

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 23
3015071

BETWEEN TRACY JOHNSON
Applicant
AND EUROVET LIMITED T/A
MOUNT VET
Respondent

Member of Authority: Robin Arthur
Representatives: Applicant in person
Joerg Thamm, director of the Respondent
Investigation Meeting: 19 December 2017 in Tauranga
Determination: 24 January 2018

DETERMINATION OF THE AUTHORITY

A. Tracy Johnson’s employment by Eurovet Limited did not end as a result of unjustified dismissal or unjustified disadvantage.

B. No award of costs was required.

Employment Relationship Problem

[1] Tracy Johnson said she was unjustifiably dismissed on 20 November 2015, barely two weeks into a new job at the Mount Vet Hospital in Mount Maunganui. She started work there on 9 November 2015 in a position her employment agreement described as a “veterinary nurse/administrative assistant”. The job offer she had accepted said she would also be asked to take up some management tasks and “work towards” the role of practice manager.

[2] Eurovet Limited operated the hospital. Joerg Thamm, the hospital’s principal veterinary surgeon and a director of Eurovet, denied Ms Johnson was dismissed. Rather, he said she became upset and “stormed out” when he spoke to her over some concerns with her work performance during those first two weeks in the job.

[3] The statement of problem Ms Johnson lodged in the Authority said Dr Thamm told her he “was terminating her contract” during an unexpected meeting with him on 20 November. Ms Johnson said she asked if he was “firing” her and Dr Thamm had replied: “We are not like that”. Ms Johnson said she had offered Dr Thamm her office key, which he took from her, and she left “with the understanding she had been fired”.

[4] Eurovet’s statement in reply agreed Dr Thamm had told Ms Johnson he was disappointed in her nursing skills. It said Dr Thamm could see Ms Johnson was “infuriated” by his comments and she had asked if he was “firing” her. However he said he replied: “This is not how we work”. He asked Ms Johnson how she felt about focusing on administration work but she had replied in a loud, angry voice: “Well, I don’t want to work for you”.” She had stood, taken her work key off her key ring, thrown it on the table and left the premises.

[5] The following day Ms Johnson sent an email asking Dr Thamm to confirm her employment was terminated. Dr Thamm’s reply said she had not given him a chance to discuss the matter on 20 November. He asked whether it was correct she did not want to give any notice and “don’t want to come back to work”. In a further email on 25 November Dr Thamm also offered to meet and talk with Ms Johnson about any grievances she might have.

[6] Ms Johnson did not send any reply indicating she wanted to come back to work or have a meeting with Dr Thamm. Instead, by email on 24 November, she asked for her final pay to be lodged into her bank account by 25 November. On 14 December 2015 a lawyer acting on her behalf raised a personal grievance on the grounds of unjustified dismissal. Ms Johnson’s application for an Authority investigation of that grievance was not lodged until 12 July 2017. The parties attended mediation on 13 September 2017 without resolving the matter.

The Authority’s investigation

[7] The issues for determination were:

- (i) Did Ms Johnson’s employment end by dismissal or by abandonment?

- (ii) Had Eurovet, through what Dr Thamm said and did, acted unjustifiably toward Ms Johnson on 20 November 2015, either by dismissing her or otherwise to her disadvantage?
- (iii) If Ms Johnson was unjustifiably dismissed or disadvantaged, what remedies should be awarded, considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate her loss); and
 - (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (iv) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Ms Johnson that contributed to the situation giving rise to her grievance?
- (v) Was Ms Johnson owed any arrears of wages for notice?
- (vi) Should either party contribute to the costs of representation of the other party.

[8] The following witnesses gave evidence under oath or affirmation: Ms Johnson, Dr Thamm, Julia Stanton-Jones, Rachael Wood and Todd Halliday.

[9] Ms Stanton-Jones is the hospital office manager and, with her husband Dr Thamm, is an equal shareholder in Eurovet.

[10] Ms Wood worked for Eurovet from 23 November 2015 to around April 2017, first as a nurse and then as its practice manager. Ms Johnson alleged Ms Wood had been interviewed and employed as her replacement prior to 20 November 2015. Ms Wood gave evidence under a witness summons issued by the Authority.

[11] Todd Halliday is a friend of Ms Johnson. His evidence recounted what Ms Johnson had told him on the evening of 20 November about her meeting with Dr Thamm.

[12] Near the end of the investigation meeting I gave the parties some initial indications about likely findings and encouraged them to consider whether they might resolve the matter without a determination of the Authority. During a brief adjournment they were unable to do so. A written determination was required.

[13] As permitted by 174E of the Act this written determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[14] The Authority determines matters according to the civil standard of proof, that is on the balance of probabilities. This requires an assessment by the Member, from the available evidence, of what was more likely than not to have happened.

What happened on 20 November – was it a dismissal or an abandonment?

[15] Ms Johnson’s argument she was unjustifiably dismissed rather than walked out on the job rested on two allegations – firstly, that a replacement for her was already in place because Ms Wood was interviewed for a role at the hospital on 19 November and, secondly, that Dr Thamm had used the words that he was “terminating her contract” during their discussion on 20 November.

Had Eurovet arranged a replacement in advance?

[16] Ms Johnson’s allegation that Dr Thamm had referred on 20 November to “terminating her contract” was more likely to be correct if, before he met with her that day, he had already arranged to employ Ms Wood for some or all of the role Ms Johnson did.

[17] Ms Wood said she hand-delivered a letter and her resume to the hospital around 17 November. At that time she had recently returned to Tauranga from Australia. She was not responding to a job advertisement. She had applied for work at Mount Vet Hospital because, while at her hairdresser’s salon, she heard a client of the hospital say a nurse’s job might be open there. Soon after dropping off her resume Dr Thamm had telephoned her. He asked her to attend an interview on 20 November, which she did.

[18] Ms Woods recalled being offered a job at the end of the interview to start on the following Monday, 23 November. Dr Thamm’s recall was different. He said he asked Ms Woods in a text he sent her at 8.58pm on 20 November if she could start work on the Monday. Ms Wood did not recall the text. She did however recall that she was offered work as a nurse, without any administrative component. It was not until around April 2016, some four or so months later, that she was asked to take up

the role of practice manager. The manager role was one that Ms Johnson had been told she could 'work towards'.

[19] Ms Wood's employment in the first week, starting on 23 November, was on a casual basis. Dr Thamm's evidence confirmed that she was working at that stage in place of Ms Johnson, who did not come to work in that week, and as cover for another nurse who was away on bereavement leave.

[20] Accepting Dr Thamm's evidence about his text to Ms Wood on 20 November, it was more likely she was not offered employment prior to his meeting with Ms Johnson on 20 November. Rather, Dr Thamm contacted Ms Wood later that evening asking her to work, on a casual basis. This was after Ms Johnson had walked out and left her work keys and he needed to arrange cover for two nursing positions in the coming week.

[21] Ms Wood was later offered and accepted permanent employment. She signed an employment agreement on 29 November. This occurred after it was clear Ms Johnson neither wanted nor intended to return to work in any capacity for Eurovet.

Did the employer 'terminate' the employment?

[22] The evidence regarding Ms Johnson's other substantive allegation was effectively a 'she said, he said' contest between her and Dr Thamm. In determining which of their accounts was more accurate, the emails sent or received on 21, 24 and 25 November were the best indicator of what most likely happened.

[23] On 21 November Ms Johnson asked Dr Thamm for "written confirmation that you terminated my employment on 20 November". On 24 November she asked for her final pay to be deposited in her bank account the next day. Those emails indicated Ms Johnson's firm view that the employment relationship had been ended at the initiative of the employer on 20 November.

[24] However Dr Thamm's responses cast considerable doubt on that description of events. His response email of 24 November, in full, read:

The date of termination of your employment depends on the notice period. You didn't give me a chance on Friday [20 November] to discuss this, but just said "I don't want to work for you" and left abruptly. From that I take it

that you don't want to give any notice period and don't want to come back, am I correct?

[25] A further email he sent the following day, 25 November, appeared to accept Ms Johnson was leaving the job. Its text, in full, read:

I have spoken to Julia [Stanton-Jones], the next pay-round is next week. Julia is transferring the money Wednesday pm, so should be in your account on Thursday am. Could I ask you to return your uniform prior to that? I also would like to make you aware that we are entitled to deduct a weeks pay, since you have not given us any notice, as per your contract of employment.

We do not intend to make use of this clause, as we don't want to part on bad terms. However, I require the same from you and would like to ask you to sign the attached declaration and return the uniforms before next week's pay.

Should you have any grievances, then please make me aware, so that we can meet and discuss this. You can bring a support person as well if you wish. Please refer to your contract of employment.

[26] The 'attached declaration' Dr Thamm's email referred to asked Ms Johnson to sign the following statement: "I hereby declare that I will indemnify Eurovet Ltd against all losses occurred (sic) as a consequence of any legal action/employment dispute raised by me regarding my employment with Eurovet Ltd". Ms Johnson did not sign or return the requested declaration. While clumsily worded and of unclear intention, even if signed, such a declaration would have been of no effect if its purpose was an attempt to protect Eurovet from the consequences of a personal grievance.¹ In his oral evidence at the Authority investigation meeting Dr Thamm said he now saw that document was "ridiculous". He said it was something he wrote, as a lay person, without getting any legal advice.

[27] However Dr Thamm's emails of 24 and 25 November made clear that, even by that stage, he had not assumed Ms Johnson's employment was necessarily at an end. They also made it unlikely that he had, as Ms Johnson alleged, told her on 20 November that he was terminating her employment.

[28] In both emails he sought to establish Ms Johnson's intention and offered to meet with her to discuss the situation. It was consistent with Eurovet's good faith obligations, where there was some doubt as to whether the employment had ended, to

¹ Employment Relations Act 2000, s 238.

be active and communicative in attempting to maintain a productive employment relationship.

[29] In doing so, he also met the obligation of an employer to check a worker's real intention if there has been a possible 'heat of the moment' resignation. This should be done after some 'cooling off' period. In this case Ms Johnson had left the work premises on Friday, 20 November, leaving her work key behind. Dr Thamm's enquiries were made on the following Monday and Tuesday, some three and four days later.

[30] Ms Johnson's own evidence established that Dr Thamm could reasonably have taken her words on 20 November as indicating she considered the employment relationship was at an end. Her written witness statement for the Authority investigation meeting said she "gave him my key and walked out of the office saying I would not be doing any more work for him". She was angry and offended by Dr Thamm's questions about whether she was able to do some of the procedures used in the hospital and what she considered was his "negative view" of her experience in clinics she had worked previously.

[31] Ms Johnson said she was unlikely to have walked out on the job given she did not have another one to go to and needed the money. However her own evidence of her ill-ease with her new workplace strengthened the likelihood that she elected to leave the job rather than having been required to do so by Dr Thamm. Her evidence showed she had considerable doubts about her new job at the hospital, had found some other staff "hostile and sarcastic", and she did not like Dr Thamm's manner or how he interacted with her. If her financial concerns had overridden her feelings about whether she had made the right decision in taking up employment at the hospital, it was also more likely that she would have taken up the opportunity to talk further with Dr Thamm and Ms Stanton-Jones about doing more administrative work and less nursing work. This would have been consistent with the notion that she was to progress to the role of practice manager.

Finding: the employment ended by abandonment, not dismissal

[32] Against that background it was more likely than not that Ms Johnson's employment by Eurovet had ended as the result of her actions rather than at the

initiative of her employer. She had abandoned the employment, not taking up an opportunity to return to it, rather than being dismissed from it.

Had the employer acted unjustifiably?

[33] Even if Ms Johnson was not dismissed, there was the prospect that her decision to walk out of the job, abandoning the employment, was the result of some unjustified action of her employer to her disadvantage. Section 122 of the Act allows the Authority to find a personal grievance to be of a type other than alleged.

[34] Ms Johnson said she was disadvantaged by Dr Thamm raising performance concerns with her on the evening of 20 November 2015. She said she was not given notice of a disciplinary meeting or a chance to bring a support person or to get legal advice. However the discussion Dr Thamm began with Ms Johnson that evening was not a disciplinary meeting. Rather it was feedback from him about her work and his concerns about how things were going for her after two weeks on the job. While, ideally, he could have given her some notice he wanted to have that sort of discussion, there was no reason to expect the intended conversation would escalate or deteriorate in the way that it did. Neither could it reasonably be concluded that, having raised those concerns and possible alternative arrangements, further discussions could not have followed over coming days or weeks resulting in a mutually agreed outcome. Dr Thamm and Ms Stanton-Jones had talked with Ms Johnson before she started work at Eurovet about taking over Ms Stanton-Jones' role as practice manager. Having Ms Johnson attend to more administrative duties than nursing duties would have been consistent with that plan.

[35] Talking with her about those concerns and prospects was something that a fair and reasonable employer could have done in all the circumstances at the time. Having met that standard of justification, Dr Thamm's action in attempting to have that conversation with her was not an unjustified disadvantage. Ms Johnson's reaction and her failure to engage any further, when Dr Thamm offered the opportunity to talk more, led to the end of her employment, not unfair actions by Eurovet.

[36] In light of that conclusion, no determination was required of the issues of remedies or their reduction for contributory conduct.

Wage arrears

[37] Ms Johnson's application included a claim that she was entitled to be paid for a notice period. Given the conclusions reached about how the employment came to end, Eurovet was not liable to pay Ms Johnson for a notice period.

Costs

[38] In light of this outcome reached in this determination Eurovet would be entitled to a contribution to any costs incurred for legal advice and representation. Answering a question at the investigation meeting Dr Thamm said Eurovet had not incurred any such legal costs. Accordingly no award of costs was necessary.

Robin Arthur
Member of the Employment Relations Authority