

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 23/06
WRC 10/06**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN SPOTLESS SERVICES (NEW
ZEALAND) LTD
Plaintiff

AND LISA MORRISON
Defendant

Hearing: 30 and 31 August 2006
(Heard at Wellington)

Appearances: P A McBride, Counsel for the Plaintiff
I Hard and N P Bourke, Counsel for the Defendant

Judgment: 4 December 2006

JUDGMENT OF JUDGE C M SHAW

[1] Ms Morrison was employed by Spotless Services (New Zealand) Ltd (Spotless) as a civilian service centre operator at Trentham military camp. She and her supervisor were required to ensure that the service centre was continuously staffed between 7.30am and 5.30pm Monday to Friday.

[2] In August 2005, Ms Morrison sought leave from her manager to undergo private surgery on 16 September 2005.

[3] Although her request for leave was refused, she was absent from work from 15 September 2005. She later advised Spotless that the operation had been successful, that she would be fit for work on 17 October 2005 and required leave without pay until then. That leave was again refused. Spotless treated her absence

as unauthorised and invoked the abandonment clause of her individual employment agreement to terminate her employment.

Employment Relations Authority determination

[4] The Authority held that this was a dreadful dismissal and not an abandonment of employment. It found that:

- The abandonment clause in the individual employment agreement (IEA) did not apply because Spotless knew from her that she was not abandoning her employment.
- Her actions in taking leave without approval was a disciplinary matter rather than abandonment.
- A fair and reasonable employer would not have dismissed her in the circumstances.
- Spotless's actions had the appearance of an employer taking advantage of an opportunity to rid itself of an employee with an appalling absence record.
- It should have taken up its right to discipline Ms Morrison when she returned and inquired fully into the reasons for her absence.

[5] The Authority found that there was no contributory fault by Ms Morrison. She was awarded lost wages of \$5,123.04 and \$7,000 compensation.

The challenge

[6] Spotless challenges the Authority's determination on the basis that she was not dismissed but had abandoned her employment. If she had been unjustifiably dismissed, she had substantially contributed to her situation.

[7] Ms Morrison defends the challenge. She positively asserts that Spotless did not use any of the applicable disciplinary procedures against her; that she did not abandon the employment; and that she was unjustifiably dismissed.

[8] Ms Morrison is claiming the lost wages ordered by the Authority and has increased her claim for compensation to \$30,000.

[9] The evidence presented to the Court on the challenge was very similar to that in the Authority although extra evidence of Ms Morrison's doctor was presented. There was also more extensive cross-examination of the witnesses.

[10] The issues that arise on this de novo challenge are:

1. Did Ms Morrison abandon her employment? If not,
2. Was she dismissed justifiably?
3. Was the refusal to grant leave reasonable in all the circumstances?
4. Did Ms Morrison contribute?

The facts

[11] A substantial agreed statement of facts was submitted by the parties and was amplified by the evidence.

[12] Ms Morrison began work with Spotless in February 2004. Her supervisor was Catherine Bryant and her manager was Colin Starling. Over the course of her 18-month employment she took 54 days of leave apart from that to which she was entitled such as annual, bereavement, and sick leave. This was due to a very bad year with bereavements and sickness of close family and friends as well as her own ill health.

[13] While all of this leave was ultimately authorised and paid for by Spotless where appropriate, the impact of her absences on the operation of the service centre was causing justifiable concern to Ms Bryant and Mr Starling and became the subject of a number of meetings between them and Ms Morrison.

[14] On 19 July 2004 Ms Bryant met with Ms Morrison to formally raise concerns about her absences and to set her performance goals. These included a goal that she would place an importance on her work and manage other commitments better around her work where possible. Ms Morrison explained about her family commitments and her health problems and said her absences were a concern to her as well.

[15] Ms Bryant told her that the work of the other employees was being affected by her time away from the office. They were happy to help each other but her absences meant that working days were interrupted. Ms Morrison said she enjoyed her job and planned to stay as long as Spotless had the contract.

[16] Ms Morrison was not absent during August 2004 but from then on took annual leave in 1 or 2 day blocks. In November and December she had 8 days' sick leave and a day's leave without pay. From the end of January 2005 she took leave without pay in blocks of 3 more days and in March 2005, having used her sick leave entitlements, took sick leave without pay.

[17] Up until 11 April 2005 in spite of her absences the relationship between Ms Morrison and Ms Bryant was untroubled. For example, they went Christmas shopping together the previous December.

[18] On 11 April 2005 Ms Bryant discussed Ms Morrison's absences with her. She had taken 3 days' leave for domestic reasons which Ms Bryant was sympathetic to but Ms Morrison told Ms Bryant that she wanted 2 more days off over the upcoming school holidays. As well, her partner had booked some non-refundable air tickets to Australia and she said she would be taking leave from 30 September to 16 October 2005. Ms Bryant told her she had to apply for any leave as leave without pay was not an entitlement and given the substantial time she had already had off it was unlikely that she would get such approval.

[19] The issue was raised again at a routine fortnightly meeting held on the same day. Ms Morrison told Ms Bryant about the financial implications of not being able to use the pre-paid air tickets if she could not have leave. Ms Bryant pointed out that she had made no application for leave and would have to talk to Mr Starling. At the same meeting Ms Morrison said that she was being headhunted by another employer.

[20] The next day Ms Morrison spoke privately to Mr Starling. He told her she could not have more leave in October than she was entitled to and she did not have sufficient entitlement.

[21] On 20 April 2005 at another service centre meeting which Mr Starling also attended, Ms Morrison's leave was again discussed. The purpose of the meeting was to agree on how the time Ms Morrison had taken off on 4 to 6 April 2005 was to be recorded. As no medical certificate had been provided, it was treated as leave without pay.

[22] Ms Morrison was told that leave without pay required management approval in advance and if it was taken without such approval the company may initiate disciplinary action in future. Her past leave was analysed. For the future she was advised that accrued annual leave was not an entitlement and, given her record of absences, it was unlikely to be approved. No reference to her medical condition was made at that meeting.

[23] In fact, Ms Morrison had been receiving medical treatment by Dr Dunn since about the end of February 2005 for severe iron deficiency anaemia caused by a gynaecological condition which eventually required a hysterectomy. Her haemoglobin levels had fallen to below normal range by 28 April 2005 and had reached such seriously low levels by 18 July 2005 that she required a blood transfusion on 19 July 2005. She was therefore very unwell during this part of her employment.

[24] On 6 May 2005 she had a diagnostic scan. There was a factual dispute about whether she told her employer about the scan or the subsequent diagnosis of this condition. Ms Morrison said that several days after the scan she told Mr Starling the results and that she needed to see a specialist and would possibly need surgery. By then she believed Mr Starling knew her diagnosis.

[25] Mr Starling told the Court that, although he recalled Ms Morrison popping her head into his office occasionally and giving him bits of information about her condition, he did not remember being told of the outcome of the scan. He was confident that there was no indication of the seriousness of her situation at that time or the need for surgery. He said that her medical situation only became an issue when she required a blood transfusion in July 2005.

[26] On the other hand, Ms Morrison sent an e-mail to Ms Bryant on 11 May 2005 recording a discussion with Mr Starling that day about her sickness. It said:

I have had a discussion with Colin this morning about my sickness & have outlined what I am up against. I'm sure if [you] want to know Colin will fill you in. I have also informed him that I will be finishing work at 3pm tomorrow to go for a job interview.

[27] Ms Morrison told the Court that in that discussion she would have told Mr Starling about the treatment she was having to stop the excessive bleeding she was experiencing.

[28] I find that as at 11 May 2005 Mr Starling knew that Ms Morrison was suffering a condition that required ongoing medical treatment but at that stage did not know there would be a need for surgery.

[29] Inevitably, her peremptory reference to finishing work early in that same e-mail inevitably caused Mr Starling and Ms Bryant alarm. It was yet another example of her taking time off work without notice or approval.

[30] The next service centre meeting between Ms Morrison and Ms Bryant was held on 30 May 2005. It was recorded fully in a file note. It is apparent that Ms Morrison was by now very unhappy at work. She said: "*I F***** hate the place, this is the worst F***** company I have worked for*". She also said the sooner she got out the better, that she wanted to wind up her social club money, and asked about how much notice she had to give if she were to leave.

[31] Ms Bryant talked to her about her need to lift her customer service but she declined to go on a customer service course. Ms Morrison handed over a medical certificate for an absence on 27 May 2005. During the rest of the meeting Ms Bryant tried to engage her about her work but met with responses that can only be described as negative. She did not want to discuss any other issues.

[32] Plainly, since the last interaction with Mr Starling, Ms Morrison had become completely disenchanted with her job and how she perceived she was being treated. Notes of the meeting were sent to Ms Morrison with an invitation to disagree or discuss. She did neither.

[33] Ms Morrison's negative attitude towards her employer continued at their next meeting on 15 June 2005. The notes describe her body language as hostile. She asked for her individual employment agreement, agreed that she had an issue with Ms Bryant but did not want to discuss it, and asked for points to be put down in writing so she could pass them on to her lawyer.

[34] Ms Morrison had taken some more leave to attend a sick child without seeking prior approval. Mr Starling told her again she had no sick leave entitlement owing but, given her difficult circumstances, took no action against her for taking the leave. She gave the meeting a medical certificate for the ill child.

[35] A more formal meeting was called for 27 June 2005. Ms Morrison was advised that it was not a disciplinary meeting but she could bring a lawyer or support person. She brought a fellow employee. The purpose of the meeting was to discuss Ms Morrison's past absences and to explain Spotless's expectations for the future. Peter Jennings, the HR manager, also attended.

[36] Although Ms Morrison was prepared to attend she was not prepared to disclose details of her medical condition. Mr Jennings told her that the company could not help her if she did not talk and said that if there was a genuine health problem to let Spotless know.

[37] Two days later, Ms Morrison took the whole day off to attend two job interviews. Although she advised Ms Bryant about this only the day before, she was accommodated in her request.

[38] In mid July 2005 Ms Morrison's symptoms began to cause Dr Dunn real concern. They developed rapidly and became alarming to him. He made a medical certificate on 11 July 2005 advising that Ms Morrison needed time off work and that there would be ongoing problems until she was seen by a specialist at the hospital.

[39] On 25 July 2005 Dr Dunn made another certificate explaining her condition had required her to have a blood transfusion, that she may need further transfusions, and was to see a gynaecologist on 9 August 2005. The certificate concluded:

As she is still anaemic and has an ongoing problem she is performing well below par for her.

[40] These certificates were not immediately supplied to Spotless but Ms Morrison had phoned Ms Bryant the night before to tell her that she needed a blood transfusion due to her anaemia. After that most communications were between Mr Starling and Ms Morrison.

[41] Ms Morrison had been off work for 12 days over July 2005. On 25 July she spoke to Mr Starling on the phone and on 26 July he wrote to her. The letter said:

From the content of our telephone conversation around 5.00pm yesterday it appears you may have a significant health problem.

For this reason Spotless is reluctant to agree to your return to work tomorrow unless we have an assurance in writing from your medical practitioner that this is in your best interests. If you are intending to apply for a sickness benefit (as mentioned in our discussion) please provide me with the appropriate details and I will consider what assistance the company can give to support this initiative.

In the interim, I suggest you continue to be absent on sick leave without pay.

As agreed, please send me your doctors certificates, covering the period 11 to 26 July 2005 inclusive, without further delay.

[42] Ms Morrison returned to work the next day and gave Dr Dunn's two medical certificates to Mr Starling.

[43] As the 26 July letter indicates, Spotless was concerned to ensure that her return to work was in her best interests and called another meeting on 2 August. This meeting was fully documented. Spotless made clear its expectation that they wanted her at work on a regular 40-hour week. Her work attendance was only 75 percent which was excessive and increasing.

[44] One of the reasons later given by Mr Starling for deciding that she had abandoned her employment was her alleged failure to provide information about her condition including her refusal to answer questions about it on legal advice. However, according to the employer's notes of the 2 August 2005 meeting, after some initial reluctance Ms Morrison gave quite a lot of information about her condition up to that date. For example:

LM – "I have a problem a womans issue that basically until it can get sorted it is out of my control" Lisa went onto say that until she has an operation it won't be sorted, and expressed that Colin was well aware of this.

...

LM advised the specialist had changed the consultation date from 9 to 16 August – she agreed the problem would not be fixed at that time – but it was expected an operation would be scheduled within a couple of months and the problem would then be fixed

...

LM – explained they don't want her blood levels to drop, and went on to explain she is anaemic, but that she isn't a doctor, and if Colin wants answers he can speak to her doctor – she also said her blood count could be expected to drop on the monthly cycle – and agreed if it got down to previously low levels a heart attack is a possibility.

[45] She also advised that she intended to be at work until the specialist appointment and after the operation would be back to normal.

[46] The only matters which Ms Morrison refused immediately to agree to was the provision of a copy of her gynaecologist's report and giving permission for Mr Starling to speak directly to her GP and specialist about her health problems before she had a chance to get advice from her lawyer. The requests for these matters caused her to become upset.

[47] After the meeting, having talked to her lawyer, she told Mr Starling she had been advised it would be an invasion of her privacy for Spotless to see her gynaecological report, that she would give permission to Mr Starling to correspond in writing with her GP, and that she would speak to her specialist on 16 August 2005 about him writing to Mr Starling.

[48] After seeing her specialist, Ms Morrison advised Mr Starling that her condition was serious and she would need an operation. A public one would be 4 to 5 months away and as she would probably be absent once a month until she could have the operation she wanted to raise a bank loan to have a private operation which could be scheduled for 16 September 2005. Her specialist was preparing a letter for her to give to her employer. She asked Mr Starling about where she stood in relation to her job as she needed to be employed to obtain the bank loan.

[49] Mr Starling wrote to Ms Morrison asking her to confirm the details of the leave required for the surgery and to make a formal written application for leave. She responded promptly with a letter:

I refer to your letter dated Friday, 19 August 2005, in which you outlined the importance of me applying for sick leave.

As you are aware, I am scheduled to have surgery on 16 September 2005, I would be required to have 4 weeks off work following this surgery, therefore I would be absent from work from 16 September 2005 until 16 October 2005. My return date to work would be 17 October 2005. I have been advised post-surgery I will make a full recovery following the recuperation period.

I have pointed out to you that this surgery is to be done privately at a considerable cost to me so I would appreciate using any entitled annual leave I have owing to me. Also it is my understanding that I am due more sick leave and would also appreciate using this to cover some of this time off.

Also I refer to your request for medical information about my recent absences, to date I have provided you with the necessary medical certificates to cover anytime off work, including a letter from my GP explaining why I have been absent from work. I have given you all the relevant information and have advised you that I am waiting for a letter from my specialist outlining that I will need 4 weeks off work following this surgery I am facing. As soon as I receive this letter I will forward you a copy along with confirmation of my surgery booking.

I want to point out to you that this has been a very stressful time for me and I have certainly provided you with more than enough information about my condition. I have been advised by my GP, specialist and lawyer that any further medical information requested by you would be an invasion of my privacy.

Finally, to be fair to the hospital they have asked that I confirm my surgery date as soon as possible, so I hope that you will promptly make your decision on my application for this leave.

[50] She attached a letter from her specialist which said that she would require to convalesce for approximately 6 weeks post-operatively.

[51] Mr Starling said in evidence that the specialist's letter gave no indication of urgency or a life threatening situation and that Ms Morrison had advised him verbally there was no guarantee her surgery would be successful.

[52] On 26 August 2005, Mr Starling told Ms Morrison that her request for leave was declined because of the limited information available and her substantial history of work absences which had nothing to do with the "latest issue". He discussed an exit package with her suggesting she resign and be paid 6 weeks' leave.

[53] Ms Morrison responded in writing that this amounted to constructive dismissal and asked for 4 months' wages plus all other entitlements. She said:

If this matter is not settled in the terms of above, after my operation I will be returning to work on the date advised [that is, 17 October].

[54] Mr Starling replied that, due to the uncertainty of the period of her proposed absence and whether she could return to work fully fit, he could not grant the leave of absence requested in her letter. He asked to be advised of her intentions and said that he was available to discuss this if required.

[55] Ms Morrison responded on 8 September:

Further to earlier correspondence between us and your letter of 1 September 2005, I am writing to confirm that my surgery date is 16 September 2005. I will be returning to work four weeks after my surgery on 17 October 2005. You have previously been advised of this and my Specialist has prescribed you with information of my surgery and likely recovery date.

As you already know I intend to return to work two weeks before the anticipated date of my return stated by my surgeon.

As a result of all of the above, if my position is not available upon my return, four weeks following the 16 September 2005, you'll be hearing from my lawyer.

[56] Mr Starling replied in writing on 13 September that her request to be absent from work had not been granted. On 15 September Ms Morrison left her work having deleted her private e-mail addresses and taking her private items home.

[57] On 21 September 2005 Mr Starling wrote again:

I refer to your request for extended leave without pay to have an operation and my letter of 1 September 2005 in which I advised that due "to the uncertainty of the period of absence and your ability to return to work fully fit, I do not believe Spotless can grant you the leave of absence requested".

In your response of 8 September 2005 you indicated an intention to undergo surgery irrespective of the company's position. I then reiterated: "my letter was quite clear in that it advised that your request to be absent from work has not been granted".

Since your Sick Leave anniversary you were absent:

- *On 7 and 8 September (medical certificate received)*
- *On 14 September (medical certificate received)*
- *After lunch on 15 September (verbal advice from your partner, medical certificate not received)*
- *From 16 September to present inclusive (no further communication).*

According to our records, you exhausted your current Sick Leave entitlement as of today. This effectively means your current absence is unauthorised.

Please contact me urgently to discuss this matter. If you fail to do so, I will make arrangements to formally terminate your employment and instruct payroll to generate a final pay, which will be direct credited to your bank account.

[58] She replied that her operation went well and that she expected to be fit for work on 17 October 2005. She repeated her request for leave without pay “*for this brief and finite period.*”

[59] Mr Starling responded that as her leave entitlements had been exhausted her current absence was unauthorised and her employment was being terminated. She was offered the opportunity to have it recorded as a resignation. Her final pay to 12 October 2005 was paid out.

[60] Mr Starling has always doubted that the surgery Ms Morrison had was as critical as she claimed and the private operation was more of a convenience than a life or death situation. This impression was reinforced by a report that Ms Morrison had been seen driving a car a week after the operation and had gone to Australia after 2 weeks on the trip that had been pre-booked earlier in the year. He found it an incredible coincidence that, having been denied leave to have a holiday in Australia, she made a request for surgery at that same time. He believed that she was going on a holiday to Australia.

[61] Dr Dunn provided a letter on 26 October 2005 which was presented to the Employment Relations Authority. Mr Starling remained sceptical even after seeing this though it referred to the blood transfusions needed to prevent her becoming critically ill, and the need for intensive treatment for her unexpected episode of anaemia.

[62] Mr Starling knew she was going to have an operation for what he called women’s problems but said his first recollection that it was for a hysterectomy came from Dr Dunn’s letter. In cross-examination he confirmed that the matters which caused him concern were Ms Morrison’s track record of absences; that he believed she had maximised everything, for example by taking a whole day off for a funeral or for a doctor’s appointment. Above all, he was concerned at the uncertainty of when she would be at work. The differences in the estimations of the convalescent period was an example of this. The specialist had said 6 weeks, she said 4. He also believed that the need for surgery was not urgent.

[63] Mr Starling was also concerned by the difficulties that he would have had replacing Ms Morrison during her leave including training, induction, continuity of employment, and having to have any new employees vetted because of the need for security clearance on the Army base. Although the vetting procedures had not previously been very stringent, since Ms Morrison's original employment these had been tightened up and it was more difficult to employ temporary staff.

[64] Ms Morrison's position was that when she was refused leave without pay to have the operation she did not try to change the dates because she wanted to avoid her condition deteriorating. While she was ill she didn't think about the Australian holiday but after her surgery she and her partner decided to use the tickets during her recuperation because of the bad year that they had had.

[65] She accepted that she didn't give Mr Starling permission to correspond with her doctors, nor did she provide any medical clarification of the period of convalescence that would be needed in spite of being asked but felt that she had been open and honest with Mr Starling about a very private and personal issue. She did not want to give Mr Starling a copy of her full gynaecological report and while he had the right to some information he didn't have the right to all of it. She believes that he had decided to get rid of her because of her attendance record.

Discussion

[66] The principle argument for Spotless is that there was no dismissal because Ms Morrison had abandoned her employment and thereby terminated it herself. Mr Hard argued that the abandonment clause does not apply in the circumstances of this case. Whether this is so depends on the terms of the abandonment clause in her individual employment agreement, the common law on abandonment, and whether the facts amount to abandonment as defined.

[67] Clause 9(c) of Ms Morrison's general terms and conditions of employment states:

Abandonment

If you are absent from work for a continuous period exceeding two (2) working days without notification to and consent from Spotless or without good cause, you shall be deemed to have abandoned and so terminated your employment. Spotless shall

make reasonable efforts to contact you during the period of absence to establish the cause.

Note: *For the purpose of this subclause, the term “good cause” shall mean a cause as serious as unexpected hospitalisation.*

[68] The plain meaning of this clause is that a person is deemed to have abandoned and terminated their employment if he or she:

- is absent for two continuous working days; and
- has not notified the employer; and
- does not have the employer’s consent; or
- has good cause for not notifying the employer in advance and obtaining consent for the absence.

[69] There is an obligation on the employer to make reasonable efforts during the course of the absence to contact the employee to establish the cause.

[70] The note to the abandonment clause does not establish an exclusive definition of “*good cause*” but provides a high standard against which a cause may be judged. An employee is only exempt from notifying and obtaining consent if there is a serious and unexpected event.

[71] Of the numerous cases on abandonment most have turned on the words in specific clauses in the employment agreement and/or the facts of the case. A common feature of the clauses in those cases are the obligations of the employee in the absence of a compelling reason such as good cause to notify the employer and/or obtain consent for a proposed absence and the obligation of the employer to establish the cause of the absence before invoking the abandonment clause.

[72] In the present case, there is no argument that Ms Morrison notified Spotless and requested leave for the operation. Equally, there is no dispute that the employer refused to consent to the leave.

[73] While “reasonably” is not referred to in clause 9(c), in relation to the granting of consent, I find it must be implied as it would offend against the requirements of

fair dealing and good faith for an employer to refuse consent unreasonably. It is a necessary implication that consent or refusal of consent must be reasonable. The question in this case is whether that consent was reasonably withheld.

[74] I find that Spotless acted unreasonably in refusing consent although not without provocation. It had been entirely justified in refusing Ms Morrison's first request for leave to travel to Australia. Her announcement of this without any prior request to take the leave was inappropriate and, in the light of her history of absences, was one step too far. Spotless was also justified in being suspicious when her announced dates for surgery coincided with the leave dates which it had already refused.

[75] But the vexed history between Spotless and Ms Morrison since April 2005 led to its decisions about her leave being overly influenced by that suspicion. By the time she advised her surgery date and sought leave for it, I find that Mr Starling had sufficient knowledge to rebut his suspicions but was unable to see past them. He had sufficient information to alert him to the fact that her medical condition was serious and justified an operation.

[76] Until the application for leave for surgery, Ms Morrison's absences for a number of reasons including her health had been tolerated and accommodated, even if reluctantly. Unfortunately for Spotless, her managers had reached breaking point at the very time she had a genuine and pressing reason for leave which had every prospect of reducing her subsequent absenteeism or at least depriving her of good reason to make the repetitive requests which preceded the operation.

[77] The reasons Mr Starling gave on 26 August 2005 for refusing her leave were that he had limited information about her condition, as well as her history of unrelated work absences. However, I find that Mr Starling did have sufficient information and his concerns about the date of her return to work should have been allayed by Ms Morrison's 8 September 2005 letter when she advised the date in writing. It is also the case that Ms Morrison had an entitlement to sick leave up to 21 September 2005.

[78] Ms Morrison's history of unrelated work absences was not relevant to whether leave should have been given for important surgery. I therefore find that the refusal to give leave was unreasonable and it is not possible to find that Ms Morrison abandoned her employment. She had notified Spotless of her surgery dates as soon as she knew them. She also advised them of her reasons for her absence and the date of her return. Spotless knew she was absent for her surgery and recuperation and knew she wanted to return.

[79] In the circumstances where Ms Morrison had notified her need for leave there is no necessity for her to show a good cause as defined in the abandonment clause.

[80] I conclude that Ms Morrison did not abandon her employment and by treating her absence as abandonment Spotless unjustifiably dismissed her.

Remedies

[81] The remedies awarded as a consequence of an unjustified dismissal must be considered in the light of the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance¹.

[82] The Authority found that both parties had mutual interests and needs, including Ms Morrison's need to be more forthcoming, but could not attribute any contributory fault to her when the employer had enough information to alert it to her significant health issues.

[83] If contribution as contemplated by s124(a) is limited to the events of the dismissal, then this approach would be correct. However, s124 is couched generally and the Court should look beyond these events. This approach has been confirmed by the Court of Appeal in *Waitakere City Council v Ioane*². When considering the employee's contribution to the personal grievance, regard may be had to the relevant history of the employment relationship.

¹ Section 124(a) Employment Relations Act 2000

² [2005] 1 ERNZ 1043 at 1051

[84] In the present case, the situation which led to the dismissal had its origins in events which occurred well before Ms Morrison knew she would need surgery but form part of the relevant history. I find that Spotless accommodated her need for extra leave on compassionate grounds with understanding and tolerance up until at least June 2005 when she took leave to care for her child. This was in spite of her extremely negative outburst on 30 May 2005 and very short notice to attend job interviews. These were not the actions of an employee who was actively and constructively maintaining a productive employment relationship³ and I find that her actions and attitude directly led to Mr Starling's decision that he would not tolerate any more leave for whatever reason.

[85] Although in the circumstances of her need for surgery that refusal was unjustified, Ms Morrison's actions contributed towards it by her previous rather cavalier attitude to the employment relationship. I find she took advantage of Spotless's tolerance of her personal and family difficulties and from mid May 2005 demonstrated disregard for the problems her absenteeism was causing to a very small workplace. Her actions of attending job interviews on very short notice during work time is a clear example of this. I make this finding mindful that from March 2005 until her surgery she was ill and suffering ongoing distressing symptoms. However this did not excuse or justify her conduct which significantly contributed to the way Spotless treated her from then on.

[86] For these reasons, I find that she contributed by 50 percent to the situation that led to her dismissal and this should be reflected in the remedies she receives.

[87] No issue was taken with the Authority's calculation of the level of her lost income of \$5,123.04. That amount is reduced by 50 percent to \$2,561.52.

[88] The Authority also set the level of s123(1)(c) compensation at a modest \$7,000 because it found that although unjustified the end of her employment was not unexpected by her. In those circumstances, the award of \$7,000 was appropriate but that sum is also reduced by 50 percent to \$3,500.

³ Section 4(1A) Employment Relations Act 2000

Costs

[89] Both parties have claimed for costs of the proceedings, however both have been more or less successful. The defendant has successfully defended the substantive findings of the Authority but the plaintiff succeeded in its claim that Ms Morrison contributed to the personal grievance. For these reasons there will be no order for costs to either party.

C M Shaw
JUDGE

Judgment signed at 3.20 on 4 December 2006

Solicitors: McBride Davenport James, Wellington, for Plaintiff
I Hard, Wellington, for Defendant