

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 136
5601226

BETWEEN MICHAELA DAVIS
 Applicant

AND WENDCO (NZ) LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: No appearance for Applicant
 Cathy Matthews for Respondent

Investigation Meeting: 2 May 2016

Oral Determination: 2 May 2016

Written Record Issued: 3 May 2016

ORAL DETERMINATION OF THE AUTHORITY

A. The Authority lacks jurisdiction to investigate Ms Davis' claims.

Employment relationship problem

[1] Ms Michaela Davis claims she was unjustifiably dismissed on or about 9 June 2015 from her employment at Wendco (NZ) Ltd (Wendy's). Wendy's denies the claim and says Ms Davis had a history of being late or absent without notification and abandoned her employment when she failed to turn up for work in June 2015. Further, Wendy's says the Authority has no jurisdiction to investigate Ms Davis's claims as she did not raise a personal grievance within the statutory 90 day period.

Procedural history

[2] The statement of problem was lodged on Ms Davis' behalf by Ms Elizabeth Bickerton of Employment Dispute Services (2014) Limited (EDS). Ms Bickerton is

no longer acting on behalf of Ms Davis and does not appear to have been acting since at least 23 February 2016 although no formal withdrawal has been received by the Authority.

[3] Notwithstanding the 90 day issue, the parties were referred to mediation on 5 February 2016. The mediation service made extensive attempts to contact Ms Davis to arrange mediation. These attempts were unsuccessful and the mediation service closed its file and referred the matter back to the Authority on 15 March 2016.

[4] On 15 March 2016 the Authority wrote to Ms Davis and requested that she contact the Authority to confirm her intentions or to provide written notification that she did not wish to pursue the matter. Ms Davis has made no contact with the Authority.

[5] The Authority received an application from Wendy's that the matter be struck out. In order to progress the matter by Notice of Direction dated 5 April 2016 I proceeded to set the matter down for an investigation meeting to be held on 2 May 2016. In the Notice of Direction I advised Ms Davis that if she failed to attend the investigation meeting the matter may be dismissed and costs may be awarded against her. This information was also contained in the Notice of Investigation Meeting.

[6] The respondent accepted the date set down and has provided relevant documents and a statement of its intended evidence. This information has been provided to Ms Davis.

[7] There was no contact from Ms Davis.

[8] While preparing for the investigation meeting I discovered a contact telephone number for Ms Davis, not previously known to the Authority. On 26 April 2016 the Authority rang the phone number and left a message for Ms Davis informing her of the investigation meeting and advising her that correspondence had been sent to her. A contact number was left for Ms Davis in the event that she had any questions or wished to discuss the process for the investigation meeting.

[9] At the commencement of the investigation meeting Ms Davis did not appear. I waited 15 minutes to take into account that Ms Davis may have been caught in traffic or otherwise running late. During this time I also asked the Authority Officer to contact Ms Davis to seek her confirmation that she would be attending the investigation meeting. The Authority Officer was successful in speaking with Ms Davis who confirmed that she did not intend appearing at the investigation meeting. Despite this notification Ms Davis was then advised by voice message and email that I would delay the investigation meeting until 11.00am at which time, if she is not present I was likely to determine the matter by making no orders against the respondent.

[10] I have concluded that Ms Davis has shown no good cause for her failure to attend the investigation meeting.

[11] I am satisfied the Notice of Direction together with the Notice of Investigation Meeting was served on Ms Davis on 7 April 2016 both physical and via email. Wendy's is entitled to have closure on this matter. There has been sufficient time for Ms Davis to be available. I have decided to proceed under clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) and act as fully in the matter as if Ms Davis had duly attended or been represented.

Facts leading to dismissal

[12] Ms Davis started working for Wendy's at its Te Rapa site on 26 November 2013.

[13] The terms and conditions of her employment were set out in an individual employment agreement dated 26 November 2013.

[14] During her employment Ms Davis was subject to a number of counselling sessions relating to her failure to arrive at work on time or because of unauthorised absences and the failure to notify her employer that she would be absent.

[15] When Ms Davis' conduct failed to show any improvement a formal disciplinary process was put in place which resulted in her being issued a verbal

warning on 24 April 2015. Despite this warning Ms Davis continued absent herself from her work during May 2015.

[16] Ms Davis then failed to turn up for work on 2, 3, 4 and 7 June 2015. Wendy's wrote to Ms Davis on 4 June 2015 requesting her to advise of her intentions. In that letter Wendy's sets out the attempts it has made to contact Ms Davis since 2 June 2015, all to no avail.

[17] Ms Davis was requested to contact Ms Cathy Matthews, HR Manager, before Monday, 8 June 2015 to advise of her situation. Ms Davis was reminded of the abandonment provisions contained in her employment agreement and was advised that failure to make contact as requested would result in a determination that she had abandoned her employment.

[18] Ms Davis contacted Ms Matthews on the morning of 8 June 2015 and provided her explanations as to why she was not at work on her rostered days. Wendy's did not accept the explanations and was satisfied Ms Davis had failed to show good reason why she was not at work on her rostered days and terminated her employment on 9 June 2015 for reasons of abandonment.

Determination

[19] Ms Matthews appeared at the Investigation Meeting as Wendy's representative. After waiting until 11.00am I determined that I would proceed to act as fully in the matter as if Ms Davis had attended.

[20] Wendy's says the Authority has no jurisdiction to investigate this matter as Ms Davis failed to raise a personal grievance within the requisite 90 days.

90 day issue

[21] An unsigned letter on EDS letterhead dated 25 June 2015 was attached to Ms Davis' statement of problem. The letter raises a personal grievance for unjustified dismissal. Ms Matthews evidence is that this letter was not received by Wendy's until Wendy's received the statement of problem on or about 18 December 2015.

[22] In support of her assertion that the letter was never received, Ms Matthew told me EDS never made any contact with Wendy's to pursue a personal grievance

between June and December 2015 when Wendy's received the statement of problem. The statement of problem was the first notification Wendy's had that Ms Davis alleged a personal grievance relating to her dismissal.

[23] Under section 114(1) of the Act personal grievances must be raised within 90 days of them arising or coming to the employee's attention, whatever is the latter. Wendy's has not consented to the personal grievance being raised outside of the statutory timeframe and Ms Davis has not established to my satisfaction that the letter dated 25 June 2015 was sent to or otherwise given to Wendy's.

[24] I am satisfied on the balance of probabilities that the Authority does not have the jurisdiction to investigate or determine the personal grievance raised by Ms Davis in her statement of problem.

Costs

[25] Wendy's was represented by its employee, Ms Matthews, so there is no issue as to costs and no order will be made.

Vicki Campbell

Member of the Employment Relations Authority