



[2] Neither Ms Mills nor anyone else on her behalf communicated with the respondent on 30<sup>th</sup> and 31<sup>st</sup> August or 1<sup>st</sup> September. On the evening of Friday 1<sup>st</sup> September a letter from Ms Benning was delivered to Ms Mills's home. It advised that she was deemed to have abandoned her employment and asked her to return all company property by the following Monday.

[3] Ms Mills did attend the respondent's offices that Monday as instructed. She took with her a copy of the medical certificate she had been given on 28 August and presented it to Ms Benning. Ms Benning remained firm in her stance that Ms Mills had abandoned her employment and refused to re-employ her.

[4] There appear to have been two principal reasons for this. The first was that Ms Mills became distressed and Ms Benning found her difficult to deal with. The other related to the fact that Ms Mills's employment was for a fixed term which had a relatively short time to run. In December 2005 her employment had been formalised by execution of an employment agreement expressed to expire on 20 December 2006. There is no dispute about the validity of the reason given for the fixed term, which was:

*"1.4.1 Prior to this agreement the Employer engaged an independent cleaning contractor (who was not a member of the Employer's staff) to undertake the cleaning of Palm Beach Plaza, Papamoa (the Plaza);*

*1.4.2 the Employee has been engaged to enable the Employer to undertake an evaluation of whether the Employer's cleaning requirements for the Plaza can be better met by the Employer employing its own cleaning staff or whether such cleaning requirements are best met by the Employer engaging an independent cleaning contractor."*

[5] The medical certificate Ms Mills received on 28 August stated that she would be unfit for work until early December, which would have left only two weeks of her fixed term employment to go. Ms Benning concluded that there was no point re-employing Ms Mills when she was going to be incapacitated for most of the remainder of her fixed term of employment.

[6] The respondent now continues to say that it did not dismiss Ms Mills and also to say that in the circumstances it could not be expected to re-employ her after she abandoned her employment. Ms Mills says that she did not abandon her employment and that this should have been clear from the messages left on 28<sup>th</sup> and 29<sup>th</sup> August. She says she was unjustifiably dismissed from her employment. She says this caused her great distress and deprived her of the opportunity for permanent work when the respondent reviewed the provision of cleaning services at the conclusion of her fixed term.

[7] In relation to the alleged personal grievance Ms Mills claims the following remedies:

- compensation for the distress arising out of the alleged dismissal. This included hurt and humiliation at the way it occurred as well as compensation for the loss of opportunity for further work at the conclusion of the fixed term, and
- earnings lost as a result of the dismissal. In her witness statement she told me that contrary to the original indications from her doctor she was cleared to return to work on 14 October 2006 but was unable to find permanent work after that. She seeks lost earnings for the period 14 October 2006 until 20 December 2006.

[8] Ms Mills also made a separate claim for 40 hours wages for unpaid outcall work (\$680.00 plus 6% holiday pay.) During my investigation meeting she conceded that she had been paid for this work at ordinary time rates, but told me that because it was overtime she felt that she should have received penal rates. She agreed that there had been very little discussion, let alone agreement, between her and the respondent about payment of a penal loading for overtime. There can be no suggestion therefore of any obligation on the employer to pay an extra loading for that work. That claim fails.

[9] The remaining issues for determination are therefore:

- whether Ms Mills abandoned her employment or was unjustifiably dismissed;
- whether she lost an opportunity for ongoing work, and
- what if any remedies are to be awarded.

### **Was there an unjustified dismissal?**

[10] Ms Mills told me that on 28 August she had difficulty getting through to the respondent's main office and did not have Ms Benning's mobile phone number. (Ms Benning had started with the respondent in July and several witnesses confirmed that she had not supplied contact details to staff prior to Ms Mills going on sick leave in mid August.) Ms Mills therefore set about leaving messages by the following means:

- On 28 August Ms Mills sent a text message to the maintenance supervisor. He was her equivalent, not her manager, but she trusted him to pass the message on to Ms Benning and he did;
- Ms Mills asked her daughter to telephone. She did so and told the receptionist that her mother was "*very ill.*" No timeframe was mentioned. The receptionist was unsure when she received the call but passed the message on to Ms Benning on 29 August, and
- Ms Potae, a staff member and friend of Ms Mills, called in to Ms Mills's home at her request and collected a copy of her medical certificate. Ms Potae was scheduled for annual leave on 28 August but went in to work to cover for Ms Mills. She told me she thought she handed the medical certificate to the receptionist then.

[11] The receptionist told me that she was not sure about whether she received a medical certificate or not. Ms Benning recalls that on 28 or 29 August she found on her desk a handwritten note telling her that Ms Mills was sick. She says she thought it was from Ms Potae but there was no medical certificate with it. Ms Potae cannot recall whether she wrote a note.

[12] Unfortunately Ms Benning did not keep the document she found on her desk. I was satisfied that both Ms Potae and Ms Benning were being as truthful and open about this matter as they could be but both were struggling to recall events that had taken place some time before. Given Ms Benning's failure to keep the document I have concluded that I must give the benefit of the doubt to Ms Potae on this issue. I accept that Ms Potae handed in what she understood to be a medical certificate.

[13] The abandonment clause in Ms Mills's employment agreement provided:

*“ABANDONMENT OF EMPLOYMENT*

*28.1 If the Employee is absent from work without notification to the employer for more than two (2) consecutive working days, the Employee will be deemed to have abandoned his/her employment and this agreement shall terminate accordingly on the expiry of the second working day or on the expiry of such further period of grace as the Employer in its discretion may allow.*

*This clause shall be read subject to the Employee's right to resort to the personal grievance procedure referred to in the agreement.”*

[14] In arguing that Ms Mills abandoned her employment the respondent relies on the Court of Appeal decision in *Pitolua v Auckland City Council Abattoir [1992] 1 ERNZ 693*, which concerned a provision very similar to this one (even to the reference to access to the personal grievance procedure.) Against a background of having been declined extended leave before he went away, Mr Pitolua had failed to return to work two days after the end of his annual leave. The employer sent him a telegram notifying him that his employment had terminated. The court held that the telegram was not notice of dismissal and the employment had come to an end in accordance with the abandonment clause.

[15] With reference to rights and obligations arising pursuant to the personal grievance procedure, the Court of Appeal had this to say at page 698:

*“Given that the termination of employment comes about by reason of the stated event, not by any act or decision of the employer, the obligation to inquire cannot arise until that event occurs and the employment has thereby come to an end. It is only then that the issue of fairness on the employer’s part arises: he must then, in accordance with the personal grievance procedure that is made available for the purpose, consider whether to reemploy.”*

[16] Mr Jacobson says that this is a case where the employment has come about by reason of the stated event, and so the issue of fairness arises only in relation to whether to employ. He says that the decision not to reemploy was not unfair given Ms Mills was to be on sick leave until the beginning of December.

[17] I do not accept Mr Jacobson’s submission. I have concluded that *Pitolua* is not on point with the present case. Upon the ending of his annual leave Mr Pitoula took no action to notify his employer of his absence or any reasons for it. Ms Mills, in direct contrast, took steps to contact her employer on 28 August as soon as the earlier medical certificate expired. Although she did not speak directly to Ms Benning, there was good reason for this: she was very ill in bed with pneumonia. In any event, Ms Benning does not dispute that she got the message. It is simply inaccurate to say that there was no notification to the employer in relation to the absence.

[18] Ms Benning told me that she expected either advice of the duration of the leave or daily updates if the absence continued. As I have found, Ms Potae did take steps, on Ms Mills’s behalf, to furnish a medical certificate which provided the relevant information. Even had this not been done, however, I am satisfied that the other messages to Ms Benning made it clear that the illness was ongoing. As of 28 August Ms Benning already knew Ms Mills had been unwell for some considerable time. Then on 29 August she was told that Ms Mills was “*very ill*” and could not yet return to work. It was not reasonable to construe that to mean that Ms Mills was taking an extra day or two of leave. In the circumstances Ms Benning’s contention that Ms Mills was “*absent from work without notification*” cannot be sustained.

[19] Since there was notification of the absence it follows that the employment did not end by operation of clause 28. There was a dismissal. In all the circumstances this dismissal was unjustified. Ms Mills is entitled to remedies for her personal grievance.

**Did Ms Mills lose an opportunity for further work?**

[20] Ms Mills argues that as a result of the dismissal she lost an opportunity for permanent employment. Had she remained with the respondent she expected to participate in the review of whether the cleaning services should remain in house and if they did she intended to seek appointment to any permanent supervisory role that was created.

[21] Ms Mills told me that she had seen the year as an opportunity to show that in-house cleaning services would work for the respondent and had put a great deal of personal effort into that project, employing all the cleaning staff herself and setting up the necessary systems and procedures. Up until her ill-health she felt that her work had been very well regarded. She had kept within budget and “held the fort” when there had been no Plaza manager. Since previous contract cleaners had not worked out, she felt optimistic both that the service would be kept in house, and that she would be continuing to run it.

[22] Ms Benning told me that, after Ms Mills left, a temporary replacement was found for her. Around October or November Ms Benning and the financial controller discussed the merits of keeping the cleaning work in-house. They did not do so sooner because Ms Benning was new to the organisation and wanted to give herself time to form a view on the matter. They decided to continue with the existing arrangements and offered the temporary supervisor a permanent contract soon after that. I am satisfied that as a result of the dismissal Ms Mills lost the chance to apply for permanent work.

**Remedies**

[23] During my investigation meeting I asked Ms Mills to tell me about her post dismissal earnings and job search efforts. All she could tell me was that she had approached several local employers and obtained some temporary work but this had not lasted long. She also said she had been unable to get an unemployment benefit. Her representative, Mr Bignell, then requested that I allow him an opportunity to

furnish further information relating to her job search efforts and post-dismissal earnings.

[24] I agreed. On 11 October 2007 Mr Bignell provided me with (amongst other things) a letter from Work and Income which stated that Ms Mills was in receipt of a sickness benefit from 5 September 2006 until 12 December 2006. The letter stated:

*“On the medical certificates completed, the Ministry were advised that she was not well enough to be contacted by Work and Income to discuss employment or training and would not undertake employment in the foreseeable future.”*

[25] Then letter stated that Ms Mills had gone into paid work when she came off the sickness benefit on 12 December 2006. Consistent with this Mr Bignell also provided me with a letter from Inland Revenue which contained a reference to her starting work on 6 December 2006.

[26] On 18 October 2007 Mr Jacobsen responded to the information Mr Bignell had given me. I convened a conference call on 8 November 2007 at which both representatives consented to my taking the letters into consideration without hearing evidence from their authors. It was also agreed that Mr Bignell would provide me with evidence of Ms Mills’s earnings for the period 6/12/06 to 20/12/06. On 15 November he provided me with the relevant wage and time records from her new employer. Those records showed that for the fortnight in question Ms Mills worked 76 hours and earned \$1,220.00 gross.

[27] Mr Jacobson provided further responses and submissions to me on 15 November and 4 December. He did not question the reliability of the wage and time records I was given and on that basis I have taken them into consideration along with the letter from Work and Income. Mr Bignell confirmed on 29 November that he had no further submissions to make.

[28] Work and Income have confirmed what Ms Mills’s doctor foresaw on 28 August 2006: ill health prevented her from working in the period from 5/9/06 to 6/12/06. That ill health started well before Ms Mills’s employment ended (even prior to 14 August 2006 she had already had very high levels of sick leave) and I heard

nothing to link her on-going health problems to her dismissal. I conclude that any loss of income Ms Mills sustained from 5 September 2006 to 6 December 2006 was the result of pre-existing health problems and not a result of the personal grievance. I also note that the earnings in the period 6/12/06 to 20/12/06 are very similar to what she would have earned with the respondent.

[29] **I therefore make no award of lost earnings.**

[30] I turn finally to the issue of compensation for hurt and humiliation. Ms Mills's partner told me that Ms Mills was stunned when she received the letter of 1 September. I heard that she found it particularly hard because she felt that she had done everything that was required of her. At the time of my meeting with her Ms Mills remained deeply upset about the way her employment ended.

[31] I am satisfied that Ms Mills was very distressed by the manner of her dismissal. She is entitled to compensation both for this and for the loss of the chance to apply for the permanent position of cleaning supervisor. I consider that in all the circumstances a total of \$7,000.00 pursuant to s.123 (i) is appropriate compensation for the associated hurt and humiliation. There can be no question of contributory conduct in such a case.

[32] **Catalyst Commercial Ltd is therefore ordered to pay to Ms Mills the sum of \$7,000.00 pursuant to s.123 (i).**

### **Costs**

[33] The issue of costs is reserved. If it is required that the Authority determine the matter submissions should be lodged within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority