IN THE EMPLOYMENT COURT
AUCKLAND

AC 37/09
ARC 58/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	REAL COOL LTD Plaintiff
AND	CHRISTINE GUNFIELD Defendant

Hearing: 20 and 21 October 2009
(Heard at Rotorua)

Appearances: AA Hopkinson, Counsel for Plaintiff
Kerry Single, Advocate for Defendant

Judgment: 21 October 2009

ORAL JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This challenge by hearing de novo to a determination of the Employment Relations Authority must decide whether Christine Gunfield was dismissed and, if so, justifiably. Ms Gunfield also alleges that she was disadvantaged in her employment by unjustifiable action by her employer that also amounts to a personal grievance for which she should be compensated. There are also associated claims against Real Cool Limited ("Real Cool") for penalties for failure to provide an employment agreement and for failure or refusal to provide copies of wage and time records.

[2] This is a very different proceeding than was considered by the Employment Relations Authority where the employer did not participate in its investigation of Ms Gunfield's claims. The Authority found that Ms Gunfield had been dismissed

unjustifiably and awarded her remedies including compensation for lost remuneration of $9,230.76 and distress compensation under s123(1)(c)(i) of the Employment Relations Act 2000 ("the Act") of $8,000. The Authority declined to order a penalty for the employer's failure to provide an employment agreement because this was eventually done. It imposed a penalty (payable to the Crown) of $1,000 for the plaintiff's failure to supply time and wage records in accordance with s130(2) of the Act. The Authority also allowed Ms Gunfield costs of $1,800 and disbursements of $98.90.

[3] Although the Authority determined that Ms Gunfield's employment with Real Cool was terminated unjustifiably, its determination does not say how or why that was so. The Authority appeared to concentrate on the issue of whether Ms Gunfield's employment with Real Cool was for a fixed term or of indefinite duration, finding that it was the latter, but does not then appear to have examined, first, whether there was in fact a dismissal or, if so, whether that was justifiable. The Authority's determination does not appear to deal with any claim to unjustified disadvantage as is now before the Court.

[4] Some of the evidence that I have heard is irrelevant to the issues to be determined on this challenge. The case has also illustrated the parties' misunderstandings of employment law issues including, in particular, the significance of written employment agreements and other notices to be given in writing. I regret to say that I have some significant doubts about the veracity of some of the evidence that I have heard. It seems to me that some of the witnesses have had other agendas more to do with their own relationships than with Ms Gunfield's relationship with Real Cool. I am aware that there is other litigation between Real Cool and Cold Storage Nelson Limited which is undetermined and which may have affected the tone of some of the evidence given in this case. It seems clear that the allegiances of various witnesses have changed over time.

[5] Bearing in mind all of those cautions, I make the following findings of relevant fact from the evidence at the hearing and from relevant contemporaneous documentary exhibits.

[6] Ms Gunfield began work as a shipping administrator for Real Cool on 14 May 2007. Real Cool is one of a number of cool or cold storage operators in the Tauranga/Mount Maunganui area. Its plant was located at Triton Avenue. A competitor cool store operator known as "Versacold" operated a cool store business at Sulphur Point.

[7] The best evidence of the nature of Ms Gunfield's employment with Real Cool is her account of what was contained in a written individual employment agreement of which only one copy was kept and even then possibly not signed by the employer. That copy was destroyed by shredding by Ms Gunfield on what I assess was the last day of her employment with Real Cool. The relevant elements of that agreement were that it was for employment of indefinite duration and provided a trial or probationary period of three months. That period had passed by mid-August 2007 so that when events relevant to this proceeding occurred, the plaintiff had affirmed Ms Gunfield's employment.

[8] Ms Gunfield had some awkward or difficult working relationships with others in the Real Cool office and especially with Karen Carruthers, a more senior and experienced administrator.

[9] From at least July 2007 and possibly earlier, another cool store operator, Cold Storage Nelson Limited (CSN), became intent on purchasing Real Cool's operations at Triton Avenue and Versacold's Sulphur Point operation. For this purpose, CSN engaged Christine Maxwell who, until early June 2007 when she resigned, had been Real Cool's administration manager responsible for Ms Gunfield's employment with Real Cool and to whom Ms Gunfield reported for a short time. Despite the assertion of Grant Harford who was formerly and at relevant times the Chief Executive Officer of CSN, I conclude that Ms Maxwell was an employee by CSN and was authorised by that company to act for it in preparation for its takeover of the Real Cool and Versacold businesses in September 2007.

[10] In that capacity, Ms Maxwell offered Ms Gunfield employment with CSN. It was not a conditional offer. Ms Gunfield accepted that offer with alacrity and enthusiasm. It offered her the prospect of leaving the dysfunctional working

relationships at Real Cool but nevertheless continuing work in the same field, albeit as an administrator at what was then the Versacold plant at Sulphur Point to be taken over and operated by CSN. That offer of employment with CSN was made and accepted on 23 August 2007. Ms Gunfield then discussed with Jonathon Rhodes, Real Cool's plant manager, the date when she would finish up with the plaintiff. Because of the need to train a replacement administrator at the Triton Avenue plant, this was agreed between Mr Rhodes and Ms Gunfield as being the last working day before she would start work for CSN at Sulphur Point on 3 September 2007.

[11] As it transpired, CSN was insufficiently well organised to assume the Versacold operations and it prevailed on Ms Gunfield to begin work for it earlier than had been agreed upon. She did so, starting on Friday 31 August 2007 and continuing on the Saturday and Sunday of the following weekend, 1 and 2 September 2007.

[12] By the Sunday evening, 2 September, however, CSN's Mr Harford had changed his mind about employing Ms Gunfield and purported to ask her to come to an interview on the following day to determine whether she should be offered employment. When Ms Gunfield responded that she had been offered employment by CSN, had accepted this and had already begun work, Mr Harford denied this. He asserted first that it had not occurred and then that Ms Maxwell had no authority to have made the offer or that any offer made must have been conditional upon his approval. Ms Gunfield did not continue to work for CSN after 3 September. She subsequently instituted personal grievance claims against both CSN and Real Cool. The former was settled in mediation. The Court is not aware of the terms of that settlement.

[13] Ms Gunfield was paid up to 3 September, when her employment with CSN concluded. That she was paid by Real Cool is unremarkable in the circumstances and does not mean that the plaintiff was still then her employer. That is because CSN's operations in the Bay of Plenty area were so disorganised in the lead-up to its purchase of the two businesses that it did not have the relevant systems for employing and paying staff at that stage. It was agreed, albeit tacitly, between CSN's Mr Harford and Real Cool's William Taylor that the plaintiff would continue

to make salary payments to Ms Gunfield until CSN was in a position to do so. It was also understood between the two companies that either this would form part of the accounting between the vendor and purchaser of Real Cool's business when this was settled later in September, or that it was such a minor incident of the larger commercial transaction that it would not be altered later. That position is also consistent with the payment to Ms Gunfield of holiday and other remuneration entitlements at the time of the conclusion of her employment with the plaintiff at the end of August 2007.

[14] I conclude that Ms Gunfield resigned from her employment with Real Cool and was not dismissed. In those circumstances she can have no claim to unjustified dismissal.

[15] I turn next to the claim by Ms Gunfield that she was disadvantaged unjustifiably in her employment. There are two limbs to this claim. The first consists of what Ms Carruthers is alleged to have said to Ms Gunfield about the prospects of her continuing employment at Real Cool. The second limb of this disadvantage claim is what Mr Taylor or Mr Rhodes of Real Cool may or may not have told Ms Gunfield about the company's restructuring and the consequences of CSN's purchase to her employment. The defendant says that Mr Rhodes's or Mr Taylor's failure or refusal to advise her in terms of s4 of the Act amounted to bad faith conduct and therefore constitutes the personal grievance of an unjustified disadvantage in employment.

[16] Ms Carruthers did not give evidence. Apart from what Ms Gunfield had to say about their conversation, I was not able to glean much from other witnesses about Ms Carruthers' role in the company and especially in relation to Ms Gunfield's employment. Mr Rhodes confirmed that Ms Gunfield reported to Ms Carruthers although the latter, in turn, reported to Mr Rhodes and ultimately to one of the directors, Mr Taylor. Mr Rhodes also said that Ms Gunfield reported directly to him and not to Ms Carruthers. Mr Taylor, a Real Cool director and shareholder, also confirmed that it was probably Ms Carruthers to whom Ms Gunfield reported. Although Mr Taylor says now that Ms Carruthers had no authority from Real Cool to make statements to Ms Gunfield about her employment on its behalf, if she did so

purporting to represent the management of the company in circumstances in which it could reasonably be thought that she had such a role, then Real Cool is fixed with the consequences of this.

[17] It was not, as Mr Taylor said in evidence, whether Ms Gunfield could reasonably have presumed that Ms Carruthers was *"the boss of the place"*. Rather, the issue was whether Ms Gunfield could have taken reasonably that Ms Carruthers was speaking on behalf of the management of the company when she commented adversely on Ms Gunfield's work performance and the fact that she would not be there for much longer.

[18] I am satisfied that Ms Carruthers told Ms Gunfield, albeit erroneously, that she was on fixed term employment that would expire in mid-August and that although she might remain working for Real Cool subsequently, this would not be for long. I am also satisfied that in making these statements to Ms Gunfield, Ms Carruthers purported to convey the view of the company. In all the circumstances, it was reasonable for Ms Gunfield to have concluded that Ms Carruthers was authorised to do so although she was not so authorised in fact.

[19] I am satisfied that this advice to Ms Gunfield disadvantaged her in her employment. Although this was employment of indefinite duration and the three month probationary period had passed without comment, the security of her employment that Ms Gunfield was otherwise entitled to assume was undermined by Ms Carruthers' statements that were without justification. It follows that Ms Gunfield has established an unjustified disadvantage grievance in this regard.

[20] I am not satisfied that the company, through its relevant managers Messrs Taylor and Rhodes, acted in bad faith towards Ms Gunfield in breach of s4 of the Act. Again, there is little relevant evidence about the advice given to the defendant of the restructuring. I am satisfied on balance that both managers told staff generally and at appropriate times of both the planned sale to CSN and of its intentions to protect the employment of staff engaged at the time of the sale. I am not satisfied that Ms Gunfield was ignorant of those changes when she should have been better

informed of them. This allegation of unjustified disadvantage in employment is not made out.

[21] Turning to remedies for the unjustified disadvantage grievance that I have found, I conclude that Ms Gunfield did not suffer any loss of remuneration from the unjustified actions of Ms Carruthers purporting to act for Real Cool. Any loss of remuneration that Ms Gunfield has suffered is attributable to her resignation at the end of August 2007 and to the premature end to her employment with CSN. I accept, however, that Ms Carruthers' advice was distressing and unsettling and placed unwarranted pressure on Ms Gunfield for the balance of the period of her employment. Those consequences warrant modest compensation under s123(1)(c)(i) of the Act which I fix in the sum of $3,000.

[22] The Authority's decisions on penalties were not challenged (or at least not seriously) at the hearing. On the evidence heard by me I would not be prepared to come to a different conclusion than the Authority did, first, in declining to award a penalty for failure to provide an employment agreement and, second, in ordering a penalty of $1,000 for failure to supply wage and time records. I would, however, adjust the latter penalty to provide that one-half of it, that is $500, be paid to Ms Gunfield with the balance to the Crown. It was essentially to Ms Gunfield's disadvantage that the plaintiff failed or refused to supply wage and time records as employment law obliged it to do. The consequences of this breach were visited on Ms Gunfield and she should have one-half of the penalty.

[23] The result of this challenge is that the amounts directed by the Authority to be paid by Real Cool to Ms Gunfield are now reduced. Those sums have been held on interest bearing deposit under the control of the Registrar of the Employment Court pending the outcome of this challenge. They will, however, be affected by questions of costs.

[24] The parties' representatives have raised the matter of a *Calderbank* offer made by the plaintiff to the defendant on 15 October 2009. On a "without prejudice except as to costs" basis, Real Cool offered Ms Gunfield $3,000 in full and final

settlement of all issues between the parties payable as compensation under s123(1)(c)(i) of the Act. The offer was open for acceptance until 5 pm on Friday 16 October, a short period but one in which Mr Single was able to respond by making further inquiry of its detail, but the offer lapsed. The sum offered in full and final settlement is less than the sums that I have awarded to Ms Gunfield so that the following decision on costs is not affected by the *Calderbank* offer.

[25] I conclude that the fairest outcome is to require the plaintiff to meet the actual and reasonable costs of these proceedings incurred by Ms Gunfield in both the Employment Relations Authority and in the Employment Court. Real Cool has not emerged well from this case in terms of its handling of sensitive employment issues. Its confused and ham fisted dealings with a vulnerable employee have meant that Ms Gunfield has been put to significant unnecessary cost and delay for which she should not lose further.

[26] The monies payable by the plaintiff as a result of this judgment ($3,500 together with interest accumulated on this sum while on deposit) and the $500 payable to the Crown for the penalty, should be disbursed accordingly by the Registrar after the period of 28 days from the date of this judgment. So, too, should be the defendant's costs as shall be either agreed between the parties or fixed by the Court if they cannot be agreed. The balance of the monies held on deposit should then be returned to the plaintiff.

GL Colgan
Chief Judge

Judgment delivered orally at 12.08 pm on Wednesday 21 October 2009