

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 310/09
5150914

BETWEEN PULOTU ESETA
 FAALAVAAU
 Applicant

AND STONEX SYSTEMS
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: Pulotu Eseta Faalavaau in person
 K Hughes, advocate for respondent

Investigation Meeting: 25 August 2009

Determination: 31 August 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Pulotu Eseta Faalavaau says she was dismissed unjustifiably from her employment with Stonex Systems Limited (“Stonex”).

[2] Stonex denies there was a dismissal.

Background

[3] Ms Faalavaau’s employment at Stonex began on 26 June 2008. It was facilitated through an employment programme offered by the Auckland Chamber of Commerce.

[4] Her position was part time office assistant, working a minimum of 15 hours per week at a rate of \$15 per hour. Her duties included data entry and general administrative and business support as required by the office manager, Beatrice Teo.

She reported directly to Peter Reiber, the operations manager. Mr Reiber provided her both with personal one-on-one assistance in carrying out her duties as well as a manual setting out the required procedures. One of the concerns about her subsequent performance of her duties was that she did not refer properly or at all to the documented procedures.

[5] Both Mr Reiber and Ms Teo soon noticed that Ms Faalavaau was making a number of basic clerical errors, with wrong product coding being a frequent and recurring error. They drew the errors to Ms Faalavaau's attention informally, and sought to explain the correct procedure. However matters deteriorated to the point that Ms Teo became frustrated and Mr Reiber sought to address the problem in a more structured way.

[6] To that end there was a meeting between Mr Reiber, Ms Teo and Ms Faalavaau on 8 October 2008. Ms Faalavaau raised a concern about the brusque way Ms Teo was treating her, while Mr Reiber explained that part of the problem was Ms Teo's frustration with the level of Ms Faalavaau's performance. He told Ms Faalavaau her performance would have to improve or her position could be at risk.

[7] There was no improvement, and Ms Faalavaau continued to make the same errors. Mr Reiber conducted a further meeting with her on 23 October, at which a similar discussion occurred.

[8] On 29 October Mr Reiber received a complaint from the warehouse factory manager about errors involving the inaccurate reading of information on shipped orders. Mr Reiber decided to remove sales order duties from Ms Faalavaau, and sought assistance from the Chamber of Commerce in communicating Stonex' concerns to Ms Faalavaau. He said in evidence that it seemed Ms Faalavaau had difficulty in accepting constructive criticism and quickly became defensive.

[9] A Chamber of Commerce representative attempted to provide the requested assistance. In or about late October and early November she met separately with Ms Faalavaau and Mr Reiber. Ms Faalavaau said in evidence that she was concerned about her relationship with Ms Teo and raised with the representative a wish for mediation to address that matter. That was a reasonable request, but I do not accept

that any failure to arrange mediation in those circumstances was a breach of the parties' employment agreement. It was also obvious from Ms Faalavaau's evidence that, although by the time of the Authority's investigation meeting she accepted she had made a number of mistakes, she had no insight into the difficulty that caused in the workplace or into its link to the state of her relationship with Ms Teo. She simply sought to minimise them as silly mistakes, and to focus on the relationship with Ms Teo as a separate matter.

[10] By letter dated 13 November 2008 Ms Teo offered her resignation. Mr Reiber ascertained that a reason for the resignation was Ms Teo's ongoing frustration with Ms Faalavaau, and made a number of suggestions aimed at keeping her apart from Ms Faalavaau. Ms Teo agreed to stay.

[11] Mr Reiber also sought a formal disciplinary meeting with Ms Faalavaau, by letter dated 14 November 2008. The letter said the meeting was being called because Ms Faalavaau's work contained an untenable number of errors, and because her attitude to Ms Teo was alleged to be a cause of Ms Teo's resignation. It warned that disciplinary action including the termination of employment was a possibility.

[12] The meeting went ahead on 21 November. Ms Faalavaau was represented by a solicitor, and Ms Hughes was also present. Mr Reiber produced for discussion further evidence of Ms Faalavaau's errors, and said in evidence that Ms Faalavaau refused to accept that she had made any errors.

[13] An adjournment followed, during which the parties' representatives discussed the possibility of an agreed termination of employment. They reached heads of agreement, including provision that:

- a. Stonex would pay to Ms Faalavaau the nett equivalent of three months' pay; and
- b. the employment relationship would terminate with effect from 21 November.

[14] Ms Faalavaau said in evidence that her solicitor advised her the offer was a good one and should be accepted. She said she agreed to accept it because she felt

confused and hurried. Nevertheless she returned with her solicitor to the meeting, where Ms Hughes went through the proposed agreement and obtained Ms Faalavaau's confirmation that she agreed to the terms.

[15] A record of settlement was prepared for the parties' signature. The record set out the terms discussed, including provision that:

“(i) Eseta Pulotu has resigned her employment on 21st November 2008 with immediate effect.”

[16] Ms Faalavaau also said in evidence that her solicitor told her the arrangement was that she would be dismissed and receive the payment. She denied any mention of a resignation. I consider it likely that the solicitor indicated to Ms Faalavaau that she would not be required to attend work again if the agreement was accepted, but unlikely that the solicitor told Ms Faalavaau dismissal was to be a part of the agreement. Even if I am wrong about the latter, I consider it unlikely that Ms Hughes used the word 'dismissal' when confirming the agreement. The settlement document used the word 'resignation'. While Ms Hughes was unable to say for certain that she used the word 'resignation' when confirming the terms orally, she considered it likely that she did so. Further, I accept Stonex' evidence that no decision to dismiss had been made at that point.

[17] Later that day Ms Faalavaau contacted Mr Reiber to say she had decided not to accept the settlement, although no reason was given. She refused to sign the settlement document.

[18] Ms Faalavaau did not return to work, and by message dated 24 November 2008 she sought the reasons for her dismissal. She was told she had not been dismissed. By letter dated 9 December 2008 Stonex advised that:

“Since you declined the settlement and reneged on the agreement, the company expected your return to work. No decision was presented as a result of the disciplinary meeting and therefore no termination took place.

It is the company's position that you resigned your employment.”

[19] Ms Faalavaau said in evidence that she did not return to work because she thought she had been dismissed.

[20] There followed a series of exchanges in which, in effect, Ms Faalavaau sought the reinstatement of the settlement and payment according to its terms. Mr Reiber declined to reinstate the settlement, although he made further offers of compensation in lesser amounts. These offers were not accepted.

Determination

[21] On the facts, on 21 November 2008 the parties reached an oral agreement that Ms Faalavaau's employment would end, and setting out the terms on which it would end. Ms Faalavaau had the benefit of legal advice and the direct assistance of the advisor. Nothing in the circumstances suggests Ms Faalavaau was entitled to treat the agreement as void because she was placed under duress in the legal sense.

[22] Nevertheless, she changed her mind and refused to sign the settlement document. At the time, Stonex did not take any steps to apply or enforce the agreement and neither party now seeks to rely on it. I would therefore characterise the refusal to sign the document as a repudiation or cancellation of the oral agreement, which was accepted.

[23] Accordingly, just as Stonex was no longer obliged to make the payment identified in the settlement, the employment relationship did not end as had been agreed and Ms Faalavaau should have returned to work. She had not been dismissed, as dismissal is a unilateral act of termination imposed by an employer. Ms Faalavaau had instead been a party to an agreement to end her employment which was no longer effective.

[24] Thereafter Ms Faalavaau maintained that she had been dismissed, while Stonex maintained she had resigned. Neither was the case. On the repudiation or cancellation of the settlement agreement, the employment relationship was never able to resume.

[25] Since I find there was no dismissal, no remedy is available to Ms Faalavaau.

Costs

[26] Costs are reserved.

[27] The parties are invited to resolve the matter themselves. If they seek a determination from the Authority any party seeking costs shall have 28 days from the date of this determination in which to file and copy to the other a statement setting out the amount sought by way of costs, and why. The other party shall have 14 days from date of receipt of the statement to file and copy to the requesting party any statement by way of reply.

R A Monaghan

Member of the Employment Relations Authority