

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 112
5314620

BETWEEN

JULIE FRANCES
ARMSTRONG
Applicant

AND

WELLINGTON INDOOR
SPORTS CENTRE LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: E G Dewar and Katie Patterson, Counsel for the
Applicant
Bede Laracy, Advocate for the Respondent

Investigation Meeting: 5 May 2011 at Wellington

Determination: 17 June 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant tendered her resignation during her employment due to the atmosphere she says she had experienced at work with her supervisor. Later the applicant changed her mind, and says Mr Murkesh Dayal, the company's managing director, agreed for her to stay at work.

[2] Mr Dayal says he asked the applicant first to stay at work until he got back from overseas and it was agreed that she could stay until 11 June 2010. He says there was no definite arrangement for her to stay permanently.

[3] The applicant's attendance became an issue when Mr Dayal was overseas. Mr Dayal says that when the applicant asked to withdraw her resignation he decided to wait and see how the applicant's attendance worked out for another fortnight before

making a decision as to whether or not he would accept her request to withdraw her resignation.

[4] On Thursday 24 June 2010 the applicant sent a text to Mr Dayal saying she was sick with diarrhoea. Mr Dayal says he tried to ring her without any success.

[5] On Friday 25 June when the applicant was expected back at work she sent another text that she would not be in at work because she had the flu. Mr Dayal became frustrated because the reason for her sickness had changed. He returned a text as follows (verbatim):

Flu or diarrhoea we now accept your resignation after last weeks performance. i think it is best for all.)

[6] The applicant did not return to work. She thought this message meant that she had been dismissed. She made no attempt to communicate further with her employer. Her lawyer subsequently raised a personal grievance and a statement of problem was filed in the Authority. A statement in reply followed from the respondent. The parties attended mediation in an endeavour to try and settle the matter and to save costs.

The issues

[7] The following issues apply:

- (a) How did Ms Armstrong's employment end?
- (b) If she was dismissed on 25 June 2010 was her dismissal the action a fair and reasonable employer would take in all the circumstances?
- (c) Is there is a personal grievance? If so, what remedies apply, and how much should Ms Armstrong be awarded?
- (d) Both parties are seeking costs. Which party is entitled to costs and how much?

The facts

[8] Julie Armstrong was employed by Wellington Indoor Sports Centre Limited (Wellington Indoor Sports). The parties had an employment agreement. It had a provision for any variation to be in writing and agreed by the parties.

[9] Ms Armstrong commenced her employment at Wellington Indoor Sports on 13 September 2008. She worked in customer services, primarily in the *Junglerama* (the adventure playground and café part of the business). She would work in other areas when needed. She was paid \$15 per hour for between 20 and 40 hours per week.

[10] Ms Armstrong says that her supervisor had a personal dislike for her. There was increasing tension between them during the course of Ms Armstrong's employment. Ms Armstrong complained when her supervisor allegedly called her stupid, and the general manager reprimanded the supervisor.

[11] In a letter dated 11 May 2010 Ms Armstrong decided to resign with two weeks' notice. Her resignation letter read as follows:

To whom it may concern

Regretfully this is to be my two weeks notice, as of 11th May 2010.

My last working day and date will be Tuesday 25th May 2010.

To elaborate as to my reasoning behind my resignation.

It is due to certain staff members, who have continued to undermine, demean and verbally abuse myself and other staff members, even after it was brought to the attention of management, and dealt with.

But I would like to take this opportunity to formally and humbly thank you for everything. You gave me a chance I can't thank you enough.

*Yours faithfully,
Julie F Armstrong*

[12] Ms Armstrong claimed that Mr Dayal agreed to let her withdraw her resignation. This is a major point of difference. Mr Dayal denied the claim.

[13] First, Mr Dayal says that he reached an agreement with Ms Armstrong that she would stay until he returned from overseas, and she agreed to this. This was until 10 June 2010 ("the first period"). There is no dispute over this.

[14] Second, Mr Dayal accepted that when he returned from overseas Ms Armstrong asked him to allow her to withdraw her resignation (because she could not find any other work), but Mr Dayal says that he informed her that he would assess her attendance before deciding what to do. Suffice to say there was an agreement at least for Ms Armstrong to work a second period of time. Mr Dayal says that Ms

Armstrong was to stay on until the end of the fortnight: 25 June 2010. Nothing was put in writing and the Wellington general manager and Mr Dayal have accepted this was an informal arrangement.

[15] On 21 June 2010 there was an incident over the purchase of a pie from the café. Ms Armstrong got a pie from the café and put it into the microwave to heat for her lunch. Ms Armstrong says she gave another employee a \$5 note to pay for the pie. She says that the employee did not put the money through the till as the employee was busy having to fill-in in the kitchen for the supervisor (who was busy). The Wellington general manager and Mr Dayal say they saw Ms Armstrong put the employee's ID number in the till to fix the problem. Ms Armstrong accepted that she processed the transaction afterwards because no one was there at the time.

[16] The employee denied that Ms Armstrong paid her for the pie. That employee says that she did not learn of the \$5 amount she was supposedly paid, until the day before the Authority's investigation meeting.

[17] Ms Armstrong attended work on 22 and 23 June. On 24 June Ms Armstrong sent a text to work that she had diarrhoea and would not be at work but would be in at work the next day. Mr Dayal says this was the end of a two week period that he was going to assess her and was going to advise her that she had not attended regularly enough to warrant him "*re-employing*" her. He says he decided to wait until Friday (the next day), as she advised him in the text, that she would be in at work that day.

[18] On Friday 25 June Mr Dayal received another text at approximately 7am from Ms Armstrong stating that she had the flu and would not be at work. He says he immediately tried to call her back, but she did not answer and the call went to her voicemail. Ms Armstrong told me that she did not have the flu when she sent her text that she was not going to work. She gave no other explanation for her failure to attend work.

[19] Mr Dayal says it was out of sheer frustration that he then sent her the text in which he commented on her change of medical reason for absence and informed her that her resignation would stand due to her poor performance regarding attendance at work the previous week. He accepted that the text read "*flu or diarrhoea we now accept your resignation after last weeks performance. i think it is best for all.*"

[20] The Wellington general manager acknowledged in his evidence during the Authority's investigation he at least expected Ms Armstrong to go into work on Monday 28 June. The Wellington general manager and Mr Dayal wanted to discuss the future with Ms Armstrong on the assessment of her absences.

Determination of the Authority

[21] It was common ground that Ms Armstrong would by agreement continue at work until 10 June 2010 when Mr Dayal was due to return from overseas.

[22] Ms Armstrong continued to work after this date and until 25 June 2010 when Mr Dayal sent her his text. That text effectively terminated the applicant's employment. It had nothing to do with "re-employment", I hold. This is because Ms Armstrong was already employed and had been through out. There was a new arrangement for Ms Armstrong to at least work until 25 June. Ms Armstrong believed she had on going employment. This is supported by the failure of the respondent to record anything in writing or to have a written variation of the employment agreement and for it to be signed off as required. There was no agreement on any informal arrangement as Mr Dayal and the Wellington Manager referred to it.

[23] As to any agreement on the withdrawal of the resignation this is dependant at first blush on Ms Armstrong's and Mr Dayal's credibility. It is possible that there has been some misunderstanding and both witnesses have come to believe what they say happened. In this regard I hold the following:

- a. Mr Dayal's text was tantamount to bring the employment to an end. This was effectively a dismissal before the employment was due to end. The failure to contact her further afterwards supports this conclusion, I hold.
- b. As such there has been no justification for the dismissal because Mr Dayal had become frustrated by Ms Armstrong sending a text and when he attempted to call her she did not answer and his call went to voicemail. Also, Ms Armstrong had no opportunity to comment on and to discuss the assessment of her absences and attendance.
- c. In the circumstances a fair and reasonable employer, objectively measured would not have reacted in such a way and where no formal arrangements had been made to discuss any assessment, I hold. Even so, a fair and reasonable

employer would have attempted to make some further contact with Ms Armstrong, but that did not happen.

- d. There was no investigation, proper or otherwise. The first time that anyone became aware that Ms Armstrong did not have the flu was at the Authority's investigation meeting.

[24] In any event I note that the issue around the withdrawal of the resignation is important to the parties, but the fact is that the employment was continuing without any other mutual arrangements as required by a written variation. There were no written arrangements out in place in regard to the second period of Ms Armstrong's extension to work until 25 June, and as such I have decided to put it to one side given the differences between Ms Armstrong (believing her resignation had been withdrawn) and the Wellington general manager and Mr Dayal (both of whom believed that any withdrawal would be dependant on her attendance).

[25] The dismissal on 25 June 2010 was unjustified. The employer unjustifiably reacted by sending a text message and unilaterally relied on a resignation that had purportedly been put to the side pending an assessment of Ms Armstrong's attendance without an investigation, proper or otherwise.

[26] Ms Armstrong failed to communicate with her employer when she decided not to respond to Mr Dayal's text. This was unfortunate because the Wellington general manager expected her to go to work on 28 June and at least discuss the situation. Whether or not any discussion would have avoided this situation is difficult to say, but at least both parties might have been able to attempt to resolve the problem and at the very least to better understand what was happening given the conflict over whether or not the resignation had been withdrawn by agreement and or changed terms for an assessment on attendance had been agreed, which have become the central dispute.

[27] I hold that Ms Armstrong's failure to communicate was contribution to the situation giving rise to the personal grievance, especially because:

- a. Ms Armstrong in the first place agreed to the first extension to work until Mr Dayal returned from overseas.
- b. There was agreement for Ms Armstrong to continue to work (for at least another fortnight until 25 June 2010).

- c. Ms Armstrong did not contact her employer again after 25 June until legal proceedings were raised, and she would reasonably have been expected to make some contact for a discussion, I hold.

[28] This must impact on the remedies. Ms Armstrong has attempted to mitigate her losses by looking for work and proved this by getting two jobs in the period after the dismissal. Although she went on a benefit the employer was not able to establish that she had deliberately raised a personal grievance to get a shorter stand down period, as claimed. Nevertheless her time on a sickness benefit indicates that she was not available for work and is not able to claim lost wages for that time, and her claim has not been assisted with any details of the work she looked for during the period of the benefit. On balance my assessment of the value put on her contribution is 10%.

[29] At the hearing Ms Armstrong had not assessed her losses except to provide the figure for her wages and income received for the Authority to work it all out. It is more than likely that Ms Armstrong's employment would not have lasted long at Wellington Indoor Sports Centres. This was because there were disciplinary matters that if investigated would have established she had not been fully honest about why she did not go to work on 25 June when she said she had the flu and in fact did not have the flu. There was a matter involved about Ms Armstrong failing to follow the proper procedure for having a pie. She agreed that she did not follow the proper procedure. There were issues around her absences.

[30] Her last day was 25 June 2010. She obtained new employment on 9 March 2011, despite trying to get another job, and then became unwell. She went on a sickness benefit from 10 August 2010 (bank statement). The amount of wages she lost is \$3,682.80 for 6.2 weeks (i.e. from 25 June 2010 until 10 August 2010). This has been calculated by her base rate of pay of \$15 per hour. Her hours varied. I have calculated she would have averaged 39.6 hours per week over the time of her employment (from the schedule of earnings). She is entitled to \$3,314.52 (having deducted the 10% contribution).

[31] Ms Armstrong has asked for compensation. She originally asked for \$10,000 in raising her personal grievance with her employer, but left it to the Authority to decide on a sum from her statement of problem. It was accepted that her health and matters in her life (which I do not have to go into the detail about) could not be put on her employer. Therefore the impact on her of this situation would only be about

\$3,000 for hurt and humiliation. This takes into account that she did not tell her employer the truth about having the flu. Her decision not to contact her employer again did not assist either. I discount the sum above by 10% for contribution. She is entitled to \$2,700 compensation.

[32] Wellington Indoor Sports Centres Limited is required to pay Julie Armstrong

- a. \$3,314.52 lost wages.
- b. \$2,700 compensation for hurt and humiliation etc.

[33] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority