

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 409/09  
5125497

BETWEEN                      KRYSTA SCOTT  
   Applicant  
  
AND                                EL-BOUTTY UNITED  
   LIMITED T/A ROBERT  
   HARRIS PAPPURA  
   Respondent

Member of Authority:        Marija Urlich  
  
Representatives:              Effie Lokeni, for Applicant  
   Thelma French, for Respondent  
  
Investigation Meeting:        17 September 2009  
  
Submissions Received:        25 September and 1 October 2009  
  
Determination:                17 November 2009

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**DETERMINATION OF THE AUTHORITY**

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[1]        Ms Scott was employed by the respondent as a café assistant for six weeks from 2 April 2007 until 17 May 2007. She says she was unjustifiably dismissed.

[2]        The respondent company is owned and managed by Joseph and Esmeralda El-Boutty. They say Ms Scott resigned and that her position remains available to her.

**Background**

[3]        The events leading up to Ms Scott's employment ending started when she sent a txt message to Mrs El-Boutty early on the morning of Saturday 12 May 2007 advising she would not be attending work that day because she was sick. Ms Scott says in her written evidence that Mr El-Boutty telephoned her back and told her she was *lying* that she need not *bother to come in at all* and that the call concluded with

him saying *we don't want you, goodbye*. She says in her written evidence that she understood Mr El-Boutty dismissed her over the telephone.

[4] Mr El-Boutty categorically denies dismissing Ms Scott in the telephone call. He says he returned the txt because he picked up his wife's mobile phone. He says he told Ms Scott to *not worry about coming into work* and thanked her for phoning.

[5] In her evidence to the Authority Ms Scott accepted that she may have misunderstood Mr El-Boutty and that he may not have dismissed her over the telephone. Subsequent events support that this was the case.

[6] At Ms Scott's request her father Steve Scott attended the café in which she was employed on Sunday 13 May and spoke with Mr and Mrs El-Boutty. It is clear to me from Mr Scott's evidence that he was not certain whether Ms Scott had been dismissed and that this was not clarified during the meeting. During this meeting Mr El-Boutty raised concerns about Ms Scott's work performance. This was inappropriate. Mr Scott reasonably attended the work place to clarify the telephone conversation between Ms Scott and Mr El-Boutty. It was inappropriate to use that opportunity to raise performance concerns. The meeting ended with Mr Scott saying he would speak to Ms Scott and organise a further meeting with Mr and Mrs El-Boutty.

[7] On 14 May Ms Scott obtained a medical certificate to explain her absence from work on 12 May. The medical certificate stated she would be fit to return to work on 16 May. She delivered this to Mrs El-Boutty.

[8] On 15 May Ms Scott hand delivered a letter to Mrs El-Boutty dated the same day and under her signature. The letter states Ms Scott will be returning work on 16 May. The letter goes on to seek a meeting to clarify Ms Scott's employment status and requests a copy of her employment agreement. I asked Ms Scott to comment on the apparent contradiction in the letter – it asserts her employment status in the first paragraph and then queries that status. In reply Ms Scott said her grandfather had written this letter. Mr Scott, Ms Scott's father, told me he knew nothing of this letter.

[9] A meeting was held on 16 May. Ms Scott attended with her support person Mary Housham. Ms Housham and Ms Scott say Mr El-Boutty dismissed Ms Scott during this meeting. Ms Housham's witness statement outlines a discussion at cross purposes – Ms Housham asserted Mr El-Boutty had dismissed Ms Scott on 12 May and Mr El-Boutty continued to raise concerns about Ms Scott's performance. Mr El-Boutty's evidence supports that this was the case.

[10] Mr Scott also met with Mr and Mrs El-Boutty on 16 May. The meeting ended with a request for a further meeting because Mr Scott was still unclear as to Ms Scott's employment status. Mr Scott had no knowledge of the letter Ms Scott sent to Mr and Mrs El-Boutty the following day.

[11] Ms Scott wrote to Mr and Mrs El-Boutty that Mr El-Boutty had confirmed during the meeting of 16 May that her dismissal was based on earlier verbal warnings and that she had no option but to conclude she was not wanted as an employee. The letter goes on to require payment of one week's notice, calculation and payment of all outstanding wages, a copy of the employment agreement and notice that she would collect her final wages and calculations details on 23 May.

[12] Mr and Mrs El-Boutty wrote in reply advising Ms Scott had not been dismissed, had *elected to sever (sic) [your] employment relationship by mutual agreement* and there had been no discussion about payment of one week's pay in lieu of notice. The letter goes on to outline a calculation of Ms Scott's final pay and concludes that the respondent had chosen not to invoke the abandonment of employment clause *as a way forward*.

### **Was Ms Scott dismissed?**

[13] Ms Scott says Mr El-Boutty dismissed her on 12 May and that he confirmed her dismissal during the meeting of 16 May. In support she relies on conversations with Mrs El-Boutty where she said she wanted Ms Scott to return to work but that the decision was that of her husband and he did not want Ms Scott to return to work.

[14] Mr El-Boutty denies he dismissed Ms Scott on 12 May and he wanted Ms Scott to return to work. Mrs El-Boutty says she told Ms Scott repeatedly that she was not dismissed and that she wanted her husband's decision about what to do.

[15] I am satisfied Mr El-Boutty did not dismiss Ms Scott on 12 May. In her oral evidence to the Authority Ms Scott said she could not be sure, she delivered a medical certificate to her employer on 14 May containing advice she would be fit to return to work on 16 May, Mr Scott was uncertain and Ms Scott's letter of 15 May confirms that uncertainty.

[16] I am also satisfied that the discussion between Ms Housham and Mr El-Boutty was at cross purposes – she wanted to talk about the events of 12 May, he wanted to discuss performance issues. The discussion was circular and concluded with the parties agreeing to disagree.

[17] I asked Ms Scott why she did not attend work on 16 May as per her medical certificate. She said she felt conflicted and was scared of making a scene.

[18] The evidence that Mrs El-Boutty told Ms Scott it was her husband's decision whether or not she was reinstated only makes sense if Mr El-Boutty had dismissed Ms Scott on 12 May – one cannot be reinstated to a position from which one was not dismissed. For the reasons set out above I am satisfied that Mr El Boutty did not dismiss Ms Scott on 12 May.

[19] It is clear that the relationship between the parties became tense in the days following Ms Scott's sick leave. I am satisfied this tension arose from poor communication - too many people without direct knowledge of key events become involved who advocated positions not based in fact and failed to communicate with each other, Mr El-Boutty reacted by inappropriately introducing Ms Scott's alleged performance issues and in addition English is Mr El-Boutty's second language. This was a situation ripe with the potential for miscommunication.

**Was Ms Scott constructively dismissed?**

[20] Ms Scott's letter of 17 May could be read as an assertion that she was unjustifiably constructively dismissed – *I have no option but to conclude that I am not wanted as an employee as of Wednesday 16<sup>th</sup> May.*

[21] As stated above Mr El-Boutty raising alleged performance issues after Ms Scott sought to clarify what had happened during the 12 May telephone conversation was inappropriate and introduced more confusion. An employer is entitled to raise performance issues with the concomitant obligation that those issues are raised fairly and reasonably. I am satisfied that the raising of performance issues was a defensive reaction to the assertion that Ms Scott had been dismissed during the telephone call of 12 May. I am also satisfied that the alleged performance issues were no barrier to Ms Scott returning to work upon expiry of her medical certificate.

[22] I am satisfied Ms Scott chose not to return to work upon expiry of medical certificate and that she was not constructively dismissed.

**Costs**

[23] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then the respondent should file and serve costs memoranda within 28 days of the date of this determination and the applicant is to file and serve a reply within a further 14 days.

Marija Urlich

Member of the Employment Relations Authority