

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 339
3028313

BETWEEN

PATRICIA SHELFORD
Applicant

AND

M J & M BLAIR LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: David Flaws, advocate for the Applicant
Richard Marks, counsel for the Respondent

Investigation Meeting: 25 October 2018 in Kaikohe

Determination: 5 November 2018

DETERMINATION OF THE AUTHORITY

- A. The employment of Patricia Shelford ended as a result of unjustified actions by M J & M Blair Limited, not abandonment of employment.**
- B. In settlement of Ms Shelford's personal grievance arising from those unjustified actions, M J and M Blair Limited must, within 28 days of the date of this determination, pay Ms Shelford the following sums which have been reduced by 25 per cent for her contribution to the situation giving rise to her grievance:**
- (i) \$4,680 gross as lost wages; and**
 - (ii) \$6,750 as compensation for humiliation, injury to feelings and loss of dignity.**
- C. Costs are reserved with a timetable set for memoranda to be lodged if an Authority determination of costs is needed.**

Employment Relationship Problem

[1] Patricia Shelford began work as a shop assistant at the Rawene Four Square in mid-February 2016. At the time M J & M Blair Limited (MBL) owned and operated the store. In her application to the Authority, lodged in April 2018, Ms Shelford said MBL director Michael Blair had unjustifiably dismissed her on 24 May 2016. She sought remedies of lost wages and distress compensation.

[2] MBL denied Ms Shelford was dismissed. Instead Mr Blair and his daughter, Belinda Hetaraka, who worked as the store's general manager, said Ms Shelford abandoned her employment with MBL. Ms Shelford left the store during her shift on Monday, 23 May after becoming upset about a conversation with Mr Blair. Ms Hetaraka said she was unable to contact Ms Shelford by telephone later that day so had arranged another worker to cover her shift on Tuesday, 24 May.

[3] When Ms Shelford arrived to work at the store on Tuesday morning Mr Blair told her a replacement had been arranged for her. There is conflicting evidence between her and him over what they each then said but Ms Shelford soon after left the store. Ms Shelford said she left because she understood she was dismissed. Mr Blair's evidence was to the effect that he had referred to her shift being covered by someone else that day and he had expected she would return to work on whatever day she was next rostered to work. When Ms Shelford did not arrive for that next shift, on Thursday 26 May, Ms Hetaraka and Mr Blair said they treated that situation as Ms Shelford abandoning her employment. Neither Ms Hetaraka nor Mr Blair made any attempt to contact her that day or on Saturday 28 May when she had also been rostered to work.

[4] In the following weeks Ms Shelford had telephoned the Ministry of Business' Employment Relations contact centre for information about her situation. This had resulted in Mr Blair receiving a phone call, although he could not recall who that was from, asking whether a company representative would attend a mediation to discuss Ms Shelford's dismissal. Mr Blair declined the invitation to mediation on the basis that he said Ms Shelford was not dismissed. After Ms Shelford heard MBL had declined to attend mediation she wrote a letter, dated 17 June 2016, raising a personal

grievance for unfair dismissal. She hand-delivered the letter to the store. Mr Blair received the letter but did not respond to it.

The Authority's investigation

[5] The issues for resolution were:

- (i) Did Ms Shelford's employment by MBL end by dismissal or by her abandoning her employment?
- (ii) In whatever happened to end her employment, had MBL acted as a fair and reasonable employer could have done in all the circumstances at the time?
- (iii) If MBL acted unjustifiably, what remedies should be awarded, considering:
 - (a) Lost wages; and
 - (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (iv) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Ms Shelford that contributed to the situation that gave rise to her grievance?
- (v) Should either party contribute to the costs of representation of the other party?

[6] For the Authority's investigation of those issues Ms Shelford, Mr Blair, Ms Hetaraka and Ms Shelford's husband, Pita Shelford each provided a written witness statement. All four attended the investigation meeting and, under affirmation, confirmed their own written statement and then answered questions from me and the parties' representatives. The representatives also provided closing submissions.

[7] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The end of the employment: by dismissal or abandonment?

[8] Ms Shelford had recently moved to Rawene with her husband, who had a new job in the area, when she applied for work at the local Four Square in early February 2016. Mr Blair had run the store, through MBL, for around 25 years. By the time Ms

Shelford was employed, Ms Hetaraka and another of Mr Blair's daughters were running the store but Mr Blair regularly assisted with various duties.

[9] Ms Hetaraka interviewed Ms Shelford and decided to employ her. She decided Ms Shelford would be a useful addition to staff because Ms Shelford, from previous employment elsewhere, already had the sort of manager's certificate required for the sale of liquor at the store. On behalf of MBL Ms Hetaraka also signed the written employment agreement provided to Ms Shelford a few weeks later. Although the agreement described the employment as "of a casual nature" MBL conceded the pattern of rostered work Ms Shelford did meant she was, in reality, employed on a regular and on-going part-time basis.

[10] On the morning of 24 May Ms Shelford arrived around one hour late to work. She was late because her husband forgot to return home from his own work by a pre-arranged time so he could drop her off at her work in their family car. Ms Shelford's phone records showed she had made repeated attempts to contact Mr Shelford by telephone when he had not returned home by the expected time. She also tried three times to call the store to explain why she would be late. One of her calls was answered by Mr Blair. Ms Shelford said she explained the situation but Mr Blair did not speak or respond to her and hung up.

[11] Mr Blair's explanation for not saying anything to Ms Shelford was that the store phone was not working properly. Callers could ring the store but when the call was answered he could not hear anyone on the line. When he could not hear anyone on the line he would hang up. He did not usually work in the store on Monday mornings but had gone in that day to get the telephone repaired. Ms Hetaraka said problems with the store phone were a regular event, caused by rain effecting the telephone system.

[12] When Ms Shelford arrived at the store, she spoke to Mr Blair and apologised for being late. She then told him that she thought it was "bloody rude" that he had not spoken when she called earlier and had hung up on her. She said Mr Blair had responded angrily to her comment and they had "talked back and forward for a few minutes". She said she ended the conversation by again apologising for being later and went to start work.

[13] Mr Blair's account of that conversation differed. He denied reacting angrily about Ms Shelford's comment about hanging up but said there was a tone in her voice that he did not appreciate. He said he told her "when you come to work, you can leave the attitude at the door". When he explained the phone fault, and that he could not hear anyone when he answered, he said Ms Shelford responded disbelievingly with the comment: "That's a likely story". Ms Shelford denied making that comment.

[14] A few minutes after she began work Ms Shelford said she started shaking and felt tearful. She said another staff member noticed and gave her a hug. Ms Shelford said she told that staff member "I can't do this, I can't stay here" and left the store. Before leaving Ms Shelford said she had asked the store supervisor whether the store phone was "down" but the supervisor said she did not know. Later that morning Ms Hetaraka asked where Ms Shelford was. The staff member who had hugged her told Ms Hetaraka that Ms Shelford had thrown her hands in the air, said "I'm out of here" and left.

[15] Ms Hetaraka said she tried twice to contact Ms Shelford by telephone around 4pm that day. Neither call was answered. Ms Hetaraka then arranged for another worker to come to the store on the following day to cover Ms Shelford's shift. Ms Hetaraka then rang Mr Blair to tell him of that arrangement, as he was due to be at the store early the following morning to help with a goods delivery.

[16] Ms Shelford said she had no missed calls from Ms Hetaraka on her telephone that day. She arrived at the store on the Tuesday morning to begin her shift, approached Mr Blair and apologised for leaving the previous day. She told him she did so because she had been upset. She said Mr Blair told her the problem was the aftermath she caused and said: "We had to replace you". She said she asked "what about later in the week" and he replied "not at all". She said she asked if he was dismissing her and he replied: "You dismissed yourself". Ms Shelford said she then walked out of the store.

[17] Mr Blair denied he made any mention of dismissal at all. His evidence was that he "certainly did not say to her she had dismissed herself". He said he only told

Ms Shelford that they did not know what was happening after she walked out the previous day and a replacement had been arranged.

[18] The civil standard of proof applies to assessing those conflicting accounts. The Authority must consider whether one account should be preferred as being more likely than not to correctly describe what happened. In this case both accounts are possibly correct but an assessment of the evidence overall made neither necessarily more probable than the other.

[19] Ms Shelford certainly acted as if she honestly believed she was summarily dismissed that day. She left the store immediately. She told her husband soon after that was what had happened. She made inquiries, first at the Citizens Advice Bureau and then by telephone of the Employment New Zealand contact centre, about what to do about a dismissal.

[20] However her belief alone did not necessarily make her account more likely than Mr Blair's different description of events. There was no direct evidence of any other immediate witness to their conversations that could corroborate one or other account. They were already at odds due to the misunderstanding over what had happened during Ms Shelford's phone call to the store on the previous morning. Ms Shelford thought Mr Blair was inexplicably rude. Mr Blair thought Ms Shelford was unnecessarily belligerent about a problem caused by a faulty phone, not him.

[21] A similar misunderstanding, more likely than not, arose when Mr Blair told Ms Shelford she was replaced on Tuesday. She took that to mean more than just for that day. However Ms Hetaraka and Mr Blair appear to have taken no steps after Tuesday to arrange for another worker to cover her rostered Thursday shift. This suggested, as more likely than not, that they expected Ms Shelford would return to work on Thursday.

[22] On the balance of probabilities, Ms Shelford's employment was not terminated by whatever Mr Blair said to her on Tuesday, 24 May. However what is also more likely than not was that Ms Shelford's employment did not subsequently come to an end by reason of abandonment. Rather Ms Shelford stayed away from work under a misapprehension as to what had really happened. Once Ms Shelford did not turn up

for work on the morning of Thursday 26 May, the situation entered a new phase. It was the actions, or rather inaction, of Ms Hetaraka and Mr Blair on that day and subsequent days that ultimately had the effect of ending the employment relationship. During that time they failed to do what a fair and reasonable employer could have done in all the circumstances, so MBL failed to meet the requirements of the statutory test of justification. This conclusion was reached for the following reasons.

[23] There is a broad principle in employment law that an employer should not seize on words uttered in the heat of the moment, including an apparent resignation by a worker, to then treat the employment relationship as truly at an end without first allowing a suitable ‘cooling off’ period and checking with the worker as to her or his coolly considered intentions. Such an inquiry should be relied on rather than a sudden flare up, an emotional outburst or an outburst of frustration.¹

[24] Similarly, if an employer believes a worker has walked away from the job, abandoning the employment, but has not clearly indicated an intention to finally end his or her employment, the employer should be cautious in drawing that inference and make further inquiries of the worker.²

[25] As the decisions of the courts over the years have made clear, the application of those principles turns on the facts of each case.

[26] In Ms Shelford’s case her words of “I can’t do this, I can’t stay here” or “I’m out of here” on Monday 23 May were equivocal. She had indicated her intention to continue the employment relationship by arriving for work on Tuesday 24 May. Accepting the evidence of Ms Hetaraka and Mr Blair that they intended Ms Shelford to be “replaced” only for that day’s shift and not permanently, they must have had some real doubt about why she did not turn up for work on Thursday 26 May as expected by her roster for that week. Acting with due caution they could not reasonably draw the inference that her absence indicated an intention to finally end her employment without first making some real attempt to ask her. The onus fell on them, under the statutory test of justification, to explain why they had not done so when Ms Shelford did not arrive for work that day but instead treated her as having

¹ *Boobyer v Good Health Wanganui* (unreported, EC Wellington, WEC 3/94, 24 February 1994) at 3.

² *E M Ramsbottom Limited v Chambers* [2000] 1 ERNZ 387 (CA) at [26].

abandoned the employment. They and Ms Shelford had mutual good faith obligations to be active, constructive, responsive and communicative in maintaining the employment relationship.³

[27] Ms Hetaraka gave frank evidence that established MBL had not met those obligations. She said that because Ms Shelford had “come back in” on the Tuesday, Ms Hetaraka then thought “the rest of the week would continue as normal”. However when Ms Shelford did not arrive on Thursday, Ms Hetaraka did not try to telephone Ms Shelford to find out why. Rather Ms Hetaraka said her view at the time was that she was “over it” and “was tired of the situation”. She accepted doing nothing “was not becoming of a manager” but said she did not see the point in attempting to contact Ms Shelford.

[28] There was, however, clearly a point in doing so. Assuming Ms Hetaraka and Mr Blair were genuine in their evidence that Ms Shelford had not been dismissed on Tuesday, speaking to her would have removed whatever misunderstanding they said she must have formed about what being “replaced” that day really meant. If they had met their good faith obligation to actively communicate with Ms Shelford and to make reasonable inquiries of her about her intentions, what they said was the real situation would then have been made apparent to Ms Shelford. Because they did not, and Ms Shelford stayed away from work because of what MBL said was her mistaken belief she had been dismissed, she was unjustifiably disadvantaged by MBL’s inaction.

[29] A further reason for that inaction emerged in Ms Hetaraka’s frank evidence at the investigation meeting. In the previous two weekends Ms Shelford had sought to swap a Saturday shift with another staff member. On the first occasion that swap went ahead but Ms Hetaraka was not happy with such arrangements. The store had to have at least one staff member on duty who had a manager’s certificate. If Ms Shelford swapped a rostered shift with a younger staff member without the necessary certificate, MBL had to arrange for and pay another worker with a certificate to also work that shift, effectively doubling the staff cost compared with just having Ms Shelford working. This problem had not been directly addressed with Ms Shelford on

³ See *Cross v Onerahi Hotel Limited* [2014] NZEmpC 26 at [32]-[33] and *Taylor v Milburn Lime Limited* [2011] NZEmpC 164 at [31]-[32].

a performance or disciplinary basis. However it probably contributed to a sense that Ms Hataraka held that the employment relationship with Ms Shelford might not be working out and why Ms Hataraka did not make more effort to check with Ms Shelford when she did not turn up for work on Thursday 26 May.

[30] Of course Ms Shelford had good faith obligations of her own to be active and communicative but she believed, because of what she was told about being ‘replaced’ on Tuesday, that she had been dismissed. She did act constructively in the following weeks by seeking mediation but Mr Blair had rejected that prospect out of hand.

[31] If MBL had acted promptly and reasonably on Thursday 26 May, in a way consistent with its good faith obligations, the relationship may well have continued. Its failure had the effect that MBL was responsible for ending the employment relationship in a way that a fair employer acting reasonably could not have done in all the circumstances. At law that is treated as a dismissal. As a result Ms Shelford had established her personal grievance and was entitled to an assessment of remedies.

Remedies

Lost wages

[32] An assessment of the wages Ms Shelford lost as a result of her grievance must consider the full extent of that loss. It must also take account of other contingencies of life that might otherwise have limited what she would have earned if her employment by MBL had not ended when it did. MBL sold the business in January 2017 and not all its employees transferred to work for the new owner, so Ms Shelford’s employment may have ended by then anyway. Taking that seven-month period as the full extent of her loss, several other factors may have reduced her earnings within that timespan. Firstly, during the winter months she would likely have had a reduction of the number of hours or days worked but, probably, would have remained employed. Secondly, Ms Shelford had various health problems that may have interfered with her ability to either keep working or working as much as she had done. Medical records provided as part of the evidence showed Ms Shelford experienced chronic pain from osteoarthritis that, realistically, would have eventually made the standing, moving and carrying required in her store role too demanding. It was sufficiently severe that she had a hip replacement operation the following year. She also had a long history of alcohol dependence, with several admissions for treatment over recent years. While

Ms Shelford said those health issues were made worse by stress caused by how her job with MBL ended, a realistic assessment must allow for the prospect that her employment may not have continued for many more months anyhow. Thirdly, Ms Shelford had not attempted any real job search or generated alternative earnings during the period for which lost wages was sought. This was said to be on medical advice so she could concentrate on addressing longstanding health problems. While those problems were probably made more acute by distress arising from the end of her employment, MBL could not reasonably be required to reimburse her for loss arising from all her underlying and longer-term difficulties.

[33] Against that background, an award for reimbursement of lost wages had to be made for at least three months' ordinary time remuneration.⁴ A further month ordered under s 128(3) of the Act was also warranted. However the calculation of the ordinary time remuneration for those four months reasonably had to be made on a likely 'winter months' reduction of days rostered to three a week. The resulting calculation as the hourly rate of \$15 she was paid for eight hours a day multiplied by three gave a weekly gross rate of \$360. For four months the total figure was \$6240.

Compensation for humiliation, loss of dignity and injury to feelings

[34] Ms Shelford was greatly upset by being sent away from work on Tuesday 24 May. She walked to her husband's workplace, where he was teaching a class of polytechnic students, and arrived in tears. He and students in his class comforted her. Those circumstances contributed to news of what she believed had happened then circulating quite quickly in the local community. Ms Shelford, although relatively new to the area and having contributed to that news spreading, found that situation humiliating. She felt that her sense of upset also made her existing health problems worse. This included increased chronic pain from osteoarthritis and more alcohol use, for which she sought further treatment.

[35] Setting an appropriate level of compensation under this heading, while guided by compassion, has to be careful not to conflate distress caused by the situation that gave rise to the grievance with suffering that resulted from the difficulties of her long standing health problems. There was no tested evidence from a registered health professional to guide that assessment. Notes from her health advisors in Ms Shelford's

⁴ Employment Relations Act 2000, s 123(1)(b) and s 128(2).

medical records mentioned the fact of the end of her employment. They did not, however, directly assist with any evaluation of the extent that event made her symptoms worse, to a degree that would not otherwise have happened.

[36] The distress compensation should address the situation created by the actions of MBL held to be unjustified, that is its failure to engage with Ms Shelford from Thursday 26 May. She was left with what MBL said was the mistaken impression that she had been dismissed. It failed to take the reasonable steps that would have changed that situation.

[37] Mr Shelford said his wife “just went downhill” following the events of Tuesday 24 May. He said she often cried over the following weeks, could not sleep and did not eat properly.

[38] For that distress, directly related to MBL’s failure to properly communicate with her, an appropriate level of compensation was \$9000.

Contribution

[39] Under s 124 of the Act the Authority must consider whether any remedies awarded for a personal grievance require reduction due to any blameworthy conduct by Ms Shelford contributing to the situation that gave rise to her grievance. The situation is assessed broadly. In this case this is not limited to MBL’s failure to contact Ms Shelford on Thursday 26 May or subsequently but includes what happened that led to that situation.

[40] The situation arose because Ms Shelford had been late for work on Monday, 23 May. She had made prompt attempts to let her employer know that morning and apologised on arriving at work. However she also started what became a terse exchange with Mr Blair. She neither knew or nor appeared to accept that what she thought was his “bloody rude” behaviour occurred because he was on the other end of a faulty phone line. When she felt upset about his response, she left work without telling her manager or supervisor she was going or why. While Ms Hataraka was not successful contacting her later that day, neither did Ms Shelford make any attempt to call Ms Hataraka to explain why she had left. This contributed to Ms Hataraka’s decision to replace Ms Shelford the next day that, in turn, led to Ms Shelford turning

up and going away with a mistaken view of what that change probably meant for her on-going employment. While MBL had failed in its good faith duties, Ms Shelford could also have been more active and communicative. She may have regarded Mr Blair as being in a position of authority, as an owner of the company that ran the business, but it was Ms Hetaraka who was general manager, had employed Ms Shelford, signed her employment agreement and made staffing and rostering decisions. Had she spoken to Ms Hetaraka on the Monday, Tuesday or Thursday, the outcome may well have been quite different.

[41] On a common sense assessment Ms Shelford was partly at fault for the situation. A reduction of remedies was reasonably required to acknowledge her role in the failures of communication between both parties. A reduction of one quarter was sufficient for that purpose.

Costs

[42] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms Shelford may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum MBL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[43] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵ As the investigation meeting was completed in about two-thirds of a standard day, the starting point for assessment would adjust the daily tariff to the same proportion, that is \$3000.

Robin Arthur
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.