

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Justine Ray (Applicant)
AND Mahoe Developments NZ Ltd (Respondent)
REPRESENTATIVES John Peebles, Advocate for Applicant
Glenys Steele, Advocate for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 28 February 2006
DATE OF DETERMINATION 28 March 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Ms Ray submits she was unjustifiably dismissed by her former employer. To remedy her alleged grievance she seeks lost remuneration and compensation pursuant to s.123 (1) (c) (i) of the Act.

The respondent denies it dismissed Ms Ray. It is submitted that Ms Ray resigned her employment. She was given the opportunity to reconsider that resignation but after she affirmed her intention to resign the respondent accepted it.

Background

The respondent is in the construction business. The Managing Director, Mr McGovern spends a good portion of his time on construction sites but he also spends about 30% of his working day in the office

In August 2004 Ms Ray commenced employment with the respondent as a part-time office worker. She was employed on Mondays and Tuesdays for 7 ½ hours per day. At the time her employment ceased she was paid \$14 per hour. This was Ms Ray's first employment back in the workforce after a period where she had been raising her family.

It would be fair to describe Mr McGovern is a focussed person. Tasks are prioritised and managed according to that priority. He is direct and business like in his communication to the point of being brusque if his concentration is interrupted. In November 2005 Mr McGovern appointed Ms Patterson-Gray to be Office Manager. It was her role thereafter to manage staff and office administration issues.

It seems on the evidence that Ms Ray took personally Mr McGovern's direct and somewhat brusque style of communication. She did not heed advice given to avoid engaging Mr McGovern at inappropriate times and in fact she had the tendency not only to engage Mr McGovern but indeed to confront him and argue the point over management decisions that were properly Mr McGovern's to make e.g. the events pertaining to Ms Ray working at the respondent's construction site on Saturday 2 April 2005.

On this day it seems Ms Ray and her partner accepted the invitation of a subcontractor on one of Mr McGovern's building sites to undertake work there. Mr McGovern arrived at the site. He went about the work that had brought him there. At some stage Ms Ray approached him and asked if he was unhappy about her being there. Mr McGovern advised he was unhappy as she was not trained in site safe procedures and was not appropriately kitted out with safety gear. Ms Ray argued the point regarding her capability and right to be on site. Mr McGovern disagreed and later told the contractor that he was not to employ Ms Ray on any of his sites because of the health and safety implications. Mr McGovern was very clear in his evidence about the importance he places on workplace safety and the fact that no one works on his sites until they have undertaken training in safety procedures, signed the appropriate documentation and have been appropriately kitted out for the work undertaken. He is to be commended on his strict attendance to safety and was entirely within his rights to insist that no one work on his sites without the necessary training and gear.

Ms Ray was still debating the matter on Monday 3 April albeit she did come to accept Mr McGovern's directions that she not work on any of his sites.

Ms Ray did not work on Fridays but on Friday 8 April she went to the workplace to deliver a letter she had written to Mr McGovern. In that letter Ms Ray raised grievances she had over Mr McGovern's treatment of her over the previous few months. She expressed her feelings (citing examples) that he "*had been treating her unfairly by putting her down and making comments that have no justification in any workplace*". She said it had got to the stage that she felt "*anxious about coming to work*". She described Mr McGovern's manner as arrogant and rude towards her unless others were around. She concluded:

"I need to bring this to your attention by letter because whenever I try to discuss this with you it ends up with you belittling me even more. I hope this matter can be resolved sensibly and fairly and await your comments".

Mr McGovern was not at the office when Ms Ray delivered the letter. She gave it to Ms Patterson-Gray and advised she could read it. Ms Patterson-Gray brought the letter to Mr McGovern's attention later that day. She advised him not to speak to Ms Ray about the letter unless another person was present. It was agreed Mr McGovern would look at the letter over the weekend and that he and Ms Patterson-Gray would meet with Ms Ray to discuss it on Tuesday morning (which was be the earliest time that Ms Patterson-Gray would be available). A time was diarised on the computer and Ms Ray was to be advised of the meeting on Monday.

Ms Ray came to work on Monday. Mr McGovern was present and she asked him if he had received her letter. He advised he had. Unfortunately, Mr McGovern commented on how busy he was and that he had been lucky to find the letter. Ms Ray interpreted this as Mr McGovern being dismissive of her concerns. She asked if he would comment on the letter. He advised he would not do so at this stage but that there would be a meeting on Tuesday when Ms Patterson-Gray was available. I find Ms Ray told Mr McGovern she had been vomiting in the mornings before coming to work because she was so stressed. She also told him she had been taking medication for stress. Mr McGovern's evidence was that he was shocked to hear this, as Ms Ray's manner did not appear distraught when she came to work.

Mr McGovern went about his work for the day. The conversation with Mr McGovern regarding her letter left Ms Ray feeling belittled and uncomfortable. She said she felt unwell and had to get out of the office before Mr McGovern returned. It is Ms Ray's position that she telephoned Ms Patterson-Gray to advise her of this. It was her evidence that she said she was leaving the office, locking up and going to see her doctor. She admits Ms Patterson-Gray tried to talk her out of it and said she would come to the office immediately to talk about it. However, Ms Gray wanted to leave there and then as she was upset and did not want to be at the office when Mr McGovern returned.

It is Ms Ray's evidence that she rang Ms Patterson-Gray on Tuesday 12 and apologised for any inconvenience caused by her departure the previous day and advised she was going to see her doctor. She offered to help out with the monthly accounts if needed. Ms Ray went to see the doctor and on Wednesday 13 April she rang Ms Patterson-Gray and said she was taking sick leave and that she would be forwarding a medical certificate. At this point she was advised by Ms Patterson-Gray that the respondent considered she had resigned. Ms Ray said told Ms Patterson-Gray that was not the case and stated she would have given written notice to Mr McGovern if she had resigned. That day (at 16.48 pm) she faxed a note to the respondent saying:

"I am writing to let you know that I am taking two weeks stress leave. I will forward the doctors letter as soon as I receive it".

The same day the respondent, represented by Ms Patterson-Gray, faxed Ms Ray. Ms Patterson-Gray went over her understanding of the events that had taken place over the previous two days particularly the fact that the Ms Ray had been advised that the employer had arranged a meeting to address her concerns but that she had repeatedly refused to attend and had reiterated that she would be leaving. Ms Patterson-Gray went on to state:

"On that basis we accepted that you would not be returning and have started making arrangements to employ someone else".

Ms Ray faxed her medical certificate on Wednesday 14 April and wrote to Mr McGovern the same day. She traversed (from her perspective) the events of Monday 11 April, which led to her departure from the workplace. She stated she had not quit her employment but had needed to leave to see her doctor. The doctor had stated she was entitled to stress leave and had provided her with a medical certificate. She closed her letter:

"This is an issue about you as an employer treating me unfairly and bullying me. I need to take stress leave to consider my own health and after two weeks will then arrange a meeting to discuss this problem and hopefully come to a satisfactory result".

It is Ms Ray's evidence that she did not resign her employment but that she left the workplace because she was upset and made plans to see her doctor who recommended that she take two weeks stress leave and not do anything hasty.

Ms Patterson-Gray gave very different evidence. She said she was rung by Ms Ray on Monday morning. Ms Ray was upset and told her that she was closing the office and leaving and not coming back. Ms Patterson-Gray asked Ms Ray to stay for five minutes and she would come in, make a cup of tea and talk about the problem. Ms Ray replied that Mr McGovern's manner towards her would not change and she reiterated she was leaving. They had a discussion. Ms Ray said she had been to the doctor and was on medication. She told Ms Patterson-Gray that Mr McGovern had said he would not discuss her letter. Ms Patterson-Gray corrected Ms Ray and said that it was on her advice that he declined to discuss the letter there and then and that a meeting had been arranged to discuss

the letter the next day at 11.30 am. Ms Ray reiterated that nothing would change and that she was leaving. She took her personal possessions including her coffee cup.

The next Ms Ray rang and apologised for the inconvenience she had caused. Ms Patterson-Gray again tried to reassure Ms Ray that if she came to the planned meeting matters could be resolved. Ms Patterson-Gray said she would spend more time at the office to support Ms Ray. Ms Ray again said nothing would change and she was not coming back. She did however offer to help out with the monthly accounts.

It was Ms Patterson-Gray's evidence that Ms Ray rang the next morning (13 April) and said she had been to the doctor and that he had told her not to do anything rash and had told her to apply for two weeks stress leave. Ms Patterson-Gray considered this indicated that Ms Ray was attempting to resile from her clear resignation and said so. Ms Ray responded that as she hadn't given her resignation in writing she had not left. Ms Patterson-Gray said she would discuss the matter with Mr McGovern. Mr McGovern's evidence was that Ms Patterson-Gray told him that Ms Ray was now saying she hadn't resigned. She told him that she had explained to Ms Rae her resignation had been accepted and they were in the process of employing a temp.

Ms Patterson-Gray said that when she received Ms Ray's note on the afternoon of 13 April (stating that Ms Ray was taking two weeks stress leave) she responded immediately by fax saying that on Monday 11 April Ms Ray had twice said she was leaving. She had refused to stay five minutes until Ms Patterson-Gray could get to the office to discuss matters with her. She had declined to come to the meeting planned for 11.30 am on Tuesday 12 April and on that day she had again refused to come to the planned meeting. She had refused Ms Patterson-Gray's offer to provide more support at the office and reiterated that she was leaving. She was advised that on this basis her resignation had been accepted and the company had commenced the process of replacing her. Ms Ray was invited to meet with the respondent to discuss her grievances at a mutually acceptable time.

It was the evidence of Mr McGovern that it was apparent from Ms Ray's letter of 14 April that she was trying to rescind her resignation and was using falsehoods to do so, saying that she had always said she was going to the doctor. This was not true and the respondent felt in good faith they were entitled to rely on her resignation. After taking legal advice they wrote to Ms Ray confirming her resignation had been accepted on 13 April and enclosing a cheque together with details of her final pay.

It needs to be said too that Mr McGovern strongly denies bullying Ms Ray. Ms Patterson-Gray too gave evidence that the conduct complained of by Ms Ray is not the conduct of the Mr McGovern she knows.

Issues to Be Decided

- Did Ms Ray resign?
- If she did was the respondent entitled to rely on her resignation or did Ms Ray's termination amount to a dismissal?
- If Ms Ray was dismissed was that dismissal justifiable weighed objectively against what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred? (S.103A).

Discussion and Findings

This has been a difficult matter to decide. In arriving at my determination I have had regard to the evidence, submissions of the parties and to relevant case law.

Credibility

Taking the evidence overall it supports Ms Patterson-Gray's evidence as to the nature of her telephone conversations with Ms Ray on the 11th and 12th of April. It is clear to me and I find overall that Ms Ray did resign verbally on the 11th and she reiterated her resignation to Ms Patterson-Gray on the morning of 12 April. Mrs Ray then saw her doctor who advised her not to act hastily and she decided to rescind her resignation. Unfortunately she did not lay her cards on the table with her employer and advise she had acted hastily in an upset state and that after a period of calm reflection she did not wish to resign. Had she done so matters may have ended differently because it is equally clear the respondent formed the view that Ms Ray was lying when she said from 13 April that she had not resigned. The evidence is suggestive too that this influenced the respondent's thinking when it decided to confirm to Ms Ray that it had accepted her resignation.

Ms Ray was still holding out to the Authority that she did not resign her employment and having found otherwise Ms Ray's position on this affects her credibility overall. Therefore, where there are disputes in the evidence on matters pertinent to this determination it is the evidence of the respondent's witnesses that I prefer.

Findings

I find that Mr McGovern is focussed and single-minded businessman. His habit is to prioritise issues and deal with them in the order of importance he assigns to the task before him. He concentrates totally on the task at hand and finds it difficult to deal with interruptions and diversions that cause him to change his focus. His communication style, particularly when he is concentrating on the task in hand, is brusque.

Ms Ray who had only recently returned to the workplace found Mr McGovern's style of communication disconcerting. She tended to take it personally and became anxious about her role and standing in the workplace.

These difficulties were compounded in that neither person was prepared to listen to or accommodate the other's needs – Mr McGovern's need not to be engaged when he was busy and Ms Ray's need to have Mr McGovern listen to and respond to her concerns that his communication style was upsetting her to the extent it was causing her anxiety and stress.

I find that matters came to a head between them over the events of the weekend when Ms Ray and her partner accepted an offer from a subcontractor to undertake work on Mr McGovern's construction site. When Mr McGovern came to the site Ms Ray assessed correctly that he was unhappy that she was there and approached him about it. Mr McGovern confirmed he was unhappy and didn't mince his words about the situation. He was right in his concern about the health and safety implications of Ms Ray and her partner being on site without the appropriate training and gear and he was perfectly entitled to direct that Ms Ray not come on to his building sites. Unfortunately, Ms Ray did not share his opinion and sought to debate it albeit it is clear she did ultimately accept his direction that she was not to work on his sites. More importantly, however, Mr McGovern's blunt communication over this incident was upsetting to Ms Ray. She attempted to raise this with Mr McGovern when she left work on the afternoon of Tuesday 5 April. Mr

McGovern mistook her communication as an attempt by her to again raise the issue of her being on site that weekend. He said he had said all there was to say about the issue and closed down the conversation.

Ms Ray who was getting nowhere in raising the real concern she had which related to Mr McGovern's style of communication then wrote the letter she delivered to Ms Patterson-Gray on Friday 8 April requesting her to put it in front of Mr McGovern.

Mr McGovern and Ms Patterson-Gray discussed the letter. Mr McGovern agreed to consider it on the weekend and they planned to hold a meeting with Ms Ray to address her concerns on Tuesday 12 April. Ms Ray was to be advised of this on Monday 11 April.

I find that Ms Ray came to work in a heightened state of anxiety on the Monday morning. She asked Mr McGovern if he had received her letter. Unfortunately, instead of communicating simply that he had received and that it was proposed to discuss the letter with her on Tuesday morning which was the earliest time Ms Patterson-Gray would be available, Mr McGovern prefaced his communications¹ with Ms Ray that morning with statements that he was a busy person and that he had been lucky to find the letter. This was insensitive and Ms Ray interpreted Mr McGovern's statements as showing he was dismissive and uncaring about her concerns – concerns that were by now so deeply held that her health was being negatively affected. After Mr McGovern left the office Ms Ray was at crisis point and determined she would have to leave as nothing was going to change. She communicated this to Ms Patterson-Gray and refused all offers by Ms Patterson-Gray to meet with her with a view to discussing and addressing her concerns. I also find that Ms Ray was at this stage in no condition to formulate a considered intention to resign and if the respondent had relied on her communication at this stage it would certainly have run foul of the precedent case law which requires that employers allow a 'cooling off' period before accepting a resignation given in such circumstances. Auckland and Gisborne Amalgamated Society of Shop Employees etc (with exceptions) IUOW v Marbeck Building Supplies Ltd [1983] ACJ 357; Chicken and Food Distributors (1990) Ltd v Central Clerical Workers Union [1991] 1 ERNZ 502; Boobyer v Good Health Wanganui Ltd WEC 3/94 Unreported; Little Earth Ltd t/a Kiwi Hilton Backpackers v Luxmoore AC 103/99 Unreported; Milburn v Waikato DHB AA 49/04 Unreported.

When Ms Ray rang Ms Patterson-Gray the next morning, Ms Patterson-Gray again attempted to persuade Ms Ray that her concerns could be resolved if she attended the meeting set for that day. She offered to provide support in the office on the days Ms Ray worked. Ms Ray, I find, reiterated that she had left and was not coming back. If that were all there was to this story I would have found that the respondent was entitled to accept Ms Ray's resignation at that time and hold her to it.

However, very shortly thereafter (within 24 hours) Ms Ray, having taken medical advice, advised Ms Ray that she had not in fact resigned, that she wanted to take two weeks stress leave. Ms Patterson-Gray replied that Ms Ray had resigned and it now looked like she wanted to take back her resignation. She said she would talk to Mr McGovern about it. This indicates that while the respondent believed Ms Ray's had resigned after it was reiterated on the 12th, any decision to hold Ms Ray to her resignation was not set in stone. (At that point the company was exploring the option of engaging a temp to do Ms Ray's work).

After discussing the turn of events with Mr McGovern it was decided to write to Ms Ray advising her resignation had been accepted. Ms Ray replied immediately reiterating that she hadn't resigned and repeating that she wanted to take two weeks sick leave and then to return to discuss the issues

¹ I find that Mr McGovern did advise Ms Ray there would be a meeting to discuss the letter on Tuesday 12 April. This is confirmed in Ms Ray's letter to Mr McGovern of 14 April "I asked again if you had any comments and you said not at this stage and will probably (sic) have a meeting on Tuesday".

of concern with a view to resolution. The respondent took legal advice and decided it was entitled to hold Ms Ray to her resignation. It confirmed this on 15 April and with advice as to her final pay.

The difficulty I have with the employer's actions in this case arise from a consideration of the importance given (relative to earlier legislation) to the "relationship" between parties as opposed to the strict economic and contractual terms of employment arrangements. The good faith provisions of the Act give practical voice to the importance of *relationships* in employment and create obligations which are the cornerstone of the 2004 Act. In particular, I am concerned with the respondent's actions after Ms Ray's position (communicated on 14 April) cast doubt as to her real intentions. In effect it was only 48 hours since she had resigned in a crisis situation. Ms Ray's change of stance raised a doubt as to her real intentions. Once that doubt was raised it was not open to the respondent, Mr McGovern, to confirm the resignation without an inquiry of the worker to ascertain in his own mind the true state of affairs i.e. had Ms Ray in fact resigned and if she had was it open to the respondent to hold her to it or should her change of heart be allowed taking into account all matters². It would not have been unreasonable if, after a fair inquiry the employer had weighed in its decision, to allow/not allow Ms Ray to rescind her decision to resign, a belief honestly held that she was not being honest with her employer. Equally that point may have been overlooked if the respondent weighed in the mix that Ms Ray had been in such a state that an extended period should have been allowed to ensure her real intention was manifest. A matter to be weighed in arriving at the appropriate decision was the information given to the employer by Ms Ray that she was so anxious/stressed that she was vomiting prior coming to work in the morning. This and any medical information that may have been provided in the course of a fair inquiry could have persuaded the respondent that it would be fair and reasonable to have allowed a 48-hour *cooling off* period as opposed to closing the door to Ms Ray after she reiterated her intention to resign 24 hours after leaving the workplace.

That said Ms Ray greatly complicated the matter (to the point she herself did not act in good faith) when she attempted to rescind her resignation as she did without laying her cards on the table and recognising she had indeed indicated over two days that she was leaving but that now after a period of calm reflection and medical advice she felt she should not be held to her statements given the state she had been in and the fact she had not been able to see her doctor until Tuesday to obtain medical advice and treatment.

Conclusion

To answer the questions above (p. 4) I conclude:

- Ms Ray did in fact resign on 11 April and she reiterated her resignation to Ms Patterson-Gray on the morning of 12 April.
- Ms Ray was in such a state when she initially resigned that it was not open to the respondent to accept her resignation at once and it did not. It may have been possible to have held Ms Ray to her resignation after she reiterated her position on 12 April. The respondent began making inquiries about temps that day but the matter was not set in stone and when Ms Ray put her stance in doubt (when she told Ms Patterson-Gray on 12 April that she had not resigned and that she needed to take sick leave) it was not open to the respondent to confirm the resignation without an inquiry of all the circumstances. Mr McGovern had only Ms Patterson-Gray's version of events and prior to confirming the resignation he should have

² This is a different state of affairs to that which has led me to find (after an investigation) that Ms Ray did indeed resign and that on 14 April she sought to rescind her resignation – a fact she was not open about with the respondent. The respondent, Mr McGovern, could not arrive at this belief without first conducting an inquiry which included inquiring of the worker herself.

undertaken an inquiry including an inquiry of the worker, preferably taking into account all of the issues raised and any relevant medical information. Only then could have come to a fair and reasonable decision as to whether or not it was open to him to hold Ms Ray to her stated resignation.

Further, on the facts of this case I find a longer ‘cooling off’ should have been allowed. In all probability, however, the fact that the respondent believed Ms Ray was lying and attempting to rescind her resignation and the fact the respondent did not agree with the concerns raised by her in her letter to him of 8 April overly influenced the decision to hold her to her resignation. The employer also got inappropriately hooked up on the matter as to whether or not Ms Ray had said she had been to and/or was going to the doctor. The evidence shows Ms Ray advised Mr McGovern she was so stressed she was vomiting before she came to work and that she had seen her doctor and was receiving treatment. In the circumstances of her departure it would be entirely reasonable for Ms Ray to seek further medical advice and it would not be unusual that she would have to wait 24 hours or so for an appointment.

- Given I have found that the respondent was not entitled in all the circumstances to confirm Ms Ray’s resignation I must find that Ms Ray was dismissed by the respondent. The absence of a fair inquiry including an inquiry of the worker and a consideration of all relevant matters is fatal to a finding the dismissal was justified. Ms Ray was unjustifiably dismissed and she has a personal grievance against her former employer.

For the sake of completeness I do not find on the evidence before me that Mr McGovern bullied Ms Ray. On occasion he was curt and abrupt in his communications with her but it did not cross the boundary between the type of conduct that was inconsiderate causing the worker unhappiness (albeit I recognise it had a severe effect on Ms Ray) to being behaviour that was oppressive or repudiatory in nature. His Honour, former Chief Judge Goddard had this to say about such situations. (This was case of claimed constructive dismissal).

“For example, in this case there was evidence given by workers that Mrs Malcolm sometimes snapped at them or spoke to them in a manner which they regarded as inappropriate. That evidence if accepted, by itself, in the absence of any element of unfairness or oppressive conduct, is not enough. The law does not compel parties to a contract to do more than perform it and it does not require them to perform it politely, nor is this Court empowered to enforce courtesy in the workplace, no matter how desirable in that environment that quality undoubtedly is” NZ Woollen Workers v Distinctive Knitwear NZ Ltd [1990] ERNZ Sel Cas 791, 803.

Having said this Ms Ray had genuinely held concerns about Mr McGovern’s style of communication that needed to be discussed and resolved between them.

Remedies

Contribution

S.124 of the Act dictates that I consider the extent to which (if at all) the worker contributed to the events that gave rise to the personal grievance.

Ms Ray contributed to the events that gave rise to her grievance when she was not open with her employer when she sought to rescind her resignation. Her lack of honesty in this respect influenced the respondent’s decision to confirm her resignation. On balance I am setting Ms Ray’s contribution at 30%.

Lost remuneration

In all the circumstances reimbursement of lost remuneration should be limited to three months pursuant to s.123 (1)(b). Ms Ray was paid one-week's notice. She is therefore to be reimbursed for 12 weeks lost remuneration (\$2,520 gross) less 30%.

I direct the respondent to pay to the worker the sum of \$1,764 gross as remuneration lost as a result of her grievance.

Compensation pursuant to s. 123 (1) (c) (i) for humiliation, loss of dignity and injury to feelings

If I were not setting contribution in this matter I would have awarded the worker the sum of \$2,500.

Allowing for contribution of 30% I direct the respondent to pay to the worker the sum of \$1,750.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott
Member of Employment Relations Authority