

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 181
5337166

BETWEEN

MANDY JENNER
Applicant

AND

PETONE WORKING MEN'S
CLUB AND LITERACY
INSTITUTE
Respondent

Member of Authority: Greg Wood

Representatives: Ian Hard for the Applicant
Blair Scotland for the Respondent

Investigation Meeting: 27 October 2011 at Wellington

Submissions Received: By 27 October 2011

Determination: 16 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Mandy Jenner, claims that she was unjustifiably constructively dismissed by the respondent (the Petone Working Men's Club/the Club). This was said to be as a result of the Club's failure to remedy a health and safety issue, and subsequently, and in the alternative, its failure to allow Ms Jenner to withdraw her resignation during her notice period. Soon after the commencement of the investigation meeting, Ms Jenner withdrew her claim for reinstatement.

[2] The Club claims that Ms Jenner resigned of her own free will, was not subject to any breaches of its duties to her over health and safety issues and that it endeavoured to meet with her to discuss her resignation, but this was not able to take place in time.

[3] The issues for determination are:

- Why did Ms Jenner resign?
- Was the resignation as a result of any breach of duty by the Club?
- Is so was it reasonably foreseeable that she would resign?
- Did the Club fail in any duties to her during her notice period?
- What remedies, if any, are available to her?
- Costs.

Factual discussion

[4] Ms Jenner worked for the Club as its night time receptionist between December 2006 and 11 February 2010, the last day of her employment. She worked five nights a week, from either 4.30 or 5pm until close, from Wednesday to Sunday nights, although she was entitled to a weekend off on a regular basis. There were never any problems with Ms Jenner's work and she got on particularly well with the Club's many and varied members.

[5] The Club also operates a management contract for two other Hutt Valley chartered clubs, and for that reason the Chief Executive Officer of the Club, Mr Eddie Wairau, required that several parks close to the Club entrance be kept free at all times for management staff. This was because the managers of the different clubs would often visit the Petone Working Men's Club throughout the day and night for deliveries and meetings, and that as the Petone Club itself did not have a van, its managers' own vehicles were used for various freight carrying purposes, such as liquor deliveries. In addition, a number of parks close to the entrance to the Club were reserved for committee members.

[6] In the past Ms Jenner had been in the habit of parking in committee members' parks with their permission, but this had long ceased. Subsequently Ms Jenner, because she was one of the last to leave at night, would seek to park in parks near the bar so she could be easily observed or escorted by bar staff. Failing that she would park in one of the manager's parks, if no other parks outside the front door were available.

[7] Ms Jenner's reasons for wanting to park near the bar, or the front office she worked in, were entirely understandable. She was concerned about her safety working late at night and in an office that was often full of cash. Furthermore, the Club is situated next to a rugby club rooms and the Petone recreation ground, and in many people's eyes did not constitute a very safe place in the early hours of the morning, especially in the weekends.

[8] On the other hand the Club has a reasonable number of parks within its gates which are secure and are protected by camera security, albeit that the cameras are not monitored constantly.

[9] Ms Jenner particularly wanted to use the park that the Assistant Manager regularly used, but because he got to work before her he routinely used it instead. She considered that she should have had this park, which had a notice above it stating it was for *after 3 staff*, even though it had later been spray painted as a manager only car park. However, Ms Jenner never raised this issue with any managers at the Club.

[10] The problem for Ms Jenner was that she normally arrived at work during the peak time for membership attendance, and thus it was difficult for her (on Thursdays and Fridays in particular) to get a park in the car park, although on the vast majority of occasions she did manage it, even if only by taking a manager's park.

[11] From time to time, like with the committee's parks, there was a crack down on the unauthorised use of management parks. Unfortunately for Ms Jenner, who did not work on Mondays, she did not become aware of such a crack down that was notified to staff in late January 2011. On Friday 28 January 2011 Ms Jenner parked in the General Manager's car park, having failed to find a park in any of her other preferred spots. She was subsequently asked by a duty manager to shift her car.

[12] Ms Jenner's response was entirely unpredictable. As she said herself, she threw her *toys out of the cot that night*. Her response was that there had better be someone else covering her job tomorrow because she quit. She told the duty manager that she had always said that if she was asked to move her car then she would leave. The duty manager suggested that someone else could shift her car for her and then bring it back when the Club was not so busy. Ms Jenner responded that she did not want anyone else to drive her car.

[13] When the duty manager met Ms Jenner later that night she apologised for her earlier reaction. His response was that Ms Jenner knew that she wasn't to park in committee or management designated car parks and that any concerns she had should be raised with the Assistant Manager. He also informed Ms Jenner that there were other options available, such as a security guard (or someone else) walking her to her car at the end of her shift, or her shifting her car during the course of her shift.

[14] Ms Jenner explained in the course of the investigation meeting that neither of these options was practical because she did not take her designated breaks in the course of the evening, during which she could have shifted her car, and there were not always security staff available at the end of her shift to escort her to her car.

[15] Despite Ms Jenner's concerns I do not accept that either option was generally not available to her. In particular, it was her choice not to take breaks that would have allowed her to shift her car before it became too late in the evening for her to feel safe on her own, and therefore dangerous in her mind. Neither did she ever formally request someone to accompany her to her car.

[16] Ms Jenner had a number of other safety concerns, and a feeling that she was being frozen out by the Club's assistant manager, but given that these matters were not the reason for Ms Jenner's resignation, were not raised formally with the Club and there is a lack of evidence in support of them, I do not need to address them any more than to mention them here.

[17] Ms Jenner, although accepting that she had *tossed her toys out of the cot*, took the rest of the evening, some several hours, to draft up her letter of resignation, dated that day and addressed To Whom it May Concern. The most important parts of the letter state:

In light of being asked to move my car out of the General Managers Park against the fence I have decided that it is time to readdress my role with in the Club.

I have decided that my general safety is more important than a position which requires my working until the early hours of the morning so I feel I have no choice but to give 2 weeks notice. I will also be pursuing the clause of constructive dismissal (Health and Safety)

In the time I have worked for PWMC there have been at least two incidences of cars being stolen and a staff members car being broken into ... before 8.30.

I have been made aware that the committee parks are to be kept free until 10 o'clock then we can get the doorman (who is not allowed to leave the door) to move our car (which we are not insured for) or get someone to walk us to our car to get it, to hopefully find it unvandalised. (This is my only mode of transport to and from work)

I also find this somewhat confusing that as these parks are reserved for committee only then why is it acceptable for the partners and friends of committee to use the park?

... I feel the members would find it unacceptable to have the staff's safety put at risk.

At the time I was employed there were also two car parks made available to after 3pm staff which has now been eliminated to 1.

I realise that employees are expendable but would have felt that in light of the hours I work and times I have to be here (to close, in reception where people think I have access to the safes, so making me a target) there would have been some consideration granted.

I have to admit that I am disappointed that this has to be the reason for my resignation. ...

[18] Ms Jenner placed copies of her resignation, in envelopes also addressed To Whom It May Concern, under the doors of the office of Mr Wairau and his assistant. Mr Wairau saw the letter the next day. Ms Jenner saw Mr Wairau around 7pm that night, after he had been at a work related function, and asked him if he had got her letter. He responded that he had and that he would get back to her. It is common ground that it would not have been appropriate for Mr Wairau to have discussed the issues with Ms Jenner at that time.

[19] On Monday 31 January 2011 Mr Wairau met with his assistant manager to discuss Ms Jenner's resignation. Because of the content of the letter they decided that they needed to seek external advice from the Club's human resources advisers, the Employers Chamber of Commerce Central (the ECCC). Mr Wairau also decided that because the front office receptionist position was so important to the Club, he would advertise the job forthwith, including on *Trade Me*.

[20] Ms Jenner had commenced her two week notice period, but was not at work, when she saw the advertisement on Trade Me that night. She was shocked that the Club would advertise her position, believing instead that (as had happened in a previous job) her employer would have come to her over her resignation and tried to

persuade her to stay. She therefore emailed Mr Wairau late that night stating:

Could we possibly set up a meeting to discuss my future employment at the club. I feel I was forced to submit my resignation because of the lack of consideration given to me in light of my concern about keeping myself safe. I realise over the last couple of days you have been busy and under pressure due to the clubs latest developments. The issue I have is not a personal one against you. If this is possible I will be bringing [name withheld] with me as my support person.

[21] Ms Jenner's motivation in sending this email was to discuss her future with the Club, but she accepted at the investigation meeting that she would not have withdrawn her resignation unless a solution over car parking that was acceptable to her was achieved.

[22] Unfortunately the email she sent was not received, as it was sent to a non-existent web address. It was therefore re-sent late the next night, Tuesday 1 February. Mr Wairau did not see it until the next day, Wednesday 2 February. He first wanted to get a response from the ECCC consultant that the Club used. As a result of that and other work pressures, Mr Wairau did not send out a request for a meeting between himself, the ECCC and Ms Jenner and her representative until Saturday 5 February.

[23] Also on 5 February Mr Wairau asked the duty manager to ask Ms Jenner to come in and see him. His purpose was simply to set a date for the meeting, as attempted subsequently through email. Ms Jenner declined to meet with Mr Wairau without representation of her own. She was not told, probably because the duty manager did not know, that the only purpose for the meeting for to set a date for the formal meeting. Unfortunately, both parties were frustrated with the other over the failure of this initiative.

[24] A meeting date of 10 February was suggested on 5 February, and this was repeated in an email from Mr Wairau on 7 December. Ms Jenner never responded to these emails. Instead she sought the counsel of Mr Hard. On 9 February Mr Hard wrote to Mr Wairau, following his meeting with Ms Jenner on 8 February. Amongst other things the letter states:

... Mandy Jenner hereby retracts her resignation letter, which in any event you have never acknowledged and have not responded to in any manner.

Consequently the two weeks' notice given by Mandy is voided and of no effect. Her employment for your organisation continues.

However, the issues which led to Mandy taking such a desperate step are still very much alive.

... Your club ought to have sought the reasons behind the forced resignation of a competent and hardworking employee such as Mandy Jenner. The fact that you did not is nothing short of disgraceful and calls into sharp focus your commitment to health and safety issues impacting upon for your employees.

There have been other health and safety issues which put Mandy in potential danger, such as the recent fire alarm evacuation where she found herself locked in her reception area, with no key to facilitate her safe exit from the arena.

I trust that you will accept that Mandy's resignation, which you never acknowledged is withdrawn. If you do not, then there will be a constructive dismissal case commenced against you forthwith. ...

[25] The fire alarm evacuation issue took place after Ms Jenner's resignation letter and therefore can not have formed any part of her decision to resign. Therefore that issue has not been pursued by me.

[26] Through its representative the Club responded the next day. The letter states, amongst other things:

Relying on Mandy's resignation in good faith, The Employer has already made a job offer to a candidate to fill Mandy's role which has been accepted.

The employer is therefore not in a position to accept the withdrawal of Mandy's resignation.

[27] While that statement was correct at the time, that person's reference checks did not stack up and the Club relied for a long period thereafter on existing staff changing or expanding on their duties, or doing extra shifts to cover Ms Jenner's position.

[28] Despite mediation and efforts by the parties to resolve matters on their own terms, that has not proved possible. It therefore falls to the Authority to make a determination.

The law

[29] The Court of Appeal considered whether a resignation constituted a constructive dismissal where there had been a breach of duty by the employer causing

an employee to resign in *Auckland Electric Power Board v Auckland Local Authorities IUOW* [1994] 1 ERNZ 169. It held at 172:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[30] In *New Zealand Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 340 the Employment Court held:

[66] ... Where there is a genuine dispute between the parties as to their rights, especially if it is based on reasonable grounds, neither party can use the other party's stance in the dispute as a ground for either dismissal or resignation intended to be treated as a dismissal. ... The parties owe each other a duty to refer the dispute to mediation.

Determination

[31] Resignations should not be used as negotiating tools to get one's way at work. The duties the parties owe each other in good faith are such that problems at work should ordinarily be discussed between them first. Ms Jenner chose not to discuss the problems with the car parking with the management of the Club, but instead took the precipitate action of resigning. Because resigning is a unilateral action, she then had no ability to withdraw it on her own initiative. Similarly, because it was a unilateral action there was no ability for an employer to not accept the resignation. An employer may, if it chooses, seek to convince an employee not to resign, and if an employee chooses to attempt to withdraw their resignation, an employer may consider that. Under the duty of good faith I would go so far as to hold that an employer is required to consider such a request in good faith. However, a resignation once given can not be withdrawn once it has come to the employer's attention, without the employer's agreement.

