

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 469
3053772

BETWEEN	MARIE DRYLIE Applicant
AND	MANA CRUISING CLUB INCORPORATED Respondent

Member of Authority: M B Loftus

Representatives: Graham Ogilvy, advocate for the Applicant
Allan Davidson, on behalf of the Respondent

Investigation Meeting: 8 August 2019 at Wellington

Submissions Received: At the Investigation Meeting

Date of Determination: 9 August 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Marie Drylie, claims she was unjustifiably dismissed by the respondent, Mana Cruising Club, on 29 November 2018. She also claims the Club has breached her employment agreement and for that she seeks the imposition of a penalty.

[2] The Club accepts it dismissed Ms Drylie but considers it was justified in doing so by reason of medical incapacity.

Background

[3] Ms Drylie was employed by the Club as its Bar Manager in December 2017. Her terms of employment were specified in a written agreement and while a signed copy is not currently available the parties agree signature occurred. Pertinent to this dispute it contains a clause entitled *Ending employment: Medical* which reads:

If the Employer believes on reasonable grounds that the employee is not able to do their job because of a condition, illness or injury, and will not be able to resume their job within a reasonable timeframe, the employer may end the employee's employment by giving at least 4 weeks' notice.

Before doing so, the employer will:

- *request medical details from the employee about their condition*
- *consider any information provided within a reasonable timeframe, together with any results from medical examinations they have asked the employee to take*
- *meet with the employee to discuss their condition and timeframes for recovery.*

[4] On 16 March 2018 Ms Drylie suffered a work accident. An attempt to return on light duties was short lived with Ms Drylie's Doctor advising she desist and she did so with effect 26 April. That has remained the situation and she remains incapable of working.

[5] Subsequent to her April departure Ms Drylie remained in touch with the Club providing medical certificates and engaging in general conversations about her situation. The last of the certificates was proffered on 21 September. It advised the absence would continue until 17 December, perhaps longer, pending a decision about possible surgery.

[6] This created consternation given pressing concerns about the house operation, its viability and the Club's ability to comply with liquor licensing requirements as a result of Ms Drylie's absence. This led to the Club's then Commodore writing to Ms Drylie on 4 October. He acknowledged the medical certificate before outlining the Club's concerns. The letter goes on to note *There are a number of options open to us here, such as restructuring your job to enable us to appoint another manager or terminating your contract in terms of the employment agreement.*

[7] The letter then quotes the medical cessation clause ([3] above) and the continued absence before asking *Is there any other information that you hold that we should consider prior to making our decision? Do you wish to meet with Menno and myself to discuss the situation?*

[8] The letter asks for a response by 15 October.

[9] On 10 October Ms Drylie e-mailed:

In response to your letter I am getting in contact with ACC and seeking legal advise, and need more time to understand where I stand moving forward.

I will be in contact after this by the 1st of November.

[10] Due to various issues, including the fact the Commodore who had written the letter of 4 October had vacated the position on 7 October, Ms Drylie's e-mail did not reach the new Commodore until the weekend 27-28 October. He replied on 29 October by responding to another of Ms Drylie's e-mails in which she had raised the renewal of her Bar Manager's certificate. Having observed *I note you have not responded to our Past Commodore Mike's letter dated 4 October ...* he goes onto say:

In the absence of your response requested by the 15th October, the Committee determined that your contract be terminated on medical grounds ... Therefore your contract is officially terminated as of 29th November 2019.

[11] The Club's position is the response of 10 October does not suffice as it fails to provide any additional medical information.

[12] The advice of termination led to both a letter and e-mail, sent on Ms Drylie's behalf, by Mr Ogilvie. The e-mail asked notice be withdrawn to allow Ms Drylie to get advice on when she might have her operation. That would then enable the parties to meet and discuss the situation.

[13] The response came on 1 November. While the covering e-mail expressed a willingness to meet, the attached letter confirmed *... my decision is to terminate Marie's contract effective 23 November 2018 as previously advised.* It also recorded her e-mail of 10 October had not reached the new Commodore *in time* and so *... our Management Committee's decision (to dismiss) was reached without reference to her request for extra time to respond.*

[14] Mr Ogilvie wrote raising the personal grievance on 16 November and that was responded to on the 26th. The response stated:

It is the Club's position that Marie's employment contract terminates as of 29 November as provided in the notice sent to her, however we are willing to withdraw our notice if a meeting can be arranged prior to this date.

[15] This message did not reach Mr Ogilvie in time and while a follow up was sent by the Club on 3 December the dismissal had already been actioned.

Determination

[16] Ms Drylie claims she was unjustifiably dismissed. The Club accepts it dismissed her and in doing accepts it is required to justify the dismissal.

[17] Section 103A of the Act states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[18] In applying the test the Authority must consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations. A sufficient investigation requires, as a bare minimum, that the employer put the issues, allow an opportunity to respond and consider the response with an open mind.

[19] In this instance the Club relies on medical incapacity to justify its decision to dismiss Ms Drylie.¹ That requirements similar to the s 103A test apply when an employer contemplates dismissal by reason of medical incapacity has been confirmed by various cases. *Motor Machinists Ltd v Craig*² is an example with the Court observing:

(1) frustration of contract can occur where illness prevents the performance of an employment contract. However, an employment contract is not frustrated simply because an employee is ill or has been in the past. The contract is not frustrated where there is no medical evidence that the employee is permanently incapacitated or it cannot be said that the incapacity has been such that it destroyed the root of the contract. Under the doctrine of frustration there is no requirement of fairness as the contract terminates by operation of law, rather than by the decision of one of the parties. (p 591, line 24; p 592, line 1)

(2) Where illness or injury occurs which prevents an employee from returning to work the employer is not necessarily bound to hold that employee's job open indefinitely. However, if the employer chooses to dismiss the employee, its action must be justified at the time in accordance with the established jurisprudence. The employer must have substantive reasons for the dismissal and must show that the procedure it followed in

¹ Statement in Reply at [1]

² [1996] 2 ERNZ 585

carrying out the dismissal was fair. This ensures that the employee is not dismissed without the opportunity to provide information, such as medical reports, to prevent the employer taking such action, while at the same time allowing the employer to end the contract without needing to establish that the contract was frustrated.

[20] The above requirements are reflected in the *Ending employment: Medical* clause in Ms Drylie's employment agreement and it is there the Club faces a problem. The clause states the Club will do three things. Will is a word of compulsion and means there is no option. The Club was obliged to seek information about Ms Drylie's condition, consider the response and meet with her to discuss her condition and timeframes for recovery.

[21] While on the face of it the Club did ask for information on 4 October its request is tainted by the fact Mr Davidson said the Club was seeking information additional to that it already had and which had led it to conclude Ms Drylie was not going to return in time to rectify what it saw as a dire situation which had to be addressed.

[22] There was clearly no consideration of any information gleaned as none was presented and there was no meeting.

[23] There is then the fact Ms Drylie responded and advised time was needed though she did specify a date by which she would provide the information. Fault for the fact the message did not get to decision makers before they decided to dismiss lies with the Club. There are then two additional factors that present difficulties for the Club. If it had been correct and Ms Drylie had failed to reply or the reply was deemed unacceptable then the Club should have questioned the lack of response and put Ms Drylie on notice that failure to provide information could be detrimental. It didn't. The second is once the Club become aware of the response it chose to proceed and advise dismissal having concluded the response failed to provide further information rather than note it advised such information was still being sought. That is not the approach of a fair and reasonable employer.

[24] There is also the fact Mr Davidson's evidence is the decision was made, or at least confirmed, by the Club's Board. It is well established an employee facing a threat to continued employment should be allowed to address the decision maker. Not only did that not occur but such an opportunity was not offered.

[25] Turning now to the Club's offer to withdraw the notice of dismissal on 26 November. I conclude that also fails to assist the Club. First there is possible confusion from what the

Club says was an error in its letter of 1 November and which advised dismissal would occur on 23 November and not the 29th as originally advised. It is arguable Ms Drylie could have assumed that by the time the offer of withdrawal dismissal had already occurred. Second, and more importantly, the offer of withdrawal was conditional and the condition, an arranged meeting, was not met. Rather than follow this up before proceeding to dismissal the Club simply continued.

[26] Finally I note the Club has not raised any issues regarding resources.

[27] Having considered the evidence I find the Club failed to adhere to the requirements of its employment agreement. That is fatal and leads to a conclusion the dismissal was unjustified. That, in turn, leads to a consideration of remedies. Wages are not sought as Ms Drylie remains on ACC and is currently incapable of working though she seeks \$12,000 as compensation for hurt and humiliation. There is also the penalty claim.

[28] Ms Drylie supported her claim with evidence of hurt generated by a sense of bewilderment about what was occurring with this being exacerbated by the talk of restructuring. The possibility there was a multiplicity of options left her struggling with the fact there was no subsequent discussion. She also says she was upset, struggling to sleep and having panic attacks caused by concerns about how this would affect her future job prospects with that being support by uncontested evidence from her partner that she was showing signs of what he considered depression and had become withdrawn and unhappy. Having considered the evidence and current precedent I consider an award of \$8,000 appropriate.

[29] Finally there is the penalty claim. For three reasons this will not be entertained. A penalty is generally considered to be punishment for a wilful and deliberate breach. The evidence leads me to doubt the Club chose to wilfully and deliberately breach its duty of good faith. What it did was prioritise its interests and address what it saw as fiscal and legal deficiencies which leads to the second point. This appears a classic case of double jeopardy as the duty of good faith was allegedly breached as a result of the Club not considering Ms Drylie's medical information and failing to meet her. These are the very factors that have seen the grievance claim resolved in Ms Drylie's favour. The third point is there is no request the penalty, if awarded, be paid to Ms Drylie. I do not consider this a situation which warrants a benefit to the Crown.

[30] The conclusion remedies accrue means I must, in accordance with s 124 of the Act, address whether or not Ms Drylie contributed to her dismissal in a significant way. The answer is no. Medical incapacity simply cannot constitute contribution in the way envisaged by s 124 and justify a reduction in remedies.

Conclusion and orders

[31] For the above reasons I conclude Ms Drylie has a personal grievance in that she was unjustifiably dismissed.

[32] As a result I order the respondent, Mana Cruising Club Incorporated, pay the applicant, Marie Drylie, \$8,000.00 (eight thousand dollars as compensation pursuant to s 123(1)(i) of the Employment Relations Act 2000.

[33] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority