

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 394
5614627

BETWEEN EWEN McKENZIE
Applicant

A N D HOUSING NEW ZEALAND
CORPORATION
Respondent

Member of Authority: James Crichton

Representatives: Michael O'Brien, Counsel for Applicant
Blair Scotland, Counsel for Respondent

Investigation Meeting: 21 November 2016 at Auckland

Date of Determination: 2 December 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr McKenzie) alleges that he was unjustifiably dismissed by the respondent and/or suffered an unjustified disadvantage while employed by the respondent when the respondent refused to allow Mr McKenzie to withdraw a resignation previously given.

[2] The respondent (Housing NZ) resists those claims and says that Mr McKenzie resigned of his own free will.

[3] Mr McKenzie was employed by Housing NZ in its Auckland office as Procurement Portfolio Manager. There was a complaint of bullying against Mr McKenzie by a co-worker which required Housing NZ to conduct an investigation.

[4] That investigation was prolonged, in Housing NZ's view, at least in part because of delays occasioned by Mr McKenzie.

[5] On 25 February 2016, Mr McKenzie met with his immediate manager, Ms Morton. This was a regular operational meeting. The following morning at 8.21am, Mr McKenzie resigned his employment by email to Ms Morton indicating that he was taking up "*other opportunities*".

[6] At 11.11am, Ms Morton emailed Mr McKenzie accepting his resignation and at 2.30pm on that same day, Mr McKenzie indicated by email to Ms Morton how he would engage with his team to indicate his resignation and the acceptance of it.

[7] Then, at 3.21pm, Mr McKenzie sent a further email to Ms Morton retracting his resignation.

[8] On 29 February 2016 and again on 4 March 2016, there were meetings between Ms Morton and Mr McKenzie, both of which were initiated by Ms Morton to enable her to discuss the purported withdrawal of his resignation with Mr McKenzie.

[9] In the result, on 9 March 2016, Ms Morton wrote to Mr McKenzie confirming that Housing NZ did not agree to Mr McKenzie withdrawing his resignation and Mr McKenzie's employment came to an end on 24 March 2016.

The issues

[10] The only question in the present case is whether Housing NZ acted properly in declining to accept the purported withdrawal of the resignation previously tendered by Mr McKenzie.

Should Housing NZ have allowed Mr McKenzie to withdraw his resignation?

[11] I have not been persuaded that Mr McKenzie should have been allowed to withdraw his resignation. I set out in the following paragraphs why I have reached that conclusion.

[12] In *Boobyer v Good Health Wanganui Ltd* WEC 3/94, 24 Feb 1994, Chief Judge Goddard listed the different kinds of resignation. These different categories are:

- (a) Where the employee unambiguously resigns;

- (b) Where there is an ambiguous communication that is misunderstood by the employer as a resignation;
- (c) Where the employer seizes on unintended words not reasonably capable of amounting to a resignation; and
- (d) The resignation comes in the context of an emotional reaction or outburst.

[13] While it is true, as Judge Inglis observed in *Tribe v John Scott & Co Ltd* [2016] NZEmpC 80, that the statutory obligations of good faith have supplemented the old common law principles of trust and confidence, I am satisfied that the categories identified by Chief Judge Goddard in *Boobyer* are still good law.

[14] The real question in the present case is into which category Mr McKenzie's resignation falls. Not surprisingly, Housing NZ takes the high ground and says simply that Mr McKenzie's resignation was unambiguous, it referred to him taking up other opportunities which suggest a measured response, and it even identified his final day of employment. According to Housing NZ, this was not a resignation produced in the heat of an argument with the employer, nor were the words used in any way ambiguous or capable of being misunderstood. The reference to taking other opportunities suggested in fact that Mr McKenzie had another job to go to and the calculation of his last day of work suggested anything but an emotional reaction to some unknown stressor.

[15] Moreover, some six hours after the resignation had been tendered, and critically, after the resignation had been accepted by Housing NZ, Mr McKenzie was again emailing his manager communicating how he proposed to tell his team that he had resigned and that his resignation had been accepted.

[16] But what then are we to make of Mr McKenzie's next email, 50 minutes later, which seeks to withdraw the resignation? What Housing NZ says about that is simply that it was not available to Mr McKenzie to unilaterally withdraw a resignation which had been freely offered and already accepted and this is because, to go back to Chief Judge Goddard in *Boobyer*:

... the contract (of employment) provides a mechanism for its termination by the employee and once that has been invoked by the employee giving the prescribed period of notice the contract comes to

an end automatically when the notice period expires unless both parties agree to revive or renew it.

[17] So in the present case, Housing NZ says that the resignation was freely given, was accepted by the employer and it cannot now be withdrawn unless the employer agrees and for reasons that we will come to shortly, the employer does not agree.

[18] Those reasons can be expressed as an uncertainty on the part of Ms Morton, Mr McKenzie's direct manager, about why Mr McKenzie maintained that his relationship with Ms Morton had deteriorated. Despite her efforts to find out why he said that, she was unable to establish from him the detail of that allegation with sufficient particularity to enable her to understand it.

[19] To put it the other way round, had Ms Morton understood why Mr McKenzie alleged his relationship with her had deteriorated, when he first made that allegation, the outcome could well have been different. She said in her evidence that she discovered for the first time in reading his brief of evidence for the Authority's investigation meeting, what he maintained was wrong with his relationship with her.

[20] But of course, Mr McKenzie's view of matters is quite different. He might agree that on its face the emailed resignation appears to be unequivocal but he finds fault with Housing NZ in its failure to make allowances for the circumstances in which he wrote the resignation and which he comments on at great length in the meeting the two protagonists had on 29 February 2016. In the notes of that meeting which have been accepted by both parties, Mr McKenzie is recorded as trying to explain to Ms Morton that he had had an altercation that morning with another staff member and that that altercation was the tipping point which activated his writing of his resignation. Moreover, Mr McKenzie says that the underlying cause of his growing distress in the workplace was the bullying inquiry about him, which at the point he resigned was still ongoing.

[21] Ms Morton says that until the meeting of 29 February 2016, she had no idea that Mr McKenzie was feeling stressed about the ongoing bullying investigation and she was particularly struck by the juxtaposition between the resignation on 26 February 2016 and the meeting that the two protagonists had had the day before when her assessment of Mr McKenzie's demeanour was that he was positive and to use her word, "*fine*".

[22] Moreover, she knew nothing about the altercation with the other staff member until the meeting on 29 February 2016 but from Mr McKenzie's standpoint, his expectation presumably was that once Ms Morton was seized of this new intelligence, she would be disposed to see the resignation not as an example of the first category identified by Chief Judge Goddard but as an example of the last, that is a resignation made in the context of "*an emotional reaction*" or which amounts to "*an outburst of frustration*" that the employer was "*not meant to ... [take] literally and it would have become obvious upon inquiry made soberly once 'the heat of the moment' had passed.*"

[23] Moreover, Mr McKenzie would say that by virtue of the obligations on parties conferred by the statutory requirement of good faith, once Ms Morton was put on notice that there was an emotional context to the resignation, she ought to have gone further to consider whether his resignation was explicable exclusively in terms of that emotional content.

[24] But even if that analysis were to be accepted by Housing NZ, there is still a further factor and that is that during the engagements between the parties post the day the resignation was tendered and then withdrawn, Mr McKenzie advanced views about the deterioration of his relationship with Ms Morton but on her evidence never demonstrated what that deterioration amounted to with the necessary degree of particularity that would enable her to understand and address his complaints.

[25] Put shortly, Ms Morton says that Mr McKenzie's complete failure to document his concerns about the relationship he had with her as his immediate superior was fatal to her continuing to have trust and confidence in him and effectively discouraged her from considering allowing Mr McKenzie to withdraw his resignation.

[26] Certainly, for the avoidance of doubt, I am not persuaded that Housing NZ failed to fulfil its obligation of good faith to Mr McKenzie. Once he purported to withdraw his resignation, Ms Morton then met with Mr McKenzie not once but twice and had a detailed discussion with him on each occasion. I am satisfied on her evidence that if Mr McKenzie had been able to enunciate for her benefit what the elements of the deterioration in his relationship with her amounted to, there might well have been a different outcome. But for whatever reason, he did not do this.

[27] Mr McKenzie said in his evidence that he had been making it clear to Ms Morton for some little time about the deterioration in their relationship and the elements of that which he was identifying. She disputed that in her oral evidence at my investigation meeting but was absolutely explicit that having had the issues alluded to in the meeting she had with Mr McKenzie on 29 February 2016, on 2 March and again on 4 March she says she made it clear to Mr McKenzie that she needed “*chapter and verse*” on what the issues were between them.

[28] I commented at the investigation meeting that each party would have been in a stronger position if they had reduced a critical aspect of their positions to writing; if Mr McKenzie had identified in written form the reasons that he had resigned and if Ms Morton had documented her request that Mr McKenzie spell out what his complaints were about her.

[29] In summary then, I have concluded that it was available to Housing NZ not to allow Mr McKenzie to withdraw his resignation. Despite the efforts of Mr McKenzie’s able counsel, I have not been persuaded that there is any ambiguity in Mr McKenzie’s initial resignation and on that footing, the employer can accept the resignation *simpliciter* and not allow Mr McKenzie to resile from it.

[30] I do not accept the analysis offered for Mr McKenzie that his resignation was activated by an emotional context and that Housing NZ should have investigated that and failed to do so. The evidence in fact is that there were two significant meetings between the two protagonists after Mr McKenzie purported to withdraw his resignation and certainly in the first of these, for which we have notes, there was a long discussion at which Mr McKenzie had the opportunity to set out the basis for his resignation being activated by an emotional disturbance, and he took advantage of that opportunity.

[31] The fact is that his argument was not persuasive; it was not persuasive because of the explicit and dispassionate nature of the resignation itself, the detail contained in it, and the immediate context where Ms Morton stoutly maintained that she had no idea that Mr McKenzie was suffering any distress as a consequence of the continuing bullying allegation.

[32] Moreover, the overlay of the good faith obligation has been satisfied by the behaviour of Ms Morton in conducting two detailed discussions with Mr McKenzie as

well as having various other engagements with him at the relevant time. In particular her good faith behaviour is demonstrated by the request that Mr McKenzie tell her what it was that had deteriorated in their working relationship, an adequate response to which might have resulted in a different outcome. Furthermore, Ms Morton's offer to Mr McKenzie on 4 March 2016 that the parties attend mediation, an offer which he never responded to personally, although some time later on his counsel proposed precisely the same process, is more evidence of a genuine and proper attempt to engage appropriately in accordance with the statutory obligation.

Determination

[33] I have not been persuaded that Mr McKenzie has any justiciable claim.

Costs

[34] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority