

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 398
5524592

BETWEEN CORINNE TRIBE
 Applicant

AND J SCOTT AND COMPANY
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Greg Bennett, Advocate for the Applicant
 Mark Nutsford, Advocate for the Respondent

Investigation Meeting: 15 December 2015

Determination: 16 December 2015

DETERMINATION OF THE AUTHORITY

- A. J Scott and Company Limited (JSC) did not act unjustifiably towards Corinne Tribe in accepting her resignation from its employment.**
- B. Mrs Tribe must pay JSC \$3000 as a contribution to its costs in responding to her unsuccessful personal grievance application.**

Employment Relationship Problem

[1] Corrine Tribe started work as an Accounts Assistant at J Scott and Company Limited (JSC) on 18 August 2014. She was employed for 30 hours work a week and her written employment agreement provided for one month's notice of resignation in writing.

[2] Her employment ended four weeks later, on 14 September 2014. JSC considered Mrs Tribe resigned that day for health reasons as she was about to undergo radical surgery for cancer that required a long period of recovery. However Mrs Tribe's view was that she was unjustifiably dismissed because she did not intend to

resign permanently from the job and JSC did not provide her with the opportunity to return to work once she recovered from her surgery but instead had promptly employed a replacement for her.

Authority investigation

[3] In investigating her personal grievance application the Authority received written and oral evidence from Mrs Tribe, her husband David Tribe, JSC's finance manager Marius Brink, JSC's logistics coordinator Jillian Wyatt (who had worked at a desk near Mrs Tribe) and Celieta Morris, a former JSC employee who had also worked in accounts when Mrs Tribe did. Those witnesses, under oath or affirmation, answered questions from me and the parties' representatives. Other information lodged by the parties, which did not require further inquiry, comprised medical notes and a letter from Mrs Tribe's surgeon Mark Izzard and an affirmed statement from Joy Griffiths, whose husband was a former JSC employee who died of cancer in December 2014. The parties' representatives also gave closing submissions on the issues identified for investigation and determination.

[4] For reasons given in this determination, it proved necessary to resolve only two of those issues:

- (i) whether an employer acting fairly and reasonably in all the circumstances at the time could have taken Mrs Tribe's communication between 14 and 17 September 2014 as clear words of resignation; and
- (ii) should either party contribute to the costs of representation of other party?

[5] It was not necessary to address the issue of remedies for a personal grievance because I concluded JSC had not acted unjustifiably – measured on the standard set by s 103A of the Employment Relations Act 2000 (the Act) – in how Mr Brink dealt with the end of Mrs Tribe's employment.

[6] At the end of the Authority investigation meeting I gave an oral indication of preliminary findings, which this written determination has now confirmed.¹ As permitted by s 174E of the Act 2000 the written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

¹ Employment Relation Act 2000, s 174B.

Mrs Tribe's health

[7] Following an MRI scan on 3 September 2014 Mrs Tribe was advised by her medical specialist that she had a suspected cancer of the tongue. She had suffered from mouth ulcers and other oral inflammation since 2011.

[8] Mrs Tribe advised Mr Brink of her suspected condition and later had time off for a biopsy procedure and then a CT scan. The biopsy confirmed the presence of the cancer in her tongue but the scan confirmed the disease had not spread elsewhere in her body.

[9] At a meeting with her medical specialist on 12 September 2014 the necessary treatment of the cancer was confirmed as requiring removal of her tongue and transplant of other tissue to replace it, followed by post-operative radiation treatment with full recovery time expected to be a year. Mrs Tribe underwent that surgery on 22 September and was released from hospital on 2 October. Around a week after her release from hospital Mrs Tribe was advised radiotherapy treatment was not suitable or necessary. A letter of 15 November 2015 (not 2014) submitted to the Authority from her surgeon described Mrs Tribe as having made an excellent recovery and stated that he deemed she could have undertaken light work duties from around three months after her surgery as part of a gradual return to work – which would have been, on that view, from early January 2015.

The end of Mrs Tribe's employment at JSC

[10] On Sunday, 14 September 2014 – two days after the hospital meeting where she found she had to go ahead with the surgery removing and replacing her tongue — Mrs Tribe sent the following message to Mr Brink's work email address at 3.28pm (bold emphasis added, not in the original):

Dear Marius,

Sorry I have not sent this earlier this weekend or texted, to be honest I don't know which way is up right now. Having had the wonderful news on Thursday that I do not have cancer in my chest we were brought back to reality on Friday with the seriousness of the situation that I do have. The tumour is advanced and quite big so three quarters of my tongue and the soft palate and 50 lymph nodes will be removed on the 22nd September, a week on Monday. I will have a slab of flesh grafted from my stomach into my mouth and be in intensive care for 2

days and hospital for 14. I will have a tracheotomy to allow me to breath below the swelling.

I will need speech and swallowing therapy for months to come and probably radiation therapy too.

In short I will not be picking up next month's journals after all.

I am so sorry that this has left you in this situation now, I'm also somewhat disappointed for myself!!, but now have to face the reality that I am not likely to return to work after the operation for a number of months. Whilst **I would dearly love to hope that the job would be there for me I appreciate that a business cannot be run like that and that you probably need to move on, cut your losses and employ someone new.** I am concerned that my ability to speak clearly, whilst not hindering the job itself, may make it difficult for a new employer to take a chance on me so **if it was at all possible for me to keep in touch with the hope of anything that may come up at JSC I would be very grateful.**

Already I have appointments stacking up this week so **maybe we can discuss first thing when would be the best day to finish.**

Kind regards,
Corinne

[11] Later on 14 September, at 5.17pm, Mrs Tribe sent Mr Brink a text:

Hi Marius, Corinne here. I have sent you an email with the details but in short I need major surgery and it wont be a quick recovery unfortunately. :(chat in the morning?

[12] Mr Brink responded: "I am really sorry to hear that. Talk tomorrow. Marius."

[13] On the morning of 15 September Mrs Tribe went to work and met with Mr Brink around 8am. They made arrangements for her to finish work that day. According to Mrs Tribe she had suggested that she did not want to resign but Mr Brink strongly disputed that evidence. He also denied Mrs Tribe's claim that he had referred to wanting to "push her away" from work but accepted that he had encouraged her to think about her health and her family and not to worry about work. He said that was in the context of Mrs Tribe apologising for not being able to do the job and him reassuring her that was not important. They agreed that Mr Brink asked Mrs Tribe to confirm her resignation in writing.

[14] Immediately after that meeting, at around 8.15am, Mrs Tribe spoke to Ms Wyatt. Mrs Tribe's evidence was that she told Ms Wyatt: "I am leaving and this is my last day". Mrs Wyatt's evidence was that Mrs Tribe said something like: "I am leaving work and have come to collect my things".

[15] Later that day Ms Morris, another accounts worker at JSC, sent Mrs Tribe the following email:

Hi Corinne

I am so very sorry that I did not get to see you this morning to say goodbye. I was shocked to hear your news that you had to resign & were leaving us just when we were really starting to get to know each other.

My thought will be with you next week & I know you have a long road ahead of you but you seem a strong positive lady so I wish you all the best & hope it all goes really well. Maybe later on down the track Jilly & I can come visit with you.

We will keep in touch with you & tell David to keep in touch with us so we know how you are going.

Take good care of yourself.

Love,
Celieta.

[16] Mrs Tribe responded ten minutes later with an email that read:

Thanks Celieta, that is really thoughtful of you and yes I am strong and positive and I will bounce back 😊

It has been great working with you and Jillian, just such a shame it was so brief.

Love,
Corinne

[17] On 17 September Mr Brink sent Mrs Tribe an email which wished Mrs Tribe luck with her operation and asked her or her husband to advise him of progress. It included the following relevant sentence: "Please never feel guilty of not being able to carry on. There are much more important things in life".

[18] Mrs Tribe responded later that day with an email which read (bold emphasis added, not in the original):

Hi Marius

Thank you for your email and your time on Monday morning. I think it was a difficult for both of us especially as your previous colleague has been so very unlucky with his form of cancer. I now see that cancer is rather like weeds in a field, none of them are good, some are downright invasive and noxious whilst others thankfully when nipped in the bud early are quickly contained and

destroyed. Thankfully, and with praise to God, I appear to have the latter and therefore once the tumour and surrounding flesh is removed I will be cancer free with some follow-up radio therapy for good measure. My goal then is to work on rehabilitation to regain my life and speech as so many others have done before me with the same diagnosis and treatment.

To that end I look forward to being back in the work place as the valuable employee that I have been this far.

Dave will certainly keep in touch next week.

Kind regards
Corinne

[19] On 16 October Mrs Tribe and her husband visited the JSC office and talked with Mr Brink. Mrs Tribe asked about returning to work at JSC. Mr Brink told her he had employed someone else after Mrs Tribe had resigned. He referred to her email of 14 September and that she was asked in the meeting on 15 September to provide her notice of resignation in writing but had not done so. Mr Tribe asked if Mrs Tribe could be considered if any other jobs came up at JSC and Mr Brink confirmed she would. Mrs Tribe's representative raised her personal grievance with JSC the following day.

Mrs Tribe's intentions

[20] Mrs Tribe's evidence was that she had not intended to offer her resignation either by her email of 14 September or by what she had said in her meeting with Mr Brink on 15 September. She produced as evidence of that view a text timed at 8:30am on 15 September that she sent her husband. In that text she described the meeting as not being as pleasant as she had hoped and wrote: "I won't be giving him a letter of resignation as he requested".

[21] She also provided a copy of an email that she had sent later on the morning of 15 September to her employment adviser – also her representative in the Authority investigation. She referred to her cancer diagnosis, the surgery and said she expected to make a good recovery which would take "a number of months". She said her employer wanted her to resign but she wanted to return when fit. She asked where she stood legally. Her adviser's reply email said her employer could dismiss her on the grounds of medical incapacity but was not permitted to ask her to resign.

[22] Mrs Tribe's evidence was that her subsequent email of 17 September to Mr Brink was intended to make clear her intention to return to work at JSC.

An objective view

[23] In determining Mrs Tribe's claim that she was unjustifiably disadvantaged and then dismissed from her employment at JSC, the Authority cannot simply rely on what Mrs Tribe says now about what her intentions were then. Rather the evidence had to be assessed on the basis of whether, objectively, a fair and reasonable employer could have taken what Mrs Tribe said and did, at that time, to amount to a resignation and could have relied on her resignation to end the employment.²

[24] On the balance of probabilities and for four reasons I concluded Mr Brink's actions, on JSC's behalf, were within the range of responses that met that standard.

[25] Firstly, the words in her 14 September email to Mr Brink were sufficiently clear and unequivocal about what Mrs Tribe understood the situation to be and what she intended to do. She stated no expectation of her job being held open for her, only a hope that she might be considered "for anything that may come up at JSC". The email's last sentence did not suggest discussing the topic of whether she should end her present employment with JSC but rather what was "the best day to finish". It was not a phrase that, in the context used, could fairly be described as having been seized upon when not intended to refer to resignation or not reasonably capable of having that meaning.³

[26] Secondly, evidence that Mrs Tribe was "teary" when she talked with Mr Brink and "upset" when she said goodbye to Ms Wyatt on 15 September was not sufficient to establish Mrs Tribe's actions were simply "so affected by strong emotion" that Mr Brink could not have fairly relied on what she said and did.⁴ Quite understandably Mrs Tribe's 14 September email described herself as feeling that she did not know "which way is up" at the time, after the news she received on 12 September about the extent of surgery (and the year required for full recovery). However the email was not written immediately in the grip of a reaction to the news on that day but after reflection over two days. While she was tearful when talking about that situation to

² *Taylor v Milburn Lime Ltd* [2011] NZEmpC 164 at [29].

³ *Taylor*, above, at [26].

⁴ *Taylor*, above, at [26].

Mr Brink and Ms Wyatt on 15 September, she made and explained her decision to stop work for what were clearly rational reasons in the circumstances. Taken as a whole, the evidence from Mrs Tribe's communication around those days – including what was revealed in her text to her husband on 15 September and her email exchange with her advisor that day – disclosed considerable presence of mind as she prepared for the daunting physical challenge that her surgery and post-operative recovery would involve.

[27] Thirdly, the content of Mrs Tribe's separate communications with Ms Wyatt and Ms Morris on 15 September was consistent with Mr Brink's description of what she had told him. She told Ms Wyatt that it was her last day and did not say anything about the prospect of returning to work. She replied to the email of Ms Morris on the evening of 15 September – which had referred to Mrs Tribe as having to resign – with no comment that she had not resigned, or had not meant to resign or had any intention of returning to work. Rather she referred to her time working with Ms Morris and Ms Wyatt in the past tense and said it was a shame that it was so brief.

[28] Fourthly, Mr Brink could not be fairly criticised for not having acted in good faith when he promptly met with Mrs Tribe at her request and arranged for her to leave work that day. Mrs Tribe's evidence was that her departure that day was agreed as she needed to attend various appointments and “it would have been a bitty week to have worked”. It was unrealistic, in all the circumstances of Mrs Tribe's immediate need to prepare for her surgery, to expect (as Mrs Tribe's representative submitted should have happened) Mr Brink to arrange for Mrs Tribe go away that Monday and return two or so days later to discuss what she wanted and needed to do.

[29] If there was a valid criticism about observation of the duty of good faith between employer and employee, it might have fairly applied in respect of whether Mrs Tribe did enough to meet her obligation to be active and communicative. If she truly had not intended to resign or believed she was misunderstood, I do not accept that Mrs Tribe's own evidence (or any other) established on the balance of probabilities that she made any plain statement that she did not want or mean to resign or that she wanted Mr Brink to accept what he might have thought was a resignation as really a request for long term medical leave. Her best evidence on that point was that she intended her 17 September email to send that message by referring to looking

forward to being back in the work place. If that were truly her intention at the time, her message was too oblique to have fairly put Mr Brink on notice that he might have got things wrong.

[30] In reaching that view I have also preferred Mr Brink's evidence over Mrs Tribe's allegation that, during their 15 September discussion, he referred to pushing her away from work. It was more likely how Mrs Tribe understood his references to the need to prioritise her health and family over work concerns during such a time.

[31] Neither did I accept the submission that Mr Brink's request for a written notice of resignation confirmed that he understood Mrs Tribe's 14 September email did not amount to an actual statement of resignation or an intention to do so. The email and Mrs Tribe's actions on 15 September comprised the acts of resignation. Mr Brink sought completion of what he saw as a written formality (because it was referred to in the employment agreement) but its absence did not negate the actual physical deed of resignation Mrs Tribe completed when she left JSC's premises on 15 September 2014.

Costs

[32] Following the oral indication of preliminary findings given at the investigation meeting I asked the representatives whether a timetable should be set for lodging memoranda on costs or whether the usual daily tariff for costs (adjusted to allow for a meeting that finished by 3pm) should be applied.⁵ Mr Nutsford advised JSC would accept an award of costs to it being set by application of the tariff. Mr Bennett advised Mrs Tribe consented to that arrangement.

[33] Accordingly I have made the order, set out at the head of this determination, that Mrs Tribe must pay \$3000 as a contribution to the costs of JSC in successfully responding to her unsuccessful application to the Authority.

Robin Arthur
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].