

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

ATTENTION IS DRAWN TO  
THE ORDER PROHIBITING  
PUBLICATION OF CERTAIN  
INFORMATION REFERRED  
TO IN THIS DETERMINATION

[2019] NZERA 613

3059614

BETWEEN                      CHERYL BAILEY  
Applicant

AND                              TRADESTAFF GROUP LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:             John Shingleton, counsel for Applicant  
Anna Oberndorfer, advocate for Respondent

Investigation Meeting:      24 and 25 July 2019 at Christchurch

Submissions                    25 July 2019 from the Applicant  
25 July 2019 from the Respondent

Determination:                25 October 2019

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**DETERMINATION OF THE AUTHORITY**

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- A        Ms Bailey was not unjustifiably disadvantaged in her employment.**
- B        Ms Bailey was not unjustifiably constructively dismissed.**
- C        There was no breach of the obligation to provide a healthy and safe workplace.**
- D        Costs are reserved and failing agreement a timetable set for an exchange of submissions.**

### **Prohibition from publication**

[1] I prohibit from publication details about a personal matter for the applicant arising whilst she was employed by the respondent.

[2] I prohibit from publication the identities of employees past and present of the respondent who are referred to in this determination but did not give evidence. They will be referred to by a letter of the alphabet that bears no resemblance to their actual initials.

### **Employment Relationship Problem**

[3] Cheryl Bailey commenced her employment on 20 July 2015 as a recruitment consultant with Tradestaff Group Limited (Tradestaff) in Christchurch.

[4] She was promoted to the position of team leader on 11 February 2018. Prior to that in her role as senior recruitment consultant she had been looking after the team together with another senior consultant, M.

[5] On 3 October 2018 Ms Bailey gave notice that she intended to resign from her employment with her final day of work being 24 October 2018. She wrote a letter to the branch manager Lisa Young.

Dear Lisa, please accept this as my written resignation from Tradestaff. I would like to work through to Wednesday, 24 October as my last day. I know that you only require two weeks' notice but would like to be here to cover holidays & do a handover with Z when he gets back on the 23<sup>rd</sup> October.

It has been a pleasure to work with you & to be part of the Tradestaff family. I want to say a huge thank you for the opportunities & support that you have given me over the past few years. I have decided its time to move & try something new away from recruitment.

I will ensure all my uniform is returned to you in the last week of work & will clean the Tradestaff car so it is ready to handover. Please let me know if you require anything else from me.

Kind regards.

[6] On her last day Ms Bailey provided a further positive letter to the director and the general manager of Tradestaff. The general manager of Tradestaff is Janice McNab.

[7] Ms Bailey said that she had drafted a less positive letter that set out her concerns but she had been dissuaded from providing that letter by Ms Young.

[8] In a letter dated 17 December 2018 Ms Bailey, through her then solicitor, raised personal grievances that she had been unjustifiably constructively dismissed and disadvantaged in her employment. Further, that Ms Bailey intended to claim that there had been a breach of her employment agreement by failing to provide her with a safe workplace.

[9] In the amended statement of problem lodged Ms Bailey claimed by way of remedy the sum of \$20,000 compensation for the alleged unjustified actions and \$30,000 for the alleged failure to provide a safe workplace and for the alleged constructive dismissal. There was also a recommendation sought that Tradestaff put in place proper procedures for investigating alleged bullying by senior employees and other employees in general to prevent similar employment relationship problems from occurring together with costs.

[10] In final submissions it was accepted that the claim for a failure to provide a safe working environment was in the alternative to the claim for constructive dismissal and that \$30,000 was claimed either as compensation under section 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) or general damages for breach of that obligation. There was also some recognition that all claims shared in essence the same series of events. The request for a recommendation was withdrawn as updated policies were provided to the Authority and Mr Shingleton.

[11] Tradestaff do not accept grievances for unjustified disadvantages were raised within the statutory period or that there was implied consent to extend time. It further does not accept that there was a basis for any of the grievances raised if implied consent is found. Further it does not accept that it breached its contractual obligations to provide a safe workplace, says that Ms Bailey resigned of her own volition and was not unjustifiably constructively dismissed.

