

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 263  
3008395

BETWEEN            PHILIPPA SHAW  
                                 Applicant

A N D                    POINT PROPERTY AND  
                                 PORTFOLIO MANAGEMENT  
                                 LTD  
                                 Respondent

Member of Authority:      Rachel Larmer

Representatives:            Roland Samuels, Advocate for Applicant  
                                 Gary Pollak, Counsel for Respondent

Investigation Meeting:      11 August 2017 at Auckland

Date of Determination:      01 September 2017

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] Ms Philippa Shaw worked for Point Property and Portfolio Management Limited (Point Property) as a Portfolio Manager from 07 November 2016 until 16 May 2017.

[2] Ms Shaw handed Mr Alistair Bone, Chief Executive of Point Property, a written resignation letter on 16 May 2017. The resignation letter stated that Ms Shaw was tendering her resignation “*effective immediately*”. She also verbally advised Mr Bone that she had obtained a position with one of Point Property’s competitors based in Takapuna.

[3] Ms Shaw told the Authority she expected that after handing over her resignation letter to Mr Bone they would discuss when she would be leaving work.

Ms Shaw said that Point Property's usual practice was to require employees to leave work immediately in which case pay in lieu of the notice period was given.

[4] Ms Shaw had advised her new employer that she needed to give four weeks' notice to Point Property but that she expected that Point Property may elect to terminate her employment immediately once it knew she was going to work for a competitor, because that is what it had done previously for other employees in that situation.

[5] Ms Shaw says that she was told by Mr Bone that she had to leave work immediately and was subsequently escorted to the lift by him. Ms Shaw said that she had been ready, willing, and available to work out her notice period if required, but was not surprised when Mr Bone said she had to leave work immediately because that had been its usual practice.

[6] Mr Bone and one of Point Property's directors, Ms Lisa Phillips had immediately met with Ms Shaw to discuss her resignation after she had handed Mr Bone her resignation letter. Ms Shaw said that she felt intimidated by Mr Bone because of the adverse reaction he had to her resignation.

[7] Ms Shaw alleges that Mr Bone and Ms Phillips raised their voices to her and expressed their anger about the resignation. They both strongly deny that allegation. However, it is common ground that Mr Bone and Ms Phillips were both unhappy that Ms Shaw had resigned to work for a competitor because they considered they had put a lot of training into her.

[8] Ms Shaw says that she felt too intimidated to question Mr Bone about her pay in lieu of notice during that meeting, so she sent him an email as soon as she got home around 1.30pm on 16 March 2017. Ms Shaw's email asked for pay in lieu of notice on the basis she was available to work out her notice but Point Property had directed her to leave work immediately.

[9] However Ms Shaw did not receive any response to that request until Mr Bone emailed her six days later on 22 March 2017. Mr Bone's email said that Point Property had accepted her resignation as being immediate because she had failed to provide the contractual notice under the terms of her employment agreement so it would not be paying her past her final day of work which it said was 16 March 2017.

[10] Ms Shaw responded by email to Mr Bone saying she made it clear that she had been willing to work out the four weeks' notice so it was Point Property's decision that her employment be terminated immediately. Ms Shaw reiterated her belief that she should be paid her four weeks' pay in lieu of notice as per her employment agreement and advised that she intended to take legal action.

[11] Clause 29 of Ms Shaw's individual employment agreement deals with termination of employment. This required either party to give four weeks' notice of termination except in the case of serious misconduct, which enabled Point Property to dismiss without notice.

[12] Clause 29.3 of the employment agreement allowed Point Property at its sole discretion to elect to pay Ms Shaw in lieu of notice. Clause 29.4 provided that if either party did not provide the requisite notice "*an amount equal to the unprovided period of notice shall be paid or forfeited by the party improperly terminating this agreement*".

[13] There is no dispute that Mr Bone and Ms Phillips did not ever discuss pay in lieu of notice with Ms Shaw. Nor did Mr Bone advise Ms Shaw that the reference in her resignation letter to "*immediate effect*" was viewed by him as advice that she wanted to resign without giving the requisite notice period, in breach of the notice provisions in her employment agreement.

