

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 387/10
5290402

BETWEEN FIONA ANDERSON
 Applicant

AND MEDIA SOLUTIONS
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: David Feist, Advocate for Applicant
 Greg Scott, Advocate for Respondent

Determination: 26 August 2010

DETERMINATION OF THE AUTHORITY

- A Fiona Anderson has a personal grievance for unjustified dismissal and she is entitled to remedies for her employment relationship problem.**
- B Media Solutions Limited is ordered to pay Fiona Anderson;**
- (i) \$3,912.54 gross as unpaid notice;**
 - (ii) \$6,500 pursuant to s. 123(1)(c)(i) of the Employment Relations Act 2000.**

Employment relationship problem

[1] Fiona Anderson claims she was unjustifiably dismissed from her job with Media Solutions Limited (“MSL”). She says that she was called to a meeting on 28 October 2009, without any prior warning, and told by her boss, Greg Scott that she was too sick to continue working, so should leave her job immediately. Ms Anderson also claims three weeks’ unpaid notice.

[2] MSL denies dismissing Ms Anderson and says her employment ended by agreement. Mr Scott says he met with her on 27 October 2009 to address his concern about her ongoing poor health and, as a result of that, they both agreed that Ms

Anderson was too sick to work. MSL says that both parties agreed that Ms Anderson's employment would be "*adjourned*" or "*put on hold*", so she could focus on her health. It says she received one week's pay in lieu of notice.

[3] Ms Anderson disputes that she agreed she was too sick to continue working or that she agreed to leave her job for health reasons. She says she only left her job because Mr Scott told her to. Ms Anderson says she needed her salary to be able to pay her mortgage, so would not have suddenly left of her own accord. She also states that their meeting occurred on 28 October 2010.

Issues

[4] The issues to be determined are:

- (i) Is Ms Anderson entitled to unpaid notice pay?
- (ii) Did Ms Anderson's employment end by agreement or was she dismissed?
- (iii) If there was a dismissal, was it justified?
- (iv) If dismissal was unjustified, what (if any) remedies should be awarded?

Is Ms Anderson entitled to unpaid notice pay?

[5] Pursuant to clause 17 of her employment agreement, Ms Anderson was entitled to 4 weeks' notice of termination. MSL accepts she was only paid one week's pay in lieu of notice. She is therefore entitled to three weeks' unpaid notice pay.

[6] MSL is ordered to pay Ms Anderson \$3,912.54 being the agreed amount of her unpaid notice pay.

Did Ms Anderson's employment end by agreement or was she dismissed?

[7] The parties agree that Ms Anderson's employment ended at the conclusion of her meeting with Mr Scott, but there was a dispute about whether that occurred on 27 or 28 October 2009. Ms Anderson produced a note of the meeting and an email to Mr Scott dated 28 October 2009 which referred to the meeting "*that morning*". I find that

the meeting which ended her employment occurred on 28 October 2009 (“the meeting”).

[8] It was common ground that Ms Anderson had not resigned, abandoned her employment, or been suspended. Mr Scott stated there was no dismissal because she agreed to leave. Ms Anderson said she did not leave voluntarily, but was told to go.

[9] The Court of Appeal in *E N Ramsbottom v Chambers* [2000] 2 ERNZ 97; 102 and *Principal of Auckland College of Education v Hagg* [1997] ERNZ 116 characterised dismissal as a unilateral act by the employer which terminated the employment. Dismissal was also defined by Williamson J in *Wellington etc Clerical etc IUOW v Greenwich & Assocs Employment Agency and Complete Fitness Centre* (1980) ERNZ Sel Cas 95 as being “*the termination of employment at the initiative of the employer*”.

[10] Ms Anderson’s evidence of the meeting was that Mr Scott expressed concerns about her health and ability to continue working which caused her to ask him: “*what are you asking me, what are you telling me?*”, which he avoided responding to. She then asked him “*are you asking me to leave?*”, to which he replied “yes”. She then says that she asked him “*when do you want me to leave?*”, and he said “now”. Mr Hookey, who was present at the meeting at Mr Scott’s request and who gave oral evidence at the investigation meeting, agreed that this exchange had occurred.

[11] As soon as she arrived home, Ms Anderson made a note of the key points that had been discussed in the meeting. Her evidence was consistent with her note, and neither Mr Scott nor Mr Hookey challenged the accuracy of her account of the meeting. Mr Scott did however highlight that he had discussed her health and his concerns in more detail than she had recorded, and Mr Hookey observed that her note omitted her admission that she “*was very sick*”. I find that Ms Anderson’s account of what Mr Scott said to her at the meeting is reliable.

[12] Ms Anderson’s email to Mr Scott immediately after their meeting is also consistent with her belief she had been dismissed. It stated:

“This email is to confirm our conversation this morning; you stated you felt my health was affected by work, I then asked you if you wanted me to leave, to which you replied yes. I asked you when, to which you replied now. Please confirm my dismissal.”

[13] Mr Scott's evidence was that he replied to her via email that evening. Ms Anderson said she never received any response from him. Mr Scott's email stated (among other things): "*I have asked you to terminate your position here [...]*".

[14] Mr Scott's oral evidence was also consistent with a dismissal scenario. He told me that "*she had to go*". When I asked if he had intended Ms Anderson's employment to end, Mr Scott readily agreed that he did, because he strongly felt that he "*had to do something because the situation could not go on any longer*". Mr Scott accepted that the purpose of the meeting was to end Ms Anderson's employment.

[15] Ms Anderson gave evidence that she did not want to leave; she liked her job and needed her income so she could pay her mortgage. She believed she was fit to work because her medical certificate for her sick leave had expired. Ms Anderson also noted that she was well enough to have obtained full time employment two weeks after her dismissal.

[16] I do not accept there was any true agreement reached to end her employment. The outcome of their meeting reflected what Mr Scott wanted to achieve, rather than some mutually agreeable arrangement or a genuine meeting of the minds. Mr Scott described her as being very distressed when they met and he acknowledged she was crying throughout the meeting. It should have been obvious that she was not giving a considered or voluntary response to his suggestion that she needed to end her employment so she could focus on getting well.

[17] The initiative for Ms Anderson's employment ending came solely from Mr Scott; see *NID Distribution Workers IUOW v Foodtown Supermarkets Ltd* [1988] NZILR 588. He effectively sent her away, thus ending her employment. Even if Mr Scott did not actually dismiss Ms Anderson, he nevertheless followed a course of conduct with the deliberate or dominate purpose of inducing or coercing her to resign; see constructive dismissal category two in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136.

[18] I accept that Ms Anderson's employment did not end by agreement. I find that Mr Scott initiated the termination and unilaterally acted to end her employment, which amounted to a dismissal.

Was Ms Anderson's dismissal justified?

[19] Having found Ms Anderson was dismissed, the onus now shifts to MSL to justify it. Whether Ms Anderson's dismissal was justified must be assessed in accordance with the s.103A justification test, which requires an objective assessment of all of MSL's actions: *Air New Zealand Ltd v V* [2009] ERNZ 185.

[20] Section 103A states:

“For the purposes of s.103(a) and (b) the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.”

[21] Also relevant to my assessment of MSL's actions, and how it acted, are the statutory good faith obligations contained in s.4(1A) of the Act. This provision requires an employer which is proposing to make a decision that may adversely effect the continuation of an employee's employment, to provide the employee with access to information relevant to its decision, and an opportunity to comment on it, before a final decision is made.

[22] The Full Court in *Air NZ v V* described s.4(1A) as reflecting:

“[...] the Act's general emphasis upon open exchanges of relevant information and appropriate participation in decision making by offering opportunities to add to or contradict relevant information before decisions are made affecting employment relationships.”

Substantive justification

[23] Mr Scott categorised Ms Anderson's ill health as a health and safety issue which he had to urgently address. He also said that her poor health had been so ongoing that he could not allow it to continue any longer.

[24] Mr Scott explained that on the day of their meeting Ms Anderson had to return home to get changed after vomiting on her way to work. He described her as returning to work “*in a state and obviously unfit to work*” which caused him to decide “*enough was enough and her employment had to end*”.

[25] I find that there was no good reason at the time of her dismissal for MSL to end Ms Anderson's employment. I do not accept that Ms Anderson's attendance at work presented an urgent health and safety issue which had to be resolved by ending her employment. MSL should have invoked clause 13 of her employment agreement, which dealt with her return to work after a period of sick leave.

[26] Clause 13 states:

"If you propose to return to work after a period of absence on sick leave, the company may require you to provide a medical certificate certifying that you are fit to resume work, or in some cases we may require you to undergo an examination by our nominated registered medical practitioner to assess whether you are fit to resume work. If you are found unfit to perform your duties you may return to work on reduced duties if these are available, or we may place you on sick leave until you are cleared to return to full duties. We will meet the cost of the medical certificate or examination"

[27] Ms Anderson was initially employed, pursuant to an employment agreement dated 2 July 2008, by Retail Media Limited ("RML"). RML was placed in receivership in early June 2009 and Ms Anderson transferred, by agreement, on her same terms and conditions to Retail Media Solutions Limited ("RMSL"). When RMSL lost the contract she was working on, Ms Anderson's employment transferred, by agreement, on her existing terms and conditions to MSL on 22 September 2009.

[28] It is common ground that RML, RMSL, and MSL were three separate legal entities and that the 2 July 2008 employment agreement governed Ms Anderson's employment with all three companies.

[29] MSL relied on the fact that Ms Anderson had taken 20 days sick leave in total during the 15 months over which she had been employed by all three companies. I find that her sick leave with RML and RMSL was irrelevant and should not have been taken into account by MSL.

[30] This case therefore involved 4 instances, consisting of a total of 11 days, of certified sick leave, which occurred over a one month period, with the longest continuous period of absence being 5 days. Ms Anderson's sick leave was for different relatively minor illnesses, rather than problems arising from a serious ongoing or underlying medical condition. MSL did not provide any evidence that this level of absence could not be sustained by the business. I find that this level of

sickness absence had not reached the stage where MSL could fairly call halt to her employment.

[31] There was no issue over the genuineness of Ms Anderson's sick leave. Mr Scott's main concern was that Ms Anderson's health deteriorated a few days after returning from sick leave, which led him to conclude that her job and work environment were adversely impacting on her health. This was despite his awareness that she was experiencing significant personal stresses at the time, which were unrelated to MSL.

[32] Mr Scott accepted that Ms Anderson had never complained about her job, or work, or working environment, and that she had never suggested work issues were adversely impacting on her health. MSL had no medical evidence about her health situation and had not investigated her workload or working environment. I find that MSL did not have any objective evidence to support its conclusion that Ms Anderson's ill health constituted a serious health and safety issue.

[33] It was premature for Mr Scott to dismiss Ms Anderson. Her employment agreement provided it with a range of other options which Mr Scott accepted had not even been considered.

Procedural fairness

[34] Mr Scott submitted that the situation was so urgent, and his concern about Ms Anderson's health so great, that he would have been negligent if her employment had not ended immediately.

[35] I do not accept that. I find that MSL should have addressed its concerns via a structured process. MSL's complete lack of process went further than mere technical deficiencies and I do not accept that the outcome would have been the same had it followed a proper procedure.

[36] The Employment Court in a number of decisions, including *Barry v Wilson Parking NZ (1992) Ltd* [1998] ERNZ 545; *Motor Machinists v Craig* [1996] 2 ERNZ 585; and *Paykel v Morton* [1994] 1 ERNZ 875, has highlighted an employer's obligation to seek appropriate medical information and to properly communicate to the employee the fact that their ongoing employment was in jeopardy, before making a decision to end the employment. That did not occur in this case.

[37] The way in which MSL addressed its concerns was fundamentally flawed. It was common ground that Ms Anderson was not given advance notice of the meeting; prior notification of what the meeting was about; advice that her ongoing employment could be at risk; the right to take advice; an opportunity to be accompanied by a support person or representative; any time to review or consider the information MSL was relying on; a warning that it considered her attendance record unacceptable; any information about MSL's specific concerns; an opportunity to prepare for the meeting; or to produce any medical information about her current health situation. These deficiencies deprived Ms Anderson from having any meaningful input into the decision to end her employment.

[38] Mr Scott accepted that in the absence of any medical information he had no idea what Ms Anderson's diagnosis, treatment, or prognosis was. Contrary to the requirements of natural justice, the outcome of the meeting was also predetermined because Mr Scott admitted that he went in to it with the intention that Ms Anderson's employment would be ending.

[39] Despite Mr Scott's observation that Ms Anderson was in a distressed state before the meeting even started, and that she became even more distressed during the meeting to the point where she was openly crying, she was not given the opportunity to calm down, collect herself, or obtain support. Instead, Mr Scott pressed on with his agenda to obtain her 'agreement' to end her employment.

[40] Because MSL did not provide Ms Anderson with access to the information on which it was basing its view that her employment should not continue, she was unaware that it was taking into account the sick leave she had with her two previous employers, or that it saw her ill health as an ongoing situation, or that her continued employment was in jeopardy. This information should have been provided to her to comment on. MSL's failure to do so was in breach of its s.4(1A) good faith obligations.

Dismissal unjustified

[41] MSL's actions were seriously deficient. It did not have a good reason for concluding Ms Anderson's employment had to end and it had not followed a fair and proper process before reaching that conclusion. It also failed to comply with statutory good faith requirements.

[42] MSL's failure to request a medical report meant it had no evidence about Ms Anderson's diagnosis, prognosis, treatment, or current health status, upon which to base its decision that she could not continue working. I also find that MSL had no reliable or objective evidence from which to conclude that her continued attendance at work constituted a serious and urgent health and safety issue.

[43] MSL's actions, and how it acted, regarding its concerns about Ms Anderson's health were not what a fair and reasonable employer would have done in all of the circumstances at the time of her dismissal. Accordingly, I find that Ms Anderson's dismissal was substantively and procedurally unjustified.

Remedies

Lost remuneration

[44] Ms Anderson obtained new employment on 18 November 2009. Although her employment ended on 28 October 2009, she received one week's pay in lieu of notice, so (because of MSL's pay cycle) she was effectively paid by MSL up until 6 November 2009.

[45] Ms Anderson claimed reimbursement of two weeks' lost remuneration for the period she was without work. However, I make no award for reimbursement pursuant to s.128(2) of the Act because, as a result of the award of unpaid notice, she has not actually lost any remuneration.

Humiliation and distress

[46] Mr Scott recognised that whilst Ms Anderson was already distressed before the meeting she was even more distressed after it. Ms Anderson said she was "*beside herself*" and Mr Scott acknowledged that she was "*extremely upset*".

[47] Ms Anderson gave evidence of her humiliation and distress. She talked about crying in the meeting with Mr Scott and Mr Hookey, and crying at her desk the whole time she was collecting her personal effects. She said she could not wait to get out of the building but was slowed down by her attempts to copy photos off the work mobile phone and laptop of her deceased cat. She was unsuccessful in doing so, and those images are now lost forever, compounding her distress.

[48] Ms Anderson explained that she was so distressed that she was unable to operate her car normally. She ended up waiting in her car in the work car park for about 45 minutes before driving home.

[49] Ms Anderson said her distress at her dismissal also adversely impacted on her relationship with her husband, and gave evidence that it was a contributing factor in their separation a couple of months later.

[50] I am satisfied that Ms Anderson did suffer humiliation, loss of dignity, and injury to her feelings. Having regard to Ms Anderson's evidence, the limited duration of her employment, the fact that she was already suffering from significant personal stresses, and bearing in mind awards in other cases of this nature, I award her \$6,500 as compensation pursuant to s.123(1)(c)(i) of the Act.

Contribution

[51] I find that Ms Anderson did not contribute in any way to the situation which gave rise to her unjustified dismissal. Her absences were covered by medical certificates and MSL accepts she was genuinely sick. There is no blameworthy conduct requiring a reduction in remedies pursuant to s.124 of the Act.

Costs

[52] Ms Anderson has been successful so is entitled to a contribution towards her actual legal costs.

[53] The parties are encouraged to resolve costs between them. If that is not possible, Ms Anderson has 14 days from the date of this determination within which to file a costs memorandum, which is to include advice regarding her actual costs. MSL then has 7 days within which to file a memorandum in response. **I will not entertain a costs application or costs submissions outside of these time frames without prior leave having been granted.**

[54] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Rachel Larmer

Member of the Employment Relations Authority