

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 68  
5361805

BETWEEN RACHAEL LEE HARRINGTON  
Applicant

A N D PICTURE VEHICLES LIMITED,  
formerly known as CENTRAL  
FREIGHT SERVICES LIMITED  
First Respondent

THUNDERBIRD ONE LIMITED  
Second Respondent

Member of Authority: M B Loftus

Representatives: Angela Boniface, Counsel for Applicant  
No appearance for Respondent

Investigation meeting: 16 April 2013 at Dunedin

Submissions Received At the investigation

Date of Determination: 24 April 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Ms Rachael Harrington, claims she was dismissed (albeit constructively) from the employ of the respondent(s) in December 2008.

[2] She also claims she was unjustifiably disadvantaged, suffered gender based discrimination and sexually harassed. The events underpinning these allegations are, along with others, those which led her to conclude she could no longer remain in the respondent(s) employ.

[3] There is no response to the substantive claims with the respondent(s) having relied on a technical defence tendered by the first respondent concerning its identity and a claim the defence was prejudiced by a delayed pursuit. These matters have

already been determined, along with a claim to join the second respondent (refer *Harrington v Picture Vehicles Ltd & Ors* [2012] NZERA Christchurch 227).

### **Representation of, and non-attendance by, the respondent(s)**

[4] As just said, this claim was the subject of a preliminary investigation and determination. The respondent(s) were then represented by counsel, Mr Kieran Tohill, and Mr Justin Marshall, a director and shareholder of both. The outcome saw Thunderbird One Limited declared the employer and dismissal of the claim of prejudice occasioned by delay.

[5] It was claimed during the investigation meeting both respondents are now shells without assets (though Ms Harrington disputes this). This has undoubtedly had a bearing on subsequent events.

[6] On 5 April 2013 Mr Tohill sought leave via e-mail to withdraw as counsel *on the basis that I have had no instruction to act or progress the matter since I forwarded the briefs of evidence produced by the applicant's solicitors*. The request was confirmed by letter which contains advice preliminary instructions from Mr Marshall indicate there are no resources available *to locate and brief witnesses to assist the Authority*. Mr Tohill confirmed Mr Marshall was aware of the investigation meeting and its scheduling.

[7] In the circumstances the application for leave to withdraw is granted but that raises the question of whether or not I should proceed in the absence of the respondent(s).

[8] As already said the respondent(s) are aware of the investigation via Mr Tohill's advice to Mr Marshall. Notwithstanding that, they are absent. The absence was neither notified nor explained, therefore I know of no reason why I should not proceed. Given warnings of the consequences of non-attendance in both the Regulations and the Notice of Investigation Meeting, I choose to do so.

### **Background**

[9] Ms Harrington was employed by Thunderbird One Limited, a Cromwell based company operating a Mainfreight franchise. She was engaged as a truck driver based in Queenstown and commenced in September 2008.

[10] Her employment was both short and fraught. On 29 December 2008 she resigned. She advised this was due to unresolved issues which she had brought to Mr Marshall's attention but which he had ignored. She also advised she would be seeking advice about the possibility of further action.

### **Determination**

[11] As a result of the first determination (see 3 above) all claims against the first respondent, Picture Vehicles Limited (formerly known as Central Freight Services Limited), are dismissed.

[12] Ms Harrington asks I conclude she has a personal grievance in respect to one or more of the following:

- (a) she has been unjustifiably dismissed by way of a constructive dismissal;
- (b) she has suffered a disadvantage in her employment in respect to the unilateral variation of her duties;
- (c) she has been discriminated against by reason of her gender; and
- (d) she has been sexually harassed.

[13] Ms Harrington's evidence was unchallenged by the respondent and they have never offered any views or denials in respect to the substantive claims. That said, I had some concerns about the veracity of Ms Harrington's claims given an inconsistency between statements made during the interlocutory hearing and documentary evidence proffered in support of the substantive claim. I questioned Ms Harrington who responded in detail and this resulted in an investigation which was lengthy for an undefended matter.

[14] Ms Harrington's answers and presentation allayed any reservations and I accept her evidence and claims in their entirety.

[15] I therefore conclude Ms Harrington was unjustifiably disadvantaged, discriminated against and sexually harassed. I will not go into what was a significant amount of detailed evidence but offer the following as a precise.

[16] Ms Harrington's claim of unjustified action arises from three events. The first saw the issuing of an unjustified warning which included a finding Ms Harrington had damaged a vehicle when she couldn't have - she wasn't even present when the damage occurred. The second relates to a requirement Ms Harrington work hours which exceeded statutory maxima for drivers and which when raised, was responded to with threats of disciplinary action. The third occurred just before her resignation and saw a unilateral alteration to Ms Harrington's duties and place of employment which would have resulted in a significant increase in the cost of travelling to work.

[17] The sexual harassment claim relates to two incidents involving Ms Harrington's supervisor. Ms Harrington took offence at his actions, which included inappropriate touching, and complained. Ms Marshall's initial response was that an investigation would not occur till after Christmas combined with a comment the complaint could result in counter allegations and disciplinary action against Ms Harrington. Such a threat is totally improper. This was followed by subsequent advice the claim was unfounded but the investigation, if any, was totally deficient - Ms Harrington was not even spoken to.

[18] The discrimination claim relates to a multiplicity of events which led Ms Harrington to conclude it was clear she, as a female, was not welcome at Thunderbird One. These include some of the issues already discussed but one series of incidents is paramount.

[19] Ms Harrington says that on 15 December 2008 she was asked to try and perform unsafe duties which were beyond her capability (and those of any other person) such as trying to manhandle a load of around to 800 kilograms as the result of the employer failing to comply with a client request and supply a truck equipped with a hoist. She tried briefly before refusing, and then received threats from colleagues they would complain to management about her inadequate performance. When trying to more the load, she felt what she describes as a stabbing pain.

[20] The following day there were further altercations with aggressive and inappropriate comments directed at Ms Harrington. This occurred in the presence of a manager who did nothing. Ms Harrington says this was indicative of the type of bullying she had to sustain during the period of employment.

[21] The key incident occurred on 17 December 2008. In the early hours of that morning Ms Harrington started suffering further pain. She attributes her pain to injuries suffered when trying to move the load on 15 December but accepts there is no evidence to support her belief. The pain increased as the day went on and was accompanied by visible signs of incapacity and distress. She says that while she thought it appropriate to seek medical assistance she initially chose not to as she felt obligated to continue working.

[22] By the time she reached the Cromwell depot her pain was acute. She sought assistance from her manager and this led to derision and laughter from other employees. She claims some went so far as to block her access to first aid and she was then refused help in obtaining medical assistance. Ms Harrington says that went so far as to include Mr Marshall advising she would not be permitted to call an ambulance and to do so would result in disciplinary action.

[23] Ms Harrington got her father to take her to a doctor who advised she should urgently seek hospital assistance in Queenstown. Ms Harrington says she advised Mr Marshall of that and asked the company assist with transport. Ms Harrington claims Mr Marshall refused and suggested she seek assistance from a competing firm approximately a kilometre down the road.

[24] Ultimately Ms Harrington's father took her to hospital where she remained for a couple of days.

[25] The final straw came on 29 December 2008 after Ms Harrington's return to work when she was assisting a colleague on the instruction of the Cromwell branch manager. Another employee intervened and criticised her for doing so before approaching the manager and attempting to have the instruction altered. Ms Harrington says she asked her colleague to desist and he responded with an inappropriate and hurtful comment about her recent illness. That was the final straw and she immediately wrote out her resignation.

[26] In *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965 the Court stated that for a dismissal to be constructive:

*It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.*

[27] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[28] There must also be a causal link between the employers conduct and the tendering of the resignation (*Z v A* [1993] 2 ERNZ 469).

[29] While a simplistic summary of significantly more complex law, the assumption underlying the concept of constructive dismissal is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation.

[30] When I consider the facts I also conclude Ms Harrington was constructively dismissed. In my view they illustrate a course of conduct and failures which would ultimately, and obviously, lead to resignation. I also conclude the failure to address the sexual harassment complaint would, on its own, have constituted a breach of duty sufficient to cause the employee to resign as would the failure to assist with, indeed impede, access to medical assistance in the face of what was an obvious and serious condition.

[31] The conclusion Ms Harrington has a multiplicity of personal grievances raises the question of remedies. She seeks a number of remedies which are beyond the Authorities domain (and which would, in reality, be meaningless) such as an order Mr Marshall apologise.

[32] What can be considered are the monetary claims which comes in two parts - wages lost as a result of the dismissal and compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act.

[33] Ms Harrington seeks the difference between what she would have earned had she remained in Thunderbird One's employ and the amount received as a sickness

beneficiary until those payments ceased in December 2012. This raises the issue of whether or not there has been a loss as a sickness benefit implies an inability to work. Ms Boniface responds the answer is yes as the sickness that led to Ms Harrington's benefit is psychological. It is directly attributable to the respondent's actions and causative of Ms Harrington's hurt. I accept that, but I do not accept the entire period is payable.

[34] This is because of the time which has passed and the fact Ms Harrington was precluded from pursuing her claim. This was due to the fact an initial grant of legal aid was withdrawn on 12 August 2010. Thunderbird One can not be held accountable for that or the delay which followed with Ms Harrington challenging the decision and obtaining the grants reinstatement. I conclude it appropriate to cease payment of lost wages as of that date.

[35] There is then the issue of overtime and whether or not that should be recompensed. Notwithstanding I accepted the claim Ms Harrington was required to work excessive hours, these were not accurately quantified. I therefore have no information upon which to base an award that exceeds ordinary pay. Ordinary pay for the period to 12 August 2010 would have totalled \$55,440.

[36] There is then the question of whether or not I should deduct the benefit payments made during that period. The answer is yes. That is what is claimed and it is not like an unemployment benefit which may have to be repaid. The fact of sickness remains, as would eligibility for the benefit. I calculate the residual loss as being in the order of \$38,243.38. That amount is payable.

[37] Ms Harrington seeks \$30,000 as compensation for hurt and humiliation. She supported her claim with strong evidence, including that of serious psychological harm necessitating a lengthy period of professional intervention and assistance. That said, it was clear not all of her angst can be attributed to the actions of the respondent, with the response from legal aid adding to her hurt. There are also issues which arise from the fact Thunderbird One's actions sparked a rekindling of previous psychological injury. Thunderbird One can not be held responsible for the earlier harm which has affected and magnified the hurt now felt, though it is responsible for reigniting it.

[38] Having considered the evidence, which is amidst the strongest I have heard, I conclude it appropriate to award \$25,000.

[39] There is also a claim for interest in the monies awarded above. Interest is payable for the use of money rightfully belonging to which they are deprived of the use of. Until this decision there was no known entitlement, so no deprivation of use. Interest will not therefore be granted on either lost wages or compensation.

[40] Ms Harrington also seeks a penalty against the respondent(s) for having impeded the investigation process by not attending. I appreciate Ms Harrington sought an opportunity to tell Mr Marshall how his actions hurt her but conclude her demeanour during the process may have made this traumatic. I also note the non-attendance of a respondent tends to assist an applicant establish their case. Having considered the claim I conclude Mr Marshall's absence advantaged Ms Harrington and decline the request I consider a penalty.

### **Conclusion and Orders**

[41] For the above reasons I conclude Ms Harrington has a personal grievance as she was unjustifiably dismissed, unjustifiably disadvantaged, sexually harassed and discriminated against.

[42] As a result the second respondent, Thunderbird One Limited, is ordered to pay the applicant, Ms Rachael Harrington, the following:

- i.     \$\$38,243.38 (thirty eight thousand, two hundred and forty three dollars and thirty eight) gross as recompense for wages lost as a result of the dismissal; and
- ii.    A further \$25,000.00 (twenty five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[43] Costs are reserved.