

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 160
5575285

BETWEEN	LUCY MARIA BERTOGG Applicant
A N D	CATHERINE DEVON RYBURN t/a MARLBOROUGH DAY SPA First Respondent
A N D	MARLBOROUGH MEDI SPA LIMITED Second Respondent

Member of Authority: Rachel Larmer

Representatives: Peter Radich and Miriam Radich, Counsel for Applicant
Graham Hill and Graeme Gowland, Counsel for Respondents

Investigation Meeting: 18, 19 and 20 July 2016 at Blenheim

Submissions: 26 July 2016 from Applicant
01 August 2016 from Respondent
03 August 2016 from Respondent

Date of Determination: 19 September 2016

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Ms Catherine (Devon) Ryburn purchased the Marlborough Day Spa (the Spa) on 23 September 2014. Ms Ryburn offered Ms Bertogg the receptionist position at the Spa for 27.75 hours per week. The parties entered into an employment agreement dated 22 September 2014 and Ms Bertogg started work at the Spa on 23 September 2014.

[2] Ms Bertogg's employment agreement dated 22 September identified her employer as "*Marlborough Day Spa*" which is not a legal entity but is the trading name for the Spa business. The parties therefore agree that Ms Ryburn personally employed Ms Bertogg from 23 September 2014 until 31 March 2015.

[3] Ms Ryburn is the sole director and shareholder of Marlborough Medi Spa Limited (Medi Spa) which was incorporated on 01 December 2014. In early 2015 Ms Ryburn started talking to the Spa staff about rebranding the business as the Medi Spa.

[4] On Friday 25 March 2015 Ms Ryburn gave Ms Bertogg a new employment agreement which offered her employment with Medi Spa starting on 01 April 2015. This new employment agreement records Ms Bertogg's employer as being "*Marlborough Medi Spa Limited*" not Ms Ryburn personally.

[5] Ms Bertogg signed Medi Spa's proposed new employment agreement on 30 March 2015. Ms Bertogg started work for Medi Spa on 01 April 2015 doing the same receptionist role she had been doing at the Spa when employed by Ms Ryburn.

[6] Ms Bertogg's acceptance of Medi Spa's offer of employment effectively ended her employment relationship with Ms Ryburn (as her employer). This meant that from 01 April 2015 Ms Bertogg was in a new employment relationship which involved Medi Spa as her employer.

[7] By way of background, on 31 March 2015 Ms Ryburn used a trial period provisions to dismiss employee 'A'¹ from her (A's) employment with Ms Ryburn. Unlike Ms Bertogg and Ms Brittany Hughes², Employee A was not offered new employment by Medi Spa.

[8] On 14 April 2015 Ms Ryburn met with Ms Bertogg and Ms Hughes for a normal weekly catch up. During this meeting Ms Ryburn:

- (a) Expressed concern about what she believed were ongoing stock discrepancies;

¹ I refer to her as A to preserve her privacy. Employee A and Ms Bertogg are good friends and they also worked together for approximately three months when they were both employed by Ms Ryburn.

² Ms Hughes made the same or substantially similar claims against Medi Spa as Ms Bertogg has.

- (b) Told Ms Bertogg and Ms Hughes that the free underarm depillar treatment Ms Hughes had recently given Ms Bertogg³ should have been charged for;
- (c) Advised that she would be taking over control of all stock until she could work out why the apparent stock discrepancies were occurring.

[9] Ms Bertogg and Ms Hughes both say they felt that they had been accused of stealing in the 14 April meeting. Ms Ryburn denies that. Ms Ryburn says she was trying out figure out why stock appeared to be missing but hadn't formed any conclusions about that so did not make any accusations.

[10] The context of Ms Bertogg's resignation was that Ms Hughes had resigned on 21 April and was working out her notice period so her employment was due to end on 16 May 2015.

[11] Ms Bertogg says that she decided to resign "*for her physical and mental wellbeing, to protect her personal and professional reputation and to protect her financial security*". This is the same reason Ms Hughes gave for resigning.

[12] Ms Bertogg says she felt very stressed at work and believed that Ms Ryburn was going to either dismiss her (Ms Bertogg) for stealing or would end her employment under the new trial period provision, which at that time Ms Bertogg did not know was invalid.

[13] Ms Bertogg resigned in writing on 06 May 2015. She worked out her notice so her employment ended on 03 June 2015.

[14] Ms Bertogg's resignation letter (after giving written notice) states:

I am currently unsure what my next venture will be.

Thank you for the opportunity you have given me, I wish you and the business all the best with the future.

[15] Ms Ryburn says she spoke to Ms Bertogg about her resignation and Ms Bertogg told Ms Ryburn that she was going to look after her mother who was about to have an operation then Ms Bertogg was hoping to move to Wellington to be with her partner who lived there.

³ Ms Hughes and Ms Bertogg say they thought the underarm waxing was free as part of the "treatment of the month" perk. Ms Ryburn says underarm waxing was not one of the allowable 'perks'.

[16] The parties acknowledge Ms Bertogg had two separate periods of employment with two different employers:

- (a) From 23 September 2014 to 31 March 2015 - when Ms Ryburn personally employed her to work for the Spa;
- (b) From 01 April to 03 June 2015 when Medi Spa employed Ms Bertogg to work for Medi Spa.

[17] Ms Bertogg accepts that she did not raise a personal grievance against Ms Ryburn personally and that she did not invoke the problem resolution clause in her employment agreement when employed by Ms Ryburn. Ms Bertogg also accepts that Ms Ryburn did not dismiss her (Ms Bertogg) so Ms Bertogg acknowledged that her constructive dismissal claim relates to Medi Spa only.⁴

[18] Notwithstanding that, Ms Bertogg sought to rely on a list of concerns she had about Ms Ryburn (while Ms Ryburn was her employer) as evidence that Medi Spa had breached her (Ms Bertogg's) terms and conditions of employment and/or had constructively dismissed her.

[19] Evidence about what Ms Ryburn said or did that potentially impacted on the Authority's assessment of credibility issues was permitted but evidence about alleged disadvantages or breaches of contract between Ms Bertogg and Ms Ryburn (that occurred before Ms Bertogg and Medi Spa were in an employment relationship) was held to be inadmissible.

[20] The claims before the Authority involve an investigation into what Medi Spa as Ms Bertogg's employer did or did not do, so issues predating their employment relationship are not relevant to whether or not Medi Spa breached its obligations to Ms Bertogg.

[21] I am aware as a matter of background evidence that Ms Bertogg believes that Ms Ryburn treated her badly when Ms Ryburn employed her personally and that Ms Ryburn denies such allegations. However it was not necessary to resolve those conflicts in order to determine the current claims against Medi Spa.

⁴ Ms Bertogg's employment with Ms Ryburn ended when Ms Bertogg accepted the offer of employment from Medi Spa.

[22] Ms Bertogg claims her resignation from Medi Spa was a constructive dismissal because Medi Spa either:

- (a) Embarked on a deliberate course of conduct designed to coerce Ms Bertogg's resignation; or
- (b) Fundamentally breached a term of her employment making her resignation reasonably foreseeable. In the face of such a breach.

[23] Ms Bertogg also claims that Medi Spa unjustifiably disadvantaged her by:

- (a) Including a trial period provision in her employment agreement which was of no legal effect;
- (b) Failing to advise her of the right to take legal advice on the new offer of employment from Medi Spa;
- (c) Reducing her hours from 27.75 per week when employed by Ms Ryburn to 23.75 hours when employed by Medi Spa;
- (d) Creating a work environment of suspicion that Ms Bertogg had taken stock;
- (e) Failing to give training or effective communication around stock management processes;
- (f) Not explaining the legal implications of Medi Spa being a limited liability entity.

[24] Medi Spa denies all of Ms Bertogg's claims. Medi Spa says Ms Bertogg was not disadvantaged in her employment and that she was not dismissed because she freely and voluntarily resigned.

The issues

[25] The Authority needs to determine the following issues:

- (a) Should Ms Ryburn be named as a personal party to these proceedings?
- (b) Was Ms Bertogg unjustifiably disadvantaged in her employment?

- (c) If so, what if any remedies should be awarded?
- (d) Was Ms Bertogg dismissed?
- (e) If so, was her dismissal justified?
- (f) If not, what if any remedies should be awarded?
- (g) What if any costs should be awarded?

Should Ms Ryburn be named as a personal party to these proceedings?

[26] With the limited exception in s.134(2) of the Employment Relations Act 2000 (the Act), the Authority only has jurisdiction to investigate and determine claims involving parties to an employment relationship.

[27] While Ms Bertogg and Ms Ryburn were in an employment relationship from 22 September 2014 until 31 March 2015, in which Ms Ryburn in her personal capacity was Ms Bertogg's employer, that employment relationship between Ms Bertogg and Ms Ryburn ended when Ms Bertogg started new employment with Medi Spa.

[28] Because Medi Spa is a standalone legal entity, it is legally separate from Ms Ryburn, notwithstanding that Ms Ryburn is the sole director and shareholder. This means that Medi Spa, as Ms Bertogg's employer, is legally responsible for its own acts and omissions.

[29] Ms Ryburn is not able to be held personally legally responsible (as a private individual) for Medi Spa's actions because Medi Spa and not Ms Ryburn was Ms Bertogg's employer.

[30] In terms of the Authority's jurisdiction, Ms Ryburn could potentially be held personally liable for a penalty under s.134A of the Act but no such claim was put before the Authority so any potential liability under s.134A of the Act is not one of the claims to be investigated in these proceedings.

[31] There is no claim currently before the Authority that relates to the period in which Ms Ryburn (in her personal capacity) was Ms Bertogg's employer which the Authority has jurisdiction to investigate.

[32] I therefore find that Ms Ryburn should not be a party to these proceedings in her personal capacity. Accordingly Ms Bertogg's claims against Ms Ryburn personally do not succeed.

[33] This investigation therefore only involves what did or did not occur from 01 April 2015 to 03 June 2015 being the period during which Medi Spa and Ms Bertogg were in an employment relationship.

Was Ms Bertogg unjustifiably disadvantaged in her employment?

[34] Ms Bertogg bears the onus of establishing on the balance of probabilities that she was disadvantaged in her employment. If Ms Bertogg discharges that onus then the burden of proof moves to Medi Spa to establish on the balance of probabilities that any disadvantage Ms Bertogg may have suffered was justified.

[35] Justification is to be objectively assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act).

[36] Ms Bertogg identifies six ways⁵ in which she claims Medi Spa disadvantaged her, so I deal with each of these in turn.

Invalid trial period provision

[37] The parties agree that the trial period provision Medi Spa included in Ms Bertogg's employment agreement was invalid because it failed to meet the requirements of s.67A of the Act.

[38] Ms Bertogg says she was disadvantaged by the fact that Medi Spa had included an invalid trial period into her agreement because it made her feel less secure in her employment.

[39] I consider it was Ms Bertogg's lack of knowledge that the trial period provision was invalid that caused the disadvantage and not the mere fact that a trial period provision had been inserted into her employment agreement.

[40] Medi Spa's failure to meet the requirements of s.67A of the Act meant it was prevented from relying on the trial period to prevent Ms Bertogg from pursuing a dismissal grievance if she was dismissed during the invalid trial period.

⁵ Ibid paragraph [23].

[41] I therefore find that because the trial period clause was of no effect it did not actually disadvantage Ms Bertogg.

Failure to advise of the right to take legal advice

[42] Medi Spa admits it failed to advise Ms Bertogg of the right to take legal advice about the proposed intended employment agreement in breach of s.63A(2)(b) of the Act.

[43] I find that failure also disadvantaged Ms Bertogg because she was not aware that she had the right to take advice on the intended proposed new employment agreement, so she failed to obtain legal advice before accepting Medi Spa's offer of new employment.

[44] That omission lead to a situation where Ms Bertogg was not fully aware of her legal rights and in particular the fact that Medi Spa could not rely on the trial period because it was invalid.

[45] Ms Bertogg's lack of knowledge of the invalidity of the trial period meant she incorrectly believed she could be dismissed without cause and would not be able to bring a personal grievance. This led Ms Bertogg to become overly anxious about her employment because she believed her employment was not secure.

[46] That became a major concern for Ms Bertogg because in her mind she believed Medi Spa was blaming her for unexplained apparent stock discrepancies. I am therefore satisfied that Ms Bertogg was actually disadvantaged because the lack of advice had an adverse effect on the way she viewed her employment situation.

[47] I am satisfied that such disadvantage was unjustified. A fair and reasonable employer is expected to comply with its statutory obligations but Medi Spa failed to do so.

Reduction in hours

[48] I find that Ms Bertogg did not have her hours of work reduced. Medi Spa offered Ms Bertogg employment based on specified contractual hours, and she accepted that offer. Ms Bertogg worked in accordance with her contractual hours so this claim does not succeed.

[49] This claim appears to arise from Ms Bertogg's mistaken belief that the employment by Ms Ryburn personally and the employment by Medi Spa are the same employment relationship when they are not.

[50] Ms Bertogg's situation involved two different (separate) periods of employment by two different employers under two different employment agreements which contained different terms and conditions of employment.

Creating a work environment of suspicion

[51] While Ms Bertogg appears to genuinely believe that she was subjected to an "environment of suspicion" I consider that is merely her subjective view of Medi Spa's understandable concern over what it believed were stock discrepancies.

[52] Medi Spa raised its stock concerns with all staff, not just Ms Bertogg. It was to be expected that Medi Spa would ask Ms Bertogg whether she knew why stock appeared to be missing because she was responsible for all retail stock, for reordering stock, and for recording what stock the beauty therapists had taken to use.

[53] I do not accept that Medi Spa's inquiries of staff about stock discrepancies can reasonably be said to have disadvantaged Ms Bertogg in the circumstances.

Failing to give training or communicate effectively about stock management

[54] I consider that Medi Spa could have had better stock management processes in place but I do not accept that disadvantaged Ms Bertogg. I find that Ms Bertogg was already well aware of what had to be done in her receptionist role regarding stock records, stock ordering and stock movements within the business.

[55] Ms Bertogg's stock duties and responsibilities remained the same as had applied during Ms Bertogg's employment by Ms Ryburn, so I do not agree that Ms Bertogg was disadvantaged in this regard.

[56] Ms Bertogg was not confused about what was required of her and I do not consider she needed more training. If Ms Bertogg had felt she needed more training then she could have asked for it. The fact she did not do so suggests to me this was not an issue of concern at the time.

Failure to explain legal implications of employment by company

[57] I do not consider Medi Spa was legally required to explain to Ms Bertogg the legal implications of Medi Spa being a limited liability company. I therefore do not find that Medi Spa disadvantaged Ms Bertogg in this regard.

Outcome of disadvantage grievances

[58] Medi Spa unjustifiably disadvantaged Ms Bertogg because it breached its obligation under s.63A(2)(b) of the Act by failing to advise her of the right to take advice on its proposed employment agreement before she accepted Medi Spa's offer of employment.

[59] I find this actually disadvantaged Ms Bertogg because she was not aware that the trial period provision was invalid which meant she incorrectly believed she could be dismissed in reliance on the trial period clause. It also meant that she was deprived of the opportunity to take advice on the change in employment relationship that occurred when she accepted Medi Spa's offer of employment.

[60] If Ms Bertogg had been advised of her right to take advice I consider it likely she would have done so. In which case Ms Bertogg would probably have been advised that Medi Spa would be unable to rely on the trial period clause and of the legal effect changing her employer from Ms Ryburn to Medi Spa had on her employment relationships.

[61] Medi Spa is ordered to pay Ms Bertogg \$3,000 under s.123(1)(c)(i) of the Act to compensate her for the hurt, humiliation, loss of dignity and injury to feelings she has suffered as a result of the unjustified disadvantage she suffered by not being made aware of her legal right to take advice.

[62] I find that there is no contributory conduct by Ms Bertogg which warrants a reduction in remedies under s.124 of the Act.

Was Ms Bertogg dismissed?*Relevant law*

[63] A dismissal in law involves a sending away or an ending of the employment which originates from or is initiated by the employer. A voluntary resignation is not a

dismissal. Because Medi Spa denies dismissing Ms Bertogg, she bears the onus of establishing on the balance of probabilities that she did not freely or voluntarily resign.

[64] Ms Bertogg sought to rely on issues⁶ she says arose when Ms Ryburn personally employed her. However these alleged issues predate Ms Bertogg's employment relationship with Medi Spa.

[65] I therefore find these issues (even if established) cannot be evidence of breaches by Medi Spa because at the time they occurred there was no employment relationship with Ms Bertogg so there were no legal obligations for Medi Spa to have breached.

[66] I find that the actions which give rise to the unjustified dismissal claim must involve Medi Spa because it is Medi Spa that Ms Bertogg alleges fundamentally breached her employment agreement and/or acted with the deliberate or dominant purpose of coercing her resignation.

Was there a course of conduct designed to coerce resignation?

[67] Ms Bertogg claims Medi Spa engaged in a concerted course of conduct with the deliberate and dominant purpose of securing her resignation. I find the evidence does not support that view.

[68] I do not accept that Medi Spa's failure to advise Ms Bertogg of the right to take legal advice on the intended employment agreement was designed to coerce her resignation. That omission occurred before Ms Bertogg had accepted the offer of employment. I am satisfied Medi Spa wanted to employ Ms Bertogg which is why it offered her employment.

[69] I do not accept that the inclusion of an invalid trial period provision is an example of an intention to coerce Ms Bertogg's resignation. Again, this issue arose before Ms Bertogg accepted Medi Spa's offer of employment.

[70] I find that Medi Spa wanted to employ Ms Bertogg which is why it offered her employment and gave her an employment agreement so these cannot be actions deliberately designed by Medi Spa to coerce her resignation.

⁶ Ms Ryburn denies all of Ms Bertogg's allegations of wrongdoing.

