Determination Number: AA 378/05
File Number: AEA 359/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Jennifer Batt (Applicant)
AND	Laine Furnishings (NZ) Pty Limited (Respondent)
REPRESENTATIVES	Garry Pollak, Counsel for Applicant John Gray, Counsel for Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	20 September 2005
DATE OF DETERMINATION	26 September 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant claims her employer misunderstood a statement of an intention to resign as being a resignation and unjustifiably dismissed her. The respondent employer says it simply accepted a statement of resignation by the applicant and was entitled to reject her attempts to withdraw it.

[2] The matter was not resolved in mediation. Written briefs were provided by the applicant, the respondent's New Zealand sales manager Lisa Koegler and Don Graham, the respondent's Melbourne-based group sales manager Don Graham. A brief investigation meeting heard further evidence from Ms Batt, Ms Koegler and Mr Graham and submissions from counsel.

[3] The issues for determination are whether the applicant resigned or was dismissed and whether, in all the circumstances, the employer acted as a fair and reasonable employer would have. This includes determining whether – if a statement of resignation was made – the employer was entitled to act on it in the way that it did.

Background

[4] Ms Batt was employed by the respondent company as a sales consultant from 17 January 2005. She was provided with a written employment agreement in early February. Although not signed by the applicant, the parties confirmed to me in the investigation meeting that the terms and conditions of employment were as set out in the written agreement.

[5] From early February Ms Batt expressed dissatisfaction that her role was not as challenging and varied as she had hoped. Ms Koegler spoke with her several times about her concerns. Ms Batt also spoke with Mr Graham. On 24 February a further such conversation between Ms Koegler and Ms Batt was cut short because they needed to start a presentation to clients.

[6] The following day Ms Koegler asked to speak with Ms Batt in her office. It was a Friday around 4.30pm. The parties do not agree on the exact words of the conversation. They do agree that Ms Koegler expressed her concern about Ms Batt's unhappiness in the job and wanted her to think about whether the role was suitable for her. Ms Koegler suggested Ms Batt take the weekend to think it over. Ms Batt replied that she did not need the weekend as she had already decided the position was not right for her.

[7] What was meant by the words then exchanged are at the heart of the difference between the parties. Ms Batt talked about leaving the job and when Ms Koegler asked her when that might be Ms Batt replied: "*The sooner, the better*".

[8] Ms Batt says she talked about intending to leave the job but did not resign. Ms Koegler says she clearly understood Ms Batt to be resigning and intending to leave immediately. The two women do agree that Ms Koegler asked whether Ms Batt wanted her to tell other staff that she was leaving but Ms Batt wanted that left until a later, unspecified time.

[9] Ms Batt left the office around 5pm and met a friend. After hearing her account of the meeting, her friend suggested that she needed to make clear to Ms Koegler that she was not resigning. At 6.11pm she left the following message on Ms Koegler's cellphone voice mail:

> *"Hi Lisa, Jen here, just having a think on our discussion just before and … you know um, realistically it is not possible for me to resign on a really short notice period without another job to go to, because I just, I don't have money – savings. If it is possible can you give me a call back and let me have your thoughts on that. Thanks. Bye."*

[11] Ms Koegler retrieved the message on Saturday, 26 February. She returned Ms Batt's call around 4pm. She took Ms Batt's message to mean that she wanted to work out four weeks' notice rather than not come in on Monday, 28 February. However as she began to talk about this, Ms Batt told her that she had not resigned. The conversation ended with Ms Koegler saying she would talk about the matter with Mr Graham.

[12] After talking with Mr Graham and the company's legal advisor, Ms Koegler prepared and delivered to Ms Batt a letter dated 28 February. This set out her view that Ms Batt had resigned on 25 February which was "*mutually accepted*". This stated that as Ms Batt had not signed her employment agreement, the company's "*usual procedure*" of four weeks notice would be required, making her last day of work 24 March. Until then Ms Batt was to undertake office bound tasks rather than visiting clients.

[13] Ms Batt responded with a letter the same day denying she had resigned, stating that she had "*not submitted a letter of resignation*" and asking to be restored to her normal duties. She also offered to resign immediately in return for one month's salary in lieu of notice and a further two months of salary and car allowance in order to have time to find another job.

[14] Ms Koelger replied three days later with an offer of one month's salary in lieu of notice in return for an immediate resignation. She noted that on 25 February she had offered Ms Batt the opportunity to consider her position over the weekend but Ms Batt had responded that she "*did not require the weekend*" and had "*indicated [her] desire to leave*". She said it was "*open to our company to accept your resignation on the basis of one month's notice in accordance with the company's standard terms of employment*". She said it was not open for Ms Batt to retract the notice of resignation given on 25 February. Ms Batt replied with a letter restating her position.

[15] On Friday, 4 March Ms Batt was given a letter requiring her to return any company property and to leave to the premises. She was also given a cheque for one month's salary in lieu of notice.

[16] Ms Batt had worked each day of the week of 28 February – 4 March in the respondent's offices on tasks assigned to her.

Legal principles

[17] Once notice is unequivocally given by either party to an employment agreement, it cannot be withdrawn without the consent of the other party: *Harris & Russell Limited v Slingsby* [1973] 3 All ER 31, 32; applied in *NZ Labourers IUOW v Hodder & Tolley Ltd* [1989] 1 NZILR 430, 439 (EC, Palmer J); followed in *Malaysia Airline System BHD (New Zealand) Ltd v Malone* [2003] 1ERNZ 494 at [42] (EC, Travis J).

[18] However, where the circumstances of the giving of notice are ambiguous or equivocal, an employer should act with caution and allow a "cooling off" period before taking reasonable steps to ensure a resignation is genuine: see cases cited in *Little Earth Ltd (t/a Kiwi Hilton Backpackers) v Luxmore* (unreported, EC Auckland AEC 149/98, 8 December 1999 Travis J). In one of the those cited case – *Boobyer v Good Health Wanganui* (unreported, EC Wellington WEC 3/94, 24 February 1994, Goddard CJ) – the Court states than an employer cannot safely insist on its interpretation of words of resignation that are "an emotional reaction or amount to an outburst of frustration" if it is obvious that on sober inquiry the words were not meant to be taken literally.

[19] The opportunity for an employee to reconsider a statement of resignation, if not already acted on or relied on by the employer, may also be greater under the Employment Relationships Act 2000, because of the broader emphasis on the relationship rather a narrower, purely contractual view of the rights and obligations of the parties: *Milburn & Waikato District Health Board* (unreported, ERA Auckland, AEA 1252/03, 11 February 2004, Alastair Dumbleton). In that case, an employee who gave both oral and written notice of resignation emphatically refused her employer's offer to "sleep on it". However, within 24 hours the employee had reconsidered, but the employer then refused to allow the resignation to be withdrawn. The Authority noted that:

> *the employer had allowed an opportunity for the employee to back out of her resignation, but having done so it could not reasonably take that opportunity away from her before [the employee] had had a chance to make use of it.* (p3)

[20] In the *Milburn* case, the Authority concluded that where an employee clearly advises within a very short space of time that he or she has had a change of mind, and the employer had not had enough time to rely on the resignation or change its position in any substantial way to its detriment before that advice, the employer should not 'foreclose' on the opportunity to reconsider during the period of time it has offered for reconsideration.

[21] This remains consistent with the factual context in which the principle identified in *Hodder & Tolley* (cited at [17] above) was applied in that case. There the employee had given "unqualified notice" of a precise finishing date six months ahead. He was then involved in company discussions about restructuring and confirmed that no position was needed for him in the future. Despite this, he then attempted to withdraw his notice, some four months after giving it. The company had relied on his notice in making its restructuring plans. And in *Malaysia Airlines* (cited at [17] above) – a case applying the same principle to an employer's notice of redundancy – the employer attempted to withdraw the notice some 27 days after issuing it.

Determination

[22] I do not accept Respondent's counsel submission for a credibility finding against the applicant. I accept that all three witnesses remembered events and conversations as best that they could. I note that the applicant's counsel said Ms Batt accepted that Ms Koegler's account in her brief of evidence was "*pretty much right*" and particularly that Ms Batt did say "*the sooner, the better*" in response to the question of when she wanted to leave.

[23] I find that the applicant was dismissed by the respondent by being 'sent away' on 4 March. For the following reasons I find this was not what a fair and reasonable employer would do in all the circumstances, the dismissal was unjustified, and the applicant is entitled to remedies.

[24] Ms Batt did not initiate the meeting with Ms Koegler in the late afternoon of Friday, 25 February. She had earlier expressed her discontent with her job to both Ms Koegler and Mr Graham. I consider her expression of wanting to leave "*the sooner, the better*" was most likely an outburst of frustration. More importantly, it followed Ms Koegler offering her the weekend to think it over. I consider Ms Batt's rejection of that time to consider her position was intemperate in the circumstances – Ms Koegler says that Ms Batt gave that response "*without hesitation*" (letter of 3 March). Ms Koegler acted reasonably in offering that opportunity for reflection – an opportunity which I consider was not extinguished by Ms Batt's hasty response.

[25] Within 75 minutes of having left the office, Ms Batt had either reconsidered her words of resignation (as seen by Ms Koegler) or, on her account, realised that Ms Koegler may have misunderstood her statement of intending to resign as being a resignation. Her phone message alerted Ms Koegler to Ms Batt not wanting to resign without first having arranged another job or serving more than "a really short" notice period.

