

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 207/09
5140404

BETWEEN JESSICA GRIFFIN
 Applicant

AND EASTZONE LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Gary Pollak for Applicant
 Paul Lever for Respondent

Investigation Meeting: 9 June 2009 at Auckland

Determination: 25 June 2009

DETERMINATION OF THE AUTHORITY

[1] Jessica Griffin says she was unjustifiably dismissed from her job as a design consultant for Eastzone Limited. She worked for Eastzone from November 2007 until May 2008. It trades as Tile New Zealand and sells tiles and other wall and floor surfacing products.

[2] In early 2008 Ms Griffin learned that she was pregnant. In April 2008 she raised with Eastzone director Paul Lever whether she could work reduced hours as she was feeling tired at work.

[3] Ms Griffin says she sent Mr Lever an application for parental leave by fax and email on 17 May 2008. Mr Lever says he has no record of that application and Ms Griffin says she does not have the original application or any copy.

[4] On 21 May 2008 Ms Griffin and Mr Level met to discuss work matters. Mr

Lever says the meeting was held because Ms Griffin had said she wanted to leave work. Ms Griffin says she thought the meeting was to discuss her request for reduced hours and her parental leave application.

[5] Following that meeting Mr Lever prepared a letter dated 22 May 2008 which stated it was “*to confirm termination of your contract with us as discussed*”. He says that he arranged for that letter to be given to Ms Griffin on 22 May by Tina Lever. Ms Lever is Mr Lever’s daughter. She worked at Eastzone’s Mt Wellington shop with Ms Griffin.

[6] Ms Griffin says she knew nothing of the termination of her employment until she spoke by telephone with Ms Lever on 28 May. At the time Ms Griffin was away from work on sick leave on the recommendation of her midwife.

[7] Ms Griffin says Ms Lever told her during that telephone call that her employment was terminated and later sent her text messages about returning shop keys. Ms Griffin says Ms Lever did not give her the 22 May letter until she went to the Mt Wellington premises on 31 May to return the keys.

[8] Ms Griffin says she did not agree to end her employment with Eastzone and seeks remedies for what she says amounts to an unjustified dismissal.

Issues

[9] The decisive issue for resolution in this case is factual – did Ms Griffin initiate the end of her employment with Eastzone or was she summarily dismissed because, as submitted by her representative, she would not agree to work reduced hours under a casual rather than permanent employment agreement and so that Eastzone could avoid responsibilities to her under maternity and parental leave requirements?

Assessing the evidence

[10] There is a stark conflict between the sworn or affirmed evidence, on one hand, of Ms Griffin, and on the other, of Mr and Ms Lever.

[11] In this situation the Authority must resolve the matter on the balance of probabilities, that is what is more likely than not to have happened. This requires some assessment of the relative credibility of each witness. In this case that assessment has been made on the basis of records of communication between the witnesses that were generated at the time rather than their subsequent recollections.

[12] While Eastzone provided copies of company memos or file notes that Mr Level and Ms Lever said were made at the time, I have not relied on those in making this determination. Rather I have relied on two records of communication between the parties which were made at the time:

- (i) Emails between Mr Lever and Ms Griffin on 20 May; and
- (ii) Text messages between Ms Griffin and Ms Lever and between Ms Griffin and Mr Lever between the dates of 26 May and 1 July 2008.

[13] Ms Griffin produced a transcript of these text messages at the investigation meeting. Mr Lever and Ms Lever, while not able to check them against their own mobile phone records or to recall the specific messages, accepted the transcript was likely to be correct. My own check of a sample of messages saved on Ms Griffin's mobile phone (which she also produced at the meeting) showed her transcript was accurate.

The 20 May email

[14] Eastzone has provided a copy of an email from Mr Lever to Ms Griffin dated 20 May 2008 with the subject line saying "Catch up". Its text reads:

*hello Jessica,
how are you doing?
Tina has just told me about you leaving,
can we catch up tomorrow?
kind regards
paul*

[15] Ms Griffin replied:

*Morning Paul :o)
I'm well thank you, how are you?
Sounds good, see you then :o)
Regards,
Jessica Griffin*

[16] This email expressly refers to Ms Griffin “*leaving*”. It supports Ms Lever’s evidence that Ms Griffin had spoken to her on 20 May about wanting to leave work and that Ms Lever had passed this information on to Mr Lever.

[17] If Ms Griffin was not intending “*leaving*” work, it is unlikely that her reply to Mr Lever’s request for a meeting would have only been “*sounds good*”.

[18] For that reason I prefer Mr Lever’s evidence that when he and Ms Griffin met on 21 May, Ms Griffin said she felt unable to keep working even on reduced hours. She felt too tired to keep working, had some health concerns about her pregnancy and had some personal relationship difficulties which also troubled her. None of those problems were the responsibility of her employer. Eastzone had already indicated it was prepared to reduce her hours or days of work, if it would assist her, and she had no problem getting time off and sick leave when required during her pregnancy. She was not told that she had to leave if she would not accept reduced hours on a casual contract.

Subsequent text messages

[19] This conclusion is supported by the tone of the subsequent text messages, particularly those after 28 May when Ms Griffin says she received unexpected news from Ms Lever that her employment was terminated.

[20] There is nothing to indicate surprise. For example, in response to a text from Mr Lever on 30 May, asking her to return the shop key, Ms Griffin replied: “*That’s no problem: I just need 2 talk 2 you first. Thank you*”.

[21] Ms Griffin’s explanation is that she wanted to talk to Mr Lever directly about why her employment ended rather than say anything about it in a text message. However I consider that her request to talk to Mr Lever was more likely to be about arrangement for her final pay and holiday pay. There is nothing in the tone of subsequent text messages which indicate her employment was ending without her agreement, as seen in this example on 4 June from Ms Griffin to Ms Lever:

Hey Tina how are you going? Could you please give me a txt whenever its cool 2 come pick up that pay slip? Thank you

[22] There was subsequently a mistake in the payment of final holiday pay due to Ms Griffin. Eastzone advised WINZ that it had paid Ms Griffin a certain amount. However, by an error not discovered for some weeks, Eastzone credited the money due to another account rather than Ms Griffin's account. She, understandably, became very annoyed about not getting money due to her. The money due has since been paid.

Determination

[23] For the reasons given, I find, on the balance of probabilities that Ms Griffin's employment with Eastzone ended at her own initiative and for personal reasons rather than by unjustified dismissal by her employer. Accordingly Ms Griffin's personal grievance application is dismissed.

Costs

[24] At the request of Ms Griffin's representative cost issues were also addressed at the investigation meeting.

[25] Ms Griffin is awaiting a decision on an application for legal aid. She is presently on a domestic purposes benefit.

[26] Eastzone has incurred no legal costs in defending her claim. Its expenses have been the time involved in preparing witness statements from Mr Lever, Ms Lever and another employee, each of whom attended the investigation meeting.

[27] In these circumstances no order for costs is required.