

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 69
5341207

BETWEEN KULDEEP KUMAR
Applicant

AND FLIWAY LOGISTICS
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
Stewart Lorimer, advocate for Respondent

Investigation Meeting: 29 March 2012

Determination: 17 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated and now determines a claim by the applicant, Mr Kuldeep Kumar, to recover arrears of wages due upon the ending of his employment relationship with the respondent, Fliway Logistics Ltd.

[2] When Mr Kumar resigned from his position in Christchurch with Fliway he was owed wages and holiday pay. The amount calculated by the company to be paid to him showed a sum forfeited "in lieu of notice". Mr Kumar was paid half of the total he claims was owed at termination and seeks to recover from Fliway the balance of \$3,219.55.

[3] There is no dispute that under the terms of the written individual employment agreement entered into by Mr Kumar and Fliway the following notice of termination provisions applied:

22.1 The Employment Agreement may be terminated by one month's notice by either party. The Employer may elect to

pay 1 month's salary in lieu of notice. This, however, shall not prevent the summary dismissal of an Employee for serious misconduct.

22.2 *Where the employment is terminated by the Employee without the requisite notice, wages equivalent to the unworked notice shall be forfeited.*

22.3 *The Employer shall be entitled to deduct from wages payable on termination all moneys owed by the Employee to the Employer.*

[4] Immediately after the first Christchurch earthquake struck on 4 September 2010, Mr Kumar with his wife and young child fled for safety to Auckland. His mental and physical well being was considerably affected by what he and his family had experienced.

[5] Mr Kumar saw a doctor in Auckland about three days after the earthquake and was certified as "unwell and understandably stressed with the current scenario in Christchurch." He was certified as unfit to work for at least three to four weeks.

[6] Mr Kumar sent the medical certificate to Mr Stuart Lorimer, the HR Manager of the Fliway group of companies which includes the respondent. At the same time in the email message of 7 September to which the certificate was attached, Mr Kumar stated:

Given the current circumstance I wish to resign from this position with immediate effect.

[7] He said that he was not well enough to return to Christchurch, thanked Mr Lorimer for the Christchurch position he had been given and expressed regret at the way things had turned out.

[8] There is no dispute that Mr Kumar did not give one month's notice of termination as required of him under the written Employment Agreement at clause 22.

[9] Following receipt of the 7 September email and Mr Kumar's resignation, Mr Lorimer replied next day asking Mr Kumar to call him as soon as possible "so we can discuss your decision and the implication for your employment with Fliway." Mr Lorimer who is based in Auckland said in his email:

I appreciate this is a very difficult time for you and your family, but I would like the opportunity to discuss with you particularly now you're back in Auckland.

[10] Later that day Mr Lorimer and Mr Kumar had a telephone conversation which Mr Lorimer made reference to in another email, as follows:

It was good to catch up by phone this afternoon and have an opportunity to discuss in more detail the decision you have made to leave Christchurch and return to Auckland. Obviously your health along with that of your family is most important and I'm pleased you have been to the Dr and are taking [medicine] to assist you through this difficult period. In regards your ongoing employment with Fliway Logistics we have agreed to discuss this further on Friday which gives you a couple of days to get some sleep and get your health on a more "level keel" this week will be paid as Sick Leave.

[11] Contact broke down at this point and Mr Lorimer was unable to have the face-to-face discussion he wanted with Mr Kumar about the situation.

[12] In the circumstances, Mr Kumar's application cannot succeed. He had agreed to give notice of one month but failed to. He had agreed in that event to forfeit one month's pay in lieu of notice to Fliway.

[13] While extraordinary circumstances surrounded the termination of Mr Kumar's employment, the Authority cannot find that they amounted to grounds for excusing him from giving notice as required by the employment agreement. The operation of the employment agreement had not been suspended by the earthquake. Fliway still had work for Mr Kumar to do under it and premises in which it could be done. Fliway had not sought his resignation but, I am satisfied, had very much wished to retain his service. The company could not however compel him to retract his resignation once he had decided to leave his employment. Considerable cost was incurred by Fliway when it had to engage a contractor to perform Mr Kumar's work

[14] He had not needed to resign in order to make reasonable arrangements to protect his health and safety and that of his family. Fliway had understood why he felt compelled to leave Christchurch and had not been critical of him for doing that. What the company had sought reasonably to do was to speak to Mr Kumar about the future and how the employment might be carried on, particularly with the use of sick leave while Mr Kumar considered the situation. Attempts to have a face-to-face discussion were not successful and the company had no alternative but to recognise that Mr Kumar simply did not want to return to Christchurch where his job was. There was in the circumstances no discussion about the possibility of Mr Kumar being able to work out the notice period, if he was intent on resigning, in Fliway's

operations at Auckland where he had originally worked until transferring to Christchurch on promotion.

[15] If Mr Kumar was, at least temporarily, incapacitated from performing his employment, he was still obliged to give notice to the employer who could then consider whether Mr Kumar could reasonably be required to work out the period or whether Fliway would discharge him from his obligation. That should have been a choice available to Fliway but the company was not allowed to exercise its option in that regard.

[16] Mr Lorimer had offered Mr Kumar at least one week's paid sick leave and, as a measure of its sympathy for Mr Kumar's plight, Fliway withheld only half of the month's wages in lieu of notice. Further, in a spirit of conciliation and compromise Mr Lorimer had offered to settle differences over the termination and its legal consequences, but this was rejected by Mr Kumar.

Determination

[17] For the above reasons, I find that Mr Kumar's claim to recover the wages in lieu of notice deducted from his final pay cannot succeed and no orders justly are to be made against the employer company.

A Dumbleton

Member of the Employment Relations Authority