

the tasks undertaken for the residents are generically the same. Further, the respondent says Mr Subash advised he did not want to work in the hospital and when he asked the General Manager, Mrs Williams, what notice he needed to give her, she advised him the notice period was two weeks. However, she said she would accept his resignation by telephone if he was insistent upon resigning. Mrs Williams said Mr Subash told her he would not be returning to work.

[4] Given the respondent's view that it was entitled to transfer the applicant's shift to where his time would be more beneficial to residents, it declines to meet the remedies sought. Further, it denies any breach in respect of the applicant's employment agreement.

Essential facts

[5] There is no dispute over dates between which Mr Subash was employed nor over his competence as a carer, there having been no problems with his work for residents over the almost one year of his employment.

[6] Mr Subash said he was told by Karen Lake when he started work that he would not be working in any other part of the complex other than the rest home wing. Further, he says that at no time was he ever rostered to work anywhere else. He said his work was restricted to the rest home because of his age and inexperience and that Ms Lake specifically mentioned the hospital and dementia unit.

[7] On 1 May 2008 Mr Subash was telephoned by Ms Trish Shepherd and told his shift was to be discontinued in the rest home and was being transferred. He asked to whom he should speak about this and was given Mrs Williams name and contact details. The applicant duly spoke to Mrs Williams who confirmed the shift was discontinuing and he could transfer his hours to the hospital and could increase his hours if he wished. Mr Subash says he asked Mrs Williams what other options he had and says she told him there were no other shifts available. He then told Mrs Williams he would need to resign and Mrs Williams says she accepted his resignation over the telephoned.

[8] Mr Subash said he felt bullied by Mrs Williams and he started these proceedings *to try and resolve the situation and so I could clearly understand what was happening as I am new to employment matters and I felt I needed help.*

[9] Ms Kime, who arranged and oversaw staff training under the ACE Scheme and other related matters such as lifting and handling residents, told the Authority that she makes it clear to all new staff that while they may have *a preference as to where they want to work, the rest home, the hospital or the dementia unit, they accept that they have to work where they are needed.*

[10] Ms Lake says *I said that he would be trained in the rest home as this was the easiest area to learn in. At no time did I say he would not be required to work in other areas of the facility I would not have employed Munesh if he was unsuitable to work as a caregiver anywhere in the facility. If he was suitable to work in the rest home he was suitable to work in the hospital.*

The investigation meeting

[11] At the investigation meeting the Authority heard from the applicant in person and for the respondent evidence was presented by Ms Keri Lime, Ms Karen Lake and Mrs Andrena Williams.

The legal position

[12] The initial onus of proof in a claim of constructive dismissal rests with the applicant. It must first be established a dismissal has occurred after which the onus of justification for the dismissal passes to the respondent.

Issues

[13] To resolve this matter the Authority needs to make findings on the following issues:

- Was the respondent entitled to re-deploy the applicant when the shift in the rest home was discontinued; and
- Did the respondent convey to the applicant he would be employed only in the rest home; and
- Did the applicant freely offer his resignation; and
- Was the applicant unjustifiably, constructively dismissed; and
- If so, what if any remedies, are due to him.

Analysis and discussion

[14] Mr Subash is an able university student from overseas. He is also a gentle mannered young man. The two witnesses for the respondent who knew him well regarded him as a competent and friendly caregiver to residents. When initially employed Mr Subash worked two three hour shifts from 8am to 11am on Saturday and Sunday. He later reduced his involvement to the Saturday shift only.

[15] At the heart of this matter is what I believe is a misunderstanding of the information Ms Lake gave Mr Subash upon starting the job, namely, that he would be trained in the rest home section as this would be the easiest area in which to learn the job. The applicant appears to have understood that he was to remain as a caregiver in that section of the facility. During his time at Ilam Lifecare he was not asked to cover a shift in any other area which appears to have confirmed his view that his role was confined to the rest home.

[16] I am satisfied the respondent has the ability to transfer staff to an area where their skills can be utilised to better advantage of residents and the decision to disestablish the shift Mr Subash was working in the rest home was open to the respondent. That decision clearly caused the applicant some anxiety and might have been handled more constructively. However, the refusal of Mr Subash to move to the hospital and his request regarding how he was to convey his resignation, makes it clear the relationship ended at his initiative.

[17] The fact Mrs Williams accepted his resignation verbally is not relevant given Mr Subash had told her he would not be returning to work.

[18] The post resignation incident when the applicant returned to the rest home to visit a resident was very poorly handled by the respondent. Mrs Williams says she was *direct rather than aggressive* in dealing with this issue. On this I prefer the evidence of Mr Subash but as the incident occurred after the applicant's resignation, the Authority is unable to consider the clear offence taken by Mr Subash.

Determination

[19] Returning to the issues set out above in this determination I find:

- The respondent was entitled to re-deploy the applicant; and

- The respondent did not convey to the applicant that he would be employed only in the rest home; and
- The applicant declined to return to work and tendered his resignation. It was a choice he was free to make; and
- The applicant was not constructively dismissed and does not have a personal grievance.

[20] The Authority is unable to assist Mr Subash further.

Costs

[21] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority