

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 92
3184599

BETWEEN ZOE BOULGER
 Applicant

AND LCD SERVICES LIMITED
 Respondent

Member of Authority: Alex Leulu

Representatives: Paul Mathews, advocate for the Applicant
 Merran Keil, counsel for the Respondent

Investigation Meeting: 12 September 2023 in Auckland

Submissions and further 7 October 2023 and 22 November 2023 from the
information received: Applicant
 8 November 2023 from the Respondent

Determination: 20 February 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Zoe Boulger was employed by LCD Services Limited (LCD) as a receptionist. Ms Boulger's employment with LCD ended in July 2022. Ms Boulger claimed she was either unjustifiably dismissed or constructively dismissed by LCD. She also claimed she was unjustifiably disadvantaged by LCD when LCD failed to properly pay her KiwiSaver and PAYE tax payments to the Inland Revenue Department (IRD).

[2] LCD disputed Ms Boulger's dismissal claims and said she had either abandoned her employment on 7 July 2022 or alternatively, she had resigned from her employment on 13 July 2022. LCD also opposed Ms Boulger's claim for unjustified disadvantage.

The Authority's investigation

[0] For the Authority's investigation, written witness statements were lodged from Ms Boulger, her father Robert Boulger, LCD director John Campbell and LCD administration manager Karen Campbell. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also lodged written closing submissions.

[1] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[2] The issues requiring investigation and determination were:

- (a) Did LCD unjustifiably disadvantage Ms Boulger:
 - (i) because of the way it dealt with her KiwiSaver and/or her PAYE deductions; and
 - (ii) by permitting her to go home (on pay) at 3:30 pm on 13 July 2022 because she was upset?
- (b) Was Ms Boulger dismissed? If so, was her dismissal justified in accordance with the justification test in s 103A of the Act?
- (c) If not, what if any remedies should Ms Boulger be awarded, considering:
 - (i) Whether she had appropriately mitigated her loss?
 - (ii) What remuneration did she lose?
 - (iii) What if any distress compensation should she be awarded?
- (d) Should remedies be reduced under s 124 of the Act, on the grounds of contribution?
- (e) Should either party contribute to the costs of representation of the other party?

Context

Ms Boulger's initial employment

[6] LCD provided a variety of client services to other companies including document service and debt collection services. On 30 June 2020 Ms Boulger started her employment for LCD. As part of her day-to-day work, she reported to Mr Campbell's personal assistant. She also reported directly to Ms Campbell for any matters associated with her pay.

[7] Early in her employment, Ms Boulger became concerned about whether her KiwiSaver contributions were paid to IRD. Around August 2020 Ms Boulger requested copies of her payslips from LCD. In response to her first request, LCD provided Ms Boulger with a spreadsheet which set out the detail of her wage payments. Throughout her employment Ms Boulger made further requests to LCD about whether her KiwiSaver and IRD payments were correctly paid to IRD.

Ms Boulger's promotion

[8] On 30 June 2021 Ms Boulger accepted a promotion to a secretary role for LCD. She reported directly to Mr Campbell and still reported to Ms Campbell for any issues about her pay.

[9] The duties of the secretary role were previously part of LCD's personal assistant role. Due to LCD's growing business, the secretary duties were separated out into its own role. Around the same time LCD recruited a new personal assistant.

[10] Around December 2021 Ms Boulger agreed to temporarily swap roles with the new personal assistant. Shortly after this time and before Christmas 2021, the new personal assistant resigned. Ms Boulger said she then assumed the duties of both the secretary and personal assistant roles. As a result, Ms Boulger said she became stressed as she tried to manage her assigned duties and training newly recruited LCD employees.

The 13 June 2022 conversation

[11] On Monday 13 June 2022 Ms Boulger arrived at work and was anxious and upset. Later in the day Ms Boulger and Mr Campbell talked in his office (the 13 June discussion).

[3] Much of the 13 June discussion was about Ms Boulger's ability to conduct her work and how she was unhappy in her role. Ms Boulger became upset during the discussion. As a result, Mr Campbell suggested for her to go home and consider whether she wanted to "do the job". Mr Campbell also said they would try to resolve the matter the next day. Ms Boulger left the workplace and went home.

Ms Boulger's sick leave

[4] Later in the day, Ms Boulger messaged Ms Campbell to say she would not be attending work the next day because she was unwell. She also did not attend work on 15 June 2022.

[5] On 15 June 2022 she also messaged Ms Campbell saying she would arrange for an appointment with her doctor. Ms Boulger provided LCD with her medical certificate on Monday 20 June 2022. Her medical certificate confirmed her being unfit for work from 14 June 2022 to 4 July 2022.

[6] Also on 15 June 2022, Ms Boulger's representative Paul Mathews emailed LCD raising a personal grievance for unjustified disadvantage. The personal grievance was for LCD's alleged failure to pay Ms Boulger's KiwiSaver payments and for sending her home on 13 June 2022 (which at the time she alleged was an unlawful suspension).

[7] On Wednesday 22 June 2022 Ms Campbell requested the return of Ms Boulger's mobile phone. Ms Campbell said LCD needed the mobile phone for work related reasons. The mobile phone was returned through Ms Boulger's representative, Paul Mathews. Ms Boulger also asked for all communication with LCD to go through Mr Mathews.

[8] On Monday 4 July 2022 Ms Boulger arranged a doctor's appointment on Thursday 7 July 2022 where she obtained a second medical certificate. The medical certificate confirmed Ms Boulger was unfit to attend work from 4 July 2022 to 18 July 2022.

[9] On the same day she emailed the medical certificate to Mr Mathews for it to be forwarded to LCD. Ms Boulger said it later became apparent Mr Mathews was not aware of Ms Boulger's email at the time because it went into his spam email folder. As a result, Ms Boulger's medical certificate was not received by LCD.

[12] On 7 July 2022 Ms Campbell contacted Ms Boulger directly by text message and requested the return of her office key and swipe tag. Ms Boulger queried why and was told by Ms Campbell it was company property. LCD requested the office key and swipe tag again on two further occasions.

[13] On Monday 11 July 2022 LCD changed its office locks because they said Ms Boulger was no longer a trusted employee. LCD also said it had not heard from Ms Boulger or her representative.

[14] On the same day, Ms Boulger found out about the lock change after being notified by LCD staff. On the following day, Ms Boulger raised a further personal grievance for unjustified disadvantage against LCD for changing her workplace locks.

[15] On Wednesday 13 July 2022 Ms Boulger resigned from her employment and raised a personal grievance for unjustified constructive dismissal. LCD responded by saying her resignation was of no effect because she had already abandoned her employment on 4 July 2022.

[16] As a result of LCD's response, Ms Boulger realised her second medical certificate was not sent to LCD. The second medical certificate was eventually provided to LCD as part of the Authority's investigation.

Preliminary matter

[17] LCD is a part of a wider group of companies which includes Law Holdings Limited (LHL) and Law Debt Collection (NZ) Limited (LDCL). Ms Boulger said her employment should be treated as if she was employed across LCD's wider group of companies. She said this was because her bank and tax records showed LHL paid her tax and KiwiSaver payments and LDCL paid her wages.

[18] LCD disputed Ms Boulger's claims on the basis her employment agreement was with LCD and not LCD's wider group of companies. It also said, the structure of LCD's tax affairs and its filing under a group name were irrelevant to its employment relationship with Ms Boulger.

[19] Ms Boulger's signed employment agreement clearly showed LCD as her employer. Regardless of which entity paid Ms Boulger wages and her IRD

entitlements, LCD would be primarily liable for any failures to pay these entitlements in accordance with Ms Boulger's employment agreement.

Unjustified disadvantage claim

Were Ms Boulger's KiwiSaver and IRD payments paid to IRD?

[10] At the investigation meeting, Ms Boulger withdrew her second disadvantage claim in respect of her going home on 13 July 2022. Ms Boulger still claimed she was unjustifiably disadvantaged by LCD when it failed to pay IRD her KiwiSaver and PAYE payments when they were due.

[11] LCD disputed Ms Boulger's claims. It said these payments were all made when they were required to. However, during the investigation meeting Ms Campbell explained she did not make the payments to IRD on every pay day. This was supported by IRD documentation which showed many tax returns filed by LCD around July and August 2022. The documentation also showed tax returns and payments relating to Ms Boulger being backdated to June 2021.

Was Ms Boulger disadvantaged?

[12] Ms Boulger said her KiwiSaver and PAYE payments were not filed and paid correctly to IRD. She said she was disadvantaged by LCD's failure, and this had caused her hurt and humiliation. She also relied on guidance from IRD which said:¹

Payday filing

Every payday you must complete an Employment information – IR348 form, which has details of your employees' gross wages and deductions made.

If filing electronically the due date is within two working days after the payday.

[13] LCD said Mr Boulger was not disadvantaged because all payments due to her were paid by 11 July 2022. It also said as a result, she received the full government KiwiSaver contribution, and any late payment did not result in lost profits to her KiwiSaver account.

