

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 408
5316691

BETWEEN JADE SCOTT

AND WAIWERA INFINITY SPA
RESORT LIMITED

Member of Authority: Yvonne Oldfield

Representatives: Brian Fox for applicant
 Richard Upton for respondent

Investigation meetings 17 May 2011, 22 June 2011

Submissions: 6 July 2011, 18 July 2011

Determination: 19 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Scott's employment as a senior beauty therapist came to an end in late 2009. After a long period of leave to recover from a gradual process injury she had been offered changed hours and duties which were unworkable for her. She decided she could not come back on those terms. She now alleges that the circumstances amounted to a constructive dismissal or in the alternative, to unjustifiable disadvantage.

[2] The respondent maintains that Ms Scott's injury had placed constraints on what she could do and consequently the proposal was reasonable. It also says it was open to ongoing discussion with her and therefore it could not be said that the employment had ended. The respondent says that there was in fact continuing discussion up until the point (on 29 September) when the respondent wrote to Ms Scott's representative confirming that she could return to full duties as a Senior

Therapist if she provided a medical clearance. The respondent says that she was dismissed (justifiably) when she opted not to do so.

[3] The nature of Ms Scott's claim was not clear from the original statement of problem. Mr Fox (and Ms Scott in person) have subsequently clarified that the claim relates to alleged disadvantage and constructive dismissal arising out of the events of 12 August 2009. Ms Scott told me she believed her employment ended at that point. For that reason she is not pursuing a separate claim in respect of the purported dismissal which followed the 29 September correspondence.

[4] At the time this matter was lodged there was also an issue regarding holiday pay however the parties have resolved that matter. The remaining issues for determination are whether Ms Scott was constructively dismissed or unjustifiably disadvantaged, and if so, what remedies are appropriate.

Constructive dismissal/unjustified disadvantage

[5] Ms Scott was employed by the respondent as a senior beauty therapist in December 2008. In April 2009 pain in her wrist led to a diagnosis of carpal tunnel syndrome. Ms Scott had a short period of leave but after returning for a half day her symptoms flared up again. Her medical advisors then decided that she should go back on leave, on earnings related compensation, until 5 August 2009.

[6] Ms Scott contacted the respondent to advise the duration of the leave set out in her medical certificates (the final one of which was 56 days) and the respondent in turn called her two or three times to see how she was getting on. Otherwise there was no contact between the parties until she reported for work on 10 August 2009.

[7] During Ms Scott's absence a new role of spa manager had been created. Ms Amanda Brewer was appointed. At the time of the Authority investigation Ms Brewer had left the respondent but her whereabouts were established and she was summoned to give evidence.

[8] Ms Brewer had met Ms Scott only once at a staff training session but she had been briefed on what happened when Ms Scott returned to work the first time and

knew that Ms Scott would be away on “ACC” until early August. Ms Brewer did not hear from Ms Scott directly and made no plans for Ms Scott’s return. As a result she was unprepared when Ms Scott arrived on 10 August and had to ask her to come back to see her on 12 August.

[9] At the meeting on 12 August, according to Ms Brewer, Ms Scott advised she was well enough to start work again but said that due to her wrist problem she would have to limit time spent in massage duties. She said Ms Scott could give no indication of how long this situation would continue. She told the Authority it was not easy to accommodate Ms Scott’s needs since the work of a therapist could at times be up to 80% massage. Her solution was to offer Ms Scott a combination of work on reception and therapist work on particular (busy) shifts where the level of work overall would create more scope to avoid massage work.

[10] This did not add up to forty hours work and would have included weekend shifts. The receptionist’s pay rate was also lower than that for a therapist. Ms Scott needed full time work and did not have access to childcare over the weekend. She indicated that she was not happy with Ms Brewer’s proposal. Ms Brewer responded by saying that an alternative could be for her to talk to senior management about redundancy.

[11] Ms Brewer said she did not take any steps that would have made Ms Scott think her employment was actually over. She said she had no authority to dismiss anyone or to make anyone redundant, did not dismiss Ms Scott, and planned to talk to senior management about what had been discussed. Meanwhile she understood Ms Scott was going to think the proposal over and get back to her.

[12] Ms Scott told me she thought at this point that her options were either to accept Ms Brewer’s proposal or leave. Later that day, after going home, Ms Scott called Ms Brewer and said she would not be back in until she had seen a lawyer. That was her last personal contact with the respondent.

[13] On 19 August Ms Scott’s representative (who was not, at that time, Mr Fox) wrote to the respondent “*regarding her current employment situation.*” The letter included an allegation that Ms Scott had been replaced by Ms Brewer during her

leave. It appears that this contention was dropped after the respondent clarified that Ms Scott had been Senior Therapist, not Spa Manager. The letter also contained the following:

“We understand that Ms Scott is currently on leave pending resolution of this matter and accordingly it is in the best interests of all parties for issues to be resolved quickly and practically.”

[14] Thereafter matters were escalated to Wendy Snookes (General Manager of Marketing and Customer Service for the whole Waiwera operation.) She acknowledged that Ms Brewer’s handling of the meeting of 12 August was not ideal. On 29 September, after several exchanges between the parties, Ms Snookes wrote to Ms Scott’s lawyer confirming that Ms Scott could return to full duties as a Senior Therapist if she provided a medical clearance. Ms Scott did not do so and the respondent proceeded to dismiss her.

Determination

[15] The respondent’s position is that nothing Ms Brewer said to Ms Scott on 12 August 2009 amounted to a constructive dismissal or even a disadvantage grievance. It says that the respondent’s primary concern, on 12 August and thereafter, was to ensure that Ms Scott was not put into an unsafe working environment. It says that the employment continued until Ms Scott failed to meet a reasonable request to supply a medical clearance¹ at which point her employment was justifiably terminated.

[16] Ms Scott has maintained to the Authority that she was medically fit for work when she returned in August. She has not acknowledged qualifying this in any way in her conversation with Ms Brewer however I am satisfied that Ms Brewer’s evidence on this point is more complete. I conclude that Ms Scott did indicate that there was a need to manage the risk of her injury flaring up again.

¹Ms Scott says that she did in fact get a medical clearance however having decided that she did not want to go back to work for the respondent she did not instruct her lawyer to pass it on to the respondent.

[17] In such circumstances it was both reasonable and appropriate for Ms Brewer to put forward a proposal for hours and duties which would enable Ms Scott to come back to work safely. In itself, that cannot amount to a constructive dismissal. Only if the proposal had been put without any scope for further discussion or preparedness to consider other alternatives would there have been some foundation for Ms Scott's assertion that she was unjustifiably dismissed or at least disadvantaged.

[18] Ms Scott now says that the proposal was made on a take it or leave it basis. Her view arose out of Ms Brewer's comment about redundancy. It is fair to say that this comment was unfortunate and was likely to make Ms Scott worry about her job security. However, I have not been persuaded that it was enough to turn the situation on 12 August into a constructive dismissal or disadvantage grievance.

[19] I conclude instead that it was premature for Ms Scott to treat the employment as effectively at an end. There is no dispute that Ms Brewer had indicated that she would speak to senior management about the situation. Discussions had clearly not reached an end point. That this was understood by both parties is shown in the position taken in Ms Scott's solicitor's letter of 19 August which describes her as being on leave. It is also consistent with the parties' subsequent discussions of alternative ways of getting Ms Scott back to work. I am satisfied that there was a shared understanding that the employment remained on foot after 12 August 2011.

[20] Ms Scott has failed to establish either a constructive dismissal or a disadvantage grievance. I can do nothing more to assist with her employment relationship problem.

Costs

[21] The issue of costs is reserved. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority