

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 251
3051852

BETWEEN NICOLE MARJORIE McGRATH
Applicant

AND EARLAWN LIMITED T/A
ROBERT HARRIS TIMARU
Respondent

Member of Authority: Philip Cheyne

Representatives: Clayton Williams, counsel for the Applicant
Jonathan Loh, counsel for the Respondent

Investigation Meeting: 17 June 2020 at Timaru

Submissions Received: 19 June 2020 from the Applicant

Date of Determination: 25 June 2020

DETERMINATION OF THE AUTHORITY

A. Earlawn Limited t/a Robert Harris Timaru is to pay Nicole Marjorie McGrath compensation of \$15,000.00 under section 123(1)(c)(i) of the Employment Relations Act 2000, by 23 July 2020.

B. Earlawn Limited t/a Robert Harris Timaru is to pay Nicole Marjorie McGrath \$2,250.00 in costs, by 23 July 2020.

Employment relationship problem

[1] Earlawn Limited operates a business called Robert Harris Timaru under a franchise agreement. Brendon Soal and Maxine Soal are the company directors and shareholders. Nicole McGrath started working for Earlawn Limited in about December 2017. Mr & Mrs Soal had no experience with the day-to-day running of a

café but Ms McGrath was experienced in that work. Soon after starting in a casual role, Ms McGrath became the day-to-day manager of the café.

[2] On 10 June 2018 there was an incident at the café between Ms McGrath and Mr Soal. Ms McGrath left work, sought advice from a family friend who is a Police constable and also spoke to Mrs Soal by phone. Ms McGrath took some sick leave, later returned to work and then went on a period of pre-arranged annual leave, followed by parental leave. Ms McGrath contacted the franchisor regional manager to report the incident and also laid an assault complaint with Police. Later, Earlawn Ltd's lawyer emailed Ms McGrath correspondence about a restructuring proposal to disestablish the manager's role, inviting her to a meeting. However, by letter dated 14 August 2018, Ms McGrath raised a personal grievance based on her claim that on 10 June Mr Soal verbally abused her in front of other staff and customers and then assaulted her, resulting in Ms McGrath feeling that she could not return to work.

[3] Ms McGrath's claim is a personal grievance of constructive dismissal. Compensation of \$30,000.00 is sought. There is no claim for lost remuneration. Costs are sought.

[4] The issues are:

- (a) What happened on 10 June?
- (b) How did Ms McGrath employment end?
- (c) Has Ms McGrath established a personal grievance?
- (d) If yes, what is the remedy?

What happened on 10 June?

[5] By agreement, Ms McGrath was working reduced hours because she was pregnant. Ms McGrath worked on 10 June. Mrs Soal was not present at the café at the time of the incident.

[6] There is a security camera which might have recorded some of what happened. Counsel for Ms McGrath requested it on 14 August. Counsel for Earlawn Ltd replied on 12 September saying on their instructions too much time had passed and Mr Soal was unable to retrieve the footage.

[7] The franchisor apparently investigated the incident in response to contact from Ms McGrath. The applicant and the respondent were directed to seek relevant material from the franchisor. Shortly before the investigation meeting, counsel for the applicant advised that the franchisor had declined to provide the information. The material was not provided by the respondent. I did not direct the franchisor to provide the information to the Authority as it would have delayed this determination.

[8] Mr Soal told me that he has little recall of the 10 June incident between him and Ms McGrath. Ms McGrath formally complained to Police on 16 July, Mr Soal was charged on 7 August with common assault and the charge was resolved with Police diversion on 11 September 2018. The Police summary of facts alleges that Mr Soal approached Ms McGrath in a manic state and accused her of ruining his business, before going to his office. Ms McGrath went to the office intending to ask why he had acted that way to her. Ms Soal got up abruptly and pushed his chest into Ms McGrath knocking her backwards. Mr Soal then continued his earlier accusation about her ruining the business. In his evidence Mr Soal says he pleaded guilty to the charge as part of the diversion. Police diversion involves an acceptance of the charge.

[9] In counsel's 31 October letter responding to the personal grievance claim, it is claimed that the alleged assault "had simply been accidental physical contact whereby Mr Soal in no way intended to assault Ms McGrath". Mr Soal denied abusing Ms McGrath in front of staff but said "both parties did have a heated discussion". Given the absence of any video footage, the diversion based on accepting the assault charge and Mr Soal's evidence about his recollection, there is little reason to doubt Ms McGrath's account of the incident on 10 June.

[10] Two other workers were present in the café on 10 June. Ms Miers overheard Mr Soal criticising Ms McGrath. Mr Soal says that Ms McGrath followed him to the back of the café while yelling at him, however Ms Miers says only Mr Soal was yelling. I accept her evidence on that point. Ms Miers also says she saw Mr Soal pushing his chest against Ms McGrath's chest, backing her into the kitchen bench. Ms Miers then put herself in between Mr Soal and Ms McGrath and told him to calm down and to stop. Mr Soal told her it was Ms McGrath's fault and that "you can't trust her". Ms Miers reminded Mr Soal that Ms McGrath was pregnant. Mr Soal said "I don't care". Another staff member asked for help out the front, Ms Miers went and

Mr Soal followed, criticising Ms McGrath's fitness as a mother. There is no reason to doubt Ms Miers' account and I accept her evidence.

[11] Ms Lane similarly described events she witnessed. Her evidence is that she heard Mr Soal yelling and Ms Miers telling him to "get back", "stand back" or something to that effect. Ms Lane went through to the back and saw Mr Soal who was "right up in Nicole's face". As Ms McGrath went through to the front, Mr Soal followed her saying things like "I feel sorry for those babies, having a mother like you". Mr Soal's comments were made within the hearing of customers. There is no reason to doubt Ms Lane's account and I accept her evidence.

[12] Ms McGrath in her evidence was more descriptive of what was said to her before the assault. Her evidence is that Mr Soal said "you are not worth it, we are going to shut the doors of our business ...no one is going to have a job because of Nicole ...I can't believe you would bring children into this world..." Ms McGrath says that when they were out the back Ms Soal stood up and intentionally barged her, shoving his chest and stomach into her. Mr Soal continued to say what a poor mother she was. There is no reason to doubt Ms McGrath's account and I accept her evidence.

[13] Mr Soal says the incident started when he asked Ms McGrath for her café key to hand over to another employee. In a letter he describes it as "our argument over your key being handed to another staff member." Ms McGrath agrees that she had been asked for the key but she needed a key for her duties the next day. Her evidence is that there had been a txt exchange about this before Mr Soal arrived at the café. A disagreement over the key did not warrant Mr Soal's actions.

[14] It is common ground that Ms McGrath rang Mrs Soal soon after the incident. This was the first Mrs Soal was aware of it. Ms McGrath says that Mrs Soal pleaded with her not to take the matter to the Police but Ms McGrath said she had already contacted the Police. This was a reference to the family friend who Ms McGrath called first. Mrs Soal says that the first she was aware of any Police involvement was later when Mr Soal was contacted about the assault charge. It is not necessary to resolve this conflict as it adds nothing to the personal grievance claim or defence.

[15] Ms McGrath says that Mrs Soal promised that Mr Soal would not be present at work, that it would be safe for Ms McGrath to return to work and that Mr Soal would

be taking extended leave due to a medical condition. As the call was the first that Mrs Soal knew of the incident, it is unlikely that Mrs Soal would have been able to say that Mr Soal would be on extended leave due to a medical condition.

[16] Mrs Soal's evidence is that she had a discussion with Ms McGrath at work following the incident. At that point Mrs Soal apologised on Mr Soal's behalf, said that he was unwell and would be away from work for some time. I accept Mrs Soal's evidence as to the timing of the conversation, as she would not have been in a position to say that Mr Soal was unwell and would be away from work for some time when the two women spoke on 10 June.

[17] In summary, Mr Soal arrived at the café, was verbally abusive to Ms McGrath in the hearing of customers and other staff and then went to the back of the café. When Ms McGrath approached him at the back of the café to ask what the issue was he assaulted Ms McGrath by standing up and pushing his chest and stomach against her. The assault ended when Ms Miers intervened. Mr Soal continued being verbally abusive about Ms McGrath within the hearing of customers and staff. The incident at the café ended as Ms McGrath left the premises. Following the incident, when Ms McGrath returned to work Mrs Soal apologised, said that Mr Soal was unwell and would be away from work for some time.

How did Ms McGrath's employment end?

[18] It is common ground that Ms McGrath returned to work after the incident and that Mr Soal was not at the café for a while. Ms McGrath commenced pre-arranged annual leave on 9 July 2018.

[19] In its reply, Earlawn Ltd says that the personal grievance claim about the 10 June incident is "likely a reactive claim by the applicant in an effort to obtain financial benefit as a result of the possibility her managerial position would be disestablished."

[20] Earlawn Ltd instructed counsel to write the 3 August letter to Ms McGrath inviting her to a meeting with Mrs Soal and counsel to discuss a proposed restructure based on a the company's belief that the manager's role had become surplus to requirements. Counsel sent the letter by email, for a meeting on 10 August. The letter was not sent to Ms McGrath's correct email address. Ms McGrath's evidence is

that she did not see the letter until Sunday 12 August when she first noticed it had been put into her mailbox. There is no reason to doubt this evidence.

[21] The 3 August letter followed an earlier letter to staff from Mr Soal dated 5 July outlining the restructuring proposal based on the directors having learnt the knowledge and skills to undertake the day-to-day management of the café, with the result that the current manager's position (held by Ms McGrath) would be disestablished. A staff meeting was set for 25 July. Ms McGrath did not attend that meeting. The 5 July letter refers to advice to staff of the proposal restructuring in a letter "last month". The earlier letter was not produced in evidence.

[22] I accept that the company first referred to a restructuring proposal affecting the manager's position before Ms McGrath raised her grievance based on the 10 June incident. Ms McGrath confirmed that in her evidence. While a proposed restructuring affecting the manager's position was known to Ms McGrath before the 10 June incident, the present claim is not for a "financial benefit" in the face of a possible justifiable redundancy dismissal. It arises out of the 10 June incident when Mr Soal abused Ms McGrath within the hearing of customers and staff and assaulted her.

[23] Mr Soal was seen by senior nurses in the Timaru Mental Health Services. A letter from that service to his GP describes Mr Soal as presenting in a "distressed state". The letter refers to "Queen's Birthday Weekend". I suggested it was a typographical error because the incident was during the following week. Counsel for Ms McGrath sought written confirmation from the Service, which Mrs Soal said would be sought. I was advised this week that there would be a delay of some weeks before the Service could provide another letter. Earlawn Ltd is not disadvantaged if I proceed on the basis that it is a typographical error. My view, to be explained, is that Ms McGrath has a personal grievance so her case is not advanced if Mr Soal in fact attended the Service the weekend before the incident. Nothing useful is achieved by deferring this determination.

[24] The letter lists medications which were stopped or adjusted and Mr Soal's continued medications. I have also been provided with a copy of receipts showing current medications. Mr Soal says he thought he was having an "anxiety attack" and describes it as a "nervous breakdown". The Police summary of facts describes Mr

Soal as approaching Ms McGrath in a “manic state”. Mr Miers says that Mr Soal was “shaking”. Ms Lane says that Mr Soal was often grumpy and would have to leave the premises to calm down which Mrs Soal would attribute to his “mental health” or “depression”. However, there is no expert evidence that a medical condition or side effect of medication caused Mr Soal’s behaviour. The evidence falls well short of proving that Mr Soal should not be treated as responsible for his conduct towards Ms McGrath.

[25] Ms McGrath’s evidence is that after some weeks Mr Soal came in to the work place on days she was there but he had not been due to work. She thinks that Mr Soal came in specifically to “have a go” at her. Mr Soal says he would at times “pop into” the café but would avoid Ms McGrath. While there is no specific evidence of interaction between Ms McGrath and Mr Soal over this period, it is unsurprising that someone in Ms McGrath’s position would be concerned about the purpose of the visit. Earlawn Ltd took no steps manage the concern. Mr Soal returned to work in early July, taking steps to proceed with the restructuring proposal. Ms McGrath was on leave from 9 July.

[26] Counsel’s letter of 14 August advised that Ms McGrath was “currently away from her employment on parental leave and given what has occurred does not feel she can return.” Counsel raised a grievance in relation to the 10 June incident. Counsel on 7 September followed up in the absence of a response. Earlawn Ltd on 12 September denied the facts as alleged. A more detailed denial followed on 31 October where counsel sought to advance the proposed restructuring. Later, counsel for Ms McGrath reiterated that Ms McGrath did not feel that she could return to the workplace.

[27] Mr Soal’s evidence is that he understood the 14 August statement to mean that Ms McGrath felt unsafe to return to work until the matter had been dealt with, which he believed was resolved later through the court process. He says that he understood Ms McGrath to be on parental leave intending to return to work, until counsel’s 21 November email which refers to a constructive dismissal. There is no reasonable basis for Mr Soal’s views. The 14 August letter referred to the incident and the prosecution, Mr Soal having been charged the week before. It did not suggest Ms McGrath might return to work. Rather, it questioned the genuineness of a proposed

restructure in light of the assault, given counsel's observation that Earlawn Ltd would have anticipated a personal grievance claim based on the assault.

[28] Any reasonable reading of the 14 August letter shows that Ms McGrath considered her employment was at an end. It would have been open for Earlawn Ltd to attempt to ameliorate Ms McGrath's concerns, but that did not happen. I find that the employment ended on 14 August.

Has Ms McGrath established a personal grievance?

[29] The claim is of constructive dismissal. The Act permits me to find that a personal grievance of a type other than that alleged.

[30] An employee has a personal grievance if their employment was affected to their disadvantage by an unjustified action by the employer.

[31] I find that by assaulting and verbally abusing Ms McGrath, Mr Soal affected her employment to her disadvantage. The assault and abuse were unjustified actions as Mr Soal has not established an absence of responsibility, a grievance then arose. Additionally, Ms McGrath felt unsafe to continue working, exposed to the risk that she might be abused or assaulted again by Mr Soal. Mr Soal as one of the principals of the business had a right to attend the premises, but Earlawn Ltd had obligations to manage the effect on Ms McGrath when Mr Soal did attend the premises. Mr Soal's evidence that he avoided Ms McGrath when he "popped in" to the café did not manage Ms McGrath's reasonable fears, leaving her concerned that he was there "specifically to have a go" at her. This exacerbated Ms McGrath's grievance.

[32] While events might also sustain a constructive dismissal claim, I consider Ms McGrath's concern is better addressed as an unjustified disadvantage grievance as it more directly focuses on the 10 June incident and the absence of effective steps to mitigate or manage the effects for Ms McGrath.

[33] The possibility that Earlawn Ltd might have justifiably dismissed Ms McGrath due to redundancy is not relevant. There is no claim for lost remuneration and the grievance is focused on the incident and Ms McGrath's employment for the brief time afterwards.

[34] I find that Ms McGrath's employment was affected to her disadvantage by unjustifiable actions of her employer, giving rise to a personal grievance.

What is the remedy?

[35] There is no claim for lost remuneration.

[36] The claim under s 123(1)(c)(i) of the Act is for \$30,000.00 compensation. I am referred to *Waikato District Health Board v Archibald*¹ and *Richora Group Limited v Cheng*² in support of the submission that the harm suffered by Ms McGrath is more significant than the harm established in the former case but less serious than in the latter case.

[37] As part of diversion on the assault charge, Mr Soal wrote a letter of apology to Ms McGrath. Ms McGrath is critical of the need for a second draft of the apology and the time taken to provide it. Mr Soal also paid a small sum in reparation. These steps were to resolve the criminal charge. The steps and Ms McGrath's criticisms have no significant bearing on the assessment of compensation for humiliation, lost dignity and injured feelings.

[38] Ms McGrath's evidence is that the incident caused her a great deal of humiliation, especially because she was abused in front of customers and work colleagues. She says she suffered a lot of stress, especially fearful that her twins would be born early. I accept this evidence. Ms McGrath's partner says that Ms McGrath was really shocked because of her hard work, long hours and efforts to help her employer to sort out their business issues. He also says that the incident knocked Ms McGrath's confidence and that it was tough for them financially when Ms McGrath left work. I accept this evidence. Ms McGrath spoke with her GP on 25 July 2018. The GP's notes record Ms McGrath saying she felt very upset about the incident and was finding it hard to cope emotionally with flashbacks and needing help to cope. The GP diagnosed stress and anxiety due to the incident and referred Ms McGrath to a mental health service for counselling and support. There is a letter from that service confirming that Ms McGrath was not able to work due to emotional distress caused by the assault, was seen twice and then referred to a post-natal service

¹ [2018] NZEmpC 113

² [2017] NZEmpC 132

for longer-term support. I find that all these effects were caused by the personal grievance.

[39] In *Archibald*, the Court concluded that "...quite apart from the feelings which would inevitably have accompanied the loss of employment, Mrs Archibald also experienced a deep sense of hurt... She felt cornered... and became very upset and anxious... She also experienced stress and worry... It is clear that although her employment came to an end some time ago, the WDHB's actions have had a lingering negative impact on her."

[40] The circumstances of the employer and the employee in *Archibald* differ significantly from the present case, but the focus must be on the proven effects caused by the established grievance. I conclude that the effects on Ms McGrath are somewhat less significant than in *Archibald*, principally because the effects have not had a lingering impact. Compensation of \$15,000.00 properly remedies the proven harm.

[41] There was no blameworthy contribution by Ms McGrath to the situation that gave rise to the grievance.

Costs

[42] Directions made when the meeting was first set included that submissions would be dealt with as part of the meeting. Submissions heard at the end of the meeting extended to costs. However, counsel for Ms McGrath later lodged a memorandum asking that costs be reserved on the basis that there may be issues affecting costs if there is a determination in the applicant's favour. Both counsel had an opportunity to make submissions and it should have been foreshadowed at the meeting if there might be a need to timetable submissions once the claim had been determined. It might be on the basis of incomplete submissions, but I consider the better approach is to determine costs now.

[43] The matter was originally set for a two day investigation meeting. That meeting was cancelled, then it was rescheduled for one day. The meeting took less than half a day. Counsel for Ms McGrath sought costs for one day based on the daily tariff.

[44] Costs here should follow the event. It is a standard personal grievance claim with little legal or factual complexity. Significant issues were resolved in the applicant's favour. The respondent should have sought documents generated by the franchisor investigation and provided those with redactions if needed, but the reasonable cost to the applicant of counsel's thwarted attempt would not cause me to adjust the tariff award. I fix half the daily tariff (\$2,250.00) for a one day meeting to reflect the duration of the meeting.

Philip Cheyne
Member of the Employment Relations Authority