[14] Ms Boulger had a reasonable expectation that her IRD payments were going to be paid on time. These were not paid to IRD when they should have been paid. After

¹ <https://www.ird.govt.nz/employing-staff/payday-filing>.

checking her IRD records Ms Boulger became concerned, and she continuously raised these concerns with LCD. Although there was no financial loss to Ms Boulger, the concept of disadvantage caused by an employer's unjustifiable action is a broad concept and was not limited to material loss or demonstrable financial loss.²

[32] LCD failed to properly acknowledge and address her concerns and its actions were not of a reasonable employer. Ms Boulger's claim for unjustifiable disadvantage was established. It is also important to note, Ms Boulger's IRD payments were not rectified until she had raised her grievances against LCD. If she had not raised her concerns, it was unclear whether her IRD payments would have been made at all.

Unjustified dismissal claim

How did Ms Boulger's employment end?

[33] To determine the outcome of the employment relationship problem between the parties, it is first important to first establish when and how the employment relationship ended. Both parties had submitted alternative arguments as to how Ms Boulger's employment ended as follows:

- (a) LCD said Ms Boulger's employment ended when LCD decided she had abandoned her employment on 7 July 2022. If that was correct, the question for determination would become whether LCD's actions in making this decision were justified?
- (b) Ms Boulger said her employment ended when she resigned on 13 July 2022. If that was correct, the question for determination would become whether she was constructively dismissed by LCD?

[34] After the 13 June discussion, Ms Boulger went on sick leave, and she provided a medical certificate to LCD confirming her medical absence to Monday 4 July 2022. Although she had obtained a medical certificate on 7 July 2022, it was not received by LCD. After not hearing from Ms Boulger on 4 July, LCD said it was left in the dark as to whether Ms Boulger was to return to work.

² *Alliance Freezing Co (Southland) Ltd v New Zealand Engineering Workers Union* (1989) ERNZ Sel Cas 575 at [580].

[35] LCD said it relied on the abandonment clause of Ms Boulger's employment agreement to terminate her employment on 7 July. The clause said:

Abandonment of Employment: where the employee is absent from work for a continuous period exceeding three days without notification to or consent from the employer or without good cause, they shall be deemed to have terminated their employment.

[36] Considering all the available evidence, it became clear the employment was in fact ended by LCD taking steps based on its view that Ms Boulger had abandoned her employment. Those steps comprised of LCD asking Ms Boulger for the return of her office key and swipe card on 7 July 2022. It also replaced the work premises locks on 11 July 2022. This meant that Ms Boulger's resignation on 13 July 2022 was of no effect. LCD had already ended the employment relationship. She was effectively sent away by not being able to go to work, even if she wanted to.

Was Ms Boulger's dismissal justified?

[37] Ms Boulger argued her dismissal was unjustified because LCD:

- (a) failed to follow a proper process before it decided Ms Boulger had abandoned her employment; and
- (b) should have enquired further about Ms Boulger's circumstances before making its decision. This was especially given Ms Boulger was on sick leave prior to 7 July, and she was represented by an advocate who had previously been in ongoing communication with LCD's representative.

[38] LCD disagreed with Ms Boulger and said it was under no contractual obligation to follow a procedure where it had to make further enquiries in respect of Ms Boulger's abandonment from her employment. It also relied on a Court of Appeal decision to say, once the factual situation triggered the operation of the abandonment clause of her agreement, Ms Boulger's employment ended in accordance with the clause.³

[39] The Act requires the Authority to objectively assess whether LCD's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Ms Boulger was dismissed.⁴ A fair and reasonable employer

³ *Pitolua v Auckland City Council Municipal Abattoir* [1992] 1 NZLR 6; [1992] 1 ERNZ 693 at [9]

⁴ Employment Relations Act 2000, s 103A(2).

is expected to comply with its statutory obligations which include the good faith requirement to provide access to relevant information and an opportunity to comment on it before an employee is dismissed.⁵

[40] The abandonment clause of Ms Boulger's agreement would be triggered if she became absent from work for a continuous period exceeding three days without notification to or consent from LCD or without good cause.

[41] The Court of Appeal said in a more recent case, the good faith duty should encourage an employer "to make enquiries of the employee" to establish whether the employment relationship had ended.⁶

[42] Between the 13 June discussion and 7 July 2022, Ms Boulger and LCD were in contact with each other (or through their representatives) on several occasions. This included when Ms Boulger raised her personal grievance on 15 June 2022 and when LCD requested the return of Ms Boulger's mobile phone on 22 June 2022.

[43] Mr Mathews also sent LCD an email on 7 July 2022 which confirmed Ms Boulger's belief that she was still employed by LCD. In the email Mr Mathews said:

...it seems likely that Zoe will have no option but to resign and raise a constructive dismissal grievance.

[44] By 7 July 2022 LCD were aware of its ongoing employment relationship problem with Ms Boulger and her previous sick leave arrangements. There was no evidence to show LCD had made reasonable attempts to enquire with Ms Boulger as to whether the employment relationship had ended.

[45] It was unfortunate Mr Mathews had not realised Ms Boulger's had emailed him her second medical certificate. However, if LCD had made reasonable enquiries to Ms Boulger (through Mr Mathews) from 4 July 2022 to 7 July 2022, it would have found Ms Boulger had not abandoned her employment with LCD.

[46] LCD also did not tell Ms Boulger about the termination of her employment by abandonment until Wednesday 13 July 2022. This was the first time Ms Boulger was told about LCD's view of her abandoning her employment on 7 July 2022. There was

⁵ Employment Relations Act 2000, s 4(1A).

⁶ *E N Ramsbottom Ltd v Chambers* [2007] NZCA 183 at [14]-[16].

also, a number of communications on various matters between the parties from 7 July 2022 up to 13 July 2022. There was no mention by LCD of Ms Boulger's abandonment until it responded to her resignation in the late afternoon on 13 July 2022.

[20] LCD did not make reasonable attempts to enquire with Ms Boulger whether she had abandoned her employment. It also failed to appropriately communicate with her the termination of her employment by abandonment. These were not actions of a reasonable employer and as a result, Ms Boulger's dismissal by LCD was unjustified.

Is Ms Boulger entitled to remedies?

[21] Ms Boulger had established her claims against LCD for unjustified disadvantage and unjustified dismissal. She was entitled to a remedy for each of her grievance claims.

Lost wages

[22] Ms Boulger sought a remedy of three weeks' lost wages under the Act.⁷ This covered the period from when she was dismissed on 7 July 2022 until the day, she started her new job on 28 July 2022. The total amount claimed by Ms Boulger was \$3,816 gross which was made up of her weekly salary multiplied by three.

[23] LCD did provide any specific submissions regarding any orders for remedy against it. Accordingly, the Authority orders LCD to pay Ms Boulger the amount of \$3,816 gross for lost wages.

Compensation for Ms Boulger's unjustified disadvantage claim

[24] For her unjustified disadvantage grievance Ms Boulger sought compensation of \$8,000 for humiliation, loss of dignity and injury to feelings.⁸ As set out earlier in this determination, Ms Boulger made numerous efforts to determine whether her IRD payment were filed correctly by LCD. Ms Boulger said this caused her stress and anxiety over a long period of time.

[25] I accept, Ms Boulger did suffer hurt and humiliation because of LCD's actions in relation to her IRD entitlements. Considering similar cases, an appropriate remedy

⁷ Employment Relations Act 2000, s 123(1)(b).

⁸ Employment Relations Act 2000, s 123(1)(c)(i).

was an order for LCD to pay Ms Boulger an amount of \$3,000 for hurt and humiliation in respect of unjustified disadvantage claim.

Compensation for Ms Boulger's unjustified dismissal claim

[26] Ms Boulger also sought compensation of \$20,000 for her unjustified dismissal claim. As a result of her dismissal, she said she felt degraded and had suffered significant levels of stress and anxiety as a result. This led to her feeling angry, and she began to verbally “lash out” at her father as a result.

[27] She also explained her stress when she realised her work premises locks were replaced and how LCD made her liable for the cost of replacing the locks. This was made worse when she realised her work colleagues also knew about aspects of her employment relationship issues with LCD. Her father Mr Boulger also described Ms Boulger's distress as a result of LCD's actions.

[28] Considering the distress experienced by Ms Boulger both during and after her dismissal and the general range of awards in similar cases, an appropriate amount of compensation to be ordered was \$17,000.

Should the remedy be reduced for blameworthy conduct by Ms Boulger?

[29] The Authority must consider whether any remedies awarded should be reduced due to any actions of the worker which contributed to the situation giving rise to the personal grievance.⁹

[30] A key aspect of LCD's decision to dismiss Ms Boulger was because LCD had not received any communication from Ms Boulger after 4 July 2021. LCD did not receive her second medical certificate which would have excused her from work.

[31] But for an unfortunate technological issue where her second medical certificate was emailed to Ms Mathews spam email inbox, it would be unfair to describe this as blameworthy conduct. Taking into account all the circumstances, Ms Boulger did not contribute to the circumstances to the situation giving rise to her personal grievance claims.¹⁰

Costs

⁹ Employment Relations Act 2000, s 124.

¹⁰ Employment Relations Act 2000, s 124.

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[48] If they are not able to do so and an Authority determination on costs is needed Ms Boulger may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum LCD would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[49] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances or factors required an upward or downward adjustment of that tariff.¹¹

Alex Leulu
Member of the Employment Relations Authority

¹¹ See www.era.govt.nz/determinations/awarding-costs-remedies.