

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 127/10
5159042

BETWEEN

SUSAN LEE WILSON
Applicant

A N D

ABC DEVELOPMENTAL
LEARNING CENTRES (NEW
ZEALAND) LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Mary-Jane Thomas, Counsel for Applicant
Jo Douglas, Counsel for Respondent

Investigation Meeting: 25 March 2010 at Queenstown

Determination: 28 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Wilson) claims that the respondent (ABC) has unlawfully deducted a portion of her annual leave entitlement, made unilateral changes to her terms and conditions of employment and thus disadvantaged her by unjustifiable actions and/or committed breaches of the good faith obligation. In addition, Ms Wilson claims to have been constructively dismissed by ABC. All of those allegations are resisted by ABC.

[2] Ms Wilson was employed by ABC as its Centre Director at the Arrowtown Montessori ABC Child Care Centre commencing work there on 26 June 2006. In that capacity, she was covered by an individual employment agreement. In effect, Ms Wilson was the manager of the centre and therefore the most senior person present on site. It follows that she was not subject to direct physical supervision and was

managed remotely from another location. She reported to an area manager based elsewhere who visited occasionally.

[3] Pursuant to the individual employment agreement, Ms Wilson was paid a salary and had her hours of work described as 40 per week. The first issue that caused difficulty for the parties revolved around the operating hours of the centre which were 40 weeks per year. Ms Wilson claims that ABC determined that she was not entitled to be employed during the close down period unless she were on annual leave or was previously approved to work by her area manager. Ms Wilson's contention is that, in effect, ABC was requiring her to accept unpaid leave for portions of the working year.

[4] Then Ms Wilson alleges that in May 2009 or thereabouts, ABC improperly made a deduction from her annual leave entitlement.

[5] On 27 March 2009, Ms Wilson suffered a non-work injury which caused her to take significant time off work. She fell at home and hit her head and there were serious downstream medical consequences for her. Ms Wilson alleges that ABC prevented her returning to work in a timely fashion. There was a meeting in September 2009 as part of the process of negotiating Ms Wilson's return to work. At that meeting, all of the parties involved in Ms Wilson's potential return to work were gathered for the first time. Ms Wilson contends that the outcome of that meeting was inconclusive and that she therefore resigned her employment frustrated at the inability to negotiate a return to duty with her then employer.

[6] The matter went to mediation in the usual way and then came on to the Authority having failed to be resolved in the mediation context.

Issues

[7] It will be helpful to analyse the two separate claims made by Ms Wilson, the first relating to her employment prior to her accident and the second relating to the situation after the accident and, in particular, her allegation that, as a consequence of the accident, she was constructively dismissed.

Was Ms Wilson unjustifiably disadvantaged?

[8] I am satisfied on the evidence before the Authority that Ms Wilson has completely misunderstood the position in respect of her employment around annual leave and that she has no cause for complaint.

[9] I am satisfied the factual position is simply that Ms Wilson was employed as the manager of the ABC's child care centre at Arrowtown, that that centre operated for 40 weeks a year and that during that 40 weeks, Ms Wilson was expected to generally be available to manage the affairs of the centre. In the balance of the year, the expectation was that she would take a period of annual leave (four weeks) together with her statutory holiday entitlement. The issue in dispute is what was to happen with the balance of the working year which loosely amounts to six weeks a year (allowing for statutory holidays and four weeks' annual leave).

[10] Ms Wilson claims that ABC directed her to take leave without pay. I am satisfied that is simply not true. What happened was that ABC became increasingly frustrated about its inability to get adequate information from Ms Wilson about when she was actually taking leave and that it was that fact alone which created the difficulty. As I noted above, Ms Wilson was managed remotely because she was the manager of the Arrowtown centre and therefore the most senior person in the ABC centre in Arrowtown. In that role, she was supposed to provide notification to ABC management of annual leave taken by her staff and herself.

[11] During the period in dispute, ABC attempted to clarify the business of taking and recording annual leave with Ms Wilson but, despite its efforts, that correspondence seems to have confused rather than assisted. Ms Wilson became convinced that she was not going to receive payment for every week of the year, that is, that she developed the expectation that some of the period the centre was shut down would effectively not be paid time for her but would be treated as leave without pay. She formed this view from an erroneous interpretation of the email traffic from ABC which was attempting to explain its requirements to her but succeeding in making matters worse.

[12] Even although there is apparent confusion in Ms Wilson's mind about the matter, the legal position is very straightforward. It is absolutely apparent that Ms Wilson was paid throughout her employment for 52 weeks of the year and in

consequence she has suffered no disadvantage so the claim that she was being required to take some leave without pay simply has no foundation.

[13] Ms Wilson's next claim is that she suffered arbitrary and unilateral deductions in her annual leave entitlement which had the same effect as if she had been required to take leave without pay, that is, she was deprived of the benefit of her employment which had a monetary value and therefore she suffered a loss or disadvantage by reason of that. I am satisfied that claim also must be rejected as it simply is not in accord with the evidence before the Authority.

[14] The factual position is that, from early 2009, ABC changed its annual leave requirements in respect of Ms Wilson because it could not obtain her cooperation in managing her own annual leave. In essence, ABC wanted to maintain proper records of when annual leave was taken. First, it has a statutory obligation to do that under the Holidays Act, and second of course any business requires to keep proper records of a growing contingent liability such as the provisioning for annual leave. ABC says (and I accept), Ms Wilson was difficult to extract the relevant information from and as she was managed remotely, there was no person who could be relied upon to provide the information for ABC to maintain its record base, if Ms Wilson would not cooperate.

[15] Accordingly, ABC made the decision in 2009 to effectively independently record annual leave using what amounted to a mechanical process. Because the centre had a time clock arrangement, it was possible to record when Ms Wilson was physically present at the centre (particularly during close down periods) and when she was not. Those records were provided to the Authority. It is clear from those records that, as ABC says, Ms Wilson was absent from the centre for significant periods of the close down. Ms Wilson seems to imagine that that time is not annual leave but plainly it is. The fact that she was not complying with ABC's requirements and making formal application for annual leave in the usual way is neither here nor there. In the absence of her engagement with ABC's proper process, it is perfectly appropriate for ABC to intervene and record details mechanically. I am satisfied that that time clock record properly identifies when Ms Wilson was physically in the workplace and when she was not and that it is appropriate for ABC to draw the inference it does that when she was not at the workplace, she was therefore choosing to take annual leave.

[16] One extraordinary aspect to Ms Wilson's claim is the implication in some of what she says that she was somehow entitled to be paid for 52 weeks of the year and then to receive an additional four weeks by way of annual leave. That very clearly is not what the employment agreement says, nor is it the sort of provision that any employment agreement would contain, save if there was a fundamental error made.

[17] That apparent confusion was, to some extent, contributed to by the fact that Ms Wilson had previously worked for the former operator of the same business in Arrowtown and had been paid, in that connection, by reference to an individual employment agreement the terms of which were understandably different from those applying to the ABC employment. It may be that some of the confusion in Ms Wilson's mind as to the provisions in respect of the ABC employment is a consequence of the difference between the ABC employment and the earlier employment.

[18] Whatever the explanation, I am satisfied there was no actual or perceived disadvantage to Ms Wilson in relation to her employment and her evident anxiety about the matter is simply misplaced and not appropriately sheeted home to the employer. Her complaint about the employer deducting annual leave from her entitlement might, if done mistakenly, constitute a disadvantage, but I am satisfied that even if that were the case (and I do not find it so), the process by which the employer deducted Ms Wilson's absences from the ABC centre and attributed those absences to annual leave was not an unjustified action within the meaning of the law. Those decisions were taken, I hold, because Ms Wilson failed to cooperate in the recording and taking of annual leave. She says she did that because she became concerned about her conviction that she was not to be paid for the whole year, a conviction which I have already concluded was completely misplaced. Even if Ms Wilson were to remain anxious about that particular provision (albeit erroneously), her failure to properly address ABC's legitimate request for a proper engagement in respect of annual leave cannot be justified and must entitle ABC to take the action that it did to address the issue of the recording and taking of annual leave by Ms Wilson.

[19] Ms Wilson contends that because she never initiated the taking of annual leave except, on her evidence, for *a very few days*, it is not available to ABC to make deductions from her annual leave balance based on her absences from the workplace

using the time clock system. I disagree. Ms Wilson had failed absolutely in her obligations to the employer to provide ABC with information about the recording and taking of annual leave. She admits that herself in her own evidence. She says in response to the contention that she failed to fulfil her obligations that she became focused on her belief that she was not going to be paid for the full year, a belief which in fact was quite erroneous and for which I have found there was no reasonable basis for her to so conclude. But in any event, for the purposes of the annual leave record, Ms Wilson had an absolute obligation to provide the employer with that evidence and she failed to fulfil that obligation. Given that failure, she cannot be heard to complain about the employer endeavouring to meet its statutory and business obligations by taking reasonable steps to remedy Ms Wilson's own default.

[20] What is more, it seems interesting that while Ms Wilson's evidence maintained that she took only a few days leave, the time clock system discloses that she was away from the workplace for significant periods of time during its close down period and it ought to have been absolutely plain to her that when ABC took the centre over from its previous operator, it (ABC) had made it absolutely clear that ABC regarded the operation as being a 52 week a year operation and had an expectation that its staff at management level would work for that full period save only for annual and statutory leave.

Was Ms Wilson unjustifiably constructively dismissed?

[21] I am satisfied on the evidence before the Authority that Ms Wilson was not unjustifiably dismissed from her employment. Ms Wilson complains that after she suffered her non-work related head injury in March 2009, ABC made it difficult for her to return to work. ABC rejects that contention and the facts support ABC. In fact, ABC throughout the rehabilitation process carefully followed the advice of the occupational therapist engaged by ACC to help with Ms Wilson's rehabilitation to the workforce. Amongst other things, that occupational therapist indicated that Ms Wilson should not be given administrative duties too soon and ABC was discouraged from allowing Ms Wilson to participate in managers' meetings for the region as that would involve significant travelling by motorcar which would potentially be difficult for her.

[22] By September 2009, Ms Wilson had been away from the workplace for fully six months. Ms Wilson's claim that ABC sought to prevent her graduated return to

the workplace is simply not supported by the evidence. ABC in fact was desperate for her to return. She was the only Montessori-trained teacher at the Arrowtown facility.

[23] There was a meeting of all interested parties on 23 September 2009. As well as Ms Wilson and ABC, the ACC case manager, Ms Wilson's GP, and the occupational therapist were all present. I note in passing that the meeting was structured in an unusual way. All of the participants, except ABC, met first and then ABC was invited in. ABC thought this unusual and said so. It is inevitable that this would be a difficult meeting for all parties. This was the very first occasion that all of the actors in Ms Wilson's rehabilitation were present together. Ms Wilson had been away from the workplace for over six months. ABC was desperate to get some indication about when she might be able to return to her full time duties completely. Until the 23 September meeting, there had been no intimation from anybody that Ms Wilson would be able to return to her duties at any time in the foreseeable future. ABC felt obliged to indicate that unless there was some *light at the end of the tunnel*, it would have to terminate Ms Wilson's position for incapacity and seek to replace her with a permanent full time manager.

[24] Ms Wilson says that by ABC making its position clear in that regard, it was effectively breaching its obligations to her and thus forming the basis on which she could subsequently repudiate her employment contract by reason of the employer's breach and thus claim to have been constructively dismissed from her role.

[25] There is dispute about the conclusion of the 23 September meeting. Ms Wilson submits that the meeting was inconclusive but again that submission is not supported by the evidence. The evidence is that Ms Wilson's doctor gave an undertaking that she would issue a medical clearance for Ms Wilson to return to full duties as the Centre Director. Both the Regional Manager of ABC and the Human Resources Manager of ABC gave evidence to my investigation meeting (which I accept) to the effect that they expected Ms Wilson would immediately return to her duties as a consequence of the successful outcome of the meeting. Amongst other things, arrangements were put in place by ABC's Human Resource Manager to bring in an administrative support person to assist Ms Wilson in her first week back on the job. Ms Wilson was told about this.

[26] Immediately thereafter, Ms Wilson resigned. Shortly after her resignation, she commenced working for a new childcare centre operating in competition with ABC.

ABC contends that Ms Wilson must have been contemplating the move for some little time prior to her resignation and a story in the *Otago Daily Times* about the start up of the new business is called in aid of that submission.

[27] Whether that is the position or not does not need to be determined by the Authority in order to deal with the constructive dismissal allegations. I am satisfied on the evidence before the Authority that the evidence to support a constructive dismissal is simply not present. Ms Wilson resigned her employment almost immediately after a meeting at which I am satisfied proper arrangements were made for her to return to work, including a commitment from her general practitioner to give her a full clearance for that purpose. The ABC witnesses who gave evidence at the investigation meeting satisfied me that their expectation was that Ms Wilson would promptly return to work and in those circumstances Ms Wilson's sudden resignation and her claim that she had been constructively dismissed by ABC's failure to allow her to re-engage with work on a graduated basis simply does not ring true.

[28] In fact, Ms Wilson had been re-engaging on a graduated basis for some months and had performed all of the range of duties which the occupational therapist considered that she was ready, willing and able to perform. However, Ms Wilson was excluded from the performance of another group of duties (specifically administrative type and managerial type duties) because the occupational therapist supervising her care was of the view that this would place undue stress on her which would impact on the repair of her head injury. ABC complied with those requirements to the letter while that process was ongoing.

[29] At the meeting on 23 September 2009, the focus was on getting Ms Wilson back to full duties. ABC made it clear that unless there could be some commitment in that regard, it would have to contemplate terminating Ms Wilson's employment for incapacity and replacing her because it needed the role to be performed. As I say, at the end of that undoubtedly difficult meeting, I am satisfied that agreements were reached that Ms Wilson was to return to work and that her general practitioner would certify her as fit to work.

Determination

[30] For reasons I have enunciated above, I am satisfied that Ms Wilson has not been constructively dismissed from her employment nor has she suffered a disadvantage as a consequence of unjustifiable actions of her employer, ABC.

Costs

[31] Costs are reserved.

James Crichton
Member of the Employment Relations Authority