

Determination number: WA 62/07

File number: 5046426

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

*Under the Employment Relations Act 2000*

BETWEEN Lynn Turchie (Applicant)  
AND Prestige Limited (Respondent)  
Member of Authority: P R Stapp  
Representatives: David Oliver for Applicant  
Tony Snell for Respondent  
Investigation Meeting: Napier, 13 March 2007 and 26 April 2007  
Submissions received: By 22 March 2007  
Determination: 26 April 2007

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

[1] This is an employment relationship problem about the circumstances in which Ms Turchie's employment came to an end with Prestige Limited ("Prestige"). She claimed she had no choice but to leave her employment. The claim is denied by Prestige and it says Ms Turchie decided to leave by resigning. It denied that Ms Turchie was dismissed in any way.

[2] Prestige Limited accepted it did not provide Ms Turchie with an intended employment agreement as required. It claims this was due to an oversight. Ms Turchie is seeking a penalty against the company for the breach.

### **The issues in the employment relationship problem**

[3] There is an issue about what was said during a discussion between Ms Turchie and Mr Treadway, Prestige's general manager, on 16 June 2006. No one else was present at the meeting. Thus this is a credibility issue.

[4] Was the applicant dismissed or did she resign or did she decide to leave? If she resigned, what was the breach by the employer that would have made the resignation foreseeable?

[5] Should Prestige be fined a penalty for failing to provide the intended employment agreement to Ms Turchie when she became a permanent employee on 1 March 2006?

### **The facts**

[6] Ms Turchie commenced her employment with Prestige Limited as a temporary employee through Able Personnel ("Able's") on 18 January 2006. There was a letter of appointment. Prestige's contact at Able was Sonia Henderson, Able's manager. Ms Turchie commenced a full time permanent position with Prestige on 1 March 2006. She was not given an intended employment agreement despite saying she requested one. Prestige says this was overlooked and Ms Turchie had the responsibility to provide them for new employees from a template on her computer.

[7] In May 2006 performance issues were raised by Mr Treadway with Ms Turchie and Nicky Clark the office manager. The issues included: Ms Turchie's responsibility to provide any new employee with an induction pack and a copy of Prestige's employment agreement, recording and paying sick leave arrangements, clocking in and out, payroll details and errors, training observations between Ms Turchie and Ms Clark and agreement needed on any changes. Mr Treadway asked them to cooperate and sort their problems out constructively. The issues were recorded in a letter dated 11 May 2006 written by Mr Treadway. Ms Turchie was stressed and upset by the situation. She put the letter in a file.

[8] Later Mr Treadway telephoned Sonia Henderson on what he should do about performance issues in regard to Ms Turchie. She told him that because she was not a temp he had to take responsibility for dealing with any issue.

[9] On 16 June 2006 Mr Treadway met with Ms Turchie in her office after he became aware of a payroll problem from the company's accountant. He says he informed one of the directors about the problem and that he was going to discuss it with Ms Turchie. Ms Turchie and Mr Treadway disagree over what was said at the meeting. There were no witnesses to the meeting.

[10] Ms Turchie says Mr Treadway "*swept*" in to her office on 16 June 2006, closed the door and offered her one week's pay in lieu of notice and three to four weeks' pay, otherwise she would have to face the stress of a disciplinary process and performance management, which would result in her leaving anyway. She says she was requested to sign a "*litigation letter*", if she accepted the offer. Ms Turchie says the meeting was unpleasant and she says she was told by Mr Treadway that he and the management of the company did not have any confidence in her work. She suspects an argument she had the day before with one of the company's director's over signing cheques and a desire by them to replace her with Ms Clark were at the root of Mr Treadway's action to get rid of her. She also says that Mr Treadway, upon getting legal advice from his lawyer, set about to put the best light on the situation because of his poor management skills. Also she says she was required to train someone else, which supported her conclusion Prestige did not have confidence in her. She says an email from Mr Treadway referred to by the parties supports her on this, but it was not produced. This is denied by Prestige, although Mr Treadway accepted he emailed the applicant and says it must be considered in context that she was capable of training to carry on working.

[11] Mr Treadway denied Ms Turchie's version of the discussion. He says that he went to Ms Turchie's office to gather information on areas of concern and to raise with Ms Turchie her performance and discuss the necessary standard required. He says it was a conciliatory and non-threatening meeting but she became too emotional. He says it was Ms Turchie who stated that "*If my best is not enough, I want to resign*". She denied saying that. He says she requested a week's notice and time to get other employment and sought assistance from him. He says he tried to dissuade her and she became emotional. He told her she had time to think about leaving. She said the job was affecting her health and "*it was a horrible place to work*".

[12] She says she decided to leave and take the one week's pay in lieu and 3 or 4 weeks wages offered by Mr Treadway but changed her mind over the weekend. Mr Treadway denied he made any such offer. Her decision was not what he wanted and he told her she could return to work on Monday after she had an opportunity to calm down.

[13] However, after the meeting Ms Turchie was upset and this was witnessed by some other employees, Fred Lancaster, Alexia De La Haye and Michelle Herndell. She left work.

[14] Ms Turchie's partner, Mr Booker, and Mr Treadway made contact with each other over the telephone on the Friday. Ms Turchie's keys and uniform were returned by Mr Booker on Monday 19 June. By that time Ms Turchie had decided that she would not return to work.

[15] Ms Turchie never returned to work. There was no further direct contact made between Ms Turchie and Mr Treadway. Prestige continued to pay Ms Turchie until 4 July 2006. There was no letter of resignation from Ms Turchie. Mr Treadway says that he did request Ms Turchie to sign a standard resignation letter if she wished to pursue her decision to leave.

[16] Ms Turchie telephoned Ms Henderson at Able's with her version of events that she had been "*fired*". Mr Treadway replied to Ms Henderson's message left for him to ring her. He explained Ms Turchie had not been "*fired*" and he agreed she could help to mediate. Ms Henderson attempted to mediate but Ms Turchie declined/refused to allow her to become involved in the matter because she says Ms Henderson was not impartial because Ms Henderson called Mr Treadway a "*nice*" man. The fact is that Ms Henderson was told each other's version of events by them. She recognised a problem. She was approached for help and she tried to help.

[17] Ms Turchie then contacted a representative (Megan Williams) for help over the weekend 17-18 June. Megan Williams raised a personal grievance with a \$25,000 compensation claim on 21 June, and Prestige's lawyer replied fully on 3 July 2006. An open attempt to settle what Prestige considered was a misunderstanding was declined by Ms Turchie who by that stage was definitely not looking to return to the workplace.

[18] On 3 August 2006 Ms Turchie obtained a medical certificate in regard to a consultation she had with her GP on 10 July 2006 on the effects of her having to leave her job. The medical certificate recorded that a consultation occurred and what she told her GP.

**Who do I believe about what was said?**

[19] I accept what Mr Treadway says because it seems more probable, that is it was more likely than not, that his version was what happened. What Ms Turchie says happened could be true, but

this is a difficult case, and while she might be right, it is more than likely that Mr Treadway is right because of the following matters.

[20] I have reached the decision to prefer Mr Treadway's evidence because Ms Turchie exaggerated one of the things she said happened during the discussion with Mr Treadway when she talked to Ms Henderson. Ms Turchie retracted saying that she had been "*fired*" after being so emphatic that she had been fired. Indeed her claim from being "*fired*", dismissed and resigned has changed throughout the events and finally she has relied upon having no other option but to leave without any letter of resignation. This I conclude was a subjective conclusion of her own and if she changed her mind over the weekend it was influenced by legal advice from her first legal advisor (Megan Williams). I am supported in reaching this conclusion by a letter Ms Williams wrote on Ms Turchie's behalf. Also there is an inconsistency in Ms Turchie's evidence that has not been adequately explained. That is she says she at first accepted the alleged offer and that she had to sign a "*litigation*" letter and then changed her mind. This does not fit with what she says she relies upon immediately after the meeting.

[21] Ms Turchie acknowledged she had no proof of her "*suspicion*" that the directors and/or management wanted to get rid of her and replace her with Ms Clark. Ms Clark had previously been employed as the officer manager. Ms Clark does not appear to have been very popular or even liked. She was at the time engaged on a contract to fix some telecommunication problems. When Ms Turchie decided not to return to work Mr Treadway approached Ms Clark to help out on the pay roll, which had to be completed by Tuesday 20 June. Ms Turchie's position was ultimately filled by another person who subsequently left. An ulterior motive to replace Ms Turchie with Ms Clark has not been established.

[22] Ms Turchie had once before wanted to leave over performance issues that were raised in May and she was convinced by Mr Treadway not to leave at that time. Also, at that time, she started to look for another job through another agency. She was also upset.

[23] Ms Turchie's updated CV was produced for the Authority's investigation and used by her to apply for jobs after 16 June. In it she said that her health was excellent, whereas her doctor had diagnosed stress induced headaches, insomnia and anxiety in the same period.

[24] Ms Turchie was witnessed upset by some other employees. None of the witnesses overheard the disputed discussion that gave rise to Ms Turchie getting upset. Ms Turchie has relied upon

inferences to be taken from what they saw and what she told them. Given that Ms Turchie got upset on the earlier matters raised with her in May her upset in June could have been accounted for by either of the versions of the discussion. Her upset does not mean her version is to be preferred. One witness Ms Michelle Herdell recalled Ms Turchie coming out of the meeting and saying that “*she felt that the company did not have confidence in her*”. This was the applicant’s view of the matter and the comment was made immediately prior to Ms Turchie leaving. That she felt that the company had no confidence in her contrasts with Ms Turchie’s evidence now that she was told that the company had no confidence in her, which is denied by Mr Treadway.

[25] I have given more weight to the above factors than the notes Ms Turchie kept. This is because Mr Treadway had also advised his lawyer of his version of the events and had the events recorded in correspondence to balance the difference between him and Ms Turchie.

[26] Furthermore Ms Turchie was emphatic that she was telling the truth. I have noted Mr Treadway has not referred to much detail, as Ms Turchie did. Equally Mr Treadway has been consistent with his denials and his version of the discussion. It was submitted that his demeanour during the Authority’s investigation was such that he was an unreliable witness. I found him endeavouring to be careful, cautious and clear. It falls short of supporting him being unreliable. Given this and that Ms Turchie retracted saying she had been “*fired*” to Ms Henderson, and Ms Turchie’s version of events is not fully accepted by other witnesses present after the meeting, Ms Turchie’s emotional state makes it possible she would not have recalled everything as precisely that she believes she does now. She has become entrenched, especially saying emphatically she is telling the truth, and believes what happened rather than what actually happened.

[27] Ms Turchie’s decision to leave would have been more than reasonable if Mr Treadway had put to her an exit arrangement alongside any comment that put her under pressure of a performance review and told she would have to leave anyway. In such a situation, I accept that such behaviour would not have been the action of a fair and reasonable employer. However she has, as I said, not proved that her employer acted this way. Her reference to him making it “*so bad [she] had to leave*” is more likely to have related to her upset about him raising problems with her about her work with the payroll considering it had happened a short time earlier. An employer is entitled to raise performance issues. She considered her work was satisfactory because no one had raised her performance with her since 10-11 May and she says that Ms Clark even apologised to her about her performance soon after their meeting in May with Mr Treadway. The fact that Mr Treadway went to her office to discuss matters raised with him by the accountant and without any arrangements for

something more formal suggests that he was trying to keep the issues informal and consistent with gathering information. This evidence makes it likely there were other options.

[28] Both parties have relied upon their advisors. Initially Ms Turchie's first legal advisor (Megan Williams) raised a personal grievance, which in the absence of Ms Turchie providing a written resignation, has caused the problem to focus on legal causes of action and confused the situation, and did not help resolve it. She cannot be critical of the respondent doing the same when a substantial claim for money was made. Mr Treadway was entirely entitled to use his lawyer faced with a \$25,000 claim from Ms Turchie's representative (Megan Williams).

[29] Ms Turchie says that Mr Treadway said to her he had "fired" another person. He denied saying that but accepted another employee was made redundant from another branch. It is very difficult to draw any inferences from an attempt by Ms Turchie to use similar fact evidence when the full detail and context is not available. It does not prove that Mr Treadway had poor management skills to make it likely that he wanted to remove her by relying on his lawyer to fix a problem, which Ms Turchie says was of his own making.

[30] Mr Treadway tried to contact Mr Booker when he learnt Mr Booker tried to contact him. Mr Treadway's action was consistent with an employer following up a concern about an emotional employee instead of having any intention of forcing the applicant to leave her work. Mr Booker confirmed that Mr Treadway wanted the applicant to return to work on Monday even although Mr Booker and Ms Turchie were saying she would not return. This supports Mr Treadway that he asked the applicant to reconsider her position and tell him what she was going to do. Moreover her evidence is now that she changed her mind over the weekend and decided to leave instead of accepting an alleged exit package. Mr Treadway always denied making such an offer and Ms Turchie's evidence is inconsistent with her and Mr Booker's position at the time. Also, Mr Booker contradicted the applicant when he told the Authority that he did not believe that Ms Turchie had looked for alternative employment that she had referred to in her notes about the earlier events in May.

[31] Ms Turchie says that Mr Treadway's lawyer's involvement was in some way an attempt to put the best light on his poorly conducted management practises and cover up the exit offer. I have rejected this claim. First, Mr Treadway immediately sought help from a person who was known to both parties to help and give some assistance: Ms Henderson. Secondly, the evidence does not support the suggestion because Mr Treadway was relying on his own version of events given to his

lawyer and instructions given to include it in his statements and correspondence prepared by his lawyer on his behalf. Furthermore he has acknowledged to the Authority that an intended employment agreement was not provided and that he overlooked providing it and accepted that it was the employer's responsibility to provide it.

[32] It appears no copy of the training email referred to by both parties has been kept. However, if it did relate to a request for Ms Turchie to train other employees in the future it supports an indication that there was an expectation that Ms Turchie would still be working. Indeed none of the other employees gave any evidence to the contrary, i.e. that there was any desire by anyone wanting to see her leave.

[33] Ms Turchie belatedly raised the matter of an argument with one of the directors over a cheque that she suspected was a cause of the directors' loss of confidence in her. There was no evidence that Mr Treadway was aware of it or that he was in some way linked to it or that he took any action related to it.

[34] It is most unlikely that there were plans to replace Ms Turchie with Ms Clark. In the first place Ms Clark was employed on a telecommunications project, which was not challenged. Someone was needed quickly for the payroll that had to be done and a person was needed who could do the work when Ms Turchie made it clear she was not returning. This was only for three months until another person was employed as a permanent replacement. Prestige therefore has been able to explain Ms Clark taking over.

### **Was the employer responsible for Ms Turchie deciding to leave?**

[35] The employer was entitled to raise problems relating to work performance with an employee. While these matters might have ultimately disadvantaged Ms Turchie, they were not unjustified. Therefore, Mr Treadway cannot be held responsible for Ms Turchie's decision to leave that could only relate to a discussion over some issues on the payroll and performance that Ms Turchie did not like being raised. That is not to say of course she did not have an employment relationship problem, when she did. It means the remedy cannot be found in a personal grievance claim. In these situations, particularly in a one on one conflict without direct witnesses and difficulties with evidence of any probative value, the manner in which the matters are pursued to resolve them becomes acutely important.

[36] I cannot determine from the telephone call, made by Mr Treadway to Ms Henderson, enquiring about what he should do in regard to performance issues, in any way makes it likely that he intended to exit her from her employment. Ms Henderson's evidence did not support any such conclusion except that Mr Treadway had to take responsibility because Ms Turchie was an employee. There was no evidence of any awareness by Ms Henderson that Mr Treadway was approaching the matter to remove Ms Turchie.

**Could the employer have done more given Ms Turchie's decision to leave?**

[37] The employer proposed that Ms Turchie could return to work on Monday 19 June, especially since she was upset and probably emotionally affected by the discussion. Mr Treadway genuinely contacted a person, known to both parties, and agreed for Ms Henderson to assist. Prestige continued to pay Ms Turchie until 4 July when she was not at work. The timing was consistent with Mr Treadway's attempts to get her to return to work on the Monday before he even engaged legal counsel to assist him. This is consistent with Mr Treadway's evidence that if Ms Turchie decided to leave she would need to sign a template resignation letter. Whatever the name given to this letter, which Ms Turchie says Mr Treadway called a "*litigation letter*", on its own, does not support her position.

[38] Mr Treadway's position is supported further by the following:

- He spoke to Mr Booker confirming the applicant's position was still open and she should return to work.
- He spoke to Ms Henderson. There is no record from her that he referred to any termination of employment and he confirmed Ms Turchie's position was still open and agreed to allow Ms Henderson to be involved in a mediation to try and resolve any differences.
- Ms Turchie remained on the payroll even before a lawyer was engaged.
- Mr Treadway engaged a lawyer in response to a considerable monetary claim and sought to try and resolve matters with open offers without conceding that there was any personal grievance.

[39] Ms Turchie is critical that Prestige did not allow greater time to cool off. Responsibility cuts both ways on this. A clear message was given to Ms Turchie that her position remained open and that she had time to respond on what she wanted to do. However, she had made her mind up by Friday, or over the weekend. She told Ms Henderson that under no circumstances would she return

and would not be involved in a mediation with Ms Henderson. Such a cooling off period would have had no impact in those circumstances. Ms Turchie's reliance on her legal representative (Megan Williams) would have put paid to any cooling off period, especially as the advice focussed on a personal grievance claim, instead of trying to work through an employment relationship problem that she had some responsibility to help resolve too. This could have been constructively approached in a much different way instead of a personal grievance claim at that point in time. This was especially so when there were no witnesses to the meeting on 16 June and one person's word against another makes any legal action risky.

### **Prestige's reasons for failing to provide an intended employment agreement**

[40] Prestige has breached the Act and did not provide Ms Turchie with an intended employment agreement under the Act when she started on 1 March 2006. I accept that it was overlooked by Mr Treadway. Ms Turchie acknowledged he would have been busy. This is not enough for the employer to mitigate its responsibility when it was under an obligation to provide one. These are not defences, especially where the employer has arrangements for employment agreements to be provided to employees and accepted it was the employer's responsibility. This is a matter for a penalty but it cannot be said to have caused or contributed to this employment relationship problem, and because there were arrangements in place for new employees to be provided with a template agreement any penalty would be at the very much lower end of the scale. Prestige Limited is to pay the Crown a penalty of \$500 for its failure to provide an intended employment agreement as required.

### **Orders**

[39] The Applicant's claim for personal grievance is dismissed.

[40] Prestige Limited is to pay the Crown a penalty of \$500.

**Costs**

[36] Costs are reserved.

P R Stapp  
Member of the Authority