

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 130
3008973

BETWEEN LETITIA STEVENS
Applicant

AND ALISON GREEN LAWYER
LIMITED
First Respondent

AND ALISON GREEN
Second Respondent

Member of Authority: Vicki Campbell

Representatives: Jenny Murphy for Applicant
Glenn Mason for Respondents

Investigation Meeting: 28 August 2017

Submissions Received: 9 September 2017 from Applicant
18 September 2017 from Respondent

Determination: 13 December 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. One or more conditions of Ms Stevens' employment were not affected to her disadvantage by an unjustified action by Ms Green.**

- B. Ms Stevens was not constructively dismissed.**

- C. Ms Stevens did not breach her duty of good faith.**

- D. Costs are reserved.**

Identification of the employer

[1] In her initial statement of problem Ms Stevens cited the First Respondent as her employer. The First Respondent is not a trading entity and when this was drawn to her attention Ms Stevens amended her statement of problem to include the Second Respondent.

[2] At the commencement of the investigation meeting the parties agreed the Second Respondent was Ms Stevens' employer, that is Alison Green personally who trades as Alison Green Lawyer.

Oral indication of preliminary findings

[3] At the end of the investigation meeting on 28 August 2017 I gave the parties an oral indication of my preliminary findings that the verbal warning issued to Ms Letitia Stevens on 21 December 2016 was justified. I also indicated that I was not satisfied Ms Stevens had established that she had been constructively dismissed.

Employment relationship problem

[4] Ms Stevens was employed as Support Legal Executive working for Alison Green who traded as Alison Green Lawyer. Ms Stevens has more than 25 years' experience working in a legal office including as a Registered Legal Executive.

[5] On 21 December 2016 Ms Stevens was issued with an oral warning relating to concerns about mistakes she had made in carrying out her duties. Ms Stevens claims one or more conditions of her employment were affected to her disadvantage by the issuing of the oral warning which she says was an unjustified action.

[6] On 2 February 2017 Ms Stevens resigned from her employment. She claims her resignation was in fact a dismissal and the dismissal was unjustified.

[7] By way of counter-claim Ms Green claims Ms Stevens breached her obligations of good faith and seeks the imposition of a penalty for each breach.

Issues

[8] To resolve this employment relationship problem I must answer the following questions:

- a) Was the oral warning a justified action?
- b) Did Ms Steven's resignation amount to a dismissal and if so was it unjustified and if so, what, if any, remedies should be awarded?
- c) Did Ms Stevens breach her statutory duty of good faith and if so should a penalty be imposed?

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Stevens and Ms Green but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Was the oral warning a justified action?

[10] It is well known that warnings are a disadvantageous action because they put an employee closer to dismissal than they would otherwise be without a warning on their record. For that reason my investigation focussed on whether Ms Green could establish on the balance of probabilities that the warning was a justified action. This requires me to consider whether Ms Green's actions and how she acted were what a fair and reasonable employer could have done in all the circumstances.¹

[11] Ms Stevens was employed in 2007 by Ms Green who is a lawyer operating business primarily in property conveyancing, wills and trusts. At the time Ms Stevens resigned she was working part time for 28 hours each week.

[12] The terms and conditions of Ms Green's employment were set out in an individual employment agreement which included the following relevant provisions:

- a) Clauses 6(b), (c) and (d) set out Ms Stevens' obligations including that she would perform her duties with all reasonable skill and diligence, conduct her duties in the best interests of Ms Green, and deal with Ms Green in good faith in all aspects of the employment relationship.

¹ Employment Relations Act 2000, section 103A.

- b) Clause 23 sets out the agreed procedure to be followed in disciplinary matters. In particular clause 23 requires:
 - i. Advice of the allegations, of the right to representation or support and of the potential consequences of the meeting. Such information must be provided prior to the meeting.
 - ii. If the matter is considered to be misconduct and it is a first offence the employee may be issued with a verbal warning. Written warnings are reserved for second offences with dismissal being an option only after a third offence.
- c) Schedule B to the employment agreement sets out a list of items which constitute less serious misconduct. Failure to perform to the expected level of performance is included as an item in the list.

[13] During 2015 Ms Green changed the workflow required for progressing conveyancing files in the office so that residential conveyancing files were allocated to one support staff to handle from becoming unconditional through to settlement. The support staff would complete their tasks under the general supervision of the Author. Until this change Ms Stevens had been allocated various tasks on a number of files on which other support staff were also carrying out tasks at different stages.

[14] By early 2016 Ms Green and Ms Mary Chapman, a registered Legal Executive, became concerned Ms Stevens was leaving the completion of some tasks to the last minute on files allocated to her. To ensure her expectations around the completion of tasks was clear Ms Green implemented a “5 day rule”.

[15] The rule was established to ensure anomalies on the files such as unpaid deposits, would be identified and followed up in a timely manner. The rule required support staff:

- a) For sale files – request the discharge of the bank mortgage and prepare and send the settlement statement to the purchaser’s lawyer within five days of the sale file becoming unconditional.

- b) For purchase files – set up the dealing in the Landonline WorkSpace and send the dealing number and sale notices to the lawyer for the vendor within five working days of a purchase file being allocated.

[16] The instruction about the “5 day rule” was issued orally during a meeting with staff and was not reduced to writing. Ms Stevens confirmed that she was told about the “5 day rule” at a staff meeting in early 2016.

[17] In August Ms Chapman raised concerns with Ms Green about errors made by Ms Stevens in a number of reporting letters. Ms Green directed Ms Chapman to raise her concerns with Ms Stevens directly, which she did.

[18] In October Ms Green had cause to raise concerns with Ms Stevens about mistakes she had made on files. At the investigation meeting Ms Stevens acknowledged she had made mistakes. Examples she gave me included failing to pay rates and commissions and failing to pay full settlement amounts on time.

[19] In November Ms Green discovered further errors made by Ms Stevens between 1 August and 18 November relating to five separate client files. Given the two previous discussions held with Ms Stevens about mistakes Ms Green decided to deal with the issues in a formal disciplinary process.

[20] On 18 November Ms Green sent Ms Stevens a Memo inviting Ms Stevens to attend a disciplinary meeting to discuss the errors. Ms Green recorded her concern that Ms Stevens may have attempted to conceal the errors.

[21] Ms Green attached copies of all the documents relating to the errors, set out a full account of the dealings on each file and identified the errors made by Ms Stevens. Over the five files there were 16 identified errors in total.

[22] Ms Green also attached a copy of Ms Stevens’ employment agreement and reminded Ms Stevens that not meeting expected performance levels constituted less serious misconduct and referred her to Schedule B.

[23] Ms Stevens was advised of the purpose of the meeting, told that if any of the allegations were established, it would amount to less serious misconduct and was

invited to have a representative or support person in attendance. Ms Green advised Ms Stevens that dismissal was not a penalty she was considering at that time.

[24] The meeting went ahead as scheduled, on 25 November. At the beginning of the meeting Ms Stevens was reminded of her right to representation and that she could take a break at any stage during the meeting.

[25] Ms Stevens handed a full written response to the allegations to Ms Green which she read through. Ms Green began to ask clarifying questions about the responses provided by Ms Stevens. At that point Ms Stevens says she stopped the meeting because she did not believe Ms Green intended considering any of her responses and felt she had already made her decision about the allegations.

[26] I have not accepted that explanation. This is because the notes of the meeting show that Ms Stevens told Ms Green she wished to be represented at the meeting. Ms Green then advised Ms Stevens she would provide a written response to Ms Stevens' response and adjourned the meeting until the following Wednesday to allow Ms Stevens the opportunity to seek representation. Ms Stevens was aware that the date for the reconvened meeting was subject to the availability of Ms Stevens' representative.

[27] On 30 November Ms Green wrote to Ms Stevens setting out her response to the written responses provided by Ms Stevens on 25 November and sought further clarification on some issues. Ms Green also identified where explanations provided by Ms Stevens in her written response were accepted. Ms Green clarified the matters still requiring explanation which had the effect of reducing the number of total errors from 16 to seven.

[28] A further disciplinary meeting was held on 9 December at which time Ms Stevens provided a further written document setting out her explanations to the issues raised by Ms Green in her 30 November Memo.

[29] During the meeting Ms Stevens acknowledged making three of the seven alleged errors. Ms Green accepted Ms Stevens' explanation about two of the seven errors but not for the remaining two.

[30] The errors Ms Green identified as being caused by Ms Stevens were:

- a) Between 17-21 October Ms Stevens failed to take into account a \$750 reduction in the purchase price of a property which resulted in an overpayment being made to the vendors solicitors.
- b) Between 17-21 October Ms Stevens failed to include a sum of \$450 relating to an invoice posted on 6 October, in the draft trust account statement resulting in the client not paying the \$450.
- c) Between 26-28 October Ms Stevens omitted to pay the balance of a commission owing to a real estate company from available net proceeds of a sale on settlement.
- d) Between 31 August and 2 September Ms Stevens miscalculated the amount required to be paid by a client to settle a purchase which resulted in the transaction being settled with insufficient funds being held on behalf of a client in Ms Green's trust account. Ms Green had to advance \$599.93 to the client to enable settlement to occur.
- e) Between 4 October and 11 November Ms Stevens failed to adhere to the "5 day rule" in respect of turnaround of key work on a file. No work was carried out on the file until 8 November which was only three days before settlement on 11 November.

[31] On 14 December Ms Green wrote to Ms Stevens and advised her of her finding that she had established five of the seven errors were mistakes made by Ms Stevens. Ms Green was satisfied the mistakes amounted to Ms Stevens failure to perform to the required standard. Ms Green invited Ms Stevens to attend one further meeting to discuss penalty.

[32] Ms Stevens wrote to Ms Green on 15 December and asked Ms Green to convey her decision in writing without the need for a further meeting. Ms Stevens raised concerns about the process used by Ms Green including that there were no grounds to suggest Ms Stevens had misconducted herself. Despite denying any misconduct Ms Stevens set out possible outcomes including a verbal warning.

[33] The outcome of the disciplinary process was a verbal warning issued to Ms Stevens on 21 December for failure to perform her duties with reasonable skill and care. She was directed to thoroughly check information contained on client files and in the trust account when preparing documentation and to ensure her actions were accurate and correct.

[34] On 21 December Ms Green set out in writing her “5 day rule” for future reference on the basis that during the disciplinary process Ms Stevens denied knowledge of what was expected to be completed within the “5 day rule”.

[35] Ms Stevens relies on *Trotter v Telecom*² to support her claim that the verbal warning was unjustified. *Trotter* can be distinguished by the fact that Ms Stevens’ case is about whether a verbal warning is a justified action. *Trotter* was concerned with a dismissal and sets out a framework requiring warnings for poor performance.

[36] I am satisfied Ms Green has followed the requirements set out in *Trotter* to give warnings before dismissal is contemplated. Mistakes made by Ms Stevens had been raised with her on at least two previous occasions (August and October) and at a meeting of all staff in July, including Ms Stevens staff were told that mistakes on files must stop.

[37] Ms Stevens claims Ms Green predetermined that the allegations were not performance but misconduct. That submission ignores the fact that the parties through their employment agreement have agreed that a failure to meet the expected level of performance will constitute less serious misconduct. The parties have also agreed that the penalty for the first incidence of misconduct may be a verbal warning.

[38] Ms Stevens has raised concerns that background information relied on by Ms Green when she made the decision to issue a verbal warning was not provided to Ms Stevens. I find Ms Green provided all relevant information to Ms Stevens. If I am wrong about that any errors in the process would have been minor and did not result in Ms Stevens being treated unfairly.

[39] I am satisfied that issuing a verbal warning to Ms Stevens was an action an employer acting fairly and reasonable could do in all the circumstances.

² [1993] 2 ERNZ 659.

Constructive dismissal

[40] Ms Stevens' says that while she resigned from her employment, in reality the resignation was a dismissal because she had no option but to resign. Ms Stevens claims a constructive dismissal.

[41] In *Auckland Shop Employees Union v Woolworths (NZ) Ltd*³ the Court of Appeal listed three situations in which a constructive dismissal might occur, although the Court noted that these were not exhaustive. The three situations are:

- a) Where the employee is given a choice of resignation or dismissal;
- b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- c) Where a breach of duty leads a worker to resign.

[42] Ms Stevens bears the onus of establishing on the balance of probabilities that she did not freely or voluntarily resign. Ms Stevens relies on the second and third situations set out above to support her claim that her resignation was not voluntary.

[43] Ms Green told me Ms Stevens did not resign because of a course of conduct embarked on by herself or any breaches of good faith, but rather she resigned because she had accepted a new job.

Was there a course of conduct designed to coerce resignation?

[44] I must assess whether there was a course of conduct that crossed the line to become dismissive or repudiatory conduct sufficient to justify the termination of the employment relationship.⁴

Why did Ms Steven's resign?

[45] During the disciplinary process leading to the verbal warning Ms Green became aware of further mistakes made by Ms Stevens on a number of additional files.

³ *Wellington Clerical Workers IUOW v Greenwich* [1985] 2 NZLR 372.

⁴ (1983) ERNZ Sel Casual 95 at 104.

[46] On 22 December Ms Green wrote to Ms Stevens (who was now on annual leave) setting out a further 14 errors found on ten files allocated to Ms Stevens. Ms Stevens was provided with all documents relating to the errors and was invited to attend a meeting on 18 January 2017 which was two days after Ms Stevens was expected to return to work following the Christmas/New Year break.

[47] In her Memo to Ms Stevens, Ms Green advised her that if any of the allegations set out in the Memo were established it would amount to a breach of the employment agreement. Ms Green advised Ms Stevens that termination was not a penalty that would be imposed and was invited to have a representative or support person with her at the meeting.

[48] During the previous disciplinary process Ms Stevens had been critical of Ms Green for having a support person with her at the meeting and not providing advance notification of that to her. On 9 January Ms Green emailed Ms Stevens and advised her that she would have Mr Mason in the meeting with her on 18 January. At the same time she took the opportunity to get confirmation from Ms Stevens that she would be available for the meeting on 18 January.

[49] After receiving the email on 9 January Ms Stevens says she broke down and was encouraged to get medical assistance. Ms Stevens contacted her doctor and made an appointment for the first available time and date. This was in the afternoon of 13 January.

[50] On 10 or 11 January Ms Stevens was told about a job vacancy in another law firm. She made enquiries with the Agency handling the recruitment process and dropped her CV into them on 11 or 12 January. She attended an interview for the position in the morning of 13 January.

[51] Later that day, after the interview, Ms Stevens attended her doctor and was put off on sick leave until the end of January. On 30 January this was extended to 17 February.

[52] Ms Stevens was offered the new job on 1 February. She resigned from her employment on 2 February and signed the new employment agreement on 3 February with a confirmed start date of 28 February.

[53] Ms Stevens says the way in which Ms Green conducted the disciplinary process was bullying behaviour. She told me that she was sensitive to criticism and was left on 21 December feeling stressed as a result of the process. This was communicated to Ms Green on 21 December before she left the office.

[54] When Ms Stevens applied for the new job on 10 or 11 January she completed an application form. The form required Ms Stevens to answer a question about whether her work had ever been affected by stress. She answered “no” to this question. At the investigation meeting Ms Stevens told me she answered “no” because her work hadn’t been affected – it was only when Ms Green began pressuring her by sending her the second set of allegations and documents and requiring that she attend a meeting on 18 January that she became anxious and stressed resulting in her doctor’s appointment on 13 January.

[55] Ms Stevens’ doctor issued Ms Stevens with a medical certificate confirming that she was not fit to work until 31 January. Ms Stevens confirmed she attended a second interview for the vacant job on or about 30 January. At the investigation meeting she confirmed that she did not disclose any health concerns to her prospective employer. Attending a job interview is inherently stressful. Attendance at the interview is not consistent with Ms Stevens’ statement in her letter to Ms Green 2 days earlier on 28 January that she was in “...too frail a state to meet in a mediation process...”.

[56] On 17 February 2017 a further medical certificate identified that Ms Stevens was suffering from symptoms of acute anxiety because of work place stressors. By this time Ms Stevens had not been in the workplace for nearly two months and she had resigned from her employment after accepting a new role.

[57] I find it is more likely than not that Ms Stevens resigned from her employment because she had secured alternative employment. The question then becomes whether Ms Stevens was motivated to find alternative employment as a result of Ms Green’s conduct.

Course of conduct

[58] Ms Stevens had received a verbal warning on 21 December and at the same time Ms Green emailed her a written outline of the requirements on the 5 day rule to

ensure Ms Stevens had a clear understanding of Ms Green's expectations. This was the first time the requirements of the rule had been reduced to writing.

[59] On 22 December Ms Green raised 14 new complaints about errors made on client files which had been discovered during the disciplinary process. A large proportion of the errors related to a failure to adhere to the "5 day rule".

[60] On 9 January Ms Stevens was reminded about the meeting on 18 January. Ms Stevens says it was this action by Ms Green that caused her to require medical assistance which she received on 13 January.

[61] Ms Stevens raised a personal grievance on 14 January claiming Ms Green had embarked on a campaign to cause her to resign. She says the campaign included raising misconduct issues resulting in a verbal warning when they were not misconduct but were competency issues. The verbal warning was followed immediately by further allegations. In her letter raising the grievance Ms Stevens reminded Ms Green that when the further allegations were raised Ms Stevens had informed her that she was suffering from stress.

[62] Ms Stevens outlines her view that Ms Green intended to reach the same result with the new allegations which would contractually allow Ms Green to issue a written warning or consider dismissal.

[63] Ms Green responded on 18 January denying the claims and offering early mediation. On 24 January Ms Stevens wrote to Ms Green advising her among other things that if Ms Green failed to act in good faith then she may have no option but to resign. In response to Ms Green's offer to attend early mediation Ms Stevens advised that if no resolution could be reached the mediation may be a forum for unresolved issues.

[64] In her response on 27 January Ms Green addressed each of the points raised by Ms Stevens in her correspondence. In her summary Ms Green denied embarking on a campaign to cause Ms Stevens to resign and expressed her view that she did not want Ms Stevens to resign, she wanted her to perform her duties at the expected standard and adhere to the "5 day rule".

[65] Ms Green denied knowing Ms Stevens was suffering from stress when she raised the new allegations on 22 December. Ms Green referred to Ms Stevens email to her on 21 December where Ms Stevens requested annual leave for 22 December with a return to work date of 16 January. Ms Green pointed out that Ms Stevens had advised her in the email that “Following today’s meeting I feel rather stressed after this process...”. Ms Green also pointed out to Ms Stevens that in her response approving the days annual leave Ms Green emphasised with Ms Stevens when she stated:

I understand any employment process has the potential to cause stress which has probably been exasperated by the impending Christmas/New Year break. I too have found the employment process stressful but the issues must be dealt with.

[66] Ms Green recognised her obligation to investigate a claim by an employee that they are suffering from stress. She enclosed a copy of the “*Guidance Note for General Practitioners*” which she had downloaded from the WorkSafe website. Because the medical certificate Ms Stevens had provided was general in nature, Ms Green asked Ms Stevens to provide her doctor with a copy of the guidelines so the medical certificate could be particularised and asked for the particularised medical certificate to be provided to her.

[67] In her response Ms Green also asked if Ms Stevens would be willing to attend a registered medical practitioner at her [Ms Green’s] cost in accordance with section 16(c) of the employment agreement. Ms Green finished by inviting Ms Stevens again to participate in mediation.

[68] Further correspondence was exchanged but was not helpful in resolving matters between Ms Green and Ms Stevens. On 2 February Ms Stevens resigned from her employment stating that Ms Green’s actions (and inactions) from November 2016 had followed a course of conduct with the deliberate and dominant purpose of coercing Ms Stevens to resign.

[69] I am not satisfied Ms Green followed a course of conduct with the dominant purpose of coercing Ms Stevens to resign. Ms Green had genuinely held concerns about mistakes Ms Stevens was making on client files. Ms Green was entitled to raise those concerns and to have them addressed in accordance with the terms of the employment agreement.

[70] If I were to find fault in Ms Green's process it would be the failure to allow Ms Stevens an opportunity to demonstrate any improvement in her adherence to the "5 day rule" after she had clarified the rule in writing.

[71] A number of the mistakes identified by Ms Green in her 22 December Memo related to breaches of the rule. These mistakes were made before Ms Green had clarified the rule in writing.

[72] However, the parties were not able to address these issues because Ms Stevens pre-empted the process by resigning from her employment. This was despite Ms Green offering twice to attend mediation in an effort to resolve matters between them.

[73] In these circumstances I find the fault in Ms Green's process to be minor and could not be said to have caused any unfairness to Ms Stevens such that Ms Stevens' resignation could be considered anything other than voluntary.

Did Ms Green breach her statutory duty of good faith?

[74] The second limb to Ms Stevens claim is that Ms Green breached her statutory obligations of good faith which constitutes a breach of duty owed to her.

[75] Ms Stevens says that after telling Ms Green on 21 December that she was stressed Ms Green sent a courier package containing a large bundle of documents and setting out a further 14 errors which Ms Green alleged constituted misconduct. Ms Stevens says the errors all predated the warning given to her on 21 December and constituted a breach of good faith because this demonstrated an intention by Ms Green to keep the pressure on Ms Stevens despite Ms Stevens being on annual leave.

[76] Ms Stevens also claims Ms Green breached the implied duty to provide a safe working environment.

[77] I am not satisfied Ms Stevens has established any breach of duty on the part of Ms Green. Ms Stevens had been critical of Ms Green for not raising issues in a timely manner during the first disciplinary process. With the summer break upon them Ms Green wanted to ensure the concerns she had identified were dealt with in a more

timely fashion and was at pains to provide Ms Stevens with the information well in advance of the meeting on 18 January.

[78] Ms Stevens raised concerns about suffering from the effects of stress after her first appointment with her doctor. At that time Ms Green put a process in place to investigate that with a view to addressing it. Ms Green was unable to progress her investigation because Ms Stevens resigned.

Conclusion

[79] I find Ms Stevens has not established to my satisfaction that Ms Green embarked on a course of conduct that crossed the line to become dismissive or repudiatory conduct sufficient to justify the termination of the employment relationship.

Did Ms Stevens breach of statutory duty of good faith?

[80] The duty of good faith in employment relationships is a mutual obligation. Ms Green claims Ms Stevens failed to adhere to her obligation of good faith when she resigned without notice and failed to advise Ms Green that she had accepted alternative employment.

[81] When Ms Stevens resigned she did not expressly provide the one month's written notice as required by the employment agreement. However, her letter states that she is not well enough to work out the notice period.

[82] Ms Green seems to have accepted this position as she paid Ms Stevens her final pay on 10 February. There is no correspondence to support any claim that Ms Green wanted Ms Stevens to work out her notice period.

[83] There is no duty on an employee to advise an employer that they have accepted alternative employment.

[84] Ms Green has not established to my satisfaction any breach of good faith on the part of Ms Stevens.

Costs

[85] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Green shall have 28 days from the date of this determination in

which to file and serve a memorandum on the matter. Ms Stevens shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[86] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority