

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Lisa Morrison (Applicant)  
**AND** Spotless Services (New Zealand) Limited (Respondent)  
**REPRESENTATIVES** Ian Hard for Applicant  
Paul McBride for Respondent  
**MEMBER OF AUTHORITY** P R Stapp  
**INVESTIGATION MEETING** Wellington 6 December 2005  
**DATE OF DETERMINATION** 10 February 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] This is an employment relationship problem concerning the termination of Lisa Morrison's employment with Spotless. She has claimed that she has a personal grievance and is seeking lost wages, compensation and costs. The respondent has denied the claim. Instead it says Ms Morrison abandoned her employment.

**The Facts**

[2] Lisa Morrison started work for Spotless as an operator in a service centre on 23 February 2004 under a facilities management and maintenance contract for the Trentham Military camp and associated sites. That contract commenced in January 2004. The management of the contract is based in a small office, where Ms Morrison worked, as the single point of contact. Her employment was confirmed by letter dated 10 February containing her hours of work, salary, and starting date. She acknowledged the specific conditions in her employment agreement and confirmed understanding Spotless' rules and conditions in the staff handbook.

[3] The terms of employment included 20 days notice from either party for termination. There was also a provision for abandonment:

(c) *Abandonment*

*If you are absent from work for a continuous period exceeding two (2) working days without notification to and consent from Spotless or without good cause, you shall be deemed to have abandoned and so terminated your employment. Spotless shall make reasonable efforts to contact you during the period of absence to establish the cause.*

*Note: For the purpose of this sub clause the term “good cause” shall mean a cause as serious as unexpected hospitalisation*

[4] After two weeks at work Ms Morrison had two days off work on sick leave. This was immediately followed by prearranged and approved absence for her to have a personal trip to Auckland.

[5] Between April and mid July 2004 Ms Morrison had a total of 18 days off work (including 3 days anticipated annual leave).

[6] On 19 July 2004 Ms Morrison’s absences from work were formally raised as a concern by Catherine Bryant the service centre manager, to whom Ms Morrison reported.

[7] From 30 September 2004 until 6 April 2005 she had 32 working days off work (including 12 days annual leave).

[8] In April 2005 Ms Morrison applied for leave without pay to have a non refundable overseas holiday that she had booked and paid for, from 30 September to 16 October 2005. Ms Bryant had some difficulty granting the leave because it was inconvenient for work, difficult to manage around and was in excess of Ms Morrison’s entitlement.

[9] On 20 April 2005 the holiday issue was taken up with the applicant by Ms Bryant and Colin Starling the location manager. They discussed Ms Morrison’s attendance at work. She was told that any further leave without pay would require prior approval.

[10] From the end of April until June 2005 Ms Morrison had a further 14 days off sick.

[11] By 27 June 2005 her absence had become a problem. Another meeting was held with Peter Jennings, Spotless’ Human Resources manager. Also present were Ms Bryant, Ms Morrison’s

support person, Haley Walker, the applicant and Mr Starling. They discussed Ms Morrison's on going absences, the reasons for them and suggestions to help her. It was not a disciplinary enquiry.

[12] From July 2005 she had a further 12 days off work. On 25 July her doctor, Dr M V Dunn, provided a letter "*To Whom It May Concern*". Amongst other things it said that Ms Morrison had become anaemic due to gynaecological problems (and that she required a blood transfusion of three units on 19 July 2005). He also said she was still anaemic and could require further transfusions and that she was due to see a Gynaecologist on 9 August 2005. He wrote further on 27 July that Ms Morrison's on-going medical condition was causing her stress, "*as she would prefer to be able to go to work*". He said that, "*[t]his will be an on-going problem until she is seen by a specialist at the hospital*".

[13] There was another meeting on 2 August 2005 that did not involve Peter Jennings and Catherine Bryant, but Haley Walker attended with Ms Morrison and Mr Starling. Spotless sought Ms Morrison's agreement to discuss her health with her medical advisor: but she advised that her medical advisor was not willing to discuss matters at all. Instead Ms Morrison said she would authorise Spotless to contact her advisor in writing. No authorisation was received. The matter was not pursued again by Spotless.

[14] On 16 August Ms Morrison was absent without a medical certificate. However Spotless knew that she was seeing the specialist (that had been deferred from 9 August 2005).

[15] On 17 August Ms Morrison informed Spotless that she needed an operation and had decided to go private because it was quicker than the 4-5 month delay she says she was told would involve the public system. The surgery was arranged for 16 September 2005.

[16] Mr Starling says he requested details from Ms Morrison of her intended dates of absence, the date she would return to work, and asked her to provide any information on her on going health issues and specialist opinion on the medium to long term prognosis.

[17] On 22 August Spotless received advice from Ms Morrison of her intention to be absent from work from 16 September for 4 weeks.

[18] On 23 August the specialist confirmed the surgery date of 16 September 2005 and indicated that Ms Morrison would need 6 weeks to convalesce. Mr Starling says that Ms Morrison told him that the specialist had the view there was no guarantee that the surgery would be successful.

[19] Mr Starling declined the request for leave without pay on 26 August, and he says he gave his reasons for his decision. On 8 September Ms Morrison wrote to Spotless saying that she would take the leave anyway, and intended to return to work on 17 October 2005. Spotless confirmed that Ms Morrison's leave had not been granted in a letter dated 13 September 2005. She was put on notice that her employment would be terminated if she failed to urgently contact Mr Starling to discuss the matter. She replied making another request for leave but was put on notice of unauthorised absence. Between 28 September and 10 October the process of termination from employment was put in place with her final pay being made on 14 October 2005. In the meantime her position was temporarily filled by a fixed term arrangement commencing from 4 October 2005 until the vacancy could be advertised.

[20] Ms Morrison had her surgery and then went to Australia on 30 September to convalesce and returned on 14 or 15 October. A statement of problem was lodged in the Authority for reinstatement to her position. The parties attended mediation with a mediator from the Department of Labour. The claim for reinstatement was withdrawn but otherwise the employment relationship problem was not resolved.

### **The Issues**

[21] The first issue to determine is whether or not the applicant abandoned her employment. Would a fair and reasonable employer have reached this conclusion?

[22] Secondly, if the applicant was dismissed was the dismissal justified? Would a fair and reasonable employer have dismissed the applicant?

[23] If a dismissal was unjustified, what remedies should be applied?

### **Did the applicant abandon her employment?**

[24] The applicant says she did not abandon her employment because Spotless knew she was going into hospital, that she would be absent for four weeks and would be returning on 17 October. Spotless says the applicant repudiated her own employment by not turning up to work when leave

without pay was declined. Spotless says the applicant chose to absent herself from work when leave without pay had been refused. Therefore she was absent for more than two days. The requirements for notification and consent with good cause were not met because leave was not approved and hospitalisation was expected. Spotless says the applicant terminated her employment by not returning to work. Spotless says that it made reasonable efforts to contact Ms Morrison and was able to confirm that the absence was the surgery that she had chosen to have at that time, and not some other factor. Spotless relies on the contemporaneous correspondence and Mr Starling's evidence to prove its point rather than the applicant's claim of being dismissed.

[25] The information in front of Spotless was that the applicant could have had medical treatment in a public hospital. It knew that the applicant had decided to go private and knew the dates of that surgery. It had conflicting information about the applicant's period of convalescence: the applicant's opinion of four weeks and the doctor's opinion of six weeks. Spotless was not told the reasons for the surgery when it requested it.

[26] I conclude that the abandonment clause does not apply simply because in this situation Spotless knew that Ms Morrison was not abandoning her employment. She wrote telling Mr Starling that her intention was to be absent from work from 16 September 2005 for 4 weeks and the specialist confirmed the surgery date of 16 September and indicated Ms Morrison would need 6 weeks to convalesce. Also Spotless knew from Dr Dunn's letters the applicant had an ongoing problem involving anaemia and a gynaecological issue. Mr Starling declined the request for leave without pay on 26 August, and he says he gave his reasons for his decision then. On 8 September Ms Morrison wrote to Spotless saying that she would take the leave anyway and intended to return to work on 17 October 2005.

[27] Also I conclude that the information available to Mr Starling was enough to alert a fair and reasonable employer that the applicant had a significant medical issue considering her absences on sick leave, Dr Dunn's letter, the specialist's information and the fact the applicant was having surgery.

[28] The employer was not faced with an abandonment but an employee who made a decision to take time off work when leave had not been approved and who was on notice that her employment would be terminated if she failed to urgently contact Mr Starling to discuss the matter. This is more in the nature of a disciplinary matter rather than abandonment. The respondent reached the wrong conclusion in the action it decided to take.

### **The applicant's dismissal from her employment**

[29] The applicant was dismissed from her employment when Mr Starling wrote to her on 10 October 2005. His letter read in part as follows:

*Dear Lisa*

*As I have had no response to my letter of 28 September 2005 I have today instructed Payroll to generate your final pay...*

[30] This letter needs to be read in context with another letter dated 23 September, written by Mr Starling: as follows:

*Dear Lisa*

*Thank you for your letter of 22 September 2005, in response to mine of 21 September 2005, advising that your operation went very well.*

*As your request for extended leave without pay was not granted and your Sick Leave entitlement has been exhausted I confirm that your current absence is unauthorised. I therefore advise that I will be taking steps to have your employment formally terminated and will instruct Payroll to generate your final pay, which will be direct credited to your bank account.*

*If you would like the termination recorded as a resignation please let me know. Alternatively if you would like to discuss this matter further please feel free to contact me.*

[31] Ms Morrison says that she did not contact Mr Starling because she came to the opinion that he had already made up his mind. It was open to her to come to that opinion.

[32] It is clear to me that Mr Starling had embarked on a formal termination of Ms Morrison's employment on the grounds of unauthorised absence. This could not justify a dismissal when he knew that she was not abandoning her employment, she had had successful surgery and had told him she was returning to work on 17 October. A fair and reasonable employer would not have dismissed in the circumstances and especially when it was able to fill her position temporarily.

[33] Spotless' actions have all the appearance of an employer taking advantage of an opportunity to rid itself of an employee with an appalling absence record. It has tried to make the situation look as if it was an abandonment of employment.

[34] It is my conclusion that the applicant has been able to establish that she was dismissed from her employment.

### **Was the dismissal justified?**

[35] The dismissal was not justified. A fair and reasonable employer would not have dismissed the applicant when Mr Starling knew that she was not abandoning her employment, she had had successful surgery and had told him she was returning to work on 17 October and especially when Spotless was able to fill her position temporarily. Of course it was open to Spotless to invoke disciplinary action for the applicant's decision to take leave when leave without pay had not been approved. Although, it can support the decision not to grant the leave with reasons it says were given at the time, this, however, is not the issue.

[36] A fair and reasonable employer would not have dismissed the applicant for being defiant, and not providing medical information, and for sickness where the sick leave was defined and exhausted, because these were not put to her for comment on as matters likely to lead to her employment being terminated. The applicant has not helped herself in this matter when she was on notice that her employment was at risk if she was not at work when discretionary leave had not been approved (21 September 2005 and 23 September 2005). She certainly had an opportunity to comment on Mr Starling's notice of terminating her employment on 21 September 2005. Her reply in writing dated 22 September 2005 was to tell him of the success of her operation and to request leave without pay again. In replying to her on 23 September 2005 Mr Starling does not appear to have covered off her request for leave to be reconsidered, and instead, formally activates her termination of employment by instructing Payroll to generate a final pay.

[37] It now transpires that the applicant had surgery for a hysterectomy. She made a decision in the interests of her health to proceed quickly in a private hospital after taking out a loan to have the surgery. What she did not do was confide in her employer as to the circumstances at the time and it was reasonably open to the employer to conclude that she refused to do so. Indeed her evidence of protecting her privacy supports this conclusion. Her failure to provide more details than she did,

and the amount of leave she took during her employment, has contributed to her employer's antipathy towards her. This antipathy has caused her employer to react and terminate her employment. A fair and reasonable employer would have taken account of its right to a disciplinary investigation in respect of Ms Morrison not turning up to work when her leave had not been approved and enquire fully into the reasons, and that her position had been temporarily filled by a fixed term arrangement that meant her position could have been left open.

[38] The applicant was unjustifiably dismissed, I hold.

### **Remedies to resolve the employment relationship problem**

[39] Since the applicant has a personal grievance it is open to me to consider remedies available for a personal grievance, but I must also consider the applicant's contribution to the situation giving rise to her personal grievance.

[40] The applicant's failure to provide detailed information about the reason for her surgery, the urgency of it and the extent to which it was life threatening is linked to Spotless' decision. It was entitled to the information given that the applicant was seeking an indulgence for leave that she did not have available to her, and that Spotless had supporting reasons to decline her application for leave without pay. The applicant believed she had some right to her privacy, a right to remain silent and not divulge information, and to take time off. However she has to accept that there was another party directly involved in the relationship. The applicant's position was not assisted by the amount of leave she had already taken and that the employer had conflicting information from her and her medical advisor about the amount of time she required for convalescence and that she is reported to have said that her specialist had the view that there was no guarantee that the surgery would be successful. Although not directly relevant, but because of the amount of time the applicant had had off work, and since she decided to take time off for surgery when leave had not been approved, it was open to a fair and reasonable employer to enquire about her medium to long term prospects to work. Of course this would have been open to an employer enquiring in a disciplinary investigation, and especially if it was related to incapacity to work, rather than the setting here. There is no question that any disciplinary investigation was not commenced because disciplinary action was not being taken. However, a fair and reasonable employer would have been alerted to the significance of the applicant's medical situation having regard to her absences, Dr Dunn's letters and the information from the specialist of the situation. Both parties had mutual interests and needs including the applicant being more forthcoming but I can not attribute any contributory fault

when the employer had enough information that would have alerted it to the significant health issue the applicant had, and that it decided to temporarily fill her position with a fixed term agreement. On this latter point any argument that the applicant's absence would be inconvenient for management reasons raises a question about whether a fair and reasonable employer would have denied her leave knowing that there was a significant medical issue. In deed the applicant tried to do something about her problem and elected to have surgery sooner rather than later: being a circumstance that the employer would have had an investment in considering that earlier it had a meeting to raise suggestions to help the applicant and her absences.

[42] For completeness the applicant did go to Australia on 30 September 2005 after her surgery. I accept that she did so to recuperate, which she would be entitled to do and must have been medically able to do so, since there has been no evidence or suggestion to the contrary. Mr Starling says she continued with her holiday that had been planned. On balance because of the applicant's surgery and that it was a significant operation, and according to Dr Dunn's letters the applicant had medical problems, I have to accept that she was recuperating and convalescing. There was common ground that recuperation and convalescence for such an operation would be up to six weeks at least. No ulterior motives have been proven that the applicant took advantage of having surgery earlier to go to Australia on non refundable tickets. She accepted that she knew of Spotless' intentions from 23 September, and upon returning to New Zealand on the 14<sup>th</sup> or 15<sup>th</sup> of October 2005 was ready to return to work on 17 October, and she had obtained Mr Starling's letter of 10 October 2005 terminating her employment.

[43] Ms Morrison has withdrawn her claim for reinstatement. She has claimed lost wages. She was paid \$32,000 per annum, by monthly salary, for 40 hours per week. There is no contributory fault. Therefore the applicant is entitled to at least three months lost wages. I am satisfied that she was ready to return to work on 17 October 2005. I assess her lost wages as \$5,123.04 by deducting her earnings estimated at \$1030.80 (for eight days work at \$17.18 that she received to mitigate her loss and a further deduction of 2 weeks in the absence of sufficient evidence to mitigate her losses fully.

[44] The applicant has claimed \$20,000 compensation. This is a dreadful dismissal. That is not to say the employer rightly was very concerned about the applicant's absences, which was another matter. The employer made a decision to treat the situation as an abandonment where that could not possibly be a correct and a proper decision for a fair and reasonable employer. The applicant would have known that she risked her employment at least from 21 September. So it would not have come

as too great a surprise to her on 14 or 15 October when she received Mr Starling's final letters. Nevertheless she was unjustifiably dismissed in an opportunistic situation. I accept that there has been an impact on her because of the dismissal. She lost a job she had a reasonable expectation to return to. I therefore award her \$7,000 compensation for loss of dignity and injury to her feelings.

[45] It is my decision that Spotless Services (New Zealand) Limited pay Lisa Morrison the sum of \$5,123.04 for lost wages and \$7,000 compensation for loss of dignity and injury to her feelings.

[46] Costs are reserved.

P R Stapp  
Member of the Authority