

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 427  
5339297

BETWEEN

MARIE GODDARD  
Applicant

A N D

SHARON BAKKER trading as  
THE CABBAGE TREE CAFE  
RESTAURANT AND BAR  
Respondent

Member of Authority: K J Anderson  
Representatives: Anamika Singh, counsel for applicant  
Sharon Bakker, in person  
Investigation Meeting: 11 August 2012 at Hamilton  
Date of Determination: 30 November 2012

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] The applicant, Ms Marie Goddard, claims that she was unjustifiably dismissed on 2 March 2011. Ms Goddard asks the Authority to find that she has a personal grievance and award her reimbursement of lost wages and compensation in the sum of \$10,000. Conversely, the respondent, Ms Sharon Bakker, denies that there was a dismissal and says that Ms Goddard voluntarily left her employment on 2 March 2011 and never returned.

**Background**

[2] Ms Goddard commenced her employment at the Cabbage Tree Cafe Restaurant and Bar (the Cabbage Tree) in Tirau on 17 February 2011, in the role of business sales/service supervisor – function and marketing assistant. The position

involved all aspects of catering for functions and the general food and wine presentation for the business.

[3] It seems that Ms Goddard was well qualified for the role, having obtained some experience in previous positions.

### **The departure of Ms Goddard – 2 March 2011**

[4] There is substantial conflict in the evidence in regard to what happened on 2 March 2011; the last day of Ms Goddard's employment. The Authority has the evidence of Ms Goddard on the one hand, and then there is the evidence of Mr Nigel Brown, the General Manager of the restaurant.

### ***The evidence of Ms Marie Goddard***

[5] The evidence of Ms Goddard is that she commenced work as normal on 2 March 2011. Two other staff were working that day; along with Mr Brown. Ms Goddard says that while Mr Brown normally talked to her about general matters that would take place during the day, on this day, he hardly spoke to her. Ms Goddard also says that Ms Bakker, the owner of the business, would normally "have a chat" but did not do so on that day.

[6] Ms Goddard also relates to the other two staff "having conversations amongst themselves" and Ms Goddard says that she thought this was "weird." Just why she thought this, was not really explained.

[7] The evidence of Ms Goddard is that at about 4.30pm on the day in question, as she was about to leave for the day, she said goodbye to the other two staff and called goodbye to Mr Brown who was in his office up the stairs in the building. Ms Goddard says that Mr Brown then called down from his office and said that he wanted to see her. Ms Goddard says that she went up to Mr Brown's office and as he was talking on the telephone, she had to wait five minutes until he had finished his call. Ms Goddard says that Mr Brown then said to her: "*I have to let you go*" and that these were the first words that he said to her.

[8] Ms Goddard attests that she started to "breakdown and cry" and questioned Mr Brown as to why she was being "let go." Ms Goddard says that Mr Brown told

her that “the girls” had been with the café for a number years and they were not happy. But Mr Brown would not tell her what the problem was.

[9] The further evidence of Ms Goddard is that Mr Brown then told her that he would “sort out” her final pay. Ms Goddard says that she went back downstairs, left her apron in the kitchen, left the premises and never returned. Ms Goddard’s evidence is that upon arriving home, she told her partner about what had happened, but there is no evidence from him.

[10] There is some corroborative evidence from two other people who attended the investigation meeting. First, Ms Stacey Howard, Ms Goddard’s daughter. Ms Howard says that she received a phone call from her mother on 3 March 2011 and that her mother was very upset and crying. The statement of evidence appeared to have been cloned almost directly from Ms Goddard’s written statement, but it is commonly accepted that Ms Goddard was upset about her circumstances.

[11] There is also evidence from Ms Jo Turner-McKee, who has known Ms Goddard for five or six years; having been a work colleague. Ms Turner-McKee related to speaking to Ms Goddard a few days after she started work at the Cabbage Tree, whereby Ms Goddard advised that she was enjoying the work but was starting to feel “uncomfortable” about a couple of the other workers who appeared not to have accepted her.

[12] Ms Turner-McKee’s evidence is that she spoke to Ms Goddard “three days to a week” after 2 March 2011 and Ms Goddard told her about what happened on that day.

### ***The evidence of Mr Nigel Brown***

[13] First, Mr Brown disagrees with the times that Ms Goddard says that certain things occurred on 2 March 2011. For example, Ms Goddard says that the Cabbage Tree closed at 4.30pm and she was about to leave at this time. But Mr Brown says that the Cabbage Tree has closed at 3.30pm for the past three years and has occasionally closed at 3.00pm, with the effect being that the staff would sign out at about 4.00pm.

[14] The evidence of Mr Brown is that he was not talking on the phone as Ms Goddard has said, nor did he call down the stairs for Ms Goddard to come up to

the office. Mr Brown says that that is not something that he would do if he wished to speak to an employee.

[15] The further evidence of Mr Brown is that he was at the bottom of the stairs and said goodbye to the other two staff on the day. He then asked Ms Goddard to come upstairs to his office as he wished to discuss “a couple of things.”

[16] The oral evidence of Mr Brown is that upon going to his office he and Ms Goddard sat down and he then told her that two staff members had come to see him and informed that they were upset about Ms Goddard being bossy. Mr Brown says that Ms Goddard was “very quick” to break down and cry and then asked why the girls were upset. Mr Brown says that he informed Ms Goddard that he had to act upon anything the staff complained to him about.

[17] Mr Brown told the Authority that he then talked about the issue of food waste whereby that morning an extra dozen paninis had been made and Ms Goddard needed to “keep an eye on it.”

[18] The written evidence of Mr Brown is a little different in that he attests that he started the conversation with the issue about the paninis and that he then went on to talk about how staff members were upset regarding how Ms Goddard had been treating them. This is also what he said under cross examination from Ms Singh. Mr Brown states that Ms Goddard’s response was that the other staff were “ganging up” on her. To which he responded that, the staff who had an issue with Ms Goddard, had been there several years and are generally accepting of new staff. Mr Brown says that he informed Ms Goddard that: “...we can’t have this going on and that they [the staff] had said that should it continue, they would consider leaving.”

[19] The further written evidence of Mr Brown is that Ms Goddard became emotional and started crying and said: “Well, what do I do?” Mr Brown says that as Ms Goddard was so emotional he responded by saying: “We’ll leave it at that then.” But before he could finish what he wanted to say, Ms Goddard “stormed out” of the office, went down the stairs and left the building. Mr Brown denies saying to Ms Goddard that he would have to let her go. He states that seconds after leaving the building, Ms Goddard came back in and threw her apron onto the kitchen bench and then left again.

[20] Ms Goddard denies leaving the building and coming back again to leave her apron. I also note that in a letter (25 March 2011) responding to Ms Goddard's raising of a grievance (17 March 2011), Ms Bakker appears to accept Ms Goddard's version of leaving her apron in the kitchen, but nothing rests on this.

[21] Mr Brown says that he was expecting Ms Goddard to return to work as usual the next day, but when she did not, he did not attempt to contact her as he considered that she had chosen to walk out and not return. It seems that Ms Goddard had her final pay deposited into her bank account on or about 7 March 2011.

### **The issues for determination**

[22] The first issue that must be determined is: *Was Ms Goddard dismissed or was her departure a resignation or, alternatively, an abandonment of employment?*

[23] First, the evidence of Ms Goddard and Mr Brown is consistent in that it is clear that Ms Goddard was upset as a result of the discussion in Mr Brown's office on 2 March 2011.

[24] It is also probable that there were problems in regard to Ms Goddard's working relationships with two other staff members; Ms Clifton and Ms Verner, both of whom have provided written statements referring to their experiences of working with Ms Goddard.

[25] I also accept that the problem of Ms Goddard's working relationship with the other staff was something that Mr Brown had planned to, and did, address with Ms Goddard on 2 March 2011. It is what was said on the day that I am required to decide, given the substantial conflict in the evidence about this.

[26] Given the totality of the evidence about what happened on 2 March 2011, I conclude that Mr Brown's version of events is more probable. There are a number of factors that bring me to this conclusion. First, there is the matter of how the meeting came about. Ms Goddard says that Mr Brown called down from his upstairs office and then when she went to the office, Mr Brown was on the phone. I conclude that it is most unlikely that Mr Brown would have interrupted a phone call to summon Ms Goddard to see him and then resume the conversation on the phone. Also, given the gravity of the staff complaints, it seems most probable that Mr Brown would have been downstairs waiting for Ms Goddard to finish work so that he could be sure of seeing her before she left.

[27] I also conclude that it is most unlikely that Mr Brown would have opened a conversation with the words: *we have to let you go*. I find that it is more probable that Mr Brown discussed the food wastage (paninis) and then moved to the matter of the staff complaints. I conclude that it was at this point that Ms Goddard became upset. I accept that Mr Brown then indicated that he would “leave it” for the day. For Mr Brown to say that Ms Goddard “stormed out” of the office is probably a somewhat dramatic description version of events. Nonetheless, it is commonly accepted that Ms Goddard was upset and left with some haste.

[28] In summary then, I find it is more probable that Ms Goddard was not dismissed on 2 March 2011. Rather, I conclude that she left the workplace in an upset and emotional frame of mind because she had been informed that other staff had found her difficult to work with.

[29] That then takes us to the next question to be determined: ***Was the employer entitled to treat the departure of Ms Goddard as a termination of the employment relationship by her?***

[30] The evidence of Mr Brown and Ms Bakker is that because Ms Goddard did not return to work the following day (3 March 2011) or indeed at all, they simply accepted that she had left; effectively terminating her employment by her actions. But I find that the employer was not entitled to adopt that stance.

[31] It is established that Ms Goddard left the workplace in an upset and/or emotional state of mind. It seems to me that a fair and reasonable employer who cared about an employee in such circumstances, would have made contact to inquire about Ms Goddard’s welfare and ascertain when she was coming back to work. The employer’s position is that by her actions, that is leaving and not returning, Ms Goddard terminated the employment relationship, effectively resigning. But I do not accept that the matter is as simple as that; for several reasons.

[32] First, the employment agreement at clause 12.2 provides for abandonment of employment thus:

In the event the Employee has been absent from work for three consecutive working days without any notification to the Employer, and the Employer has made reasonable efforts to contact the Employee, this agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

[33] It seems to me that while the employer attempts to “side step” this provision by suggesting that the departure of Ms Goddard was not an abandonment of employment but a resignation, given that she did not return to work, Ms Goddard’s absence can hardly be seen as anything other than abandonment. I therefore find that there was an obligation under clause 12.2 of the employment agreement for the employer to make “*reasonable efforts to contact the Employee,*” and the failure to do so must be seen as a breach of this provision. It is the understanding of the Authority that it was only a matter of a few working days after her departure from the Cabbage Tree, that Ms Goddard received her final pay; thereby confirming the termination of her employment.

**Was the termination of Ms Goddard’s employment what a fair and reasonable employer would have done in the circumstances?**

[34] Section 103A of the Employment Relations Act (as it was then)<sup>1</sup> provides the test that the Authority must apply:

The test is 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.

[35] Any analysis of whether the employer acted fairly and reasonably in the circumstances must begin with the obligations of the employer under the previously referred to abandonment of employment clause of the employment agreement.

[36] Given that I have accepted that Ms Goddard left the Cabbage Tree suddenly and never returned, hence abandoning her employment, the employer is obliged to make “*reasonable attempts to contact the employee*” before concluding that the employment has been terminated.

[37] Mr Brown and Ms Bakker acknowledge that no attempt was made to contact Ms Goddard. The explanation for the failure to attempt to contact Ms Goddard is basically that the business had to continue on and they had a catering contract with a large company to fulfil. And as far as they were concerned, Ms Goddard had simply resigned due to the fact that she did not return to work. But that explanation is not satisfactory, given the obligation of the employer under the employment agreement.

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<sup>1</sup> Prior to 1 April 2011

[38] While I cannot be certain, it seems more probable that because of the problem that had arisen in regard to Ms Goddard's working relationship with other staff, Mr Brown and Ms Bakker, most probably, saw the failure of Ms Goddard to return to work as an easy solution to their problem; hence there was no inclination to contact her.

[39] The matter of the obligation of an employer to inquire of an employee as to his or her intentions after an apparent abandonment of employment has been assessed by the Courts on a number of occasions. For example in *EM Ramsbottom Ltd v. Chambers*<sup>2</sup> the Court of Appeal accepted that there was "substantial force" in a submission for the employee that: ["... the employer should be cautious in drawing an inference that the employee has abandoned their employment" and: ["... clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment."]

This must particularly be so where the employment agreement requires this, as in this case.

[40] I conclude that a fair and reasonable employer would have contacted Ms Goddard and put it to her that it appears that she had terminated her employment, and then given her an opportunity to confirm or refute such.

[41] And then there is the obligation under s.4(1A)(b) of the Employment Relations Act 2000 (the Act) whereby the duty of good faith:

Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; ...

[42] The obligation to be "active and constructive" and "responsive and communicative" in the employment relationship applies to employers and employees alike. Therefore, while there was an obligation under the employment agreement and s.4(1A)(b) of the Act, for the employer to contact Ms Goddard before determining that the employment relationship had been terminated, there was a corresponding

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<sup>2</sup> [2000] 2 ERNZ 97

obligation on her to contact her employer about her future intentions; a matter I will return to shortly.

### **Determination**

[43] In summary, I conclude that because the employer failed to comply with the terms of the abandonment of employment clause and also to be active and constructive and responsive and communicative, as required by s.4(1A)(b) of the Act, I must conclude that these actions were not what a fair and reasonable employer would do in the circumstances. It follows that I find that the termination of Ms Goddard's employment was unjustifiable.

[44] However, given the overall actions of Ms Goddard, I decline to award any remedies. This is because while Ms Goddard says that that she was dismissed on 2 March 2011, I have found that she abandoned her employment after being employed for only two weeks. I have also determined that she had a duty under s.4(1A)(b) of the Act to be active and constructive and responsive and communicative in the employment relationship, and Ms Goddard failed to meet this obligation. Indeed, I conclude that Ms Goddard suddenly left the workplace on 2 March 2011, after she had been informed by Mr Brown that there were issues regarding her relationship with other employees. And while it could be accepted that she acted on her emotions on the day, one would have thought that after having "slept on it" she would have returned to work the next day, or at the very least, made contact with her employer. Further, Ms Goddard made no effort at all to contact her employer, except to raise a personal grievance some two weeks later. I conclude that the reality of the situation is that Ms Goddard displayed no intention of wishing to retain her employment at the Cabbage Tree after 2 March 2011. And while I have found that the employer had legal obligations to make contact with Ms Goddard, those obligations are reciprocal and I decline to award any remedy in the circumstances. In reaching this conclusion, I particularly take into account that Ms Goddard had only been employed for two weeks.

**Costs**

[45] Given the outcome of this investigation, costs shall lie where they fall.

**K J Anderson**  
**Member of the Employment Relations Authority**