

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 137  
5336425

BETWEEN                      DEBORAH BOWLER  
   Applicant  
  
A N D                              IRB REALTY LIMITED  
   Respondent

Member of Authority:      Rachel Larmer  
  
Representatives:              Scott McKenna, Counsel for Applicant  
   Tim Kinder, Counsel for Respondent  
  
Investigation Meeting:      13 March 2012 at Hamilton  
  
Submissions Received:      19 March 2012 from Respondent  
   26 March 2012 from Applicant  
   30 March 2012 from Respondent  
  
Date of Determination:      18 April 2012

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**DETERMINATION OF THE AUTHORITY**

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- A. Ms Deborah Bowler was unjustifiably dismissed by IRB Realty Limited (“IRB”).**
- B. IRB is ordered to pay Ms Bowler:**
- (a) \$5,906.25 lost remuneration; and**
  - (b) \$5,000.00 distress compensation.**

**Leave to defend matter**

[1] Ms Bowler’s Statement of Problem (“SoP”) was filed on 1 November 2011. IRB did not file its Statement in Reply until 29 February 2012. Because it had failed to file a SiR within 14 days of service of the SoP, IRB required the leave of the Authority to defend this matter.

[2] IRB had a history of unsatisfactory engagement with Ms Bowler and with the employment institutions in respect of this matter, so conditions were put around the granting of leave. The leave application was dealt with at the investigation meeting to ensure that IRB would properly engage in the Authority's process prior to leave being granted.

[3] IRB fulfilled the leave conditions and it fully participated in the investigation meeting so it was granted leave to defend this matter.

### **Employment relationship problem**

[4] Ms Bowler alleged she had been unjustifiably dismissed whilst on genuine sick leave. Ms Bowler said she was only away from work because she was very ill, to the extent that she had to be hospitalised. She alleged that her summary dismissal was substantively and procedurally unjustified.

[5] Ms Bowler alleged that Mr Ian Brookes, the sole director of IRB, summarily dismissed her during a telephone call to her mother (Mrs Frances Bowler – ("Mrs Bowler")) on the evening of Sunday 10 October 2010. She alleged Mr Brookes told her mother to tell her not to return to work the following day because he had found a replacement for her.

[6] IRB admitted ending Ms Bowler's employment during a telephone call with her mother, however Mr Brookes said he thought that call must have taken place on either Wednesday 6 or Thursday 7 October 2010. He denied calling Mrs Bowler on Sunday 10 October 2010.

[7] Mr Brookes believed that summary dismissal was justified because he had told Ms Bowler on Friday 1 October 2010 that she had to be at work on Monday 4 October 2010 regardless of whether or not she was sick because he needed her to run some important reports for him and the only other employee who could have done that was on annual leave for the week.

[8] Mr Brookes said that despite that advice, Ms Bowler did not attend work and did not call in to explain her absence. He said that Ms Bowler's failure to attend work on Monday 4 October 2010 seriously inconvenienced him.

[9] Mr Brookes said he concluded Ms Bowler had abandoned her employment which was why he told her mother that Ms Bowler “*was not required to come back to work.*”

### **Background facts**

[10] Ms Bowler was 17 years old when she commenced employment with IRB, and it was her first experience in the workforce.

[11] Ms Bowler was employed by IRB as a Receptionist. She worked 32.5 hours per week, from 9.00am to 4.00pm Mondays to Fridays with half an hour for lunch. Ms Bowler was paid \$13.50 per hour and she commenced employment on 2 August 2010.

[12] Ms Bowler took unpaid sick leave from 9-11 August 2010; 6&7 September 2010; and 4-8 October 2010<sup>1</sup>. Her first absence was due to flu, the second due to a migraine, and the third was the result of a severe kidney infection which resulted in her hospitalisation.

[13] Mr Brookes said he thought that Ms Bowler may have also been absent from work on 23 and 30 August 2010. His view was based solely on the absence of any telephone messages being recorded in the reception diary for those two dates. Mr Brookes accepted that Ms Bowler had not been recorded as absent from work on those two days and that she had been paid as normal.

[14] That contrasted with what had previously occurred when she had taken sick leave, when her absence had been recorded and she had not been paid. I therefore prefer, on the balance of probabilities, Ms Bowler’s evidence that she worked on 23 and 30 August 2010.

[15] I find Ms Bowler had a total of ten days sick leave during her employment, five days of which was certified sick leave.

[16] Ms Bowler said that when she returned from her first period of sick leave on 12 August 2010 Mr Brookes told her she had to phone the office if she was going to be absent. Ms Bowler said she explained she had not called because she did not have credit on her mobile phone. She said that she lived with her brother who could

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<sup>1</sup> This was the week prior to her dismissal.

contact their mother on his mobile phone for free<sup>2</sup> so she agreed that her mother would contact the office if she was going to be away from work if she did not have sufficient credit left on her mobile phone to call IRB herself.

[17] Ms Bowler agreed she was told she had to work on Monday 4 October 2010 regardless of whether she was sick but said she was physically unable to go to work because she was so ill. Her mother visited her that morning and it was agreed she would advise IRB that Ms Bowler was too ill to get to work.

[18] Mrs Bowler said she called the IRB office on 4 October 2010 to inform them that her daughter was too ill to work and that they did not know at that point how long she would be away. Mrs Bowler said she would call again the next day with an update on her daughter's health.<sup>3</sup>

[19] Mrs Bowler could not recall who at IRB she had spoken to but was certain she left a message saying her daughter was sick. Mr Brookes said that no call was ever received, so he was unaware that Ms Bowler was ill.

[20] I have preferred Mrs Bowler's evidence, because I consider it more likely than not that she did inform IRB that her daughter was away from work because she was ill. Mr Brookes said he did not receive documents which had been sent to IRB by the Authority via a track and trace courier and which had been signed for as having been received by IRB, so it follows that a telephone message may not have been passed on to him.

[21] Ms Bowler tried to see her doctor on Monday 4 October 2010 but was unable to get an appointment until the morning of Wednesday 6 October 2010. When she did see her doctor she was signed off work for the rest of the week.

[22] Mrs Bowler said she called Mr Brookes from her office on Wednesday 6 October 2010 immediately after her daughter's medical appointment to let him know she would not be returning to work before Monday 11 October 2010 because she had a kidney infection. Mrs Bowler said she offered to send Mr Brookes a copy of her daughter's medical certificate but he said it was not required.

[23] Mr Brookes denied this call occurred.

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<sup>2</sup> Because of his calling plan.

<sup>3</sup> Mrs Bowler admitted that she got busy at work and forgot to call IRB on Tuesday 5 October 2010.

[24] I have preferred Mrs Bowler's evidence because I consider it more likely to be correct than Mr Brooke's. I therefore find on the balance of probabilities that;

- a. IRB were informed of Ms Bowler's sickness absence on 4 October 2010; and
- b. Mrs Bowler personally informed Mr Brookes on Wednesday 6 October 2010 that her daughter had been signed off work until Monday 11 October 2010;
- c. Mr Brookes was offered a copy of Ms Bowler's medical certificate but declined it.

[25] Ms Bowler's health deteriorated on the evening of 6 October 2010. She was admitted to hospital around 01.00 am on Thursday 7 October 2010 and was released mid afternoon on Friday 8 October 2010.

[26] Mr Brookes admitted;

- a. to having spoken to Mrs Bowler on either Wednesday or Thursday;
- b. that during his call with Mrs Bowler he told her that he no longer had a job for her daughter;
- c. he did not recall what, if any response Mrs Bowler made;
- d. he did not make any notes of the call; and
- e. he believed his call to Mrs Bowler had ended Ms Bowler's employment with IRB.

[27] Mrs Bowler said that between 6pm and 7pm on Sunday 10 October 2010 Mr Brookes telephoned her at home to say he had been unable to contact her daughter. She said that Mr Brookes asked her to pass a message to her daughter not to come into work on the following day (Monday, 11 October 2010) because he had found a replacement for her.

[28] Mrs Bowler said she was taken aback by this advice so asked Mr Brookes if he had replaced her daughter because she had been sick. Mrs Bowler alleged that Mr Brookes told her "*there had been quite a lot of health issues*".

[29] Mr Bowler did not believe this call had occurred because he said it was his practice not to call people on Sundays.

[30] I have preferred Mrs Bowler's evidence about the call because her actions were consistent with the call having taken place on the Sunday, rather than earlier in the week. Mrs Bowler advised her daughter on the evening of 10 October 2010 that Mr Brookes had replaced her because of her health.

[31] Mrs Bowler also faxed Mr Brookes on Monday 11 October 2010 asking him to urgently advise whether Ms Bowler was required to work out her notice period. The fax specifically referred to their telephone conversation the night before.

[32] Mr Brookes admitted that he received Mrs Bowler's fax but did not reply to it. If Mr Brookes' evidence was correct then I would have expected him to have responded to Mrs Bowler's reference in her fax to their conversation the previous evening. The fact he did not do so lends credibility to Mrs Bowler's evidence.

### **Abandonment**

[33] Although Mr Brookes suggested that Ms Bowler had abandoned her employment, IRB's case did not proceed on that basis. Rather IRB's position was that it ended Ms Bowler's employment and that it was justified in doing so.

[34] For the sake of completeness, I find that Ms Bowler did not abandon her employment. She was only away from work because she was genuinely ill and expected to return to work on Monday 11 October 2012. I note that there was no written employment agreement, so there was no abandonment clause IRB could have relied on to have ended Ms Bowler's employment by operation of contract.

### **Dismissal**

[35] Ms Bowler's employment ended without notice at IRB's sole initiative, so I find that she was summarily dismissed. Although Mr Brookes believed that the dismissal must have occurred on either Wednesday 6 or Thurs 7 October 2010 I do not accept that evidence.

[36] Mr Brookes did not have a clear or reliable recollection of events. His evidence was based on assumptions he had made about how he believed he would

have acted and what he thought he would have done, rather than an actual recollection of the events in issue.

[37] I consider that Mr Brookes' memory of the events involving Ms Bowler was poor. I therefore consider that his evidence was weaker than the evidence of Ms Bowler and Mrs Bowler, who both could specifically recall most of the events they were recounting.

[38] I consider it more likely that Mrs Bowler spoke to Mr Brookes on Wednesday 6 October 2010 to inform him that her daughter would not be at work for the remainder of the week. I also find that the dismissal occurred during Mr Brookes' telephone call to Mrs Bowler on Sunday 10 October 2010 when he told her that Ms Bowler was not to return to work the following day.

[39] The issue for determination is therefore whether Ms Bowler's summary dismissal via a telephone call to her mother whilst she was on certified sick leave was justified.

#### **Justification test**

[40] The s.103A justification test in the Employment Relations Act 2000 ("the Act") as it applied prior to the 1 April 2011 amendment, applies to this matter.

[41] This requires the Authority to assess justification on an objective basis, by considering whether IRB's actions, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

#### **Reasons for dismissal**

[42] Mr Brookes told me that Ms Bowler's employment ended because;

- a. She had not come into work the week commencing 4 October 2010;
- b. She had failed to report her absence on 4 October 2010;
- c. Some of the office programmes were beyond her experience;
- d. Some of the office systems were beyond Ms Bowler's capabilities.

[43] Explanations (c) and (d) above were not referred to in the SiR or in Mr Brooke's written statement but were raised by him for the first time when giving his evidence.

[44] I find that none of the above concerns either singularly or in combination were capable of amounting to serious misconduct which would have justified summary dismissal. I therefore find Ms Bowler's dismissal was substantively unjustified.

### **Process**

[45] Mr Brookes admitted that no formal process had ever been commenced with Ms Bowler in respect of any of the concerns he had identified as reasons for her summary dismissal.

[46] Mr Brookes accepted he had never warned Ms Bowler that she could lose her job if she did not report in on the first day of sickness absence or if she continued to have time away from work because she was unwell. Nor did Mr Brookes ever advise Ms Bowler that he believed she was having too much sick leave or that she was engaging in "*Mondayitis*". Likewise, his concerns about her alleged inability to appropriate manage her duties were never raised with her.

[47] Mr Brookes also accepted that Ms Bowler had not received any prior warnings regarding any of the matters of concern to him which had resulted in her dismissal. Accordingly, Ms Bowler was never put on notice that her ongoing employment was in jeopardy, so she was deprived of any opportunity to respond to Mr Brookes' concerns before she was summarily dismissed.

[48] IRB did not follow a fair or proper process, so I find that her dismissal was procedurally unfair.

### **Good faith**

[49] I find that IRB breached its s4(1A) statutory duty of good faith because it failed to provide Ms Bowler with information relevant to its decision to dismiss her. That meant she was deprived of any opportunity to comment on the information IRB relied on before it dismissed her. This undermines the justification of her dismissal because a fair and reasonable employer would comply with its statutory good faith obligations.

**Outcome**

[50] IRB did not have a good reason for dismissing Ms Bowler. It did not follow a fair or proper process before dismissing her and it breached its statutory good faith obligations. I find that IRB's actions and how it acted were not what a fair and reasonable employer would have done in all of the circumstances.

[51] Accordingly, I find that Ms Bowler's dismissal was substantively and procedurally unjustified.

**Comment on IRB's actions**

[52] I consider that IRB's failure to appropriately engage with Ms Bowler, a 17 year old whose employment with IRB was her first experience in the workforce, does it no credit.

[53] Ms Bowler was not provided with a written employment agreement. Nor was she provided with written terms of employment. Her attempts at the outset of her employment to obtain clarity around the payment of her wages were not responded to for three days by Mr Brookes.

[54] Mr Brookes terminated Ms Bowler's employment by asking her mother to tell her she was not to come back to work. He did not engage personally with Ms Bowler at all.

[55] The day after Mr Brookes terminated Ms Bowler's employment her mother faxed him asking if her daughter was required to work out a notice period. Mr Brookes admitted receiving Mrs Bowler's fax but never responded to it. No notice was paid out upon termination.

[56] Mr Brookes failed to respond to a written request from Ms Bowler's representative dated 29 October 2010 which was made pursuant to s.120 of the Act for written reasons for Ms Bowler's dismissal, despite admitting to having received it.

[57] Mr Brookes also failed to respond to a separate written request from Ms Bowler's representative dated 29 October 2010 asking for a copy of Ms Bowler's wage and time records, pursuant to s.130 of the Act.

[58] Ms Bowler's representative followed these requests up with a telephone call to Mr Brookes and was told the information would be provided. However, he failed to do so.

[59] Ms Bowler's solicitor wrote to Mr Brookes raising her personal grievance claim on 21 December 2010. Mr Brookes did not respond to that correspondence, despite being specifically asked to do so.

[60] Mediation was scheduled to occur in Hamilton on 5 May 2011. IRB did not attend mediation. When the mediator made inquiries with Mr Brookes to determine why IRB had not attended the scheduled mediation Mr Brookes said he had been unable to attend because his mother had just died.

[61] During the Authority's investigation Mr Brookes advised that his mother had in fact passed away on 25 April 2011. Mr Brookes was unable to explain why that had prevented his attendance at mediation on 5 May 2011 or why he had not informed Ms Bowler, her representative, or Mediation Services that he would not be attending.

[62] Mr Brookes' actions wasted mediation resources which could have been reallocated to other parties had Mr Brookes made those involved with his mediation aware prior to the scheduled mediation date that he would not be attending. It was unsatisfactory for a mediator to have to chase him up to explain his absence.

[63] Mediation occurred on 22 June 2011. The parties were also directed to further mediation on 5 March 2012, which both parties attended.

[64] The Authority had proof that Ms Bowler's SoP dated 1 November 2011 had been served on IRB on 2 November 2011 because it had been signed for. IRB did not file its SiR within 14 days, as required.

[65] The Authority wrote to Mr Brookes on 7 December 2011 to advise that because IRB had not filed a SiR within time it required leave of the Authority if it wished to defend Ms Bowler's claim. Mr Brookes was advised to respond to the Authority by 14 December 2011 if IRB intended to defend the matter. No response was received by that date. The Authority has proof that its letter was served on IRB on 8 December 2011.

[66] By letter dated 19 January 2012, the Authority directed IRB to provide a copy of Ms Bowler's wage and time records, pursuant to s.130 of the Act together with a copy of its employer monthly schedule for the months during which Ms Bowler was employed. This information was never provided.

[67] IRB did not file its SiR until 27 February 2012. Its application for leave to file its SiR out of time was not filed with the Authority until 5 March 2012.

## **Remedies**

### *Mitigation*

[68] Ms Bowler said she enrolled with three different job agencies and attended an Employment Plus course run by the Salvation Army which was designed to help people learn skills to obtain a job. This covered issues such as writing a good CV and attending a job interview.

[69] Despite applying for job and cold-calling on potential employers, Ms Bowler was unable to obtain new employment. Because she was 17 at the time she was dismissed she was not eligible for an unemployment benefit, so relied on parental support until she turned 18 on 6 January 2011. After this date Ms Bowler began to receive the unemployment benefit. She has not obtained employment since her dismissal.

[70] I am satisfied that Ms Bowler took appropriate steps to mitigate her loss. I am also satisfied that she lost remuneration as a result of her unjustified dismissal. It is appropriate that she be compensated for that.

### *Lost remuneration*

[71] Ms Bowler claimed lost remuneration of \$5,906.25.

[72] I find that Ms Bowler lost more than three months' remuneration as a result of her unjustified dismissal and that it is appropriate to compensate her under 128(3) of the Act for her actual loss.

[73] IRB Realty Limited is ordered to pay Deborah Bowler \$5,906.25 pursuant to s.128(3) of the Act.

*Distress compensation*

[74] Ms Bowler also satisfied me that she suffered hurt, humiliation, and injury to her feelings.

[75] I find that IRB exhibited a total disregard for Ms Bowler's rights. The manner in which it dismissed Ms Bowler whilst she was genuinely very ill was callous and impersonal in the extreme.

[76] IRB made no attempt to follow any kind of process at all. Dismissal came as a complete surprise to Ms Bowler, who at the time was struggling with ill health.

[77] Mr Brookes did not even do Ms Bowler the basic courtesy of having a personal conversation with her, nor did he respond to any of her attempts to communicate with him after he advised her mother she was not to return to work.

[78] I consider that distress compensation of \$5,000 is appropriate.

[79] Accordingly, IRB Realty Limited is order to pay Deborah Bowler \$5,000.00 pursuant to s.123(1)(i)(c) of the Act to compensate her for the humiliation, loss of dignity, and injury to her feelings her unjustified dismissal caused her.

**Contribution**

[80] I find that Ms Bowler was genuinely ill, so I consider that she did not contribute towards the situation that gave rise to her dismissal grievance.

[81] Mr Brookes' direction that she attend work on 4 October 2010 regardless of whether she was genuinely ill was unreasonable and inappropriate. Ms Bowler's failure to attend work when she was genuinely very ill was not blameworthy conduct which warrants a reduction in remedies.

**Costs**

[82] The applicant was legally aided. She has been wholly successful so entitled to a costs award in her favour.

[83] The parties are encouraged to resolve costs by agreement. However, if that does not occur within 14 days of the date of this determination, then Ms Bowler has a

further 14 days within which to file an application for costs. IRB has 14 days within which to respond.

[84] No costs applications will be considered outside this timetable without the prior leave of the Authority.

**Rachel Larmer**  
**Member of the Employment Relations Authority**