

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 36  
5436153

BETWEEN MICA DEVELOPMENTS LIMITED  
Applicant

AND CHARLES WANG, LABOUR  
INSPECTOR  
Respondent

Member of Authority: David Appleton

Representatives: Mike and Carma Beer, Advocates for Applicant  
Greg La Hood, Counsel for Respondent

Investigation Meeting: 25 February 2014 at Christchurch

Submissions received: 25 February 2014 from Applicant  
25 February 2014 from Respondent

Determination: 26 February 2014

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**DETERMINATION OF THE AUTHORITY**

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**The Applicant's objection to the Labour Inspector's Improvement**

**Notice dated 12 November 2013 is declined.**

**Employment relationship problem**

[1] Mica Developments Limited (the company) lodged an objection to an Improvement Notice issued to it on 12 November 2013 under Section 223D of the Employment Relations Act 2000 (the Act) by Mr Wang, a Labour Inspector.

**Preliminary point**

[2] Pursuant to s.223E of the Act, an employer may, within 28 days after an Improvement Notice is issued to it, lodge with the Authority an objection to the Notice. In this particular case the company lodged its objection outside of the 28 day period but Mr Wang waives any objection to the late lodging of the objection on the basis that the company was initially not given accurate guidance on how to object.

[3] Accordingly, with the consent of the parties, the Authority extended time for the opposition application to be lodged and investigated, pursuant to s.221(c) of the Act.

**Background**

[4] The Improvement Notice required the company to pay to a former employee, Mr Kieran Stewart, a payment in respect of six days' sick leave, for the period from 3 to 10 September 2013, pursuant to sections 71 and 72 of the Holidays Act 2003. The company was given until 29 November 2013 to make the payment but has failed to do so.

[5] The company objects to the Improvement Notice on the basis that the directors believe that Mr Stewart's sickness was not genuine and that, after he failed to return to work on Tuesday 3 September 2013, he never had the intention to return, and wanted to use up sick leave he had accrued prior to leaving the company's employment by way of resignation on 10 September.

[6] The company's version of events is that Mr Stewart telephoned Mr Beer, a company director, on the evening of Monday 2 September 2013 and made statements to the effect that he was resigning because he was upset at having been reprimanded earlier that day (namely, *he had had enough, he was throwing in the towel and that he had had a guts full*). Mr Stewart's father, Neil Stewart, then came on the phone and said that his son was not resigning. The company says that, the following day, Mr Kieran Stewart advised Mrs Beer, the other director of the company, that he had reconsidered his position and had decided that he was not resigning but was instead sick due to stress, and that the company would have to pay him sick leave, *and there was nothing [the company] could do about it*. On 10 September 2013, the last day for which he would be eligible to receive sick pay, Mr Stewart resigned, asking for his two weeks' notice to be waived.

[7] The company has doubts about the veracity of Mr Stewart's statement that he was sick, even after he had produced a medical certificate from his general practitioner on 4 September 2013 which signed him off work as unfit for work for seven days from that date. This is because of what Mr Stewart had said to Mr and Mrs Beer on 2 and 3 September and also because a later certificate, dated 16 September, covering the same period as the previous certificate, stated that Mr Stewart was suffering from gastritis, rather than stress.

[8] During the case management telephone conference with Mr Beer and Mr Wang on 24 January 2014, Mr Beer accepted that he could not refuse to pay sick pay to an employee who had produced a medical certificate from a medical practitioner, even if he doubted that the employee was actually ill.

[9] In light of this, it was agreed that the only way that the Authority could uphold the company's objection was to find that Mr Stewart had resigned with immediate effect on 2 September 2013, prior to obtaining the sickness certificate on 4 September, as he would no longer have been an employee at the point when the sick leave commenced. It was that issue that the investigation meeting was confined to.

### **Determination**

[10] The Authority heard evidence from Mr and Mrs Beer and from Mr Kieran Stewart as well as his father Mr Neil Stewart. Mr Kieran Stewart's evidence was that he had never said any words to the effect that he wished to resign during his telephone conversation with Mr Beer on 2 September but that he had merely said that he was sick.

[11] As Mr Beer had said that Mr Neil Stewart had come to the telephone the same evening, saying that his son was not resigning, Mr Neil Stewart was also questioned by the Authority. His evidence was that he had merely asked Mr Beer what the problem was, as the conversation between Kieran and Mr Beer was going on for a long time given that Kieran was simply telling Mr Beer that he was off sick. He said that their conversation and subsequent conversations were mainly about the obtaining of a doctor's certificate for Kieran.

[12] In respect of the conflict of evidence between Mr and Mrs Beer on the one hand and Neil and Kieran Stewart on the other, on balance I prefer the evidence of Mr and Mrs Beer. Therefore, I accept Mr Beer's evidence that Kieran Stewart said

that *he had had enough, he was throwing in the towel* and that *he had had a guts full*. I also accept Mr Beer's evidence that, at that point, from those words, Mr Beer understood that Mr Kieran Stewart no longer wished to work for the company.

[13] Mr La Hood made the submission that Mr Beer's evidence of what was said by Kieran Stewart could not reasonably be interpreted as words of resignation because they were ambiguous. Mr La Hood did not expand on the manner in which the words reportedly used by Mr Stewart were ambiguous but I accept that they could theoretically be unclear as to the time when Mr Stewart *throwing in the towel* would take effect. On balance, however, I believe that Mr Beer was reasonable in his understanding that Mr Stewart's words intended to convey that he was leaving at that point.

[14] However, Mr Beer's evidence, which was candid, was that Mr Neil Stewart came on the telephone shortly afterwards to say that Mr Kieran Stewart was not quitting and Mrs Beer confirmed that, in a conversation with Kieran Stewart the following day, he had said to her that he was not resigning after all. In other words, I must consider whether there was a withdrawal of the resignation, which was accepted by the company.

[15] It was the evidence of Mr Beer that the conversation on 2 September in which Mr Kieran Stewart made his statements was heated because Mr Stewart was upset at having being reprimanded earlier by Mrs Beer over his workmanship. There have been a number of Authority and Employment Court cases which have examined whether words uttered by an employee in the heat of the moment can reasonably be construed as words of resignation. The basic principles to be derived from this body of case law are as follows;

- a. An unequivocal resignation cannot be withdrawn without the consent of the employer;
- b. In circumstances where a resignation is given during a heated discussion, an employer should act with caution and allow a cooling off period before taking reasonable steps to ensure a resignation is genuine; and
- c. An employer cannot safely insist on its interpretation of words of resignation that are an emotional reaction or amount to an outburst of

frustration if it is obvious on sober inquiry that the words were not meant to be taken literally and that this would have been obvious if the employer had made enquiry after the heat of the moment had passed.

[16] These principles are underpinned by the Act which, at s.4(1A)(b), provides that the duty of good faith owed by both parties *requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*

[17] Therefore, when words are uttered in the heat of the moment, the duty of good faith requires an employer to inquire as to the true intention of the employee, once he or she has calmed down.

[18] To his credit, this is exactly what Mr Beer did. His evidence was that he made further contact with both Kieran and Neil Stewart to ascertain where the relationship was going next. Mr Beer said that he was concerned that Mr Kieran Stewart had stated that he was stressed and wished to understand more about this state of affairs. This was entirely the right thing for Mr Beer to have done.

[19] However, what this means is that Mr Beer's actions on behalf of the company, enquiring about Mr Stewart's health and asking for a doctor's certificate, demonstrate that the company as Mr Kieran Stewart's employer effectively accepted the withdrawal of the words of resignation, so as to preserve it during the following period when Mr Kieran Stewart was signed off as unfit for work by his GP.

[20] This conclusion is confirmed by the fact that, when Mr Stewart resigned formally on 10 September 2013, both over the telephone and in writing, instead of Mr Beer replying that Mr Stewart had already resigned and had not been an employee since 1 September, Mr Beer accepted that formal resignation given on 10 September and agreed to Mr Stewart waiving his obligation to give two weeks' notice. As Mr La Hood points out, this was done because the employer accepted that Mr Kieran Stewart remained an employee at the time when he submitted his letter of resignation, six days after the date when his sick leave commenced.

**Conclusion**

[21] In light of the unequivocal evidence given by Mr and Mrs Beer, there is no doubt that, even though Mr Kieran Stewart uttered words in the heat of the moment which amounted to a resignation on the evening of 2 September 2013, the withdrawal of that resignation communicated first by Mr Neil Stewart the same evening and by Mr Kieran Stewart the following day was accepted by the company so that Mr Stewart remained an employee throughout the period of his sick leave.

[22] It follows that there are no grounds upon which to uphold the company's objection to the Improvement Notice dated 12 November 2013.

[23] I would conclude by noting that I believe the company acted in good faith when dealing with Mr Stewart and do not wish Mr and Mrs Beer to reach the conclusion that they should not have done what they did in trying to ascertain the circumstances of Mr Stewart's reported sickness.

[24] Mr and Mrs Beer feel that they have not been treated fairly by Mr Stewart and that he has not acted in good faith by going off on sick leave with the intention of never returning. I have some sympathy with this position. However, s.71(1) of the Holidays Act 2003 sets out a clear requirement upon an employer to pay an employee an amount that is equivalent to the employee's relevant daily pay or average daily pay for each day of sick leave taken by the employee that would otherwise be a working day for the employee.

[25] The company had the right to require Mr Stewart to produce proof of sickness, given that it gave rise to leave for a period of three or more consecutive calendar days. The company exercised that right. However, once Mr Stewart had produced that proof of sickness in the form of a certificate from his medical practitioner that stated that Mr Stewart was not fit to attend work because of sickness (see s.68 of the Holidays Act 2003) the company was obliged to comply with its obligations under the Holidays Act to pay the sick pay owing to Mr Stewart.

**Costs**

[26] Costs are reserved. The parties are directed to seek to agree how the respondent's costs are to be dealt with but, in the absence of an agreement between the parties, the respondent may lodge and serve a memorandum of counsel seeking a

contribution towards its legal costs within 28 days of the date of this determination. The company will then have a further 14 days within which to serve and lodge any reply.

David Appleton

Member of the Employment Relations Authority