

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2016] NZERA Auckland 95
5554725**

BETWEEN BARRY NEAL
 Applicant

A N D NORTH SHORE SWIMMING
 POOL CENTRE LIMITED t/a POOL
 DOCTOR
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Eddie Bluegum, Counsel for Applicant
 Stephen Tee, Counsel for Respondent

Investigation Meeting: 8 March 2016 at Auckland

Submissions Received: 8 March 2016 from Applicant and Respondent

Date of Determination: 24 March 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Mr Barry Neal, claims that he has been unjustifiably dismissed by the Respondent, North Shore Swimming Pool Centre Limited t/a Pool Doctor (Pool Doctor). Mr Neal claims he was dismissed on 4 May 2015 by way of abandonment of his employment with Pool Doctor.

[2] Pool Doctor claims that it did not dismiss Mr Neal on 4 May 2015

The issue

[3] The issue for determination is whether or not Mr Neal was unjustifiably dismissed by Pool Doctor.

Background facts

[4] Pool Doctor was established on or about the late 1970s. It has two retail shops which sell swimming pool supplies and equipment, and offers the servicing, maintaining and valeting of swimming pools and spa pools.

[5] Whilst sales and administration staff are office based, valet staff employees and service technicians mainly operate from vans travelling to customers premises in order to work on their pools.

[6] Mr Neal commenced employment with Pool Doctor as a Service Technician in February 2004. He worked as part of a team consisting of three Service Technicians with a fourth Service Technician being engaged during each summer period to provide additional assistance during the busy summer period. The fourth service technician was engaged on an independent contractor basis.

[7] Mr Neal had been provided with a written individual employment agreement in September 2013 (the Employment Agreement) and signed and dated it on 19 September 2013. In signing the Employment Agreement, Mr Neal acknowledged that he had read and accepted the conditions of employment. At clause 7 headed *Termination of Employment* the Employment Agreement stated :

Two weeks of notice of termination is required by either party, but dismissal without notice applies in the case of serious misconduct. ...

If you are absent from work for a continuous period exceeding three working days without notification to and consent from the company, you shall be deemed to have abandoned and so terminated your employment.

[8] Mr Jade Pearce, Service Manager, is responsible for the allocation of work between the Service Technicians, all of whom operate independently of each other and use their own vans. Their roles included the installation of new filters and pumps, fault finding including leaks, and the repair and maintenance of pool and spa equipment.

[9] Mr Neal confirmed that the installation of new filters and pumps was usually the most straightforward and possibly the favourite job of the Service Technicians, and the fault finding including leaks (fault finding) was often the least favourite task as it could be difficult and time-consuming. A further responsibility of the Service Technicians was to show how the equipment worked to customers when they demonstrated the equipment to them (Show Work).

[10] Ms Megan Cooksley, General Manager, explained that the fault finding and 'Show Work' tasks are those which typically required a high level of communication between staff or between staff and customers.

[11] In October 2014, Ms Cooksley spoke to Mr Neal on the subject of his retirement. Mr Neal said he had advised Ms Cooksley that he did not have any plans to retire at that stage

and that he would not think about retiring for at least 18 months because he needed to pay off his mortgage.

[12] Ms Cooksley said that she had been planning for the busy summer months which were approaching. Mr Neal was a very experienced, competent and capable tradesman who had been highly valued by Pool Doctor. She was aware that Mr Neal had reached retirement age and she had wanted to ensure that he was not intending to retire. As Mr Neal assured her that he had no plans to retire, she had organised her staffing arrangements for the summer period on that basis.

[13] Mr Pearce had been party to the conversation between Mr Neal and Ms Cooksley and confirmed what had been discussed.

[14] At the time of his employment in 2004, Mr Neal had a hearing disability of which Pool Doctor was aware. The hearing disability had not presented as an issue during his employment prior to late 2014, however Ms Cooksley said it became an issue on or about that time.

[15] Mr Pearce said that in the period October to December 2014, Pool Doctor was extremely busy. On or about that time, he had noticed a deterioration in Mr Neal's hearing to a point where communication with him was becoming very difficult. Mr Neal had become withdrawn and began contributing very little at the daily morning meetings.

[16] Problems also began to arise in terms of Mr Neal's performance. Mr Pearce explained that these were not customer-driven issues but rather a comparison of the amount of time Mr Neal was taking to undertake tasks compared with the other Service Technicians and his output compared with them generally.

[17] Mr Pearce tried to raise these issues with Mr Neal directly and to seek his feedback. However, Mr Neal had been unresponsive and his typical reaction had been to simply shrug his shoulders. Mr Pearce said he had raised with Mr Neal the prospect of reallocating work between the Service Technicians so that he could concentrate on work which required less communication leaving other tasks, especially the 'Show Work' and leak detection to the other Service Technicians. However, he said Mr Neal had chosen not to respond or engage in the discussions.

[18] Mr Neal when questioned at the Investigation Meeting, said that Mr Pearce had spoken to him and discussed the jobs that he could allocate to him, however, he had not understood to what he was referring and that when he had questioned what the problem was,

Mr Pearce had been vague in the responses he had given. He said he had not understood what Mr Pearce had been saying.

[19] Ms Cooksley said she also had noticed deterioration in Mr Neal's hearing in late 2014 and was aware that Mr Pearce had spoken to Mr Neal but had been unable to have a productive discussion on the subject.

Letter dated 8 December 2014

[20] Ms Cooksley gave a letter to Mr Neal dated 8 January 2014. The letter stated:

Dear Barry,

I would like to start by stating this is not a written warning, but is a letter to state concerns I have about your ability to continue with your role as a Service Technician with us.

Currently conversing with you is difficult due to your limited hearing. It impacts on your understanding of what is required of you at certain jobs & is impacting greatly on your ability to work for and alongside colleagues.

It means we are now limited in what jobs we can offer you.

We are not able to send you to any jobs that involve show workings or require listening to determine faults for example bearings.

Simple jobs are often taking a far greater amount of time than is acceptable & we are not able to on charge all of your time.

In many cases your work has not reflected the experience and knowledge that we know you to have.

I would appreciate it if you could investigate if there is something you can do to improve your hearing.

I would hope that with your hearing improved it would have a flow on effect and improve other areas of your working ability.

If you are not able to secure an improvement, then your position with the company is in question.

Due to the limited nature of what we can currently offer you we could investigate the possibility of a part time position or contract work. Neither these positions would allow for the use of a company vehicle.

Please confirm to me within five working days what medical advice you have been offered and what steps you will take to improve your hearing.

Please sign and date this form for inclusion into our file. If you wish to discuss further with me please do so.

[21] Mr Neal said he believed, upon receipt of the letter, that he was being targeted because of his age and disability and he also felt that there were too many employees and not enough work.

[22] He had felt attacked for his hearing disability, and he also felt the letter did not adequately explain any of the allegations in terms of his performance. He did not accept that communication was an issue.

[23] Mr Neal believed that the purpose of the letter was to vary his employment agreement by means of pressurising him with performance issues. He said that from 8 December 2014 he was not given tasks to allow him to perform a role as a Service Technician but had been given menial tasks.

[24] Mr Pearce disputed that Mr Neal had been allocated menial tasks, or any tasks outside of the duties of a Service Technician. He said that Mr Neal's role as a Service Technician included a number of duties and whilst the duties that he was allocating to him had been limited to those which required less communication with customers, Mr Neal had, however, been allocated only tasks that a Service Technician would carry out. These tasks included the more favoured installation of new filters and pumps.

[25] Mr Pearce explained that Pool Doctor employed valet staff and labourers for tasks which the Service Technicians were not required to undertake as part of their role.

[26] Mr Neal said he chose not to respond to the letter dated 8 December 2014 although he acknowledged the offer to discuss the matter further with him. He also refused to sign the letter for inclusion in his file, advising Ms Cooksley that he would be seeking legal advice and would not sign on that basis.

Letter dated 18 December 2014

[27] Ms Cooksley sent a second letter dated 18 December 2014 acknowledging the advice from Mr Neal that he would be consulting a solicitor and that he would not sign and return the letter of 8 December 2014. In the letter dated 18 December 2014, Ms Cooksley itemised the fact that during November 2014 Mr Neal had documented a total of 177.5 hours on his timesheets, however, the report run for the hours charged out for him for the same month equated to 55.25 hours. In the letter she stated:

... On the morning of the 16th you advised me that on advice from your solicitor you would not sign & return the letter as acknowledgement of receipt, nor under the same advice would you discuss it. ...

I have a number of recent jobs in which your performance has not matched with your experience and knowledge I know you to have. ...

The service manager discussed these jobs with you. He has relayed to me that he did not have the confidence that he can continue to give

you work that involves problem solving, just limiting further the work that we can give you.

I also have concerns that your lack of hearing is of concern regarding health and safety.

Since you returned to us after your period of poor health your performance and productivity has continued to decline.

It is imperative that we have some feedback from you in order to move forward.

I would like a meeting with you and with a representative of your choice to discuss how we can improve performance and productivity. You have a wealth of experience and knowledge and I would like to see you back at a level that reflects this. I suggest Monday 5 January at 8am. ...

[28] Ms Cooksley concluded by asking Mr Neal to confirm the date for the meeting, or to suggest an alternative date.

[29] Mr Neal said he had been upset at the receipt of the letter, in particular by the inference that he presented a health and safety risk in the performance of his work

[30] Whilst he had been requested to provide some feedback in the meeting scheduled for 4 January 2015, he had considered this to be pointless based upon his perception to the change in his employment duties.

[31] Mr Bluegum, acting upon instructions from Mr Neal, replied to the letter dated 18 December 2014 on 19 December 2014. Mr Bluegum raised the issue of Mr Neal's hearing impairment in his response, stating that:

A reasonable employer would look at all alternatives before considering such an approach, such as providing Mr Neal with directions in writing or obtaining written instructions from clients.

Prior to a meeting with the writer, our client has investigated ways to improve his hearing and notes the full cost of replacement of his current hearing aids is around \$10,000. At this time our client is unable to afford this.

[32] The letter pointed out that Mr Neal was not prepared to move from the position of Service Technician to a part-time position or contract work. It noted that Mr Neal had experienced recent health issues and that these had been exacerbated by his increasing stress levels. The letter concluded by a request that the meeting be postponed until 16 January 2015.

Meeting held on 23 January 2015

[33] The first meeting with Mr Neal took place on 23 January 2015. Present at the meeting were Ms Cooksley and Mr Stephen Tee, a solicitor. Mr Neal was accompanied at that meeting by Mr Bluegum and Ms Kelly Neal, his daughter, as a support person.

[34] Ms Cooksley said that the meeting had been opened by Mr Tee asking whether Mr Neal or Mr Bluegum would like to start the meeting by providing a response to the letters of 8 and 18 December 2014. However, they had declined to do so until such time as Pool Doctor had outlined its position.

[35] Ms Cooksley said that it was explained that the meeting was intended to be an opportunity to discuss performance issues which had been outlined in the letters dated 8 and 18 December 2014 with the intention of identifying and discussing areas of concern, and to collectively work out and agree how matters might be improved.

[36] She had outlined her view that Mr Neal was having difficulty in communicating both with Pool Doctor customers and other staff, and that the range of tasks he could undertake had had to be reduced when compared with the tasks he had historically undertaken.

[37] Ms Cooksley said it had been confirmed that Pool Doctor would outline the areas where it thought Mr Neal could improve, and then he would have the opportunity to respond. Similarly, Mr Neal would be able to identify areas where he thought Pool Doctor could improve, and collectively an improvement plan would be decided.

[38] At that point Mr Bluegum suggested that Pool Doctor had predetermined an outcome by the use of the words "*improvement plan*". It was agreed to adjourn the meeting and when it resumed, Mr Bluegum confirmed that his client's instructions were not to continue with the meeting.

[39] Mr Tee had confirmed in detail what had occurred at the meeting in a letter dated 28 January 2015. In the letter, Mr Tee stated:

Our client's primary concern is to determine whether Mr Neal can return to his full range of duties, and how this can best be achieved. Our client would like to investigate whether improved hearing aids would assist, and whether they can be obtained.

[40] Mr Tee said that Pool Doctor did not accept the view that there was a predetermined outcome and that it remained open to discussion. He concluded that a further meeting needed to be arranged and suggested that a meeting take place on 2 February 2015.

Meeting held on 10 February 2015

[41] A second meeting took place on 10 February 2015. Present were Ms Cooksley, Mr Tee, Mr Neal, Mr Bluegum and Miss Neal. Mr Neal said he had felt the meeting to have been more positive and provided an opportunity for him to respond.

[42] He confirmed that Pool Doctor did not talk about a performance management plan but had discussed the issue of his hearing. Upon being advised that there might be some improvement if Mr Neal purchased new hearing aids at a cost of \$10,000.00, it had advised that it was prepared to loan him \$5,000.00 towards the cost of new hearing aids. Mr Neal said he had explained at the meeting that the purchase of new hearing aids might not however improve his hearing.

[43] Ms Cooksley said both Mr Neal and Miss Neal agreed that the offer of Pool Doctor to provide a loan of \$5,000.00 would be very helpful and had seemed genuinely appreciative of the offer.

[44] Ms Cooksley said that collectively it had been decided to adjourn the meeting in order that Mr or Miss Neal could make inquiries to confirm the cost of hearing aids available and the extent of any ACC subsidy available in order that Pool Doctor could look to fund the balance.

Events following the 10 February 2015 meeting

[45] Ms Cooksley said that Pool Doctor did not hear back from Mr Neal for approximately two weeks following the meeting. As a consequence, Mr Tee emailed Mr Bluegum on 25 February 2015 and asked whether or not Mr Neal had been able to make any progress in obtaining quotes or details for hearing aids.

[46] Mr Bluegum emailed a response to that request on 27 February 2015 advising that the offer to assist in purchasing new hearing aids was declined. The email stated:

Mr Neal continues to feel hurt and offended by the initial letters received from Ms Cooksley, and embarrassed by the offer to assist in purchasing new hearing aids as he considers that his hearing is not the issue. Mr Neal also continues to feel targeted by other employees and after a unilateral directive to work over his existing 40 hours, his predicament continues. Mr Neal is stressed and he is struggling to continue in his position on account of the actions as outlined already. This is affecting his health and wellbeing.

To move forward on this we suggest that we enter into without prejudice discussions in contemplation of a possible exit strategy and seek your advice as to whether or not your client will be open to such discussion.

[47] Ms Cooksley said she had been disappointed by the content of the email dated 27 February 2015. Whilst Mr Neal said he had been embarrassed by the offer to assist in the purchase of new hearing aids, she felt that was not the impression either he or Miss Neal had given at the meeting on 10 February 2015.

[48] The issue of Mr Neal feeling ‘targeted’ by other employees had been discussed at the meeting on 10 February 2015, however the suggestion that Mr Neal was working in excess of 40 hours surprised her as his contractual hours were from 7.00 a.m. to 4.00 p.m. and she was unaware that he had been asked to work any additional hours outside of these hours.

[49] She had also been disappointed by the suggestion in the email that discussions could begin in contemplation of an possible exit strategy which she said was at odds with Pool Doctor’s wish to retain Mr Neal’s services which she believed had been confirmed clearly in the meeting on 10 February 2015.

[50] At the Investigation Meeting Ms Neal said that he had not wanted to accept the offer from Pool Doctor to assist in the purchase of new hearing aids as he felt that would have committed him to staying in employment with Pool Doctor. He confirmed when questioned that he had decided that he wanted to leave his employment at that point as he had been upset at what had occurred and was looking: “*for an easy life*”. That had been the reason for his instructing Mr Bluegum to seek discussions in contemplation of an exit strategy.

[51] At the Investigation Meeting, when questioned as to whether the: “*unilateral directive to work over his 10 hours*” referred to by Mr Bluegum had been made by Mr Pearce and Ms Cooksley, Mr Neal said that he had not had enough work to fill 40 hours of working time.

[52] Mr Tee responded on behalf of Pool Doctor by a letter dated 6 March 2015 in which he stated:

We noted that Barry confirmed his hearing would be improved by obtaining the next level of hearing aids,

All parties present at the meeting agreed that it would be a good idea to investigate the viability of obtaining improved hearing aids, and in fact it was agreed that Barry would make inquiries, and obtain quotes, and investigate the level of any subsidy available. The company offered to lend to Barry any difference in price. There was general discussion and agreement that this arrangement would assist Barry not only at work, but at home also.

We note that Barry feels targeted by other employees. We recall that issue being discussed, and Megan offering to discuss various options of how that situation might be improved. ... It would assist if Barry

could provide some feedback as to how he considers his relationship with other staff could be improved. ...

We are unsure what the “unilateral directive to work over his 40 hours” refers to. Barry’s contract sets out his hours and days of work which he is expected to perform.

[53] Attached to the email was a complaint from a customer and a request that a further meeting be arranged in order that Mr Neal could respond to the matters raised in the letter of 6 March 2015.

First Personal Grievance letter

[54] Mr Neal instructed his solicitors to raise a personal grievance by means of a letter dated 12 March 2015. The grounds for the personal grievance were harassment/discrimination, breach of the employer’s obligation of good faith, and breach of process. The letter stated:

It is our stance that the conduct of the company has severed the mutual trust and confidence between itself and our client.

[55] The letter also raised an issue of leave entitlements, in particular the accrual of Mr Neal’s holiday pay.

[56] The letter sought remedies, including compensation for hurt and humiliation, paid stress leave and all associated legal costs. The letter sought the agreement of Pool Doctor to attend mediation with the MBIE Mediation Service.

[57] Mr Neal had commenced sick leave on 6 March 2015, but was unable to see a doctor until 13 March 2015 at which time a medical certificate was provided to Pool Doctor stating that he had been certified as medically unfit for work from 13 March 2015 and would be fit to resume work on 20 March 2015.

[58] Pool Doctor replied to the letter from Mr Neal’s solicitors on 18 March 2015 stating:

We have outlined our client’s position in our earlier correspondence, and reiterate that their priority is to do all they can to retain the services of a valued staff member.

Our client undertakes to continue being active and constructive in maintaining a productive employment relationship. They welcome any additional feedback as to how that can best be achieved. We refer to our letter of 6 March 2015 in that regard. We note the mutuality of the good faith obligation.

Our client is a caring and supportive employer, and does not believe the relationship of trust and confidence has been severed. They

remain prepared to work with Barry to demonstrate that, including attending mediation if that is his preference.

[59] The letter concluded by suggesting a further meeting and/or mediation.

[60] The leave entitlement issue raised on behalf of Mr Neal in the letter dated 12 March 2015 was resolved on 24 March 2015 and there was an apology for any inconvenience the error and miscalculation may have been caused to Mr Neal.

[61] Mr Neal's wife had emailed the medical certificate dated 13 March 2015 which stated that he would be returning to work on 20 March 2015, Mr Pearce had responded, confirming receipt of the certificate and that Pool Doctor would arrange to pick Mr Neal up for work at the expiry of the medical certificate. In response, Mrs Neal confirmed that she would let Pool Doctor know by 16 March 2015 if Mr Neal would be returning to work.

[62] Pool Doctor did not receive a response to its letter of 18 March 2015, however, it did receive a further medical certificate dated 19 March 2015 confirming that Mr Neal was currently unfit for work but should be able to return by 6 April 2015.

[63] Pool Doctor wrote again to Mr Neal on 25 March 2015, acknowledging the further medical certificate and stating:

Our client remains committed to taking all steps to maintain the employment relationship, and proposes the parties meet again at a mutually acceptable time after 8 April (to allow for the Easter break). We have already confirmed that our client is agreeable to mediation if that is Barry's preference.

[64] Pool Doctor did not receive a response to that letter; however, on 2 April 2015 it received a further medical certificate dated that day indicating Mr Neal would be fit to resume work on 20 April 2015.

[65] Mr Tee responded to that information by means of a letter dated 2 April 2015 in which he stated:

We note Barry has been absent on sick leave since 7 March 2015 so his total period of sick leave anticipated will be a period of about six weeks, provided he is able to return on 20 April.

By that point we believe our client will have waited a reasonable time to allow Barry to recover, especially given the earlier indications that he will "be fit" to resume work.

[66] The letter included the information that Pool Doctor would like to commence an inquiry to ascertain whether or not Mr Neal had a realistic prospect of returning to work within a further reasonable time and asked that it be provided with all the information

Mr Neal had which was relevant to that inquiry. It noted that the information might be used for the purpose of deciding whether or not to continue the employment relationship, stressing that no decision had been made in that respect.

[67] As no response was received to that letter, Mr Tee emailed Mr Bluegum on 14 April 2015 asking if he had any instructions to respond to the letter of 2 April 2015. The email noted that Mr Neal had an obligation to be active and constructive in maintaining the employment relationship.

[68] Mr Bluegum replied that same day stating in an email that he was meeting with Mr Neal the following day and would take instructions then. Mr Bluegum emailed Mr Tee on 15 April 2015 confirming he had met with Mr Neal and had been instructed to progress the matter to urgent mediation.

[69] Mr Tee emailed on 16 April 2015 asking whether or not Mr Bluegum could confirm any dates proposed for mediation. Mr Bluegum replied that same day stating that the matter had been forwarded to mediation but was going through a procedural stage. He confirmed the reference number afforded to the file. In the email Mr Bluegum added:

Our client remains happy to entertain without prejudice discussions in the interim.

[70] Mr Neal stated in the Investigation Meeting that he had issued instructions to Mr Bluegum to seek without prejudice discussions in order to save cost and stress.

[71] He confirmed that he had not issued Mr Bluegum with any instructions to respond to the issues raised by Pool Doctor at various stages as he had decided to wait until mediation to discuss them, at which time he would also provide a further medical certificate to cover his continuing absence.

[72] Ms Cooksley said Mr Neal did not return to work as expected on 20 April 2015. He did not provide a further medical certificate either at that time or subsequently. It had not been agreed by Pool Doctor that Mr Neal would not have to provide current medical certificates to cover periods of absence due to ill health, or only to produce historic medical certificates at the proposed mediation meeting. Other than the medical certificate stating only that Mr Neal was unfit for work, she said Pool Doctor had received no information as to the cause or extent of Mr Neal's medical incapacity.

[73] Ms Cooksley said Pool Doctor did not receive any information from Mr Neal or his advisers and received nothing from Mediation Services to indicate that mediation was being arranged.

[74] After two full working weeks had elapsed whilst Mr Neal was not at work, had not provided medical certification in regards to his absence, and having received no communication from him, Pool Doctor's lawyers wrote to Mr Bluegum on 4 May 2015 inquiring whether Mr Neal had elected to abandon his employment. The email dated 4 May 2015 stated:

We refer to our earlier correspondence.

We have not received any feedback or response to our requests that Barry provide information to enable our client to commence an inquiry to determine when he might have been fit enough to return to work.

As a consequence our client can only rely on the information provided in the last medical certificate, which confirmed Barry would be fit enough to return to work on 20 April 2015.

Barry did not return to work on 20 April 2015, and has made no effort to contact our client to explain his absence for the subsequent period which now covers 10 working days.

The only conclusion our client can draw is that Barry has elected to abandon his employment, which terminates as a consequence of that decision on his part.

Second Personal Grievance

[75] Ms Cooksley said Pool Doctor received an email from Mr Bluegum the same day, 4 May 2015. The email acknowledged the letter dated 4 May 2015 and noted Mr Neal's view that: "*This is a dismissal by way of abandonment and we say it is unfair and unjustified*". The email further stated:

By your letter we understand that Mr Neal's position has been terminated with Pool Doctor on account of a failure to provide information sought by you regarding his position.

We are quite perturbed by your position considering that this matter is going to mediation of which you knew our client was suffering from stress related issues on account of his treatment by your client. Your client had full knowledge of this at all times. ...

Accordingly we are instructed to raise a personal grievance with the Pool Doctor on account of unfair and unjustified dismissal.

Communications 5 May 2015

[76] Pool Doctor replied by letter dated 5 May 2015 noting that the response to the letter dated 4 May 2015 had been received the same day, however: "*By contrast we have not had a substantive response to the matters raised in our letter of 2 April 2015, nor has your client*

responded to the request for information or feedback raised in our letters of 6 March 2015 and 18 March 2015”.

[77] Pool Doctor stated that it had requested information on how the employment relationship could be best maintained, and on when Mr Neal might be fit to return to work, however had received no response to the requests. It noted that it had not been made aware of any arrangements for mediation having been made and requested confirmation that a request had been made.

[78] Pool Doctor concluded the letter:

Finally for the record our client has not made any decision, nor is one recorded in our letter of 4 May 2015. Our letter refers to Barry’s election to abandon his employment, and his employment terminating as a consequence of “that decision on his part”. If Barry has not abandoned his employment, we need:

- 1. An explanation of the grounds for his absence without explanation from 20 April 2015.*
- 2. His response and feedback as to when he might be able to return to work.*
- 3. Confirmation of the efforts that have been made to arrange mediation.*

[79] Mr Bluegum emailed a lengthy response by email dated on 5 May 2015 stating Mr Neal’s view that it was dismissal by way of abandonment and that it was unfair and unjustified. The email stated that the letter of 4 May 2015 was not an enquiry as to whether or not Mr Neal had elected to abandon his employment.

[80] It is noted that Pool Doctor had been advised on 15 April 2015 that Mr Neal would be facilitating mediation and would provide all the information sought at mediation. Mr Neal had progressed towards facilitating mediation as requested.

[81] The letter also noted:

While mediation was on offer, to save costs in terms of stress on our client, we were instructed to seek without prejudice discussions for which we did over this timeframe. This evidences being communicative for which we have been throughout this matter.

[82] Pool Doctor responded by email that same day, 5 May 2015, stating:

We do not consider your client has grounds for a grievance, and nor do we consider his employment as being terminated by our client.

[83] Mr Bluegum emailed a response explaining that he had again contacted Mediation Services and had been informed that there was a backlog even though urgent mediation had been requested. He concluded:

We await a mediation date and no doubt we can have full and frank discussions there. Again without prejudice discussions are welcomed in the interim.

[84] On 28 August 2015, Mr Neal filed a Statement of Problem with the Authority. The parties attended mediation, but this did not resolve the employment relationship problem..

Determination

Was Mr Neal unjustifiably dismissed by Pool Doctor?

Did the 4 May 2015 letter terminate Mr Neal's employment?

[85] Mr Neal believed he had been dismissed as a result of the letter dated 4 May 2015 which stated:

The only conclusion our client can draw is that Barry has elected to abandon his employment, which terminates as a consequence of that decision on his part.

[86] The Employment Agreement stated at clause 7 that Pool Doctor would consider an employee as having terminated his or her employment if the employee was: "*absent from work for a continuous period exceeding three working days without notification*".

[87] The letter dated 4 May 2015 had been sent to Mr Neal in circumstances which included the last received medical certificate covering Mr Neal's absence from work having expired on 20 April 2015, and Pool Doctor having received no further medical certificate, although Mr Neal continued to be absent from work.

[88] Further Pool Doctor had received no detailed information regarding the reason for Mr Neal's absence other than the reference to Mr Neal suffering from stress in the email from Mr Bluegum on 27 February 2015. Moreover the medical certificates provided by Mr Neal provided no diagnosis or prognosis, and Mrs Neal had not provided any supporting information when forwarding the medical certificates to Pool Doctor.

[89] In addition, the 4 May 2015 letter arose in a context in which the meeting held on 10 February 2015 which all in attendance agreed had been positive, had concluded with Mr Neal's undertaking to make enquiries about new hearing aids relating to Pool Doctor's offer to assist in providing funding for them.

[90] Pool Doctor not having heard from Mr Neal during the two weeks following the 10 February 2015 meeting, contacted him to ascertain his progress and there ensued the following series of communications:

- 25 February 2015: the request from Pool Doctor regarding progress in the matter of the hearing aid enquiries;
- 27 February 2015: the response from Mr Neal:
 - rejecting the offer by Pool Doctor to assist in the purchase of new hearing aids
 - raising issues regarding targeting of Mr Neal by other employees and the directive to work in excess of 40 hours;
- 6 March 2015: Pool Doctor's response requesting feedback on the issues raised in the email dated 27 February 2015 and suggesting a further meeting;
- 12 March 2015: the raising of a personal grievance on behalf of Mr Neal, seeking the agreement of Pool Doctor to attend mediation, and proposing the holding of 'without prejudice' discussions;;
- 18 March 2015: the letter from Pool Doctor requesting additional feedback in order to maintain a productive employment relationship with Mr Neal, and suggesting a further meeting and/or mediation;
- 19 March 2015: no feedback provided but the provision of a medical certificate certifying that Mr Neal was unfit for work until 6 April 2015;
- 25 March 2015: the letter from Pool Doctor confirming that it was committed to: *"taking all steps to maintain the employment relationship"* and was prepared to attend mediation and seeking a meeting with Mr Neal;
- 2 April 2015: provision of a medical certificate certifying that Mr Neal was unfit for work until 20 April 2015;
- 2 April 2015: the letter from Pool Doctor stating that it wished to commence an enquiry to ascertain if Mr Neal had a realistic prospect of returning to the workplace, and for information to assist that process;
- 14 April 2015: the letter to Mr Bluegum asking if he had any instructions to respond to the letter dated 2 April 2015;

- 15 April 2015: the email from Mr Bluegum advising Pool Doctor that his instructions were to progress the matter to urgent mediation and providing a mediation reference number.

[91] I find that the communications indicate that Pool Doctor was attempting to engage with Mr Neal and maintain an ongoing employment relationship. By contrast there was little or no positive engagement on the part of Mr Neal.

[92] I note as relevant to this pattern of communication Mr Neal's intentions regarding the future of his employment with Pool Doctor was Mr Neal's evidence at the Investigation Meeting that, following the 10 February 2015 meeting, he did not want to accept a loan from Pool Doctor to assist in purchasing new hearing aids as he felt this would commit him to remaining in employment with Pool Doctor.

[93] In addition he also confirmed that he had instructed Mr Bluegum to seek the agreement of Pool Doctor to 'without prejudice' discussions on the basis that he had decided he no longer wished to remain employed at Pool Doctor.

[94] In summary, prior to writing the letter dated 4 May 2015, Pool Doctor had (i) offered to assist Mr Neal in the purchase of new hearing aids, (ii) asked for feedback on the concerns raised by Mr Neal regarding his allegations of targeting by other employees and directives to work in excess of 40 hours, (iii) further sought feedback in response to the raising of the first personal grievance on 12 March 2015, and (iv) requested information on his return to work.

[95] In response Mr Neal had provided little in the way of feedback other than the information contained in the personal grievance letter dated 12 March 2015, the request for mediation to which Pool Doctor had agreed, and medical certificates without any additional information, and which had reached an expiry date on 20 April 2015.

[96] Whilst Mr Neal had offered to provide information at mediation, I find this did not lessen his good faith obligation to be responsive and communicative to his employer prior to mediation.

[97] Although Pool Doctor had agreed to mediation initially on 18 March 2015, and reiterated its agreement on 25 March 2015, it had heard nothing further concerning mediation since the email from Mr Bluegum dated 15 April 2015. It had not been contacted by the mediation service, and there had been no medical certificate provided in respect of Mr Neal's continuing absence after 20 April 2015.

[98] Given these circumstances I consider that a fair and reasonable employer could reach the conclusion that an employee who had not attended his or her place of work for a

consecutive number of days without cause or explanation had decided to abandon his or her employment, thereby unilaterally terminating his or her employment agreement.

[99] However the fair and reasonable employer may not safely proceed to conclude that the employee had terminated his or her employment without ascertaining that abandonment had been intended by the employee.

[100] In this context I note that whilst I do not find that the wording of the letter of 4 May 2015 constituted an unequivocal termination of Mr Neal's employment by Pool Doctor, but rather stated its conclusion that abandonment of his employment was what was intended by the conduct of Mr Neal, the relevant circumstances at the time included the fact that Mr Neal had requested, and Pool Doctor had agreed to, mediation taking place

Was it reasonable for Pool Doctor to conclude there had been abandonment given the agreement to attend Mediation?

[101] At the date of writing the letter dated 4 May 2015, Pool Doctor had been made aware that Mr Neal had applied for mediation and that he had stated he would be providing the information requested by Pool Doctor at that mediation.

[102] Whilst Pool Doctor had agreed to attend mediation, it stated that it had not agreed that Mr Neal would not return to work until after mediation, or that an explanation for Mr Neal's continuing absence, or that medical certificates would not be required in relation to Mr Neal's continuing absence from work after 20 April 2015. The letter dated 4 May 2015 stated its understanding of that position.

Did Pool Doctor act in reliance on that conclusion?

[103] In the email in response to the letter dated 4 May 2015 Mr Bluegum advised of Mr Neal's understanding that Pool Doctor had terminated his employment. Accordingly he advised that he had been instructed to raise a personal grievance for: "*unfair and unjustified dismissal*".

[104] At that point I find Pool Doctor was made aware of Mr Neal's view that it had dismissed him. In the Employment Court judgment in *New Zealand Cards Limited v Ramsay*¹ Judge Couch stated:²

If the mistake is about dismissal rather than resignation, the analogous scenario is this. Where the communication is equivocal, the

¹ [2012] NZEmpC 51

² Ibid at para [51]

employer learns that the employee has misunderstood it as a dismissal contrary to the employer's intention but does nothing within a reasonable time to correct the employee's false impression. In such a case the employer must suffer the adverse consequences of passively standing by and letting the employer think that a dismissal has taken place,

[105] I find that Pool Doctor did not let Mr Neal think a dismissal had taken place. It made a timely response on 5 May 2015 enquiring on how the employment relationship could best be maintained and seeking information pertinent to that enquiry.

[106] In response to that enquiry Mr Neal reiterated his belief that his employment had been terminated in an email dated 5 May 2015. To clarify its position, Pool Doctor sent a further email that same day reiterating its position that no dismissal had taken place, and asking: “*when he might be able to return to work*”.

[107] I find that following Mr Neal's initial response to the email from Pool Doctor dated 4 May 2015 that his understanding was that a dismissal had taken place, Pool Doctor had twice clarified its position that no dismissal had taken place and had made an enquiry as to how the employment relationship could be maintained and when Mr Neal might be able to return to work.

[108] In such a situation I find that Mr Neal had no grounds for persisting in his belief that his employment had ended because Pool Doctor had terminated his employment rather than as a result of him abandoning his employment.

[109] I determine that Mr Neal abandoned his employment and was not unjustifiably dismissed by Pool Doctor.

Costs

[110] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority

