



Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Constructive Dismissal Actually Fair Treatment

Ms Jones resigned during an investigation into the use of her company car. She was employed as a Territory Manager and her terms of employment included a company car. In February 2016, the company installed a GPS monitoring unit in all vehicles advising her that they did so for reasons of vehicle security, driver health and safety and route efficiency. Every time the ignition was switched off and on the device recorded the location and time.

In April 2016 Mr Shipley (Ms Jones' Manager) reviewed all GPS units. He noticed anomalies in Ms Jones' vehicle use and in writing called her to a meeting. The issues he identified were that between 4 and 21 April 2016:

- a. Her car started for the first time on three days at 9.00 am and seven days at 10.00 am and twice after 11.00 am.
- b. Her car switched off at her home once between 1.00 pm and 2.00 pm, ten times between 3.00 pm and 4.00 pm and twice after 4.00 pm.
- c. Several residential addresses were regularly visited.
- d. Regular stops were made to malls or the CBD and one to Sumner; the latter at a time when she claimed she was unable to attend a meeting with Mr Shipley because of illness.

Ms Jones was advised of her right to be represented and that the outcome of the meeting could be a disciplinary one.

Ms Jones engaged Christchurch Advocate Robert Thompson. Following protracted correspondence between the company and Mr Thompson, a meeting was held on 7 June 2016. Ms Jones had been on sick leave (stress) leading up to that date. The meeting went badly and on 8 June 2016 Mr Thompson wrote to Mr Shipley claiming that he was biased, hostile and not open-minded. It also claimed that Mr Shipley had instructed Ms Jones that working from home was acceptable, that he knew she could take time off in lieu and had held without prejudice talks intending to end her employment.

The letter concluded that the meeting was unfair and that *'if Ms Jones did not receive assurances within 24 hours, she would be forced to resign and claim she had been dismissed'*.

On 13 June 2016 Mr Shipley wrote setting out the company's account of the investigation process to date which included:

- "(a) As to being at home during the business day:*
- (i) She was either working from home or taking time off in lieu but could not recall which.*
 - (ii) If working from home, she sometimes connected to the internet and sometimes used her mobile phone or her home phone to make company calls. Working from home could involve research by reading the newspaper and magazines.*
 - (iii) If she was not working, she was taking time off in lieu. She believed she was entitled to this time off because her normal working hours had been exceeded and/or she had worked through her breaks.*
 - (iv) On one occasion she had gone home at 2 pm to meet a tradesman.*
- (b) Regarding unusual travel to Sumner, other residential addresses, the CBD and malls during business hours:*
- (i) She could not recall which clients were visited.*
 - (ii) At areas like the CBD, and malls, she was prospecting for new business.*
 - (iii) She had no diary notes, client information or confirmation of sales activities.*
- (c) As to the occasion when she travelled to a residential address and then to Sumner, after calling in sick and being unable to attend a meeting with Mr Shipley, she may have gone to visit friends or family."*

Mr Shipley stated that he did not accept the explanations and denied that there were arrangements for 'self managed time off in lieu'. He concluded that he had referred the concerns to the General Manager.

Ms Jones resigned on 22 June 2016 claiming that the company had not provided her with the clear assurances that she sought, and therefore she had been constructively dismissed. It was noted by the Court that she had not explained exactly what she sought.

The claims of Ms Jones were accepted in the Employment Relations Authority who awarded \$20,000 compensation and \$11,192 lost wages. This decision was challenged by the employer and heard in the Employment Court in a decision released on 29 May 2020.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Peter Zwart, Dean Kilpatrick or Jane Taylor.**

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The Court firstly considered the concept of constructive dismissal accepting the 1985 **Woolworths** decision and noted:

"In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. . . . the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach."

Ms Jones claimed that Waste Management had followed a course of conduct and had breached multiple duties with the purpose of coercing her to resign:

- a. In 2012 the company had written to her raising issues over her absence from work.
- b. They required her to return to work at the end of each day to complete the day's duties. This practice lapsed by 2015.
- c. She claimed that she was treated differently from other employees, for example, another Territory Manager was allowed to work from home. However, this was because he had a hearing impairment and found working in the office difficult. The Court accepted the employer's explanations and noted these cases were on a different scale from the allegations made against Ms Jones.
- d. Ms Jones also claimed that Mr Shipley should not have investigated the claims because he was a witness to her contention that he had authorised her right to work from home. This arose from an email that he had sent her in September 2015. The Court held that the meaning of the email was self-explanatory and was therefore not contentious and it was not improper for him to investigate.
- e. Ms Jones also claimed that the employer had failed to take further steps to investigate issues raised at the 7 June 2016 meeting. The Court determined that Ms Jones knew that this further investigation (into a claim of bullying) had yet to be completed when she resigned.
- f. In addition, she challenged the fact that Mr Shipley had phoned her at her home in May 2016 when off sick and knowing she was represented. The call was because her medical certificate had expired and she had not returned to work. The Court held there *'was no reason for him to speak to her representative about such an innocuous inquiry'*.

Breach of Duty

Ms Jones claimed that her employer had been responsible for nine particular breaches of its duty to her which caused her to lose trust and confidence in them.

These included allegations made by Ms Jones about the actions of the employer which the Court found she either failed to prove or that they were not significant enough to result in the claimed breach of trust. Among others she claimed that they had failed to provide all information relevant to the investigation. On 25 April 2016 Ms Jones' representative requested:

- "(a) a copy of Ms Jones' individual employment agreement;*
- (b) her time and wage records;*
- (c) any company policies and procedure manuals; and*
- (d) copies of any emails or communication held by the company in relation to working from home."*

Mr Shipley sent back an annotated version of the email with answers, attached her agreement and responded that time and wage records and policy and procedure manuals were available to Ms Jones electronically, or a copy of the policies was available at the office. He was advised that there were no arrangements for working from home – point d. The representative refused a subsequent request for a meeting without the requested policies and wage and time records.

The parties exchanged emails regarding this resulting in what was described by the Court as a *'Mexican Standoff'*. However, the Court found that the obligation to provide information (s.4 (1A)(c) Good Faith) can be satisfied provided the employer provides access to the information, and that *"the appropriate means of providing access to relevant information will depend on the nature of the information, the volume of it and the circumstances of both the employer and employee."* The Court felt that the requests were so broad that the company could not reasonably have been expected to provide hard copies. In one exchange of emails Ms Jones had stated that she was having technical difficulties downloading information. The company offered technical IT support which sufficiently dealt with this concern. The Court went on to provide that s.4 (1a)(c)(i) refers to access to relevant information and that some of the information sought was not relevant.

Ms Jones also claimed that the meeting of 7 June 2016 was very stressful and that Mr Shipley was domineering and rude when he conducted the meeting. Mr Shipley similarly claimed that his efforts to conduct the meeting were hampered by Ms Jones' representative. The Court ultimately found that the meeting still allowed for a fair investigation because the *"meeting was an opportunity for both parties to impart further information to progress the inquiry. That is what happened."* Ms Jones had, by the conclusion of the meeting offered the employer the explanation that she wanted to rely on.

Ms Jones also claimed that the failure to provide undefined *'clear assurances'* in the letter of 8 June 2016, was a breach. The employer subsequently wrote asking what assurances were sought but this was not answered before the resignation was received.

In conclusion the Court found that there was no breach of duty by the employer and the Authority decision was overturned.

This decision interestingly considers the requirements of constructive dismissal and the obligations on both sides in an investigation. The delaying tactics adopted by the employee and the pre-emptive decision to resign, while frustrating, ultimately resulted in an outcome that reasonably reflects the requirements of fair treatment.