

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Edith Anne Hakansson (Applicant)
AND Esther Monteith t/a Centre Café (Respondent)
REPRESENTATIVES David Perreaux for Applicant
Esther Monteith on her own behalf
MEMBER OF AUTHORITY G J Wood
INVESTIGATION Napier
MEETING Wednesday, 28 March 2007
DATE OF 1 May 2007
DETERMINATION

DETERMINATION OF THE AUTHORITY

1. The applicant, Ms Anne Hakansson, worked as a cook for the respondent, Mrs Esther Monteith, at the Centre Café in Hastings for six months in the first half of 2006. She did so without ever having a written employment agreement.
2. Ms Hakansson found the working environment unpleasant because of difficulties she had with Mrs Monteith and other workers. On the other hand, she enjoyed the work itself and needed the income provided to her of 40 hours per week on average.
3. While there had been general staff meetings about discontent amongst staff, these meetings did not specifically address any particular concerns about Ms Hakansson's behaviour.
4. On Friday, 21 July 2006, Ms Hakansson had an argument with another worker about the use of a mop. Ms Hakansson became irritated and, having had no lunch or tea break that day, decided to leave her job ten minutes early. She told Mrs Monteith as she left, verbatim:

“Going a little early – I’m out of here – See Ya”

5. While it was alleged that Ms Hakansson's intention to leave for good could be ascertained by her taking her cookbooks, the facts are that she left behind her umbrella, jacket, teapot and her own food.
6. Mrs Monteith had no opportunity to respond at the time, but rang Ms Hakansson at home soon afterward, accusing her of walking off the job, which Ms Hakansson denied.
7. In this conversation, Mrs Monteith spoke to Ms Hakansson about the atmosphere in the café, which she blamed on Ms Hakansson. Ms Hakansson replied that maybe it was best if she did leave if nobody at work liked her. She also said that she was not leaving at this time and if she was to leave she would do so by giving notice in writing.
8. Mrs Monteith reiterated that Ms Hakansson had walked off the job and her employment was therefore over. Ms Hakansson then raised her concern that she had not been paid all her wages and that some \$200 in pay was currently overdue, plus holiday pay.
9. Later that day, a lawyer rang on Mrs Monteith's behalf informing Ms Hakansson that she had walked off the job and was not entitled to any holiday pay. Ms Hakansson disputed this, stating that she had not walked off the job and would be back to work on Monday. She also disputed that she was not entitled to be paid any holiday pay. The lawyer informed her that her outstanding pay was now available to her.
10. Ms Hakansson went back to the café that evening and was told that the locks would be changed and she would not be able to work on Monday.
11. On Monday, 24 July, Ms Hakansson came into work as if as usual. She was met by Mrs Monteith's husband, who told her she should not go into the café for her own good. As Ms Hakansson was barred from entering the premises she now conclusively believed that she had been dismissed. She left and sought advice, as she was also concerned at not being paid her last week's wages, nor any notice or holiday pay.

12. That day, Mrs Monteith sat down with some of her staff to write letters about Ms Hakansson's behaviour. I do not accept Ms Abby Eagle's evidence that she was forced to write these letters by Mrs Monteith, as another witness gave evidence that the two staff involved were laughing and joking with Mrs Monteith as they wrote the letters. I find that the two staff members involved did not like Ms Hakansson and therefore wrote negative comments about her. In Ms Eagle's case, I find that she believed those comments at the time. Her letter, however, does not advance the situation as to whether Ms Hakansson's leaving work constituted a resignation or abandonment of her employment, or a dismissal, in all the circumstances. I have taken no account of the other employee's letter, as that person did not attend the investigation meeting or give evidence in any other way.
13. Despite undertakings by Mrs Monteith to the Authority that Ms Hakansson's holiday pay would be paid, it has still not been paid, in blatant breach of her undertakings and the law.
14. I have determined the facts above following my acceptance of the evidence of Ms Hakansson over that of Mrs Monteith on the key issues in dispute. This is because Ms Hakansson's evidence has been consistent, while Mrs Monteith has broken undertakings to the Authority and given differing explanations to different issues. For example, Mrs Monteith expected Ms Hakansson to return to work on the Monday, but if Ms Hakansson had clearly walked out and resigned as Mrs Monteith claims, she would have had no reason to expect her back that day.
15. As the Employment Court held in *Boobyer v. GoodHealth Wanganui Ltd* (unreported, Goddard CJ, WC17/94, 24 February 1994), an employer is not simply entitled to rely on words spoken that are ambiguous or made in an emotional state to assert that the employee has resigned and can not return to work. The Court held:

"... where an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so, or takes advantage of words of resignation known to be unwitting or unintended and the employee promptly makes it plain that the employee's communication was not meant to be a resignation and should not be treated as if it were. In that kind of case, the employer cannot safely insist on its interpretation of what the employee said or wrote. That is also the position if words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once 'the heat of the moment' had passed and taken with it any 'influence of anger or other

passion commonly having the effect of impairing reasoning faculties'. Chicken & Food Distributors (1990) Ltd v. Central Clerical Workers Union [1991] 1 ERNZ 502, 507. Examples of a sudden flare up being treated as a resignation are scattered through the books. Some feature either extreme actions by the employee including emphatic language and expressive conduct extending to actually walking out or using words of resignation, only to return to recant later. Each case turns on its own facts but it is at least clear that "[a]n apparent resignation can also amount, notwithstanding the words used, to a dismissal".

16. In this case, I accept that Ms Hakansson's words and actions in leaving ten minutes early were ambiguous. Mrs Monteith was right to follow the matter up with a phone call. From that point on, however, it was clear that Ms Hakansson did not intend to resign. Mrs Monteith's decision to continue to insist, in the face of this clear advice, that Ms Hakansson had in fact resigned and to refuse to allow her to re-enter the premises is clearly therefore a dismissal.
17. The dismissal was also clearly unjustified, as there was no good cause for the dismissal of Ms Hakansson. Although she had left work a few minutes early there was no damage to the café's business as a result of that and she was entitled to extra time in any event, as she had not had her breaks that day.
18. Because of her age and health, and because she had another part-time job which she wanted to retain, Ms Hakansson was unable to find work for the rest of that year and into late February 2007.
19. In all the circumstances of this case, I conclude that it is appropriate to award Ms Hakansson 21 weeks lost remuneration, taking into account the fact that she was not paid for the last two days of work and the limitations she herself placed on doing temporary work. Ms Hakansson is also owed \$886.28 gross holiday pay, a sum that was not disputed.
20. Ms Hakansson was greatly affected by the loss of her job and her inability to find other employment. At the time her employment ended, she was shouted at by Mrs Monteith and later refused entry to the café premises. I conclude that \$8,000 compensation is appropriate.
21. While Ms Hakansson's leaving on 21 July may have appeared ambiguous, that matter was clarified very soon afterward. Given that she had not taken her breaks

that day, her leaving a bit early can not be considered to be blameworthy behaviour compared with Mrs Monteith's later responses. I therefore make no deduction for contributory actions.

22. Ms Hakansson has also claimed penalties against Mrs Monteith for breaches of the employment agreement and good faith. Other than a claim for the failure of Mrs Monteith to provide Ms Hakansson with a copy of the intended employment agreement, these claims all cover issues for which Ms Hakansson has already been compensated. No good point would be served by penalising Mrs Monteith any further for those breaches, especially as substantial compensation has already been ordered. While no employment agreement was ever signed, I find that there was not sufficiently strong enough evidence to satisfy me, to the level required for a penalty, that no copy of an intended agreement was ever provided to Ms Hakansson. I therefore decline to award any penalties against Mrs Monteith.
23. I therefore order the respondent, Mrs Esther Monteith, to pay to the applicant, Ms Edith Anne Hakansson, the following sums:
 - (a) \$8,000 compensation under s.123(1)(c)(i);
 - (b) \$10,920 gross in lost remuneration; and
 - (c) \$886.28 gross in holiday pay (plus interest at the simple rate of 9% per annum from 21 July 2006 until paid).
24. Costs are reserved.

G J Wood
Member of the Employment Relations Authority