



**The law**

[4] This is a matter about how the applicant's employment ended. The applicant has to establish that she was dismissed and/or was constructively dismissed. Since she claims she did not resign, it is up to her to establish that the employer's action was an actual dismissal. This is dependent on the version of events relating to a meeting held on 26 May 2012. The determination of the facts is made on the balance of probabilities, i.e. what was more likely than not.

**The facts**

[5] Ms Evans was employed from April 2010 by Gowrie Periasamy t/a Hair Ministry Salon Gowri as a senior stylist at one of Ms Periasamy's hair salons located in Wellington. The parties had an individual employment agreement (IEA). The IEA provided for two weeks' notice. Ms Evans' rate of pay was \$27.50 per hour and paid weekly into her bank account. In addition, there was an entitlement to receive commission.

[6] Ms Evans telephoned Ms Periasamy on 18 May 2012 because she did not feel well enough to work due to stress. However, during the telephone call, she agreed to work in the afternoon. Leading up to this telephone call, Ms Evans had started to look for work in Ashburton and she attended a job interview there on 12 May 2012. Ms Periasamy became aware of Ms Evans' possible intentions and she got upset. Because of this and difficulties that had started to arise in the workplace, Ms Periasamy made arrangements for a lawyer, who she says she consulted to act as a "mediator" at a meeting, as a way for both parties to move forward. The meeting took place on Monday, 21 May 2012. It was not a disciplinary meeting, but a preliminary fact finding meeting and an attempt to promote the employment relationship.

[7] Both parties have quite different versions of what happened at this meeting. It is common ground that the parties raised the issue of notice and the payment thereof during the discussions in the meeting. The discussion resulted in a settlement agreement being written up afterwards.

[8] When Ms Evans received the settlement agreement, it included new terms. One of the terms was that she would not return to work and would not have contact with any of the other employees for a certain period. At this point, Ms Evans decided

that any arrangement was therefore not suitable to her because she wanted time to notify her clients and have contact with her friends at work.

[9] The respondent relies on a letter dated 21 May 2012 as the applicant's offer to resign, and says the offer to resign was accepted. I do not accept that letter represents a resignation. This is because the subsequent settlement agreement was written up that included preconditions and new terms which the applicant did not accept, and indeed had not been seen by Ms Evans until she received the purported settlement agreement.

[10] Subsequently, any offer of resignation became the subject of negotiations between the parties' legal representatives. It was anticipated that Ms Evans's last day of work would be at the end of any notice period, still the subject of discussion. The settlement agreement was never signed at the time by the parties. The applicant telephoned the respondent on 26 May 2012 to ascertain what she was required to do. Ms Evans says that Ms Periasamy informed her not to return to work. Ms Periasamy agreed she did say that Ms Evans was not to return.

[11] A personal grievance was then raised. In the meantime, Ms Evans was unemployed for approximately five weeks. She was offered and accepted a new job that was in Ashburton during June 2012, and she started work there on 2 July 2012.

[12] I considered mediation in the matter as I am required to do under s.159 of the Employment Relations Act 2000 (the Act). I decided that, given the background involvement of both parties' representatives that not much more would be achieved by the parties attending mediation, and therefore with the consent of both parties set this matter down for an investigation meeting. It falls on the Authority to determine the matter.

### **Determination**

[13] There is a direct conflict of evidence between Ms Evans and Ms Periasamy. I have preferred Ms Evans's evidence. The reasons for this follow.

[14] I hold that Ms Evans was dismissed by Ms Periasamy. My reasons are:

- (a) That there was no signed settlement reached between the parties, despite attempts to negotiate a settlement, resignation and notice to leave;
- (b) That despite terms being discussed, there were new conditions put into the settlement agreement that Ms Evans was entitled to consider the full package without being bound by them. The new conditions had not been previously raised with Ms Evans;
- (c) That there was no formal resignation and that the letter dated 21 May 2012 was not a resignation;
- (d) That Ms Periasamy agreed she told Ms Evans that she was not to return to work on 26 May 2012;
- (e) That Ms Evans genuinely did not want to settle and be prevented from maintaining contacts with her friends at work;
- (f) That the conflict between both parties about what happened and the nature of the meeting held on 21 May 2012 was not indicative of a mutual resignation and exit arrangement;
- (g) Ms Evans did not have a new job at the time;
- (h) That Ms Evans had indicated her desire to get another job and had arranged for an interview in Ashburton, whereupon there was a job offer that followed later.
- (i) That the evidence does not support Ms Evans' constructing a personal grievance as a legal framework to get more money.

[15] There was a discussion and for the resolution of an employment relationship problem and this led to how an agreement might be arranged, but there was no agreement. In the circumstances any agreement had to be put in writing before it could become binding. The respondent's representative put in writing what she thought would be acceptable, but upon the applicant considering it Ms Evans decided the full purported settlement was not acceptable and I hold that the additional terms not previously covered off during the parties' meeting made it reasonable for Ms Evans to reject any arrangements that had been discussed. Ms Evans was not

represented at the time the purported arrangement was discussed. She was then informed not to return to work.

[16] The respondent's conduct constituted an actual dismissal. The respondent has put forward the proposition that Ms Evans and her legal representative have framed a legal setting to construct a version of events that appears to be consistent with a dismissal. Ms Periasamy entirely rejects that there was any dismissal, based on the behaviour of Ms Evans and her representative. In essence, Ms Periasamy relies on this being a matter akin to an employment relationship problem, but falling short of meeting any requirements for a personal grievance, because the Act makes provision for institutional dispute resolution requirements recognising:

- The prompt resolution by the parties themselves of any dispute;
- The expert problem-solving support and assistance needs to be available at short notice;
- The procedures for problem-solving should be flexible.

[17] I accept the general proposition advanced in regard to this, but it is not inconsistent that a dispute could arise over the interpretation of events giving rise to the employment ending, as has happened in this matter. This is because:

- The procedures are to help to resolve employment relationship problems. They do not prevent parties from seeking their rights through the menu of options for dispute resolution that are available.
- That both parties had genuinely held beliefs about the factual background. They are entitled to have those genuine beliefs tested.
- Ms Evans was not allowed to return to work.
- Ms Periasamy advised Ms Evans that she (Ms Evans) would be removed if she tried to return.
- That the "mediation" could only ever be an informal meeting since there was no mutual agreement on an independent mediator, and that Ms Evans was not aware of the arrangements made for the meeting by Ms Periasamy to use her own lawyer.

- That Ms Evans came to a reasonable belief that Ms Periasamy's lawyer was Ms Periasamy's own representative, despite the attempts by the lawyer to help both sides: for example drafting a settlement and that Ms Evans was informed that the lawyer would be a mediator.
- That Ms Periasamy wanted a representative in attendance because she did not want to meet Ms Evans alone.
- That Ms Periasamy did not offer Ms Evans the opportunity to have someone present to assist her.
- That there was tension between both parties prior to the meeting that could construe that the meeting was about Ms Evans' employment, thus leading to the disputed settlement agreement.

[18] I prefer the version of events that the applicant has relied upon because:

- Ms Evans did not have a real involvement in the meeting arrangements being put together.
- Ms Evans always denied resigning.
- That without prejudice negotiations took place alongside Ms Evan's adamant denial of resigning.
- That there are additional terms that were made to the settlement agreement, without Ms Evans' agreement.
- That the negotiations did not involve settlement, despite discussions on Mr Evans resigning and Ms Periasamy making a monetary offer. The terms did not synchronise.

[19] Ms Evans has been accused of not reciprocating the attempts being made by Ms Periasamy to deal with the issues. It seems that the outcome did not suit Ms Periasamy when Ms Evans failed to agree. Of course Ms Evans did not have to agree, and because she never resigned it was Ms Periasamy who decided that Ms Evans was not allowed back in the workplace.

[20] The blame for this situation can not be about how the matter was cast in a legal framework by Ms Evan's Counsel. There have been inferences made about this, but I have no conclusive evidence that that was in fact the case and/or that there was some deliberate attempt to create the situation for the benefit of the applicant. The facts are determined on their own. I accept that the meeting was not a disciplinary meeting but was to work on the employment relationship. Ms Evans was never required to sign anything, given she was not represented and did not ultimately agree with terms to leave.

[21] There does not have to be a motive for dismissal because in the circumstances it is the employer's action that has to be assessed, and ultimately Ms Periasamy requested Ms Evans not to return to work. In any event Ms Periasamy agreed that there were difficulties, tensions and that she would not meet Ms Evans alone.

[22] It was not unreasonable for the applicant to look for alternative work and indeed she did secure that. She had an obligation to do so.

[23] The respondent has not been able to provide reasons to justify the dismissal. The elements of procedural fairness prescribed under s.103A (3) of the Act are entirely absent. I have had regard to s 103A (4) as to any other factors that may be relevant. Also, I have had regard to s 103A (5) and I hold that the defects in the procedure followed by the employer are not minor and or technical.

[24] Therefore, Ms Evans is entitled to remedies for a personal grievance. Her claim for lost wages amounts to 5 weeks wages (\$27.50 per hour 35 hours per week). The lost wages claimed is \$4,812.50. However the situation does involve some matters raised by the respondent about Mr Evans' conduct for assessment and these matters were not enough to support the respondent's claim that Ms Evans acted deliberately and maliciously to construct the situation about her employment ending. Thus, I hold that there is no contributory conduct of a blameworthy nature. She is entitled to her claim for wages since she has a personal grievance (s 128 of the Act applied). Her lost wages are \$4,812.50.

[25] She mitigated her loss and obtained work.

[26] Her claim for compensation for hurt and humiliation is at the lower end of the scale, I hold. I assess her evidence as requiring a payment of \$2,000.

[27] Gowrie Periasamy t/a Hair Ministry Salon Gowrie is required to pay Donna Evans:

- (j) \$4,812.50 (gross) lost wages
- (ii) \$2,000 compensation under s 123 (1) (c) (i) of the Act

**Costs**

[28] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority