

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 27
5305576

BETWEEN KATE VAN HALEWYN
 Applicant

A N D SAVEMART LIMITED
 Respondents

Member of Authority: Philip Cheyne

Representatives: Georgina Burness, Representative for Applicant
 Tom Doonan, Representative for Respondent

Investigation Meeting: 8 February 2011 at Christchurch

Further Information: 11 February 2011 from the Respondent

Determination: 11 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kate Van Halewyn worked fulltime for Savemart Limited from June until September 2009 when she resigned after an exchange with her manager over time off work. Ms Van Halewyn says that the circumstances are such that she was either unjustifiably dismissed or unjustifiably disadvantaged. Savemart says that Ms Van Halewyn simply resigned.

[2] To resolve this problem I need to explain precisely what happened on 16 September 2009 regarding the resignation before assessing whether any grievance arises. There are several other matters raised by Ms Van Halewyn that help explain the events on 16 September to which I may also have to refer.

[3] As I understand the claim by Ms Van Halewyn, the alleged unjustified disadvantage is simply another way of characterising her dispute about the termination of her employment.

What happened on 16 September?

[4] Ms Van Halewyn worked Monday to Friday each week starting at 7.00am. Her supervisor was Helen Rudkin. Ms Van Halewyn found Ms Rudkin difficult to deal with.

[5] On Wednesday 16 September Ms Van Halewyn rang Ms Rudkin at about 7.00am and told her that she would not be coming to work that day as she had received a phone call at 2.00am from her father in Waimate saying that her mother had fallen and was in hospital. Ms Van Halewyn said that she needed to care for her mother who was to be released from hospital later that day. Ms Rudkin accepted this without demur.

[6] In fact the excuse Ms Van Halewyn gave was not true. She needed time off work to care for her adult son but she thought that Ms Rudkin would be more sympathetic if she pretended to need time off to care for her mother.

[7] Later on 16 September, sometime in the middle of the afternoon, Ms Van Halewyn arrived at the workplace. She asked Ms Rudkin if they could speak and was directed to the staff room. No-one else was present. Ms Van Halewyn's evidence, which I accept, is that she was not there for the purpose of starting work but simply to speak to Ms Rudkin about the time off that she required to attend to her son's issues. However, Ms Van Halewyn maintained the pretence about needing to care for her mother. There is a dispute in the evidence between the two women over what precisely was said. Ms Van Halewyn's evidence is that she told Ms Rudkin that she might be back at work on Friday but she would definitely be back no later than Monday. Ms Rudkin's evidence is that Ms Van Halewyn said she had to care for her mother saying *It could be 3 weeks or it could be 3 months so I will have to resign*. On balance I prefer Ms Van Halewyn's evidence. She needed several days off work to deal with some personal issues regarding her son. She did not want three weeks or three months off work and there is no reason why she would have exaggerated the time needed.

[8] It is common ground that Ms Rudkin suggested other options to Ms Van Halewyn such as getting her father, another family member or a carer to care for her mother. Ms Van Halewyn rejected these other options. I further find that Ms Rudkin made it clear that it was not convenient for business reasons for Ms Van Halewyn to have time off. She said things such as *I have a business to run and I need the 4th sorter here*. Ms Van Halewyn's evidence, which I accept, is that she then said *What else can I do? I appreciate your position but this is my family. What do you want me to do? Resign?* Ms Rudkin said that she would need to get someone else in if Ms Van Halewyn could not be there so *that* (resignation) would be the only way to deal with the situation. Ms Van Halewyn said *Well, I don't have a choice then, do I?* Ms Rudkin responded *So you want to resign?* Ms Van Halewyn replied *No, I don't want to but it looks like I have to doesn't it?*

[9] There is a dispute in the evidence about whether Ms Van Halewyn asked for some paper to put her resignation in writing (Ms Rudkin's evidence) or whether Ms Rudkin said that a written resignation was required and went and got some paper (Ms Van Halewyn's evidence). Again I prefer Ms Van Halewyn's evidence. There was no reason for her to initiate an exchange about putting her resignation in writing. When Ms Rudkin returned with the paper Ms Van Halewyn wrote out a resignation as follows:

16-9-09

To whom it may concern.

I regretfully find it necessary to relinquish my position as a sorter at Savemart ...owing to health issues relating to my direct family which I need to address. As this situation is current and urgent I am unable to work out my notice.

Please accept my sincere apologies for any inconvenience this undoubtedly has caused

Sincerely

Kate Van Halewyn

[10] There is a dispute about whether Ms Van Halewyn was then told to leave the premises via the staff door to avoid others seeing her but it is not necessary to resolve that issue. Ms Van Halewyn says that she was threatened with losing wages in lieu of notice while Ms Rudkin says that she mentioned that to try and dissuade Ms Van Halewyn from resigning without notice. In any event Ms Van Halewyn left

and was later paid her holiday pay and for her time worked. There is also a dispute about whether Ms Rudkin told Ms Van Halewyn to get back in touch once things were resolved but I find that nothing to this effect was said.

[11] On or about 20 September Ms Van Halewyn spoke to Scott, a Savemart manager but did not indicate to him that there was anything untoward with her apparent resignation. Savemart also responded to a WINZ request for verification of earnings at about the same time.

Raising the grievance

[12] Ms Van Halewyn's evidence, which I accept, is that she did not intend to do anything about the circumstances of her departure from Savemart until she spoke to a friend who suggested she get some advice. That resulted in Ms Van Halewyn seeing a representative who wrote on 12 November 2009 to Savemart raising a grievance essentially about Ms Van Halewyn being forced to resign. That drew a response dated 23 November 2009 denying any basis for a grievance.

[13] Nothing more happened until May 2010 when these proceedings were initiated. At that point it emerged from material attached to the statement of problem that Ms Van Halewyn had not told Ms Rudkin the true reason why she needed time off.

[14] Despite mediation the parties have not been able to resolve this problem.

Constructive dismissal?

[15] In *Auckland etc Shop Employees etc IUOW v. Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases where the employer gives the employee a choice between resigning or being fired, or the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign.

[16] Most constructive dismissal claims are based on an alleged breach of duty. Although no submissions of a legal nature were made I think I should first analyse the problem as a breach of duty claim. Not every breach of duty is sufficiently serious to give rise to a personal grievance for constructive dismissal. In *Auckland Electric*

Power Board v. Auckland Provincial Districts Local Authorities Officers IUOW Inc
[1994] 1 ERNZ 168, the Court of Appeal said:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[17] The case for Ms Van Halewyn indicates that Ms Rudkin was unsympathetic about the family emergency that she claimed required her attention at the expense of her work obligations. Rather, Ms Rudkin insisted that Ms Van Halewyn had to meet her work obligations. That does not amount to a breach of duty on the part of Savemart. Ms Van Halewyn did not have a legal right to any paid or unpaid time off. It is easy to characterise Ms Rudkin's response as lacking in compassion but she was lawfully entitled to prefer the requirements of the business and insist on the proper performance of Ms Van Halewyn's obligations to Savemart. I find that there was no breach of duty by Savemart.

[18] There is no evidence that Savemart embarked on a course of conduct with the deliberate and dominant purpose of coercing Ms Van Halewyn to resign. While I accept Ms Van Halewyn's evidence to the effect that she found Ms Rudkin difficult and demanding as a supervisor, there is no reason to think that Ms Rudkin much less Savemart intended or even wanted her to resign before Ms Van Halewyn raised that as a possibility on 16 September 2009.

[19] I do not accept that Ms Van Halewyn was given the choice of resigning or being fired. Ms Van Halewyn's evidence is that, although she cannot recall exactly the words used by Ms Rudkin, she was given the impression that Ms Rudkin wanted her to resign. I do not accept this evidence. The initiative for a resignation as the way out of the impasse about Ms Rudkin refusing to allow Ms Van Halewyn time off first came from Ms Van Halewyn. Ms Rudkin, as she was entitled to do, was simply insisting on Ms Van Halewyn performing her work. Despite that, Ms Van Halewyn was adamant about needing the time off. The only way she could secure that

objective was by resigning. This is not one of those cases where a dismissal has been dressed up as a resignation.

[20] Sometimes a dismissal arises when an employee apparently resigns as an emotional outburst in the heat of the moment without intending that to be taken literally, promptly makes it clear that they did not mean to resign but the employer holds them to the apparent resignation: see *Boobyer v. Good Health Wanganui Ltd* (unreported, 24 February 1994, WEC3/94). Those principles do not apply here. Ms Van Halewyn intended to resign because that was the only way she could have time off to attend to personal issues. I also note that some time went by before there was any further contact from her calling her resignation into question.

[21] For the foregoing reasons I do not accept that Ms Van Halewyn has a personal grievance against Savemart Limited.

Summary

[22] Ms Van Halewyn resigned. She does not have a valid personal grievance against Savemart Limited.

[23] Because the respondent was not legally represented there may be no legal costs to claim but I will reserve costs just in case. Any claim for costs should be lodged with the Authority and served on the other party within 28 days who may then lodge and serve a response within a further 14 days.

Postscript

[24] Because it was not possible to read part of the copy of a faxed WINZ form provided to the Authority by Savemart I asked Mr Doonan to provide me with the original form as received in Savemart's office. That and a copy of the employment agreement were received by the Authority on 11 February 2001. I confirm that the form as received by Savemart from WINZ is also unreadable. Savemart has not masked or obscured any information.

Philip Cheyne
Member of the Employment Relations Authority