

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Marion Jean Milburn (Applicant)  
**AND** Waikato District Health Board (Respondent)  
**REPRESENTATIVES** Mark Hammond for Applicant  
Emma Huston for Respondent  
**MEMBER OF AUTHORITY** Alastair Dumbleton  
**INVESTIGATION MEETING** 3 February 2004  
**DATE OF DETERMINATION** 11 February 2004

**DETERMINATION OF THE AUTHORITY**

[1] At the request of Dr Marion Milburn, the Authority has been asked to resolve an employment relationship problem which has arisen in her job with the Waikato District Health Board (the "WDHB").

[2] Her problem is that while the WDHB insists she clearly and unequivocally, both orally and in writing, gave notice of resignation from her job, Dr Milburn maintains that although indeed she did give such notice, in the particular circumstances it was not a resignation that the employer should be permitted to hold her to. She asks in effect for the resignation to be quashed and for her to be allowed to continue in her job with the WDHB until such time in the future as either party may terminate their relationship lawfully.

[3] It seems to me unnecessary for this problem to have been allowed to escalate to such a degree that the Authority must now resolve it. The problem should have been taken firmly in hand by WDHB on 27 November 2003 and fixed then as soon as Dr Milburn made it clear that despite the intention she had announced the day before, she wanted to retract her notice. WDHB had not yet had enough time to have relied on the resignation and changed its position in any substantial way to its detriment. However I do acknowledge and respect the fact that the parties have since 27 November discharged their duty to try and resolve the matter between themselves and, when that proved not to be possible, have tried in good faith to resolve the problem with the aid of a mediator.

[4] The factual circumstances of this case are more unusual than they are complicated. In considering them, the parties need to keep clearly in mind that the governing law is now the Employment Relations Act 2000 and not earlier legislation such as the Employment Contracts Act 1991 which took a narrower and more commercial view of the rights and obligations of parties in an employment relationship.



[5] There is no dispute that deliberately and without any coercion from the WDHB, on 26 November 2003 Dr Milburn suddenly conveyed to her employer her intention to resign from 26 February 2004. She clearly stated her intention orally and almost immediately after, when questioned about it, confirmed it in writing. Within 24 hours however Dr Milburn stated equally clearly that she wished not to proceed with her resignation. The WDHB has not allowed her to withdraw the resignation and believes it is not required to as a matter of law. Its stance was made plain on 4 December 2003 in a letter sent to Dr Milburn by her manager, Ms Kitty Flannery, who wrote:

*As per our recent discussions on 26 November 2003 I am writing to confirm my verbal acceptance of your resignation from your position of Medical Officer Special Scale effective from the 25 February 2004 as given in writing on 26 November 2003.*

.....

*With regards to our subsequent discussion on the 27 November 2003, where you advised me that you wished to withdraw your resignation which you confirmed by email, I am writing to advise that we do not accept this withdrawal.*

[6] Subsequently Dr Milburn and the WDHB instructed solicitors and they corresponded, but when the matter remained unresolved a statement of problem was lodged in the Authority on 12 December 2003. Arrangements were made with counsel Mr Hammond and Ms Huston for the case to go to mediation and then, if still necessary, to the Authority as a matter of urgency. Arrangements made for the Authority meeting in January 2004 were undone by my unplanned hospitalization but it was later agreed that the matter could proceed most efficiently on 3 February 2004 with a full investigation meeting by the Authority and the delivery of a final determination.

[7] Dr Milburn is qualified in medicine and has worked for WDHB and its predecessors for all of her professional working life, a period of 28 years. For the last 12 years she has worked in the Sexual Health Service of the WDHB, which has about 8 staff. The manager of that Service, Ms Flannery, has held her position for 13 years. Consequently Dr Milburn and Ms Flannery have worked closely together in their respective roles for some 12 years.

[8] Dr Milburn resigned in the following circumstances. On Wednesday 26 November 2003 she attended a regular staff meeting with her colleagues. In the course of it she found herself in disagreement with Ms Flannery over a matter of the medical practice or procedure appropriate for future work of the Service then under consideration. While voices became raised there is no suggestion that the disagreement was carried on at a personal level or that offensive remarks were made by anyone. Dr Milburn's behaviour is now categorised by her as "juvenile". She told the Authority, and I accept, that she lost her temper to the point where she said she was resigning. At about same time she wrote and signed a resignation letter. I find that her letter contains a clear expression of resignation, even going to the extent of advising the date of resignation, 25 February 2004, which coincided with a three month notice period under the employment agreement between Dr Milburn and the WDHB.

[9] At that point arguably the resignation became effective according to its terms, with the employer not required to do anything more than acknowledge the communication to it of the resignation. However in this case Ms Flannery, commendably and quite understandably in my view, did not merely receive passively the advice of resignation but immediately upon hearing it and reading it tried to get Dr Milburn to reconsider whether, because of her anger, she meant what she had said. Ms Flannery urged Dr Milburn to "sleep on it", or allow herself time overnight to think about whether she really wanted to resign. Ms Flannery, I find, offered Dr Milburn the

opportunity to reflect on what she had done and then to discuss it further the following morning, presumably with a view to seeing then whether Dr Milburn was still intent on resigning. It seems likely that if Dr Milburn in response to this opportunity had immediately said she had not meant to resign, that would have been an end to the matter and a problem would not have arisen.

[10] Dr Milburn remained insistent that she wished to resign, but the discussion about this with Ms Flannery ceased when Ms Flannery handed back to Dr Milburn her letter of resignation. The letter remained in front of Dr Milburn on top of her desk or table while Ms Flannery went away to attend to other work for a while. There is no dispute that later in the afternoon Ms Flannery walked past Dr Milburn's desk, at which the latter was then sitting, and uplifted the letter saying, "I will take this", or, "I'm taking that". This was potentially ambiguous as to whether "this", or, "that", was a reference to the piece of paper itself or to the notice of resignation given via the document. I find that there was no other discussion between Dr Milburn and Ms Flannery at the time the resignation letter was removed by the latter from the formers desk. It is reasonable to expect that Dr Milburn would have said something if she thought Ms Flannery was acknowledging the resignation by taking the letter. This action, Ms Flannery confirmed to Dr Milburn the following day, had demonstrated her acceptance of the resignation. Previously however the employer had at least introduced an element of extension into the resignation transaction, by holding out to Dr Milburn that she should or could take time until the following morning to reconsider her decision.

[11] An employee is of course usually able to unilaterally terminate an employment contract by resigning and that is not a situation where the employer may choose to accept or reject the resignation. The important element in this case however is that the employer through Ms Flannery, offered a period in which Dr Milburn could reconsider her decision, to last until the morning of 27 November. Having done that in my view it was not reasonable for Ms Flannery to then withdraw that opportunity or curtail the period of reconsideration, without making it quite clear to Dr Milburn that that was what she proposed to do on the basis that Dr Milburn had seemed adamant that her mind was made up. The employer had allowed an opportunity for the employee to back out of her resignation, but having done so it could not reasonably take that opportunity away from her before Dr Milburn had had a chance to make use of it. Saying to her that the letter was being uplifted was not a sufficiently clear way of withdrawing the offered opportunity.

[12] In view of the particular circumstances that surround this case the employer should be prevented from enforcing Dr Milburn's resignation, or from insisting that it can be validly retained.

[13] It seems to me that since Dr Milburn has remained employed and will do so until 26 February 2004 under the terms of the notice she gave, this is not a situation where an order for reinstatement is an available remedy. As I discussed with the parties, a binding declaration of their rights and obligations under the employment agreement seems more appropriate. That remedy is available where there is a dispute within the meaning of the Employment Relations Act 2004, about the operation or application of the agreement.

[14] The Authority was referred to a number of cases about the legal effect of a freely given resignation, but many of these such as *Boobyer v Good Health Wanganui*, unreported, 24 February 1994, WEC 3/94, were decided under the Employment Contracts Act 1991 and earlier legislation. Under that Act there was greater encouragement for courts up to the Court of Appeal, to regard employer and employee as commercial people dealing at arms length. Under the Employment Contracts Act it might well have been arguable that Dr Milburn had resigned in the narrow legal sense, in that she had purported to comply with terms and conditions of an employment contract. However under present law and within the wider context of the over-riding "relationship" between parties to an employment agreement, in my view it would be unfair and unreasonable for the employer to insist that the Dr Milburn had resigned. I am required to look at the question of

resignation under the Employment Relations Act 2001. As stated by the Government when that law was introduced in Bill form:

..... *employment is a human relationship involving issues of mutual trust, confidence and fair dealing, and is not simply a contractual, economic exchange.*

[15] The precedent value of earlier cases may therefore have been lessened by a significant change in the legislation and a shift of emphasis to the "relationship" aspect of employment. The Authority is expressly required in carrying out its role to support successful employment relationships. That is apparently what Dr Milburn and the WDHB had enjoyed over a very long period. Even if Ms Flannery had merely acquiesced in the resignation and had not offered Dr Milburn a chance to change her mind, I do not think it would be consistent with the notion of a successful employment relationship to allow the employer to insist upon the resignation being implemented. This is especially so where the employee clearly advises within a very short space of time that he or she has had a change of mind. The law regarding the withdrawal of the resignation once tendered, may not therefore be quite the same under the Employment Relations Act 2000 as it was under earlier legislation. The Authority also notes an express object of the Act which is to acknowledge and address the inherent inequality of bargaining power in employment relationship. It seems to me that a fair employer may well be required to allow an employee to change his or her mind after they have given notice of resignation. As already mentioned however, that is not exactly the situation that occurred here as the employer encouraged or allowed for a possibility that the employee would change her mind, but then it foreclosed on that arrangement.

[16] Therefore as the resolution of an employment relationship problem in the nature of the dispute, I determine that the WDHB may not regard or treat Dr Milburn as having resigned from her employment as Medical Officer. Dr Milburn will remain employed after 26 February 2004. This was the determination I gave orally to the parties at the end of the investigation meeting held with them on 3 February 2004. I said I would record the decision in writing, which I have done above, together with my reasons. Upon the Authority announcing its determination, Mr Hammond advised that the claim for compensation on behalf of Dr Milburn was withdrawn and that no other remedies were being sought. As to the question of costs, I expressed my view that Dr Milburn must take some responsibility for creating the situation in the first place that lead eventually to this Authority investigation. I therefore consider that it is appropriate for costs to lie where they fall.

[17] Finally, it should be clearly stated by the Authority that Ms Flannery deserves no criticism for what happened in this case. She acted from the best possible motives and good intentions to try and prevent her acquaintance and colleague Dr Milburn from doing something in haste she might later regret. Ms Flannery and Dr Milburn have worked together for some 12 years and there is no suggestion that their relationship was at any time a bad one or that Ms Flannery simply took an opportunity that arose unexpectedly to secure the departure of Dr Milburn for some underlying reason. I note that Ms Flannery is a clinician manager rather than a specialist HR manager. I do not know what support she was given by any professional HR officer of the WDHB but it may be timely for the employer to provide managers such as Ms Flannery with some updating on the law and matters of good practice under the Employment Relations Act 2000.



A Dumbleton  
Member of Employment Relations Authority

