*exposing my mental illness to the staff*" was a breach of privacy and that Josie's terms of employment were breached by having to find cover for her shift in the event of a bereavement.

[56] David's attempts to investigate those concerns consisted of only a cursory conversation with Josie and he quickly moved to a position where he sought to end her employment at the earliest opportunity without persevering with any further inquiries as to the reason for it. In that respect he did not do enough to discount the

prospect that her concerns were real and that resignation was an action which should be discouraged rather than facilitated in those circumstances.

[57] I do not accept David's evidence that he could not have done more because Josie seemed happy and would not discuss the matter any further. He had gone into the store and talked to Josie while she was working. In his oral evidence he said she was facing the shelves and stacking goods as he talked to her. He knew from her letter that she was partly upset about the issue of privacy about her health information, yet he sought to discuss that issue in a public area open to customers and other staff.

[58] While Josie may have been unresponsive to the questions he asked her in that work area, he then made no real effort to find out more from Kym and Taane about what had happened before moving to have Josie's employment finish as soon as possible. It was not until after Josie raised a personal grievance that David got proper reports from Kym and Taane about what they understood had happened.

[59] In those respects his actions were, I find, less than what a fair and reasonable employer would have done in all the circumstances at the time. A strong indication of that comes from Taane's evidence that she went and spoke with David where he was talking to Josie. She suggested David have someone else with him while talking to Josie but he responded: "*Don't worry, it's sorted*". Taane's view was that they should "*take it upstairs*", that was go to the office rather than talk in the store. It was a suggestion which reflected both appropriate management practice and her own experience of how best to deal with Josie throughout the employment relationship.

[60] There was the prospect that proper inquiries and discussion might have quickly resulted in a different outcome which was suitable for both parties. And in that respect I do not accept that David was correct in the assertion that he made in his 18 November letter that Josie did not give him a chance to look into her grievance with Kym and that DJGSL was not responsible for Kym's actions. Rather he opted to quickly move to curtail notice and end the employment. As a result Josie was unjustifiably disadvantaged by not having her concerns properly investigated, even if they were mistaken, and by not having a discussion with her employer in a suitably private place.

[61] For those reasons I find Josie has a personal grievance for unjustified disadvantage for which remedies must be considered.

Remedies

[62] As Josie's grievance was not found to be one of unjustified dismissal, a remedy for lost wages is not available to her. The appropriate remedy for the disadvantage grievance found is an award of compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act.

[63] That remedy does not extend to all the upset Josie felt about the end of her employment, as I have found she chose to resign rather than being forced or induced to do so by the actions of her employer.

[64] However she did suffer injury to feelings from the actions of David in bringing her employment to an early end without any real inquiry into what she believed were legitimate concerns about ridicule and breaches of privacy.

[65] I accept her evidence that those actions contributed to feelings of distress, embarrassment and a collapse of confidence that impacted on her family life and social contact in her local community.

[66] I consider the extent to which those feelings were caused by DJGSL's unjustified actions should be compensated by an award of \$6000.

[67] Under s124 of the Act remedies are to be reduced where blameworthy conduct of the employee contributed to the situation giving rise to the grievance.

[68] In all the circumstances of this case I consider a reduction of one third is required to mark Josie's conduct in, firstly, failing to properly discuss her concerns with Taane and David before resigning on the basis of unreliable and probably incorrect information and, secondly, not being entirely frank about her basis for seeking leave on 16 November. The effect is to reduce the amount of compensation DJGSL must pay Josie to \$4000.

Costs

[69] Costs are reserved. The parties are encouraged to agree any issue of costs between themselves. If the parties are not able to agree and an Authority determination of costs is required, Josie's representative should lodge and serve a memorandum as to costs within 28 days of the date of this determination. DJGSL would then have 14 days from the date of service to lodge a reply memorandum. No application will be considered outside this timetable without prior leave. If the Authority were required to determine costs, it would most likely be on the notional daily rate of \$3000, subject to any relevant information in the parties' memoranda and the application of the principles discussed in *PBO v DaCruz* [2005] ERNZ 808.

Robin Arthur
Member of the Employment Relations Authority