

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number: WA 71/08  
File Number: 5092989

BETWEEN      BRENDA COLLINS  
                    Applicant  
  
AND              TMS MEDICAL LIMITED  
                    Respondent

Member of Authority:      P R Stapp  
  
Representatives:              Sharon Brennan for Applicant  
    Leile Sims for Respondent  
  
Investigation Meeting:      Wanganui 23 April 2008  
  
Submissions:                  2 and 9 May 2008  
  
Determination:                27 May 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Brenda Collins has claimed that she was unjustifiably dismissed. She is seeking an annual leave entitlement of 18.75 days, 9 hours of unpaid overtime worked, 4 weeks notice, lost wages and compensation of \$15,000 for humiliation, loss of dignity and injury to feelings, penalties for a breach of employment agreement and breach of good faith, and costs.

[2] The Respondent denied dismissing the Applicant. It contended that the Applicant failed to attend work after a period of paid leave.

[3] The Respondent denied all the other claims. It contended that some of the events are outside the 90 days allowed for to raise a personal grievance and does not consent to raising a personal grievance on those matters. It was agreed by the

Applicant, during the Authority's investigation meeting, that those matters had been covered as a matter of background to her personal grievance.

### **The Facts**

[4] Brenda Collins was employed in a job share role as a medical receptionist for TMS Medical Limited (TMS) on 8 November 2004. Her starting rate of pay was \$15 per hour. Upon the resignation of Carol Schiebli, the other receptionist working alongside Ms Collins, Ms Collins agreed to extend her hours to 32 hours per week. Ms Collins immediate supervisor was Mrs Norma Faumui, also an employee and a shareholder in TSM.

[5] Ms Collins says her training upon being appointed was insufficient to support her in her role. TMS says that she applied for the role representing her self as capable and qualified for the challenge, although she did not have a medical background. It says she was provided with training and had the other receptionist present to help. In addition TMS had a Procedure and Process Book as a resource and Mr Penaia Albert Faumui, also known as "PJ", the owner, and had an "open door" policy. Ms Collins was also provided with external computer "IT support", which she utilised. Typing was outsourced when the she was under pressure. Ms Collins was provided with a paid hearing test and headphone options were made available.

[6] Ms Collins was paid overtime, but in May 2005 Mrs Faumui says that Ms Collins asked for time in lieu instead of being paid, and Mr Faumui agreed to that proposal. It was confirmed by Ms Collins in a letter dated 6 February 2007.

[7] Ms Collins has provided much detail on a performance assessment made on 28 December 2006. The Respondent has been unclear why this concern has been raised now. I simply refer to this as background and will refer to any detail as it is relevant to do so.

[8] On Thursday 8 February 2007 there was an incident involving a telephone call. Mr Faumui telephoned Ms Collins about information he had been provided with on a patient being moved up the operating list at Good Health Wanganui (GHW). Because he was concerned and needed to ensure no mistake had been made he telephoned Ms

Collins for information. He says he asked Ms Collins if she knew what had happened and whether she had called the hospital regarding the patient. He says her reply was vague and he decided he would have to deal with it later considering he was at the hospital. Ms Collins says he yelled at and abused her. He denied yelling and abusing her and says he merely was trying to find out what had happened. Joanne Kirk an enrolled nurse at Good Health Wanganui says Mr Faumui did not yell at Ms Collins because she was present when Mr Faumui telephoned Ms Collins. Ms Kirk provided a letter dated 15 May 2007 on the event. However, she informed the Authority that that letter was written in conjunction with Mr Faumui. She also provided her own witness statement for the Authority's investigation.

[9] Ms Collins got up set after the telephone call. Mrs Faumui and Ms Collins met and Mrs Faumui says she tried to calm Ms Collins down. Mrs Faumui says that she was worried about how upset Ms Collins was and says she suggested Ms Collins take the rest of the day off. Ms Collins declined the offer. This was not challenged. Mrs Faumui says Ms Collins then told her how unhappy she had been for the last six months, she had been unwell, and could not bear to work there another day, and that Ms Collins indicated that she was considering resigning, although in her written evidence Mrs Faumui said that Ms Collins had resigned. Mrs Faumui says Ms Collins declined again to take some time out, which was not challenged. Ms Collins denied that she said to Mrs Faumui how unhappy she had been for the last six months, she had been unwell, and could not bear to work there another day. She says she never said she was resigning, but had to put it in writing because that is what Mr and Mrs Faumui wanted.

[10] Ms Collins says she was accused by Mr Faumui of informing Good Health Wanganui of placing someone up the public list. She says that she said to Mrs Faumui that she "felt like" resigning, not that she wanted to resign or that she was going to resign. She says she reluctantly resigned after Mrs Faumui requested her resignation in writing. She has relied on Jodi Edwards, the Bay Audiology receptionist who had shared services with TSM, confirming that Mr Faumui yelled at her over the phone, that Ms Collins was up set, and that she advised Collins to get some advice from MERCAM. Ms Edwards was not available to attend the Authority's investigation meeting. Ms Collins says she burst in to tears in front of patients, and told me at the investigation meeting a patient heard Mr Faumui on the phone yelling.

[11] Mrs Faumui contacted Mr Faumui who agreed to deal with the problem when he returned to the clinic, but in the meantime he asked her to contact someone at the Employers and Manufacturers Association (EMA) to get advice about notice and pay when someone decides to resign.

[12] Mrs Faumui says she followed advice that she received from EMA to get any resignation in writing, and says she explained to Ms Collins the notice required under the employment agreement, whereupon she says Ms Collins got more up set and decided that she would not work for Mr Faumui any more, but says she wanted to work out her notice after returning from her leave.

[13] Mrs Faumui says she told Ms Collins that she wanted her to at least turn up to work on Monday and Tuesday because it would be difficult to find someone at short notice. Mrs Faumui denied saying to Ms Collins *“that it would be best if she resigned”*.

[14] Ms Collins put her resignation in writing and gave it to Mr Faumui. It read *“I hereby give my notice of 4 weeks resignation, as stated in my contract, affective as at today 8.2.2007”*.

[15] On 9 February 2007 Mr Faumui sent a letter to Ms Collins giving her an opportunity to get independent advice and to reconsider her resignation. He believed that her resignation *“may have been submitted under stress or under duress”*. He offered to meet to discuss her reasoning for resigning and that he wished her to make a decision before 10.00am on Monday 12 February 2007. He also gave her the opportunity to get independent advice. The parties have put different meaning and emphasis on the words *“submitted under stress or under duress”*

[16] Ms Collins prepared an email to TMS stating her resignation had been *“submitted under duress and stress as a result of [the Respondent’s] phone call on Thursday from Good Health Wanganui”*, but that she enjoyed working at TMS and said that she would like to continue working for TMS.

[17] Ms Collins attended work on Monday 12 February 2007. She says that Mrs Faumui told her it was too late to take back her resignation because Mr Faumui had

gone to surgery. Mrs Faumui denied this and says she informed Ms Collins that Mr Faumui had gone to surgery and that he would not have seen the email and would not be able to see it until he got out of surgery at lunch time. Ms Collins says she sent the email before a deadline of 10.00am that Mr Faumui gave her to respond and time to think about what she was doing. She says Mrs Faumui abruptly asked her to leave the premises and said it was “*obvious we don’t want you here*”. Mrs Faumui denied this. Ms Collins says she refused to leave and worked until the end of the day. She also worked a half day on the Tuesday as planned. Mrs Faumui says all she said to Ms Collins was that it was “too late for PJ to see it”. She says she had no idea what it meant that PJ had not seen the email and she could not speak for him.

[18] Ms Collins returned to work on Tuesday 12 February 2007 and claimed Mrs Faumui acted smugly. Ms Collins says she was uneasy, there was no verbal communication, and any tasks that she had to do were put in a note on her desk. Ms Collins says this up set her. She says she cleared her desk of her personal belongings. This is denied by Mrs Faumui who says Ms Collins had no personal belongings and any photos to clear, except for leaving the key in an envelope. Mrs Faumui says she expected Ms Collins to have her holiday and return to work as she had withdrawn her resignation. The Faumuis say they considered Ms Collins’ email was a withdrawal of her resignation.

[19] On 13 February 2007 Mr Faumui raised three incidents for a disciplinary meeting when Ms Collins returned from her leave, on 6 March 2007.

[20] The next day (14 February 2007) Ms Collins went on her leave that had previously been arranged. She was expected to return to work on 5 March 2007. Her pay went through as normal. But she did not return to work believing that she was not wanted and that her resignation had not been rescinded by Mr and Mrs Faumui. She did not attend the meeting requested for 6 March 2007, and then a letter dated 2 March 2007 was received after 5 March by TSM in which Ms Collins claimed an unjustified dismissal. Ms Collins claims that Adecco was called in by Mrs Faumui to replace her and is prove of predetermination on the outcome. There was not sufficient detail provided to support the claim.

[21] Mrs Faumui asked Carol Schiebli, who was going to cover during Ms Collins' leave, to help out, and she did so upon returning from her own leave from 8 April and is now Mr Faumui's personal assistant. Ms Collins says she understood that a person from Adecco went in to talk to Mrs Faumui to replace her. This is denied and Mrs Faumui says that she arranged for a temp from Adecco once Ms Collins did not return and this contact was only made on 5 March and the person worked from 13 March. The temporary engagement finished on 20 April 2007.

### **The Issues**

[22] What were the circumstances in which Brenda Collins' employment with TMS ended? Is there a supportable claim for unjustified dismissal? Is Brenda Collins owed any outstanding leave and overtime? Has TMS breached Ms Collins' employment agreement and has it failed to act in good faith for penalties?

### **Determination**

[23] Ms Collins resigned on Friday 9 February 2007 when she put her decision in writing. I find that it is entirely reasonable for an employer to ask an employee who is considering or intending to resign to put it in writing. Clearly it remains a dispute about what Ms Collins and Mrs Faumui said to each other and in its best light there probably has been some misunderstanding. Whatever was said between them nevertheless does not detract from the employer's right to ask for any intended resignation to be put in writing. Indeed the Faumis' approach was consistent to obtain from Ms Collins what she wanted to do and give her an opportunity to think about what she wanted to do. In this case Mrs Faumui received advice from EMA and I accept that there was nothing more than that to it. Ms Collins' reason for resigning, unfortunately for her, could not be corroborated. Mr Faumui denied "yelling and abusing" Ms Collins. Another witness, Joanne Kirk, supported him, about how he says he behaved in making the telephone call, because she was present and heard him and watched him during that call. Mr Faumui was also supported by a character witness, Carl Schiebli, who says Mr Faumui does not yell and is not abusive in her experience of working with him.

[24] I accept that Mr Faumui requested Mrs Faumui to get advice from the EMA on what to do when Ms Collins announced she was considering resigning. I accept that

Mr Faumui decided that Ms Collins would be required to put her decision in writing if she intended to resign to enable her to have time to reconsider her decision because she was terribly up set. He is supported by his letter of 9 February giving her time to reconsider and get independent advice. In hindsight he now accepts that the timeframe should have been left open given that Ms Collins was going on leave.

[25] The next issue is about whether or not Mrs Faumui told Ms Collins that she was not wanted and was to leave and *“that it would be best if she resigned”* when she had wanted to know whether or not Mr Faumui had received her email withdrawing her resignation and what he had decided. This dispute was not dealt with by Mr Faumui probably because the events happened so quickly and Ms Collins left. I find that given that Ms Collins remained at work on 12 February and returned to work on 13 February it was improbable that Mrs Faumui would have said *“that it would be best if she resigned”* and that it was *“too late for PJ to see it”*, referring to the email, and it was *“obvious we don’t want you here”*.

[26] I find it was reasonable for the Faumis to have expected Ms Collins to return to work after her leave because:

- A temp was brought in to cover her leave.
- Ms Collins has not been able to establish that the Faumis had decided to replace her before she took her leave.
- A temp was arranged only when Ms Collins did not return to work on 5 March.
- A further arrangement was put in place for a temp between 13 March and April with an agency called in to help find a replacement.
- No final pay was completed and no calculations taken on any leave and sick leave until Ms Collins’ lawyers became involved.
- The disciplinary meeting letter implied an expectation Ms Collins would return to work after her leave when Mr Faumui expected to meet with her.
- During his evidence he explained that his concern was to get the procedures and systems right and for there to be a clear understanding about various roles concerning the private and public lists at GHW.

[27] I find that the meaning Mr Faumui attached to his use of the words “*stress and duress*” in his letter related to how he believed Ms Collins had reacted to his telephone call and the events, and not attributed to any of his actions and those of Mrs Faumui. This was a plausible and genuine explanation of the situation.

[28] Ms Collins’ decision not to return to work after 5 March is not a ground upon which a personal grievance can be found given that it is probable she made her decision not to return in the circumstances where there was no proven dismissal when she either thought there was or was told there was a dismissal. Either way this was incorrect. Ms Collins took an extreme risk putting her employment on the line.

[29] The employer’s decision to send Ms Collins the letter for a disciplinary meeting on 13 March was not particularly sensitive on the eve of Ms Collins taking her leave, although an employer is not prevented from writing in such terms to pursue matters that legitimately were of some concern. The legitimacy of those matters has not been challenged in the sense that Ms Collins raised any personal grievance about them as opposed to Ms Collins believing that there was no substance to them, which is an entirely separate matter. Even if it was unjustified of the employer to raise them Ms Collins would not have been disadvantaged because there was an opportunity for her to respond and reply in due course. Insensitivity does not necessarily equate with an unjustified action, I hold.

[30] Furthermore, the employer’s right to raise such matters of any concern and to do so for a reply, response and any comment, outweigh Ms Collins’ belief that the letter was sent to make her position more intolerable and untenable. As I said it was insensitive but not unjustified and did not disadvantage Ms Collins where she had the opportunity later to reply, respond and comment. She would have also had an opportunity to seek a delay but there is no evidence that she did so considering the parties’ next steps involved their representatives in a legal process on a personal grievance. It would have been entirely unjustified for the employer to have denied any request for a delay considering Ms Collins was taking annual leave and her right to prepare and be informed of the details of the three allegations. The details of the three allegations were not provided at the time the letter was written, but the opportunity existed for Ms Collins to obtain the detail after her leave and she was informed of Mr Faumui’s desire to meet with her and a representative. The meeting could not take

place anyway because Ms Collins did not return to work and it was not pursued by Mr Faumui.

[31] In the meantime on 5 and 6 March Mrs Faumui tried to contact Ms Collins without any success. There were no further attempts made to contact her after that because Mr Faumui took the view that she had some responsibility to contact them. I will return to this point shortly.

[32] Ms Collins has not been able to support her claim that her resignation was not withdrawn as she had requested. This is because there were no independent witnesses to the conversations between her and Mrs Faumui. Any way I am satisfied that Ms Collins was dealing with Mr Faumui, and not Mrs Faumui, because he wrote to Ms Collins and she replied to him and understood she needed to reply to him. There was an absence of any delegated authority and any alternative arrangements for Mrs Faumui to make any decision. In the absence of that Ms Collins could have reasonably waited until Mr Faumui was available, even although he had gone to surgery.

[33] Mr Faumui explained to me that his concern was to get the procedures and systems right and for there to be a clear understanding about various roles concerning the private and public lists at GHW. If this was the intention it was unfortunately not communicated at the time because the letter sent was a disciplinary letter containing three allegations Ms Collins was asked to explain. Mr Faumui accepts now the responsibility for embarking on a disciplinary process instead of establishing the responsibilities for the various roles and importance of the procedures and systems for the public and private hospital surgery lists as he may have intended. The letter is not the subject of any grievance as such.

[34] Mr and Mrs Faumui expected Ms Collins to take some responsibility for contacting them after 6 March when Mrs Faumui was not able to reach her. The Faumis knew at least from 5 March that Ms Collins had been on leave and was due to return. By that stage they knew there was a personal grievance that had been raised and lawyers had become involved. I find that that excuses them from making any further contact with her and where Ms Collins says she "*was advised not to return to work as I had already been dismissed*". On this basis it was reasonable for the employer to conclude she would not be returning to work, and that was her decision. Also with the

applicant submitting a personal grievance the Faumui's could be excused from any further involvement and rely on their representative, and properly have to deal through the applicant's representative.

[35] Therefore, Ms Collins' claim for a personal grievance and claims of breaches of good faith for penalties are dismissed.

[36] I now turn to Ms Collins' claim for overtime. She agreed that any overtime hours would be paid by a time in lieu arrangement. There is no contractual provision for such hours to be paid if the time in lieu had not been taken before leaving. Moreover, Ms Collins was not able to support her claim with any documentation and any independent verification of such overtime being worked. In the absence of that considering the claim was denied I dismiss the claim.

[37] I find that the calculation produced by the employer was not challenged and Ms Collins did not contradict the off setting of sick leave and holidays from the reconciliation provided by Mrs Faumui. Indeed Ms Collins' decision to leave was calculated in the final calculation including her pay and any notice. Ms Collins' claim is dismissed.

### **Orders of the Authority**

[38] The applicant's claims are dismissed.

[39] Costs are reserved as requested by the respondent.

P R Stapp  
Member of the Employment Relations Authority