

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 69/08
5070207

BETWEEN STEPHANIE ATKINSON
 Applicant

AND SUTTON'S MOSS LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Stephanie Atkinson in person
 Linda and Les Sutton in person

Investigation Meeting: 4 March 2008 at Greymouth

Determination: 15 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Stephanie Atkinson worked for Sutton's Moss Limited from June 2006 until November 2006. There are several aspects to her employment relationship problem.

[2] Ms Atkinson says that she is owed arrears of wages for time she says she worked but was not paid. Ms Atkinson says that she tendered her resignation by giving notice on 20 October 2006 because Sutton's Moss failed to provide her with safe working conditions. Ms Atkinson further says that during her resignation notice period she was dismissed for alleged redundancy. Also during that notice period, Sutton's Moss is said to have substantially changed the job, causing Ms Atkinson not to work the remainder of the notice period. From these events, Ms Atkinson says that she has a personal grievance for unjustified dismissal for which she claims remedies of compensation and reimbursement. The final aspect of Ms Atkinson's problem is her claim that Sutton's Moss breached the Employment Relations Act 2000 by failing

to provide a written employment agreement. She seeks the imposition of a penalty for that breach.

[3] In its statement in reply, Sutton's Moss says that Ms Atkinson was not dismissed but that she resigned on 20 October 2006 by giving notice to work until Christmas 2006. Ms Atkinson then left the employment on 6 November 2006 without working out the last six weeks of her notice, an action that amounts to abandonment. Sutton's Moss paid Ms Atkinson for that period at the time but now seeks to recover that as an overpayment. Sutton's Moss also complains that Ms Atkinson failed to return company property. However, it is accepted that there was no written employment agreement.

[4] By the time of the investigation meeting, both parties were no longer represented by counsel. That caused me to reassess the arrangements for the investigation meeting, the earlier arrangements having not been complied with. Accordingly, the meeting proceeded with Ms Atkinson, Mr Sutton and Mrs Sutton being interviewed by me and with them having an opportunity to comment on what was said by the other side. I also heard evidence from two other witnesses. From this I am satisfied that I have sufficient information to reach a determination on these problems.

[5] There is substantial disagreement between the parties not only about relevant issues. However, I will endeavour to focus on resolving only those disagreements necessary to reach a conclusion about the arrears, personal grievance, penalty and counterclaim issues. I intend to review and determine relevant aspects chronologically.

The beginning

[6] Mr and Mrs Sutton are the principals of Sutton's Moss Limited. Both are actively involved in the business. A vacancy arose for administrative assistance and Ms Atkinson was referred to the company. Ms Atkinson first met Mrs Sutton and subsequently Mr Sutton. They recognised that Ms Atkinson is a very able person and offered her a full time position at \$19 per hour with the intention that her duties would include some of Mrs Sutton's responsibilities, Mrs Sutton wanting to reduce her commitment.

[7] Ms Atkinson started work in late June 2006. That was towards the end of the company's fortnightly pay cycle. The reasons are disputed but there is no doubt that Ms Atkinson was paid a full fortnight's pay on the first pay day after she started, even though she had only worked two of the ten working days in that pay period. Mrs Sutton's evidence is that she assumed the advance would be paid back in due course but she could not give evidence about a specific arrangement to that effect. Mr Sutton gave no direct evidence about the nature of this first pay.

[8] In early September 2007, Ms Atkinson prepared a spreadsheet in which she identified herself as having received pay in advance, commencing in that first pay period. Her workings carry eight days pay in advance through to the date of the spreadsheet calculation. Later, Ms Atkinson claimed that the advance had been written off by Mrs Sutton. Then in an email of 7 February 2007, Ms Atkinson said *it was given with the understanding that there would be times when longer hours would be worked, such as travel and this would balance out.*

[9] Short of a specific written or oral agreement that the initial payment included an advance to be repaid in due course, it must be treated as non-recoverable from wages or holiday pay owed to Ms Atkinson. Mrs Sutton's evidence does not take it as far as saying that there was any agreement about repayment.

[10] It is common ground between Mrs Sutton and Ms Atkinson that Ms Atkinson was paid several days' sick leave during the employment even though she was not entitled to that benefit. Mrs Sutton's evidence is to the effect that this was done as an expression of goodwill and generosity at the time without any expectation of repayment.

[11] I find therefore that Sutton's Moss is not entitled to recover or offset any so called *advance*.

Ms Atkinson's overtime claim

[12] Ms Atkinson says that over the course of her employment she worked at least 200 hours unpaid. However, there is no evidence of any agreement that Ms Atkinson was entitled at her election to work these hours and claim payment in addition to her regular pay. As with the company's decision to pay the first fortnight's full wages and sick pay without there being a strict entitlement, Ms Atkinson may have worked some extra hours but did so (if at all) as part of the goodwill that existed between the

parties at the early stage of the employment relationship. Accordingly, Ms Atkinson's claim for arrears cannot succeed.

A resignation?

[13] Ms Atkinson says that the situation began to deteriorate from 23 August 2006. From then, she says that higher level duties were removed from her and she was isolated from key business contacts and removed from an independent decision-making role. All this is denied by Mr and Mrs Sutton.

[14] In late August 2006, Ms Atkinson and Mr Sutton travelled to Auckland for business purposes. There is no evidence of any problems arising during this trip. Ms Atkinson says that Mrs Sutton told her after this trip that she (Mrs Sutton) would be coming back to work in the office and from that time Ms Atkinson felt gradually excluded from key tasks and key clients. Mrs Sutton says that she never stopped working in the office.

[15] I accept Mrs Sutton's evidence that there was no interregnum regarding her office work. I also accept Mrs Sutton's evidence to the effect that key tasks and key clients were not removed from Ms Atkinson. Ms Atkinson is obviously a very able person capable of handling more than administrative tasks and from time to time did so in the company's business. However, this was always at the instigation and/or under the control of Mr and Mrs Sutton. What may have happened is that Ms Atkinson came to feel as if she had been excluded from some work but Mr and Mrs Sutton simply decided not to delegate particular tasks as was their prerogative. Ms Atkinson's feelings of dissatisfaction led her to start talking about a possible resignation.

[16] In September 2006, there was an incident between Mr Sutton and Ms Atkinson. Mr Sutton thought that Ms Atkinson was spending time unnecessarily working on some figures. He told her abruptly that it was a waste of time. Later, possibly the next day, the resulting tension between them escalated. Mrs Sutton's evidence is that Ms Atkinson swore at Mr Sutton and he then yelled at her saying *you don't need to throw your toys out of the sandpit*. Mrs Sutton told Mr Sutton not to talk like that and to get out of the office. Ms Atkinson's evidence is that after Mr Sutton had said something, she told him to speak professionally to her. That was a rebuke. He demanded messages that had been written on a piece of paper and said he

was going to call those people to find how they found Ms Atkinson to deal with. At that point, Mrs Sutton told Mr Sutton that he had gone too far, that caused an argument between Mr and Mrs Sutton and Mr Sutton then walked out.

[17] I will assume for present purposes that Ms Atkinson's account of this incident should be preferred. Even on that basis, it does not amount to a breach of duty sufficiently serious so that a resignation would have been reasonably foreseeable. That point is clear enough in that Ms Atkinson continued to work at the company for another three weeks. There is no evidence of any further incidents between her and her employers over that period of time.

[18] On 20 October 2006, there was a discussion between Ms Atkinson and Mrs Sutton. Ms Atkinson said that she wanted to resign, that Mrs Sutton could set the final date and that her sons were coming to New Zealand over Christmas so she needed to know when to finish up. Mrs Sutton apparently said to work up to Christmas and Ms Atkinson agreed. No one else was present.

[19] In its statement in reply, the company says:

The Employee resigned from her position on 20 October 2006. The Employee gave notice to work until Christmas 2006.

...

On 20 October 2006 the applicant stated to Linda Sutton that she would stay until New Years. No end date was given. No written resignation was provided.

[20] On or about 2 November 2006, Mr and Mrs Sutton gave the following description of this exchange to their advisor (Wayne Merriman) who made a note (perhaps wrongly) dated 3 November 2006:

Verbal offer of resignation was given by Stephanie with a notice period through to Xmas but nothing formalised.

[21] The description given to the advisor and the statement in reply partly confirms Ms Atkinson's evidence. Mr and Mrs Sutton mistakenly thought that the resignation as given was not effective or sufficient, but I find that the effect of the communication between the two women on 20 October 2006 amounts to an effective resignation with the employment to end at Christmas 2006.

Redundancy

[22] Some days after this discussion between the two women, Mr Sutton gave a letter dated 26 October 2006 to Ms Atkinson requiring her to attend a meeting to discuss the company's financial situation and the potential for that to impact on her position. The genesis of this action was discussion between Mr and Mrs Sutton and their business advisor in September 2006. I heard evidence from Mr Merriman. He prepared an agenda and notes to guide the meeting that was held on 31 October. There is some dispute about exactly what happened during this meeting but I accept that the agenda and notes prepared by Mr Merriman reflect how the meeting actually proceeded. That is also his evidence, which I accept.

[23] There was discussion about the company's difficult financial situation, a proposal to disestablish Ms Atkinson's position and its impact on her continuing employment, reference to six weeks as an appropriate notice period and arrangements for a second meeting to hear back from Ms Atkinson. There was also mention of the possibility of a part-time position being established covering some of Ms Atkinson's current responsibilities.

[24] There is some complaint by Ms Atkinson in her statement of problem that she was given insufficient notice of the first meeting to allow her to engage a representative. However, Ms Atkinson's evidence is that it would have been too little notice if the meeting had proceeded on 27 October as originally intended. The meeting was actually on 31 October. Ms Atkinson suffered no disadvantage as a result of not being represented at this first meeting and there is no merit in the complaint in the statement of problem.

[25] Ms Atkinson was represented at the second meeting held on 2 November. Mr Merriman's evidence is that it was during this meeting that Ms Atkinson first referred to having earlier given notice of resignation. On the other hand, Ms Atkinson refers to her undated handwritten note which she says relates to things said during the 31 October meeting. The note indicates that mention was made of the resignation and other parts of the notes indicate that the note was made prior to 2 November.

[26] The confusion about the sequence is unfortunate. What is clear is that matters remained unresolved despite these meetings. During the 2 November meeting, Ms Atkinson was told by Mr Merriman that there would be a further meeting on 3 November and he would call her mobile phone to confirm the time. Ms Atkinson was unsure whether she needed to attend work the following day so she phoned

Mr Sutton who told her it was up to her and that the third meeting might be at 2pm. Ms Atkinson decided to attend work and arrived around 8.30am. She found that file material and trays on her desk had been rearranged. Ms Atkinson also says that a computer password had been changed. The company provided an invoice for some computer work done on 2 November 2006. That involved the installation of some software, sorting out a sound issue on a notebook computer and some investigation of a web database.

[27] There is no reason to think that any improper inference in respect of Ms Atkinson's position and the consultation exercise should arise as a result of this computer work. Equally I accept Mrs Sutton's evidence that the files were rearranged principally to facilitate the service agent's access to the computer equipment. In any event, Ms Atkinson continued working on 3 November. She learnt that there was some confusion about arrangements for the third meeting and that eventually took place on Monday 6 November 2006.

[28] By the time of the third meeting, the company's advisor had learnt of Mrs Sutton's recollection of the 20 October exchange, as noted above. During this meeting it was agreed that Ms Atkinson would resign effective 19 December 2006 with that to be formalised in writing. Ms Atkinson said she wanted to work out the notice period subject to obtaining advice. There was disagreement about the wages paid at the beginning of the employment. The company saw it as wages paid in advance and wanted agreement about that sum being offset against payments due during the notice period. Ms Atkinson, however, claimed that there had been an earlier agreement to write off those wages against extra hours to be worked by her. Mrs Sutton denied any such arrangement and said that it was only the sick pay that was mentioned as having been written off. The meeting ended with Ms Atkinson to get advice. Ms Atkinson did not return to work after the 6 November meeting and there was a phone discussion between her and Mrs Sutton about that, following on from their earlier discussion when Mrs Sutton told Ms Atkinson it was up to her whether to work out the notice period.

[29] Mr Sutton wrote to Ms Atkinson on 7 November and received a response from Ms Atkinson's lawyer on 8 November. The solicitor's letter proposed mediation for 4 December 2006 being the earliest date available. There was some continuing dialogue about the final wages due and the company's intention to offset the wages

paid for time not worked at the commencement of the employment. The dialogue included a letter dated 14 November 2006 from the company to the effect that it had decided to disestablish Ms Atkinson's position effective 11 November 2006 and would pay six weeks' wages less the advance. There are also other communications which have been placed before the Authority but there is a *without prejudice* aspect to them which means they should not be canvassed.

[30] There is already a finding that Ms Atkinson resigned and it was understood between the parties that her employment would end on 19 December 2006 with her to choose whether to work the whole of the notice period, a choice Ms Atkinson communicated. In those circumstances, it cannot be said that Ms Atkinson abandoned her employment. The 14 November letter could be seen as a dismissal but nothing turns on that given the finding about the efficacy of Ms Atkinson's notice of resignation. Accordingly I do not think it can sensibly be said that the company terminated Ms Atkinson's employment for redundancy.

Constructive dismissal

[31] I should say some more about constructive dismissal. There are generally three situations where constructive dismissal arises: see *Auckland etc Shop Employees etc IUOW v. Woolworths (NZ) Ltd* [1985] ACJ 963. Here, there is no suggestion that Ms Atkinson was offered a choice between resignation and dismissal. There is no evidence to support any contention that the company embarked on a course of conduct with the deliberate and dominant purpose of coercing her resignation. As explained above, there was no breach of duty sufficiently serious to warrant Ms Atkinson's resignation. Mr Sutton's behaviour may have been inconsiderate, even rude, but it was not such as to induce a resignation that occurred three weeks later. Accordingly, no grievance arises from her resignation.

Unjustifiable disadvantage

[32] Because Sutton's Moss did not appreciate that there had been a valid and binding resignation, it embarked on a restructuring exercise. Ms Atkinson says that there was no genuine redundancy situation but I do not accept that assertion. It is clear that there were significant losses which Sutton's Moss was entitled to address by reducing staff numbers. However, no employer acting in a fair and reasonable manner would have continued a consultation process with a view to dismissing as

redundant an employee who it knew had already resigned. By the end of the 2 November meeting, even on the company's account of events, it should have realised that there was an effective resignation and taken the restructuring discussion no further.

[33] The company endeavoured to focus on confirming a resignation date and making arrangements to recover what it saw as overpayments. When there was no written confirmation of resignation from Ms Atkinson, nor an acceptance of its intention to recover the alleged overpayment, the company reverted to restructuring and notified Ms Atkinson of her redundancy. That should not be seen as a dismissal or sending away because it was ineffectual, Ms Atkinson having already ceased worked with the employment to terminate in accordance with her notice.

[34] However, Sutton's Moss implemented its plan which resulted in Ms Atkinson receiving only a small amount of the wages due to her for her notice period. In that way her employment was affected to her disadvantage by an unjustified action on the part of her employer so Ms Atkinson has established a personal grievance, albeit not an unjustified dismissal.

Remedies for the grievance

[35] Ms Atkinson did not contribute in a blameworthy way to the situation giving rise to the grievance as found.

[36] Ms Atkinson's employment ended on 19 December 2006 and she is contractually entitled to pay to that date in accordance with the orders below. That means that there are no lost wages as a result of the grievance.

[37] Ms Atkinson is not entitled to compensation for the loss of the job as that came from her resignation. However, I accept that Ms Atkinson was caused a measure of distress because of the way Sutton's Moss treated her at the conclusion of the employment in relation to her final pay. That meant that Ms Atkinson did not have money when her sons were visiting over Christmas. There is evidence from her about how she felt about the resulting financial difficulties. The situation overall calls for a modest award of compensation. I order Sutton's Moss Limited to pay Ms Atkinson the sum of \$2,500.00 compensation pursuant to section 123 (1)(c)(i) of the Employment Relations Act 2000.

Arrears of wages and holiday pay

[38] Sutton's Moss is not entitled to any deduction or offset for wages actually paid during the employment. Accordingly Ms Atkinson should have been paid her ordinary wages for the entire notice period to Tuesday, 19 December 2006.

[39] Ms Atkinson is entitled to holiday pay calculated at 6% of the gross between 22 June and 19 December 2006. It is accepted that Ms Atkinson took some annual leave in advance totalling 50.5 hours so Sutton's Moss may adjust the holiday pay owing to take account of that advance.

[40] Sutton's Moss should lodge with the Authority within 14 days its calculations of the amount of wages and holiday pay owing in accordance with these findings. The Authority will then check with Ms Atkinson and a determination will be issued confirming the amount of wages and holiday pay owed.

Penalty

[41] While it is acknowledged that no written employment agreement was provided for Ms Atkinson that was an aberration in terms of the company's usual approach to this obligation. There is no need to impose a penalty to impress on Sutton's Moss or anyone else the importance of this obligation.

Counter-claim

[42] I am not satisfied that there is any further unreturned property. It seems that the company thought that more database development work had been done than it found on its computer system. That being the case, there is nothing to return.

[43] Finally, costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority