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Baynes v Mouttaki (Christchurch) [2007] NZERA 252 (20 March 2007)

Determination Number: CA 25/07 File Number: 5032390

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY OFFICE

BETWEEN AND

REPRESENTATIVES

MEMBER OF AUTHORITY INVESTIGATION MEETING

SUBMISSIONS RECEIVED

DATE OF DETERMINATION

20 March 2007

Anna Baynes (Applicant)

Ahmed Mouttaki (Respondent)

Peter Anderson and Russell Ibbotson, counsel for the applicant

Nic Soper, counsel for the respondent

Helen Doyle

Queenstown 13 November 2006

19 February 2007

1 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Baynes, the applicant, was employed by Mr Mouttaki as a mail sorter and delivery person in April 2005. Her position involved the sorting and delivery of mail by motorcycle in the Queenstown area.

[2] Ahmed Mouttaki, the respondent, is the owner/operator of a mail delivery contract with NZ Post based in Queenstown.

[3] Ms Baynes was party to an individual employment agreement with Mr Mouttaki dated 24 April 2005.

[4] There is significant factual conflict between the accounts of Ms Baynes and Mr Mouttaki about what happened on 14 November 2005 which was the last day that Ms Baynes attended at work. Ms Baynes says that on that date she was unjustifiably dismissed either actually by Mr Mouttaki when he gave her two weeks' notice after swearing at and abusing her, or constructively. Ms Baynes says that while she was undertaking her postal run on 14 November 2005, Mr Mouttaki grabbed her by her right shoulder and arm and forcibly dragged her from her motorbike.

[5] Ms Baynes made a complaint to the Police that Mr Mouttaki assaulted her on 14 November 2005. Mr Mouttaki was charged with assault and pleaded not guilty. The charge of assault was then withdrawn because Ms Baynes no longer wished to proceed with her complaint. Ms Baynes has been in receipt of weekly compensation from the Accident Compensation

Corporation from 22 November 2005 and this is ongoing. When this was disclosed at the investigation meeting, it was clear to me that Mr Mouttaki and Mr Soper were taken by surprise about this. I requested Mr Anderson obtain the details from the Accident Compensation Corporation as the compensation payment would potentially have an impact on remedies. That information was subsequently obtained and provided to the Authority.

Ms Baynes had claimed three months' lost wages in the sum of \$7,000 in her statement of problem.

[6] Mr Mouttaki denied that he ever used abusive language or inappropriate behaviour towards Ms Baynes. He says that Ms Baynes was often abusive and confrontational with him and other staff members and was always creating *dramas and problems*. He said that on 14 November 2005, Ms Baynes threatened to resign and he responded that if she wanted to she had to give two weeks' notice. Mr Mouttaki said that he did not dismiss Ms Baynes and he totally denied assaulting her and said that the suggestion that she was knocked to the ground and hurt is ridiculous.

[7] After 14 November 2005, Mr Mouttaki's wife, Kerry O'Donnell who is a solicitor in Queenstown, attempted to telephone Ms Baynes on 16 November 2005, after which date a letter dated 17 November 2005 was written to Ms Baynes confirming her resignation had been accepted and suggesting she had abandoned her employment.

[8] The issues for determination in this matter are:

- How did the employment relationship end and when;
- Did Ms Baynes voluntarily resign or abandon her employment or was she dismissed, actually or constructively;
- If Ms Baynes was dismissed then was the dismissal unjustified;
- If the dismissal was unjustified then what remedies is Ms Baynes entitled to, considering amongst other matters s.317(3) of the [Injury Prevention, Rehabilitation and Compensation Act 2001](#) and any issues with respect to contribution.

The employment relationship

[9] Ms Baynes and Mr Mouttaki agreed that the first month of employment was relatively incident-free. Ms Baynes said that some issues arose after that first month.

Surgery

[10] Ms Baynes said that she had advised Mr Mouttaki that she was on a waiting list for surgery before she took up the position with him. Mr Mouttaki did not accept that Ms Baynes advised him that she was on a waiting list for surgery.

[11] Having considered the evidence, I think it more probable, given Mr Mouttaki's reaction, that Ms Baynes did not advise him that she was on a waiting list for surgery at the time she was interviewed for the position. She would not have been entitled to be paid sick leave although I am not satisfied that Mr Mouttaki denied her leave. It was unfortunate that Ms Baynes cancelled her surgery but I do not find that this matter had any significant effect on the working relationship.

Motorbike

[12] Ms Baynes says that concerns she had with her motorcycle were raised with Mr Mouttaki but were not fixed. She refers in that regard to the throttle sticking on the motorbike. Ms Baynes said she noticed this in June or July 2005 but despite mentioning this to Mr Mouttaki, no action was taken. Ms Baynes said it took two months for the back tyre to be replaced after she advised Mr Mouttaki in or about August or September 2005 that the tyre

was too bald for the bike to be safely ridden. Mr Mouttaki said that he had not previously been advised of the concerns about the motorbike that Ms Baynes raised in her statement of evidence.

[13] Mr Mouttaki provided copies of 10 invoices relating to servicing and maintenance of the motorbike used by Ms Baynes between 18 April 2005 and November 2005. The invoices show that the motorbike had a full service on 18 April 2005. On 1 June 2005 an invoice shows that, amongst other work performed on the motorcycle, the rear tyre was replaced and the throttle cable was repositioned correctly. On 8 June 2005, presumably after continued issues with the throttle, the throttle cable was replaced, along with front and rear sprockets and wheel bearings and the bike was road-tested. There was a general inspection of the bike carried out on 1 August 2005 which included tyre pressure and brake wear and some other minor work performed in August 2005. Both the front and rear tyres were replaced on 1 November 2005.

[14] The invoices do not support Ms Baynes's evidence that Mr Mouttaki took no action with respect to the throttle. There was some work carried out on the throttle on 1 June and the throttle cable was replaced on 8 June 2005. I am of the view that, given the regular servicing the bike was given, Ms Baynes' evidence that Mr Mouttaki simply failed to get the back tyre replaced for two months when it was in a dangerous condition is less probable than Mr Mouttaki's evidence. In the circumstances, I prefer the evidence of Mr Mouttaki that the motorcycle was regularly serviced and maintained and that Ms Baynes was not expected to ride it in a dangerous manner.

Bereavement

[15] Ms Baynes said in her evidence that her employment agreement entitled her to three days' bereavement leave on the death of a close family member. Sadly Ms Baynes' grandmother and father both died within a few weeks of each other in or about August and early September. Ms Baynes said in her evidence that she was told she could only have one day's bereavement leave for each bereavement. Clause 11 of Ms Baynes' employment agreement provides that following six months of continuous employment with the employer, the employee is entitled to sick leave and bereavement leave as provided by the [Holidays Act 2003](#). Ms Baynes had not worked for Mr Mouttaki for six months at that time.

[16] I think it likely that Ms Baynes read clause 11.5 of her employment agreement which refers to a duration of three days' bereavement leave for the death of a close family member without first reading clause 11 which deals with entitlements for sick and bereavement leave. That is completely understandable. As a result of reading the agreement in this way, I am of the view that Ms Baynes became resentful during her employment that she did not receive the correct entitlement at a distressing time. It was an issue, however, that was capable of clarification and resolution if raised with her employer. When clause 11 was drawn to Ms Baynes' attention her response was that the agreement was not the one she signed. I am satisfied that the individual employment agreement that was provided by Ms Baynes with her evidence was the same employment agreement that she signed.

Inappropriate behaviour and language

[17] Ms Baynes said that Mr Mouttaki would regularly swear at her and abuse her when she was working. Ms Baynes said the amount of abuse and swear words increased over time and she became concerned that Mr Mouttaki was trying to get rid of her. She gave an example, although could not be specific about the actual date, when there was a morning tea for a special occasion. She said that Mr Mouttaki yelled at her across the room to go and have her morning tea. She said that she was at that time feeling extremely intimidated by his behaviour and upset so she continued sorting her mail and prepared to commence her round. Ms Baynes said that Mr Mouttaki came over and told her to go and have *fucking morning tea*.

[18] Mr Mouttaki denied that he had ever used abusive language or inappropriate behaviour towards Ms Baynes. He said that English is not his first language and that sometimes people may have a problem understanding him. He did not believe that that was a problem with Ms Baynes. Mr Mouttaki said that Ms Baynes was always creating dramas and problems about petty issues, claims for sexual harassment, domestic abuse, heart attacks and constant medical problems. He said that this often led to arguments or incidents with others. He produced a letter Ms Baynes had written to a supervisor at the Post Office relating to an incident where Ms Baynes had had a confrontation that was brought to his attention.

[19] Mr Mouttaki said that during Ms Baynes' employment, she was spoken to about her attitude, work performance and ability to work with others. He said that Ms Baynes was spoken to about the following:

- Inability to listen to and accept directions;
- Excess coffee and cigarette breaks;
- Numerous verbal altercations with Post Office staff and management;
- Loitering at Post Office site;
- Returning excess undelivered mail;
- Mail case sorting;
- Mood and attitude swings.

[20] I find that Ms Baynes was given two letters in respect of her work performance while she was employed by Mr Mouttaki. Mr Mouttaki was unable to locate copies of the letters, but there was a letter from Ms Baynes in response to one of the letters dated 19 August 2005.

[21] Without seeing a copy of the letters, I am unable to make any findings about their contents, save as what can be established by Ms Baynes' letter of 19 August 2005. That being the only letter, I set that out in full below:

19.8.05

Kerry & Ahmed

Re: Letter received 19.8.05

I am sorry for any problems that have arisen in the past. Majority of what was said in the letter I agree with except mainly work being done in an acceptable time. In the last few weeks my sorting of mail has become quicker and on average have been finishing at 12.45pm. Thank you to you both for today especially to you Kerry for stopping and talking to me. I really appreciate

it alot. I meant what I said to you both and I won't go back on it. I know the areas that need to be addressed and will do so. Anyway, thanks again.

Anna

[22] Ms Baynes accepted that she was spoken to by Mr Mouttaki about poor performance and the concerns as listed above. Ms Baynes did accept toward the end of her employment she had mood swings, although she attributed these to, amongst other matters, the tough time she had with Mr Mouttaki as an employer.

[23] Ms Baynes says, with respect to the letter of 19 August, that she was told if she did not agree to everything in the letter she was given by Mr Mouttaki, then she would lose her job. Whilst Ms Baynes is the only person who can give evidence as to why she wrote the letter, and

what was in her mind when she did so, the letter goes somewhat further than simply agreeing with the contents of the letter she received.

[24] There was no independent evidence from anyone who may have worked in the Post Office sorting area and observed conversations which would assist me in determining if Mr Mouttaki used abusive language when talking to Ms Baynes. Ms Baynes told me that the abuse would take place in the morning when other Post Office people were about.

[25] Ms O'Donnell gave evidence that Mr Mouttaki frequently raised concerns with her about Ms Baynes' attitude and work performance. She said that she did not at any time see Mr Mouttaki verbally abusing or otherwise acting in an inappropriate way towards Ms Baynes. There is no good reason not to accept Ms O'Donnell's evidence about that matter, but she was not often present at the work site and therefore I can attach little weight to her evidence.

[26] I telephoned Sue Reid during the investigation meeting after being given her name by the parties. Ms Reid is the New Zealand Post team leader. She did some work in the mail room of NZ Post Queenstown where Ms Baynes and Mr Mouttaki sorted the mail before embarking on their respective mail runs. That was the place where Ms Baynes had contact with Mr Mouttaki before they set off. Ms Reid said that she heard Ms Baynes getting heated more than Mr Mouttaki, although accepted that they could have had altercations that she did not hear. Ms Reid said that she never heard Mr Mouttaki use inappropriate language towards Ms Baynes. I wrote to another employee whose name I was given by the parties but there was no response.

[27] The evidence supports that Mr Mouttaki found it difficult to communicate with and raise matters with Ms Baynes. Mr Mouttaki said that Ms Baynes would either argue with him or walk away rather than discuss concerns or issues. He said that this made him feel frustrated and so he decided to raise issues with Ms Baynes in writing.

[28] Ms Baynes made no mention of abusive or inappropriate swearing in her letter of 19 August 2005. There is no evidence that she raised her concerns with Ms O'Donnell, to whom she clearly spoke as recorded in the letter.

[29] In conclusion, therefore, I find the relationship was not an easy one. The raising of performance issues by Mr Mouttaki with Ms Baynes may well have impacted negatively on the relationship. Ms Baynes was a strong minded employee. Mr Mouttaki probably let Ms Baynes know of his frustrations at times. There were some misunderstandings and Ms Baynes harboured, in my view, resentment about issues with respect to bereavement and surgery.

[30] Ms Baynes said to me that other people observed the exchanges between her and Mr Mouttaki. I did not hear evidence from anyone else to support the exchanges in the way described by her took place, which is a little surprising. I have also concluded from the evidence that Ms Baynes tended to raise concerns at an early stage if she thought she was treated badly. I note, for example, on or about Ms Baynes' first day of employment she told Mr Mouttaki that she was unhappy about the NZ Post person who was training her and that she was going to leave. It seemed to me that if Mr Mouttaki treated her in the manner she says he did continually, she would have done something about it at an earlier stage.

[31] Continued swearing and abusive behaviour by an employer toward an employee is a serious matter and a serious allegation. I am not satisfied from the evidence that Mr Mouttaki swore at Ms Baynes continually or otherwise acted abusively or inappropriately towards her. There was also insufficient evidence to satisfy me that Mr Mouttaki had some predetermined plan to get rid of Ms Baynes and replace her with somebody else.

14 November 2005

[32] There was agreement that Mr Mouttaki had spoken to Ms Baynes about tidying her mail case prior to 14 November 2005.

[33] Ms Baynes said that although she had tidied her case on the morning of 14 November 2005, Mr Mouttaki abusively told her to do so. Her evidence is that when she advised him that she had already sorted her case, he called her a *fucking liar* and then yelled and swore at her for being too slow. Ms Baynes said that Mr Mouttaki telephoned Ms O'Donnell and when he got off the telephone he advised her that she was getting a written warning.

[34] Mr Mouttaki, on the other hand, says that he requested Ms Baynes sort her mail case and Ms Baynes became angry and walked off without acknowledging the instruction he had given. Mr Mouttaki and Ms O'Donnell both say that there was no telephone call at that time and I prefer their evidence about that to Ms Baynes evidence. I am of the view, though, that it was quite likely Mr Mouttaki did say that Ms Baynes would be given a warning.

[35] Ms Baynes said that Mr Mouttaki telephoned his wife a second time and then advised her, while she was sitting outside Joe's Garage having a coffee, that she was fired with two weeks' notice. Both Mr Mouttaki and Ms O'Donnell do not accept that there was a telephone call at that point. Again, I accept their evidence. Ms Baynes said that after she was told that she was dismissed, Mr Mouttaki raised with her concerns about break times and the amount of mail she brought back. Ms Baynes said that he would not listen to her explanation. Mr Mouttaki accepts that he did go outside and remind Ms Baynes, who he said was having her third or fourth coffee and cigarette, to sort her mail case and start her deliveries. Mr Mouttaki said that Ms Baynes became angry and said *I don't want to do it any more*. He said that as it was not the first time she had threatened to resign, he told her that if she wanted to leave she could give two weeks' notice and he then went back inside to continue sorting the mail.

[36] I have carefully considered the evidence about this part of the events of 14 November 2005. I find Ms Baynes' evidence less reliable than Mr Mouttaki's. Although Ms Baynes said that much of the exchange was observed by others, I heard no evidence from anyone else. I cannot safely conclude that Mr Mouttaki addressed Ms Baynes in the abusive manner about her mail case that she now alleges. I have preferred Mr Mouttaki's evidence which was supported by Ms O'Donnell that there were no telephone calls at this time. I accept, though, that it was more probable than not that Mr Mouttaki did mention a warning being issued. It is less probable in my view that Mr Mouttaki would then tell Ms Baynes that she was dismissed. Even if there were things that could be taken as words of dismissal or resignation, they were said in the heat of the moment and as it turned out overtaken by subsequent events. I do not find that there were statements that could safely be relied on without further clarification by both parties that Ms Baynes was dismissed by Mr Mouttaki or that Ms Baynes resigned.

[37] I now turn to consider what happened following the discussion outside Joe's Garage. Ms Baynes was about to start her run when she realised that she did not have petrol. Ms Baynes went to see Mr Mouttaki about the matter. Ms Baynes said that Mr Mouttaki said *I'm fucking working* and that Ms Baynes responded to the effect *fine, let the bike run out*.

[38] Mr Mouttaki agreed that Ms Baynes asked for petrol and he said that he explained to her that he was busy at that time but that he would catch up with her on her run.

[39] Ms Baynes said that she commenced her run and saw Mr Mouttaki driving at high speed toward her, tooting and gesturing. Ms Baynes said that she was scared and decided not to stop. She said that instead of stopping she carried on down Hensman Road on the footpath as she was delivering mail. Ms Baynes said that Mr Mouttaki then drove his car in front of her, blocking her path and jumped out of the vehicle screaming at her. Ms Baynes said the only words she heard were *fuck* and *petrol*.

[40] Mr Mouttaki, on the other hand, says that as promised he caught up with Ms Baynes on her round and that although she saw him she did not stop or approach him. He agreed that he tooted to get her attention but she continued to ignore him. Mr Mouttaki said that he followed Ms Baynes down the road for a bit, and then stopped in a driveway and Ms Baynes eventually stopped her motorcycle. Mr Mouttaki said that he got the petrol can and approached Ms Baynes to fill up the motorcycle but that she ignored him and started to move off. He

denied that he used abusive language. He said that he reached over and removed the key from the motorcycle.

[41] I find Mr Mouttaki's evidence about meeting up with Ms Baynes on her round consistent with what subsequently occurred. I prefer his evidence that he advised Ms Baynes that he would meet up with her to Ms Baynes' evidence that there was no discussion about that matter. Ms Baynes did not have any other explanation for why Mr Mouttaki would be following her on her run in his vehicle at that time and tooting to attract her attention.

[42] Ms Baynes said she indicated to Mr Mouttaki when he approached her that the petrol was *okay* to try and diffuse the situation. She said that Mr Mouttaki tried to grab the key from the motorcycle but that she managed to grab it beforehand. Ms Baynes said that before she knew what had happened, Mr Mouttaki had grabbed her by her right shoulder and arm and forcibly dragged her from her bike. Ms Baynes said that she managed to stay on her feet although that is inconsistent with the statement Ms Baynes made to the Police on 14 November 2005 in which she says that she ended up on the ground.

[43] Mr Mouttaki said that when he removed the key he did not have any physical contact with Ms Baynes. He denied that she fell to the ground and denies that he assaulted her. Ms Baynes says that it was only after she was dragged from the bike that she gave the keys to Mr Mouttaki.

[44] Mr Mouttaki said that after he had removed the key from the motorbike Ms Baynes walked off saying *I'm out of here. I'm not going to do this any more*. Ms Baynes did not accept that she made that statement. She agreed that Mr Mouttaki telephoned his wife. Ms O'Donnell said that she received a call from Mr Mouttaki when she was at work. Ms O'Donnell said that Mr Mouttaki asked her to meet him and collect his vehicle. She was told that this was so that he could complete Ms

Baynes' mail run on her motorbike as Ms Baynes had quit in the middle of her mail run. I found Ms O'Donnell's evidence reliable about the nature of the telephone call and Mr Mouttaki's evidence is consistent with that.

[45] There is an important conflict in the evidence as to whether Mr Mouttaki removed the key from the bike and retained it or Ms Baynes held on to the key and only gave it to Mr Mouttaki after she was off the bike. In my view, if Mr Mouttaki had removed the key and in that way immobilised the bike so that it could safely be filled with petrol, then it is less probable that there would have been subsequent physical contact with Ms Baynes. I think it more likely, from the evidence, that Mr Mouttaki did remove and retain the key. I am of the view that Ms Baynes' evidence that she grabbed the key first and then only gave it back to Mr Mouttaki after being dragged off the bike is less likely.

[46] Mr Mouttaki said that whilst he was talking to Ms O'Donnell Ms Baynes came back and grabbed the mail from the bike and said that she was going to do the rest of the delivery by foot. Mr Mouttaki said that he sought some clarification of the situation from her as he understood she had quit. Mr Mouttaki said that Ms Baynes was very angry and swearing at him at that time. Mr Mouttaki then telephoned Ms O'Donnell back and advised her that Ms Baynes was now going to complete the delivery. There was agreement that Mr Mouttaki handed the telephone to Ms Baynes so that Ms O'Donnell could speak to her. Ms O'Donnell told Ms Baynes that there would need to be a meeting to discuss Ms Baynes' employment and that matters could not continue as they had been. Ms Baynes wanted her own lawyer to be present if there was a meeting and that is essentially how matters were left.

[47] Ms Baynes did not advise Ms O'Donnell during the telephone conversation that Mr Mouttaki had assaulted her or acted inappropriately toward her or that she had been injured. Ms Baynes did not advise Ms O'Donnell that she had been dismissed.

[48] Mr Mouttaki then returned the key to Ms Baynes and she completed her delivery run as usual. Ms Baynes said that as she became less angry the adrenalin wore off and she noted that her arm and shoulder were injured. Ms Baynes said that she went to see a lawyer and laid a complaint with the Police that same day. Ms Baynes had a consultation with a doctor on 16 November 2005, although the medical certificate that was dated 21 November 2005 was not provided to Mr Mouttaki until early the following year. Ms Baynes said that she could not go back to work given the incident on 14 November 2005 and Mr Mouttaki's abusive behaviour.

[49] Mr Mouttaki said that he expected Ms Baynes to attend work on 15 November 2005 but she did not. He said that nothing further was heard from her on 16 November 2005. When Ms O'Donnell telephoned Ms Baynes on 16 November, Ms Baynes hung up on her.

[50] On 17 November 2005, Mr Soper wrote to Ms Baynes acknowledging that she had tendered her resignation and advising that, notwithstanding she had not provided the required notice period, her resignation was accepted. It was further noted in the letter that the acceptance of her resignation precluded the need for an investigation into the occurrence of serious misconduct on 14 November 2005 and the subsequent abandonment of work and performance issues raised on 14 November 2005. The letter advised that Mr Mouttaki was arranging payment of the holiday pay.

Determination

[51] I have found that Ms Baynes was not dismissed and she did not resign as a result of the discussion outside Joe's Garage on 14 November 2005. Ms Baynes alleges that Mr Mouttaki then assaulted her by dragging her off her motorbike. Ms Baynes said that she could not contemplate returning to work as a result of Mr Mouttaki's actions and inappropriate abusive language. Ms Baynes says that this was dismissive or repudiatory conduct which was sufficient to justify termination of the employment relationship. I have considered therefore whether Ms Baynes' was unjustifiably constructively dismissed on 14 November 2005 or, alternatively, that Ms Baynes was actually dismissed by virtue of Mr Soper's letter of 17 November 2005.

[52] I have not found, on the balance of probabilities, that Mr Mouttaki continually swore or was abusive and inappropriate throughout the employment relationship. I have not found, on the balance of probabilities, that Mr Mouttaki was abusive on the morning of 14 November 2005, although I am of the view that he probably threatened a disciplinary sanction in the form of a warning.

[53] I accept that if there had been an assault it would certainly amount to a serious breach of duty on the part of Mr Mouttaki and entitle Ms Baynes to treat the employment agreement as repudiated by him.

[54] In this case, from the evidence, I am not satisfied to the degree of probability required for an allegation of this seriousness that the assault took place. In reaching that conclusion, I have already made findings that parts of Mr Mouttaki's evidence were more consistent with other reliable evidence than Ms Baynes' evidence. I have placed weight on the fact that Ms Baynes did not tell Ms O'Donnell any of the matters that she told the Police and the Authority when she talked to Ms O'Donnell almost immediately after Ms Baynes says the incident occurred. I have balanced this with the fact that Ms Baynes may have felt uncomfortable given Ms O'Donnell's relationship with Mr Mouttaki, but it still, in my view, is a matter upon which weight properly should be placed. I have also placed weight on the fact that Ms Baynes continued on and completed

her delivery after the alleged incident. Although there is a suggestion from Ms Baynes' evidence and Mr Anderson's submissions that Mr Mouttaki wanted to get rid of Ms Baynes, Mr Mouttaki made no attempt to stop her completing her delivery on 14 November 2005, immediately returning to her the motorbike key. The issues between them were to be left for discussion at a later meeting.

[55] I accept that there were issues between Ms Baynes and Mr Mouttaki on 14 November 2005. Matters had got to the stage where there had to be a meeting. I do not find though a breach of duty by Mr Mouttaki of sufficient seriousness to make it reasonably foreseeable to him that Ms Baynes would not be prepared to continue work as at 14 November 2005.

[56] I do not find on 14 November 2005 that Ms Baynes was actually or constructively unjustifiably dismissed.

[57] Mr Mouttaki was advised later on 14 November 2005 by the Police that Ms Baynes had made a complaint to them that he had assaulted her. He did not know what Ms Baynes intended to do and whether she would return to work.

[58] Ms Baynes made no contact with Mr Mouttaki the following day and hung up on Ms O'Donnell on 16 November 2005. The letter of 17 November 2005 followed.

[59] I need to determine whether Mr Mouttaki was entitled to believe that Ms Baynes had resigned or abandoned her employment in the particular circumstances. In doing so I consider what would be expected of an employer in terms of obligations of good faith, fair dealing and trust. Mr Mouttaki expected Ms Baynes to return to work on 15 November 2005. I do not find though that a fair and reasonable employer, given knowledge of the police complaint, would have concluded that Ms Baynes had voluntarily resigned from her employment.

[60] There was no resignation tendered by Ms Baynes for Mr Mouttaki to confirm. All parties were clear that there was to be a meeting after 14 November 2005 to talk about issues between Ms Baynes and Mr Mouttaki.

[61] I find that, considering the matter objectively, Mr Mouttaki should have been cautious in drawing the inference that Ms Baynes had abandoned her employment, particularly given the Police complaint. This, in my view, would have created some very real doubt as to whether that was in fact the situation.

[62] I find the facts in this case distinguishable from those in *EN Ramsbottom Ltd v. Chalmers* [2000] NZCA 183; [2000] 2 ERNZ 97. Ms Baynes had not, in my view, clearly evinced an intention to finally end her employment and had made a complaint to the police. Mr Mouttaki did not sufficiently discharge his obligations of good faith, trust and fair dealing in the circumstances. I accept Mr Anderson's submission that the appropriate response would have been a letter to Ms Baynes to clarify her future intentions rather than an acknowledgment of her tender of resignation.

[63] The actions by Mr Mouttaki in finalising Ms Baynes' employment without clarifying the position as to her future intentions constituted a dismissal. The justification for the letter was that Ms Baynes had not presented for work on 15 or 16 November 2005. There is no abandonment clause in the employment agreement and the matter has to be placed in the context of the Police complaint that Ms Baynes made. I do not find justification of the dismissal on the basis of abandonment or voluntary resignation.

[64] Ms Baynes has a personal grievance that she was unjustifiably dismissed on 17 November 2005. She is entitled to remedies.

Contribution

[65] I am required under [s.124](#) of the [Employment Relations Act 2000](#) to consider the extent to which the actions of Ms Baynes contributed to the situation that gave rise to the grievance and if required reduce the remedies that would otherwise be paid.

[66] It is not the events of 14 November 2005 that give rise to the grievance but the failure to make further inquiries of Ms Baynes where she had not evinced a clear intention to finally end her employment.

[67] I do find that the failure on Ms Baynes' part to clarify in some way her position or her intentions with respect to her employment with Mr Mouttaki amount to blameworthy conduct on her part which I will take into account.

Reimbursement

[68] Ms Baynes is entitled to reimbursement of the sum equal to the whole or part of wages lost as a result of the grievance. Ms Baynes has been receiving compensation from ACC since 22 November 2005. Her only claim for reimbursement therefore, could be in terms of the days that she would have worked between 14 and 22 November 2005. Ms Baynes told me that after 14 November 2005 she did not intend to return to work. I have not found that she was actually or constructively dismissed as a result of the events of that day. The grievance I have found is in respect of the letter of 17 November 2005. As Ms Baynes never intended to return to work after 14 November 2005, I do not find that she lost any wages as a result of the grievance and therefore make no order for reimbursement of the same.

Compensation

[69] Ms Baynes said that she did not intend to return to work after 14 November 2005. If however there had been a letter to Ms Baynes asking about her intentions with respect to returning to work rather than accepting her resignation, then it may well have given her an opportunity to put her concerns in writing. Matters may have been resolved close to the point of the employment relationship problem and there may have been some satisfactory outcome. I have taken into account that Ms Baynes contributed to the situation by failing to clarify her own intentions about returning to work.

[70] In all the circumstances, I am of the view that an award is called for but only a modest award. I am of the view a suitable award would be \$1,200.

[71] I order Ahmed Mouttaki to pay to Anna Baynes the sum of \$1,200 under [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) without deduction.

Costs

[72] I reserve the issue of costs.

Helen Doyle

Member of Employment Relations Authority

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