

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 481
3088412

BETWEEN

MICHELLE ANN SMITH
Applicant

AND

FITZHERBERT REGENCY
MOTOR LODGE (2018)
LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Kathy Jarrett, advocate for the Applicant
Gordon Paine, counsel for the Respondent

Investigation Meeting: 16 and 17 December 2020 at Palmerston North

Submissions Received: 9 February 2021 and 3 March 2021 from the Applicant
24 February 2021 from the Respondent with further input
up to 9 March 2022

Date of Determination: 22 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Michelle Smith, claims she was unjustifiably dismissed, albeit constructively, in early 2019.

[2] The respondent, Fitzherbert Regency Motor Lodge (2018) Limited (FRML), initially took the view no grievance had been raised as required by the Act¹ though that approach was

¹ Section 114(1) of the Employment Relations Act 2000

later abandoned. The position subsequently taken was that Mrs Smith resigned of her own volition and was not dismissed, constructively or otherwise.

[3] There were also issues about Mrs Smith final pay and deductions therefrom but by the time of the investigation these had been resolved.

This Determination

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[5] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Background

[6] FRML operates a motor lodge in Palmerston North. It was and is owned by Gerald Haddon and, at the time of these events, managed by Kevin Davey.

[7] Mrs Smith was originally employed as a receptionist in 2014 with another business owned by a third party which operated from premises it leased from FRML. Her employment transferred when FRML took over operation of the business in March 2018 though she says her roles and responsibilities increased significantly after a discussion with Mr Haddon. She says that in addition to her reception duties she was to undertake further roles such as stock ordering, the rostering of staff and managing the payroll. She says it was agreed the changes were to be documented though this never occurred despite numerous requests.

[8] As already said Mrs Smith claims to have been constructively dismissed and in support of her claim Mrs Smith relates a number of incidents which she says influenced her decision to resign.

[9] Amidst these were what she says was a developing expectation she would be available to assist out of hours and even while on leave via external access to FRML's systems. Mrs Smith says this first occurred in July 2018 and she cited three examples that month.

Another two are cited in October, along with one on 10 November with the latter having what she considered an unfortunate sequel. The following day, a Sunday, she was again called about an issue with the booking system but missed the call which, according to Mrs Smith, resulted in repercussions the next day (12 November) when she was the subject of an unacceptable verbal “dressing down” by Mr Davey though other events also appear to have contributed to that.

[10] Mrs Smith says the type of excessive reaction she was subjected to on 12 November was indicative of what was, in her view, a developing trend with improper responses to various issues. The first example of that she evidences resulted from the purchase of a pumpkin in September 2018. It was to be used in the preparation of a meal for a school group and was one of the items in a wider purchase. Mrs Smith says Mr Haddon was incensed by the purchase and berated her in front of both staff and guests for some time with his criticism then extending to the purchase of breakfast items. Mrs Smith says the behaviour stopped when Mr Davey intervened and Mr Haddon later apologised.

[11] Mrs Smith offered the view that the fact it had happened may, however, have influenced Mr Davey’s behaviour as he yelled at her for the first time in early October.

[12] As already said 12 November was a day upon which events occurred with which Mrs Smith takes issue. Mrs Smith says she received a call from a cleaner who had been embarrassed by waking a guest with a late check-out time about which she was not aware. Mrs Smith says when she raised this with Mr Davey he responded by shouting at her in the hearing of both guest and staff. She then says that following the verbal “dressing down” about that and her failure to answer the phone the previous day, her “management” access to the booking system was removed along with other duties such as the ordering of cleaning materials and the checking of rooms prior to occupation. Mrs Smith says she left in tears and took the next couple of days off due to the stress she felt.

[13] It is Mrs Smith’s evidence that from this point she was effectively ostracised with Mr Davey only interacting with her when necessary. There were also a chain of interactions over the next week or two with which Mrs Smith takes issue given they resulted in her being abused or yelled at by either Mr Haddon or Mr Davey.

[14] On 6 December there occurred an incident which Mrs Smith categorises as the worst though this involved what Mrs Smith considered inappropriate behaviour by a colleague as

opposed to either Messrs Davey or Haddon. She says she was physically intimidated” by the employee so loudly it woke Mr Davey who was “asleep upstairs”. He came down, calmed the situation and advised Mrs Smith the matter would be dealt with. That said, it appears he then left resulting in Mrs Smith again feeling under threat. She chose to leave the premises and says that when doing so she was again “verbally attacked” by the same employee. She followed that up with a text to Mr Davey that evening and an e-mail addressed to Mr Haddon and his partner, Jill Dixon, who she considered supportive.

[15] The text advises “sorry I’m not being screamed and sworn at by other people and so its best I go home...” Mr Davey responded saying “ok ...” and Mrs Smith then advised she was drafting an email to Mr Haddon and apologised for leaving Mr Davey “short this afternoon”.

[16] The e-mail opens with the statement “I am writing to let you know that while I am still very upset over being screamed, sworn at and threatened today, it really was the final straw and I feel I can not take any more stress or abuse”. It goes on to refer to building tensions since the Haddon’s had assumed operation of the motor lodge and dissatisfaction with Mr Davey’s performance and support. She goes on to comment on duties such as organising the cleaners and stock ordering being removed and states that is fine but she objects to the fact staff and customers admonish her when mistakes are made by her replacements. The email then observes Mr Davey now only speaks to her when “he absolutely has to” before closing with the observation “I am not sure where to from here – this bullying and abuse is really unacceptable”.

[17] Ms Dixon responded by advising Mr Haddon was out but she would give the email to him when he returned and urging Mrs Smith get a good nights sleep as “this will be dealt with tomorrow”.

[18] The following day Mr Haddon did speak to Mrs Smith but she says that simply led to further concerns as the issue was not addressed with Mr Haddon simply saying the other staff member had a different story. The lack of action meant Mrs Smith chose not to attend the work Christmas function given a fear that the employee would feel emboldened to further abuse her but her absence was not well received by Mr Haddon. That said she also feels vindicated as it there is evidence there were some altercations at the function attributable at least in part to the employee in question.

[19] The build up to the final straw came on 18 December 2018 when Mr Haddon, prior to leaving for an overseas trip, advised Mrs Smith that in addition to being responsible for banking and the mail over Christmas, she would be charge of rostering staff over the Christmas period and he expected Mrs Smith keep the “hours under control”. She says she feared this as she felt Mr Haddon would hold her responsible for any cost blow out yet she had no real control. Her concerns were later enhanced when, according to Mrs Smith, Mr Davey advised he had put another in charge of these tasks despite knowing of Mr Haddon’s instruction.

[20] Further issues then arose as the cleaners were being rostered to start earlier than normal and before guests had checked out which, in turn, led to an increase in staff wages for the period. Mrs Smith says her attempts to address this with the employee doing the rostering were unsuccessful. This further increased the tension as did a requirement Mrs Smith process the wages each of the next three Mondays despite being formally on leave.

[21] On one of the wage preparation visits, 7 January 2019, Mrs Smith found an email about an alleged charge for a cancelled room. That led to a disagreement with Mr Davey and further concerns arose when Mrs Smith found the hours she was paying the cleaners exceeded those she would have expected by over 50%. She says “I was completely sick and scared about the huge telling off I would be getting when Mr Haddon returned”.

[22] That was the final straw and on 9 January 2019 Mrs Smith advised Mr Haddon and Ms Dixon of her resignation in an email giving two weeks notice though they were overseas at the time. They replied that they were sorry to see her go and only accepting the resignation with reluctance.

[23] On 16 January Mrs Smith and Mr Haddon, who had by then returned, discussed the resignation though Mrs Smith says that simply confirmed her view he had no idea why she had was resigning. She decided to explain in an email which opened by saying she was “taken back” by the fact Mr Haddon did not understand the reasons for her resignation. She says that while he may have expressed disappointment at her resignation she was equally disappointed that her position had become untenable and she had felt forced to resign. The email then went on to express why she felt that way and commented on the removal of duties and the removal of access to a work eftpos card which, in her view, implied a lack of trust. Perhaps more importantly was the fact she felt her opinions and experience were no longer valued and she was no longer able to say anything to her Mr Davey or other staff without “being ridiculed,

belittled, accused of being a liar, being sworn at and often simply ignored”. She also expressed a concern she was being asked to work in a way that created health and safety risks for both staff and visitors before stating “And finally, being told that what duties I have left are a “waste of time” is unacceptable”.

[24] In accordance with her notice Mrs Smith left on 23 January though she left early that day on the instructions of Mr Davey. Subsequent issues then arose as the remaining time was not paid and these were further deductions from her final pay. There were discussed in a lengthy letter Mrs Smith sent on 13 February which also reiterated she was firmly of the view her resignation had been forced and advised that she was contemplating a personal grievance. The letter appears to have been actually sent the following day appended to an email whose subject was “Advice of a Personal Grievance”.

[25] It would be fair to say the evidence tendered on behalf of the respondent did little to deny Mrs Smith’s portrayal of specific events but instead focused on suggesting that what occurred was the result of Mrs Smith inability to relate effectively with her colleagues.

Discussion

[26] As already said Mrs Smith claims she was constructively dismissed.

[27] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*² the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where a breach of duty by the employer causes an employee to resign. There must be a causal link between the employer’s conduct and the tendering of the resignation³ and the possibility of resignation in response to that conduct should be foreseeable.⁴

[28] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Mrs Smith to establish, prima facie, there was such a breach.

[29] Mrs Smith’s evidence is clear. She resigned not only due to the way she was treated but particularly as a result of FRML’s failure to address the “considerable dissatisfaction” she expressed when raising her concerns. She says it got to the stage she concluded, after

² (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

³ *Z v A* [1993] 2 ERNZ 469

⁴ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

considering the events of 6 December and what followed, that there was no point and it was that realisation which led her to conclude she had no option but to go.

[30] First to consider are the allegations concerning abuse, bullying, unreasonable demands on her time and the removal of duties. From FRML's perspective the key witness with respect to these allegations was Mr Davey.

[31] Mr Davey's general approach was that Mrs Smith was difficult to get on with. That said he considered her crucial to FRML's operation having skills and knowledge he didn't but thought she was taking advantage of that. He accepted relationships were damaged, especially between Mrs Smith and the cleaners, labelling them "frosty". When asked what he did about it he said initially he tried to coach Mrs Smith but after a week or two around October he concluded there would be less stress by letting it pass and, in any event, he said the tense relationships "might be advantageous to all of us" but did not explain what that meant.

[32] Mr Davey accepted, when questioned, that duties were removed claiming that had he not done so then "we would have no cleaners" and that as a result they felt "liberated". He said he did so by simply telling Mrs Smith and there was no discussion about it. He also accepted Mrs Smith was essentially right about his response on 12 November, saying he had been disappointed by her saying, when he raised it, that her job description did not require her to be on call. When asked if he had been aggressive his immediate response was "yes", though that was followed by "no" and "can't remember".

[33] He also accepted another of Mrs Smith's claims that he had undermined her by reversing instructions she had given a contractor on 16 November, saying "what's the problem".

[34] FRML's position was perhaps not assisted by the calling of another witness to suggest that Mrs Smith was part of the problem as "it was 2 way with Michelle" but who then admitted that while she had heard there were fights and arguments this was all second hand as she worked weekends. That said she had witnessed Mrs Smith being yelled at on one occasion.

[35] This evidence leads me to conclude there is merit to Mrs Smith's complaints at least to the extent there were events about which she might properly feel concerned. It follows she had the right to raise these with her employer and irrespective of whether or not they were

ultimately found to have substance their raising placed FRML under a statutory obligation to respond in a constructive and communicative manner.

[36] That is because section 4 of the Employment Relations Act 2000 (the Act) imposes upon the parties a duty to deal with each other in good faith. Included in that duty is a requirement the parties *“be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative”*.

[37] Despite that FRML did nothing to address what I consider Mrs Smith’s validly raised concerns though why that occurred perhaps became clear from the evidence of Mr Haddon and Ms Dixon.

[38] Mr Haddon, who says the resignation came as a shock, stated in oral evidence that he had no knowledge of Mrs Smith’s email of 6 December at the time. Shortly after he said that he also stated he had no recollection of the discussion Mrs Smith says happened the following day. That said, and when asked, Mr Haddon accepted that while he had no recollection, he could not deny the discussion may have occurred. He did, however, accept knowledge of the incident saying he heard about it from Mr Davey but did nothing as he thought the latter had dealt with it.

[39] Mr Haddon did however recall a discussion about the fact Mrs Smith did not attend the BBQ saying he was disappointed.

[40] Perhaps most crucially he said that while the resignation came as a shock, he did nothing about it and did not attempt to remediate what had clearly become a difficult situation on the grounds of “what could I do”. Thereafter, and while he went to FRML’s premises two or three times a week during the notice period and spoke to Mrs Smith it was not about the issues she had raised. He said his view was “she was going and I’d accepted it”.

[41] Despite the emails it was Mrs Smith’s evidence that when voiced, she raised most of her concerns to Ms Dixon. When asked if this was the case Ms Dixon said she agreed but questioned whether that was appropriate. Ms Dixon accepted she was well aware Mrs Smith was not happy but stated she felt like “piggy in the middle” and did not pass the concerns she heard to Mr Haddon. She also said this was in part due to her view Mrs Smith was “letting off steam” and the complaints were not in fact serious.

[42] With respect to the email of 6 December she stated she simply prints documents she receives and had no recollection of it or what might have then occurred. This admission might explain why Mr Haddon had no recollection of it.

[43] Notwithstanding that Ms Dixon's evidence makes it clear she was an active participant in the management of FRML's business with, for example, her acceptance that when Mrs Smith's resigned she and Mr Haddon "...talked about how we would cope...".

[44] The evidence leads to a clear conclusion Mrs Smith raised her concerns but for various reasons FRML failed to address them. That is, I conclude, a breach of the statutory duty imposed by s 4 of the Act and its obligations to Mrs Smith.

[45] Add the fact Mrs Smith repeatedly raised her concerns to no avail I conclude a reaction such as resignation was, or at least should have been, foreseeable especially as it was heralded as a possibility in the email of 6 December via the words "I can not take any more...".

[46] This was, I find, a constructive dismissal and as often occurs in such cases it is unjustified as the very nature of the defence, no dismissal, means there is no attempt or evidence to fulfil the justification requirements of s 103A of the Act.

Remedies

[47] The conclusion the dismissal was unjustified raises the question of remedies. Mrs Smith seeks lost wages and while she initially sought \$5,000 as compensation this was increased, prior to the investigation, to a total of \$25,000. Given the latter was notified well prior to the investigation and FRML could respond to it I shall take the later as the claim.

[48] First though is the claim for lost wages. Section 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser.

[49] During her notice period Mrs Smith was introduced to Ms Jarrett who was seeking an administrative employee. She applied and was successful but she only worked 20 hours a week as opposed to 35 with FRML. She seeks the balance for six months.

[50] As already said the act provides for three months and in this instance there was no argument or evidence as to why that should be increased. The difference was quantified as being \$3,380 for three months and being wages clearly lost as a result of the dismissal this is

payable. The employers Kiwisaver contribution of \$101.40 was also sought and being a benefit Mrs Smith would have received this is also payable.

[51] The submissions also included a claim for “lost annual leave due to being on call” but no evidence was offered to support this claim and it remains unclear what it was, especially given the statement the wage issues had been resolved. There shall not, therefore, be an order under this head.

[52] Turning now to compensation. As already said the claim was for \$25,000 although a further unspecified recompenses to recognise Mrs Smith needed “counselling” as a result of these events was added in submissions. This last element will not be considered as (a) it was not pleaded till submissions and (b) this factor can be taken into account when considering the claim as pleaded.

[53] Mrs Smith’s evidence makes it clear she was hurt. Not only did she speak of the issues during employment and the angst they caused but she spoke of ongoing stress, anxiety and humiliation with these affecting her to the extent she needed counselling. That said there is a question as to how much of that is attributable to FRML, as there is evidence Mrs Smith was under other, unrelated, personal pressures. There are also other issues with the evidence. For example one of the things she relied upon, in oral evidence, was a claim resolution of this matter was dragged out and the investigation delayed but the early issues revolved around the wage issues which were said to have been resolved and some of the early delay attributable to her and her then representatives unavailability.

[54] Standing back and considering the evidence along with current precedent I consider the above average award of \$18,000 appropriate.

[55] Finally, the conclusion Mrs Smith has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.⁵ Notwithstanding FRML’s view Mrs Smith’s conduct contributed to the dysfunctional relationships that resulted in her resignation their evidence fell well short of establishing it was such that remedies should be reduced.

⁵ Section 124 of the Employment Relations Act 2000

Conclusion and Orders

[56] For the above reasons I conclude Mrs Smith has a personal grievance in that she was unjustifiably dismissed. As a result I order the respondent, Fitzherbert Regency Motor Lodge (2018) Limited, pay Michelle Smith:

- (a) \$3,481.40 (three thousand, four hundred and eighty one dollars and forty cents) gross as recompense for wages and other benefits (Kiwisaver) lost as a result of the dismissal; and
- (b) A further \$18,000.00 (eighteen thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[57] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed Mrs Smith may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date FRML will have 14 days to lodge any reply memorandum.⁶

Michael Loftus
Member of the Employment Relations Authority

⁶ www.era.govt.nz/assets/Uploads/practice-note-2.pdf