[26] Any remaining ambiguity was removed within 24 hours. The Saturday, 26 February phone conversation was unequivocal. Ms Batt stated clearly that she was not resigning, at least yet. That was well within the 48-hour period Ms Koegler had offered for her to reconsider. I do not consider it was reasonable for the employer to then attempt (by its letter of 28 February) to reject Ms Batt's change of mind because:

(i) it was made and advised to the employer within a very short space of time (as little as 75 minutes and no more than 24 hours); and

(ii) the employer had not had enough time to rely on the resignation or change its position in any substantial way to its detriment before that advice (it was over the weekend).

[27] That is the difference from a case cited in the respondent's submission, *Sandall & NZ CCS* (unreported, ERA Christchurch, CEA 112/03, 16 September 2003, Helen Doyle) where the Authority considered a resignation effective. There Ms Sandall had initiated a discussion with her employer to announce that she had a new job and would be leaving. Ms Sandall told other staff of her plans that same day. The next day the employer offered another employee extra hours as a result of Ms Sandall's planned departure and made arrangements for a farewell function and gift. Five days later Ms Sandall told the employer that she had a change of heart and wanted to keep the job. This was clearly more than the "very short space of time" contemplated for reconsideration in the *Milburn* case and, because the applicant was announcing she had already accepted a new job elsewhere, the employer had not had any reason to offer a period for reconsideration.

[28] There is another point which emerged in the letters exchanged by Ms Batt and Ms Koegler in the following week. The employment agreement provided that the employment "*may be terminated by either party by the giving of one month's written notice*". I would not have been prepared to find in favour of the applicant on that basis alone. However the company did purport to rely on its

"*standard terms of employment*" in order to pay her one month's pay in lieu of notice and terminate her employment on 4 May. Arguably, it can't rely on some terms but ignore others. However it is possible for such a term requiring written notice to be varied by mutual consent – with the parties accepting oral notice – but the issue would then be whether there was genuine agreement, which takes us no further in this particular case.

Remedies

[29] Ms Batt seeks lost wages for the period from 1 to 11 April 2005, the period from the expiry of her paid notice to starting a new job. The modest wage claim shows there is no issue as to adequate mitigation by Ms Batt of her loss. I award the sum claimed (excluding any vehicle allowance).

[30] Ms Batt also seeks compensation for loss incurred in having to seek a car she purchased as required for her position with the respondent. Ms Batt says she purchased the vehicle for $29,870 on hire purchase and sold it for $21,000 as she could not afford to keep it. She had put $5000 of her savings into the car. The company provided a vehicle allowance of $14,500 gross a year, paid monthly ($1208.33 a month). She used her vehicle allowance to meet her hire payments and running costs.

[31] The respondent made no objection to Ms Batt's vehicle costs claim in its statement in reply or witness briefs but she submitted no documentary evidence to support it or quantify the exact loss. She told me she would probably have had to sell the vehicle in any event if she had left the respondent after finding another job. On that basis I am not prepared to provide the remedy sought. However under s123(c)(ii) I am able to provide a remedy for loss of a benefit that the employee might reasonably have been expected if the grievance had not arisen. Under that heading I award a sum equal to the vehicle allowance for a further two months, being a period that Ms Batt might, but for the personal grievance, have worked for or been paid by the respondent.

[32] Ms Batt also claimed $5000 for being "very upset and embarrassed about my dismissal". There was no additional evidence offered to support this claim apart from that comment in her statement. However I accept that there was some loss of dignity and injury to feelings inherent in being forced to leave her job earlier then she intended and the uncertainty during the short period between her paid notice expiring and starting her new job. I also take into account that she worked only 7 weeks for the respondent; has successfully secured another job; and appears from giving her evidence at the investigation meeting to be an articulate, confident person who bears no continuing harm from earlier-than-expected departure from the respondent's employment. Balancing these factors, I award compensation under s123(c)(i) of $3000.

[33] Remedies may be reduced if the employee contributed to the circumstances giving rise to the grievance. While Ms Batt may have been indecisive or unclear in her communications with her employer, I do not consider her conduct was of the culpable or blameworthy type which would be required to reduce her compensation for contribution.

Summary of orders

[34] The respondent is to pay to the applicant:

(a) A sum equal to her usual wage (gross) for the period from 1 April to 11 April 2005, (excluding vehicle allowance);
(b) A sum equal to the vehicle allowance for two months (gross);
(c) Compensation under s123(c)(i) of $3000 (without deduction).

Costs

[35] Ms Batt is entitled to a reasonable contribution to her costs. I invite the parties to agree the appropriate amount. If they are unable to do so, counsel may file memoranda for a determination on costs by the Authority.

Robin Arthur
Member of Employment Relations Authority