



# New Zealand Employment Relations Authority Decisions

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## **Parker v Ceres Enterprises Limited (Auckland) [2012] NZERA 872; [2012] NZERA Auckland 127 (13 April 2012)**

Last Updated: 26 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2012] NZERA Auckland 127  
5347124

BETWEEN CARMELLE PARKER Applicant

AND CERES ENTERPRISES LIMITED Respondent

Member of Authority: Eleanor Robinson

Representatives: Gurjinder Singh, Representative for Applicant

Keith Langton, Counsel for Respondent

Investigation Meeting: 28 March 2012 at Auckland

Submissions received: 4 April 2011 from Applicant

3 April 2011 from Respondent

Determination: 13 April 2012

### DETERMINATION OF THE AUTHORITY

#### **Employment Relationship Problem**

[1] The Applicant, Ms Carmelle Parker, claims that she was unjustifiably dismissed by the Respondent, Ceres Enterprises Limited (“Ceres”).

[2] Ceres denies that it terminated Ms Parker’s employment, and claims that Ms Parker left her employment voluntarily by reason of abandonment

#### **Issues**

[3] The issue for determination is whether Ms Parker was unjustifiably dismissed by Ceres, or whether she voluntarily terminated her employment.

#### **Background Facts**

[4] Ceres is a wholesaler of organic food products distributed through a variety of retail outlets. Ms Parker was employed as a Sales Assistant at the Ceres Wholefoods Store (“the Store”).

[5] Ms Parker took a period of approved leave from 24 January 2011 until 28 February

2011; comprising 4 weeks annual leave entitlement and 1 week of unpaid leave. Ms Marianne Weber, Manager of the Store,

stated that she had agreed to the period of extended leave on the basis that February was generally a quiet month.

[6] During her period of absence, Ms Weber stated that she had received a number of emails from Ms Parker. These emails had contained comments regarding Ms Parker's trip, and had included requests that Ms Weber locate the spare key to her house and check that there were no problems at the house.

[7] Ms Weber explained that she had expected Ms Parker to return to work on 1 March

2011, however Ms Parker had failed to return to work on 1 March 2011

[8] Ms Parker explained that she had been taken ill upon her arrival at Delhi airport on 27

February 2011. Ms Parker said that she had received some first aid treatment at the airport and had then travelled to the family home in Chandigarh, stopping at a hospital en route in the early hours of 28 February 2011, where she received some initial treatment. Ms Parker stated that the doctor she had seen at the hospital had recommended that she have bed rest for a minimum period of 7 days.

[9] Ms Parker explained that the following day, 1 March 2011, she had visited a doctor at a clinic in her hometown of Panchkule for a check-up and a second opinion. Ms Parker said that the doctor had advised her to have 3 weeks rest.

[10] Ms Weber stated that she and the other employees at the Store had been concerned when Ms Parker had not returned to work on 1 March 2011. Ms Caroline Marshall, an employee at the Store and a friend of Ms Parker, said that she had been concerned for Ms Parker's safety as she knew from conversations with Ms Parker that her ex-husband was a violent man.

[11] Ms Weber said that, not having heard from Ms Parker, she had telephoned Ms Parker's New Zealand home and her cell phone to check if she had returned to New Zealand, and had also sent messages via Ms Parker's Indian cell phone and email.

[12] Ms Parker said that on 3 March 2011 she had asked her niece to inform Ms Weber about her sickness and inability to return to work because she was unable to communicate herself.

[13] Ms Parker explained that whilst in India her access to the internet was dependent upon using her brother's laptop when he visited her home and that he was frequently away.

[14] Ms Parker said that she had been unable to communicate by telephone as her cell phone call plan had expired whilst she was in India, and there was no landline telephone at her parent's home.

[15] Ms Weber stated that she had received an email and a telephone message from Ms Parker's niece on 4 March 2011. The email from Ms Parker's niece stated that Ms Parker had suffered from severe chest pain whilst at Delhi airport, had been unable to board her flight, and that she was still in hospital. Ms Parker's niece had also stated in the email that Ms Parker would not be able to travel before 10 March 2011.

[16] Ms Weber said she had responded to the email, explaining that she had hoped to hear from Ms Parker, and had asked that Ms Parker supply a medical certificate for her illness on her return to New Zealand. However Ms Weber said that she not heard from Ms Parker during the following 4 days.

[17] Ms Weber explained that she had tried to contact Ms Parker personally, but that she could not make connection via Ms Parker's Indian based cell phone. Ms Weber said that there had been no emergency number on Ms Parker's employee file and consequently she had emailed Ms Parker's niece to ask for a contact number for Ms Parker.

[18] Ms Weber said that Ms Parker's niece had replied, explaining that she had conveyed a message to Ms Parker, but that she was in a different city in India.

[19] Ms Parker said that she had booked a return waitlisted flight for 9 March 2011 and had informed Ms Weber of this by telephone message and email on 7 March 2011, which Ms Weber had received on 8 March 2011.

[20] Ms Weber stated that she had been surprised at Ms Parker's relaxed tone in the telephone message and also by the fact that Ms Parker had neither offered an apology, nor had appeared to be concerned about her absence.

[21] Ms Weber said she had responded to this email, commenting on the fact that Ms Parker did not appear to be concerned as to her continued absence, or to appreciate how worried all the employees at the Store had been about her. Ms Weber said that she had explained in the email that Ms Parker's position at the Store might need to be replaced.

[22] Ms Weber said that she had not heard from Ms Parker the next day and assuming that Ms Parker had boarded her flight, expected her to be at work the following day. However Ms Parker had not attended for work and Ms Weber said that she had had no communication from Ms Parker for a further four days.

[23] Ms Weber stated that at this point she had contacted the Employment Relations Advice department of the Retailers Association who had advised her to let Ms Parker know what her obligations were under her employment agreement.

[24] Ms Weber next heard from Ms Parker by email dated 12 March 2011. In the email Ms Parker said that the waitlisted seat on the flight to New Zealand had not been confirmed, and that she had then booked confirmed flights on the earliest available flight, which was on

20 March 2011.

[25] In the email Ms Parker advised that she would be arriving in New Zealand on 21

March 2011 when she would attend for work unless she was too tired, in which case she would be at the Store the following day, 22 March 2011.

[26] Ms Weber said she had been disturbed by this email. Ms Weber explained that Ms Parker had previously been communicating with her by text messages from her mobile telephone, and she had wondered if it was correct that there were no flights available for 11 days. Ms Weber stated that she had checked the internet and a search had revealed that there were at least 10 flights per day from Delhi to New Zealand.

[27] Ms Weber said that during this period a private email had been discovered on the Ceres computer system which Ms Parker had sent from her New Zealand work email address, which contained sensitive information and alluded to a court case in India. Ms Weber said that she had started to suspect that Ms Parker was extending her leave period for reasons other than the alleged unavailability of flights, especially in light of the number of flights which appeared to be available.

[28] Accordingly on 16 March 2011 Ms Weber had emailed Ms Parker and copied the email to Ms Rodnie Whitlock, Ceres Company Director, and Mr David Josephson, Ceres General Manager. Ms Weber wrote in the email:

*Your absence from work over three days without notification has been cause for much concern.*

*It is disappointing to note that you have been absent from work since*

*1st of March 2011. At the time of this letter, 2 weeks after your expected return.*

*As you are aware, you are required to notify us of your expected commencement time if you are not able to attend for work on any day, and your employment contract states:*

*27.1 Where the employee is absent from work for three or more consecutive working days without advising the employer or seeking the employer's authorisation for such absence, the employee shall be deemed to have terminated their employment by reason of abandonment.*

*Alternative arrangements have been made to cover your duties.*

*This letter is to inform you that before you come back to work, we need to schedule a meeting to discuss this matter and find out the reasons for it.*

*Please bring with you any information and evidence you have for your reasons, including flight booking information. You need to be aware that your employment is at risk.*

*Let us know when you are back in the country for certain, so we can schedule a time to meet with you.*

[29] On 18 March 2011 Ms Parker said she had been upset by the emailed letter from Ms Weber and she had emailed a letter in response offering to bring documents to a meeting to be held at a time and place of Ms Weber's choosing, and suggesting 24 March 2011 as the date for the meeting. Ms Parker further wrote in the email:

*I am helpless at the moment that I could not leave few disturbing matters midway. 14,16,18 March were very important deciding hearings in the court. I thought it better to solve it out myself than leaving it to someone even if it is my family.*

[30] Ms Weber said that this was the first time Ms Parker had informed her of the court case and that there were specific hearing dates scheduled.

[31] Ms Weber said she had sent a response email to Ms Parker confirming the meeting date as 9.30 a.m. on 24 March 2011. Ms Weber said she had heard nothing further from Ms Parker in respect of her having arrived in New Zealand as advised on 21 March 2011

[32] Ms Parker explained that as her daughter had developed an eye infection, she had had to extend her flight date from India by two days, and had arrived in New Zealand at 7.30 a.m. on 24 March 2011. Ms Parker said that since the meeting had been set to take place on 24

March 2011, she had seen no necessity for informing Ms Weber that she had had to delay her return flight yet again.

[33] Ms Weber stated that Ms Parker had failed to attend the meeting at 9.30 a.m. on 24

March 2011 but had telephoned her at 9.40 a.m. to explain that she had just arrived in New

Zealand but would come to the meeting immediately.

[34] Ms Whitlock, who had arrived in time for the 9.30 a.m. meeting with Ms Parker, said she had not been prepared to wait any longer and had encouraged Ms Weber to postpone the meeting and allow Ms Parker to recover from jetlag.

[35] The postponed meeting took place the following day, 25 March 2011. Ms Weber stated that at the meeting she had explained the concern Ceres had experienced concerning Ms Parker's absenteeism and non-communication, and had pointed out that there had been three instances of three day periods when there had been no contact from Ms Parker.

[36] Ms Weber asked Ms Parker for her explanations for her delayed return. Ms Parker:

confirmed that she had had a confirmed return flight for 28 February 2011;

explained that she had been about to board her flight, having gone through the boarding gate, when she had experienced severe chest pain and had collapsed, consequently being taken to a nearby airport hospital;

- explained that the delays in communication had been due to the immense stress she had been under and not having access to a telephone or email; and

that the unavailability of return flights between 9 and 20 March 2011 had been due to the number of people travelling as a result of the Christchurch earthquake, the Japanese Tsunami and returning students.

[37] Ms Weber explained that at the meeting on 25 March 2011 Ms Parker had claimed to have been taken from Delhi airport by ambulance to a hospital. Ms Whitlock stated that Ms Parker had informed her and Ms Weber that her luggage had been loaded onto the aeroplane and had had to be unloaded when she was taken ill.

[38] Ms Weber stated that she had asked Ms Parker if she had stayed in India in order to attend the court case, but Ms Parker had responded by saying that she only chose to attend the court hearings after she was unable to obtain flights to return to New Zealand.

[39] Ms Weber said she had asked why Ms Parker had not informed her of her possible overstay in light of the court case and Ms Parker had commented that it had been too hard to explain it in an email and she had wanted to wait until her return.

[40] Ms Weber said that the meeting had concluded with her advising Ms Parker that she and Ms Whitlock needed to consider her explanations, and that they would inform her of the outcome.

[41] Later that same day Ms Weber said she had emailed Ms Parker requesting further evidence in the form of supporting documentation, explaining that she required the documentation in order to make a fair decision regarding Ms Parker's future employment.

[42] Ms Weber explained that following the meeting she had been approached by a representative for a number of employees at the Store, expressing their disapproval of how Ms Parker had behaved. Ms Weber said that she had subsequently received an email from Ms Caroline Marshall, another employee and a friend of Ms Parker, who had been concerned that Ms Weber would be adversely influenced by these views in her decision about Ms Parker. Ms Weber said she had endeavoured to explain to all concerned that she would act in a fair and reasonable manner.

[43] Ms Parker said she had become aware of the employee representations against her continued employment and had arranged a meeting with Ms Whitlock, which she said Ms Whitlock had suggested should be a private meeting. Ms Whitlock stated that the suggestion that the meeting be private had been made by Ms Parker.

[44] The meeting took place on 28 March 2011. Ms Whitlock explained that at the meeting Ms Parker had requested that she intervene and inform Ms Weber that she (Ms Parker) be allowed to return to work. Ms Whitlock said she had explained that she would not intervene as the decision was for Ms Weber to make.

[45] At this stage Ms Whitlock stated that Ms Parker had informed her that she had brought two work colleagues with her, one of whom was Ms Marshall, and who were waiting outside in a car. Ms Whitlock said that she had been astonished that Ms Parker had brought these two employees with her to what she had believed to have been a private meeting, and she had refused to see them.

[46] Ms Weber said she had received the requested information from Ms Parker on 28

March 2011 and sent Ms Parker a text message on 29 March 2011 to confirm that she had received the documents and was examining them. Being aware that Ms Parker was receiving no income pending the outcome of the meeting and that it might take her some time to examine the documents provided, Ms Weber said she had also texted Ms Parker asking if she had been

to WINZ for financial support.

[47] Ms Weber stated that the documentation provided included two medical certificates, a flight itinerary, a certificate of court attendance, a copy of Ms Parker's passport and two boarding passes dated 23 March 2011.

[48] Ms Weber said she had considered the documents and had observed:

The flight itinerary provided showed that Ms Parker's actual flight was due to arrive in New Zealand at 7.30 a.m. on 1 March 2011, a flight which had been booked on 16 November 2010. This information did not accord with the previous communications to Ms Weber which had indicated the arrival date as 27 February and that Ms Parker would be taking 28 February 2011 as a leave day to recover from jetlag.

Ms Parker had not provided evidence of the boarding pass which she had claimed to have when she became ill at the boarding gate of the flight on 28

February 2011.

Research she had undertaken concerning the location of the hospital in

Zirakpur which Ms Parker had claimed to have been taken to by ambulance

from Delhi airport, had revealed that the hospital was in another state, some

260 kilometres from Delhi airport.

One medical certificate dated 28 February 2011 from JP Hospital, Zirakpur, advised rest until 6 March 2011, and the second medical certificate dated 1

March 2011 from a clinic in Panchkula advised 3 weeks rest. Ms Parker had not mentioned the second medical certificate and advice to Ms Weber, who had assumed from the information received from Ms Parker that she was planning to travel on 9 March 2011 and that she considered herself fit to do so.

Ms Parker did not produce evidence of any flights wait-listed on 9 March

2011, or of the flight she had said was confirmed for 20 March 2011; however Ms Parker had provided a boarding pass which showed that she had boarded a flight on 23 March 2011.

Ms Parker provided an emailed certificate from counsel for the court case in

India stating that Ms Parker had attended court on 14, 16 and 18 March 2011.

[49] Ms Parker said that Ms Weber had telephoned her at approximately 9.00 a.m. on the morning of 30 March 2011 stating that she was on her way to Ms Parker's home and had finished the call before Ms Parker could ask her the reason for her visit.

[50] Ms Parker said that when she arrived, Ms Weber had told her that it was a mutual decision between Ceres management, some of the Store employees and the Employment Relations Advice department of the Retailers Association to terminate her employment, informing Ms Parker that she had a few days in which to make a submission.

[51] Ms Weber stated that she had telephoned Ms Parker on the morning of 30 March

2011, saying that she wished to meet with her, and asking Ms Parker if she would prefer the meeting to take place in a public place or at her home. Ms Parker had responded that she preferred the meeting to be held at her home.

[52] Ms Weber said that she had explained to Ms Parker that the meeting was to discuss with Ms Parker her initial views on her employment position and to provide Ms Parker with an opportunity to respond.

[53] Ms Weber explained that at the meeting she had informed Ms Parker of the discrepancies she had found, but that Ms Parker was unable to offer a reasonable explanation for the mismatched date of her initial flight, or how she had been intending to resume her employment one hour after arriving at the airport on 1 March 2011.

[54] Ms Weber said that when asked why she had only caught a flight on 23 March 2011 after telling Ms Weber she was confirmed on a flight on 21 March 2011, Ms Parker had said that her daughter had been ill, which was the first time Ms Weber said she had been informed of this fact.

[55] Ms Weber said she had then asked Ms Parker about the court case in India and asked why Ms Parker had not requested extended unpaid leave, and that Ms Parker had agreed that she wished she had done so at the time, but that she had been under much stress at the time.

[56] Ms Weber stated that she had advised Ms Parker that she had failed in her obligations to keep Ceres informed during her period of absence and explained the abandonment clause. Ms Weber said that she had told Ms Parker that “*it was not looking good*”, confirmed that the allegations would be put in writing and Ms Parker would be given an opportunity to explain before a final decision about her employment was made.

[57] Ms Parker said that later that day, 30 March 2011, she had written a letter addressed to the Manager Ceres Wholefoods, Ellerslie, stating that she was fit and ready to attend work on 31 March 2011. Ms Parker had delivered this letter to the Store.

[58] Ms Weber said that she had been astonished at the letter and felt that she had to move to an immediate decision in the circumstances. Ms Weber said that she had then written a letter to Ms Parker confirming the decision to terminate her employment. In the letter Ms Weber advised that Ms Parker that she did not accept that a reasonable effort had been made to communicate her absence from 1 March to 24 March 2011. Ms Weber had written:

*As an employee you have a responsibility to maintain communication about your return to work at all times, especially if this time frame exceeds your expected date of return.*

*... I note that on several occasions, 3 days lapsed where we expected you back at work. Several attempts were made to contact you...*

[59] The letter concluded with the statement that:

*On the basis of the lengthy unadvised absence from work, it is deemed that you have terminated your employment by reason of abandonment.*

[60] Ms Weber said that she had driven to Ms Parker’s home where she had found Ms Parker in her front yard and had given her the letter, telling Ms Parker to read the letter and that it meant that Ms Parker could not attend for work the following day.

[61] Ms Parker stated that Ms Weber had communicated this last piece of information to her loudly, within hearing distance of a gardener, two neighbours and her daughter. Mr Vijay Narayan, Mechanic, confirms that he had overheard Ms Weber telling Ms Parker that she was not to attend for work the next day.

## **Determination**

### *Abandonment of Employment*

[62] The Individual Employment Agreement (“Employment Agreement”) which had been issued to Ms Parker and which she agreed she had read and understood, stated at clause 27.1:

*27.1 Where the employee is absent from work for three or more consecutive working days without advising the employer or seeking the employer’s authorisation for such absence, the employee shall be deemed to have terminated their employment by reason of abandonment.*

[63] In the letter dated 30 March 2011 Ms Weber sought to rely on this clause when confirming her view that Ms Parker had terminated her employment by reason of abandonment.

[64] The Court of Appeal in *EN Ramsbottom Ltd v Chambers*<sup>1</sup> accepted a submission that an employer must be cautious in drawing the inference that an employee has abandoned their employment and that it faces a high threshold if contending that the employment ended at the employee’s initiative.

[65] I consider that the actions of Ceres did not surmount this high threshold in that they were not consistent with Ceres’s view that Ms Parker had abandoned her employment.

1 [\[2000\] NZCA 183](#); [\[2000\] 2 ERNZ 97](#)

Whilst there were periods when Ms Parker had not communicated within the 3 day period specified in clause 27.1 of the Employment Agreement, there had nevertheless been a consistent flow of communication between the parties during the period of Ms Parker’s absence, and a meeting had been scheduled for Ms Parker to provide an explanation for her absence following her return to New Zealand.

[66] In these circumstances I consider that Ceres’s behaviour and actions were not consistent with those of an employer holding the belief that the employee had abandoned their employment, and that Ceres, notwithstanding the actual words of the letter of 30 March 2011, by any reasonable interpretation of that letter, terminated Ms Parker’s employment.

[67] The Test of Justification prior to the amendment on 1 April 2011 and which is applicable in this case, is set out at [s 103A](#) of the [Employment Relations Act 2000](#) (“the Act”):

*For the purposes of [section 103\(1\)\(a\)](#) and (b), the question of whether a dismissal or an action was justifiable must be*

*determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred"*

[68] The decision must be both substantively and procedurally fair. The test as set out in [s103A](#) requires the employer to establish both limbs of the test and adheres to the principles of natural justice.

### *Substantive Justification*

#### *Explanation for not returning to work in New Zealand on 1 March 2011 - the end date of approved leave*

[69] Ms Weber had not accepted as credible or satisfactory Ms Parker's explanations for her inability to communicate with Ceres within the time schedules as specified in clause 27.1 of the Employment Agreement or to report to work on the various dates notified in communications. I consider that conclusion to have been a reasonable one on the following basis:

**1)** Ms Parker gave firstly an illness, and then subsequently a lack of communication facilities, no flight availability, and her daughter's illness, as reasons for not returning to New Zealand until 24 March 2011.

i. Ms Parker's explanation at the Investigation Meeting of what had occurred at the airport in Delhi was inconsistent with the explanation which Ms Weber said she had provided to her and Ms Whitlock at the meeting on 24 March 2011.

ii. Ms Parker had subsequently provided two medical certificates to Ms Weber following the meeting on 24 March 2011, the second of these, which advised 3 weeks bed rest, had not been mentioned to Ms Weber in any of the communications from India.

iii. Ms Weber had been expecting Ms Parker to return to work after 10

March 2011 as had been the advice from Ms Parker's niece upon instruction from Ms Parker, however there was no contact from Ms Parker until 12 March 2011, which lack of contact Ms Parker attributed to her having had no access at her parent's home to a landline telephone facility or laptop. Ms Weber had attempted to contact Ms Parker after the communication from Ms Parker's niece but there was no communication from Ms Parker, despite the frequent contact prior to this date.

iv. At the Investigation Meeting Ms Parker agreed that she had been able to send a voice message and text to Ms Marshall on 8 March 2011, but said that she had been unable to send telephone messages after that date in order to explain that she had not been allocated seats on the waitlisted flight as, her own cell phone being no longer operative, she had used a friend's cell phone which was not available after that date. I am not convinced that this explanation is wholly credible.

v. I am also not convinced that Ms Parker's explanation that she was unable to communicate with Ceres by landline telephone from her parent's home is credible, given that Ms Parker was able to use her brother's laptop to send emails during the time he was present at her parent's home, and this would have required a modem and an operational landline.

**2)** Ms Parker stated that she had been unable to access availability on flights after the 9 March date until 20 March 2011. Ms Weber said she had had

concern that this explanation was credible and she had researched the number of flights to New Zealand from India during the relevant period, discovering that there were at least 10 flights daily.

i. Ms Parker agreed that there were many flights daily but said that she had been unable to obtain available seats on a flight to New Zealand until 20 March, a period of 11 days from 9 March 2011. Ms Parker stated that the reasons she had been given to explain the lack of availability were the earthquake in Christchurch, the tsunami threatening New Zealand, and returning students.

ii. I do not find these explanations to be credible, it is possible that the first two reasons might account for flights being full leaving New Zealand for India, but in this situation it seems unlikely that flights from India to New Zealand would be all full for such reasons. In the case of the third reason, the school and university terms would have already started by March and again it seems unlikely that, even if some smaller colleges started after the school and university start dates, there would have been sufficient student numbers to account for a total lack of availability on 10 flights each day for 11 days.

**3.** Ms Weber said that she become suspicious that the reason Ms Parker had extended the end date of her leave beyond that which had been authorised was for reasons other than those she had communicated to Ceres, in particular the court case.

i. Ms Parker's evidence was that she attended court hearings in relation to her dowry and harassment claims whilst she was in India. Ms Parker said that her attendance had not been required at the court, and that her father had represented her interests at the hearings.

ii. However in the letter addressed to the court in India, which had been found on the Ceres computer system, Ms Parker had written that her father had been beaten to death by her ex-husband's younger brother.

iii. Ms Parker also stated that she had merely attended the hearings on

14, 16 and 18 March 2011 because she was delayed in India.

iv. I do not find Ms Parker's evidence on this point credible, and her evidence was further undermined by Mr Narayan's evidence at the Investigation Meeting that Ms Parker had informed him prior to her leaving New Zealand that she was going to India to attend a court case.

#### *Ms Parker's extended unauthorised absence as serious misconduct*

[70] Serious misconduct in the Employment Agreement includes at clause 25; "*unauthorised and/or unexplained absence from work*" Ms Parker's extended absence over a three week period was unauthorised leave and was regarded by Ceres as constituting serious misconduct as set out in the Employment agreement.

[71] The test for serious misconduct is set out in *Northern Distribution Union v BP Oil New Zealand Ltd*<sup>2</sup>. In that case the Court of Appeal in defining what constituted conduct justifying summary dismissal stated:<sup>3</sup>

*Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*

[72] Ms Weber stated that she had not been satisfied with Ms Parker's explanations for her non-communication and unauthorised absences. I find that this view was based on reasonable grounds, and I consider that this had resulted in Ceres having a loss of trust and confidence in Ms Parker, which was an essential prerequisite for the employment relationship.

[73] In all the circumstances I find that Ceres had substantive justification for terminating

Ms Parker's employment summarily..

#### *Procedural Justification*

[74] A decision to dismiss must also be carried out in a procedurally fair manner. The basic requirements as outlined in *NZ Food Processing Union v Unilever NZ Ltd*<sup>4</sup> are notice informing the employee of the allegations, a real opportunity for the employee to respond to

the allegations, and a decision not tainted by bias or pre-determination. Additionally the fair

<sup>2</sup> [\[1992\] NZCA 228](#); [\[1992\] 3 ERNZ 483](#)

<sup>3</sup> *Ibid* at p.487

<sup>4</sup> [\[1990\] 1 NZILR 35](#)

and reasonable employer will inform an employee of their entitlement to have representation of their choice at a meeting of a disciplinary nature.

[75] Ms Parker had not been advised that she was entitled to have representation at either the meeting on 24 March 2011, or the meeting on 30 March 2011 which took place at Ms Parker's home and which she had been informed was to be an informal personal meeting.

[76] Ms Parker said that there had been no advance warning that the second meeting held on 30 March 2011 was to take place. Whilst I accept that Ms Weber telephoned Ms Parker a short time in advance of that meeting, this was on the same day and certainly allowed no time for Ms Parker to arrange to have a representative present.

[77] Additionally given the informality of the meeting and venue, and the lack of notification of the actual purpose of the meeting, there was no notification of the specific allegations to be made and therefore no opportunity for Ms Parker to address such allegations at that meeting.

[78] Although Ms Parker was informed by Ms Weber that her conclusion that Ms Parker was in default of the abandonment clause was preliminary only, and further that the allegations would be put in writing and Ms Parker would be allowed to make submissions before a final decision was confirmed, I find that this does not adequately fulfil the expectations of a fair and reasonable procedure.

[79] I also find that the reference to Ms Parker seeking the assistance of WINZ in Ms Weber's email of 29 March 2011 inferred that Ms Weber had already determined an outcome, such as to imply the decision to dismiss had been pre-determined.

[80] I find that there are more than minor procedural defects in the decision to terminate

Ms Parker's employment, and determine that Ms Parker was unjustifiably dismissed by Ceres.

## Remedies

[81] Ms Parker is claiming remedies of reinstatement, loss of earnings and compensation for hurt and humiliation. In considering the question of remedies, the Authority has to consider the extent to which the employee contributed towards the situation which gave rise to the personal grievance.

[82] Ms Parker had an implied duty of fidelity towards Ceres. Ms Parker was also expected to behave in such a manner that the mutual trust and confidence between the parties was not destroyed. Ms Parker was further under a good faith duty pursuant to [s4 \(1A\)\(b\)](#) of the [Employment Relations Act 2000](#) which requires the parties to deal with each other in good faith, and amongst other things, to be "*responsive*" and "*communicative*".

[83] I find that Ceres had behaved in good faith towards Ms Parker, Ceres had been concerned for Ms Parker's welfare when she had failed to return on the original end date of her authorised absence, and had attempted to, and did, communicate with her to elicit the reason for her absence.

[84] I do not find however that Ms Parker acted in good faith towards Ceres for the reasons set out in the preceding paragraphs; in particular she had failed to be communicative and responsive about both the reasons for her absence and for her failure to present for work when expected to do so.

[85] I find that Ms Parker had mislead and deceived Ceres about the reason for her not returning on the end date agreed at the time her leave request was granted. I find that Ms Parker travelled to India on account of the court case addressing her dowry and harassment claims, as confirmed by the evidence of Mr Narayan, and I consider that it had always been Ms Parker's intention to attend the court hearings on 14, 16 and 18 March 2011, the dates notified to Ms Weber in the email dated 18 March 2011 and confirmed in a copy email from the Indian court.

[86] The Authority is to act in equity and good conscience pursuant to [s 157\(3\)](#) of the Act. Having found that Ms Parker's actions constituted a breach of the duty of good faith and were intended to mislead Ceres, I consider that as Ms Parker's actions contributed wholly towards the situation which gave rise to her personal grievance, it would be inequitable to grant her any remedies.

[87] In these circumstances I decline to order any remedies.

## Costs

Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of

service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**

**Member of the Employment Relations Authority**

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