### **The issues**

[12] The Authority is required to determine the following issues in this matter.

- (a) What unjustified disadvantage grievances are alleged?

- (b) Were disadvantage grievances raised within the statutory time frame or was there express or implied consent to the disadvantage grievances being raised outside of the 90-day period?
- (c) What is the background against which the grievances need to be considered?
- (d) If there were unjustified actions on the part of Tradestaff then did they cause disadvantage to Ms Bailey?
- (e) Was Ms Bailey's resignation caused by a breach of duty on the part of Tradestaff?
- (f) If the answer to that is yes that it was then were there breaches of duty by Tradestaff?
- (g) If there were breaches of duty by Tradestaff then were they of sufficient seriousness to make it reasonably foreseeable that Ms Bailey would not be prepared to continue to work in the conditions that existed at the time of her resignation?
- (h) Alternatively was there a breach of the obligation to provide a safe workplace?
- (i) If the Authority gets to the point of remedies then what remedies should be awarded?

**What unjustified disadvantage grievances are alleged?**

[13] The first disadvantage grievance alleged is that there was a lack of support given to Ms Bailey to manage an employee who I shall refer to as Z. The evidence establishes that employee Z went to work at another branch of Tradestaff on or about 2 July 2018 and was therefore no longer managed by Ms Bailey after that date.

[14] The date of 2 July 2018 is the last date on which any action alleged to amount to a personal grievance occurred. The grievance in relation to whether there was sufficient support provided to manage employee Z was raised outside of the 90-day statutory time frame.

[15] The second alleged unjustified disadvantage grievance was an alleged failure by Tradestaff to investigate Z's conduct. The same time frame applies to this grievance as with the earlier one. This was also raised out of time.

[16] The third alleged unjustified disadvantage grievance was a failure to investigate concerns raised by Ms Bailey about alleged conduct of the National People and Capability Manager Sue Harrison. It is alleged the failure to investigate concerns was ongoing until Ms Bailey's final day on 24 October 2018. I am not satisfied that this grievance was raised out of time in the letter of 17 December 2018.

[17] Having found therefore that two grievances were raised outside of the statutory time frame and one was raised within the statutory time frame the Authority now needs to consider whether there was implied consent by Tradestaff to the raising of two of the grievances.

**Was there implied consent to raising two disadvantage grievances out of time?**

[18] The Court of Appeal in *Commissioner of Police v Hawkins* (No. 3)<sup>1</sup> considered the issue of implied or express consent to an extension of time for raising a grievance. It was stated that the real issue in that matter was not whether the Commissioner turned his mind to the extension but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time. It was stated that whether what occurred constitutes consent is a matter of fact and degree in each case.

[19] It is necessary to consider on the facts of this matter whether in respect of the two disadvantage grievances raised outside of the statutory timeframe Tradestaff can reasonably be taken by its conduct to have consented to an extension of time.

[20] Ms Oberndorfer in her letter of 28 February 2018 responded to the letter raising both unjustified constructive dismissal and unjustified disadvantage grievances on behalf of Ms Bailey dated 17 December 2018. She stated that Tradestaff did not accept that any disadvantage grievances had been raised and that there were no details about what they were.

[21] The disadvantage grievances were not particularised in the letter of 17 December 2018 but rather were part of a factual matrix presented in respect of what appeared to be the main grievance of unjustified constructive dismissal. It was only after the facts had been set out in the letter that there was reference to a further grievance of unjustified disadvantage.

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<sup>1</sup> *Commissioner of Police v Hawkins* [2009] NZCA 209 at [23].

[22] In the reply to the grievance in a letter dated 28 February 2019 Ms Oberndorfer acknowledged receipt of the letter raising a personal grievance. She stated with respect to the unjustified disadvantage claims the following:

There are no details identifying a claim for unjustified disadvantage and our client does not accept that any grievance has been raised for unjustified disadvantage.

[23] Amongst other matters raised there was agreement to discuss the matter further at mediation. There was no dispute that a grievance had been raised for unjustified constructive dismissal within time. It was noted:

This is done out of respect for Ms Bailey as a previous employee but should in no way be taken as accepting that there are reasonable grounds for the claims made in your letter.

[24] Ms Oberndorfer in her letter of 28 February 2018 also responded to matters 1 - 16 in that factual matrix in the letter of 17 December that included those now advanced as separate disadvantage grievances particularised for the first time when a statement of problem was lodged on behalf of Ms Bailey on 26 April 2019.

[25] The parties then attended mediation.

[26] Mr Shingleton refers me to an Authority determination *Singh v VR Lofts Management Limited*<sup>2</sup> where there was some discussion with reference to Employment Court judgments about whether the attendance at mediation means consent to an out of time grievance. One of the Employment Court judgements considered was *Anna Ale v Kids at Home Limited*<sup>3</sup>

[27] In *Anna Ale*<sup>4</sup> Judge Inglis as the Chief Judge was at that time did not accept the defendant's attendance at mediation could reasonably be construed as implied consent to pursue a disadvantage grievance out of time having regard to the circumstances. In that matter there were a number of alleged grievances of which some, but not all, were within time and it was stated that it was difficult to conclude that attendance at mediation signifies consent.

[28] The statement in reply to the statement of problem did not state that the disadvantage grievances were raised out of time. It was not obvious that there was an issue about time

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<sup>2</sup> *Arwinder Singh v VR Lofts Management Limited* [2017] NZERA Christchurch 159

<sup>3</sup> *Anna Ale v Kids At Home Limited* [2015] NZEmpC 209

<sup>4</sup> Above n3 at [34]

from Tradestaff's perspective from the statement in reply. The statement in reply provided Ms Bailey was not unjustifiably disadvantaged and a response to the facts relating to all grievances.

[29] Considering the letter of 28 February 2019, the mediation and the statement in reply together I find Tradestaff could reasonably be regarded on an objective basis as having impliedly consented to an extension of time for the two out of time disadvantage grievances.

### **The background against which the grievances need to be considered**

[30] The facts relied on for the disadvantage grievances and the alleged unjustified constructive dismissal are essentially the same and there are two broad issues.

#### *Employee Z*

[31] It is alleged that Ms Bailey was disadvantaged by unjustified actions of Tradestaff in failing to support her in her dealings with Z. It is alleged that there was a failure to investigate Z's conduct. Finally the Authority needs to consider issues about Z then returning to the Christchurch branch in light of the resignation and then the alleged unjustified constructive dismissal.

[32] The previous branch manager of Tradestaff in Christchurch passed away in October 2017. The evidence supported that she was very much respected and liked. Her passing had a significant impact on the Christchurch branch. The head office of Tradestaff is based in Christchurch. There are other branches throughout New Zealand.

[33] Ms Harrison said that she encouraged both M and Ms Bailey to apply for the role of team leader. M did not want to proceed with his application as he wanted to take up a different role and Ms Bailey was duly appointed as team leader.

[34] There appeared to be a difference in the evidence about when Ms Bailey took up the team leader role. Ms Bailey put the date in her written evidence as January 2018. Ms Harrison in her evidence said that Ms Bailey was appointed to the team leader position on 11 February 2018. I prefer Ms Harrison's evidence that Ms Bailey commenced the team leader role on or after 11 February 2018. It was only in emails after that date that Ms Bailey recorded her position as team leader rather than senior recruitment consultant.

[35] Ms Bailey said that after she was appointed to the role as team leader one of her team members, Z, frequently came to work inebriated and in no condition to work. She said this continued to be an issue throughout his employment. Additionally Ms Bailey said that Z behaved in an inappropriate manner toward female candidates including interviewing them for an hour or so for construction roles that they were not suitable for. Ms Bailey said that when she asked for assistance from Ms Harrison there was no support and Ms Harrison did not properly investigate the concerns about Z. Ms Bailey said that Ms Harrison would advise her the matter was being dealt with but not what action was being taken.

[36] Ms Harrison has been employed by Tradestaff for four and a half years. She said that she got along well with Ms Bailey professionally and personally. She agreed that Ms Bailey indicated she was having some trouble with Z about his performance and that Ms Bailey talked about his drinking. Ms Harrison said that she spent time with Ms Bailey and went over Z's personality profile and offered some suggestions for management of him. Ms Harrison did not accept that Ms Bailey talked to her about Z being inappropriate with female candidates.

[37] Ms Harrison said that there were two occasions when she was aware that Z was hung – over and intoxicated. The first of these she said she was “pretty sure” arose in December 2017 when she made a decision to take his keys away from him and have another person drive him home. Ms Bailey put the date of that incident as 23 February 2018 rather than in December 2017. She said that it was the day before the Electric Avenue festival on 24 February 2018. She produced some Facebook messages between her and Z on the second day of the investigation meeting to support that. It is difficult to confirm with any degree of accuracy what the conversation was about from the Facebook messages. Ms Harrison said that she had never seen the messages before. I have adopted a cautious approach to this new information but I do accept that a message from Ms Bailey could indicate that Z turned up under the influence that day.

[38] Both Ms Harrison and Ms Bailey agreed there was an incident on 7 February 2018 when Z did not turn up to work and messaged another colleague and not Ms Bailey. Emails produced that day show that Ms Bailey emailed Ms Harrison advising that Z had not turned up to work, had messaged another colleague instead of her and that “he’s been on a bender & had been advised by M not to turn in smelling of alcohol.” Ms Bailey wrote that she thought Z needed to be spoken to about alcohol affecting his work. Ms Harrison responded that she

was away from work for the rest of the week but Ms Bailey could talk to him if she was comfortable or ask another senior person called A to do so. Ms Bailey said that she was comfortable and she undertook a discussion with Z and made notes. Ms Harrison followed up with an email on 8 February 2018 asking how Ms Bailey got on and advising that Z would have to apply for a half days leave. Ms Bailey advised in an email of the same date that Z's attitude was terrible the day before which she put down to the hangover but that his performance was better that day and he was on time and able to work. She then sent through the notes she took of her discussion with Z.

[39] There was then an incident at the Electric Avenue festival when Ms Bailey said quite negative and rude things to Z. I will not set out what was said. Other Tradestaff employees were present at the time. One staff member was very concerned about that behaviour from a manager to an employee. She reported the incident and Ms Bailey was spoken to by Ms Harrison and Ms McNab. Initially Ms Bailey denied behaving in that manner. She was then advised of the person who had complained and she knew that person had not been drinking at the event and was reliable. Ms Bailey then said that she had been drinking and could not recall what had been said or done but agreed she had lost her temper. She said it was a warm day; she had been drinking and had eaten very little.

[40] Ms Bailey was asked to apologise to Z. Ms Harrison followed up with her about that. The response from Ms Bailey was that the discussion with Z went well and the air between them was cleared. Ms Bailey stated she had discussed her frustration with Z and that Z was keen to move forward.

[41] Ms Harrison did not accept that Ms Bailey ever instructed her to investigate matters with Z. She did not accept that she told Ms Bailey she was dealing with matters with Z herself.

[42] A subsequent performance review completed by Ms Bailey of Z in June 2018 made no mention of issues about alcohol. Ms Bailey said that the performance appraisal is a tick box exercise and this was completed months after Z's behaviour was "out of control" and Ms Harrison had not got back to her with any help. The comments made by Ms Bailey at the top of the front page were reasonably positive about Z referring to "progression over the past few weeks in a number of areas." Although Ms Bailey had said that the team fell apart with

attempting to deal with Z she scored him a “4” for creating a positive environment although his accountability scores were lower.

[43] When Ms Bailey held the position of team leader she also met with Ms McNab on a weekly basis unless it was arranged otherwise to discuss the Christchurch branch performance and results. The meetings included working through how to manage the members of the team to get the best outcomes from them. Ms McNab in both her written and oral evidence said that whilst Ms Bailey did mention there were some issues in the relationship between her and Z these were not communicated to be more challenging than other team members were presenting. Her written evidence provided that Ms Bailey did not indicate the relationship was under stress.

[44] Ms McNab said that she was aware of one instance when Z arrived at work and appeared to be under the influence of alcohol and Ms Harrison arranged to have him taken home. She said that Ms Harrison advised her of this. She believed this incident to be before 7 February 2018. In her evidence Ms McNab said that she was unaware of any issues of concern with Z and female candidates.

[45] She said that she did not become aware of the second instance on 7 February until she had some discussion with Ms Bailey about Z returning to Christchurch. She said that she was not aware that Z coming to work frequently drunk and said Ms Bailey did not advise her that she was feeling unsupported in dealing with Z or otherwise. She said that the weekly meeting would have provided an opportunity for that sort of discussion.

[46] Both Ms McNab and Ms Harrison referred to another team member in Ms Bailey’s team requiring some performance management. Ms Harrison said this was in April 2018 and Ms Bailey undertook the process very well, supported by Ms Harrison.

[47] In her resignation letter dated 3 October 2018 Ms Bailey gave additional notice to cover holidays and do a handover with Z when he got back. In an email dated 8 October 2018 Ms McNab asked Ms Bailey if it would change her mind if Z was not coming back to Christchurch. Ms Bailey responded:

Possibly, although I think I’ve decided that I would like to take some time out anyway. I absolutely believe it’s the right thing to do for the business for him to be back here, so he can be managed properly.

### *Issues in relationship with Ms Harrison*

[48] Ms McNab agreed that Ms Bailey advised her that her relationship with Ms Harrison had become strained. Ms Bailey accepted that she did not mention bullying but said to the effect that the relationship was not what it once was and she believed that Ms Harrison was not engaging as she once had.

[49] Ms McNab assured Ms Bailey that if there were any issues with anyone in her team she would manage them.

[50] Ms McNab explained to the Authority that she spoke to the newly appointed branch manager Ms Young on 20 August 2018. She said that Ms Young confirmed that the relationship between Ms Bailey and Ms Harrison was not great but she did not think there was a need to escalate things. She said that she had not seen anything inappropriate or unprofessional.

[51] Ms McNab said that on 11 September she spoke to an administrator who worked alongside Ms Bailey who also confirmed that she had not seen anything of concern in the way Ms Harrison spoke to Ms Bailey.

[52] Ms McNab also spoke to Ms Harrison. Ms Harrison stated that following on from Ms Bailey's behaviour at the Electric Avenue festival she no longer engaged at the level that she had done but that her behaviour and communication remained professional.

[53] Ms McNab said that she was satisfied that Ms Harrison was not unprofessional or discourteous. She did not advise Ms Bailey of her informal discussions and view before Ms Bailey resigned.

### **Conclusions with respect to disadvantage grievances**

[54] A disadvantage grievance claim is set out in s 103(b) of the Act as follows:

- (b) the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was(during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

*Failure to support Ms Bailey in her dealings with Z*

[55] Mr Shingleton submits that the evidence supports a lack of support from Ms Harrison to manage Z's behaviour and that this disadvantaged Ms Bailey because she became stressed, anxious and restless.

[56] I have considered the evidence. The emails around 7 February indicate Ms Harrison was supportive and that she followed up with Ms Bailey about what had occurred. If Ms Bailey considered she was not supported from Ms Harrison then she had weekly meetings with Ms McNab who she got on well with. Ms McNab said that she was not made aware of the 7 February 2018 issue until much later in September/October when there was talk about Z returning. She said that she was never advised about the incident Ms Bailey gave evidence about on 23 February. She did hear about other team members from Ms Bailey in addition to Z. There was a process with respect to another team member in or about April 2018.

