IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 37/10
5272278

	BETWEEN	JOELLE GRAGILLA Applicant
	AND	THE LEARNING CONNEXION LIMITED AND JONATHAN MILNE Respondents

Member of Authority:	P R Stapp
Representatives:	JoElle Gragilla in person and Steve Creed support person Denise Evans Counsel for Respondent
Investigation Meeting:	9 February 2010 at Wellington
Submissions received:	9 February 2010
Determination:	26 February 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] JoElle Gargilla claimed that she was unjustifiably dismissed from her employment. She identified in her statement of problem that her employer was The Learning Connexion and Mr Jonathan Milne personally, as her employer. She agreed to join The Learning Connexion Limited (TLC), but opposed Mr Milne being struck out. She claimed that she has suffered a loss of income and seeks to have her name cleared. In correspondence to Mr Milne, TLC director, she claimed reimbursement of lost wages and compensation.

[2] Mr Milne denied being Ms Gargilla's employer personally. The respondents have denied the claims entirely. TLC has claimed that Ms Gargilla was not

dismissed, but that she abandoned her employment when she did not return to work from leave on time.

[3] On 13 January 2009 Ms Gargilla applied to take leave from work to visit her parents in the United States and arrange a surprise birthday. She applied for leave to commence on 9 February 2009 and to resume work on 16 March 2009. Her annual leave was approved. Upon commencing her leave she went to the United States.

[4] On 26 February, while Ms Gargilla was in the United States, she applied for an extension to her leave for two weeks, but because she did not have enough leave, she was requested to apply for discretionary leave (equivalent to two weeks holiday pay) from Mr Milne directly. The management group declined her leave on 27 February and this was confirmed in an email by Mr Milne.

[5] However, on 3 March 2009 Ms Gargilla put to Mr Milne her personal reasons for such leave and made some alternative suggestions to work off site. Mr Milne agreed to extend her leave by three weeks, until 23 March 2009 (approved on 4 March), but without pay except for the time necessary to do assessments.

[6] Ms Gargilla says that she understood her leave would expire to enable her to return to work on 30 March. Mr Milne accepted that he had approved three weeks and that his requirement for her to return to work on 23 March did not add up considering her leave originally approved. However, he still required her to return to work on 23 March 2009, based on the date of his approval from 4 March 2009. In other words, Ms Gargilla raised an issue about the timing of her extended leave.

[7] On 6 March, Ms Gargilla claimed that she was unable to get a flight from Atlanta to Los Angeles or San Francisco to get home in time, despite trying. She contacted TLC, but Mr Milne was not contactable personally until 17 March.

[8] On 19 March Mr Milne advised her that her proposal to return to work on 30 March was not acceptable as her request had been previously rejected. She was informed that if she did not return to work on 23 March the employer would regard her as abandoning her employment and her contract with TLC would end. Ms Gargilla considered that this was an unreasonable deadline.

[9] Ms Gargilla did not return to work and her next contact with TCL was on 30 April 2009 proposing a way to present her employment ending without reinstatement and any compensation.

Issues

[10] The following are the issues:

- Who was the employer?
- Did Ms Gargilla abandon her employment or was she dismissed?
- Did the employer have reasonable reasons to decline the extension of leave?
- Did the employer act as a fair and reasonable employer would have acted in all the circumstances?

The Law

[11] The Court of Appeal commented in *E N Ramsbottom v Chambers* [2000] ERNZ 102:

> [21] *An employment contract may terminate in a variety of ways apart from dismissal. Thus it may end through the relinquishment of the employment by the employee. The employer here believed that the employee had abandoned the employment. "Abandoned" in its ordinary dictionary sense simply means "to give up". Whether in an employment abandonment constitutes misconduct and so a breach of contract, or whether it is an allowed means of ending the contract, depends on the express or implied terms of the particular contract. In some circumstances it may be an agreed informal mode of immediate resignation.*

[12] In the above case there was a reference made to another case called *Pitolua v Auckland C C Abattoir* [1992] 1 ERNZ; [1992] 1 NZLR 6 (CA) and the Court said: *"concerning the termination of employment by an employee who is absent for a specified time without notification to the employer":*

> *"[A]n employer does have an obligation to make an inquiry where it appears that an employee may have abandoned his/her employment. The main reason*

for this is that if there is no specified agreed terms upon which the parties can rely then both parties should be able to expect a minimum of fair treatment.""

[13] His Honour Judge Travis has added in *Lwin v Honest International Co Ltd* [2003] 1 ERNZ 387 that an implied term is not prevented where there is no express term "*…to give business efficacy to a contract, that if the employee abandons his or her employment, that will bring it to an end"*. He also went on to say that the Court of Appeal had noted: *"…where the issue is whether the employee has abandoned the employment, the employer should be cautious in drawing the inference and must face a high threshold if contending that the employment ended on the employee's initiative in that way"*. *It observed "clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make enquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment"*

The Facts

[14] Ms Gargilla was employed by The Learning Connexion Limited.

[15] I am supported in this finding because Ms Gargilla accepted she signed her employment agreement with a declaration and confirmation of acceptance involving The Learning Connexion Ltd. This was enough to support that Ms Gargilla was informed that her employer was a limited liability company.

[16] Ms Gargilla's application for leave was approved, certainly, to start from 9 February, but the length of her leave and the finishing date were vague from my assessment of the evidence. She understood the approval was until 16 March. The documents indicate the leave was paid and payments were made to cover the available leave until 8 March.

[17] Ms Gargilla's request for an extension of leave was granted by Mr Milne, but only until 23 March 2009. This was his discretion because Ms Gargilla had run out of annual leave and any further leave was considered as discretionary holidays. At first Ms Gargilla was confused about how much leave she was entitled to, but accepted she needed approval for discretionary leave. There has been no argument about the

calculation of the annual leave. She has complained that Mr Milne miscalculated the period of the time of the approved extension and that Mr Milne disregarded her suggestions to work from the United States.

[18] She claimed that she could not get a flight back from Atlanta to Los Angeles or San Francisco in time to return to work on 23 March. TLC has doubts about the genuineness of this, but did not investigate Ms Gargilla's claims at the time. She suggested returning on 30 March, but this was rejected by Mr Milne.

[19] It was open to a fair and reasonable employer to insist that Ms Gargilla return to work on 23 March given her annual leave had expired and that she had used discretionary leave. Also the place of work was in New Zealand and the contract specified that, albeit there had been a move to new premises. The employer was entitled to require Ms Gargilla to work from the place of work and was entitled to reject her suggested options to work in the United States.

[20] Ms Gargilla did not provide any information to satisfy her employer of any difficulties she had encountered at Atlanta. She was not asked at the time.

[21] The employment agreement did not make any provision for abandonment of employment, but that does not prevent an employer implying abandonment in the terms. In any case the employer had no knowledge on reasonable grounds that Ms Gargilla would not return to work. This is supported by the emails and Ms Gargilla's intention to return by 27 March. A fair and reasonable employer would have more properly invoked disciplinary proceedings and an investigation if it had concerns about Ms Gargilla acting deceptively and or not acting genuinely. Any allegation that she intentionally planned to seek more leave when she was in the United States would presuppose an investigation being put in place. Indeed Mr Milne raised during the Authority's investigation meeting that Ms Gargilla was absent without authority from work, including that she mislead her employer as to the nature of and reason for an approved absence. There was no investigation on this allegation. There was absolutely no notice of that allegation being put to Ms Gargilla at the time.

[22] A fair and reasonable employer would not have implied an abandonment of work when it knew that Ms Gargilla was in the United States, that she had been on

approved annual leave and extended leave where there was no evidence that she had no intention not to return to New Zealand. This was supported by the tenure and tone of the emails.

[23] Furthermore there were no employment issues of any significance between the parties, no prior warnings, no prior disciplinary issues and Ms Gargilla had been in her employment for 4 years. Also, there were no pressing deadlines in regard to her work while she was overseas except that Mr Milne referred to the pressure everyone was under with the move to new premises, student numbers and that one of the programmes had stalled that involved Ms Gargilla and her supervisor. Finally, cover had been planned when the leave was first approved.

[24] There was no basis to the work reasons relied upon by Mr Milne for his decision that could not have waited until Ms Gargilla returned to work.

[25] Thus I hold that a fair and reasonable employer would not have treated Ms Gargilla's conduct as abandonment, but that would not have prevented TLC from instigating an investigation and disciplinary action on the allegation that she was absent without authority. TLC failed to do that properly at the time.

Determination

[26] Ms Gargilla was dismissed without good cause, reasons and appropriate grounds. There was an absence of any investigation on the allegations associated with Ms Gargilla's absence. The dismissal was at the employer's initiative by email, and it concluded, wrongly, that she had abandoned her employment and that the contract had ended. This amounts to an actual dismissal.

[27] Ms Gargilla has a personal grievance.

[28] I now turn to remedies. This situation is partly of Ms Gargilla's making. She knew that Mr Milne was not available between 4 March and 17 March after he had made his decision to extend her leave until 23 March. When she raised her difficulties getting travel she did not provide any details to support her predicament. Thus, Mr Milne's suspicions were aroused about her intentions. There has been no

proof proffered by Ms Gargilla of when she returned, but I accept her evidence that she did return on 27 March. I access that she has contributed to the situation giving rise to her personal grievance because she has not been able to explain adequately her absence when she was required to return to work.

[29] Unusually this is a matter not so much to do with money because Ms Gargilla was prepared to trade reinstatement and compensation to label her employment ending as redundancy. There was no question that any redundancy was involved. She is seeking vindication that her employment ended unfairly. She has been successful in establishing a personal grievance for unjustified dismissal.

[30] I accept that she mitigated her lost wages by getting part time work and then full time work in an administrative role, but not in the same professional role and industry. She did not apply for any teaching work. She clearly decided that her employment had ended at TLC, and reasonably concluded that was caused at the imitative of her employer, but made no reasonable attempt to try and retrieve the situation in person with Mr Milne until a month later when she wrote to him. There was nothing to prevent her contacting him earlier. During the Authority's investigation she explained her calculation of lost wages as a differential between her new earnings and what she earned at TLC. However, there were no details provided of her actual earnings and hours in her new job, and the start date. Thus I have decided to limit her lost wages to the notice of 4 weeks pay calculated at $21 per hour for 35 hours per week. I have reduced this for contribution by 25%.

[31] Ms Gargilla did claim compensation but her evidence here was vague and not compelling enough to award her more than the lower end of the scale to compensate her for hurt feelings on the basis of only one description of her feelings being affected. I assess her compensation at $2,000 under s 123 1 (c) (i) of the Employment Relations Act, but reduced by 25%.

Orders of the Authority

[32] I order The Learning Connexion Limited to pay Ms JoElle Gargilla lost wages of $2,205 for her notice and $1,500 compensation for hurt feelings.

[33] The Learning Connexion Limited is to pay JoElle Gargilla the filing fee of $70.

P R Stapp
Member of the Authority