



Employment Court of New Zealand

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Tribe v John Scott & Company Limited [2016] NZEmpC 80 (23 June 2016)

Last Updated: 4 July 2016

IN THE EMPLOYMENT COURT AUCKLAND

[\[2016\] NZEmpC 80](#)

EMPC 7/2016

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN CORINNE TRIBE Plaintiff

AND JOHN SCOTT & COMPANY LIMITED
Defendant

Hearing: 3-4 May 2016

Appearances: G Bennett, advocate for plaintiff
M Nutsford, advocate for
defendant

Judgment: 23 June 2016

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mrs Tribe commenced work as an accounts assistant at the defendant company on 18 August 2014. Her employment ended less than a month later. The sole issue is whether Mrs Tribe resigned or was unjustifiably dismissed. The Employment Relations Authority concluded that it was the former.¹ Mrs Tribe contends for the latter, challenging the Authority's determination on a de novo basis.

[2] Resolution of the challenge essentially boils down to two communications between the parties. The first is an email in which Mrs Tribe advised that she was confronting imminent major surgery and that she wished to discuss a finish date.

The second is the discussion which followed.

¹ *Tribe v J Scott and Co Ltd* [2015] NZERA Auckland 398.

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[3] I understood the argument advanced on Mrs Tribe's behalf to be that her email was not sufficiently clear to amount to a resignation in the circumstances, and that Mr Brink (the finance manager of the company) had unreasonably seized on statements Mrs Tribe had made at a time when it should have been obvious to him that she was distressed. It was further said that any lack of clarity was addressed the following day when Mrs Tribe made it clear to Mr Brink that she wished to return to work.

The facts

[4] Mrs Tribe was known to Mr Brink prior to her appointment, having previously applied for a role in the company. While another applicant had been appointed, Mrs Tribe had impressed Mr Brink to such a degree that he contacted her when the role subsequently became available. Following discussions, an offer was made and accepted.

[5] Mrs Tribe had been experiencing health issues prior to her appointment and had seen a specialist. The specialist had warned her

that it might be serious and had referred her for an MRI scan, which she had on 3 September 2014. On that date she was advised by her medical specialist that she had a suspected cancer of the tongue and that the cancer may have travelled to her lymph nodes and chest. A CT scan was booked. Mrs Tribe discussed her medical situation with colleagues at work (Mrs Morris and Mrs Wyatt), who understood that she was confronting major health issues with the possibility of a very lengthy recovery period. Mrs Tribe advised Mr Brink of her predicament. She received the scan results on 11 September, confirming that the disease had not spread to her chest. On Friday 12 September Mrs Tribe met with a team of medical specialists to discuss her options. It was decided that radical surgery was required to remove her tongue. At this stage it was considered that post-operative radiation treatment would be necessary. Full recovery time was expected to be around a year.

[6] Mrs Tribe emailed Mr Brink two days later, on Sunday 14 September, advising that:

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 serious of the situation that I do have. The tumour is advanced and quite big so three quarters of my tongue and the soft pallet and 50 lymph nodes will be removed on 22 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 two 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 a situation now, I am 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.*

(Emphasis added)

[7] Around two hours later Mrs Tribe sent a text message, following up on her earlier email. The text message said:

Hi Marius, Corinne here. I have sent you an email with the details but in short I need major surgery and it won't be a quick recovery unfortunately. :(Chat in the morning?

[8] Mr Brink responded:

I am really sorry to hear that. Talk tomorrow. Marius.

[9] Mrs Tribe went to see Mr Brink the next morning. There is a dispute about what occurred. Mrs Tribe says that she did not want to resign, and that she told Mr Brink that while she could not work following her operation she wanted to return to work at some later date. She says that Mr Brink was unreceptive and gestured towards her, in a pushing away motion. Mr Brink says that Mrs Tribe made it clear

that she could not continue working for the company, said nothing about a return to work and said nothing about not wanting to resign. He refutes suggestions that he made any dismissive gestures with his hands but says that he did make it clear that she should not worry about the company and that she ought to focus on her health.

[10] Reference was made to a text message that Mrs Tribe had sent her husband following her meeting with Mr Brink. The text said that the meeting had not been as pleasant as Mrs Tribe had hoped and that she would not be giving Mr Brink a letter of resignation as he had requested. An email to an employment advocate, Mr Bennett, followed later that day. In it Mrs Tribe said that her recovery would take a number of months, "the company want me to resign but I want to return when I am fit. Where do I stand legally?" Mr Bennett responded the next morning (16

September) advising that the company could dismiss Mrs Tribe on the grounds of medical incapacity but that she could not be asked to resign. He concluded by advising that: "It would be best, if you haven't already, discussed with them about remaining either in person or at mediation."

[11] The wording of the email to Mr Bennett provides some support for the suggestion that Mr Brink put pressure on Mrs Tribe to resign during the meeting. However, I preferred Mr Brink's evidence as to what occurred. During the course of cross-examination Mrs Tribe clarified that Mr Brink had not asked her to resign:

Q. And so you're saying that [Mr Brink] asked you to resign?

A. I'm saying he asked me to put my resignation in writing.

Q. Not that he asked you to resign – that he asked you to confirm your resignation?

A. He asked me to put my resignation in writing.

[12] Mr Brink says, and I accept, that his request reflected a wish to formalise the notice of resignation contained in the email of 14 September and that there was no discussion during the course of the meeting that Mrs Tribe did not wish to resign. Relevantly the request for her resignation in writing came at the conclusion of the discussion. There is no suggestion that Mrs Tribe responded to the request, including by clarifying that she did not wish to resign. That, in turn, is consistent

with the fact that the meeting was convened at Mrs Tribe's request and for the express purpose of discussing her final day of work.

[13] Further, I accept that Mr Brink endeavoured to make it clear to Mrs Tribe that she ought not to worry about leaving the company in the lurch and should concentrate her energies on the significant health issues she was confronting. Mr Brink's evidence is supported by an email he sent to Mrs Tribe two days later (on 17

September) wishing her luck with her operation, asking to be kept advised of progress and stating "please never feel guilty of not being able to carry on. There are much more important things in life."

[14] Following her meeting with Mr Brink, Mrs Tribe spoke to a colleague, Mrs Wyatt. Mrs Wyatt gave evidence, which I accept, that Mrs Tribe told her that she was leaving the company and that it was her last day. Mrs Tribe then collected up her personal belongings from her desk. Mrs Wyatt understood from her discussion with Mrs Tribe that she (Mrs Tribe) was leaving the company permanently and had resigned for health reasons. Mrs Tribe did not raise any concerns or issues with Mrs Wyatt about the circumstances surrounding her meeting with Mr Brink, or the reasons why she was leaving the company.

[15] Later that day another colleague, Mrs Morris, emailed Mrs Tribe extending her condolences. She had not been in the office that morning when Mrs Tribe had met with Mr Brink but says that she understood from Mrs Wyatt that Mrs Tribe had resigned for health reasons. Mrs Tribe responded thanking Mrs Morris for her thoughtfulness. No mention was made of a return to work with JSC. Rather the email emphasised how much Mrs Tribe had enjoyed working with Mrs Morris and Mrs Wyatt and that it was "just such a shame it was so brief."

[16] As I have said, on 17 September Mr Brink sent Mrs Tribe an email wishing her luck with her operation and reiterating that she must not feel bad about "not being able to carry on". Mrs Tribe responded later that evening thanking Mr Brink for his email and his time on 15 September and advising that:

I think it was a difficult meeting 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 radiotherapy 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 this 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.

[Mr Tribe] will certainly keep in touch next week. Kind regards

[17] This email followed the advice that Mrs Tribe had sought and received from her employment advocate, which I have set out above. Mrs Tribe gave evidence that her email was "quite clear" as to its meaning, namely that she would be returning to work at JSC when she was well enough to do so. If this was what Mrs Tribe had in mind, it was not something that was communicated to Mr Brink with sufficient clarity. Mr Brink interpreted the email as reference to a possible return to the workforce generally at some later date. This was reasonable, including having regard to the fact that the email came against the backdrop of Mrs Tribe's earlier correspondence of 14 September and the discussion on 15 September.

[18] Mrs Tribe underwent surgery on 22 September and was released from hospital on 2 October. Around a week later, Mrs Tribe was advised that radiotherapy treatment would not be necessary.

[19] Mrs Tribe said that she spent the time in hospital believing that she would have a job to return to at JSC, because of her email of 17 September. This does not sit comfortably with her subsequent evidence that she and her husband visited the JSC offices the following month (16 October) in the hope of resolving "the problem" and to discuss "a possibility of me coming back".

[20] It is clear that the topic of a return to work did come up during the 16 October visit and Mr Brink advised that a person had been appointed to the role. It seems that Mrs Tribe queried this and Mr Brink referred back to their earlier communications. Mr Tribe asked if Mrs Tribe could be considered if any other jobs

came up at the company and Mr Brink confirmed she would. Mrs and Mr Tribe then left.

[21] The next day Mrs Tribe raised a personal grievance through her representative. Mr Brink said that he felt as though he had been set up.

[22] A letter was obtained from Mrs Tribe's surgeon some 14 months after her departure from the company. He advised that Mrs Tribe had made an excellent recovery and could have undertaken light work duties from around three months after her surgery as part of a gradual return to work.² This was not known at the relevant time.

Analysis

[23] Much evidence was given about what Mrs Tribe intended in her communications with Mr Brink. However, as the Authority Member observed, what Mrs Tribe subjectively intended is not the central issue.³ Rather the question is whether, objectively, a fair and reasonable employer could have taken what Mrs Tribe said and did at the time to amount to a resignation and could have relied on her resignation to end the employment.⁴ I agree with the Authority that this is the correct approach.

[24] Mr Brink interpreted the email of 14 September 2014 as conveying clear notice of resignation on the basis of significant health issues. The email made reference to a desire for future work with the company if a position became available at some later stage and expressed a wish to meet with Mr Brink to discuss a suitable finish date. While Mr Tribe gave evidence, which I accept, that both he and Mrs Tribe were upset on the Sunday (the date on which the email was written), the point is what Mr Brink could reasonably take from the correspondence in the circumstances. The email is crafted in a considered, detailed and measured manner.

It came two days after Mrs Tribe's meeting with the specialists and against the

² As the Authority Member pointed out, this would have meant that Mrs Tribe could have commenced a gradual return to work from early January 2015; *Tribe*, above n 1, at [9].

³ *Tribe*, above n 1 at [23].

⁴ *Taylor v Milburn Lime Ltd* [2011] NZEmpC 164, (2011) 9 NZELR 275 at [29].

earlier backdrop of concerns about her health and possible health outcomes, which Mr Brink was aware of. Mrs Tribe's text message later that evening was in a similar, considered vein.

[25] Even if the email could reasonably be interpreted as ambiguous, it was made clear to Mrs Tribe at the meeting of 15 September that Mr Brink considered that she had resigned and that was what prompted his request that she put her resignation in writing. In *Boobyer v Good Health Wanganui Ltd* Chief Judge Goddard observed that where a communication is equivocal and the employee later learns that the employer has misunderstood it as a resignation contrary to the employee's intention but does nothing within a reasonable time to correct the employer's false impression, the employee must suffer the adverse consequences of passively standing by and

letting the employer think that a resignation has taken place.⁵ It is true, as Judge

Couch pointed out in *Milburn*, that since *Boobyer* the longstanding obligations of trust and confidence have been supplemented by obligations of good faith and the specific requirement that parties to an employment relationship be responsive and communicative.⁶ Those obligations cut both ways.

[26] Mrs Tribe did not respond to Mr Brink's request at the meeting of 15

September that she put her resignation in writing. Nor did she take the opportunity to clarify that she did not wish to resign. Rather she left the meeting and gave Mrs Wyatt the clear impression that she was resigning from the company because of her serious health issues.

[27] While I do not discount the possibility that Mrs Tribe may, by the time of the meeting with Mr Brink on 15 September, have wished to keep her options open, this was not communicated to Mr Brink and I do not accept that he was obliged in the circumstances to seek further clarification of what Mrs Tribe had already made clear, namely that she was resigning. He said, and I accept, that she appeared to have reached a clear view about what she wished to do, he knew her to be a strong and

organised person and he wished to support her in her decision.

⁵ *Boobyer v Good Health Wanganui Ltd* WEC3/94, 24 February 1994.

⁶ *Milburn*, above n 4 at [29].

[28] The employment agreement provided for termination on one month's notice in writing. No such notice was given. This is unsurprising, given the circumstances. Rather it is apparent that the resignation took immediate effect following the parties' discussion on 15 September, consistent with Mrs Tribe's request to meet to discuss a finish date. A final pay was then processed.

[29] This is not the sort of case in which an employee has resigned in the heat of the moment or under the spectre of an employment investigation.⁷ In such circumstances a fair and reasonable employer may well be obliged to make further enquiries of the employee. The decision communicated in the present case by way of email dated 14 September appeared to have been made in a considered way, for entirely understandable reasons and in the face of major surgery with very substantial anticipated recovery times.

[30] Even if Mrs Tribe could, as late as 17 September, have taken steps to correct any misapprehension Mr Brink was labouring under, her email of that date was not crafted with sufficient clarity to achieve that end. While Mrs Tribe raised the issue at the meeting on 16 October, by then it was too late, and JSC had already acted on its reasonably held understanding that Mrs Tribe had resigned and had appointed another person to the position.

Conclusion

[31] The challenge is dismissed.

[32] If the parties are unable to agree costs, the defendant is to file and serve a memorandum and any supporting material within 20 working days; the plaintiff within a further 15 working days and anything strictly in reply within a further 5 working days.

Christina Inglis

Judge

Judgment signed at 2.45 pm on 23 June 2016

7 Compare, for example, *Milburn*, above n 4.

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