[14] If Mr Bone had raised that with Ms Shaw I am satisfied that she would have alerted him to the fact that she did not intend to resign without giving the contractual notice she was required to give. Rather, she was using the words "*effective immediately*" to mean that she wanted her four week notice period to commence immediately i.e. to run from 16 March 2017, being the day she had handed in her resignation.

[15] Ms Shaw said she had never had to write a resignation letter before so just copied a pro-forma letter that she had found on the internet and did not realise the significance of her using the words "*effective immediately*", nor did she intend to breach her employment agreement.

[16] Ms Shaw's new employer provided a letter to the Authority confirming that she had advised it of her requirement to give four weeks' notice of her resignation to Point Property.

[17] Ms Shaw started work with her new employer only after Point Property had made it clear that it would not be paying her in lieu of notice and that it considered her employment had already ended on 16 March 2017.

[18] Ms Shaw claims that she was unjustifiably disadvantaged because of the manner in which Point Property handled her resignation, in particular by requiring her to leave work immediately but not paying her in lieu of notice or discussing with her its view that she was in breach of the notice requirements so would not be paid in lieu and/or was at risk of having four weeks' salary deducted from her for an alleged breach of the notice provision in her employment agreement.

[19] Ms Shaw also claims that Point Property's failure to discuss the notice requirements with her unjustifiably disadvantaged her because it meant she left the premises because of what she thought was Point Property's direction to do so when Point Property's position was that she was leaving on 16 March 2017 as it believed she had wanted to.

### **The issues**

[20] The following are to be determined:

- (a) Did Point Property unjustifiably disadvantage Ms Shaw in her employment?
- (b) If so, what if any remedies should be awarded?
- (c) What if any costs should be awarded?

### **Did Point Property unjustifiably disadvantage Ms Shaw in her employment**

[21] Mr Bone's failure to discuss Ms Shaw's requirement to give four weeks' notice of resignation in accordance with clause 29.1(b) of her employment agreement meant that the parties were engaging with each other based on a miscommunication about Ms Shaw's intention regarding leaving work and the length of the notice period she had given, and about pay in lieu of notice issues.

[22] Ms Shaw believed she was giving notice so there would then be a discussion with Point Property about whether or not it wanted her to work out some or all of her notice period. Ms Shaw interpreted Mr Bone's actions in escorting her off the

premises as Point Property's decision to end her employment that day, as it had done previously for other employees who had been in her situation.

[23] Point Property says it believed that Ms Shaw was resigning without notice even though it admits it did not have that conversation with her.

[24] While it was open to Point Property to waive the contractual notice period, it had to have discussed that with Ms Shaw. Mr Bone should not have assumed that Ms Shaw intended to breach her employment agreement without giving her an opportunity to confirm that she was aware of her obligations and had elected to deliberately breach them.

[25] If those discussions had occurred then the miscommunication would have been evident because it was clearly not Ms Shaw's intention to breach her employment agreement by not giving the requisite notice. Ms Shaw had no reason to put her salary at risk and her new employer was aware of her notice requirements.

[26] Point Property considered that it was legally entitled under clause 29.4 of Ms Shaw's employment agreement to deduct four weeks' wages from her pay for her failure to give the contractual notice however it never advised her of that so she had no opportunity to respond to it.

[27] I find that Point Property's failures to discuss its view of her resignation letter with Ms Shaw disadvantaged her in her employment because it prevented her from correcting Mr Bone's misinterpretation about it.

[28] I consider that Point Property must have been aware of this miscommunication by 1.30pm on 16 March at the latest because Ms Shaw had raised notice issues in the email she sent Mr Bone as soon as she had arrived home.

[29] Ms Shaw made it clear that she was ready, willing and able to work out her notice period if required, and that she only left work on 16 March because she had been directed to, to the extent of being walked to the lifts, by Mr Bone.

