

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 291/08
5026866

BETWEEN SYLVIA RONG FU
Applicant
AND RAPPONGI EXCURSIONS
LIMITED
Respondent

Member of Authority: Robin Arthur
Representatives: Mark Nutsford for Applicant
Basil Po-Ching for Respondent
Investigation Meeting: 24 July 2008
Determination: 14 August 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant says the termination of her employment – two weeks after she had given the month’s notice of resignation required in her employment agreement – was an unjustified dismissal.

[2] Salary owed for the remainder of the notice period were not paid until after the Applicant had lodged her claim in the Authority. While that issue was settled between the parties before the investigation meeting, the failure to pay those wages at the time of termination forms part of the factual background to the Applicant’s unjustified dismissal claim.

[3] The Respondent says the Applicant agreed to finish work part way through her notice period and the failure to pay her wages for the remainder of that period was simply administrative oversight which had not previously been brought to its attention.

Issues

- [4] The issues for resolution in this determination are:
- (i) whether the Applicant agreed to finish work partway through her notice period or whether the Respondent ended her employment in an unjustified manner; and
 - (ii) if there were an unjustified dismissal, what remedies are required; and
 - (iii) whether either party should be awarded costs?

Investigation

[5] Written witness statements were lodged by the Applicant, the Respondent's Director of Operations Peter Fernandez and its former Pakuranga unit manager Pious Gomez. John Shadbolt, an employment advocate who had earlier represented the Applicant, also lodged a written statement but its contents did not require further questioning. The Applicant, Mr Fernandez and Mr Gomez attended the investigation meeting where, under oath, they each confirmed their statements and answered questions from the Authority and representatives. The representatives provided oral closing arguments.

The facts

[6] The Applicant worked as a duty manager for the Respondent's restaurant chain from August 2004 to November 2005.

[7] In October 2005 she sought leave to take an extended trip to China in January 2006. Her father lived there and was ill at the time. The Respondent declined the leave application.

[8] On 8 November 2005 the Applicant gave written notice of resignation. Her employment agreement required one month's notice, making her last day of work 6 December 2005.

[9] In the following week the roster included changes to when the Applicant did 'graveyard' shifts and she found these changes onerous. The Applicant complained to her store manager but no changes were made to the following week's roster. She formed the view that the roster changes were intended to punish her for leaving the job.

[10] After completing a double shift on 14 November the Applicant felt overtired and unsafe while driving home. She visited her health practitioner at a Chinese Medical Clinic. She was to take a day's sick leave to get a good sleep. She was given a medical certificate saying she would be fit to return to work after one day.

[11] The Applicant took a day's sick leave on 16 November and returned to work on her next rostered day, 18 November.

[12] At work she showed her store manager her medical certificate.

[13] She also found the following note written in the manager's log, a notebook in which managers left messages to communicate between shifts:

16/11 Sylvia,

How come you make it very convenient that whenever you have split off days you call in sick. Fine (sic) I can (sic) rely on you, and then reading your notes left in the mgr log book.

You can now finish your last day Sunday 20/11/05. If you fail to turn up until then, I will take you to court and hold your money.

C Fernandez

[14] Mr Fernandez had written this note. His evidence was that below this passage he also wrote: "*Please contact me to discuss this*". The photocopy of the note produced in evidence did not include this sentence. Mr Fernandez says it was written on the following page of the log but could not satisfactorily explain why he would write that sentence below rather than above his signature. The Respondent no longer has the original log book.

[15] Mr Gomez gave evidence that on or about 17 November 2005 he met with the Applicant. He says the Applicant said she could not handle the shift work and it was

making her sick. He says he asked the Applicant to work until 20 November and she agreed. He also told her she would be paid up to her resignation date of 6 December 2005.

[16] The Applicant's employment agreement allowed for the Respondent to elect to pay wages in lieu of some or all of the notice period.

[17] The Applicant firmly denies any such conversation took place with Mr Gomez. She was not at work on 17 November. She says she spoke only once and briefly with Mr Gomez before finishing work and that was on 20 November 2005, on her last day of work, about stocktaking in the store.

[18] The Applicant's evidence was that, after finding her last pay was made up to only 20 November, she rang the Respondent's pay office and then Mr Fernandez. She says that Mr Fernandez told her that he did not care about "*the bloody contract*" and refused to authorise payment of the remaining notice period.

[19] Mr Fernandez firmly denies that any such conversation took place.

[20] By letter of 30 November 2005 the Applicant's representative at that time raised a personal grievance with the Respondent alleging the termination of employment on 20 November 2005 was unjustified. After quoting the extract from the managers log set out above, the letter says:

My client informs me that she has only had three periods of sick leave during her employment, for an ankle injury, food poisoning, and the latest incident of sleep difficulties. Your accusations are therefore unfounded. Your threats of court action and withholding of wages are bullying and inappropriate.

In dismissing [the Applicant] without any process being followed, and for no justifiable reasons, you have unjustifiably dismissed her.

[21] The Respondent was asked to attend mediation. By letter of 9 December 2005 the Respondent agreed to attend mediation. However by the time that mediation was arranged the Applicant had left the country to visit her sick father in China.

[22] The Applicant's evidence was that she did not return to New Zealand until May 2006 due to delays in her visa arrangements.

[23] In December 2007 her present representative renewed her claim. The Respondent again agreed to attend mediation. That occurred in April 2008. It did not resolve matters between the parties. The Respondent says that through mediation it became aware for the first time that the Applicant had not been paid salary due to her for the remainder of her notice period.

Determination

Unjustified dismissal

[24] This matter concerns events which occurred just a little under three years ago. The evidence of the Applicant, Mr Fernandez, and Mr Gomez differ markedly on three points: firstly, whether Mr Fernandez's note in the managers log written on 16 November included a request for the Applicant to contact him; secondly whether the Applicant agreed in conversation with Mr Gomez to finish work on 20 November and thirdly, whether Mr Fernandez subsequently refused to pay the Applicant's wages for the remainder of the notice period. However, considering the totality of the evidence, I find that even if I prefer the evidence of Mr Fernandez and Mr Gomez on each point, none change the unjustifiability of the Respondent's decision to end the Applicant's employment on 20 November. I do so for the following reasons.

[25] Mr Fernandez's note in the log book on 16 November announced her last day of work as being 20 November. This was more than the exercise of the Respondent's ability to pay in lieu of notice. He made that decision on the assumption that the Applicant was taking a day of sick leave without proper reason. His note announced his decision, whether or not the Applicant subsequently contacted him, as Mr Fernandez suggests part of his note asked her to do.

[26] He explained his thinking this way in his written witness statement:

I believed Sylvia was abusing the system and was only going to turn up for work when it suited her. When managers fail to turn up to run a shift it

seriously disrupts our system. I felt it was better for her to finish earlier than her resignation date and for us to replace her with a more reliable manager.

[27] He did not enquire into the genuineness of her illness or give her an opportunity to provide a medical certificate or any other explanation before making that decision.

[28] He accepted in answering a question from the Authority that, at the time he wrote the note in the log book, he did not know how many sick days the Applicant had taken during her employment. The one day taken on 16 November did not justify Mr Fernandez's note. However the note did reveal his state of mind when he arbitrarily set the Applicant's last day of work as 20 November and informed her by way of a written note in a log book.

[29] Consequently Mr Gomez's conversation with the Applicant, if it occurred as he suggested, did not secure her agreement to the termination on 20 November. It was merely yielding to a decision already made and announced by Mr Fernandez.

[30] Similarly, even if Mr Fernandez is correct that he did not tell the Applicant she would not be paid the remainder of her notice period, his decision to end her employment on the basis of an assumption only and without considering the genuineness of the reason for her absence is not rendered justifiable.

[31] I find that the Respondent's actions, through Mr Fernandez, were not what a fair and reasonable employer would have done in all the circumstances at the time. The Applicant has a personal grievance for unjustified dismissal and remedies must be considered.

Remedies

[32] There is no claim for lost salary. The Applicant was entitled to be paid for the remainder of the notice period and although the payment was considerably delayed, that issue was settled prior to investigation. She did not pursue a claim for interest on that amount.

[33] The Applicant is entitled to an award of compensation for hurt and humiliation arising from the method of communication of the termination of her employment. Mr Fernandez's note included an accusation that the Applicant misused sick leave, was unreliable and needed to be coerced into attending her remaining days of work by a threat to "*hold your money*" and "*take you to court*". It was written in a place accessible to all the store's managers on various shifts. It was an inherently humiliating way of going about the termination of employment.

[34] **The Respondent is to pay to the Applicant the amount of \$2500 under s123(1)(c)(i) of the Employment Relations Act 2000 ("the Act") in compensation for the injury to feelings occasioned by how it carried out the termination of her employment.**

Contribution

[35] As required under s124 of the Act I have considered whether this remedy should be reduced for any blameworthy conduct by the Applicant contributing to the situation giving rise to her personal grievance. There was no blameworthy conduct by the Applicant and no deduction is required.

Costs

[36] The Applicant seeks costs on the tariff basis described in *PBO v Da Cruz* [2005] ERNZ 808 (EC).

[37] Taking \$2000 a day as the starting point for a relatively uncomplicated investigation, as this was, and applying it to the half day taken, the Applicant is awarded costs of \$1000.

Robin Arthur
Member of the Employment Relations Authority