Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 178
5605965

	BETWEEN	DIANE WEALLEANS Applicant
	A N D	A FEMININE FINISH LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	J Goldstein, Counsel for Applicant P Zwart, Counsel for Respondent
Investigation Meeting:	29 September 2016 at Christchurch
Submissions Received:	29 September 2016 from both parties
Date of Oral Determination:	29 September 2016
Date of Written Determination:	3 October 2016

DETERMINATION OF THE AUTHORITY

A. Diane Wealleans was unjustifiably dismissed by A Feminine Finish Limited.

B. The parties penalty actions for breaches of good faith and for failing to provide a written employment agreement are dismissed.

C. I decline to make any award of lost wages pursuant to s.123(1)(b) of the Employment Relations Act 2000.

D. There is an order for payment by A Feminine Finish Limited to Diane Wealleans the sum of $15,000 compensation for hurt and humiliation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

E. Costs are reserved.

Non Publication Order

[1] There is a non-publication order pursuant to clause 10 Schedule Two of the Employment Relations Act 2000 pertaining to medical certificates and reports of the applicant and others.

Employment relationship problem

[2] Diane Wealleans alleges she was unjustifiably dismissed by text message on 24 December 2015 following a period of ill health. She submits her employer knew or ought to have known that she was unwell and had not abandoned her employment.

[3] Her employer, A Feminine Finish Limited, submits Ms Wealleans abandoned her employment because she had not attended work since 10 December 2015 and had failed to communicate the reasons for her absence.

Agreed Facts

[4] Ms Wealleans was employed as a cleaner since 2008 by A Feminine Finish Limited. She reported to Denise Jones, the respondent director and owner. The respondent company provides cleaning services to various commercial premises within Christchurch.

[5] In 2014 Ms Wealleans began shift work doing morning and afternoon shifts at various commercial premises. Ms Jones would pick her up in the morning and drop her to the worksite.

[6] On 10 December 2015, Ms Wealleans contacted Ms Jones. She told Ms Jones her father had had a fall and that she could not attend work in the afternoon. This was untrue.

[7] By 3.30pm that day, Ms Wealleans had been hospitalised due to an overdose of pills and alcohol. Her son had texted Ms Jones to advise of the situation. By 9.36pm Ms Wealleans' daughter, Sarah, had also texted Ms Jones to advise that Ms Wealleans was in the hospital.

[8] It appears Ms Jones was somewhat confused by the messages she was receiving. However, by 11 December 2015, Ms Jones was aware Ms Wealleans was in hospital but not the cause. Ms Wealleans was released that same day.

[9] By 12 December 2015, Sarah Wealleans had texted Ms Jones saying that her mother was at home and would text her if anything changed.

[10] No further information appears to have been exchanged between Ms Wealleans and Ms Jones until 16 December 2015. At 10.33am that day, Ms Jones received a text message from a number stating:

> Hi Denise
> I noticed I didn't get paid today. I have a doctor's note for the time I had off. Is there a reason for this?

[11] That same number sent a further text message at 10.38am saying:

> Hi again
> Could you please drop off to me my wage and time report my holiday and leave report. This is a requirement as an employer.

[12] Ms Jones did not reply to that number until sometime later in the evening. It was during this period of time that Ms Jones also received a message from Ms Wealleans' sister, Susan Lloyd. Between 8.30 and 10.08pm that day, text messages were exchanged between Ms Jones and Ms Lloyd about Ms Wealleans' wages, threats to go to the IRD and further requests for wages and holiday records.

[13] That same day Ms Wealleans' felt depressed and had suicidal thoughts. She was admitted to respite care for six days until 22 December 2016. Ms Jones was unaware of this development.

[14] By 17 December 2015, Ms Jones had determined to seek advice from a local Chamber of Commerce. The advice she received was about possible abandonment of employment by Ms Wealleans.

[15] This galvanised Ms Jones to post Ms Wealleans a letter that same day. The letter alleged abandonment of employment and referred to an assumption that Ms Wealleans *"would not be returning to work"*.

[16] On 18 December 2015, Ms Jones received two medical certificates. The certificates confirmed Ms Wealleans was unfit to return to work from 10 December 2015 until 21 December 2015. This again prompted Ms Jones to post a further letter to Ms Wealleans which stated, amongst other things, *"I consider you have abandoned your employment"*.

[17] Ms Wealleans remained in hospital until 22 December 2015. She then noticed that she had not been paid. She sent a text message to Ms Jones on 23 December 2015 asking:

> Why am I not getting paid. You owe me two weeks' sick pay. I have given you medical notes.

[18] Ms Jones did not reply until the following day at 12.02am on 24 December 2015. She replied to that same number stating:

> To whom texted.
> Check your facts re workers' entitlements. Five sick days per year only. Three letters sent to Diane Wealleans have all the facts and relevant information. More to follow as then advised as you do not seem to understand the facts. NO SICK DAYS OWING. NO HOLIDAY PAY OWING. NO MONEYS OWING. NO REPLY FROM LETTERS. NO LONGER AN EMPLOYEE. Continuing to text phone threaten or intimidate will not change the law or the facts. Far too many lies have been told to me by both Diane and Sarah and I do not want to bail either out again. I don't need Diane's medical records nor backdated medical certificates. Her actions and non-actions have spoken enough.

[19] Later that morning at 9.21am, Ms Wealleans sent a text message stating *"no letters received from you to date 24.12.15."* Ms Jones replied by text at 12.15pm stating *"posted last Thursday, Friday and Saturday"*. At 12.18pm Ms Wealleans sent back a final text message *"sorry not received them yet"*.

[20] At no stage prior to 24 December did Ms Wealleans reveal the reasons for why she had been in hospital.

[21] In May 2016 Ms Wealleans advised the respondent of her personal trauma during this period. The respondent made an open offer for reinstatement which was refused.

[22] The parties were unable to resolve this matter themselves and it is now before me for oral determination.

Issues

[23] The issues were discussed with the parties at the start of the hearing. They are:

(a) Did Ms Wealleans abandon her employment or was she dismissed?

(b) Were there breaches of good faith by both parties in failing to be communicative and responsive?

(c) Were there breaches of good faith by Ms Wealleans in her untruths about her illness? and

(d) Did the respondent fail to provide an individual employment agreement?

Law

[24] For an unjustified dismissal claim to succeed, the onus is upon the employee to establish first that there has been a dismissal.

[25] An employment contract may terminate in a variety of ways apart from dismissal. It may end through the relinquishment of the employment by the employee. Here the employer states it believed Ms Wealleans had abandoned her employment.

[26] This is despite there being no provision in the employment agreement for termination due to abandonment of employment. The legal test is whether an objective bystander would reasonably conclude that employee had abandoned their employment.[1]

[27] There are implied statutory duties of good faith in every employment relationship. Good faith requires parties to the employment relationship to be both active and constructive and responsive and communicative. It also requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment to provide that employee with all relevant information and an opportunity to comment on it before the decision is made.[2]

[28] The Courts have held the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment.[3]

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[1] *EN Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97,104 at [30].
[2] Section 4(1A) Employment Relations Act 2000.
[3] See n1 above at [26].

Abandonment?

[29] The evidence of Ms Jones was that the real reason the respondent believed there was abandonment was because it was implied or said by Ms Lloyd in her phone message left on 16 December 2015. This was raised for the first time at hearing by Ms Jones. There was no recording of this message available because Ms Jones did not preserve it. It was not put to Ms Lloyd for comment. It was not written in Ms Jones' brief of evidence filed or in the pleadings. It was not even raised in the correspondence sent by the respondent's lawyer on 2 February 2016 raising the abandonment of employment. I reject this evidence.

[30] I do not accept the evidence evinced an intention by Ms Wealleans to finally end her employment. There was a text message Ms Jones had received on 16 December 2015 which referred to Ms Wealleans having a doctor's note for her time off inferring she was unwell during the period of alleged abandonment. That should have put the respondent on notice that there was no abandonment of employment.

[31] By 18 December 2015, Ms Jones had received two medical certificates, both of which explained why Ms Wealleans was absent from work. The respondent was well aware that Ms Wealleans was unwell and that was the reason she was not at work.

[32] Despite the medical certificates the respondent made no inquiries. Ms Jones gave evidence she doubted the medical certificates because she saw Ms Wealleans' out and about on 14 December. She did not investigate, raise this concern with Ms Wealleans' or take any steps about this before alleging abandonment of employment.

[33] There was no basis for an objective observer to conclude Ms Wealleans' had abandoned her employment.

Dismissal?

[34] Ms Jones tried to allege the 17 and 18 December letters did not dismiss Ms Wealleans. I do not accept this. The 17 December letter stated the respondent assumed Ms Wealleans would not be returning to work. The 18 December letter stated *"I consider you have abandoned your employment"*. It is more probable than not the respondent had determined at 17 December Ms Wealleans was no longer an employee. However, this was not communicated to Ms Wealleans until 24 December.

[35] On 24 December 2015 Ms Jones texted Ms Wealleans stating she was amongst other things "NO LONGER AN EMPLOYEE". This text communicated to Ms Wealleans in no uncertain terms she had been dismissed.

Unjustified?

[36] The fact Ms Wealleans was dismissed has been determined. The onus falls upon the respondent to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*[4] Relevant matters to justification are whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.[5]

[37] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (s.103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal/disadvantage being found to be unjustified.[6]

[38] There has been no investigation, no raising of concerns prior to the text message dismissal being received and there certainly was never any opportunity for Ms Wealleans to be heard about the respondent's concerns.

[39] I find that Diane Wealleans was unjustifiably dismissed by A Feminine Finish Limited.

Breaches of Good Faith

[40] The breach of good faith alleged by both parties is the failure of the other to be active and constructive, responsive and communicative. The applicant alleges a breach of good faith by the respondent's failure to take steps to determine if Ms Wealleans' employment had been abandoned or not.

[41] In my view there was a breach of good faith. However, the evidence does not warrant the grant of a penalty. This was a one-off event in an 8 year relationship. I accept it was serious because of its outcome, but it was not sustained. There was an

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[4] Section 103A(2) of the Employment Relations Act 2000 (Act).
[5] Section 103A(3) of the Act.
[6] *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

attempt to remedy the breach in May 2016 by offering reinstatement when the respondent became aware of the circumstances of Ms Wealleans' illness.

[42] The respondent alleges the applicant failed to communicate the circumstances of Ms Wealleans' ill health. I do not accept there was any failure. I do not accept Ms Wealleans had any duty to tell her employer explicit detail of her trauma. She had supplied medical certificates. The onus was upon the employer to make further enquiries at that point if it did not accept her medical certificates. The respondent did not.

[43] There was a breach of good faith in Ms Wealleans untruth about her father being unwell and that being the reason for why she did not return to work on 10 December 2015. Again, this evidence does not warrant the imposition of a penalty. That was a one-off event. I accept it is serious to lie to your employer about the reasons for not attending work, however, that breach was not sustained.

Did the employer fail to provide an employment agreement?

[44] The respondent has produced an unsigned employment agreement. Ms Wealleans does not accept that was the one she was given. She admits she signed one but not this one. I do not accept there was any failure to provide an employment agreement.

[45] The parties penalty actions for breaches of good faith and for failing to provide a written employment agreement are dismissed.

Remedies

Lost remuneration

[46] Ms Wealleans has a personal grievance of unjustifiable dismissal. If she has lost remuneration, she is entitled to recover up to 3 months' ordinary time remuneration or the Authority may order payment of a sum greater than that.[7] Ms Wealleans seeks 8 months wages because she was unable to find a job until August 2016.

[7] Section 128(2) and (3) of the Act.

[47] In considering an order for remuneration under s.128, the employee has an obligation to mitigate loss by seeking alternative paid employment.[8]

[48] An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.[9]

[49] In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like[10].

[50] Ms Wealleans' evidence was she did not begin searching for work until February 2016. She could not identify the date she started or the jobs she applied for between December 2015 and April 2016. There was no evidence her health prevented job searching. She told me she did not search immediately because her family supported her during this period.

[51] In my view, the evidence does not, on the balance of probabilities, prove mitigation during that period. Ms Wealleans has not lost remuneration. Even if there had been sufficient information, I would not have been inclined to give a remedy beyond May 2016 when the offer to reinstate was made and rejected. I decline to make any award of lost wages pursuant to s.123(1)(b) of the Employment Relations Act 2000.

Compensation

[52] The factors relevant to an award of compensation here are as follows:

(a) The length of service by Ms Wealleans of eight years;

(b) The brutal circumstances of the dismissal. Ms Wealleans was dismissed by text message when she was particularly unwell immediately prior to Christmas.

[8] *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)
[9] *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977
[10] *Allen v Transpacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]

(c) Her medical evidence shows that her condition may have been worsened by this dismissal.

(d) She has given compelling evidence about the emotional and physical effects on her of the dismissal during trying personal circumstances.

(e) I have to balance that against her evidence she was sufficiently recovered from any physical effects of the dismissal by March 2016.

[53] In my view an appropriate award of compensation would be $15,000 subject to any reduction due to contributory conduct.

Contributory conduct?

[54] There is a submission that there has been contributory conduct. To be contributory conduct, it must be both causative and blameworthy.[11] There is no logical link between the untruth about her father and the dismissal. Ms Wealleans' untruthfulness was, in my view, remedied within one day of the lie being told. Whilst that behaviour may be blameworthy, it cannot in my view have caused the dismissal based upon Ms Jones' evidence.

[55] There is no reduction in remedies for contributory conduct.

[56] There is an order for payment by A Feminine Finish Limited to Diane Wealleans the sum of $15,000 compensation for hurt and humiliation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[57] Costs are reserved. If the parties cannot agree costs between them, the party seeking costs is to file a memorandum within 14 days of the date of this oral determination. The other party shall have an opportunity to reply within 14 days thereafter and a decision will be issued on the papers.

T G Tetitaha
Member of the Employment Relations Authority

[11] *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at para.[49].