

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 149
5453292

BETWEEN DIANE LYNETTE SAMPSON
Applicant

A N D PREBBLETON VETERINARY
HOSPITAL (2009) LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Darline Ewing-Jarvie, Advocate for Applicant
Raewyn Gibson, Advocate for Respondent

Investigation Meeting: 26 November 2014 at Christchurch

Submissions Received: 19 December 2014 from Applicant
27 January 2015 from Respondent

Date of Determination: 12 October 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Diane Sampson, claims she was unjustifiably dismissed (albeit constructively) by the respondent, Prebbleton Veterinary Hospital (2009) Limited (Prebbleton Vets) on or about 14 February 2014.

[2] Prebbleton Vets denies it constructively dismissed Ms Sampson and asserts she left of her own volition.

[3] There were originally claims regarding monies deducted from Ms Sampson's final pay and a claim for outstanding holiday pay. The claim re deducted money's was resolved prior to the investigation and the issue of holiday pay was not pursued. In any event it is clear the money in question has been paid with Prebbleton Vets

having cashed up Ms Sampson's outstanding annual leave. It is now clear from answers provided by Ms Sampson this was in response to a request she made.

[4] Prebbleton Vets seeks the payment of \$308.29 it claims Ms Sampson still owes on a staff account.

Background

[5] Ms Sampson was a Veterinary Nurse and commenced with Prebbleton Vets on 26 January 2012. The relationship between her and the owner of the business, Michael House, was fraught. Similarly, there were tensions between Ms Sampson and Prebbleton Vet's Office Manager, Gregory Crawford.

[6] Ms Sampson says these tensions culminated in her decision to resign which she did on 14 February 2014.

[7] She says the resignation was the result of numerous actions of her employer which were designed to force her from the employment. In other words she claims she was constructively dismissed.

[8] In particular, and via the statement of problem, Ms Sampson relies on five events. They are:

- (a) Prebbleton Vets failure to provide a written employment agreement upon commencement compounded by a later failure to ensure Ms Sampson signed the document she subsequently received;
- (b) Prebbleton Vets claim it conducted a performance appraisal towards the end of Ms Sampson's 90 day trial period when it didn't;
- (c) The pursuit of a disciplinary allegation concerning the non-payment of a debt Ms Sampson was said to owe Prebbleton Vets but which, she says, was paid. She takes particular issue with the fact the meeting was not preceded by a formal letter of invitation and was, as a result, unaware of the allegations being made and that it led to a written warning on 8 August 2013;

- (d) The fact no letter of invitation was given in respect to a disciplinary meeting which occurred on 28 January 2014 and which meant she was, once again, unaware of the allegations being made; and
- (e) A claim that toward the end of the 28 January meeting Mr House demanded Ms Sampson reduce her hours in an aggressive and abusive manner.

[9] Ms Sampson asserted in the statement of problem the fear generated by the 28 January meeting was the final catalyst for the resignation she tendered some two weeks later.

Determination

[10] As already said Ms Sampson claims she was constructively dismissed.

[11] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[12] In *Wellington etc Clerical Workers etc IUOW v Greenwich*² the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[13] There must also be a causal link between the employer's conduct and the tendering of the resignation³.

¹ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

² (1983) ERNZ Sel Cas 95; [1983] ACJ 965

³ *Z v A* [1993] 2 ERNZ 469

[14] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Ms Sampson to establish, prima facie, there was such a breach.

[15] For the following reasons, I conclude she is unable to do so.

[16] When asked during the investigation meeting to explain why she resigned Ms Sampson's initial answer was that she thought she had been dismissed. She said she did not want a dismissal on her record and, having considered the issue for a couple of weeks, chose to resign instead. She then added she also felt she was being pushed out of the business and referred to the events summarised in [8] above.

[17] This answer raises a considerable problem. Tendering a resignation in response to advice of an actual dismissal is a significantly different concept to the one pleaded in the statement of problem – namely that Ms Sampson was coerced into leaving by a series of actions of the employer designed to obtain such an outcome.

[18] If Ms Sampson does not know why she resigned, or offers incompatible and conflicting answers, it is unlikely she will be able to establish a prima facie claim of constructive dismissal.

[19] In any event the orally tendered answer would fall well short of supporting a claim Ms Sampson had been constructively dismissed. If she thought she had been dismissed she could have asked for clarification. There is no evidence she did. In any event a resignation tendered after an already advised dismissal does not constitute a constructive dismissal. It is an actual dismissal. It should be challenged as such but that has not occurred here.

[20] As already said though Ms Sampson then added that she felt she was being pushed from the business as a result of the originally pleaded actions. That requires some comment about them.

[21] The first of those was an allegation Prebbleton Vets failed to provide a written employment agreement upon commencement and once having done so failed to ensure she signed it.

[22] The allegation Prebbleton Vets failed to provide an employment agreement upon commencement failed to survive questioning with Ms Sampson accepting that not only was she given one she returned it on her first day due to a belief it contained some errors. A replacement was subsequently provided and I am unaware of anything which says a failure to *pursue* or *obtain* Ms Sampson's signature constitutes a contractual breach and/or a breach of duty, or at least one of sufficient import it provides grounds to claim the employment relationship has been destroyed.

[23] The second allegation was that Prebbleton Vets wrongly claimed to have completed a review at the end of Ms Sampson's 90 day trial. In essence it is being suggested Prebbleton Vets lied and that has undermined the trust Ms Sampson had in her employer. This claim also fails to impress with Ms Sampson resiling from the initial allegation. In evidence she now states she cannot recall the meeting as opposed to her earlier accusation it did not occur. That, and the fact Ms Ewing-Jarvie was unable to disturb Mr House and Mr Crawford's claim the meeting took place leads me to conclude it did. This cannot, therefore, constitute an event giving Ms Sampson cause to think her employer wanted her gone.

[24] The third allegation concerns the disciplinary meeting and subsequent warning issued in August 2013. The meeting was taped.

[25] I agree with Ms Gibson's submission that a failure to provide a written invitation does not constitute a contractual breach and/or a breach of duty. In any event the real complaint is the failure disadvantaged Ms Sampson in that it deprived her of any knowledge about the meetings rationale.

[26] The evidence does not support this contention with the transcript confirming Ms Sampson was well aware of the allegations to be discussed and there is evidence to show she had discussed the prospect of a disciplinary outcome with other staff prior to the meeting.

[27] There is then the fact there is no evidence of a formal challenge to the warning at the time. If Prebbleton Vets actions were as destructive as now claimed surely a more timely reaction would have occurred. The time delay of over five months between warning and resignation would tend to undermine any contention there is a causal link.

[28] There is then the meeting of 28 January 2014 which, according to Ms Sampson's initial claim provided the proverbial straw which broke the camel's back. In particular she takes issue with two points. The lack of a written precursor and an allegation Mr House tried to reduce her hours in an aggressive and abusive manner.

[29] Again the meeting was recorded.

[30] I have already commented about the failure to give written notice prior to a meeting and again note the evidence shows Ms Sampson was well aware of the meetings purpose.

[31] About the meeting itself Ms Gibson submits:

On the basis of the recording taken during the course of this meeting the respondent strongly maintains that the respondent's conduct during the course of this meeting does not even come close to establishing a breach of any duty by the respondent, let alone a repudiatory breach the applicant could rely upon in support of a constructive dismissal claim.

[32] Having perused the transcript I agree. The meeting canvassed:

- (a) A request from Prebbleton Vets that Ms Sampson cease working overtime except where necessary and requiring she take breaks during her working hours. She indicated she was happy to comply with both requests;
- (b) Prebbleton Vets agreeing to Ms Sampson's request she have a 7.30 am starting time;
- (c) Prebbleton Vets raising concerns about time wasting;
- (d) Prebbleton Vets appraising Ms Sampson of a complaint from another staff member before going on to stress the purpose of raising this was to *bring it to Diane's attention* before commenting on the importance of sharing work responsibilities and working together.
- (e) Prebbleton Vets offering to pay for a dog Ms Sampson had and then having Ms Sampson pay the sum back by way of instalments. Here it should be noted Ms Sampson now disputes

this alleged debt but that was not clear at the time and the practice of Prebbleton Vets paying Ms Sampson's bills and having her reimburse it over time was not new. It had occurred previously.

[33] There was absolutely no indication Ms Sampson faced dismissal and nothing to support Ms Sampson's new contention she had reason to think she had been dismissed. To the contrary, it was implicit in the discussions the employment would be ongoing. Similarly there is nothing to suggest Ms Sampson was contemplating resignation or there was any prospect she might leave.

[34] By way of summary, and even if Ms Sampson had not undermined her claim by suggesting her reason for leaving was something other than that pleaded, there is nothing in the evidence to suggest the originally pleaded grounds would have supported a claim of constructive dismissal.

[35] Ms Sampson's claim she was unjustifiably dismissed is therefore rejected.

[36] Turning to the claim Ms Sampson still owes Prebbleton Vets \$308.29 for a DNA test Ms Sampson ordered for private purposes and the unapproved purchase of boots on the company's account. Ms Sampson accepts there is a debt with respect to the DNA test but disputes the amount. In this regard I conclude the evidence supports the claim and Ms Sampson's position concerning the boots is untenable. Ms Sampson is therefore ordered to pay Prebbleton Vets the amount sought.

Conclusion and orders

[37] The claim Ms Sampson was constructively dismissed is rejected.

[38] The claim Ms Sampson owes Prebbleton Vets \$308.29 on an unpaid staff account succeeds and she is ordered to pay the amount sought.

[39] Costs are reserved.