

A Disadvantageous Resignation

It is not uncommon for an employer to receive a letter of resignation from an employee which, in addition to giving notice to the employer of the employee's intention to resign, may also indicate the reasons for the resignation are due to negative issue arising from their working relationship.

A recent Employment Relations Authority determination – *Hauraro v. D & J Grindley Supermarket Limited t/a Riverlea Mall SuperValue* [2011] NZERA 350 has determined that it may not be in an employer's best interests to simply ignore complaints raised by the employee in a letter of resignation and has in fact found that an employer who does so may be open to claims that they have acted in a manner which constitutes an unjustified disadvantage to the employee.

In this case, the employee (Josie) was engaged as a checkout operator at the time of her resignation.

The employee had telephoned her husband at home and asked him to prepare the letter of resignation and bring this into the workplace after she had had a "heated discussion" with the store team leader (Kym Hale) in the storeroom. The letter of resignation gave two weeks' notice in accordance with the terms of the applicable individual employment agreement.

The written resignation included a complaint that the "store team leader Kym Hale had breached Josie's privacy by "exposing my mental illness to the staff" and that Josie should not have had to find someone else to cover her shift in order to attend a funeral on the previous day."

Upon receiving the letter of resignation the employer went and spoke to the employee. During the conversation the employer proposed that the employee finish work without serving out the two week notice period, to which the employee agreed. This agreement was subsequently confirmed in writing by the employee.

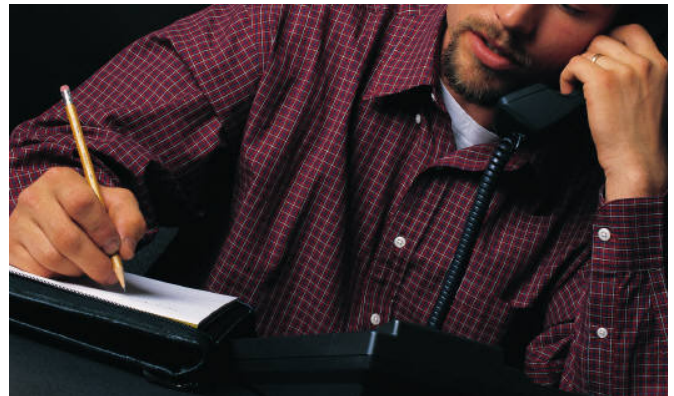
The day after the employee resigned, the employee's husband telephoned the employer and told him that the employee was unhappy about the circumstances leading to her resignation. The employer responded in writing as follows:

"I appreciate the views outlined in your letter. Regrettably, you have resigned and not given me the chance to look into your grievance with the other party/parties concerned.

I now see this as a personal manner, and do not wish to involve myself or my business. In summarising I have no interest in being involved in mediation between yourself and the other party/parties concerned.

Whatever action you decide on from here, Jason and yourself are welcome in SuperValue and all courtesies will be expected from staff to you as a valued customer."

The employee then raised a personal grievance claim alleging she had been unjustifiably constructively dismissed.



The issues for investigation and determination by the Authority were:

- (i) whether Josie's resignation was a constructive dismissal because:
 - a. there were sufficiently serious breaches of her terms of employment which the employer would reasonably foresee would result in a substantial risk of resignation (with the breaches being the alleged breach of privacy, ridicule, and denial of bereavement leave); and/or
 - b. her resignation was coerced (by options allegedly put to her); and
- (ii) whether DJGSL, through David's actions, dealt with her resignation as a fair and reasonable employer would have done."

By way of background, there was evidence before the Authority that the employee had experienced periods during which she was depressed and that on one occasion when the employee was off work sick she had told the Store Manager that she "had been depressed, and was on a bit of medication". The employee asked the Store Manager not to tell anyone about this except the owners of the business.

Also the employee had been required to make arrangements to provide cover for her absence in the workplace to allow her to attend a tangi for the son of her half-brother. The employee duly arranged for her shift to be covered. The employee was annoyed she had to make arrangements for work cover.

In subsequent discussions with the person (Barnes) who had covered for the employee's absence while she was at the tangi the following occurred:

"While talking to Josie on the phone Barnes mentioned a recent conversation she had with Jo [another employee]. She said she and Jo had talked about Josie having a mental illness and used the phrase "You know, that John Kirwan thing". That was a reference to a Ministry of Health-funded public awareness campaign which included television advertisements in which former All Black John Kirwan talked about his experience of depression."

There was a dispute in the evidence before the Authority as to who it was alleged had disclosed the mental illness issue.

The day following this conversation (and the day the employee resigned) the employee confronted the team leader, whom she believed had been talking about her mental illness and the team leader denied this. There was also a dispute as to what occurred during this discussion. The team leader indicated that the employee was "yelling and talking about resigning" with the team leader indicating she had encouraged the employee to go home and think about it first before resigning. The employee alleged that the team leader had denied making any comments about the employee's mental illness and that there was an argument between the two which subsequently resulted in the employee tendering her resignation.

There was further dispute over the nature of the employee's conversation with the employer after receiving the resignation. The employer alleged that he had provided the employee the opportunity to talk about any issues at that time, however stated that she had refused to discuss the resignation or the matters giving rise to it. The employee alleged it was the employer who did not want to discuss the reasons for the resignation.

The Authority determined as follows:

1. The Authority did not accept that the team leader had made the alleged comments about the employee's mental health in the workplace and that rather what had occurred was "simply gossip between co-workers" which the team leader was not responsible for.
2. The actions of the team leader "did not encourage, induce or require the resignation".
3. It was not unreasonable for the Store Manager to ask the employee to check whether someone could cover her shift for the employee to attend the tangi:

"While she may have been dissatisfied, there was nothing to suggest that taking the leave put her job in any real jeopardy or questions about it were so overbearing that she reasonably believed she needed to or was required to resign."

4. The decision to resign was not "made in the heat of the moment and unfairly seized upon by DJGSL in a way that might then make the end of Josie's employment a constructive dismissal. However I do not consider that was so for two reasons. Firstly, Jason's evidence was that he and Josie had "a general discussion" about the prospect of resigning from her job on the evening of 16 November after the phone conversation with Barnes. Secondly, on 17 November, several hours passed between Josie confronting Kym and handing over her resignation letter to Taane. In that time she had a letter prepared setting out her reasons so the words of resignation were not hurried or unconsidered."

On the basis of these determinations the Authority determined that the employee had not been unjustifiably constructively dismissed.

However what is of some concern for employers is that the Authority determined that the employee was unjustifiably "disadvantaged" by the way her employer dealt with her resignation on the following basis:

1. *"The letter of resignation made a serious complaint about the actions of Kym who was a DJGSL supervisor. It claimed "exposing my mental illness to the staff" was a breach of privacy and that Josie's terms of employment were breached by having to find cover for her shift in the event of a bereavement."*
2. *"David's attempts to investigate those concerns consisted of only a cursory conversation with Josie and he quickly moved to a position where he sought to end her employment at the earliest opportunity without persevering with any further inquiries as to the reason for it. In that respect he did not do enough to discount the prospect that her concerns were real and that resignation was an action which should be discouraged rather than facilitated in those circumstances. . . . While Josie may have been unresponsive to the questions he asked her in that work area, he then made no real effort to find out more from Kym and Taane about what had happened before moving to have Josie's employment finish as soon as possible. It was not until after Josie raised a personal grievance that David got proper reports from Kym and Taane about what they understood had happened. "*
3. *"In those respects his actions were, I find, less than what a fair and reasonable employer would have done in all the circumstances at the time. A strong indication of that comes from Taane's evidence that she went and spoke with David where he was talking to Josie. She suggested David have someone else with him while talking to Josie but he responded: "Don't worry, it's sorted". Taane's view was that they should "take it upstairs", that was go to the office rather than talk in the store. It was a suggestion which reflected both appropriate management practice and her own experience of how best to deal with Josie throughout the employment relationship. "*
4. *"There was the prospect that proper inquiries and discussion might have quickly resulted in a different outcome which was suitable for both parties. And in that respect I do not accept that David was correct in the assertion that he made in his 18 November letter that Josie did not give him a chance to look into her grievance with Kym and that DJGSL was not responsible for Kym's actions. Rather he opted to quickly move to curtail notice and end the employment. As a result Josie was unjustifiably disadvantaged by not having her concerns properly investigated, even if they were mistaken, and by not having a discussion with her employer in a suitably private place."*

The Authority awarded the employee a \$4,000.00 compensatory payment.

Employers must therefore proceed with caution when receiving a letter of resignation in which an employee raises concerns about the workplace as being the rationale for the resignation. This Authority determination would appear to suggest that an employer is obliged to, at the very least, canvass these matters with the employee and carry out an investigation to determine the veracity of the concerns raised, or face the prospect of a disadvantage claim.

As always, if you are faced with this scenario we would strongly urge that you seek advice before acting in a manner which may leave you exposed to an unjustified disadvantage and/or unjustified constructive dismissal claim.