[71] Ms Bertogg claims that Medi Spa made allegations against her. I do not accept that. Ms Bertogg's perception was that allegations had been made against her but I find as a matter of fact they had not.

[72] Medi Spa had not made any allegations of wrongdoing because it did not know why there appeared to be stock discrepancies so was still investigating the apparent problem. I am satisfied on the balance of probabilities that no conclusions had been formed.

[73] Medi Spa's questioning of Ms Bertogg about stock issues was not an attempt to coerce her resignation – rather it was a genuine attempt to work out why some of its stock appeared to be missing.

[74] Ms Bertogg also believes that Medi Spa's alleged failure to properly investigate stock issues was designed to coerce her resignation. I do not accept that.

[75] Medi Spa did not fail to investigate stock issues. I am satisfied that Medi Spa was trying, with the resources it had, to investigate the stock issues but it was having difficulty identifying why the problem was occurring.

[76] None of the staff identified why there could be stock discrepancies so Medi Spa was attempting to monitor and track its stock movements much more closely. Medi Spa was not doing that to coerce Ms Bertogg's resignation – it was doing it to identify why the supposed problem was arising.

[77] Ms Bertogg claims that video surveillance cameras were put in place to coerce her resignation. I do not accept that. The presence of cameras on the business premises predated Ms Bertogg's employment by Medi Spa. Ms Bertogg was also aware of the use of security cameras on site before she accepted Medi Spa's offer of employment so the use of cameras cannot be viewed as an attempt to coerce her resignation.

[78] Ms Bertogg claims that Medi Spa unilaterally removed her contractual responsibilities for stock control from her on 14 April 2015 when Ms Ryburn advised all staff that she would be taking over responsibility for all stock related matters until the stock issues had been resolved.

[79] I do not accept this was an action designed to coerce Ms Bertogg's resignation. It was a reasonable and understandable decision made by Medi Spa in an attempt to get clearer about what was happening with its stock. I consider it was a positive as far as Ms Bertogg was concerned because it removed her from responsibility for stock problems that occurred from that point onwards.

[80] I find that Ms Bertogg has failed to establish to the required standard of proof that Medi Spa embarked on a course of conduct designed to coerce her resignation.

Fundamental breach of contractual term?

[81] Ms Bertogg claims that Medi Spa's investigation of stock concerns was a fundamental breach of contract. I do not agree.

[82] Medi Spa was not actually investigating Ms Bertogg personally. All staff were spoken to about stock issues, not just Ms Bertogg. Medi Spa was investigating the entire way stock was dealt with within the business in an attempt to get clear on why there appeared to be discrepancies between the stock ordered, stock used, stock sold and stock held on the shelves.

[83] I find that Medi Spa was in an information gathering stage with the sole purpose of understanding more about its internal stock movements. I do not consider that such action is a fundamental breach of contract, much less one that made Ms Bertogg's resignation reasonably foreseeable.

[84] I note that Ms Bertogg's resignation and subsequent conversations with Ms Ryburn gave no indication that she considered she had been constructively dismissed.

[85] Any employer would want to attempt to understand why its stock records appeared to show a discrepancy and any employer would understandably want to attempt to identify where and why any apparent problems were occurring.

[86] Ms Bertogg's claim that Medi Spa fundamentally breached her terms and conditions of employment does not succeed.

Genuine resignation

[87] I find that Ms Bertogg has failed to discharge the onus of establishing to the required standard that her employment ended because Medi Spa constructively dismissed her. I consider it more likely than not that Ms Bertogg genuinely resigned.

[88] I consider Ms Bertogg was unhappy at work, she was very upset that Ms Ryburn had dismissed Employee A, she was upset that Ms Hughes had resigned, she disliked Ms Ryburn, she did not like how Ms Ryburn was running the Medi Spa business, and did not enjoy working for Medi Spa. These were all factors which I consider led Ms Bertogg to resign.

[89] I do not consider Ms Bertogg's resignation can be linked to an act or omission by Medi Spa or to any fundamental breach of contractual terms that made Ms Bertogg's resignation reasonably foreseeable. Accordingly, Ms Bertogg's unjustified dismissal claim does not succeed.

Costs

[90] Both parties have had some success. The parties are therefore encouraged to resolve costs by agreement within 14 days of the date of this determination.

[91] If agreement is not reached then either party has 21 days from the date of this determination to file a costs application. The other party has 14 days within which to file their costs memorandum with the party who applied for costs having a further 7 days within which to respond.

Rachel Larmer
Member of the Employment Relations Authority