

Employment Relations Authority found pregnant employee's resignation to be a constructive dismissal

An employee who resigned after 'repeatedly putting her employer on notice of her need for some flexibility, and the medical issues she was facing in relation to her pregnancy,' has recently been awarded \$20,000 for a successful constructive dismissal claim.

Facts

Ms Caldeira was employed by LCNZ Ponsonby Pty Limited, (which trades as Laser Clinic Ponsonby) (LCNZ), as a part-time beauty therapist.

Ms Caldeira's employment agreement provided that her hours of work would be set by a roster, notified to her at least 14 days in advance. It stated she would be provided with an average of 15 hours per week.

A few weeks into working for LCNZ, Ms Caldeira found out she was pregnant. She advised LCNZ.

When another staff member resigned, Ms Caldeira asked if she could pick up one of the resigning employee's shifts. She was given an extra shift on Mondays. From then on, she worked three days a week on Sunday, Monday and Wednesday. Her usual hours went from about 15 hours a week to about 24 hours.

A few months later, Ms Caldeira raised concerns that she had not been treated fairly or equally to her colleagues, especially compared to a therapist who was also pregnant at the time. She said that the issues were impacting her health and wellbeing.

Ms Caldeira said that her pregnancy was high risk for herself and her baby, and that she had mental health issues. She stated that although she was not being paid for days she was sick (as she was not yet entitled to sick leave), she was questioned or shamed about being sick, or given cold and sharp treatment. She said she

was made to feel uncomfortable and guilty for feeling unwell.

Ms Caldeira said she had asked if she could start her shift at 10am, referring to the traffic in the morning, and that her morning sickness was worse in the morning, but she received a negative response.

Ms Caldeira met with management to discuss her concerns, however she was not satisfied her issues had been addressed.

The following month, Ms Caldeira text her manager to inform her that she did not sleep, and would get to work at 10am. A text exchange followed whereby the manager expressed their dissatisfaction with Ms Caldeira's message, that she was required to be at work, and reminding her of her employment agreement. Ms Caldeira forwarded a letter from her midwife which stated that the midwife supported her to take some time off work as she was feeling unwell.

The next day, Ms Caldeira found out she was no longer rostered to work Mondays. She saw this as punishment for the incident the day before, and raised her concerns with management.

Ms Caldeira and her partner attended a meeting with management. During the meeting, Ms Caldeira's partner read out a statement on Ms Caldeira's behalf. This stated the sudden decrease in hours felt like a punishment, and that Ms Caldeira's sickness was genuine. It outlined how pregnancy had been hard on her for certain stated medical reasons, and because she had consistent morning sickness and nausea. It referred to Ms Caldeira's previous request for a bit of flexibility and the option of starting at 10am. It outlined that she feared an unworkable environment was being created which may force her to quit.

That night, Ms Caldeira applied for a job at another LCNZ clinic.

The following day, Ms Caldeira verbally resigned. She followed the verbal resignation up with an email the

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following day stating that the situation and unfair treatment had forced her to resign, and the reason was that she requested flexibility to start shifts at 10am due to issues with her pregnancy, and that if that had been arranged, she would not have lost days of work and would feel able to attend.

Employment Relations Authority

Ms Caldeira claimed that she had been constructively dismissed.

One recognised category of constructive dismissal is where the resignation is caused by the employer's breach of duties owed to that worker. The resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee that a worker would resign rather than put up with such breaches. The Authority commented that it appeared Ms Caldeira considered this category applied to her situation.

The Authority commented that although Ms Caldeira had not yet become entitled to paid sick leave, as a pregnant female employee, she was entitled to take up to 10 days' unpaid special leave for reasons connected with her pregnancy under the Parental Leave and Employment Protection Act 1987 (**PLEPA**).

There was no evidence that LCNZ considered its obligations under PLEPA. The Authority stated that special leave could have potentially been taken in half days, or even smaller segments for things such as doctors' appointments, illness related to the pregnancy, or even tiredness. Ms Caldeira had not framed her texts as constituting a request for special leave, however the Authority stated that as an employer, LCNZ ought reasonably to have been aware of her entitlements and facilitated special leave.

LCNZ submitted that care should be taken in interpreting the text messages between the manager and Ms Caldeira, as English was neither of their first languages. The Authority accepted that, however stated that even allowing for it, objectively, how the manager

responded was not the actions of a fair and reasonable employer.

The Authority did not consider the parties had reached agreement that Ms Caldeira's hours would permanently increase to include Mondays. However, that LCNZ should have, in good faith, first consulted with Ms Caldeira before making the significant roster change it did. The Authority found it was more likely than not that the change was informed by the manager's concerns of Ms Caldeira's habit of being "perpetually late".

The Authority also commented that LCNZ did not give the 14 days' notice of the roster change as required by the employment agreement.

The Authority was satisfied that LCNZ's breaches were sufficiently serious to make it reasonably foreseeable that Ms Caldeira may resign. Ms Caldeira repeatedly put LCNZ on notice of her need for some flexibility and the medical issues she was facing in relation to her pregnancy. Ms Caldeira's experiences with management demonstrated that nothing was likely to change. The Authority said that Ms Caldeira's unmet requests for understanding and flexibility for pregnancy-related reasons fell on deaf ears, and she was suddenly met by an abrupt reduction in days of work.

The Authority held that Ms Caldeira's resignation was an unjustified constructive dismissal. She was awarded \$20,000 compensation.

Want to know more?

If you have any questions about the case, or what it may mean for your workforce, please contact our specialist [employment team](#).