

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 434
3066812

BETWEEN KATIE HERON
 Applicant

AND SFIZIO LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Charles McGuinness, counsel for the Applicant
 Curtis Gregorash, for the Respondent

Investigation Meeting: 10 March 2020 at Wellington

Submissions [and further 27 March 2020 from the Applicant
Information] Received: 17 April 2020 from the Respondent
 24 April 2020 “in reply” from the Applicant

Date of Determination: 20 October 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem.

[1] Katie Heron was employed by Sfizio Ltd (Sfizio) as a barista at its espresso bar in central Wellington. She says she was unjustifiably dismissed shortly after she informed Sfizio she needed to take time off to manage her health. She seeks remedies for the dismissal and payment of sick leave.

[2] Sfizio rejects Ms Heron’s claims. It says Ms Heron voluntarily resigned from her position but later sought to withdraw from it, which it says it was not obliged to accept. Sfizio

says the letter sent by it to terminate her employment was only to provide certainty as to when the employment would finish where Ms Heron had not formalised her resignation in writing.¹

Background information

[3] Terms and conditions of employment had been recorded in an individual employment agreement and agreed prior to employment commencing, although the document was not signed. Amongst other things, both parties were required to provide four weeks' notice in writing to end the relationship.

[4] The parties disagree as to the exact the date on which Ms Heron's employment commenced, but both accept she began physically working for Sfizio on 13 June 2018.

[5] On the afternoon of 6 December 2018 Ms Heron sent a text message to Curtis Gregorash, the director and majority shareholder of Sfizio, advising she had been diagnosed with "*carpel tunnel*". Ms Heron attached a medical certificate from her GP. The certificate advised she was unable to attend work as of that date but was "*possibly able to return to work*" on 7 January 2019, the date on which the business was scheduled to reopen having closed for two weeks over the Christmas and new year period.

[6] That evening the pair exchanged text messages regarding Ms Heron's immediate ability to work. Mr Gregorash, his partner and minority shareholder Kathy Parfitt, and Ms Heron then met the following afternoon (Friday 7 December 2018) to discuss the issue. Crucial to this determination is whether Ms Heron resigned at some point over this period. I shall return to these events.

[7] Ms Heron says she obtained advice from a community law centre on Monday 10 December 2018.

[8] By email, on the morning of 11 December 2018, Ms Heron advised Sfizio she was unwilling to resign, and the parties engaged in an exchange on a 'without prejudice' basis. Matters were not resolved and on Wednesday 12 December 2018 Mr Gregorash sent Ms Heron a letter confirming she was "*dismissed on notice (4 weeks)*". He referred to the meeting between them on 7 December 2018 and said:

¹ Statement in reply, para. 121.

We discussed your resignation and you confirmed that you would send through written notice of your resignation. However since then we have not received your written resignation.

[9] The letter concluded with advice that Sfizio would pay out Ms Heron's annual and public holiday entitlements, but she was not entitled to payment of sick leave. Ms Heron was informed her last day of employment was 10 January 2019, and asked to return all property.

[10] There was no further contact between the parties until Sunday 16 December 2018 whereby Mr Gregorash sent Ms Heron a resignation letter he had drafted. The letter included a statement that Ms Heron agreed to early payment of outstanding entitlements in return for her agreement that she had no employment law claim against Sfizio. She was asked to sign the document and return it. She did not do so.

[11] The parties have been unable to resolve their differences and it is left for the Authority to determine Ms Heron's claims.

The Authority's investigation

[12] Ms Heron and Mr Gregorash, both attended the Authority's investigation on 10 March 2020.

[13] This determination has been issued outside the timeframe set out at s 174C(3)(b) Employment Relations Act (the Act). The Chief of the Authority has decided exceptional circumstances existed as providing cause for the delay.²

The issues

[14] The Authority is required to determine:

- (a) whether Ms Heron resigned and if so, was Sfizio able to rely it as reason for her employment ending;
- (b) if Ms Heron did not resign, was she unjustifiably dismissed;
- (c) whether Ms Heron is owed paid sick leave,
- (d) whether remedies should be awarded.

² Employment Relations Act 2000, s 174C(4)

Did Ms Heron resign?

[15] As foreshadowed, Sfizio’s defence to Ms Heron’s claim that she was unjustifiably dismissed is to say she resigned from her position.

[16] In the lead up to the Authority’s investigation Sfizio’s primary response focused on the meeting of 7 December 2018 where, it says, Ms Heron resigned towards its conclusion. In final written submissions supplied to the Authority after the investigation meeting, Mr Gregorash says Ms Heron’s text messages advising Sfizio of her medical issues amount to a resignation. He referred to texts messages dated 8 August 2019 but I consider it likely this is typographical error and that he is referring to the messages sent on 6 December 2018.³

[17] The text messages sent on 6 December 2018 are set out below.⁴ I have numbered these for ease of reference. I then set out the differing accounts of Mr Gregorash and Ms Heron regarding the meeting of 7 December 2018.

Text messages between Ms Heron and Ms Gregorash on 6 December 2018

Ms Heron #1	Hey I’ve been having some problems with my wrist recently so I went to the doctor and they have told me I have carpal tunnel. They’ve told me if I keep using it I’ll have to have surgery which won’t be covered as it isn’t covered by ACC. My wrist is in a brace and I’ll be seeing a neurologist soon but not really sure what to do with work as I can’t afford for it to get any worse and they’ve told me to stop immediately.
Mr Gregorash #2	We are so sorry to hear that you’re going through this, we know what it’s like and how much it hurts – Kathy has had the surgery in both arms and still has sore arms every day. We need to understand what you are saying properly because the medical certificate just says (without any detail) that you are unfit to work from today until 7 January. Are you unable to do barista from today?
Ms Heron #3	They recommended me take time off to avoid using my hand at all. I can come in tomorrow if you guys wanted to come in and talk but I will need some time off. [X] has a friend that could help out if need be.
Mr Gregorash #4	OK ... [the details of Ms Heron’s first text message are recorded]. That means you can’t barista again. We are not going to bring in X’s friend, we have an employment process. What I need to know from you is are you going to be able to barista tomorrow? And for the rest of December?

³ Respondent’s Submissions, dated 17 April 2020.

⁴ The names of two staff members referred to in the text messages have been anonymised where their involvement in this matter is incidental.

- Mr Gregorash #5 Hey Katie we really need to know if you're coming to work to barista tomorrow and are going to be able to barista for the rest of December otherwise we need to urgently hire someone.
- Ms Heron #6 I probably won't be able to work much more of December but I also don't want to throw you in the deep end so can still do til while X is on machine tomorrow.
- Mr Gregorash #7 But we need a head barista not just someone on the till. X can't head barista she isn't fast enough and we are going to lose \$1,000 a week from slow coffee making. We literally don't have a position for someone who can't head barista. We could get you [Z's] two hour role after the 16th when she leaves until the 22nd but even that role will end and won't exist in January/February.
- Ms Heron #8 X is actually really fast on the machine now. It's 10 pm can we please discussion tomorrow? I'm not really sure what my options are and it would be easier to do in person.

The parties' accounts of the meeting of 7 December 2018

[18] Ms Heron, Mr Gregorash and Ms Parfitt met in the afternoon on 7 December 2018. Mr Gregorash and Ms Heron agree there was a discussion about what alternative activities Ms Heron might be able to perform. However, there is a significant conflict about what was said during the meeting and by whom. Ms Parfitt did not attend the Authority's investigation to give evidence.

[19] Mr Gregorash says Ms Heron rejected various suggested options as she thought each of these would cause her pain. He says towards the end of the discussion she said she would not be able to continue to work for Sfizio and was going to look for office work. He says Ms Heron apologised for leaving without notice and said she would send through her written resignation as soon as possible. Mr Gregorash attached a hand written file note written to his brief of evidence to support this account. However the note is dated "1/8/19"- almost nine months after the event. Mr Gregorash was unable to explain that anomaly. I have been unwilling to give any weight to this document where there is considerable uncertainty as to when it was drafted.

[20] Ms Heron's evidence characterised the meeting as "*more like an interrogation with two verses one*". She says she felt "*pressure straight away to resign*". She says Ms Parfitt spoke of her own experience with carpal tunnel syndrome, and warned of long term difficulties she could face if she continued to work as a barista including harming her future career as a teacher. Ms Heron says each of the alternative work options was discounted by Ms Parfitt as unsuitable

and that it was Ms Parfitt who introduced the possibility that she look for work in other industries. Ms Heron says:

We ended the meeting as if I was not coming back to work and they mentioned to send through my resignation when I got home. I never said I would resign at the meeting and simply listened to their self-serving conclusions.

Analysis

[21] A similar issue was dealt with *Taylor v Milburn Lime Ltd.*⁵ The Court was required to determine whether the employee had, through his actions or words, resigned from his employment albeit there was a written employment agreement which required Mr Taylor to give two weeks' notice of his resignation in writing. The Court looked at the employee's conduct and found:

Anything that the employee did on the day in question could not constitute a termination of the employment agreement on its terms. Rather, at most, it could only amount to a repudiation of the employment agreement which the employer could accept or reject.

[22] In its judgement the Court observed that in taking any action that may disadvantage an employee, the employer must ensure their actions are what a fair and reasonable employer would do. It held that applicant's words or actions "*I'm out of here, I'm finished*" could, at best, be regarded as equivocal. The employer's failure to communicate further with the employee on the issue meant it could not have reasonably concluded the employee had resigned. The Court said:⁶

... where there is doubt [as to whether the employee has resigned] a fair and reasonable employer will ensure that its response is based on the employee's actual intentions rather than what might be inferred from equivocal words and conduct.

[23] I am unwilling to find the circumstances of Ms Heron and Sfizio identical to those in *Tribe v J Scott and Company Ltd*⁷ as is asserted.⁸ In *Tribe* the employee sent an email to her employer setting out factors that precluded her from working for a "*number of months*". The applicant in that case also had an employment agreement which provided she must give notice

⁵ *Taylor v Milburn Lime Limited* [2011] NZEmpC 164 at [22]

⁶ Above at [32]

⁷ *Tribe v J Scott and Company Ltd* [2016] NZEmpC 80

⁸ Above at n3, para. 1

of termination of employment in writing. Ms Tribe did not expressly say she was resigning but asked “*maybe we can discuss first thing when would be the best day to finish*”. At the meeting to discuss her finish date she gave no indication she did not want to resign. The Court found the applicant left the employer with a clear impression she was leaving, noting the employee also had several other interactions with staff which suggested she had resigned. The Court held it was reasonable for the employer to conclude the employees actions amounted to a resignation on which it could rely.

[24] In contrast, Ms Heron’s text messages on 6 December advise she “*needed to take time off from her duties*”, and she sought to meet and discuss her “*options*”, not when she would finish. I do not accept Sfizio’s submission that Ms Heron sent a text message advising she could not “*return to work ever*”.⁹ No text message containing content of that nature was put before Authority and I do not accept it. Ms Heron’s correspondence of 6 December 2018 cannot, objectively, be characterised as a clear resignation.

[25] Turning to whether Ms Heron resigned in the meeting of 7 December 2018 I have preferred Ms Heron’s version of events. Her account (at least in part) better explains how each party acted subsequently and has a ring of truth about it.

[26] I consider it more likely than not that Sfizio commenced the meeting on the premise that it was not able to accommodate Ms Heron’s condition, and I note text message # 7 sent by Mr Gregorash to Ms Heron the previous evening stating “*We literally don’t have a position for someone who can’t head barista*”.

[27] I accept Ms Heron’s evidence that she felt increasingly silenced (and her evidence on this point was not challenged) as Ms Parfitt voiced doubts about Ms Heron’s ability to perform alternative duties without putting her health at risk. That Ms Heron did not challenge Ms Parfitt’s assessment in this respect may have left the owners with the impression that Ms Heron shared that perspective. The power imbalance between the parties is a factor that likely contributed to how their discussion advanced. But I am unwilling to accept Sfizio, could have reasonably taken Ms Heron’s silence as acquiescence to a suggestion she would be better to leave.

⁹ Above at n3, para 1

[28] Sfizio's request at the end of the Friday afternoon meeting that Ms Heron send written confirmation of a resignation suggests Ms Heron's had not expressly resigned, or, alternatively, her position on this issue remained in some doubt. As a fair and reasonable employer, Sfizio was obliged to make further inquiry with Ms Heron as to her intentions before it could act or rely on its belief she had resigned.

[29] Even if I had preferred Mr Gregorash's version of events and Ms Heron did verbally resign during the meeting as a consequence of their discussion, I find a fair and reasonable employer would have allowed a period of time for Ms Heron to reflect on that decision before holding her to it.

[30] In either of the above circumstances there is no evidence that Sfizio made any inquiry with Ms Heron after she left the meeting to ensure there was a mutual understanding. The next communication between them was initiated by Ms Heron advising she was unwilling to tender her resignation as directed. That communication cannot have left Sfizio in any doubt as Ms Heron's position and it could not have reasonably continued to act in the alternative.

Was Ms Heron unjustifiably dismissed?

[31] Whether a dismissal is justifiable is determined by the Authority inquiring into the employer's actions, both as to whether there were reasonable grounds for the dismissal and whether the process taken to reach that decision was fair. Both inquiries are assessed against what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.¹⁰

[32] I am satisfied the letter of 12 December 2018 terminated Ms Heron's employment on notice although the basis for the dismissal is unclear from its content. The letter set out Ms Heron initial text message concerning her health and the meeting on 7 December 2018. It went on to state that it received reports from other employees that she had not been in pain and not been functioning as she should. It advised and says:

Your non-disclosure of a medical condition that was affecting your employment is a breach of condition (sic) of your employment that you make "the employer aware of any and all issues affecting the business". However since then we have not received your written resignation.

¹⁰ Section 103A Employment Relations Act 2000

[33] That allegation together with a reference to a provision in the parties' employment agreement allowing for '*Termination on Medical Grounds*' were both recorded in Sfizio's statement of reply as grounds on which Sfizio was entitled to dismiss Ms Heron. At the Authority's investigation meeting Mr Gregorash confirmed Ms Heron was not dismissed on the basis of either of those matters. I need to note neither ground could have justified Ms Heron's dismissal in any event where she was not provided with an opportunity to comment on one or both of those issues before she was informed of her dismissal.

[34] There is no evidence that establishes any grounds on which a fair and reasonable employer could have dismissed Ms Heron in the circumstances it did. I must find her dismissal was therefore unjustified.

Entitlement to sick leave

[35] Section 63 of the Holidays Act 2003 (the "HA") provides that an employee is entitled to sick leave "*after the employee has completed 6 months' current continuous employment with the employer*". An employer's obligation to pay sick leave is set out at s 71 HA.

[36] Ms Heron seeks payment of sick leave for the days between 7 December 2018 and 12 December 2018, when she was sick on a day she would have other-wised worked. The basis for her claim is that her employment agreement records she commenced employment on 4 June 2018 and became for paid sick leave on 4 December 2018.

[37] There is no real dispute that Ms Heron's first day of work began on 13 June 2018. The following facts lead me to conclude this is the date on which I find her employment commenced.

[38] On Wednesday 30 May 2018 Sfizio sent an email offering Ms Heron the position. A proposed employment agreement was attached to the email and recorded the commencement date for the following Monday, 4 June 2018.

[39] By return email on 3 June 2018 Ms Heron advised she had read and accepted the contract. She said "*we can sign it in person once I start*". She told Sfizio that her notice to her current employer did not expire until 15 June 2018, albeit she had asked to finish earlier. This response indicated she was not available to commence employment with Sfizio when it was not yet certain when her current employment would end. I am not persuaded there was ever a

mutual agreement between the parties that Ms Heron's employment would begin on 4 June 2018 and I find it did not.

[40] I note that on 9 June 2019 Ms Parfitt sent a text message to Ms Heron asking if she would be available before 15 June to which Ms Heron answered she may be finishing up early and could start on the 13th which she ultimately did.

[41] It appears the parties did not return to sign the employment agreement and therefore correct the date in which Sfizio proposed employment commence, but I find Ms Parfitt's employment commenced on 13 June 2018. She was therefore eligible for paid sick leave from 13 December 2018 onwards.

Remedies

Unpaid wages

[42] Ms Heron claims arrears of wages in the form of paid sick leave, and payment of wages for the duration of her notice period from 13 December 2018 to 10 January 2019.

[43] A payslip indicates Ms Heron received gross earnings of \$13,773.02 over 26 weeks of employment up to 16 December 2018. I have already found Ms Heron became entitled to be paid sick leave from 13 December 2018 onwards. It follows she should have been paid for 5 days leave from that date until 19 December 2018 (5 days excluding the weekend). Her average weekly earnings were \$529.73 and I have calculated the payment of sick leave based on this sum.

[44] The espresso bar had a closedown between 22 December 2018 and 6 January 2019. Ms Heron accepted she was made aware of the closedown at least 2 weeks before the business shut. The HA sets out, amongst other things, how a "closedown" operates in respect to pay and annual leave. Employees who are entitled to annual leave must, if required by the employer, take annual leave holidays during the closedown.¹¹ For employees, such as Ms Heron, who are not yet entitled to annual leave at the commencement of a closedown, the employer is required to pay 8% of the employees gross earnings to him or her less any amount paid for annual leave taken in advance or otherwise already paid.¹²

¹¹ Holidays Act 2003, s 32(1)
¹² Above at s 34(2)

[45] Sfizio paid Ms Heron for each of statutory holidays that occurred over her notice period and closedown. It also paid 8% of her gross earnings in accordance with s 23 of the HA at the end of her employment. Calculation and payment of 8% gross earning it should have occurred when the closedown commenced. In this respect Sfizio was in breach of s 34 of the Holidays Act but no penalty is available under the Act and I can take the matter no further.

[46] Ms Heron was scheduled return to work on 7 January 2019 when the business reopened. She is owed wages for the four days remaining on her notice period (up to 10 January 2019) I calculate this sum to be \$423.78 (gross)¹³.

Lost wages

[47] Having established Ms Heron was unjustifiably dismissed, s 128(2) of the Act requires the Authority to award the lesser of either a sum equal to her actual loss or a sum equal to 3 months' ordinary pay.

[48] Ms Heron seeks lost wages for the period between the end of her employment with Sfizio and the date she began a new job on 28 January 2019. She is entitled to the sum of lost wages over that period. There is a suggestion in Sfizio's evidence that Ms Heron would not have been offered work in 2019 because her hours of study were different. I accept there might have been some alteration to Ms Heron's availability when the student year began, but those circumstances had not yet materialised in January 2019 and is not a factor I am willing to accept would impact of losses caused by the dismissal at this juncture. Ms Heron is entitled to the sum equal to her losses between 11 January and 27 January 21019 which I calculate as \$1,165.40 gross.¹⁴

Compensation

[49] Ms Heron seeks compensation of \$20,000 for hurt and humiliation following her dismissal. She points to the text messages sent to her on 6 December 2018 which suggested her condition would cause a financial loss of \$1,000 a week to the business and says she was made to feel guilty for becoming unwell despite the fact that her diagnosis was unexpected and a matter she felt she has no control over.

¹³ Based on weekly average earnings (5 days per week) being \$529.73.

¹⁴ As above

[50] She says she felt ashamed and upset by the way her employment ended, and became highly anxious about her future employment prospects in the immediate aftermath of her dismissal. She further says these negative impacts were exacerbated by the timing of her dismissal coming just before Christmas.

[51] I accept Ms Heron's evidence to the effect that the dismissal and how it occurred was humiliating for her and caused distress. I am not persuaded Ms Heron contributed to her dismissal in a blameworthy and causative way. Sfizio is ordered to pay Ms Heron \$15,000 under s 123(1)(c)(i) of the Act as compensate for her non-economic losses.

Summary of orders

[52] Sfizio Limited is ordered to pay Katie Heron the following:

- (a) \$953.56 (gross) in unpaid sick leave¹⁵ and wages¹⁶ pursuant to s 131 of the Employment Relations Act 2000.
- (b) \$1,165.40 (gross) for lost wages pursuant to s 128 of the Employment Relations Act 2000.¹⁷
- (c) \$15,000 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act.¹⁸

Costs

[53] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

¹⁵ Refer [43]

¹⁶ Refer [46]

¹⁷ Refer [48]

¹⁸ Refer [51]