

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 191
5477312

BETWEEN NEROLI ARRAS
 Applicant

A N D SPOTLESS FACILITY
 SERVICES (NZ) LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Charlotte Clifford, Counsel for Applicant
 Guido Ballara, Counsel for Respondent

Investigation Meeting: 21 and 22 June 2016 at Timaru

Submissions Received: At the investigation meeting and 22 July 2016 for the
 Applicant
 At the investigation meeting and 26 July 2016 for the
 Respondent

Date of Determination: 25 October 2016

DETERMINATION OF THE AUTHORITY

- A. Spotless Facility Services (NZ) Limited constructively dismissed Neroli Arras.**

- B. Spotless Facility Services (NZ) Limited must pay Neroli Arras the difference in her pay at Mitre 10 and her pay at Timaru Hospital for a period of three months after her dismissal. The parties are to agree on the amount. If that is not possible they may come back to the Authority for that amount to be fixed.**

- C. Spotless Facility Services (NZ) Limited must pay Neroli Arras \$10,000 in compensation for humiliation, loss of dignity and injury to her feelings.**

D. I have reserved the issue of costs and set out a timetable for submissions if the parties are unable to agree on costs.

Employment relationship problem

[1] Spotless Facility Services (NZ) Limited (Spotless) employed Neroli Arras at the Timaru Hospital site. She worked at the hospital for 35 hours per week before her resignation from that role on 12 March 2014. She remains employed by Spotless at the Craighead Diocesan School site as a cleaning supervisor.

[2] Ms Arras claims that she was unjustifiably constructively dismissed from her employment at the hospital because of systematic bullying and intimidating behaviour from her manager, Gwenda Norton, and supervisor, Judi de Lacey. In the alternative, she claims Spotless breached its implied duties of trust and confidence to her and failed to act in good faith leading to her suffering unjustified disadvantage.

[3] Spotless denies that Ms Arras was constructively dismissed, and, indeed, says that since she remains employed by Spotless at the Craighead site she did not resign either. In addition, it says that its actions were justified and did not result in any disadvantage to Ms Arras. If I find that Spotless' actions resulted in unjustifiable disadvantage or constructive dismissal Spotless says that Ms Arras significantly contributed to the situation and should not receive any remedies.

Procedural background

[4] Prior to the investigation meeting, I confirmed that all events that occurred within the 90-day period prior to 16 April 2014, when Ms Arras' personal grievances were raised, could be considered as a part of the unjustified disadvantage claim.

[5] I also decided that I can consider earlier events if they are sufficiently connected to the events in late February and early March 2014 that Ms Arras relies on as amounting to unjustified actions leading to disadvantage or constructive dismissal. That is only the case if the earlier events lead to a course of conduct leading to and linked to the events within the 90-day period. I am also able to consider evidence that provides background and context to the alleged personal grievances.¹

¹ *Premier Events Group v Beattie (No 3)* [2012] ERNZ 257

[6] Karen Davidson, Anne MacKay and Fiona Wills, former staff of the Timaru Hospital kitchen, gave written and oral sworn evidence. Ms Arras, Gwenda Norton, Mrs de Lacey, Josh McColl and Jason McLennan also gave written and oral affirmed or sworn evidence. All witnesses were questioned by me and by the parties' counsel.

[7] Shelley de Lacey, Mrs de Lacey's daughter, was the second cook. She did not give evidence at the investigation meeting. However, I have taken into account her written account of events produced for Spotless. Ms de Lacey was not present to have her evidence tested. However, there is no dispute as to what Ms de Lacey admits to having said.

Background facts

General background to the allegations

[8] Ms Arras' job at the hospital was two-fold. When she worked in the kitchen, her supervisor was Mrs de Lacey. When Ms Arras worked in the office, her manager was Gwenda Norton. Ms Norton was the overall manager of the kitchen, and therefore was Mrs de Lacey's manager.

[9] Ms Arras alleges that for quite some time she and others in the kitchen had been subject to inappropriate and bullying behaviour from Mrs de Lacey and Shelley. She says the manner in which she and others were spoken to was inappropriate and that Mrs de Lacey and Ms de Lacey had shouldered her and that they used to roll their eyes at her.

[10] She says she had complained about bullying behaviour a number of times to Ms Norton but that Spotless had not addressed it. Instead, Ms Norton had always backed Mrs de Lacey.

The full staff meeting – 24 February 2014

[11] Both parties agree that in early 2014 the kitchen was short-staffed. Mrs de Lacey says that nearly all kitchen staff approached her on Friday, 21 February and over the weekend with concerns, mainly about staffing. She decided to hold a staff meeting on Monday, 24 February at 1 pm. She intended to invite Ms Norton to the meeting to explain what the plans were to relieve the staffing problem and to explain the recruitment notice. She says she was not in charge of recruiting and that Ms Norton was.

[12] At about 10 am on Monday, 24 February, Ms Norton and Mrs de Lacey walked past a notice announcing the staff meeting. Ms Norton asked Mrs de Lacey what that was about and at that point, they invited her to the meeting.

[13] The parties agree that the meeting became heated and that a new staff member intervened and suggested a way forward so that things could calm down. They also agree that Ms Arras said that she was disappointed about how some of the staff members spoke to her.

[14] After the meeting, Ms Norton issued a memo to all staff entitled "Process to resolve issues in the workplace". She instructed staff, in the first instance, to discuss their concerns with Mrs de Lacey. If Mrs de Lacey could not resolve the problem, she would take it to Ms Norton. Ms Norton undertook to ensure that concerns of a personal nature would be discussed in privacy.

Ms Arras discovers Ms Norton is upset

[15] The following day, 25 February 2015, Ms Arras discovered Ms Norton was upset. Ms Norton told her she had felt ambushed at the meeting the day before. Ms Norton also told hers that a friend of her was very sick and she was upset about that.

[16] Ms Arras says that shortly afterwards in the kitchen she told Mrs de Lacey and Shelley that Ms Norton was upset and "*we should take it easy with her*". Ms Arras says she did not say why Ms Norton was upset.

[17] Mrs de Lacey and Shelley allege that Ms Arras actually said, to Shelley:

She's cracked, she's cracked, we did it, she's in the office crying.

[18] Ms Arras says, and Shelley's written evidence confirms, that Shelley said "good", and walked away. Ms Arras then left the kitchen.

Mrs de Lacey's first confrontation of Ms Arras

[19] The following day, Wednesday, 26 February, was Mrs de Lacey's day off. However, she came into Ms Arras' and Ms Norton's office and said that she wanted to speak with Ms Arras. Ms Norton left the office to go and get morning tea.

[20] Ms Arras says that Mrs de Lacey told her she was angry about what Ms Arras said about Ms Norton. Mrs de Lacey told Ms Arras that she was stirring up the staff and she was to tell Ms Norton what she had said and apologise, otherwise Mrs de

Lacey would tell Ms Norton. Ms Arras believed Mrs de Lacey said that in a threatening way, however, from her perspective she had done nothing wrong. She says that she was upset by what Mrs de Lacey was saying to her and how it was said to her.

[21] At the investigation meeting, Ms Arras told me that she assumed that it was about her having said that Ms Norton was upset and crying. She says she went into the kitchen later that morning and Shelley asked her what was wrong. She says she told Shelley that obviously she should not have said anything about Ms Norton being upset because she had been “*told off for it*”. She says she apologised to Shelley.

[22] Ms Arras did not apologise or raise the issue with Ms Norton. She says that is because she did not consider she had done anything wrong. Unbeknownst to Ms Arras, Mrs de Lacey told Ms Norton what she alleges that Ms Arras had said.

Mrs de Lacey and Ms Norton’s confrontation of Ms Arras

[23] On Friday, 28 February 2014, Mrs de Lacey walked into Ms Arras’ and Ms Norton’s office. Ms Arras says she shut the door behind her and said that she wished to speak to Ms Arras in the office with Ms Norton present. Ms Arras said she told her to leave the door open and that she would not speak to them without a support person present. Ms Norton agreed that Ms Arras should have a support person. Ms Arras went and asked Anne MacKay to come in.

[24] Ms Arras says that Mrs de Lacey told her she had been waiting for her to tell Ms Norton what she had said and because she had not done so, she had to tell her then.

[25] Ms Arras apologised, between two and four times. However, she says she did not know what she was apologising for.

[26] Ms Norton told Ms Arras that she had known for more than a day what Ms Arras had said about her. Ms Norton told her she was untrustworthy and that she was “the biggest stirrer”. She says that she told her she could not trust her again.

[27] Ms Arras says that Ms Norton also told her that she was evil. Ms MacKay agrees. Ms Norton and Mrs de Lacey deny that Ms Norton called Ms Arras evil.

[28] All parties agree that Mrs de Lacey became extremely angry during the meeting and told Ms Arras how angry she was with her. That occurred after Ms Arras asked Mrs de Lacey why she had threatened her. Mrs de Lacey denied that she had threatened her. Ms Norton did not intervene in any way to get Mrs de Lacey to calm down.

[29] However, at the investigation meeting Mrs de Lacey agreed that she had told Ms Arras that if Ms Arras did not tell Ms Norton what she had said, then Mrs de Lacey would tell Ms Norton. That is what Ms Arras was referring to as a threat.

[30] The parties agree that the meeting took between 15 and 20 minutes. The parties also agree that Ms MacKay suggested that people move on and everyone agreed to do that. Ms Arras then asked Ms Norton why, about three years ago, she had told other staff about a personal operation Ms Arras had had. Ms Norton denied ever having done that.

[31] During the meeting, Mrs de Lacey came out and asked Shelley to go into the office because Ms Arras had accused Shelley of telling Ms Arras that Ms Norton had called Ms Arras a “f***tard”. Ms de Lacey said that that was “bullshit” and she did not want to be dragged into “the crap”. She declined to go into the office.

[32] There is some dispute over whether, by the end of the Friday meeting, another meeting on the Monday had been suggested at which Shelley and Ms Arras could talk about what Ms Arras said Shelley had told her. Mrs de Lacey says that she intended to arrange such a meeting but had not got around to it.

The third confrontation

[33] On Monday, 3 March 2014, Shelley had asked Mrs de Lacey and Ms Norton if she could have a meeting with them and with Ms Arras. They agreed to do so. However, neither Mrs de Lacey nor Ms Norton informed Ms Arras a meeting would be held or asked her to attend it.

[34] At about 9.30 am Mrs de Lacey, Ms Norton and Ms Arras were in Ms Norton’s office, working separately. Shelley came into the room.

[35] There is dispute about whether Shelley calmly came in and sat down on the chair and asked if she could have a word with Ms Arras or whether she rushed into the office and screamed that Ms Arras had said things about her that were not true.

[36] Ms Arras says that she felt trapped, scared and upset. She says that Mrs de Lacey was standing by the door with her arms folded, Ms Norton had turned around in her chair towards her and had her arms folded and Shelley was sitting on a chair behind her.

[37] The parties agree that Ms Arras answered “no” to Shelley’s request. Ms Arras immediately left the room. She says that her support person, Ms MacKay, was not due at work for another half hour and she did not feel safe in the office. A short while later she walked back into the office to collect her keys and Ms de Lacey said, “Only liars walk away.” Ms Arras then said, “You don’t believe anything I say anyway.” Ms Norton did not reprimand Shelley for calling Ms Arras a liar.

[38] Ms Arras left the workplace. She says that no one tried to stop her and no one phoned her at home to find out what was happening.

[39] Ms Norton did not report to anyone at a more senior level in Spotless that Ms Arras had walked out. She did not try to contact Ms Arras later that day.

Events after Ms Arras walked out

[40] That same day, Ms Arras phoned the Spotless Human Resources Department and spoke to Josh Coll. She says she did that to assure him that she had not abandoned her employment.

[41] There is some dispute about exactly what details Ms Arras gave to Mr Coll about the reason for her leaving the workplace that day. She says that she mentioned bullying and intimidation. Mr Coll denies that but says that Ms Arras told him she was under some stress or pressure and was not able to go back there at the time. The parties agree Mr Coll asked Ms Arras to put the details of what had occurred in writing and she agreed to do so.

[42] On 3 March, Mr Coll emailed Ms Arras:

Thank you for your call before. I am sorry to hear of your unfortunate situation. I have made a senior manager aware of your contact with me and there is concern for your wellbeing. We would greatly appreciate you staying in touch with any updates as they come to hand.

It has been acknowledged that you are not abandoning your employment and will be reporting for active duties as a cleaner at the Spotless site you work at.

I look forward to your email response with more detail on the nature of the issues you have been confronting in the workplace.

[43] On 4 March, Ms Arras forwarded a medical certificate to Mr Coll which said:

The above patient was seen and examined by me on 04 Mar 2014 and in my opinion she is/has been medically unfit from 03 Mar 2014 and should be fit to resume work on 14/3/14.

[44] Mr Coll responded to Ms Arras and told her he would forward it on to senior management. He also asked her to keep in touch and said that he looked forward to receiving her concerns as discussed in writing.

[45] On 4 March, Mr Coll sent Jason McLennan, the Spotless National Operations Manager – Health NZ, an email:

Just confirming I have spoken with Neroli and she has been signed off as unfit for work by her GP until next Friday 14 March. I have requested that she scans me a copy of that certificate ASAP. I also mentioned that the business was very keen to hear from her in regards to her issues and requested that she puts this in writing to myself ASAP.

File Note

- Voicemail left on landline ... at 11.59am today.
- Please touch base with me ASAP. Want to see how you are.
- Phone conversation on cell ... at 12.05pm today.
- Checking to see how you are. Senior management requested I pass on concerns on their behalf.
- Keen to have your issues submitted in writing ASAP.
- Doc signed off as unfit for work until 14 Feb.
- Counselling sessions booked in.
- Stress medication prescribed.
- Appreciated phone call to see how she was.
- Will submit in writing ASAP – head is very unclear at present.
- Will scan to my email doc cert today.

[46] On 5 March, Ms Arras emailed Mr Coll:

Thanks Josh.

I have started my concerns in writing to you, but burst into tears when re-living it. So will get it to you as soon as I possibly can.

[47] On 7 March 2014, Mr Coll emailed Ms Arras to excuse his late reply to her email of 5 March and to excuse him missing her calls the previous day. He wrote:

I have had a very busy week. Thank you for keeping in touch. Trust your session yesterday went well and hopefully you are feeling a little better.

Feel free to call me any time.

[48] Ms Arras sent a reply email stating that she had not been paid for her sick leave and asking if Mr Coll had passed on her medical certificate. Mr Coll forwarded that query to Mr McLennan immediately.

[49] At 12.20pm on Monday, 10 March 2014, Ms Arras sent her written complaint to Mr Coll. She noted she had still not been paid for the time off the previous week and asked if he could let her know when that would happen.

[50] At 3.42pm on Monday, 10 March 2014, Mr Coll replied:

Thank you for your email Neroli. I have forwarded this on to senior management who will be in touch very soon to discuss your concerns ...

Thank you for updating me on your counselling and medication as well as there is genuine concern about your wellbeing and how this situation has affected you. I will be in touch very soon.

Ms Arras' resignation

[51] At 11.25am on Wednesday, 12 March 2014, Ms Arras emailed Mr Coll a copy of her resignation:

Under the advice from my medical practitioner and counsellor, I wish to remove myself from the unacceptable situation I have been placed in while being employed by Spotless at Timaru Hospital kitchen and give the required 14 days' notice of termination of my employment.

[52] Her covering email read:

Could you please pass on my attached termination to the appropriate people. I have another appointment with my doctor tomorrow so will let you know the outcome as soon as I can.

... could you please send me the exit and survey documents for termination.

[53] On Thursday, 13 March 2014 at 8.26am, Mr Coll emailed Ms Arras:

Sorry for my late reply. I have forwarded your notice and email onto Jason (Senior Manager – Health NZ). I understand he has been attempting to call you and has left some voice messages. He would very much like to speak to you and will no doubt try again today.

[54] At 8.27am on Thursday, 13 March 2014, Mr McLennan sent the following email:

Good morning Neroli,

As Josh has mentioned, he has referred your recent correspondence to me – I tried calling your landline and mobile yesterday afternoon however obviously was not able to speak with you (I left a message on your mobile).

I have also tried calling again just now (in the last 5 mins) to your mobile ... and again it went to your voicemail.

I would like to discuss at the soonest opportunity your situation – therefore if you could let me know a convenient time today that I could call, and the best number to call you on.

Alternatively please feel free to call me on ...

[55] On Thursday, 13 March 2014 at 9.57pm Ms Arras sent an email to Mr McLennan:

Please find attached a copy of my medical certificate. Thank you for phoning me today and for giving me 24 hours to reconsider my resignation. Can I please ask why you did this?

Should this incident be loaded into IRIM and who is paying for my medical expenses when I have been driven out of my employment?

...

After speaking with family, my doctor and support people, I have been advised not to return to the Timaru Hospital kitchen and to seek legal advice, which I will be doing next week. So at this stage there is no way I can re-consider your offer.

I did enjoy my job and I am missing the interaction of most staff members and the clients I delivered Spotless meals on wheels to.

[56] Mr McLennan sent a further email to Ms Arras at 10.39am on Friday, 14 March 2014:

Thank you for your email and your time on the phone yesterday. As discussed, we are treating this situation very seriously and will be investigating the allegations accordingly, therefore the reason for my call was that we did not want you to resign and I am intent on resolving the issues by way of addressing any misconduct and working through a plan to resolve this with an openness to compromise, if necessary.

I am extremely disappointed and sorry that the situation has escalated to such a level that you feel you do not wish to return to work, and that we have not had the opportunity to work through a resolution – however I respect your decision and therefore accept your resignation

... I thank you for your contribution to Spotless, and wish you every success in your future endeavours.

[57] After Ms Arras had resigned, Mr McLennan undertook an investigation into Ms Norton's and Mrs de Lacey's behaviour towards her. In relation to the events from 26 February to 3 March 2014, he found that it was understandable that Ms Arras:

could have felt intimidated and had the perception of being bullied (even if this was not the intention).

[58] Mr McLennan told Mrs de Lacey and Ms Norton that he was concerned that they did not follow "due processes" with Ms Arras, in particular:

...explaining to her what the concerns were, inviting her to a meeting for the issue to be discussed, offering for her to have a support person, documenting the process etc.

In addition they did not reach out to senior management or HR for advice or direction.

[59] Mr McLennan recorded that Ms Norton and Mrs de Lacey accepted that they could have handled the situation more appropriately by using "due processes".

[60] Mr McLennan decided against a formal disciplinary outcome, such as a warning, but put a copy of his written note with his findings on Ms Norton's and Mrs de Lacey's personal files.

[61] There was no investigation into whether Ms Arras had actually said "she's cracked, we did it" to Ms de Lacey. In addition, there was no investigation into Ms de Lacey having said "good" to the fact that Ms Norton was upset.

The issues

[62] The issues I need to determine are:

- (a) Whether Ms Arras resigned, given that she remains employed by Spotless at Craighead;
- (b) Whether actions by Spotless staff seriously breached one or more of Spotless' contractual obligations to Ms Arras making it reasonably foreseeable that she would resign as a result;

- (c) Whether she resigned as a result of Spotless' breaches of duty;
- (d) Whether she affirmed the contract;
- (e) Whether she was disadvantaged in her employment by actions of Spotless that were unjustifiable;
- (f) Is Ms Arras entitled to any remedies?

Determination

Has Ms Arras' employment been terminated?

[63] Ms Arras was employed by Spotless on two different sites in two different roles.

[64] Mr Ballara submits that given Ms Arras remains employed by Spotless as a cleaner at Craighead her employment has not been terminated. Put simply, he argues that an employee cannot partly resign from her employment. Either she works for Spotless, or she does not.

[65] Ms Arras was employed on the same terms and conditions at each site, but signed on two different signature pages that record the specific site location, hours and hourly rate.

[66] The events Ms Arras claims to have led to her constructive dismissal are particular to her treatment by specific Spotless staff members at Timaru Hospital. Those staff members are not employed at the Craighead site.

[67] After Ms Arras resigned from her roles at the Hospital, Mr McLennan investigated her complaint about her treatment by Mrs de Lacey and Ms Norton. He did not include Ms Arras in that investigation, or report the outcome of the investigation to her, because Spotless considered her to have resigned from her employment at Timaru Hospital.

[68] I am satisfied that Ms Arras resigned from her role with Spotless at Timaru Hospital and, therefore, I can determine whether she was unjustifiably dismissed from that employment.

Did Spotless breach one or more of its duties to Ms Arras?

[69] Ms Arras claims that she had been bullied for a relatively long time before the events beginning on 26 February 2014.

[70] She says that when she had previously complained to Ms Norton about Mrs de Lacey Ms Norton had made it clear that she backed Mrs de Lacey totally.

[71] Workplace bullying can be defined as:

repeated and unreasonable behaviour directed towards a worker ... that creates a risk to health and safety.

Repeated behaviour is persistent and can involve a range of actions over time.

Unreasonable behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person.²

[72] There is insufficient evidence to prove that Ms Arras had complained of Mrs de Lacey's behaviour in the months prior to 26 February 2014. Ms Norton denies having heard any complaints from Ms Arras about Mrs de Lacey and ignoring them. Therefore, as at 26 February 2014 I cannot find that Spotless knew of and should have acted to prevent Mrs de Lacey's bullying or intimidating behaviour.

[73] Within the hospital, Mrs de Lacey and Ms Norton were representatives of Spotless and their actions towards Ms Arras were the actions of Spotless. I have no hesitation in concluding their behaviour was unreasonable in the three confrontations with Ms Arras. I find that it was also repeated.

[74] The meetings on 26 February, with Mrs de Lacey, and on 28 February, with Mrs de Lacey and Ms Norton were disciplinary in nature. They breached basic precepts of natural justice because Ms Arras did not know about them in advance. Because of that she was not given a reasonable opportunity to respond to the concerns.

[75] In addition, both managers reached the conclusion that Ms Arras had said what Shelley had reported to Mrs de Lacey, without giving Ms Arras a reasonable opportunity to respond or to explain herself. They approached the first two meetings from the point of view that she had done what Ms de Lacey alleged.

² From page 6 "Best practice guidelines – preventing and responding to workplace bullying", February 2014, a joint Worksafe and MBIE publication.

[76] Ms Norton felt ambushed by Mrs de Lacey's organisation of the meeting on 24 February. However, she participated with Mrs de Lacey in "ambushing" Ms Arras on 28 February 2015, and in agreeing to hold a further meeting on 3 March without notice to Ms Arras.

[77] Spotless did not give Ms Arras a reasonable opportunity to respond to its concerns because it did not inform her of them in advance.

[78] Mrs de Lacey's expression of her level of anger in the second meeting was highly inappropriate. In addition, Ms Norton made it clear that she had lost trust in Ms Arras.

[79] Spotless's conclusion was that Ms Norton and Mrs de Lacey had acted in a way that "could have" caused Ms Arras to feel intimidated and bullied. I consider they did intimidate and bully Ms Arras in their combined approach.

[80] It was clearly going to be difficult for Ms Arras to keep working with the two people who said they no longer trusted her but did not give her an opportunity to explain herself. I acknowledge that Ms Arras attempted to do that by coming to work on the Monday.

[81] However, Ms Arras was justified in declining to have a meeting on 3 March because it was highly likely to be a repeat of the kind of situation she found herself in on 28 February. Shelley's comment "only liars walk away", which went unchallenged by Mrs de Lacey or Ms Norton, is evidence that it was likely that all three would have confronted Ms Arras, and essentially "ganged up" on her if she had remained.

[82] Even if Mrs de Lacey's first confrontation of Ms Arras is viewed as a low level attempt to address an issue of concern, for which procedural fairness did not have to be taken into account, the subsequent meeting on 28 February coloured the earlier meeting's flavour.

[83] There was no procedural fairness of the kind envisaged in s 103A(3) of the Employment Relations Act 2000.

Do those actions amount to constructive dismissal?

[84] Ms Clifford submits that Spotless' breaches of its duties to Ms Arras culminating in its failure to act sufficiently quickly to take action on her complaint combined to make resignation her only viable option.

[85] Mr Ballara submits that even if Ms Norton and Mrs de Lacey's behaviour damaged Ms Arras' trust and confidence in Spotless it acted reasonably, once she notified it of her complaint. He submits that because she did not resign until 12 March 2014, 9 days after the last incident, she accepted the breach or breaches and affirmed the contract.

[86] Mr Ballara says that Spotless did not unreasonably delay dealing with her complaint and that Ms Arras gave it less than 48 hours to investigate her complaint, after receiving it in writing, before she resigned. He submits that any action or inaction of Spotless after 3 March was entirely innocuous that could not objectively be seen as a "final straw".

[87] The very nature of a claim for constructive dismissal is dependent on the events that preceded it; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty or other actions by the employer.³

[88] One type of constructive dismissal scenario occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence.⁴ If an employer acts that way it is not necessary to show that the employer intended to repudiate the contract.⁵

[89] To found a claim for constructive dismissal the breach or breaches of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable.⁶

[90] Repudiatory conduct by the employer may involve a series of events over a period such that no single event may be sufficiently serious to enable the employee to treat the contract as repudiated but the cumulative effect of all the events may be.⁷

³ *Commissioner of Police v Hawkins* [2009] NZCA 209

⁴ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372

⁵ *Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407

⁶ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

⁷ *Lewis v World Motor Services Limited* [1986] ICR 157 (CA)

[91] In deciding whether an employer's conduct amounted to a breach of the implied term of trust and confidence in *Wellington etc. Clerical Workers Union IUOW v Greenwich* Justice Williamson said:

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.

[92] It is possible that the history of the relationship between Ms Arras and Mrs de Lacey and Ms Norton could form part of the basis of a personal grievance of constructive dismissal. In *Ramkissoo v Commissioner of New Zealand Police* Chief Judge Colgan wrote:

...there are many cases in which a dismissal takes place after a very long period of disputation, unsatisfactory relations, and the like which, to the extent that they are relevant, must all be taken into account in determining the question of justification for an actual or constructive dismissal⁸.

[93] The breach or breaches must actually cause the employee to resign. All the circumstances surrounding the resignation must be examined.

[94] I must also ask whether the breach is so serious to make it reasonably foreseeable that the employee would not be prepared to work under the conditions prevailing.⁹

[95] I am satisfied that Ms Norton and Mrs De Lacey's actions seriously damaged Ms Arras' ability to work under them again. They damaged the requisite trust and confidence necessary for her to return to work at the Hospital. Their actions went beyond inconsiderate conduct that simply caused Ms Arras some unhappiness or resentment.

[96] I am satisfied that their actions caused her to resign. I do not accept that she did not protest about the repudiatory conduct; she left work and immediately called Spotless' national management. She did not undertake any positive act to convey to Spotless that she accepted the repudiatory conduct. She maintained her position that

⁸ [2013] NZEmpC 147

⁹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc.* [1994] 2 NZLR 415 (CA) at 419.

she was severely distressed by Ms Norton and Mrs de Lacey's behaviour and crucially, remained away from work, until her resignation.

[97] Ms Arras made it clear she had not abandoned her employment, and she had not. She left because she alleged Spotless employees had bullied and intimidated her. Telling Spotless she had not abandoned her employment does not amount to affirmation. She made it clear to Mr Coll that she could not remain at work on 3 March and needed Spotless' assistance to resolve matters. Ms Arras' email of 5 March made it clear she was struggling emotionally when trying to put her complaint into writing because she felt she was "reliving" the events.

[98] I am satisfied that because of the emotional effect of the unjustified actions on her Ms Arras needed time to consider her options. I am satisfied that Ms Arras resigned because of the events at Timaru Hospital. Her perception that Spotless was not dealing with her concerns quickly enough was subjectively reasonable in the circumstances she was in, even if it did not amount to a "final straw". No final straw act was necessary in this case.

[99] However, I do not consider Mr Coll or Mr McLennan's actions to have been objectively unreasonable. Up until Ms Arras' resignation I consider them to have acted fairly and reasonably.

[100] Ms Norton and Mrs de Lacey's behaviour was not designed to get Ms Arras to resign but it should have been foreseeable that it was likely to cause her to feel she could not continue to work with them.

[101] In all the circumstances at the time, a fair and reasonable employer could not have acted the way that Spotless did.

[102] Ms Arras was unjustifiably constructively dismissed from her employment at Timaru Hospital. She resigned because of the cumulative effect of unjustifiable actions by her Timaru Hospital managers that destroyed the necessary relationship of trust and confidence between them and her.

Remedies

Lost wages

[103] I am satisfied that Ms Arras mitigated her loss by seeking employment almost straight away. She obtained employment with Mitre 10 by 26 March 2014. However, she earns less in that role.

[104] With the information I have it is not possible for me to tell what Ms Arras earned per week from the Spotless Timaru Hospital job alone and compare it with Ms Arras' weekly earnings from Mitre 10. Therefore, I am not satisfied that Ms Clifford's calculation of \$278 per week is accurate.

[105] I have taken into account the counter-factual analysis of Ms Arras' employment at Timaru Hospital. I consider that even without the events in the last week of February/first week of March 2014 it is unlikely that she would have remained employed there more than three months after her resignation. However, I do consider that she lost remuneration as a result of her personal grievance.

[106] Under ss 123(1)(b) and 128 of the Employment Relations Act 2000, I find that Ms Arras should be compensated for the three-month (13 week) period after her constructive dismissal; that is, from 26 March 2014. The parties should be able to reach agreement on how much is owed. If they are unable to do so I reserve leave for Ms Arras to return to the Authority to have me set the amount owed.

Compensation

[107] Ms Clifford submits that Ms Arras is entitled to a significant award of compensation for humiliation, loss of dignity and injury to her feelings.

[108] Mr Ballara submits that any award must be modest, at most.

[109] There is evidence that Ms Arras' health was significantly affected by the events at Timaru Hospital that led to her resignation. She attended her GP on the day after she left work and was certified as being sick from 3 March until 14 March. She visited her GP again on 14 March 2014 and was certified as being sick up until 26 March 2014.

[110] Ms Arras' evidence is that her GP prescribed medication for anxiety and arranged for her to have counselling. She says that she had not previously been on

medication for anxiety but that she remained on it at the time of the investigation meeting.

[111] Her email to Mr Coll of 5 March is contemporary evidence of how her situation was affecting her; she burst into tears when trying to put her complaints into writing.

[112] Her evidence is from the time she left work her sleep, appetite and mood were affected for a long time.

[113] Ms Arras is entitled to be compensated for the effects of the constructive dismissal on her. Spotless must pay her \$10,000 in compensation.

Contribution

[114] Mr Ballara submits that remedies should be reduced entirely because Ms Arras' actions so greatly contributed to the situation that gave rise to her personal grievances.

[115] There was no investigation into the allegation that Ms Arras ever said, "we did it, she's cracked" as opposed to saying Ms Norton was upset and had gone outside crying.

[116] Because Ms Arras resigned from the Timaru Hospital before any investigation began, Spotless treated her alleged behaviour that triggered the events as irrelevant to its investigation into her complaint.

[117] However, Mr McLennan clearly reached a view that Ms Norton and Mrs de Lacey's inappropriate behaviour arose out of an attempt to address Ms Arras' earlier inappropriate behaviour towards Ms Norton "which Neroli had acknowledged and repeatedly apologised for". Although Ms Arras' 10 March complaint says that she "apologised numerous times" she did not acknowledge that she had said what was alleged. Because there was no investigation into what Ms Arras said to Shelley, I do not share Mr McLennan's conclusion. There is insufficient evidence to prove that Ms Arras contributed, in a blameworthy way, to the situation leading to her personal grievances.

[118] There is to be no reduction in remedies because of contribution.

Costs

[119] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[120] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is \$3,500. The investigation meeting lasted almost two full days.

[121] If the parties cannot reach an agreement the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority