

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 47
5298230

BETWEEN

RUTH FOLEY
Applicant

AND

AUCKLAND DISTRICT
COLLECTIONS LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: H Tevita, counsel for applicant
C Patterson, counsel for respondent

Investigation Meeting: 25 January 2011

Determination: 7 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ruth Foley says her resignation from her employment with Auckland District Collections Limited (ADCL), was an unjustified constructive dismissal. She also seeks payments of sick pay and unpaid wages.

[2] ADCL denies there was a dismissal, and that any sick pay or wages are owed.

Background

[3] ADCL employed Ms Foley as a field agent, commencing in May 2009.

[4] ADCL provided a number of discretionary benefits to its employees, including an annual staff Christmas party. A party was duly scheduled for Christmas 2009, and invitations were circulated to staff and their partners.

[5] Early in December Simon Freeman, the managing director, decided to fund a second Christmas party for the children of staff members. This was the first time he had organised a children's Christmas party, but he decided to do so to recognise the children and do something special for them. He issued the relevant invitation by email message from his personal assistant, Gaynor McIntosh, dated 2 December 2009. The message was addressed to the four members of staff he knew to have children as well as a fifth, Anthony Mokofisi, who had the care of children but no children of his own. The children's party was to be held on the afternoon before the day of the adults' party.

[6] Ms Foley does not have children and was not known to have the care of any children. She did not receive a copy of the invitation. One other staff member was in similar circumstances and also did not receive an invitation. Ms Foley sought to distinguish that person's circumstances because he was based in Tauranga, but the person travelled frequently to Auckland, and was to attend the adults' party. I do not accept there is anything in the distinction.

[7] The ADCL office was small and open plan. Ms Foley overheard Mr Freeman instructing Ms McIntosh to make reservations at Rainbow's End, the amusement park where the children's party was to be held, but was unaware of the purpose of the reservations. During a phone call with Ms McIntosh on 9 December Ms Foley became aware that there was to be a children's party, and there was a conversation to the effect that she should discuss the possibility of her attendance with Mr Freeman.

[8] Later the same day Ms Foley telephoned Mr Mokofisi, whom she considered a friend. She told him she was angry that she had not been invited, and that she did not wish to work on the day of the party. In what was probably an underlying reason for the strength of her reaction, she disclosed to Mr Mokofisi that she had experienced a miscarriage some years earlier – information of which none of her colleagues was aware. She also told Mr Mokofisi she felt she had been discriminated against, and that she would sue Mr Freeman.

[9] Mr Mokofisi said he sought to comfort Ms Foley, and also encouraged her to speak to Mr Freeman. However he was uncomfortable with the repeated references to

suing Mr Freeman, and contacted Ms McIntosh after the call. Both expressed unease about Ms Foley's reaction.

[10] In a discussion with the office manager Kirsten Laurence, also on the same day, Ms McIntosh advised of Ms Foley's calls and the unease with them, as well as of Ms Foley's threats to sue for discrimination. Ms Laurence herself had a brief discussion with Ms Foley, during which the concern about discrimination was again raised. Ms Laurence considered it clear that Ms Foley did not accept that the party was for the children, and believed she had been discriminated against. Ms Laurence concluded she could not take the matter any further and it should be discussed with Mr Freeman.

[11] For her part, on the morning of 10 December Ms Foley telephoned the Human Rights Commission to raise her concern that she was not invited to the children's Christmas party because she did not have children. She was given information about the grounds of unlawful discrimination. Mediation or discussions with her employer were suggested, and Ms Foley decided she would speak to her employer.

[12] Inevitably there was tension in the office that morning. Ms Laurence sent an email message to Ms Foley at 9.22 am, explaining why Ms Foley was not included in the invitation to the children's party and why Mr Mokofisi was included. She said she struggled to comprehend why Ms Foley felt discriminated against, and said:

Personally I believe the office is too small for ill feeling like this to be stewed on for the day as they were yesterday by yourself. As I said, if you have an issue with it I would like to think that you would discuss it with Simon instead of making the office feel like we are spending the day walking on thin ice.

[13] In a further email to Ms Foley sent at 11.39 am Ms Laurence said:

*Hi Ruth,
If you haven't already, please speak to Si this morning (I know he is leaving at midday today) so please do so before he departs.*

[14] That prompted Ms Foley to approach Mr Freeman, who had been made aware Ms Foley had a concern about discrimination and that the staff felt uncomfortable about her reaction to the children's party.

[15] On Ms Foley's account the conversation was brief. She asked why she did not receive an invitation, and said she felt discriminated against. Mr Freeman diverted the conversation by referring to the other benefits he had provided, at which Ms Foley went on to explain that she had experienced two miscarriages. Mr Freeman interrupted again to say that was her problem, and said the meeting was over.

[16] Mr Freeman denied interrupting Ms Foley at all. He said he listened while she explained her concern about the lack of an invitation and sense of being discriminated against, and advised of her miscarriage. He described her demeanour as aggressive.

[17] When Ms Foley finished, Mr Freeman explained that the party was for the children of staff or children for whom staff were the caregivers. He sought to do 'something nice' for the children and he had no intention of discriminating against anyone. He referred to the adults' party and said he looked forward to seeing Ms Foley there. He said he had not been aware of Ms Foley's miscarriage, indeed he believed Ms Foley did not want children. Although I accept this may not have been a reflection of her true feelings, it was common ground that Ms Foley had previously spoken of her attitude to children in that way. Mr Freeman said he expressed sympathy. Mr Freeman then reminded Ms Foley of certain additional benefits she had received but other staff had not, yet there had not been any complaints of discrimination. He ended by expressing disappointment at the way Ms Foley felt and suggested that a break be taken.

[18] It was common ground that the conversation resumed shortly afterwards. Mr Freeman said, and I accept, that he initiated the resumption because he felt matters were unresolved.

[19] Again the respective accounts were different.

[20] According to Ms Foley, Mr Freeman opened by saying: *the walls are up, the door is closed, this is just you and me.* He went on to say in an aggressive tone: *I strongly suggest you leave.* Ms Foley thought he meant her to leave for the day, but he continued: *I'll reiterate, if you want a good reference I strongly suggest you leave because everyone on this office including myself thinks you are toxic. We don't want to work with you. Nobody wants to work with you.* Ms Foley replied: *I am not going to resign, you know what*

you have to do Simon, and you'll have to sack me because I am not going to resign. Mr Freeman told Ms Foley that if she wanted a fight she could have one.

[21] Mr Freeman's account was that he asked Ms Foley whether she accepted his explanation and felt matters had been resolved. Since he considered her demeanour continued to be confrontational he told her that if there were any issues in the future he would prefer it if she spoke to him directly, rather than with the other staff members. Her not doing so had the potential to create a toxic environment in a small team, and the staff were uncomfortable with her discussing the children's party with them. Mr Freeman denied any mention in the conversation of a reference.

[22] Ms Foley told Mr Freeman the matter was not at an end and she would be taking it further. Mr Freeman replied by asking if she wanted a fight, because it appeared that is what she sought. He agreed that she replied by saying she was not resigning and told him that if he wanted her gone he knew what he had to do. He said '*I guess I do*', meaning that if her continued employment became untenable he would have to dismiss her. He did not mean that she was being dismissed there and then.

[23] It was common ground that Ms Foley left the office, saying '*bring it on*'.

[24] Later that afternoon Ms Foley made two further approaches to the Human Rights Commission. According to a file note obtained from the commission, in the first she advised that her employer could not understand why she felt discriminated against and told her she should consider leaving her job. Because of her raising the issue her co-workers did not wish to work with her any more and thought she was toxic. In the second she was very distressed, advised she was feeling left out and discriminated against, and said her employer wanted her to resign and that she was toxic.

[25] It was also Ms Foley's direct evidence that she was extremely upset at the time. On 11 December she obtained a medical certificate stating she was medically unfit for work until 23 December. A further certificate stated she was medically unfit for work until 25 January 2010.

[26] Meanwhile by letter dated 23 December 2009 Ms Foley's solicitors set out Ms Foley's view of the facts, raised a personal grievance and sought a meeting. In a reply dated 12 January 2010 ADCL set out its view of the facts, denied that Ms Foley had a personal grievance, and advised that her position remained open for her return when she recovered. It appears an unsuccessful attempt was made to negotiate a resolution. By letter dated 28 January 2010 Ms Foley's solicitors advised that, since agreement could not be reached, Ms Foley was treating her employment as terminated in terms of a letter from ADCL's solicitors which I assume formed part of the negotiations and was not available to the Authority.

Was there a dismissal

[27] Much of the resolution of this problem turns on a construction of the meetings between Ms Foley and Mr Freeman on 10 December.

[28] The respective accounts had some elements in common. These were: the first meeting began with Ms Foley asking why she had not been invited to the children's Christmas party and saying she felt discriminated against; Ms Foley raised her miscarriage; and Mr Freeman raised the additional benefits he had provided. In the second the word 'toxic' was used; Ms Foley told Mr Freeman that he knew what he had to do if he wanted Ms Foley gone; and Mr Freeman replied '*I guess I do.*'

[29] Otherwise, while I accept Ms Foley believes her account of the discussions with Mr Freeman on 10 December is true and correct, I do not believe her recollection is full and accurate. I prefer Mr Freeman's account.

[30] In a general sense my view has been affected by the extent to which Ms Foley sought to paint as black a picture as possible of Mr Freeman's behaviour as an employer, and misread her colleagues' reaction to her concerns on 9 and 10 December. She showed no insight into how her anger might have been affecting her colleagues, whom she had made uncomfortable, and remains bitter with Mr Mokofisi. As for Mr Freeman, emailed messages produced in support of Ms Foley's view of Mr Freeman's conduct disclosed that on occasion he used coarse or inappropriate language in comments to the staff and on occasions he used a stick and carrot approach regarding their performance, but none of this descended to the level Ms

Foley sought to attribute to it. Mr Freeman has also been generous and I do not accept he was of the character Ms Foley sought to portray.

[31] Secondly, Ms Foley had been threatening to sue Mr Freeman on the ground of unlawful discrimination, and in that sense she was looking for a fight. She was in a confrontational mood and conducted herself accordingly during the discussion with Mr Freeman. She was not open to any conciliatory statement he might make, and was not herself disposed to be conciliatory. I consider it likely that attitude coloured her interpretation of what she heard Mr Freeman say, which in turn affected the account she gave in evidence.

[32] Regarding Mr Freeman's conduct during the meeting, by way of background I do not accept there was evidence of any lurking desire on his part to dispense with Ms Foley's services or that any previous incidents in the employment relationship were any more than minor. His concern with Ms Foley on 10 December was that an issue had arisen in the workplace which was upsetting her and was disturbing the staff. I do not believe he was in a frame of mind where he sought to discipline or dismiss Ms Foley, rather he sought to resolve the immediate issue.

[33] In those circumstances I consider Ms Foley to be the participant in the conversation who was most likely to misinterpret statements intended innocently, and to make threats. Further, upset or not, I consider it unfortunate that she chose to view the matter of an invitation to a party as one possibly warranting legal action, rather than approaching her employer and attempting to resolve the matter in discussion.

[34] Having said all of this, I accept that Ms Foley reacted as she did because the feelings of loss following her miscarriage were invoked again by the holding of a children's Christmas party which, because of the loss, she could not attend. To those with children, the party was simply a party for the children and was not a benefit for them. However that point of view does not recognise that the staff members are nevertheless participating in the event. Even if the event was not for their benefit, as parents or caregivers they were part of a group from which Ms Foley was excluded. Worse, the basis of the exclusion - Ms Foley's not having children - underscored the loss associated with that matter and aggravated the upset Ms Foley felt.

[35] I also consider it insensitive for an employer to arrange a social activity of this kind without at least taking steps to address the matter with the excluded staff members, or to ensure they were not excluded if that was appropriate. Mr Freeman's approach was deficient in that respect.

[36] There was no allegation of actual dismissal, and on my construction of the conversation of 10 December I would not have found there was an actual dismissal. Ms Foley says she was constructively dismissed. It was submitted that ADCL conducted itself in a manner that was likely to destroy or seriously damage the relationship of trust and confidence in that it:

- (i) discriminated against Ms Foley on the basis that she had no children;
- (ii) on 10 December it ignored her concerns, treated her insensitively when she raised her miscarriage, and asked her to resign; and
- (iii) unilaterally varied the terms of her employment by changing her retainer and commission structure.

[37] I refer to the test for constructive dismissal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Offices IUOW*:¹

... we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer ... If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words whether a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breach.

[38] Regarding the allegation of discrimination, I was not addressed on whether any discrimination involved in determining attendance at a Christmas party with reference to family status² was unlawful. Although family status is a prohibited ground of discrimination, that is not the end of the matter. Both the Human Rights Act 1993 and the Employment Relations Act 2000 set out the kinds of conduct which are actionable if entered into by reason of one of the prohibited grounds of discrimination. They also set out a number of defences. I consider it debatable

¹ [1994] 2 NZLR 415, 419

² Namely, in Ms Foley's circumstances, having no responsibility for the care of children, s 21(1) Human Rights Act 1993

whether an invitation to a Christmas party falls within the list of conduct which is actionable, and even if it does then it is also arguable that one of the defences applies.

[39] I do not accept that Mr Freeman ignored Ms Foley's concerns on 10 December, responded to the advice of her miscarriage in an insensitive way, or that he asked her to resign.

[40] Otherwise if for present purposes I assume (without making a finding to this effect) that there was an act of unlawful discrimination, and there was a breach of duty to Ms Foley which caused her resignation, the next question concerns the foreseeability of resignation with reference to the seriousness of the breach.

[41] While not wishing to belittle the depth of feeling the matter evoked in Ms Foley, I do not accept that any breach was of sufficient seriousness to make it reasonably foreseeable that resignation would result. ADCL's conduct did not reach that threshold.

[42] I do not accept point (iii) of the grounds relied on above for the reasons discussed in the next section of this determination. In addition, there was no evidence of any causal link between that matter and the termination of Ms Foley's employment.

[43] In conclusion I find Ms Foley was not constructively dismissed.

Unpaid wages

[44] At the commencement of her employment Ms Foley's remuneration comprised a 'salary' or 'retainer' of \$750 per week, and a 'management fee' of 10% of the quantum of the ledger funds collected from debtors. ADCL calculated that, after a certain amount of funds were collected per week there was more benefit to an employee if the remuneration comprised a lower retainer and a higher management fee. In Ms Foley's case this led to the entry into a further written employment agreement dated August 2009 (the August 2009 agreement), in which the weekly remuneration dropped to \$400 per week while the management fee increased to 20%.

[45] Ms Foley's claim was for payment at the rate of \$750 per week. The immediate difficulty was that she had signed the August 2009 agreement and thereafter accepted remuneration based on that agreement. There was no suggestion of any error or omission in the calculations based on the August 2009 agreement. Accordingly there was no evidence of any breach of the agreement, or any associated failure to pay, and no legal basis for her claim.

[46] Ms Foley sought belatedly to assert she had signed the August 2009 agreement under duress. There was no legal or factual basis for that assertion.

[47] Another difficulty is that there was no evidence indicating, for example, that Ms Foley's total remuneration dropped after she signed the August 2009 agreement. On the contrary, the few payslips provided indicated she was better off. Her claim rested on nothing more than a drawing of attention to the drop in the retainer. It made no reference to the increased management fee or to an overall increase in weekly earnings.

[48] Counsel very properly conceded that the claim could not proceed. Had he not done so, I would dismiss it.

Sick pay

[49] Ms Foley sought sick pay in respect of her absence in the week ending 22 January 2010.

[50] The record showed that, by then, she had no outstanding entitlement to sick pay. Ms Foley said in evidence she was aware of this, and that at the time her outstanding annual leave entitlement was applied to the absence so that she continued to be paid for it. She did not wish to have her annual leave used in that way. However since her employment ended almost immediately afterwards, and without her having returned to work, there is nothing to be gained by pursuing that point.

[51] The claim was withdrawn at the investigation meeting, following discussion. Had the claim not been withdrawn, I would have found that no outstanding sick leave

is owed, and noted there was no suggestion that any entitlement to annual leave remains unpaid.

Costs

[52] Costs are reserved.

[53] The parties are invited to agree on the matter. If either party seeks an order from the Authority there shall be 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority