

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 2013 181  
5360718

BETWEEN                      ANDREA LARSEN  
Applicant

AND                              STEVE AND SHARLENE TERRY,  
TERRY FAMILY PARTNERSHIP  
T/A DRIFTER'S CAFE  
Respondent

Member of Authority:    M B Loftus

Representatives:        Eymard Bradley, Counsel for Applicant  
Peter Van Keulen, Counsel for Respondent

Investigation Meeting:   16 May 2013 at Westport

Submissions received:   27 May 2013 2013 from Applicant  
4 June 2013 from Respondent

Determination:           30 August 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Ms Andrea Larsen, claims she was constructively dismissed by the respondents, Steven and Sharlene Terry, on 8 June 2011.

[2]     The Terry's deny the claim. They say Ms Larsen left of her own volition and commenced working for another business on or about 5 June 2011.

**Background**

[3]     Ms Larsen was employed on various front of house duties at Drifters Café, a business owned and operated by the Terry's in Granity. From her perspective the employment, which lasted approximately three months, progressed well with the exception of one incident.

[4] Mr Terry has a different view and claims there were numerous discussions concerning deficiencies in Ms Larsen's performance though only one serious enough to warrant documentation. Mr Terry says that on 12 May 2011 Ms Larsen gave a friend some food and an energy drink to the value of \$8.80 but only charged \$2. He says he asked her about it and she said she was going to pay the difference herself. Mr Terry says he challenged the response as the credit was not written down and she *...then relented and explained that she had simply taken the \$2 as payment*. He goes on to say:

*This, in our view, amounted to theft, and I believed we had the right to summarily dismiss Andrea for this. After discussing this with Sharlene we decided that we would give Andrea another opportunity. However, we did decide to give her a written warning.*

[5] Ms Larsen maintains the deficiency was only \$1 and she intended paying the difference. She does, however, accept she handled the matter poorly.

[6] When questioned Mr Terry conceded the *written warning* (paragraph 4 above) was a file note and it is unlikely Ms Larsen saw it. The note concludes by recording Ms Larsen promised she would transgress again and Mr Terry advising there would be no more chances.

[7] Toward the end of May, the Terry's took a two week holiday in Thailand. They arranged for the café to be managed by Mr Kris Ivos, an ex-employee in whom they had faith. He would be assisted by Ms Larsen.

[8] The Terry's claim, on the basis of information gathered after the event, the café became a party venue and they unwittingly provided a significant portion of the refreshment free of charge. Ms Larsen disputes the extent of alleged impropriety but accepts some free drinks were dispensed. She attributes the decision to do this to Mr Ivos, who was in charge and who, she says, told her the Terry's had said *help yourself*.

[9] On the night of 29 May a serious event occurred. Ms Larsen says Mr Ivos invited some friends to the café for after-hour drinks. She says Mr Ivos was celebrating the successful completion of a week in charge. Ms Larsen was one of seven present. She is also adamant a suggestion the Terry's now make that the

gathering was to farewell her from the café is incorrect. She adds she could not even name a couple of those present and was the first to leave.

[10] Ms Larsen goes on to say:

*In the middle of the time we were having drinks, Kris told everyone that the takings were in the bedside table drawer. Everyone went silent about this comment. I thought it was a highly strange and stupid thing to bring up, even around friends.*

[11] The following day Mr Ivos discovered the money was missing. He told Ms Larsen at approximately 6 p.m. and shortly thereafter those who had been present the previous night gathered at the café at Mr Ivos' request. This was so they might be present when the police, who had by now been advised, arrived. However the police did not come and a similar gathering occurred the following evening, though again without police attendance.

[12] On 1 June the Terry's were advised of the loss during a phone conversation by Mr Ivos. Ms Larsen was present as were a couple of others, one of whom also spoke to the Terry's. She says she heard the Terry's suggest either she or *Harley* (another of those who had been present) had taken the money and the accusation was confirmed after the conversation. She says this distressed her.

[13] During the conversation the Terry's and Mr Ivos also reached a decision to close the café until the Terry's returned approximately a week later. There is some confusion as to when they returned with Mr Terry nominating the 5<sup>th</sup>, 6<sup>th</sup> or 7<sup>th</sup> at various stages. After some confusion, Mrs Terry nominated the 6<sup>th</sup>.

[14] In the interim, Ms Larsen says she was desperate for money. She lived a hand to mouth existence and then lost her driver's licence on 4 June. That made her present arrangement difficult. She stayed with her sister who was then away and could not transport her. To address the situation she sought work at the Charming Creek Tavern at Ngakawau in return for free accommodation. Similarly she made an arrangement with the proprietor of an adjacent café to perform work in return for meals. Both arrangements were entered into on 5 June. Ms Larsen claims they were both temporary and would only last as long as the Terry's were away, at which point she could return to the café.

[15] As said earlier, the Terry's probably returned on 6 June though Ms Larsen says she did not know they were back. She only discovered that to be the case on 8 June when she was driving past the café with her sister. She says she wanted to stop but her sister refused as she had an appointment but would take Ms Larsen back later.

[16] Approximately an hour later Ms Larsen's sister received a telephone call and was told there was a large blackboard outside Drifter's Café by the main road advising *Andrea Larsen is a liar and a thief*.

[17] Ms Larsen and her sister returned immediately. Ms Larsen wiped the statement from the blackboard while her sister engaged in an acrimonious exchange with Mr Terry.

[18] Ms Larsen claims she was both defamed and publicly humiliated and in those circumstances she could not return to work for the Terry's. She didn't, and that resulted in this claim.

[19] The Terry's have a different view. Mr Terry says upon their return they found the bar almost empty of stock and their personal residence a mess and damaged. Information provided by other locals added to their disquiet. Mr Terry goes on to say:

*Sharlene and I wanted to find out more so we requested that all those involved to come and talk to us. Some of those who attended the party fronted up and told of their involvement. Among those who did not, was Andrea herself. We were getting frustrated these people did not have the decency to turn up when requested to give their version of events. We were unable to reach any conclusions about the theft from what we were told by people.*

[20] Notwithstanding Mr Terry's evidence that he and his wife invited those who had been present on the 29th to come and talk, they accepted when questioned they never spoke directly with Ms Larsen. They relied instead on others who said they would pass the message and have no knowledge as whether or not that occurred. Ms Larsen says it didn't.

[21] Mr Terry goes on to say Ms Larsen then failed to report for her rostered shift on the 8<sup>th</sup>. Given that, her failure to come to a meeting and the fact he had been told she was working at the Charming Creek Tavern, he concluded Ms Larsen had either resigned or abandoned her employment.

[22] That said, Mr Terry accepts he never approached Ms Larsen to confirm the situation and cannot attest to the fact a roster was ever posted advising Ms Larsen she was required back at work on the 8<sup>th</sup> or she was otherwise advised that was the case. He says Mrs Terry prepared the rosters and when she was questioned it became apparent the roster in question had not been prepared. Finally there is absolutely no evidence to belie Ms Larsen's claim she was unaware the Terry's had returned before she drove past the café on the 8<sup>th</sup>.

[23] Mrs Terry, who was responsible for the notice on the blackboard and a number of similar postings on Facebook says:

*On 8 June 2011, when Steve and I became aware that Andrea was not coming in to work confirming for us that she had resigned or left her job with us, they became frustrated and annoyed. I was annoyed that she had not bothered to come and explain that she was leaving and that we had learnt it second-hand and by her not turning up for work. I was annoyed that she had not bothered to meet with us to explain what happened on 29 May 2011 and talk about how she might help us recover the money (if that was possible).*

...

*Out of frustration more than anything I wrote on the blackboard outside the cafe. This blackboard had often been used to make statements or send messages to people. It was a kind of way of shaming people into responding to things they needed to deal with. I guess I figured writing on the board would get her to respond as it had done many times in the past in other situations.*

[24] Mr Terry now tries to justify the reference to theft by saying it is limited to a reflection of the events of 11 May. Mrs Terry says no – her frustration was all encompassing. It included the loss of takings, the loss of stock and a view Ms Larsen had stolen from the café in May. That said, both Terry's accept there is no evidence Ms Larsen was responsible for the loss of the money. They simply have no idea who stole it.

### **Determination**

[25] To determine this matter two questions must be answered. Was Ms Larsen still employed by the Terry's on 8 June and, if so, was she constructively dismissed? I will address the question of constructive dismissal first.

[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] Essentially the concept is that the employee leaves because of the employers' actions which must be repudiatory in nature. Ms Larsen says she resigned as a result of one event – the accusation on the noticeboard. While it is unusual for one incident to lead to a claim of constructive dismissal it is possible and here, I conclude, it is easy to see why Ms Larsen thought her employer no longer wanted her.

[30] It was a very public accusation that essentially defamed Ms Larsen. I say defamed as while the Terry's oral evidence about why the notice was written became confusing, it is clear the theft of takings was in their mind and definitely in Mrs Terry's mind. It was she who wrote the notice. There is, however, absolutely no evidence linking Mr Larsen to the loss and that the Terry's admit.

[31] To now try and justify the blackboard with reference to the May event as Mr Terry does is also inappropriate. First the evidence regarding that is also inconclusive but, in any event, it was addressed and resolved at the time. There is, other than the loss of takings and stock, no justification for suddenly revisiting it on 8 June.

[32] It would, I conclude, be almost impossible for someone to return to the employ of one responsible for a public yet unjustifiable accusation such as that Mrs Terry

posted. It was deliberate and constituted an action which was always likely to end any constructive relationship between the parties and that was foreseeable.

[33] That, however, is not the end of the matter. For there to have been a constructive dismissal, Ms Larsen must still have been in the Terry's employ. That raises the question of whether or not she had, as the Terry's allege, already left of her own volition before the event of 8 June occurred.

[34] I conclude the answer is no. The Terry's cannot rely on an assumption Mr Larsen either resigned or abandoned her employment. There is no evidence she communicated the fact of resignation and an assumption of abandonment must be supported with evidence the employer attempted to confirm the relationship had ended. It was possible for the Terry's to enquire as to Ms Larsen's intentions yet they admit they did not.

[35] More importantly there is Ms Larsen's evidence the new arrangements she entered into were stopgap measures. There was no intention they be permanent when entered into. Her evidence was not disturbed under questioning and nor was it undermined by of the new employers who agreed to give evidence on short notice. The only challenge came from one of the Terry's witnesses who claimed Ms Larsen had told her she would not stay at Drifters. There was, however, uncertainty as to when this was said and under questioning the comment about staying was qualified by the word unlikely. This does not, I conclude, evidence a definitive decision to leave. In the circumstances I accept Ms Larsen's evidence and hold she intended continuing in the Terry's employ when they returned and work again became available. That intention did not change until she saw the blackboard.

[36] For the above reasons I find Ms Larsen was constructively dismissed as claimed. That conclusion leads to a consideration of remedies.

[37] Ms Larsen seeks \$30,000 as compensation under section 123(1)(i) of the Act and costs. There is no claim in respect to lost wages as she renegotiated her temporary arrangements and both continued.

[38] Ms Larsen supported her claim with evidence about the debilitating effect the accusations had on her. The humiliation was enhanced by the fact similar accusations were repeated on facebook and those exchanges continued for a period. Her evidence

was supported by that of her sister and the owner of the Charming Creek tavern who described Ms Larsen as being extremely upset.

[39] That said, she recovered sufficiently to quickly address the situation and there was little evidence of on-going hurt other than some obvious angst during the investigation some two years later though that is understandable given she was being reminded of the event and facing the Terry's again.

[40] Having considered the evidence I conclude a reasonable award is warranted and order the payment of \$8,000.

[41] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Larsen contributed to her dismissal in any significant way. There is no evidence she did.

### **Conclusion and Orders**

[42] For the above reasons I conclude Ms Larsen has a personal grievance as she was unjustifiably dismissed.

[43] As a result the respondents, Steven and Sharlene Terry, are ordered to pay the applicant, Ms Andrea Larsen \$8,000.00 (eight thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[44] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority