

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 10
5386858

BETWEEN DEBRA MARGARET WILSON
Applicant
AND LIFE EDUCATION TRUST,
RODNEY
Respondent

Member of Authority: Tania Tetitaha
Representatives: Applicant in person
John O'Connell on behalf of Respondent
Investigation Meeting: 29 October 2012 at Auckland
Date of Determination: 10 January 2013

DETERMINATION OF THE AUTHORITY

Orders

- A. A determination Debra Wilson was unjustifiably dismissed by Life Education Trust, Rodney on 15 February 2012;**
- B. The remedies otherwise payable of \$5,982.00 are reduced to nil due to contributory conduct by Ms Wilson pursuant to s124;**
- C. No orders are made as to costs.**

Employment relationship problem

[1] Ms Debra Margaret Wilson was employed as an Educator by the Life Education Trust, Rodney (The Trust). Her job was to build and maintain relationships with schools in the Rodney District including delivery of programmes using a mobile classroom. Debra reported to the Trust's Education Liaison Committee. The Chair was Mr Bruce Davies.

[2] Debra was provided with a work car in 2010. Unfortunately the car failed its warrant of fitness on 29 September 2011 due to worn tyres and other defects. Debra spoke to a member of the Trust, Tim Hosking, about this, but was told to continue driving for another 28 days.

[3] While driving the car to a Trust function in Gulf Harbour on 13 October 2011 it lost traction on the motorway. Debra pulled over and called Tim Hosking. She told him it was unsafe to drive and was going home. She emailed Bruce Davies later that day to explain her absence. Bruce was at the Trust function Debra was to attend. She dropped the car to Tim Hosking the next day.

[4] Bruce left a voice message on 20 October 2011 regarding cleaning the carpets in her mobile classroom. Debra left a later voice message advising she had no car and could not wash the carpets.

[5] A series of incidents then occurred between Debra and Bruce Davies which form the basis for the personal grievance.

21 October 2011 telephone call

[6] Bruce Davies rang and spoke to Debra on 21 October 2011. He was yelling and angry about her non-attendance at the Trust function. He wanted the carpets cleaned, did not accept her work car was unable to be driven and suggested she could have taxied to the function or borrowed a car. Debra tried to explain her actions and lack of a vehicle but he would not listen.

[7] Debra's partner, Grant Elliot, later rang Bruce and demanded an apology. A text message from Bruce Davies apologising for his behaviour was received but was unacceptable to Debra.

[8] The work car was returned warranted to Debra on 25 October 2011.

29 November 2011 Meeting

[9] On 19 November 2011 Debra sent a letter advising she was initiating the personal grievance procedure regarding the abusive phone call and being bullied into driving an unsafe work car. She sought written recognition of why she did not attend the function and an apology.

[10] A meeting was arranged for 29 November 2011 with Bruce Davies, Tim Hosking and Robin Davies, another member of the Trust. A support person attended with Debra. At the meeting Bruce reiterated his belief Debra should have attended the fundraiser or found alternative transport. Debra restated her issues were health and safety regarding the work car and Bruce's abusive phone call.

[11] Debra later complained in an email about Bruce's behaviour at the meeting to Robin Davies stating "*we both know Bruce is not going to change.*" Robin Davies advised he was to replace Bruce as Chair of the Education Liaison Committee to prevent future contact with her. There appears to be some discussion of further time being allowed for Trust to respond to any other concerns.

30 November 2011 Resignation

[12] On 30 November 2011 Debra emailed a letter of resignation to the Education Liaison Committee due to "*irreconcilable differences*" stating her last day of work was 30 January 2012. She advised she would not be attending the next Trust meeting but would email her report. The resignation was circulated to Robin Davies, Bruce Davies and the National Life Education Trust CEO, John O'Connell.

[13] Between 30 November and 3 December 2011 John O'Connell spoke and emailed Debra regarding her concerns offering support and payment of \$2,000 towards legal fees which she accepted.

[14] On 2 December 2011 Bruce Davies emailed accepting the resignation but disputed there were irreconcilable differences as the trustees were prepared to work through her issues. He stated her employment contract provided 3 months notice.

[15] Debra replied by email on 5 December 2011 apologising for incorrectly advising her finish date as 30 January and stating she was prepared to work until 29 February 2012. Robin Davies later sought to meet with Debra to finalise the details of the termination of her employment.

8 December 2011 Serious Misconduct

[16] On 8 December 2011 at 10.56 am Bruce Davies emailed Debra alleging serious misconduct due to a conversation she had with staff at Wilmont Motors in Warkworth. At 11.20 am he again emailed Debra stating her last day working for the

Trust was 9 December 2011 and referred to clause 14.2 of her employment agreement allowing an employer to make deductions in the event of failure to give the full period of notice of an amount equivalent to the unworked notice period.

[17] Debra provided a detailed reply stating (again) she was prepared to work her entire notice period so clause 14.2 was inapplicable, there was no basis to unilaterally reduce her notice from 29 February 2012 to 9 December 2011, she would accept payment in lieu of notice, Trust property would be returned upon termination of the employment and she refuted any conduct with Wilmont Motors which would bring the Trust into disrepute.

[18] Bruce replied on 10 December 2011 advising they were seeking legal advice and she was required to work until 23 December. He directed her to undertake tasks of making up resource packs and sought a meeting on 19 December.

[19] On 13 December 2011 Debra emailed Bruce Davies advising she had a medical certificate and seeking his response to her letter of 9 December 2011 as to the end date of her employment. She emailed Robin Davies advising she had a medical certificate for the period 9 to 23 December 2011. They continued corresponding regarding school bookings and return of Trust property.

[20] On 19 January 2012 Debra emailed Bruce Davies. She sought a response to her letter of 9 December as to the end date of her employment. She had not been paid since 19 December 2011. Bruce replied the same day advising her sick and holiday pay would be paid tomorrow and asking for evidence of committed bookings by schools for term 1 2012 so he could take them to the next Trust meeting. Bruce emailed again on 20 January 2012 seeking dates for invoiced stays in Warkworth.

[21] Debra emailed on 20 January stating the invoiced stays were marked M in her log book, there were no bookings for term 1 as *“no-one had informed [her] what was happening in term 1”* and she did not ask for commitments as she may not have been replaced and the Trust having to cancel bookings *“would not have looked good”*. She believed it was the Trust’s responsibility to undertake bookings.

[22] Bruce Davies replied by email dated 23 January 2012. He referred to a meeting at the end of 2010 and the training expectations set by the National Training Manager where she was expected to have term 1 and 2 booked and confirmed by the end of the year so she had work to carry out while a new Educator was recruited and

trained. He sought agreement to an offer she finish immediately without penalty or further payment by the Trust.

[23] Debra replied the same day stating she let the Trust know in her Educators Report only 11 schools had booked for 2012. When she asked if she should confirm she got no response. Bruce emailed again seeking agreement to the above offer by 5 pm. He then emailed separately seeking copies of the commitment forms and vehicle log book.

[24] Robin Davies was also ringing and emailing Debra on 24 and 26 January 2012 seeking final pay details including the dates of her stays in Warkworth claimed and the return of the laptop, phone and printer.

[25] Debra emailed Robin Davies on 1 February 2012 stating she could only meet after 7 February 2012 to return the Trust property as she was not in the area. This is because she was on Great Barrier Island from the end of December 2011 until the beginning of February 2012.

[26] On 2 February 2012 Debra's lawyers wrote to the Trust confirming she did not accept Bruce Davies offer, confirming her resignation on 30 November 2011, sick leave taken between 9 to 23 December 2011 and that her employment was to end on 29 February 2012. It sought confirmation whether she was required to work out her notice and a meeting.

15 February 2012 Termination

[27] On 7 February 2012 Bruce Davies replied stating Debra was required to work out her notice period to 29 February 2012, disputing her view the school bookings needed to be confirmed by the Trust, raising (again) the serious misconduct regarding a discussion with Wilmont Motors for response and seeking a meeting.

[28] On 10 February 2012 Bruce Davies again sent an email regarding her failure to return to work on 13 January 2012 alleging she had failed to respond to calls for 20 days. He referred to incomplete tasks assigned prior to her taking sick leave. He followed this email up on 14 February with Debra's lawyer but was told they no longer represented her and Debra would contact the Trust directly regarding a meeting. Bruce emailed Debra directly regarding a meeting the following day.

[29] On 15 February 2012 Debra replied stating she had been contactable since 13 January but did not expect she had to return to work and she did not fully understand the task she had been assigned prior to sick leave. There were also outstanding issues of health and safety and unpaid wages. She wished these to be discussed at mediation.

[30] Later the same day Bruce Davies emailed, stating Debra's employment was terminated immediately on the grounds of unauthorised absence and abandonment of employment and referred to serious misconduct presumably about the conversation with staff at Wilmont Motors.

[31] Debra did not return to work after 13 December 2011.

[32] Debra alleges bullying and intimidation by Bruce Davies resulting in her (constructive) dismissal. The behaviour occurred between 21 October 2011 and 15 February 2012.

[33] The Trust does not deny the behaviour occurred but believes it either dealt with it at the time, was not given any opportunity to deal with it appropriately or it was not bullying. It also alleges contributory behaviour by Debra reducing any remedies payable.

Issues

[34] The issues are:

- (a) Was Debra constructively dismissed by the Trust on 30 November 2011?
- (b) If not, was she later unjustifiably dismissed by the Trust?
- (c) What remedies are payable?

Was Debra constructively dismissed?

[35] Debra resigned on 30 November 2011. The issue is whether this amounts to constructive dismissal.

[36] Constructive dismissal includes, but is not limited to, cases where a breach of duty by the employer causes an employee to resign.¹ The essential questions in constructive dismissal cases are:²

- (a) What were the terms of the contract?
- (b) Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

[37] In answering the first question, the Authority must examine “*all the circumstances of the resignation*” not merely the terms of the notice or other communication whereby an employee has tendered the resignation. If there was a breach, the next question is “*whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*”³

[38] It is an implied term of employment contracts employers’ act fairly and reasonably towards employees.⁴ The relevant behaviour is that leading up to Debra’s resignation on 30 November 2011.

[39] Bruce Davies telephone call and behaviour at the meeting was perceived by Debra as bullying. The apparent requirement to drive an unsafe work car is part of the bullying behaviour. This behaviour was not disputed by the Trust. Bullying behaviour of this nature is a breach of an implied term of the employment contract the Trust act fairly and reasonably towards Debra.

[40] However, Debra’s resignation was not reasonably foreseeable having regard to the seriousness of the breach. Bruce tendered an apology for his behaviour during the telephone call albeit via Debra’s partner. Her work car was returned with a warrant of fitness on 25 October 2011. Robin Davies replaced Bruce Davies as Chair of the Education Liaison Committee. Prior to the resignation the majority (if not all) of Debra’s concerns had been addressed. There was no reason for the Trust to foresee her resignation given the action they had already taken.

¹ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

² *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 112–113 referring to *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59 (AC) (Hepi's case)

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers’ IUOW Inc* [1994] 1 ERNZ 168 (CA)

⁴ *Turner v Ogilvy & Mather* (1995) 4 NZELC 98,354; [1995] 1 ERNZ 11

[41] Accordingly the Authority determines no constructive dismissal occurred on 30 November 2011.

Was Debra subsequently unjustifiably dismissed?

[42] A subsequent dismissal occurred on 15 February 2012 when the Trust terminated Debra's employment immediately, 14 days prior to the end of her employment on 29 February 2012. The alleged basis for this dismissal was serious misconduct and abandonment of employment.

[43] The burden of justifying the dismissal lies with the employer.⁵ The Authority must consider whether an employer before dismissing the employee:⁶

- sufficiently investigated the allegations having regard to the resources available
- raised the concerns it had with the employee
- gave the employee a reasonable opportunity to respond to the concerns
- genuinely considered the employees response to the allegations

[44] The Authority must not determine a dismissal as unjustifiable solely because of minor defects in the process followed by an employer which did not result in the employee being treated unfairly.⁷ The defects here are not minor.

[45] The serious misconduct concerns were raised but denied by Debra. No detail was given about dates, places and the content of the alleged conversation giving rise to the serious misconduct. Her request for further information about the serious misconduct was ignored. No evidence of any investigation was provided. No reason relating to the Trust's resources prohibiting investigation was provided.

[46] The abandonment of employment concerns were never raised with Debra prior to dismissal occurring. At best Debra was directed to return to work but asked to meet to discuss matters. Debra asked for a reference to mediation. The Trust then terminated her employment.

⁵ Section 103A

⁶ Section 103A(3)

⁷ Section 103A(5)

[47] There was no opportunity for explanation given. No consideration of any explanation provided. Dismissal was immediate and unjustified.

[48] The Authority determines Debra has a personal grievance regarding unjustified dismissal on 15 February 2012.

Remedies

[49] Given the above determination, the Authority must order payment of “*the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*”⁸ Debra’s employment was due to end on 29 February 2012. The lost remuneration period is from the date of dismissal to the end of the notice period being 15 to 29 February 2012. Lost remuneration for this period equates to \$2,982.⁹

[50] Debra provided some evidence of hurt and humiliation including stress and lost weight. There is no permanent injury. An award of \$3,000 pursuant to s123(1)(c)(i) is appropriate.

[51] The Authority must consider the extent an employees actions contributed towards the situation that gave rise to the personal grievance and if this requires the reduction of remedies payable.¹⁰

[52] The only relevant conduct giving rise to the personal grievance was Debra’s failure to return to work on 13 January 2012. Debra submitted at hearing the Trust failed to contact her to advise when she was required to return to work. There is evidence Robin Davies had been trying to contact Debra during the January period but was unable to do so. Between end December to 7 February 2012 Debra was on the Great Barrier Island and unavailable to work. By 10 February 2012 she had been advised by email she was required back at work but failed to show.

[53] The duty of good faith in employment relationships requires parties to be “*active and constructive*” in establishing and maintaining a productive employment relationship where parties are “*responsive and communicative.*”¹¹

⁸ s128(2)

⁹ IRD information provided shows Debra earned \$4615 gross per month equating to \$55,380 per annum divided by 260 (5 days x 52 weeks) gives daily rate of \$213 x 14 days (13/01 – 29/02)

¹⁰ Section 124.

¹¹ Section 4(1A)(b)

[54] There may have been some lack of clarity regarding her actual return date in January 2012 but it was clear she was expected to work her notice period. There is no evidence Debra took steps to clarify her return to work date with Robin Davies or Bruce Davies or any other Trust member. When directed to return to work on 10 February 2012 she failed to do so. Her failure to return to work directly caused the dismissal giving rise to the personal grievance.

[55] It is appropriate in these circumstances to reduce the remedies payable. The amount of reduction shall be equivalent to the wages Debra received for the period 13 January to 29 February 2012 of \$7,242.00.¹²

[56] Applying the reduction of \$7,242.00 to the remedies payable of \$5,982.00, the Authority determines no remedies are payable.

Costs

[57] Both parties were self-represented. The Trust contributed \$2,000 towards Debra's legal fees. Given both parties achieved partial success, they are to meet their own costs.

Tania Tetitaha
Member of the Employment Relations Authority

¹² IRD information provided shows Debra earned \$4615 gross per month equating to \$55,380 per annum divided by 260 (5 days x 52 weeks) gives daily rate of \$213 x 34 days (13/01 – 29/02)