[32] What made matters worse for Ms Jenner was the language of the resignation letter. She uses the words *constructive dismissal*. It must therefore have come as no

surprise whatsoever that management of the Club sought first to get professional advice over Ms Jenner's resignation. It was clear from the face of the letter that an employment relationship problem had been raised and that a personal grievance may follow, which is indeed what occurred.

[33] In all of these circumstances Ms Jenner simply had no right to withdraw her resignation as she purported to do on 9 February through her lawyer. Furthermore, having offered the job to another person by that stage, I accept that the Club acted in good faith in its response to that letter.

[34] None of the above means, however, that Ms Jenner can not succeed in her claims for constructive dismissal, or in the alternative a disadvantage claim due to an alleged failure by the Club to meet with her. As noted above, the reason for Ms Jenner's resignation was palpably clear – it was because of the car parking issue. For her to succeed in her claim for constructive dismissal the request to move her car and the insistence on maintaining certain car parks for managers and committee members must have been a breach of duty to her, plus also be one of sufficient seriousness to make it reasonably foreseeable that she would resign.

[35] Ms Jenner had no right to any particular car park. No doubt it was convenient to her to park in her preferred car parks, but convenience does not constitute an enforceable right. While I accept that she was genuinely concerned about this as a safety issue, the fact is that she simply did not try and engage with the Club over it. The one time she was asked to move her car she simply spent the rest of the evening writing up a detailed resignation letter. In addition, I accept that the Club had provided alternatives to Ms Jenner, to help ensure her safety, which in a job like hers nevertheless simply can not be guaranteed. She never utilised those options. In particular, her reasons for failing to move her car, especially that she simply did not take breaks in the course of her evening, were simply unreasonable.

[36] I therefore conclude that there was no breach of duty that led to Ms Jenner's resignation. Even if I were wrong about that, the resignation was not reasonably foreseeable, given that she had never raised the issue before with management formally, and that I accept that they would have discussed these matters with her. What seemed to be driving the particular issue was that Ms Jenner felt it was unfair that managers and committee members should have parks reserved for them when they were not often there during the time that she needed a park. It is inherently

unlikely that such concerns could ever give rise to a personal grievance for constructive dismissal.

[37] Ms Jenner was entitled to believe that the Club's parking system was unfair, and entitled to leave her employment if she could not put up with it, but what she was not entitled to claim is that the initiative for her leaving came from the Petone Working Men's Club as a result. I therefore dismiss the claim of constructive dismissal.

[38] No doubt the Club could have dealt with Ms Jenner's email received on Tuesday 1 February more quickly. However, given the content and tone of her resignation letter, it was entirely proper and reasonable for the Club to want any meeting to involve its professional employment advisers. Ms Jenner was just as responsible for any delays in organising matters, particularly given that she did not respond to any of the emails asking about her availability for a meeting. That is particularly surprising, given that after seeing her job advertised Ms Jenner was very concerned about her resignation letter being accepted and the Club moving to replace her, as opposed to her expectation, which was that it would come back to her and try and keep her in her employment. Furthermore, I note that this could only ever have been achieved by the Club meeting her terms over car parking in any event.

[39] It therefore follows that the Club has not breached its duty to Ms Jenner by not organising a meeting with her any more quickly. The parties both owe each other a duty to be responsive and communicative and the behaviour of neither of them has been ideal in this regard. That does not, however, constitute any disadvantage to Ms Jenner in her employment, nor does it extend to constituting grounds for constructive dismissal.

[40] I therefore dismiss all of Ms Jenner's claims.

Costs

[41] Both parties asked the Authority to determine costs, whatever the outcome, on a tariff basis. The ordinary tariff for a case like this, which went for a full day, is in the region of \$3,000. Given that the matter took all day, that Ms Jenner was unsuccessful in all her claims and that her case was never a strong one (with Ms Jenner having admitted to throwing her *toys out of the cot* by resigning, not understanding that such a situation could not necessarily be retrieved) it was always a

difficult case to pursue. In addition, Ms Jenner did not withdraw her claim for reinstatement until the investigation meeting had commenced, which put the Club to further unnecessary expense. In all the circumstances I therefore consider that costs of \$3,000 are an appropriate award.

[42] I therefore award the applicant, Ms Mandy Jenner, to pay to the respondent, the Petone Working Men's Club & Literacy Institute, the sum of \$3,000 in costs.

G J Wood
Member of the Employment Relations Authority