



[3] The remedies sought by Ms Eagle to resolve her employment problem are among those provided by the Employment Relations Act 2000 where an employee has a personal grievance. She seeks reimbursement of lost remuneration from the date of the alleged unjustified dismissal to the beginning of the investigation meeting, a period of about 12 months, and she seeks compensation of \$15,000 for hurt feelings, humiliation and loss of dignity caused by her dismissal, pursuant to s 123(1)(c)(i) of the Act.

[4] A further claim for remedies is based on the loss of opportunity for Ms Eagle to enjoy a holiday in Rarotonga with free or discounted air travel and accommodation. This was intended to be a reward for her contribution, together with other employees in her office, towards reaching sales levels that won them the trip. She seeks in this regard an amount equivalent to the cost of the return airfare and accommodation. Ms Eagle also seeks compensation of \$2,500 for hurt feelings and humiliation suffered when the Flight Centre removed her from the trip upon receiving the notice of resignation she gave.

[5] There is also a claim in respect of a payment in lieu of notice the Flight Centre intended to make to Ms Eagle. It is brought on the basis that the Flight Centre's pay records indicate she was paid for only 12 days, up to 15 June 2008, when the contractual notice period was four weeks, ending on 9 July.

[6] At the end of the investigation meeting and in final submissions for the applicant her claims were revised, to acknowledge that the damages claims were covered by the heads of compensation available for a successful personal grievance. Also, a claim for a penalty for breach of statutory obligations of good faith was withdrawn.

[7] Before the Authority investigated this employment relationship problem Ms Eagle and the Flight Centre attended mediation and tried to resolve it in that way.

[8] Ms Eagle began her employment with the Flight Centre in June 2003 as a Retail Travel Consultant. She had by then about six years experience in the travel industry.

[9] In March 2004 she helped set up the branch of the Flight Centre in Whakatane, where she worked until her employment ended in June 2008. While there she was promoted to the position of Future Team Leader.

[10] There is no dispute that for some time before termination of her employment Ms Eagle had been under strain with her health and other personal matters. Her problems had made her attendance at work erratic, particularly in April and May 2008. This did not result in any disciplinary action of any kind being taken against her and neither did the Flight Centre invoke clause 13 of the written employment agreement, under which it could have required her to be examined by a medical practitioner. That step was available to be taken for the purpose of assessing an employee's fitness or capacity to carry out the duties of the position of employment.

[11] In relation to these problems and difficulties Ms Eagle said she was having at work, the Flight Centre I accept, urged her several times to use the employee assistance programme (EAP) it made available to staff, but Ms Eagle did not seek help from that source.

[12] Further I accept that in relation to complaints Ms Eagle had made about the conduct towards her of the branch manger, Ms Elly Lang, she was offered facilitation or mediation as a means of resolving conflict. Ms Eagle declined that offer because she did not want to discuss the problems directly with Ms Lang or even have her made aware that she had raised any.

### **Resignation by Ms Eagle**

[13] There is no dispute that Ms Eagle resigned her employment on Monday 9 June 2008. On that day she was absent from work although she had been expected at the office. Her husband Mr Mark Eagle advised Ms Lang at about 9am that his wife would not be in until 10am, but she did not arrive at all. There was no contact with her until late in the afternoon when Ms Lang managed to call her at home by telephone, having tried unsuccessfully earlier.

[14] When Ms Lang inquired of Ms Eagle what was wrong with her she was told by Ms Eagle that for health reasons she wanted to resign. I accept from the evidence of Ms Lang that she asked Ms Eagle three times whether she was sure that resigning was what she intended. Ms Eagle, I find, replied each time she was sure and said that she would bring a written resignation into the office the next day, when she intended reporting for work as usual.

[15] Ms Eagle in her evidence confirmed that Ms Lang had asked her more than once if she was sure that she wanted to resign and that she had said yes each time.

[16] There is no dispute that in resigning Ms Eagle gave the Flight Centre four weeks notice, as required by the employment agreement.

[17] I find that when Ms Lang received the advice of resignation from Ms Eagle she was well aware that Ms Eagle was under stress and had been for some time because of her health and other personal matters Ms Eagle had mentioned from time to time to her.

[18] I find that although it was obvious in the circumstances that Ms Eagle regretted the need to do so, she gave her resignation clearly and unequivocally, and did so without any pressure being put on her by Ms Lang to leave her job. I find that the resignation was complete and effective from the time Ms Lang heard Ms Eagle repeat that she was sure she wanted to resign.

### **Whether resignation retracted**

[19] The dispute that has arisen between the parties is about the circumstances in which there was an attempt to retract that resignation, made either by Ms Eagle herself or by her husband, two days later on Wednesday 11 June 2008.

[20] The next day after resigning Ms Eagle did not go to work, although she had told Ms Lang she intended to work out her notice. Ms Eagle told the Authority she set out for work on the Tuesday but suffered an anxiety attack and went back home.

[21] Ms Lang's evidence is that a request to retract Ms Eagle's resignation was made by Mr Mark Eagle on Wednesday 11 June, when he visited her at the office in the morning to discuss the concerns he had for his wife. Away from the office over coffee Mr Eagle had asked whether she could have her job back. Ms Lang said that her reply was that she did not think that would be possible. Her evidence is that Mr Eagle did not mention the issue again during that conversation or during a second visit with his wife after work that day.

[22] Ms Lang's evidence is that neither on 11 June nor any other time did Ms Eagle herself try to retract her resignation.

[23] Mr Eagle denied that during the morning discussion with Ms Lang on Wednesday 11th he had asked for his wife's job back. His evidence was that it was his wife who had withdrawn her resignation later the same day, in the evening, while he was present. He said:

*That evening we went into the store to meet with Elly .... Annamarie then definitely retracted her resignation. I remember Elly's exact words were "Are you retracting your resignation?" Annamarie's answer was "Yes". This is when Elly tried to phone Air New Zealand to get Annamarie reinstated on to the staff trip to Rarotonga for that weekend. When she could not get through she told Annamarie she would get her back on the trip the next day.*

[24] Ms Eagle's evidence of what she said to Ms Lang on the evening of 11 June was:

*I told Elly that I was retracting my resignation. The exact conversation between Elly and I was "Are you retracting your resignation" (by Elly) and my response was "Yes". Elly carried on saying, "Are you sure" and again I said "Yes". I am 100% sure that Elly was in no doubt that that was what I wanted to do.*

*As I recall, Elly did not specifically state that my retraction was accepted. However, Elly did not say that she needed to seek approval from higher up or that she would have think about things. Instead, she immediately tried to get me back on the staff trip to Rarotonga .....Elly assured us that she would try to get me back on the trip the following day. I do not think that she would have done this unless the withdrawal of my resignation had been accepted. Mark and I left the office that evening very relieved thinking that everything was back on track, both with my job and with the trip.*

[25] Mr Eagle suggested in his evidence that for him to have sought a retraction of his wife's resignation would have been an inappropriate intervention by him in a matter concerning his wife's employment, and therefore he had not taken that step.

[26] I do not consider that was in practice how he saw his role at the time. As Mr Eagle agreed in his evidence, a few days earlier on 3 June he had intervened in his wife's employment when, after an incident between her and another employee, he had rung Ms Lang and threatened legal action against the Flight Centre.

[27] He also involved himself in Ms Eagle's employment on 11 June when he sent an email to Ms Siobhan McGovern, Area Manager for the Flight Centre, in which he said:

*Hi Siobhan, I understand you are coming to Whakatane tomorrow. Is there any chance I could confidentially catch up you? I know you will have heard from Elly what is going on but hopefully I can shed some light as to what I we can work through this. Annamarie is very ill right now and isn't thinking straight. She has had a breakdown. I have been to the doctor today to start the ball rolling and hopefully get her on some medication. We are crisis point now and I need your support.*

[28] It is totally understandably that Mr Eagle was greatly concerned about his wife's health and the security of her employment, to the point where he involved himself on her behalf. He confirmed to the Authority that when told of the resignation by his wife on 9 June he had regarded her actions as rash, particularly given the financial impact loss of her job would have on the couple and their ability to meet the usual outgoings they had. I therefore consider it is likely that to support his wife and protect her interests Mr Eagle did, as Ms Lang said, ask for her job back. Ms Lang did not assent to that, I find.

[29] The email Ms McGovern sent to Mr Eagle in reply to his on 11 June also strongly suggests that it was Mr Eagle who sought retraction of Ms Eagle's resignation. Ms McGovern replied with the following:

*Hi Mark  
I have spoken to Elly today and she explained that you came to her today asking for Annamarie's job back.*

[30] I accept that that is what Ms Lang told McGovern had happened that day, and I consider it is likely Ms Lang said this because it was true. On 11 June no issue had arisen about when and by whom that day any attempt had been made to retract Ms Eagle's resignation. It was not until about 20 June, over a week later, that any issue arose about that from the instructions given by the Eagles' to their solicitor to raise a personal grievance.

[31] In notes of his interview with Ms Eagle made on 17 June the solicitor recorded his instructions as "*did verbally resign – retracted resignation. Have impression am back on payroll. Employer now taking attitude I have left – "walking out"*".

[32] The solicitor's letter to the Flight Centre referred to Ms Eagle as '*tendering her resignation*' and said '*the resignation was then retracted...*', although the letter did not say when and by whom a retraction was made.

[33] The email of 11 June from Ms McGovern to Mr Eagle is therefore a contemporaneous communication indicating a likelihood that Mr Eagle had sought to retract the resignation.

[34] Ms Eagle in her evidence accepted that Ms Lang had not expressly agreed to the retraction she had sought directly on the evening of 11 June, she said. She claims that the retraction was implicitly accepted by the actions of Ms Lang in trying to get Ms Eagle restored to the Rarotonga trip, which she had been removed from after resigning two days earlier on 9 June.

[35] I do not agree that Ms Lang's action in that regard could reasonably be taken as confirming acceptance that the resignation was retracted. The trip had been booked to take place over the weekend after the resignation, which was within the four week notice period Ms Eagle intended, as Ms Lang knew, working out,. I find that Ms Lang was motivated to act by a strong sense of unfairness resulting from Ms Eagle not being allowed to take the trip she had earned, simply because she intended finishing in a few weeks time. The three who had won the trip all worked together in the same office and naturally Ms Lang would not have wanted Ms Eagle, during her last weeks of work there, to have felt left out of a holiday in Rarotonga her colleagues were able to enjoy.

[36] I also consider it likely that if Ms Eagle had believed in her conversation later on 11 June with Ms McGovern that she had retracted the resignation, and believed her retraction had been accepted, Ms Eagle would have protested when she was unexpectedly asked to leave immediately the following day 12 June, or was "*walked out*" to use the industry term. I accept the evidence of Ms Lang that Ms Eagle said nothing about an earlier retraction at that time. Although she claimed to have been stunned and rendered virtually speechless by the sudden requirement to leave immediately she remained capable of assisting Ms Lang, as requested, in working at her computer to transfer files immediately before she left. Ms Eagle agreed in her evidence that she had not protested that the walking out was contrary to any understanding of hers that the resignation had been set aside or disregarded by the Flight Centre.

[37] In relation to the retraction of resignation issue I prefer the evidence of Ms Lang to that of Ms Eagle and her husband Mr Mark Eagle. I find that Mr Eagle sought a retraction for his wife from Ms Lang who did not agree to it on behalf of the

employer. A retraction was not expressly or impliedly agreed to by Ms Lang and no further request was made by the Eagle's in this regard.

[38] The Authority was referred to a number of employment cases where an employee has purported to retract a resignation given earlier. Those cases I find are distinguishable on their facts, as they involve situations where a heated argument or exchange has led to a sudden announcement of resignation by an employee. The law from those cases is that a cooling off period should be given as a matter of reasonableness and fairness by the employer, before the resignation is either withdrawn or confirmed and acted upon. In other cases there has been some ambiguity about the employee's intentions, requiring an employer acting fairly and reasonably to seek clarification before acting on the employee's statements.

[39] I find in this case Ms Eagle intended to resign. She confirmed to Ms Lang that was what she wanted to do, after being asked several times whether she was sure. I find that the resignation given on the afternoon of 9 June by Ms Eagle was received, acknowledged and confirmed by Ms Lang on behalf of the employer and that the particular circumstances created no further obligation on the part of the Flight Centre to ask Ms Eagle if she wanted to reconsider her actions or allow her time to do so.

### **Dismissal of Ms Eagle**

[40] I find that what happened subsequently, on Thursday 12 June, amounted to a dismissal of Ms Eagle by the Flight Centre. She had advised her intention of working out her notice for four weeks from 9 June. Without further discussion Ms Eagle was told on 12 June she was being 'walked out.' The effect of that action by the employer was I find to terminate the employment without notice that day, although the Flight centre advised Ms Eagle she would be paid in lieu of notice.

[41] It is clear from the evidence that to be 'walked out' by the employer amounts to a summary or immediate ending of the employment from the time that action occurs. Ms Eagle was required to hand over all of the work she had in progress to Ms Lang before being escorted from the premises on 12 June. Her final pay was made up, although that may have been short as it was apparently to 15 June rather than 9 July.

[42] 'Walking out' is regarded by the Flight Centre as appropriate when an employee is leaving to work for a competitor. It is also viewed by the Flight Centre

as equivalent to putting an employee on 'garden leave.' Whatever expression is used to describe the employer's actions, there was no justification for the summary termination on 12 June. There is no suggestion that Ms Eagle was leaving to go and work for an opposition firm or anyone else. She was known to be unwell and had told Ms Lang that was the reason for resigning on 9 June. Neither was she asked to stay home while remaining on the payroll, as in a 'garden leave' situation. Her employment ended with immediate effect on 12 June at the initiative of the employer.

[43] There was no express term of the employment agreement allowing the employer to pay in lieu of notice, except in situations where an employee was going to a competitor or had received an employment offer. Such a term cannot be implied either, as the strong implication of the termination provisions at clause 19.4 in particular is that notice will be worked out where the employee resigns and is not taking up other employment. An employee also has a right to perform work while remaining in employment, unless suspended for cause and following consultation.

[44] It is fundamental that one party to an employment agreement cannot change its terms. Unilateral variation is a breach of the agreement. What occurred required the consent of Ms Eagle, which was not sought. It follows that Ms Eagle was dismissed in breach of the agreement, and therefore unjustifiably.

[45] Ms McGovern's evidence was that the decision to 'walk' Ms Eagle instead of allowing her to work out four weeks notice was made on the morning of 12 June. She said the main reason for this change was concerns held about Ms Eagle's health. No attempt was made to discuss any such concerns or to have Ms Eagle medically examined, as the employer could have done under the express provisions of the employment agreement.

[46] If the Flight Centre believed it had grounds for terminating the employment of Ms Eagle on 12 June then it should at least have consulted her. The duty of good faith at s 4(1A)(c) of the Act requires that whenever an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment. That applied even in this case where the employment was for a limited term of four weeks.

[47] A dismissal in breach of a statutory duty must inevitably be held to be an unfair and unreasonable action, rendering the dismissal unjustified under s 103A of

the Employment Relations Act. The actions of the Flight Centre and how it acted were not what a fair and reasonable employer would have done in the circumstances at the time of the dismissal.

[48] It follows that the finding of the Authority must be that the employment of Ms Eagle ended not by the resignation given voluntarily on 9 June but by unjustified dismissal on 12 June when she was ‘walked out.’ Therefore the Authority determines that Ms Eagle has a personal grievance arising from the way her employment was terminated.

### **Rarotonga trip**

[49] In relation to the claim that Ms Eagle was unfairly and unreasonably denied the opportunity of taking the reward trip she had earned to Rarotonga, I find that the availability and participation in such trips was a matter of discretion expressly reserved by the Flight Centre as to whether and when employees could take up such a trip, even when it had been earned by their performance. I accept the submission of Mr Erikson that the Flight Centre in this case exercised that discretion and had reasons for not allowing Ms Eagle to go on the trip. The Authority has no role to review such exercise.

[50] A major reason was the Flight Centre’s view that taking the trip would not be conducive to Ms Eagle’s health in the condition she appeared to be in at that stage. I accept that this was a view held of Ms Eagle’s frailty at this time. Over time Ms Eagle had given her employer ample reason to be concerned about her health and overall wellbeing in several respects. On 11 June advice had been received by Ms McGovern from Mr Eagle that his wife had had “*a breakdown*” requiring medical treatment. The employer had reasonable grounds for being concerned about the impact on Ms Eagle of her taking the trip, and also the possible affects this would have on the other employees accompanying her if the medical problems had become critical during the trip.

[51] As to the complaints made by Ms Eagle in relation to “*stealing*” her clients and being bullied by Ms Lang, I find that the Flight Centre had considered those particular complaints and made reasonable proposals as to how they could be dealt with. It investigated the client stealing allegation by having an audit of files carried

out and I find it took that matter seriously. It proposed facilitation or mediation between Ms Eagle and Ms Lang, but this was not acceptable to Ms Eagle.

[52] Also, the 'Palmy' system was introduced to try and eliminate 'stealing.' Ms Eagle conceded that had been a useful measure by her employer in that regard.

[53] After a brief confrontation between Ms Eagle and Ms Isabell Murray had taken place in the office on 3 or 4 June, upsetting Ms Eagle, a reprimand was given to Ms Murray by Ms Lang. This was a reasonable and appropriate response by the employer to protect Ms Eagle.

[54] I do not consider that the Flight Centre had failed to provide and maintain a safe and healthy place of work in the circumstances. The nature and extent of the health issues undoubtedly troubling Ms Eagle were not clear but the Flight Centre had pointed her in the direction of assistance through EAP, if she wished to have it. In my view the actions of the Flight Centre did not fall short of what was reasonably required of an employer and I find there was no breach of the employment agreement.

[55] I find in the circumstances that the employer acted fairly and reasonably on the information it had gathered and cannot be criticised for failing to take disciplinary action against Ms Lang or anyone else at the stage matters had reached by the time Ms Eagle resigned.

## **Remedies**

[56] In assessing remedies for her personal grievance I find that Ms Eagle did not contribute to the situation that gave rise to her unjustified dismissal.

[57] I find there was no loss of remuneration, as Ms Eagle had intended to finish the employment within four weeks of the dismissal and was paid for that period, or should have been paid.

[58] I direct that the Flight Centre is to investigate and confirm whether Ms Eagle was paid for the full four weeks of the notice period up to 9 July, or only for 12 days as suggested by the note on the payroll material referred to at para. 7.2 in Mr Eggleston's submissions. The ordinary final pay calculated is for 12 days at 8 hours which at \$31.16 equals \$2,991.36. (It may be the notice period was erroneously thought to be only two weeks instead of four.)

[59] Further directions can be sought if there is any continuing issue about this between the parties. Any amount found outstanding is to be paid to Ms Eagle together with interest at 4% from 15 June 2008, the date of the final pay.

[60] Ms Eagle is entitled to compensation for hurt feelings, humiliation and distress caused by the requirement for her to leave her job immediately and be walked out, and also by not being given an opportunity to discuss any concerns the employer had about her working out notice. Compensation is not awarded in this case for loss of the job, as Ms Eagle when she resigned had, I have found, decided herself to bring the employment to an end in the near future.

[61] In suddenly exiting her The Flight Centre treated Ms Eagle with a lack of sensitivity and compassion shown towards her known physical and mental frailty at that time. Although not deliberate this was almost callous treatment when Ms McGovern presumed to know what was best for Ms Eagle's health without asking her. I accept the evidence Ms Eagle gave about the humiliation and distress she suffered then and still suffers from as a result of this experience. A major limiting factor on the amount of compensation that can be awarded must be that, as of 12 June, the dismissal was not in respect of permanent on-going employment but employment limited to a four week period. This was at Ms Eagle's request as a result of her resignation.

[62] Pursuant to s 123(1)(c)(i) of the Act the Flight Centre is ordered to pay Ms Eagle, as compensation, \$5,000 for her unjustified dismissal in circumstances where her right to work, for the four week period of notice, was unilaterally removed by the employer. At the same time the Flight Centre did not comply with its good faith obligations owed to Ms Eagle under the Act.

### **Determination**

[63] For the above reasons I find that Ms Eagle was unjustifiably dismissed and is to be paid \$5,000 in compensation for hurt feelings, humiliation and distress caused by that action of the Flight Centre.

[64] I have given directions with regard to any pay in lieu of notice that may still be owing to Ms Eagle.

## **Costs**

[65] Costs are reserved. As usual counsel are requested to try and resolve any question by agreement. If that is not possible any application for costs is to be made in writing on behalf of Ms Eagle within 14 days of the date of this determination. Any reply from the Flight Centre is to be given within a further 14 days.

A Dumbleton

**Member of the Employment Relations Authority**