

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Regina Mae Pepene (Applicant)
AND Idea Services Limited (Respondent)
REPRESENTATIVES Regina Mae Pepene In person
Paul McBride, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 23 March 2006
DATE OF DETERMINATION 2 May 2006

DETERMINATION OF THE AUTHORITY

The applicant, Ms Gina Pepene, says that she has been disadvantaged, discriminated against and unjustifiably constructively dismissed by the respondent, Idea Services Ltd. Ms Pepene was employed as a community support worker in August 2004 in Whangarei. Idea Services looks after the needs of intellectually disabled people (“the service users”).

Ms Linda Barrie, the Northland Area Manager, said she was approached by Ms Kerry Milne, a Community Services Manager, who indicated to Ms Barrie that there were interpersonal difficulties between Ms Pepene and another employee, Ms Jenny Snookes, which she had been trying to resolve. Shortly thereafter, Ms Pepene approached Ms Barrie and gave her what she termed “a personal grievance against Ms Milne”, which complained of the fact that she felt unsupported by Ms Milne and that Ms Milne had not stopped Ms Snookes swearing at Ms Pepene.

29 April

Ms Barrie arranged to meet with Ms Pepene and a support person. At the meeting Ms Pepene was asked to set out her concerns so that Ms Barrie could follow up and investigate.

Ms Barrie then advised Ms Milne of the complaint but before Ms Barrie could interview Ms Milne in depth Ms Milne went on extended sick leave and resigned in mid 2005. Ms Barrie had formed the tentative view that some of Ms Pepene’s complaints might have substance but was unable to follow up on them at that stage. She arranged for Ms Pepene to be referred to EAP.

2 May

Ms Barrie met with Ms Pepene and Ms Snookes and tried to sort out the issue of work demarcation. This proved to be unsuccessful.

3 May and 6 May

Ms Barrie invited both Ms Snookes and Ms Pepene to attend a further meeting on 6 May when Ms Antonia Yelavich, the Auckland based HR consultant, would be present. Ms Pepene attended with her union delegate. The minutes of the meeting, which were copied to all attendees, show that Ms Pepene was reluctant to try to resolve the outstanding issues. The meeting was adjourned so that Ms Pepene could reconsider her position.

9 May

Ms Barrie had not heard from Ms Pepene (through an unfortunate failure in communication) and so invited Ms Pepene to a further meeting. She also wrote to Ms Pepene regarding her complaint against Ms Milne asking for any supporting evidence.

10 May

A union organizer attended with Ms Pepene. The file note shows that Ms Barrie tried to get Ms Pepene to make a commitment to resolving the problems between her and Ms Snookes. The interpersonal problem was having an adverse impact upon other staff and upon the service users so Ms Barrie arranged for Ms Yelavich to come to Whangarei for a further meeting.

13 May

At that meeting Ms Pepene and Ms Snookes entered into an agreement to “rebuild [the] relationship and work together professionally”. Ms Pepene then submitted a series of medical certificates until her resignation on 24 June.

Events of May

During Ms Pepene’s absence a number of issues were raised by other staff, including a serious allegation that Ms Pepene had been attempting to get some of the service users to sign a letter of complaint about Ms Snookes. Ms Barrie arranged a meeting for 21 June to discuss the allegations with Ms Pepene.

14 June

Ms Barrie wrote to Ms Pepene saying that there had been a number of complaints received about her from both staff and service users and that she wanted to discuss these with Ms Pepene upon her return from sick leave on 21 June. Ms Pepene said she would attend meeting and requested further details of the complaints.

17 June

Ms Pepene was sent a letter summarising and itemizing the complaints. She wrote:

As agreed we will be meeting on Tuesday 21 June at 8.30am. The purpose of this meeting is to give you an opportunity to provide feedback on the complaints and concerns in order for me to determine what if any further action needs to be taken. I would also like to revisit the agreements made by both you and Jenny Snookes in May to ensure that these agreements are going to be put into practice. Please feel free to bring a support person with you.

With regard to the Kerry Milne complaint she wrote:

Until I am able to progress my discussions with her I cannot provide you with any further feedback on incident reports or any other matter you have raised. Once I have concluded my investigation fully I will organize to meet with you to provide you with some feedback.

21 June

Ms Pepene was concerned that her issues with Ms Milne had not been finalized. Ms Barrie explained that Ms Milne was on sick leave and had asked not to be contacted. Ms Pepene complained that on 18 June Ms Milne had tried to run her over. Ms Barrie told her that if that was the case it was a police matter.

At the meeting Ms Pepene raised the possibility of a mediation with the Department of Labour.

22 June

Ms Barrie wrote to Ms Pepene asking to meet with her again upon her return from sick leave on 27 June in order to get feedback on the complaints she had received. Ms Barrie indicated that Idea Services was amenable to a mediation and was waiting to be contacted by the Department of Labour.

23 June

Ms Pepene confirmed by letter that she would attend the meeting, stated that she was being victimized and asked to be moved to another location. She also wrote:

I trust you don't expect me to work with people who have called me a liar and a thief! And to put me back at P.L.D would be causing me an unjustifiable disadvantage, although I have already been caused that!

These accusations relate to some of the allegations set out in the letter of 17 June although I note that there was no actual allegation of theft.

24 June

Ms Barrie received a resignation letter from Ms Pepene which was "effective immediately". The same day Ms Barrie replied accepting the resignation and an attached medical certificate and saying that although Ms Pepene had resigned if she still wished to attend the meeting on 27 June to discuss the matter at issue she could do so.

Decision

I have no doubt that Ms Pepene was upset about events that had taken place during her employment. Between 28 January 2005 and 4 May 2005 Ms Pepene made a significant number of complaints about fellow staff members: nine in total. Ms Snookes had made five complaints about Ms Pepene. Another employee had also made a complaint about Ms Pepene. Clearly, it was not a happy workplace.

In order to show that constructive dismissal has occurred the employee must show that the ostensible resignation in fact constitutes a dismissal and that the impetus for terminating the employment relationship was at the employer's initiative: Wellington etc Clerical etc IUOW v

Greenwich (1983) ERNZ Sel Cas 95. The applicant must also establish that the employer breached a duty owe to the employee.

The employer arranged a series of meetings and endeavoured to resolve the interpersonal relationship problem. It referred Ms Pepene to EAP. When matters of concern about Ms Pepene were raised Ms Barrie notified Ms Pepene and gave her an opportunity to respond to those. I cannot see any breach of the duty owed by an employer to an employee.

Ms Pepene was not constructively dismissed; neither was she disadvantaged nor was she discriminated against. Ms Pepene does not have a personal grievance.

Costs

If the parties are unable to resolve this issue leave is reserved for the respondent to file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of Employment Relations Authority