



Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

The Final Straw

The Employment Court has recently had cause to consider the principles to be applied in a constructive dismissal setting in ***Spotless Facility Services NZ Ltd v. Anne Mackay*** [2016] NZEmpC 153. The Employment Relations Authority upheld Ms MacKay's personal grievance claim of unjustified constructive dismissal and Spotless challenged the Authority's determination on the basis that it considered the Authority had applied the principles relating to constructive dismissal incorrectly

The facts surrounding this claim are:

1. Ms MacKay worked as a kitchen assistant in the Timaru Hospital kitchen
2. Ms MacKay complained on two occasions about her supervisor (Ms X's) behaviour toward her however nothing substantive occurred as a result of this
3. From Ms MacKay's perspective concerns came to a head in the workplace on 9 June 2014 when *"there were several disagreements, and even altercations, as to the standard of food presentation or the way in which it was being undertaken."* Ms MacKay recorded these events in a complaint to Ms Norton, the Spotless representative who had responsibility for the food service at the Timaru Hospital site
4. Ms Norton met with Ms MacKay, who attended the meeting with a support person, during which:
 - a) Ms MacKay was advised that Spotless had received letters from other staff raising issues and allegations about her, similar to those which Ms MacKay had raised about others.
 - b) Ms Mackay was given the opportunity to comment on the concerns which she had raised about other staff members.

- c) Spotless representatives indicated that they wanted Ms MacKay to respond to the complaints which had been made about her.

5. Spotless representatives also met with Ms X (Ms MacKay's supervisor whom she had complained about) and Ms Y (who had written a complaint about Ms MacKay) during which:
 - Ms X was coached on how to avoid inflammatory situations; and
 - Ms Y indicated she was willing to attend some form of mediation to restore a harmonious work environment.

6. Ms Mackay was provided with the opportunity of responding to the complaints brought against her, in the letter summarising the complaints, Spotless raised the possibility of mediation. Ms Mackay responded by email denying the allegations made in relation to her alleged conduct however did not comment on the option of mediation.

7. On 18 July 2014, Spotless indicated it would respond to Ms Mackay's response by 25 July 2014.

8. Having had not response from Spotless on 25 July 2014 Ms Mackay wrote a letter of resignation as follow:

"... Due to unresolved and ongoing issues within the kitchen of unacceptable behaviour, which makes it very difficult to work within, I am left with no choice but to give 2 wks notice of my resignation – Last day being Fri 8.8.14."

9. Spotless did not immediately respond to this correspondence.
10. On 30 July 2014 Ms Mackay wrote asking if she could put her resignation on hold in the hope that a resolution of the conflict could be obtained and she proposed mediation to assist in resolving the workplace issues.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

Contact Details:

Ground Floor
71 Cambridge Terrace
PO Box 892, Christchurch
Tel (03) 365 2345
Fax (03) 365 2347
www.mgz.co.nz

Neil McPhail
Email neil@mgz.co.nz
Mobile 0274 387 803

Raewyn Gibson
Email raewyn@mgz.co.nz
Mobile 0274 387 802

Peter Zwart
Email peter@mgz.co.nz
Mobile 0274 367 757

11. On 8 August 2014 there was a telephone conversation between Ms Mackay and a Spotless representative (Mr McLennan) during which:

- Ms Mackay was advised that it was not possible to put her resignation 'on hold'; she needed either to formally retract her resignation or to keep it in place.
- Ms Mackay was advised Spotless was still working through the complaint process.
- Ms Mackay advised that she had heard (it was later asserted that she had heard about this from colleagues that morning) that someone at the hospital was collecting statements from staff 'which were against her' (which Ms MacKay referred to as a 'petition') so that she would like her resignation to stand with the last day being that day (8 August 2014). There was some dispute about the nature of Mr McLennan's response in respect to the 'petition' however the Employment Court determined that Mr McLennan advised Ms MacKay he could not comment on the claims about the petition as he knew nothing about it. Ms MacKay appeared to give evidence before the Authority that Mr McLennan's failure to say that he would investigate the petition were deliberate however before the Court she gave evidence that she now "believed [Mr McLennan] when he said he did not know about it yet".
- Spotless accepted her resignation and advised Ms MacKay it would process her final pay.

12. The Authority recorded Ms MacKay's evidence that the 'petition' was "the straw that broke the camel's back".

In reviewing the previous authorities dealing with constructive dismissal the Court referred to a decision by the English Employment Appeal Tribunal in **Triggs v GAB Robins (UK) Ltd**. Where the Tribunal outlined the following principles:

[32] We derive the following principles from the Omilaju case.

- (1) The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.
- (2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.
- (3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.

- (4) And entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's acts as destructive of the necessary trust and confidence."

Ms MacKay's evidence was that what had occurred during the course of the telephone conversation on 8 April 2014 was the "final straw" and on this basis the Court considered what had occurred during the conversation and concluded that "it is apparent that there was a miscommunication between the parties". In this regard the Employment Court concluded:

"[81] The first part of the conversation related to the complaints which Mr McLennan had been investigating. He said he was continuing to investigate these.

[82] It is regrettable that he did not elaborate, and in particular that he did not say that he was at the point where he could issue a report; and that there was a consensus between the parties for mediation (which had been the case since 30 July 2014) so that there was a way forward and a means for achieving a constructive outcome. In part, the brevity of the conversation was catalysed by the fact that Mr McLennan was speaking to Ms Mackay in less than ideal circumstances, whilst he was waiting for a flight in an airport lounge. . .

[84] The second part of the conversation related to the new complaints, which Ms Mackay characterised as being incorporated in a petition. I find that Mr McLennan was honest when he stated that he did not know about these, and that Ms Mackay on being told this felt that this answer was not good enough and that she had to confirm her resignation. But I also conclude that this was an overreaction on her part. The line had not been crossed to dismissive or repudiatory conduct.

[85] I find that the circumstances fall within the fourth category of those which were referred to by the English Court of Appeal in Omilaju. That is, the employee genuinely, and subjectively but mistakenly, interpreted the employer's response as destructive of the necessary trust and confidence; but that was a response to an innocuous act: an honest statement was made which could have been better expressed; it did not justify an immediate decision to resign."

The Employment Court determined that it could not conclude that there was a relevant breach of duty by Spotless of such seriousness as to make it reasonably foreseeable that Ms Mackay would not be prepared to continue to work for it and consequently that Ms MacKay's decision to resign did not amount to a constructive dismissal. In effect, the Employment Court did not consider the employer's actions actually gave rise to a "final straw".

Christmas Shutdown

Our office will be unattended from 5 pm on Tuesday 21 December 2016 until Monday 9 January 2017. If you require assistance during this time please contact us on the following numbers: Neil 0274 387 803, Raewyn 0274 387 802, Peter 0274 367 757