

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 33
3095492

BETWEEN	JADE BROOKS Applicant
A N D	REX CONSTRUCTION LTD Respondent

Member of Authority:	Peter van Keulen
Representatives:	Applicant in person Richard Stowers representing the respondent
Investigation Meeting:	29 October 2020
Submissions Received:	29 October 2020 from the Applicant 29 October 2020 from the Respondent
Date of Determination:	29 January 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jade Brooks worked for Rex Construction Ltd for just under one year. Ms Brooks raised personal grievances with Rex Construction on 12 January 2020 for unpaid wages and constructive dismissal.

[2] Rex Construction says it did not constructively dismiss Ms Brooks but it accepted it had not paid Ms Brooks one week's wages for the week of 25 November 2019. Rex Construction says it initially withheld payment of Ms Brook's wages because of cash flow issues and work issues by Ms Brooks but when it realised it could not withhold her pay and it had the money, it paid the amount owing.

[3] Ms Brooks lodged a statement of problem in the Authority based on her two personal grievances seeking compensation from Rex Construction. Rex Construction replied to that statement of problem denying liability and seeking payment from Ms Brooks for various losses incurred from what it says was faulty work by Ms Brooks and lost and damaged tools. This is the employment relationship problem that I investigated and this determination resolves.

Events

[4] Rex Construction is owned and operated by Richard Stowers. Rex Construction operates a building business in Wanaka and it employed Ms Brooks from early February 2019 as a builder.

[5] In November 2019 Mr Stowers went on holiday leaving Ms Brooks and another employee to work without his supervision on a building job in Wanaka.

[6] Mr Stowers returned from holiday on the afternoon of Friday 29 November 2019. He visited the site where Ms Brooks was working to see how she and the other employee had progressed. When Mr Stowers was there, Ms Brooks asked if she could take the work vehicle home for the weekend so she could visit her partner in Alexandra; Mr Stowers agreed to this.

[7] On Monday 2 December 2019, Ms Brooks did not turn up for work and after exchanging text messages and then a telephone call, Mr Stowers arranged for the work vehicle to be collected from Alexandra as it was needed in Wanaka.

[8] On Tuesday 3 December 2019, Ms Brooks did not turn up for work again. After exchanging text messages, Mr Stowers and Ms Brooks agreed to meet later that afternoon to discuss her absence on Monday and Tuesday morning – the issue being that she had been unable to attend work as she was hungover or still intoxicated on Monday morning and it was unclear why she chose not to come to work on Tuesday morning.

[9] In the meeting on 3 December Mr Stowers and Ms Brooks discussed her absences from work and after an admission from Ms Brooks regarding her being too hungover to work they both agreed a written warning was the appropriate sanction.

[10] In the 3 December meeting Ms Brooks also asked about a pay rise to reflect what she saw as extra work and responsibility she had undertaken during Mr Stowers' absence. Mr Stowers discussed this with Ms Brooks and explained why Rex Construction thought a pay increase was not appropriate at that time; Ms Brooks appeared to accept this.

[11] At the end of the 3 December meeting Ms Brooks asked if she could take leave starting immediately, extending through the Christmas and New Year period, to travel to be with her family and think about whether she wanted to continue working at Rex Construction. Ms Brooks had already booked flights to travel to her family for later in December 2019, returning on 8 January 2020 but decided she wanted to go early.

[12] Mr Stowers agreed and told Ms Brooks that the warning would be suspended pending her return, if she returned, and they would revisit it then.

[13] Ms Brooks left the meeting and went on leave.

[14] On 5 December 2019, when Rex Construction was due to pay Ms Brooks for her work in the week of 25 November 2019, Rex Construction emailed Ms Brooks and another employee and advised that they would not be paid as usual but would be paid the following week; this was because they had not completed the work they had been left to do in November 2019 on time and as a result invoices for that work had not yet been paid.

[15] Mr Stowers says he then discovered the extent of what was wrong with the building work Ms Brooks had been responsible for during his absence and he had to undertake remedial work resulting in lost revenue and further delays in invoicing work.

[16] On 13 December 2019 in an email exchange with Ms Brooks about the payment of her wages, Mr Stowers told Ms Brooks that her wages would be withheld because of the substandard work and the losses Rex Construction was incurring as a result.

[17] During December 2019 and whilst Ms Brooks was on leave, Ella Richardson, Mr Stowers' partner, exchanged messages with Ms Brooks. Ms Brooks says these various messages were abusive and unwelcome. The evidence in connection with these messages was limited. Two messages were produced in evidence and do not appear to be abusive although relatively blunt in terms of identifying issues. But the reality is these messages – the two I have seen and what I understand the others to be about generally – were based on personal

issues between Ms Brooks and Ms Richardson and not work related. And it appears Ms Richardson was not communicating in any capacity as representing Rex Construction and its views.

[18] In December 2019 there were also some further email exchanges between Ms Brooks and Mr Stowers about Ms Brooks being on unpaid leave, when she would return and what would happen in terms of recommencing the disciplinary process over her absences and extending that to consider the various issues with Ms Brooks' work that Rex Construction had discovered.

[19] In one email on 24 December 2019, Ms Brooks noted that she had not agreed to her wages being withheld and she asked for it to be paid immediately.

[20] On 3 January 2020 Rex Construction agreed it would pay Ms Brooks the unpaid wages but advised her it that it needed her hours worked in order to pay her.

[21] Ms Brooks responded with the hours she worked and then Mr Stowers confirmed Rex Construction would pay her wages in the upcoming pay cycle.

[22] During this period, Ms Brooks asked for further leave and Mr Stowers declined this asking her to return on 8 January 2020 as agreed.

[23] On 8 January 2020 Ms Brooks did not attend work and later that morning Rex Construction received a medical certificate from her, which stated Ms Brooks was medically unfit and unable to work from 8 January 2020 until 12 January 2020.

[24] On 12 January 2020 Ms Brooks emailed Mr Stowers a letter of resignation dated 11 January 2020 and a letter setting out her personal grievances. In the resignation letter Ms Brooks stated:

Please accept this as my resignation from your company Rex Construction.

It is not my desire to resign however I can not return to work following the situation I have outlaid in the attached Personal Grievance Letter.

[25] In the personal grievance letter, Ms Brooks stated, amongst other things:

I believe I have a personal grievance because:

- I have not been paid for my last working week before the holiday break.
- I have been personally attacked and subject to unfair behaviour and actions from you and your partner.

[26] So, it is from this series of events that I must determine if Ms Brooks has a personal grievance and I must also consider if Rex Construction has a valid claim against Ms Brooks.

Constructive dismissal

[27] Starting with the unjustified dismissal personal grievance arising out of Ms Brooks' resignation, in previous cases the Courts have identified three situations in which a resignation can amount to a constructive dismissal.¹ The situation which is relevant to Ms Brooks' claim is where there is a breach of duty by the employer that leads an employee to resign. The issues to consider for Ms Brooks' constructive dismissal claim based on a breach of duty are:²

- (a) Was there a breach of duty by Rex Construction as alleged;
- (b) Was that breach of duty sufficiently serious that it was reasonably foreseeable that there was a risk that Ms Brooks might resign in response to that; and
- (c) Did Ms Brooks resign in response to that breach of duty?

Was there a breach of duty by Rex Construction?

[28] I have reviewed Ms Brooks' statement of problem, her personal grievance letter, her written evidence and her oral evidence and from this, the alleged breaches by Rex Construction that she complains of are:

- (a) Unpaid wages for the week of 25 November 2019 – although Ms Brooks now accepts her wages have been paid.
- (b) Being personally attacked through various communications with Rex Construction dealing with the allegations of poor workmanship and her personal dispute with Ms Richardson.

¹ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374-375.

² *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

- (c) Being subject to unfair behaviour and actions, in particular Rex Construction questioning her taking time off after working hard, not paying her extra for this hard work during Mr Stowers' absence and deciding to issue her with a warning.

[29] I will deal with each of these allegations in turn:

- (a) The failure by Rex Construction to pay Ms Brooks her wages for the week of 25 November 2019 is a breach of duty. Whilst I accept that Rex Construction has a credible explanation for initially not being able to pay and then deciding to withhold payment, these explanations do not excuse the breach.
- (b) The allegations of Rex Construction personally attacking Ms Brooks do not constitute a breach of duty. I accept that Rex Construction raised issues of poor workmanship with Ms Brooks but this was not a personal attack, rather it was an attempt to raise issues that would need to be dealt with on Ms Brooks' return to work and this was not therefore a breach of duty. I also accept that Ms Richardson and Ms Brooks exchanged messages about personal issues but as I have already indicated these were not a personal attack from Rex Construction – the various messages were a blunt exchange of views between the two about personal issues – and therefore there was no breach of duty by Rex Construction.
- (c) Rex Construction did not act unfairly toward Ms Brooks in raising and dealing with the concerns over her not attending work nor did it act unfairly toward her by not giving her a pay increase for the work she undertook during Mr Stowers' absence; Rex Construction did not breach any duty in dealing with these matters.

[30] So, the only breach of duty by Rex Construction of those alleged by Ms Brooks is the failure to pay her wages.

Was it foreseeable that Ms Brooks might resign in response to Rex Construction not paying her wages?

[31] It is foreseeable that an employee might resign in response to an employer not paying them their wages.

Did Ms Brooks resign because Rex Construction did not pay her wages?

[32] I am not satisfied that Ms Brooks resigned primarily because of the failure to pay her wages:

- (a) The possibility of Ms Brooks resigning was raised before Rex Construction failed to pay her wages, and this was connected to the disciplinary process and the work during Mr Stowers' absence with no extra pay, which prompted her to ask for leave immediately.
- (b) The resignation letter referred to the personal grievance letter as setting out the reasons. The personal grievance letter focuses on the work during Mr Stowers' absence with no extra pay, the discussion over Ms Brooks' absences and the proposed warning.
- (c) Ms Brooks' oral evidence was equivocal about when she decided to resign and why.
- (d) In any event Ms Brooks did not resign when her wages were not paid nor when Rex Construction told her it was withholding her wages.³ In contrast Ms Brooks' resignation was after Rex Construction agreed to pay her wages.

[33] After assessing the evidence, I believe Ms Brooks resigned primarily because of what she perceived as a change of attitude to her by Mr Stowers and Ms Richardson which comprised the disciplinary matter including the possible warning being issued, the failure to pay her any extra for her work during Mr Stowers' absence, the personal attacks by Ms Richardson, and Mr Stowers raising performance issues with her.

³ In essence Ms Brooks accepted and affirmed the breach rather than taking the breach as being a repudiation and ending her employment in response.

[34] So, I conclude that Ms Brooks did not resign in response to Rex Construction not paying her wages but rather she resigned due to a combination of factors which left her unhappy with Rex Construction.

[35] In these circumstances Ms Brooks' claim for constructive dismissal cannot succeed.

[36] Whilst Ms Brooks' constructive dismissal claim cannot succeed, the failure to pay wages is a breach of duty. And I am satisfied that Ms Brooks is entitled to compensation for that breach.

[37] In assessing the compensation for the breach I must assess only the effect of the unpaid wages on Ms Brooks; this means I must separate out Ms Brooks' evidence about the effects and impact of Rex Construction's other actions towards her. To this end Ms Brooks' evidence about the impact of not being paid her wages for the week of 25 November 2019 was limited and I award her an amount at the lowest end of the spectrum of awards of compensation; that is \$1,500.00.

Counterclaim

[38] I am not satisfied that Rex Construction has a valid counterclaim against Ms Brooks. This is because I am not satisfied that the actions complained of by Rex Construction can constitute a valid cause of action against Ms Brooks; the Employment Court has expressed concerns about counterclaims arising out of negligence by an employee in the performance of his/her tasks.⁴

[39] In any event, there is insufficient evidence of a breach or loss by Rex Construction.

[40] I conclude that Rex Construction's counterclaim is not based on a valid cause of action and, if I am wrong on that, then the evidence does not establish a breach by Ms Brooks and loss caused by such a breach.

⁴ *George v Auckland Council* [2013] NZEmpC 179 at [147].

Orders

[41] Ms Brooks has a personal grievance based on Rex Construction not paying her wages for the week of 25 November 2019 on time. Rex Construction must pay Ms Brooks compensation for this grievance of \$1,500.00 (without any deduction) pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[42] All other claims are dismissed.

Peter van Keulen
Member of the Employment Relations Authority