

- [2] Mr Residebri was granted legal aid on 21 January 2008.
- [3] In its statement in reply filed on 13 February the Company denied the allegation and says Mr Residebri resigned of his own volition and only after the respondent had counselled him on the consequences of his decision. The Company asked that the applicant's claims be dismissed and for a declaration of how much money would be awarded to the respondent if its claim was successful.
- [4] In an amended statement of problem filed on 28 July 2008, and following advice from the respondent that it had lost its principal commercial contract and affected staff had transferred to the new employer under s. 6A of the Employment Relations Act 2000, and in the event of being successful but finding the Authority was unable to order reinstatement, Mr Residebri sought additional compensation for humiliation, etc and lost earnings up to the investigation and into the future.
- [5] The Company elected not to file an amended statement in reply.
- [6] This employment relationship problem was not resolved at mediation during October 2007 and on 21 January 2008, nor by the parties' efforts following the initial investigation on 20 May.

Background

- [7] During the Authority's investigation Mr Residebri, of Eritrean ethnicity, was at all times provided with the benefit of an interpreter (his first language being Tigrina).
- [8] From the evidence presented to the Authority I am confident the following is an accurate summary of key events.
- [9] Mr Residebri had been employed by the Company as a cleaner since 1 August 2005 (his previous employer having been taken over by the respondent). His terms and conditions of employment were set out in a written employment agreement.

- [10] During June 2007 a dispute arose between the parties as to the amount of Mr Residebri's annual leave entitlement: a labour inspector investigated the matter and confirmed the applicant's entitlement was as the Company had advised, and not the 7-weeks claimed by Mr Residebri (document 6).
- [11] Notwithstanding the foregoing, on or about 12 July Mr Residebri applied for 7-weeks annual leave (document 7). The Company declined his request. The respondent says that, as a result of extensive communications between the parties about this fresh leave request and (unsuccessful) efforts to accommodate the request, it was left in no doubt Mr Residebri intended to resign if his application was refused.
- [12] On 27 July 2007, and because the applicant's latest leave application remained unresolved, and at the respondent's initiative, Mr Residebri met with his manager in the Company's Te Aro office. During that meeting the applicant signed a letter of resignation dated the same day (document 8 in the agreed bundle).
- [13] The Company says the resignation arose because Mr Residebri adhered to the position that either he be granted 7-weeks annual leave or he would resign: the Company says that – consistent with the parties' employment agreement – it asked for 2-weeks written notice of resignation. The Company says Mr Residebri asked that it prepare a letter of resignation for his signature.
- [14] Mr Residebri says he did not understand the contents of the resignation letter but signed it nonetheless because of pressure from his manager, i.e. he asked him to sign it.
- [15] The manager, and two other staff present, say Mr Residebri resigned of his own volition after extensive counselling from all present on the consequences of his decision to resign, and after the applicant made his intention repeatedly clear.
- [16] By letter dated 2 August (document 9) the Community Law Centre advised the Company, amongst other things, that Mr Residebri signed the letter of 27 July believing it to relate to his leave request, that he wanted to keep his job and that he had no intention of resigning.

- [17] The Company's letter in reply dated 3 August (document 10) made it clear the respondent intended relying on what it saw as a genuine resignation. A further letter dated 6 August from the Company's legal representative reiterated that stance (document 14).
- [18] By letter dated 8 August (document 15) the Company wrote to Mr Residebri expressing its concern he was not working out his two weeks notice.
- [19] By letter dated 30 August (document 17) Mr Residebri's union advised the Company of the applicant's personal grievance.
- [20] Mr Residebri says his efforts to find employment since the termination of his employment have been unsuccessful, and that he is currently undertaking voluntary, unpaid work.

Parties' Positions

Summary of Applicant's Submissions

- [21] The only issue for the Authority to determine is whether Mr Residebri resigned voluntarily or was he dismissed (by trickery – my term) by the Company?
- [22] Mr Residebri says he did not know what he was signing when he signed the letter of 27 July. On his behalf it is argued he was dismissed by the Company when it refused to accept shortly thereafter that he had not resigned when he signed the letter of 27 July.
- [23] On Mr Residebri's behalf it is argued that by composing a letter of resignation that the applicant did not understand, and then persuading him to sign it, and by refusing Mr Residebri's attempts to repudiate the notice of resignation, the Company dismissed the applicant (i.e. sent him away; *Principal of Auckland College of Education v Hagg* [1997] ERNZ, 116, 124 (CA)). It is also argued the Company took advantage of words of resignation that it knew were unwitting and unintended; *Boobyer v Good Health Wanganui*, unreported, 24 February 1999, Goddard CJ, WEC 3/94.

- [24] At the centre of the applicant's position is a claim his comprehension of English (both spoken and written) is demonstrably poor, that the Company appreciated or should have appreciated the significance of Mr Residebri's lack of English skills, and that it should therefore have taken extra care with the applicant: Mr Residebri is "*a particularly vulnerable employee, and under the ERA as there is a philosophy that such employees should receive extra protection, it is submitted that this should have been applied by the respondent in this case*" (par 3.4 (f) of the applicant's submissions received on 12 August 2008).
- [25] The Company should not have relied on Mr Residebri signing the letter of 27 July when the applicant corrected any misapprehension as soon as he was able, shortly thereafter. That correction occurred before the Company had any opportunity to act or rely on Mr Residebri's purported resignation, at a time when it relied on being short staffed to refuse his application for leave.
- [26] In all the circumstances it was not fair and reasonable for the Company to rely on the letter of resignation of 27 July.
- [27] In the alternative, if the Authority finds Mr Residebri resigned on 27 July with notice, it is submitted as a matter of good faith and fair and reasonable treatment in all the circumstances that the Company should have dealt expeditiously with the situation as a dispute: *Sky Network Television v Duncan* [1998] 3 ERNZ 917. As it happened, a dispute raised within the 2-weeks notice period did not enjoy mediation until 3 months after the event.

Summary of Respondent's Position

- [28] The Company says it acted in good faith and that Mr Residebri's decision to resign was communicated to the respondent many times.
- [29] The decision to resign was occasioned not by pressure from the Company but because the applicant was unable to have annual leave of a length and at a time of his choosing.
- [30] Having elected to resign against the Company's advice the respondent was fairly and reasonably able to rely on that decision.

- [31] Because of my determination I am satisfied there is no value in detailing further the respondent's position.

Discussion and Findings

- [32] As articulated on behalf of Mr Residebri, the issue to be determined by the Authority is whether Mr Residebri resigned voluntarily or was he unjustifiably dismissed by the Company?
- [33] In reaching a determination, on a balance of probabilities basis, I am obliged to measure the circumstantial evidence surrounding this case as well as the credibility of the witnesses to the crucial meeting of 27 July 2007, who were also involved in related matters (including Mr Residebri's application for 7-weeks leave) leading up to that day, and find either in favour of the applicant or the position advanced by the 3 witnesses for the Company.
- [34] What is apparent from the evidence put to the Authority is that – in the weeks prior to the termination of his employment - Mr Residebri continued to claim annual leave that he must have known, following the Department of Labour's intervention, that he was not entitled to. The latter's letter of 21 June 2007 (document 6) confirmed the Company was not in breach of the Holidays Act 2003. However, in the following month, the applicant sought 7 weeks annual leave (document 7). His request was reasonably refused and, I find, Mr Residebri then carried out his threat to resign his employment in light of the Company's refusal.
- [35] There is no evidence to support Mr Residebri's original claim he was entitled to take 7 weeks annual leave.
- [36] English is clearly the applicant's second language and I have no reason to doubt his comprehension of spoken and written English is limited. However, that does not mean Mr Residebri is not an intelligent man – he clearly is – or that he is not resourceful in dealing with any problems resulting from his limited comprehension: again, he clearly is resourceful.
- [37] Despite the applicant's claim in para 9 of his witness statement to the contrary, I make the finding that the applicant must have known the outcome of his complaint about his leave entitlement. That is because, having the skill to file a

complaint in the first instance, I do not accept as credible Mr Residebri's claim he was unable to understand, or indifferent to, the outcome.

- [38] I am reinforced in these conclusions by the letter of 1 June 2007 from Mr Residebri's union to him (document 5): it makes clear the applicant is able to initiate approaches to relevant organisations, offices and individuals in pursuit of his concerns: again, I do not accept he is then unable to follow up and discover the results of his efforts.
- [39] Mr Residebri's skill with English is illustrated at para 16 where he says he told a Company manager that he, the applicant, "*would go through a legal process if he didn't give me my holidays*". The applicant observed in the same conversation that, "*if I left my job I could get a job anywhere because I wanted him to know I didn't need Tanglo*" (above). This is evidence, I find, that it was not probable Mr Residebri did not understand the letter of resignation, and that he blindly signed it.
- [40] I am also satisfied from the evidence that, despite his claim to the contrary, in the weeks and days just prior to the termination of his employment, Mr Residebri's application for leave resulted in considerable communication between the applicant and the Company as a result of the latter declining the request. In particular I am satisfied the respondent attempted to accommodate the applicant's leave application to the extent of his leave entitlements while meeting the Company's operational requirements. In contrast, Mr Residebri's position remained unvarying: he continued to seek 7 weeks leave. I am therefore satisfied that it follows, on a balance of probabilities basis, that the applicant made clear he would resign if that leave was not granted.
- [41] In reaching my conclusion in favour of the Company, that Mr Residebri resigned, I also rely on evidence of adequate communications in the past by the applicant, including with the respondent. Those communications include a job interview with the applicant's original employer and one instance of Mr Residebri, as he confirmed during the Authority's investigation, negotiating with his employer a significant advance of \$1,000 on his wages, without the assistance of an interpreter.
- [42] There is evidence from the applicant's wage record of other loans or wage advances: Mr Residebri says they were never authorised by him. It is

unnecessary to determine this matter as the applicant has not initiated any application to recover those monies. However, I make the observation that it is simply implausible the applicant would have let significant deductions from his modest wages go uninvestigated.

[43] In light of the \$1,000 loan only some weeks before the termination of his employment, Mr Residebri's credibility is significantly weakened by the claim the applicant made during the investigation that the Company was trying to "kick him out" (oral evidence).

[44] There is no evidence to support a claim that the Company's 3 witnesses to the 27 July 2007 meeting in any way 'ganged up' on the applicant or colluded against him, or that they had cause to do so. Instead, all 3 witnesses presented as mature, reasonable individuals some of whose own life histories included being new arrivals in New Zealand, albeit while enjoying English as their first language.

[45] Finally, I do not find credible Mr Residebri's claim that he thought the document he signed on 27 July "was about my leave" (para 21 of his witness statement). That is because the letter of resignation looks nothing like leave applications previously completed by the applicant (including as recently as March 2007 – see document 4), and the fact that he was never previously required to sign anything about his leave other than the applications completed by him.

[46] Was it unfair and unreasonable, per s. 103A of the Act, for the respondent to decline Mr Residebri's prompt attempts to resile from his notice of resignation? I do not think so. That is because the situation the company found itself in was entirely unlike the conclusion reached by the Employment Court in *Monteith v Hakansson*, unreported, 18 March 2008, Shaw J, WC5/08, in which it found that,

"[19] ... In the absence of a clear and unambiguous resignation, an employer is not entitled to seize on words not intended or capable of amounting to a resignation especially where an employee makes it clear that resignation was not intended."

[47] Having counselled Mr Residebri as to the significance of his decision to resign, and notwithstanding its operational exigencies and the applicant's almost immediate efforts to rescind his decision, the Company was fairly and

reasonably able to rely on the applicant's considered and unambiguous notice of resignation, once the applicant – consistent with his frequently stated position – signed off his letter of resignation.

Determination

[48] For the reasons set out above I am satisfied that Mr Residebri has not made out his claim he was unjustifiably dismissed by the Company.

[49] The parties ask that costs be reserved.

[50] The respondent also seeks a declaration from the Authority under ss 40 & 41 of the Legal Services Act 2000 as to what the applicant would have been directed to pay in respect of costs if he had not been legally aided in order that the respondent may seek to recover that amount from the Legal Services Agency.

[51] The declaration is opposed by the applicant on the grounds the Authority is not able to make a declaration under ss 40 & 41 as those sections are concerned with orders rather than declarations, and there are no grounds for an order under s. 40 as there are no exceptional circumstances, i.e. the threshold is very high.

[52] Because of additional costs and likelihood of outcome it is not my intention to take this matter any further other than to observe that, in this matter and other for the fact the applicant is legally aided, there are no reasons why costs would not have followed the event in which case Mr Residebri would have been faced with a costs award against him of between \$1,500 and \$3,000 for what amounted to a typical one-day investigation by the Authority.

Denis Asher

Member of the Employment Relations Authority