

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kelly Ann Stensness (Applicant)
AND BE Design Limited (Respondent)
REPRESENTATIVES Mark Nutsford, Advocate for Applicant
No appearance for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 7 June 2005
FURTHER INFORMATION RECEIVED 8 August 2005
DATE OF DETERMINATION 29 August 2005

DETERMINATION OF THE AUTHORITY

[1] Kelly Stensness says she was unjustifiably dismissed by her former employer, BE Design Limited ("BE Design").

[2] BE Design says Ms Stensness was not dismissed, rather that she resigned.

BE Design's failure to attend the investigation meeting

[3] BE Design did not appear and was not represented at the investigation meeting although it has Ms Stensness' statement of problem. There have, however, been communications about the company's circumstances. According to those exchanges, the company's retail business in New Zealand has been sold and the director and shareholders are no longer based in New Zealand. Further, the company has ceased to trade and its current contact address is in Indonesia.

[4] That information is not of itself sufficient to bring a halt to the proceeding in the Authority. Assuming it is correct it raises for Ms Stensness the option of withdrawing her application because she may be unable to obtain the fruits of any determination in her favour, or to proceed notwithstanding. She has chosen the latter. Since the company remains on the register of companies and is not in liquidation, and there has been no settlement of this employment relationship problem, the proceeding has continued.

[5] On 7 June 2005 - the day of the investigation meeting - the Authority received a letter from the company dated 25 May 2005, saying the notice of investigation meeting and timetabling directions had been received only that day and querying why the matter was proceeding in any event.

[6] Despite the alleged delay in its receipt of those documents, BE Design still had the 7 clear days' notice of the meeting required under the Employment Relations Authority Regulations 2000 and the notice was effectively served. The company should have contacted the Authority as soon as it received the letter, rather than committing to the post a response that was not received for another two weeks. For that reason, and since Ms Stensness and her advocate had reported for the meeting, I proceeded to hear evidence from Ms Stensness in the absence of BE Design.

[7] There are a number of misconceptions in the company's 25 May letter, which I do not need to address. However because the representative is a layperson and had at least attempted to advise the Authority of the company's circumstances, I sought and obtained further written comments on Ms Stensness' brief of evidence.

The resignation

[8] BE Design employed Ms Stensness as a design administration assistant commencing in or about November 2003. As well as duties associated with projects for clients, Ms Stensness' job description included general clerical and basic accounts duties and assisting in the company's retail store when required. Brigid Eyley is the sole director. She is an interior designer who offered design services to clients and operated the retail outlet as well.

[9] Ms Stensness was planning to marry in February 2004. During the early part of her employment there were differences of opinion between Ms Stensness and Ms Eyley about the amount of work time Ms Stensness was spending on preparations for her wedding. After a disagreement about her late arrival at work for domestic reasons one day in or about April 2004, there came a point where, according to Ms Stensness, she could not work for Ms Eyley any more. Ms Stensness started to look for another job.

[10] On 26 April 2004 Ms Stensness was on the telephone discussing with her husband a job interview she had attended that morning. According to Ms Stensness, Ms Eyley overheard her. The next day, during the course of what was usually an operational meeting, Ms Eyley asked Ms Stensness if she had been for a job interview. Ms Stensness said she had, whereupon Ms Eyley 'started getting angry' with her. Ms Stensness said she explained her reasons for being unhappy, referring again to the incident following her late arrival at work, only for Ms Eyley to say Ms Stensness was costing her a fortune and was not working out. During the conversation Ms Eyley became increasingly upset and left in tears. For her part, Ms Stensness said she remained calm.

[11] In its statement in reply, BE Design said Ms Eyley asked Ms Stensness about her intentions, receiving this reply:

“... a stream of abuse and said she could no longer work for BE Design Ltd. She stated that she had been unhappy and badly treated for months. ... She was asked if she intended to resign and she replied “I resign then.” Asked to clarify it, she said again she resigned.”

[12] The next day (28 April), according to Ms Stensness, Ms Eyley approached her saying they should talk about the previous day. Ms Eyley told her she should hand in her notice because she had made it clear she could not work for Ms Eyley. Ms Stensness told Ms Eyley she would think about it and would hand in her notice by the end of the day.

[13] The written response I obtained from BE Design does not expressly address this account. Instead it says: “On the day in question she said “I resign”, and there was nothing ambiguous about the resignation, especially as she confirmed it later that day.” The statement in reply does not address it either – or at least it is not clear whether the extract set out at [11] above is intended to refer to the 27 or 28 April exchange. In any event, neither document was written by Ms Eyley. Since the responses raise the

possibility of a material conflict in the evidence I would require evidence from Ms Eyley herself, with a fuller account than that, before I could give proper consideration to whether to accept Ms Stensness' version of events or Ms Eyley's. I do not have such evidence, so I accept Ms Stensness' account.

[14] Ms Stensness did not hand in a written resignation and continued to report for work. She said that was because she decided she could not be forced to hand in her resignation. By letter dated 5 May 2004 Ms Eyley advised:

“This letter serves to acknowledge your resignation from your position of Design Administration Assistant on Wednesday 28th of April.

It is understood that Friday the 28th day of May will be your final day of employment.”

[15] In the comments on behalf of BE Design, it was said Ms Stensness merely took the letter and said ‘thank you’. Ms Stensness said she made no comment when she received the letter, as she just wanted to ‘get out’ with her reputation in the industry intact. She also said she did not open the letter until after Ms Eyley left the shop. In Ms Eyley's absence, I accept Ms Stensness' evidence.

[16] BE Design alleged in the statement in reply, and Ms Stensness denied, that her resignation was discussed with her several times over the next few weeks. It was alleged, and denied, that Ms Stensness made no attempt to indicate that she had not resigned. Again, in the absence of evidence from BE Design, I accept Ms Stensness' denial.

[17] On Monday 24 May Ms Eyley advised Ms Stensness it was considered better if Ms Stensness leave that day. She gave Ms Stensness two post dated cheques to cover her wages.

[18] No employment relationship problem has been raised in respect of the early termination, but I comment on it because it seems to have been the subject of some discussion between the parties.

[19] Even so, neither the statement in reply nor the comments I sought from BE Design specified the reason for the early termination. BE Design merely said in the statement in reply: “On 21 May 2004 it was felt that it might be best if we paid Ms Stensness up until the end of the fourth week of May, which we did.” Ms Stensness believed the decision may be connected with a discussion Ms Stensness had with another staff member on 21 May. She believes that staff member told Ms Eyley that Ms Stensness was encouraging him to pursue alternative employment. In evidence Ms Stensness said the staff member told her a friend of his wanted the staff member to work for him. She offered to cover for the staff member during a lunch break, if he wanted to go to see the friend to discuss the job. If that is so, then the early termination of Ms Stensness' employment was hasty.

[20] Then, at about the time of or during their discussion on 24 May, Ms Stensness and Ms Eyley had a disagreement about the payment to Ms Stensness of her fuel expenses.

[21] No employment relationship problem has been raised in respect of that matter either. However, Ms Stensness said in evidence that she was entitled to a monthly fuel allowance. Although there was no mention of that in the parties' written employment agreement, Ms Stensness produced bank deposit slips showing that she had received payments of \$80 in February, March and April 2004. These payments were her fuel allowance, paid in recognition of the fact that she would run errands for Ms Eyley as required. When Ms Stensness sought what she said was an overdue payment for May, there was a disagreement over whether Ms Stensness had done any ‘running around’ that month. At the time Ms Stensness owed a little less than \$80 by way of staff purchases, so, in lieu of receiving her fuel allowance, she told Ms Eyley she would not make the payment.

[22] Ms Stensness should not have done that, although I accept there was a genuine dispute over her entitlement to the fuel allowance. For the same reason, BE Design's associated insistence that Ms Stensness was guilty of theft was unhelpful.

Existence of a dismissal

[23] I have accepted Ms Stensness' evidence that Ms Eyley told her on or about 28 April that she should hand in her notice because she had made it clear she could not work for Ms Eyley. That prompted Ms Stensness' statement to Ms Eyley that she would think about it and hand in her notice by the end of the day. It is clear from that exchange that the initiative for the Ms Stensness' offering her resignation came from Ms Eyley. Accordingly when Ms Stensness did not 'hand in her notice' at the end of the day, Ms Eyley should at least have asked Ms Stensness whether she had thought about the matter and what conclusion she had reached. Ms Eyley was not entitled to take matters into her own hands and inform Ms Stensness that her last day of work would be 28 May.

[24] For those reasons I conclude that the circumstances in which Ms Stensness' resignation was apparently obtained and acted upon amounted to a dismissal. It was not justified. Ms Stensness was entitled to look for other employment if she wished. Subject to her contractual obligations to her employer, it was up to her to decide whether or when she would offer her resignation.

Remedies

[25] After her employment with BE Design ended, Ms Stensness obtained alternative employment almost immediately. In the next 13 weeks she earned an average of \$640.56 per week. Her rate of pay at BE Design was \$696.00 per week. Accordingly she has lost remuneration calculated as $13 \times \$55.44 = \720.72 , and is entitled to reimbursement of that lost remuneration.

[26] Ms Stensness wanted to leave her employment anyway, and there was little evidence of injury to her feelings arising from the way her resignation was obtained from her. It is therefore appropriate that any award of compensation for injury to her feelings be modest. However I regard the circumstances of the early termination of Ms Stensness' employment as aggravating features, and therefore increase the amount I would otherwise have awarded. Accordingly BE Design is to pay Ms Stensness the sum of \$4,000 as compensation for the injury to Ms Stensness' feelings arising out of her personal grievance.

Summary

[27] BE Design is ordered to pay Ms Stensness:

- (a) \$720.72 (gross equivalent) as reimbursement of lost remuneration; and
- (b) \$4,000 as compensation for injury to feelings.

Costs

[28] The reimbursement of the filing fee of \$70 has been sought, and BE Design is ordered to further reimburse Ms Stensness for that amount. Otherwise costs are reserved. If the parties seek any further determination they may approach the Authority in writing, setting out their positions.

R A Monaghan
Member, Employment Relations Authority