[30] Ms Shaw said she knew Point Property was legally entitled to tell her to leave work immediately because it had the option to pay her in lieu of some or all of her notice period. But she said it could not require her to leave and then not pay her.

[31] I further consider that Ms Shaw was disadvantaged because Point Property did not address the pay in lieu of notice issue until 22 March 2017. Point Property made no attempt to engage with Ms Shaw. It merely maintained its position that she was in breach of her employment obligations by failing to give any notice so it had no obligation to pay her in lieu of notice.

[32] It is clear from the evidence I heard that Ms Shaw was directed to leave work because Mr Bone escorted her off the premises so I am satisfied that her employment ended at close of business on 16 March 2017 at the initiative of Point Property.

[33] I consider it more likely than not that Ms Shaw was available and prepared to work out her notice period if Point Property had wanted her to. I am satisfied Ms Shaw did not intend to breach her employment agreement.

[34] While there may have been some confusion during their discussions at work on 16 March 2017, partly arising from the intimidation that Ms Shaw felt from the manner in which Mr Bone and then Ms Phillips jointly engaged with her to question her resignation, it is clear by 1.30pm that day at the latest that Ms Shaw had communicated her expectation that she would be paid in lieu of notice because she had been directed by Mr Bone to leave work immediately.

[35] I find that Ms Shaw was disadvantaged because she did not have the opportunity to explain what she meant by "*effective immediately*". She was therefore deprived of the opportunity to work out her notice period or alternatively if Point Property did not want her to work her notice (as it hadn't for other employees who had resigned in similar circumstances) then she was deprived of four weeks' pay in lieu of notice.

[36] Whether or not the disadvantage Ms Shaw suffered was justified is to be determined in accordance with the statutory justification test in s.103A of the Employment Relations Act 2000 (the Act).

[37] The statutory justification test requires the Authority to objectively assess whether Point Property's actions, and how it acted were what a fair and reasonable

employer could have done in all the circumstances at the time the disadvantage occurred<sup>1</sup>.

[38] A fair and reasonable employer is expected to comply with its statutory obligations. These included the good faith obligations in s.4(1A) of the Act which requires an employer that is considering making a decision that may have an adverse effect on an employee's ongoing employment to provide that employee with access to relevant information and an opportunity to comment on it before a final decision is made.

[39] Compliance with statutory obligations also applied to each of the four procedural fairness tests in s.103A(3) of the Act. Failure by an employer to comply with its statutory obligations is likely to fundamentally undermine its ability to justify its action.

[40] I find that s.4(1A) of the Act applied in this case because the decision that Point Property made to direct Ms Shaw to leave work immediately and to escort her off the premises, effectively ended her employment so it was a decision that had an adverse consequence on her ongoing employment. This adverse decision made by Mr Bone means that the s.4(1A) duty of good faith obligation applied to Point Property.

[41] I find that if Mr Bone had not told Ms Shaw she needed to collect her things and had not escorted her to the lifts then she would have remained at work working until she had been told by Point Property what her last day of work would be. If Point Property had not given Ms Shaw a direction to leave it is more likely than not that she would have worked out her full contracted notice period.

[42] Point Property breached its s.4(1A) good faith obligations in the Act to Ms Shaw because it did not provide her with information relevant to the adverse decision it made about her ongoing employment because Mr Bone did not tell Ms Shaw that he believed she had deliberately decided not to give any notice and was therefore resigning in breach of the notice provisions in her employment agreement, which put her at risk of forfeiting four weeks' pay.

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<sup>1</sup> Section 103A(2) of the Act.

[43] That failure meant that Ms Shaw did not have an opportunity to inform Mr Bone that she was not intending to breach her employment agreement but was instead waiting for his advice about how long he wanted her to continue working subsequent to her tendering her resignation, if at all. Nor could she communicate her desire to work out her full notice period if Point Property did not wish to pay her in lieu of notice.

[44] If Point Property had complied with its good faith obligations in accordance with s.4(1A) of the Act then Mr Bone would have known that Ms Shaw intended to work for as long Point Property wanted her to do so and that she had no intention of breaching the notice provisions in her employment agreement.

[45] I further find that Point Property is unable to establish that it complied with any of the four procedural fairness tests in s.103A(3) of the Act. Point Property did not sufficiently investigate its concerns that Ms Shaw was intending to resign without giving any notice in breach of the notice provisions in her employment agreement. That was not a view that Point Property had raised with Ms Shaw before telling her to leave its work premises immediately.

[46] That meant that Point Property failed to give Ms Shaw a reasonable opportunity to respond to its concerns that by using the words “*effective immediately*” in her resignation letter she intended to breach her employment agreement so was at risk of forfeiting four weeks’ pay due to the clawback provisions in clause 29.4 of her employment agreement.

[47] Point Property’s failure to raise that with Ms Shaw meant that she had no opportunity to be heard on that issue while she was still at work on 16 March. However Ms Shaw did raise her concerns about being asked to leave work immediately without having been told what would happen to her notice, in terms of whether it would be paid in lieu or whether she would be required to work it out. She raised those concerns in an email within a few minutes of arriving home from work on 16 March 2017.

[48] Point Property failed to respond to Ms Shaw’s 16 March email until 22 March. It did not engage with Ms Shaw at all about her view that she had been asked to leave work immediately on 16 March when she had indicated that she was

available to work out her notice period if required. I find that failure by Point Property unjustifiably disadvantaged Ms Shaw.

[49] These failures by Point Property to comply with its statutory obligations have resulted in it being unable to justify its actions regarding its direction to Ms Shaw to leave work on 16 March and its refusal to pay her in lieu of notice.

[50] I am therefore satisfied on the balance of probabilities that Point Property unjustifiably disadvantaged Ms Shaw in her employment when it directed her to leave work on 16 March without discussing the contractual notice provisions in her employment agreement with her and then by failing to respond to her request that afternoon for pay in lieu of notice and then for failing to pay her in lieu of notice.

#### **What if any remedies should be awarded?**

[51] I am satisfied that Ms Shaw mitigated her loss. As soon as she received the email from Mr Bone on 22 March 2017 making it clear that Point Property considered her employment had ended on 16 March then Ms Shaw made arrangements with her new employer to start work the following day. As a result of that Ms Shaw was only out of work for six days.

[52] I am satisfied that Ms Shaw lost six days' wages as a result of her unjustified disadvantage grievance, so she is entitled to be compensated for that.

[53] Point Property is ordered under s.128(2) of the Act to pay Ms Shaw within 28 days of the date of this determination \$1,614.20 to compensate her for the remuneration she lost as a result of being unjustifiably disadvantaged in her employment.

[54] Ms Shaw gave evidence of the humiliation, loss of dignity, injury to feelings she suffered as a result of the manner in which Point Property responded to her resignation letter. She is entitled to be compensated for her distress.

[55] Point Property is ordered to pay Ms Shaw \$3,500 under s.123(1)(c)(i) to compensate her for the humiliation, loss of dignity and injury to feelings she suffered as a result of her disadvantage grievance. This amount is to be paid within 28 days of the date of this determination.

### **What if any costs should be awarded?**

[56] Ms Shaw as a successful party is entitled to a contribution towards her costs. The parties are encouraged to resolve costs by agreement. If that does not occur then Ms Shaw has seven days from the date of this determination within which to apply for a costs order. Point Property then has seven days from Ms Shaw's costs application to file its response.

[57] This matter involved a two and half hour investigation meeting so costs will be assessed in accordance with the Authority's usual notional daily tariff based approach to costs.

[58] The starting point for assessing costs is therefore notionally \$4,500 which will be pro rataed to reflect the actual investigation meeting time required for this matter and then (if necessary) adjusted to meet the particular circumstances of this case.

[59] The parties are invited to identify in their costs submissions any factors which they say should result in the notional starting tariff being adjusted. If Ms Shaw applies for costs then she is required to provide proof that she has actually incurred costs in excess of the pro rataed notional starting tariff.

**Rachel Larmer**  
**Member of the Employment Relations Authority**