

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Frances Collins (Applicant)  
**AND** Ngati Porou Hauoroa Inc (Respondent)  
**REPRESENTATIVES** Graeme Ogilvie, Counsel for Applicant  
Tim Bravenboer, Advocate for Respondent  
**MEMBER OF AUTHORITY** Dzintra King  
**INVESTIGATION MEETING** 21 April 2005  
**DATE OF DETERMINATION** 31 May 2005  
**SUBMISSIONS RECEIVED** From applicant, 12 and 20 may 2005  
From respondent, 20 may 2005

**DETERMINATION OF THE AUTHORITY**

The applicant, Ms Frances Collins, claim that she was unjustifiably dismissed by the respondent, Ngati Porou Hauoroa Inc. The respondent says that Ms Collins abandoned her employment.

Ms Collins was employed by the respondent in an administrative role at Te Puia Springs Hospital. She suffered an accident on 31 October 2003 and went to hospital on 2 November. She was admitted to hospital on 11, 18 and 28 November. On 20 November she had a visit from Mr Terry Ehau, her manager.

On 4 December Ms Collins saw Dr Nathan Joseph who the applicant says indicated he would issue a medical certificate. After having tried to phone Mr Ehau Dr Joseph said he would send the certificate to Mr Ehau. Dr Joseph said he did recall trying to phone Mr Ehau but was unsure whether he had issued a medical certificate. I subsequently obtained records which showed he had not done so.

Around this time Ms Collins involved her union, the PSA. The organiser, Ms Margaret Takoko, spoke to the employer in Ms Collins' absence. Subsequently a letter containing an offer suggested by Ms Takoko was sent by the employer to Ms Collins. Ms Collins then spoke to Ms Takoko and told her to decline the offer which she did on Ms Collins' behalf in a letter dated 12 December.

The letter of 18 December says:

*Ms Collins does not accept that a fair and reasonable process has been carried out to investigate her ability to return to the workplace  
Ms Collins remains on Sick Leave with out pay until a diagnosis/prognosis is established.*

*Ngati Porou Hauora has the ability to appoint a temporary worker to fulfil the role that Ms Collins undertook – thus allowing both NPH and Ms Collins to work through a return to Workplace process*

NPH at no stage disputed that Ms Collins was to remain on unpaid sick leave until a diagnosis could be established.

Two things happened on 23 December. Ms Collins saw Dr Joseph again and he again indicated he would supply a medical certificate to Mr Ehau. This did not happen and the records show no medical certificate was issued. Dr Joseph indicated that he had said he would do a medical certificate for Ms Collins on 4 December and had tried to phone Mr Ehau to obtain clarification relating to dates and so did not finalise a medical certificate. He also accepted that although he had not done a medical certificate for 23 December he should have done so.

On the same day the employer wrote the following letter, which was addressed to Ms Takoko and copied to Ms Collins:

*Tena koe Margaret,*

*Re: Frances Collins*

*Thank you for your letter dated 18<sup>th</sup> December 2003.*

*I have read and understood Ms Collins position on this issue. I have a very busy year in 2004 and am currently planning my resource requirements for such.*

*Can you please arrange for Ms Collins to fulfil all of her obligations as per section 14 of the East Coast Collective Agreement? This will enable me to plan for the resource requirements I need in Ms Collins absence.*

*I wish Ms Collins well in her recovery.*

Ms Collins said she had not seen the Collective. This is disputed but in any event she asked Ms Takoko what clause 14 was about and was told it was about providing medical certificates. When I interviewed Ms Takoko she confirmed that she had told Ms Collins that clause 14 meant was that she needed to supply medical certificates.

Clause 14 of the Collective deals with more than the provision of medical certificates. It is headed "Sick/Domestic Leave". The evidence for the employer was that there was an expectation that all the procedural aspects of 14.5 to be complied with. This included Ms Collins needing to contact her employer and being required to indicate how long she expected to be absent. Basically, the employer wanted to know what was happening.

Ms Collins had assumed that the medical certificates had been provided. Surprisingly, she made no effort to contact Dr Joseph to ensure that they had been. Even when she saw him in the New Year after receiving her letter of termination she did not think to ask.

Having heard nothing, Mr Ehau wrote on 2 February 2004:

*This letter is formal acknowledgement by Ngati Porou Hauora Inc (NPH) that you have abandoned your employment.*

*You have been absent from your workplace since the 5<sup>th</sup> November 2003. After discussions with your PSA Organiser (Margaret Takoko) an offer from NPH was conveyed to you by Margaret Takoko which you declined as per letter date 18<sup>th</sup> December w003.*

*In response, a letter dated 23<sup>rd</sup> December 2003 was sent to your PSA Organiser in which NPH requested that you fulfil your obligations as per section 14 of the Single Site Collective Agreement.*

*As we have had no response we can no longer hold this position open for you. Therefore we are now terminating your employment with Ngati Porou Hauora Inc.*

Following this letter a medical certificate was received on 5 February which covered the period from 31 January to 1 March.

On 16 February Ms Takoko wrote to Ms Dianne Gibson, Kai Arataki, about the termination letter:

*We acknowledge your letter of the 2 February 2004. It is with great concern that we respond.*

*It is our understanding that Ms Collins and her Medical Practitioner has (sic) provided you with medical certificates to meet the requirements of the Collective Agreement. Please further note that at no time apart from a brief visit from Mr Ehau – Ms Collins has not been approached by her employer to ascertain her wellness.*

*Therefore we seek a copy of Ms Collins personal file – this is to include all aspects of her employment and medical certificates to date.*

*Please note that we are also seeking copies of medical certificates provided by Ms Collins Medical Practitioner – for comparison.*

*Ms Collins has an honest belief that medical certificates were provided and that she met the requirements as outlined in the Collective Agreement.*

*Please respond within 7 days of today's date*

NPH said the letter of 16th February had not been received but when I perused Ms Collins' file during the Investigation Meeting the letter was there and it was date stamped. It can only be assumed that the employer's procedures were less than satisfactory in that instance.

### Collective Agreement

Clause 14 imposes certain obligations upon the employer. Clause 14.5.6 says:

*Employees who have been absent for 3 moths may be required to undergo an examination by medical personnel nominated by the Employer and at the Employer's expense....*

Cause 14.5.9 reads:

*Where a person becomes incapacitated or disabled through sickness or injury as confirmed by a medical practitioner nominated by the Employer, and the employee is unable to return to work, following review of the employee's situation by the management the Employee's employment may be terminated.*

Instead of using the clauses relating to termination for illness the employer chose to use the abandonment clause.

*Where an employee absents himself/herself from work for a continuous period exceeding three working days, without notification to the employer, the employee shall be deemed to have abandoned their employment, except where the Employee, through no fault of his/her own has been unable to notify the Employer.*

The employer knew Ms Collins was ill. It had been notified of that fact and Mr Ehau had visited her at her home.

### The Termination

This is a case characterised by miscommunication with faults on both sides. It was justified as a termination due to abandonment although the reason for the termination was obviously what the employer perceived as Ms Collins' failure to keep it informed of the state of her ill health.

Once the matter of the medical certificates was brought to Ms Collins' attention by the letter of 23 December she and/or her representative should have checked the situation regarding the supply of medical certificates. I am surprised that this did not happen and received no satisfactory explanation for this failure.

I do not think that sending a letter requiring the recipient to comply with the broad provisions of the clause 14 was at all helpful. Ms Takoko, an experienced organiser, familiar with the document, said she thought it meant a request to comply with the provision of medical certificates as she was under the impression, as was Ms Collins, that she was on unpaid sick leave as per the letter of 18 December 2003. Had the employer said, simply, that it had not received any medical certificates that it didn't know what is happening and needed to know otherwise consideration would be given to the termination of her employment, matters may well have taken a different course.

This was not a case where the employee had not notified the employer. The employer knew she was sick There were clauses in the contract relating to termination for illness. Although clause 14.5.6 is discretionary, this would have been an ideal situation in which to exercise that discretion. There was no evidence that the employer had even turned its mind to the exercise of this discretion. The use of that discretion would have enabled Ms Collins to participate in the decision regarding the termination of her employment. Given the obligation of good faith inherent in the employment relationship it was incumbent upon the employer, at the very minimum, to have considered using the discretion provided for in that clause. I accept that the obligations are mutual, and it was also incumbent Ms Collins to have checked that the employer had the medical certificates she believed had been supplied.

### Decision

The termination of Ms Collins' employment was fundamentally due to her inability to work. There is no fault attached to this on her part. She was genuinely ill and unable to work.

The dismissal was unjustified because Ms Collins did not have notice of the fact that the employer was considering a dismissal and had no opportunity for input into that decision. Furthermore, abandonment could not be used as a justification as the employer had been notified. What the employer wanted, and was legally entitled to get, was to be given information about the state of Ms Collins' health so that assessments could be made about her employment.

### Remedies

Ms Collins has now been successful in getting her condition accepted for accident compensation. She can have no claim for lost income. The only remedy that can lie is for humiliation and distress. When I asked Ms Collins about this much of what she said had to do with her illness rather than with the dismissal. I appreciate that in circumstances such as her's it can be difficult to separate the two. The distress that there was derived from the suddenness of the announcement and its fait accompli nature. The respondent is to pay her \$3,000 pursuant to s.123 ( c) (i).

### Contribution

Had Ms Collins taken the trouble to follow up on what she and her representative saw as a request for medical certificates the grievance would not have arisen. This behaviour was blameworthy and did contribute to the circumstances leading to the personal grievance. The remedies awarded are therefore to be reduced by one third to \$2,000.

### Costs

If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King  
Member of Employment Relations Authority