

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 215
5415996

BETWEEN

CHERIE COTTRELL
Applicant

A N D

THE NELSON SOCIETY FOR
THE PROTECTION OF
CRUELTY TO ANIMALS
INCORPORATED
Respondent

Member of Authority: Rachel Larmer

Representatives: Tagan Lyall, Counsel for Applicant
Kay Chapman, Counsel for Respondent

Investigation meeting: 17 September 2013 at Christchurch

Submissions Received: 20 September 2013 from Applicant
27 September 2013 from Respondent
14 October 2013 from Applicant

Date of Determination: 16 October 2013

DETERMINATION OF THE AUTHORITY

- A The Nelson Society for the Prevention of Cruelty to Animals Incorporated (Nelson SPCA) did not dismiss Ms Cherie Cottrell so her personal grievance claim for unjustified dismissal does not succeed.**
- B Nelson SPCA did not unjustifiably disadvantage Ms Cottrell so her disadvantage grievance does not succeed.**

Employment relationship problem

[1] Ms Cottrell was employed by the Nelson SPCA as a Caretaker/Retail/Adoption Centre Team Member from 24 January 2011 until she resigned without notice on 12 February 2013. Ms Cottrell claims her resignation was a constructive dismissal. She says Nelson SPCA's decision to increase the rent for her on-site accommodation was a breach of duty of sufficient seriousness that her resignation was reasonably foreseeable.

[2] Alternatively she claims Nelson SPCA breached the trust and confidence inherent in the employment relationship by embarking on a course of conduct (which included the rent increase) with the deliberate and dominant purpose of coercing her to resign. Ms Cottrell admits that each of the incidents she relies on (apart from the rent increase) in themselves were not a breach of trust and confidence but claims that cumulatively these incidents taken together repudiated her employment agreement which she says resulted in her resignation.

[3] Ms Cottrell also claims Nelson SPCA unjustifiably disadvantaged her in her employment when it advised her of the rent increase.

[4] As part of the after-hours Caretaker part of her role Ms Cottrell lived with her partner in on-site accommodation. They paid reduced rent of \$150 per week. On 28 January 2013 Ms Cottrell was given a letter which said her rent would be increasing to \$300 per week from 30 March 2013. Ms Cottrell claims this increase is a breach of contract.

[5] Ms Cottrell signed a written individual employment agreement on 24 January 2011 but she was not given (so did not sign) a tenancy agreement for the on-site accommodation which related to her caretaker duties.

[6] Ms Cottrell worked 24 hours per week – eight hours on Mondays, Fridays and Saturdays for which she was paid \$14.25 per hour. Ms Cottrell was not paid for her Caretaker duties but instead received the benefit of living in on-site three bedroom accommodation at a reduced rent. The Caretaker part of her role required her to live on-site because she was responsible for the security of the centre building and general checking that the buildings were secured in the evenings.

[7] Nelson SPCA says that Ms Cottrell was advised at the outset of her employment that the rent for the three bedroom on site accommodation would be subsidised so it would only be \$150 per week to reflect the after hour caretaker duties she undertook as part of the tenancy arrangement. The other duties Ms Cottrell performed during the Nelson SPCA's opening hours were paid at the hourly rate as per her individual employment agreement.

[8] Nelson SPCA says Ms Cottrell's on-site accommodation was a service tenancy governed by the Residential Tenancies Act 1986 (RTA). It says a review by three real estate agents of the accommodation in January 2013 recommended the rent be increased to market rate.

[9] Nelson SPCA says as a result of that advice Ms Cottrell was given 60 days' notice of the rent increase as required under the RTA. It says that the level of rent was not a term and condition of her employment so the notification that it would be increased was not a breach of

duty or a breach of contract, nor was it something that fundamentally undermined the trust and confidence inherent in the employment relationship.

[10] In the alternative, Nelson SPCA says the issue Ms Cottrell had with the rent increase is a dispute about the application or interpretation of the employment agreement which the parties had agreed to attend mediation to resolve. It says Ms Cottrell's resignation was not reasonably foreseeable because she unexpectedly resigned before mediation had occurred. It says it attempted to get her to change her mind about resigning but she declined to do so.

[11] Nelson SPCA says there was no course of conduct undertaken with a deliberate or dominant purpose of coercing Ms Cottrell to resign.

[12] Nelson SPCA counterclaims against Ms Cottrell for her failure to provide two weeks' notice as a tenant under the RTA. It says it suffered loss because it had to hire security to cover her caretaker duties. It seeks \$414.46 for losses which it claims arise from Ms Cottrell's exit from the on-site accommodation without notice. It also counterclaims for Ms Cottrell's failure to give four weeks' contractual notice of resignation as required under her employment agreement.

Issues

[13] The following issues are to be determined:

- (a) Was Ms Cottrell disadvantaged in her employment?
- (b) If so, was any disadvantage justified?
- (c) If not, what if any remedies should be awarded?
- (d) Was Ms Cottrell dismissed?
- (e) If so, was dismissal justified?
- (f) If not, what if any remedies should be awarded?
- (g) What if any costs should be awarded?
- (h) Should Nelson SPCA's counterclaims succeed?

Was Ms Cottrell disadvantaged in her employment?

[14] Ms Cottrell was advised of a rent increase from \$150 a week to \$300 a week. I find that disadvantaged her because it meant that it would cost her more to continue doing her caretaker duties as a result of the increased accommodation costs.

Was any disadvantage unjustified?

[15] Justification is to be determined under the s 103A justification test in the Employment Relations Act 2000 (the Act). This requires the Authority to objectively determine “*whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the [...] action occurred.*”

[16] I consider that Nelson SPCA’s actions were what a fair and reasonable employer could have done in all the circumstances. It is a charitable organisation which had received advice that the market rent for its on-site accommodation was \$350 per week (based on the average of assessments from three different real estate agents). Ms Cottrell’s employment agreement did not set or provide a cap on the level of rent she was to (or could) be charged – it made no reference to it.

[17] I consider Nelson SPCA had good reasons based on reasonable grounds for deciding to double Ms Cottrell’s rent. Even with the increase the rent was still \$50 less than market rent which I consider reflects the time she spent doing Caretaker duties for Nelson SPCA.

[18] I also consider that how Nelson SPCA acted was what a fair and reasonable employer could have done in all the circumstances. The level of rent was not a term or condition of Ms Cottrell’s employment. She had a service tenancy which was governed by the RTA.

[19] I therefore consider there was no legal impediment to Nelson SPCA increasing Ms Cottrell’s rent, provided it complied with the notice requirements of the RTA when doing so. That occurred so I do not consider Nelson SPCA’s actions were unreasonable or unfair. Ms Cottrell had 60 days’ notice prior to the rent increase taking effect.

[20] I find that Nelson SPCA is able to justify any disadvantage Ms Cottrell suffered as a result of the proposed rent increase because it has met the requirements of the justification test in s.103A of the Act. I therefore find that Nelson SPCA’s decision to notify Ms Cottrell of a rent increase did not unjustifiably disadvantage her in her employment. Accordingly her disadvantage grievance does not succeed.

Was Ms Cottrell dismissed?

[21] Because Ms Cottrell resigned she bears the onus of establishing on the balance of probabilities that her resignation was in fact a dismissal. The Courts have long recognised that a resignation in some circumstances may actually be a constructive dismissal. See

*Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ for three well recognised categories of constructive dismissal.

Did a breach of duty by Nelson SPCA cause Ms Cottrell to resign?

[22] I find that Nelson SPCA was justified in increasing the rent and it did so in accordance with the requirements of the RTA. The rent increase was therefore not a breach of duty or a breach of the implied term of trust and confidence. I find the rent increase did not result in Ms Cottrell being constructively dismissed.

Did Nelson SPCA engage in a course of conduct with the deliberate and dominant purpose of coercing Ms Cottrell to resign?

[23] There was no credible evidence that Nelson SPCA did anything to coerce Ms Cottrell to resign. I accept Ms Cottrell was upset about a number of employment issues but I consider these feelings arose from her lack of communication and misguided perceptions rather than from any blameworthy conduct by Nelson SPCA.

Did the cumulative effect of various incidents Ms Cottrell relies on undermine the trust and confidence in the employment relationship?

[24] I find that all of the incidents Ms Cottrell relies on do not individually or cumulatively undermine the trust and confidence inherent in the employment relationship. Each incident has an innocent explanation which is at odds with Ms Cottrell's adverse view of each incident. In particular, Nelson SPCA:

- (a) was justified in initiating a disciplinary process because it received a complaint from a member of the public relating to an alleged lack of care Ms Cottrell offered to a baby bird. It decided not to impose a disciplinary sanction on Ms Cottrell but to give her training and guidelines instead;
- (b) did not deny Ms Cottrell a graduated return to work after her work related injury. It gave her what suitable work was available in terms of what she was permitted to do in accordance with the medical information it had available to it. It was up to Ms Cottrell to have provided updated medical information if she wanted to do additional work that did not appear to have been approved/sanctioned on her ACC form;
- (c) did not hold a staff meeting at which Ms Walzl announced that Ms Cottrell had sprayed vegetables with weedkiller. This was a hearsay allegation by Ms Cottrell which was not supported by direct evidence;

¹ (1985) ERNZ Sel Cas 136.

- (d) was justified in increasing the rent;
- (e) was not responsible for the presentation of the tenancy agreement and the terms within it because that was done by the rental agent and was not checked by the Nelson SPCA before the information was sent out. Ms Cottrell did not raise her concerns about this with either the agent or Nelson SPCA. Instead she decided to resign;
- (f) had to write to Ms Cottrell about various issues it wanted to raise with her which it would normally have discussed with her in person because Ms Cottrell's lawyer had asked for this information to be provided.

Conclusion

[25] It is clear that Ms Cottrell became increasingly unhappy in her employment as a result of various issues which arose subsequent to her injury at work. It was that underlying and on-going dissatisfaction that caused her to resign rather than any improper or unacceptable conduct by Nelson SPCA.

[26] I consider the initiative for the ending of her employment came solely from her, not from Nelson SPCA. Although Ms Cottrell was unhappy with some aspects of her employment, I do not consider Nelson SPCA bears responsibility for that. Its actions towards Ms Cottrell were not unjustified and it acted appropriately towards her and in accordance with its legal obligations.

[27] Nelson SPCA did not embark on a course of conduct with the deliberate or dominant purpose of coercing Ms Cottrell to resign, nor did it breach a duty which led her to resign. I do not accept that Ms Cottrell's resignation was a constructive dismissal. Ms Cottrell's unjustified dismissal personal grievance claim cannot succeed because she was not dismissed.

Should Nelson SPCA's counterclaim succeed?

[28] Nelson SPCA's counterclaim for alleged loss arising out of Ms Cottrell's failure to give it two weeks' notice of her intention to vacate the service tenancy relates to obligations under the RTA so should be determined by the Tenancy Tribunal.

[29] Although Ms Cottrell breached her employment agreement when she failed to give four week's contractual notice of her resignation Nelson SPCA did not prove it suffered any loss as a result of that. Therefore its counterclaim does not succeed.

What if any costs should be awarded?

[30] The parties are encouraged to resolve costs by agreement. If that is not possible then Nelson SPCA has 14 days within which to file its costs application, Ms Cottrell has 14 days within which to respond, with Nelson SPCA having a further 7 days within which to reply. This timetable will be strictly enforced and departure from it requires prior approval of the Authority.

Rachel Larmer
Member of the Employment Relations Authority