

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 151/09
5157749

BETWEEN KAREN MCMILLAN
 Applicant

AND TIMARU DISTRICT
 COUNCIL
 Respondent

Member of Authority: Helen Doyle

Representatives: Christie O’Driscoll, Counsel for Applicant
 Penny Shaw, Advocate for Respondent

Investigation Meeting: Timaru on 27 August 2009

Determination: 9 September 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms McMillan says that she was unjustifiably constructively dismissed from her employment as an Animal Control Officer with the Timaru District Council (the Council) on 11 November 2008. On 28 January 2009 Ms McMillan raised a personal grievance that she had been unjustifiably constructively dismissed.

[2] The Council says that Ms McMillan’s claim is barred on the basis that she received accord and satisfaction when she signed a letter confirming her resignation on 11 November 2008 and stating that she received four weeks pay in lieu of notice in full and final settlement.

[3] Ms Shaw advised that the Council are no longer pursuing an issue that the grievance was not raised within the 90 day period.

[4] By agreement there was an investigation meeting to deal with the issue as to whether Ms McMillan had received accord and satisfaction. Mediation did not take place before this investigation meeting.

[5] The issue for determination is whether Ms McMillan is barred from pursuing her personal grievance because she received accord and satisfaction by virtue of the letter of resignation dated 11 November 2008 and subsequent payment of four weeks in lieu of notice.

Is Ms McMillan barred from pursuing her personal grievance because she received accord and satisfaction by virtue of the letter of resignation dated 11 November 2008 and subsequent payment of four weeks in lieu of notice?

Background facts

[6] I have set out the facts necessary to determine the preliminary issue without going into detail in terms of matters more relevant to the substance of the personal grievance.

[7] Ms McMillan attended two formal disciplinary meetings on Friday 31 October and Friday 7 November 2008. She was represented at both meetings by Anne McWhirter from the Southern Local Government Officers Union (the Union). Ms McMillan's husband also attended to support her at the second meeting on Friday 7 November 2008. The Human Resource Manager at the Timaru District Council, Graeme McLauchlan and the Building/Environment Health Manager, David Armstrong, to whom Ms McMillan reported directly in her role as Animal Controller, attended both meetings.

[8] Prior to the meetings there had been ongoing issues between Ms McMillan and the Council but both parties accepted that these two meetings were of a formal disciplinary nature.

[9] During the second meeting on 7 November 2008 two options to deal with the concerns of the Council were outlined to Ms McMillan and her representative. The options were dismissal or a final warning with a closely monitored training programme involving daily meetings with Mr Armstrong, and a facilitated meeting with a colleague with whom there had been difficulties.

[10] Mr McLauchlan and Mr Armstrong were required to consult with the Chief Executive, Warwick Issacs before making a final decision as to the outcome of the disciplinary meeting.

[11] The outcome that was arrived at by the Council after the consultation with the Chief Executive was to issue Ms McMillan with a final warning with conditions which the Council needed to know she would agree to comply with.

[12] There was a dispute as to exactly how and when that outcome was delivered to Ms McMillan and/or Ms McWhirter. I find that Ms McWhirter's recollection is likely to be more accurate than Ms McMillan's because Ms McMillan was very upset at that time.

[13] Ms McWhirter said in her evidence that Mr McLauchlan telephoned her on Monday 10 November 2008 and advised that the Council was considering a final warning. Ms McWhirter said it was made clear to her that the Council would only consider a final warning if Ms McMillan accepted the conditions that she address certain work habits, be in effect micro-managed and have the facilitated meetings with the co-employee.

[14] Ms McWhirter said she contacted Ms McMillan who was at work that day and tried to encourage her to accept the final warning with the conditions. Ms McWhirter described Ms McMillan was being highly distressed at that time and that there was constant crying.

11 November 2008

[15] Mr McLauchlan followed up with Ms McWhirter on 11 November as to whether or not Ms McMillan had made a decision about the warning and in particular whether she accepted the conditions attached thereto. Ms McWhirter contacted Ms McMillan who advised her that she was going to resign. Ms McWhirter who is based in Dunedin told Ms McMillan that she should go and speak to Mr McLauchlan about that. Ms McWhirter explained when asked by the Authority what she thought Ms McMillan would discuss with Mr McLauchlan, that being a discussion involving the practicalities of resigning such as returning her uniform and her truck.

[16] Ms McWhirter advised Mr McLauchlan by telephone that Ms McMillan was going to resign. A discussion took place between Ms McWhirter and Mr McLauchlan

concerning Ms McMillan's distressed state. It was decided that it would be better if she not be required to work out her notice period. Ms McWhirter could not really recall any discussion about payment in lieu of notice other than an assumption that Ms McMillan would be paid out. Mr McLauchlan said in his evidence that he also did not see Ms McMillan as being capable to carry on work in her distressed state and agreed to release her from her notice period.

[17] There was no evidence that during the telephone call Ms McWhirter and Mr McLauchlan used the words full and final settlement about the notice period and any payment in lieu thereof. Further there was no evidence that there was a discussion along the lines that such payment would resolve the matter or be in full and final settlement of all matters arising out of the employment relationship.

[18] Ms McWhirter said that she was certain that there was no discussion about a full and final settlement because had there been one she says she would have taken some different steps. She said she would have alerted Ms McMillan to what the Council was seeking and would have advised her not to resign on that day. Further she said she would have come to Timaru and met with Ms McMillan and Mr McLauchlan regarding any agreement surrounding her resignation. Ms McWhirter said that she would have assisted Ms McMillan in writing her resignation or at least have wanted to see it before anything was signed. Ms McWhirter did not speak again to Ms McMillan after her discussion with Mr McLauchlan.

[19] Mr McLauchlan then spoke to Ms McMillan by telephone and organised a time for her that day to come into his office. Ms McMillan attended by herself at Mr McLauchlan's office. She confirmed with Mr McLauchlan that she was not able to accept the final warning with the conditions and was upset and felt she had no option but to resign. Mr McLauchlan talked to Ms McMillan to make sure that that was what she wanted to do and he discussed with her the financial implications of such a decision. Mr McLauchlan said that while he was aware that Ms McMillan was not happy about the situation, he believed that she was resigning of her own free will after having been given advice.

[20] Mr McLauchlan recalled that Ms McMillan was calm when they initially talked but did become upset when he advised her that they needed a letter of resignation to be able to pay out her notice period. He accepted it is possible that she began to cry at or about that time but said that Ms McMillan often cried and that he

had a box of tissues for that very reason in his office. In other words, as I understood his evidence, she was no more and possibly somewhat less distressed than she had been on other occasions. Mr McLauchlan had Ms McMillan sign a letter authorising a letter of resignation to be drafted on her behalf.

[21] Mr McLauchlan said he talked to Ms McMillan about the contents of the resignation letter before it was being typed. Ms McMillan did not accept that and said there was no discussion about its contents.

[22] I find it likely there was a discussion between Mr McLauchlan and Ms McMillan before the letter was typed about her not being required to work out her notice period. Ms McMillan was relieved about that but said that there was nothing said, or at least she did not appreciate, that she would still be paid for the four weeks in lieu of notice. Ms McMillan said she knew she had four weeks holiday pay due and owing. I would find it a little surprising if there was absolutely no discussion about payment in lieu but it is possible that, given her upset state, she may not have appreciated that she would be paid for her notice period, or confused that with her holiday pay. I find it is less likely that there was no discussion about the last sentence of the resignation letter and I prefer Mr McLauchlan's evidence about that.

[23] The letter of resignation was typed and provided to Ms McMillan for her signature. It provided:

Dear Graeme

Resignation

Further to our discussions held this morning, 11 November 2008, I wish to tender my resignation to take effect from 5.00pm today.

It is agreed that Clause 21.2 of my agreement will not apply, ie I am not required to give the four weeks' required notice. However the agreement reached between the Council and LGOU is that I will receive four weeks' salary in lieu of notice in full and final settlement.

I am sorry to be leaving the Council and I love the role of Animal Control Officer.

Yours sincerely

Karen McMillan

[24] Mr McLauchlan said that Ms McMillan read the letter and then signed it. Ms McMillan said that in signing the letter she believed the employment was ending that

day and she did not have to work out her notice. There is no dispute that Ms McMillan was given a copy of the letter to take away with her.

[25] Mr McLauchlan said that the full and final settlement words put in are the standard terminology he uses when there are any payments made and they are words put in to protect the Council. He accepted they were not put in because of anything that Ms McWhirter or Ms McMillan said to him.

[26] Mr Armstrong and Mr McLauchlan both gave evidence that as far as they were concerned matters between the Council and Ms McMillan were at an end and that Ms McMillan appeared relieved with the outcome.

[27] It is not in dispute that the four weeks payment in lieu of notice was made to Ms McMillan. She did not return the money. The evidence supports that usually the Council does expect employees to work out their notice period. Mr Armstrong gave evidence about a discussion between him and Ms McMillan on the way home on 11 November 2008 after the meeting during which he said that she appeared relieved. He gave evidence that Ms McMillan had written an apology to him in early December 2008 and had also unsuccessfully applied for an Animal Control position at the Council in December 2008.

[28] I have considered these matters but the important issue for me is whether there was a full and final settlement on 11 November 2008 that prevents Ms McMillan from proceeding with a personal grievance.

Determination

[29] Ms O'Driscoll submits that there was no agreement to a full and final settlement by Ms McMillan which bars her from proceeding with her personal grievance.

[30] Ms Shaw submits that Ms McMillan is barred from bringing her personal grievance procedures by virtue of the letter signed by her on 11 November 2008 because she received accord and satisfaction of her claim.

[31] Ms Shaw refers to three Employment Court cases *Harris v. Birchwood Farm Holdings Ltd* [2002] 2 ERNZ 392 and *Abernethy v. Dynea NZ Limited* [2007] 1 ERNZ 462 and *Graham v. Crestline Pty Ltd* [2006] 1 ERNZ 848.

[32] Ms Shaw summarised the relevant principles that constitute accord and satisfaction which are set out by the Chief Judge Colgan in *Graham*. The constituents of accord and satisfaction are a genuine dispute between the parties and a finding on the facts of a meeting of the parties minds or that one of them must act in such a way as to induce the other to think that money (or any other consideration) is taken in satisfaction of the claim.

[33] I turn firstly to the issue as to whether there was a genuine dispute between Ms McMillan and the Council. In support of the existence of a genuine dispute, Ms Shaw relies on ongoing issues between Ms McMillan and the Council within the work place over a long period of time, culminating in the formal disciplinary meetings and outcome I have outlined above.

[34] In the three Employment Court cases referred to it was accepted that there were genuine disputes. In *Harris* there was a dispute about monies owed in terms of the employment relationship for wages and the like. In *Abernethy* a personal grievance had been raised and there were discussions with respect to its resolution and in *Graham* there was an agreement that there had been an agreement to settle litigation that existed between the parties.

[35] Unlike the situation in those cases Ms McMillan had not as at 11 November 2008 raised a personal grievance. There was no evidence that she had asked for money or indeed that any owing would not be paid. In addition there was no real dispute over whether or not Ms McMillan would work her notice. Mr McLauchlan agreed that she was really not capable in the circumstances of working out her notice.

[36] That leaves the issue of four weeks payment in lieu of notice and the basis for that payment. There is no evidence that that payment was in dispute between the parties. The evidence does not support an agreement between the Council and Ms McMillan's representative, the Union, that the payment was to be made in full and final settlement of all employment relationship issues between the parties. Mr McLauchlan, being prudent, simply added the words *full and final settlement* because it involved a payment by the Council to an employee.

[37] I am not satisfied in the circumstances that there was accord and satisfaction. There was no genuine dispute or claim between the parties about which there could be a meeting of the minds to resolve and discharge any further obligations. I accept Ms

Shaw's submission that certainty is an important aspect in terms of resolving matters. In this case though the letter that Ms McMillan signed and the circumstances that she signed it under are not such that I find prevent her proceeding with her personal grievance.

[38] In conclusion I am not satisfied that Ms McMillan and the Timaru District Council reached an agreement in full and final settlement of all matters relating to her employment relationship that prevents her from proceeding with her personal grievance. Ms McMillan has not received accord and satisfaction of her claim by virtue of the letter she signed on 11 November 2008.

Mediation

[39] I direct the parties to attend mediation to see if the issues between them can be resolved.

Costs

[40] I reserve the issue of costs and given the preliminary nature of this determination it would be appropriate to leave the determination of costs until after any final determination of all matters between the parties.

Helen Doyle
Member of the Employment Relations Authority