[57] Mr Shingleton places weight on the notes taken by Ms Bailey at [20] of the common bundle supporting a need for careful management. There was no evidence to support that after the Electric Avenue event issues were raised about alcohol and Z. Mr Shingleton submits that Ms Harrison could have organised a meeting with Ms Bailey and Z to make it clear that Tradestaff supported Ms Bailey as his manager and he was to comply with her direction and requests. There is no evidence that that was necessary. The evidence was that the support was designed to empower Ms Bailey to manage. Ms Harrison said in her evidence that she encouraged managers to manage performance and discipline issues themselves and only rarely got involved. There was confidence in Ms Bailey that she could "step up" to the team leader role from the evidence of both Ms McNab and Ms Harrison. After the Electric Avenue event Ms Bailey as well as apologising explained to Z the reason for her frustrations and that meeting appeared to end on a positive note. She was clearly able to engage directly and successfully.

[58] Whilst Ms Bailey said in her evidence that there appeared to be some protection afforded to Z I could not be satisfied from the evidence of that. Ms McNab had no knowledge about that. I note the performance appraisal undertaken in June 2018 made no mention about Z and his issues with alcohol.

[59] I also asked for Ms Bailey's training schedule. She attended in 2018 amongst other training an "essential leadership skills programme." That training would have been

supportive in managing a team. I also checked her sick leave record and there were only five days of sick leave in 2018.

[60] The evidence considered as a whole does not satisfy the Authority that the claim of disadvantage about a lack of support in managing Z is established. This claim does not succeed.

#### *Failure to investigate Z*

[61] Mr Shingleton suggests that the respondent did not follow its own procedure for serious misconduct and that Ms Bailey wanted Z investigated and disciplined. There is a difference in the evidence about when the incident with Ms Harrison removing Z's keys took place. Ms Harrison did not recall the incident on 23 February 2018 that Ms Bailey refers to and the Facebook messages do not help with establishing whether Ms Harrison was involved. Ms McNab was aware of an incident that she recalled took place before 7 February 2018 when Ms Harrison took Z's keys off him. Ms Harrison thought it was in December 2017. The evidence was that there was more leniency at that time with Z because of the effect on the team of the death of the branch manager. Ms Bailey was not disciplined in any way about her actions towards Z at the Electric Avenue festival.

[62] I accept that the decision to discipline or not is for the employer. Mr Shingleton suggests that the failure to discipline Z caused disadvantage to Ms Bailey because she felt unsupported and demeaned. There is no evidence Ms Bailey asked Ms Harrison to investigate the issues of concern and/or that she authorise/support Ms Bailey to take some disciplinary action against Z.

[63] Given that Ms Bailey was involved in a process with another team member in April 2018 she must have known that such processes were possible and that she could be supported through them. If Ms Harrison would not agree to an action then she could have asked Ms McNab. At a much later point when Ms Bailey raised her concerns with Ms McNab about Z returning to the Christchurch branch Ms McNab took them seriously. It was known that any management of Z if he did return would be undertaken by Ms Young. Ms McNab was also open to Z being placed in Auckland rather than in the Christchurch branch.

[64] I am not satisfied from the evidence that Ms Bailey escalated any concerns to either Ms Harrison or Ms McNab about Z's inappropriate contact with female candidates.

[65] I do not find that the claim of disadvantage about a failure to investigate Z's conduct or discipline him is made out.

*Failure to investigate Ms Harrison's conduct*

[66] Mr Shingleton accepted that there was an informal investigation but says that it was inadequate and that Ms Bailey was disadvantaged as a result. He submitted that there was a failure to investigate a complaint of "passive bullying." It is not disputed that Ms Bailey did not use the term bullying or harassment with respect to Ms Harrison. Ms McNab in her evidence said that the discussion with Ms Bailey was that the relationship had changed and was not what it had been with Ms Harrison.

[67] Ms Harrison is a human resource advisor and a national resource. She travels around the country to other Tradestaff branches and has an office on another floor to the Christchurch Branch. She does not manage Ms Bailey as such and I accept would not interact with her on a daily basis.

[68] Ms Harrison had assisted Ms Bailey in a number of ways in 2017 with a personal matter. When Ms McNab investigated Ms Bailey's concerns with Ms Harrison she advised that she was professional and the relationship with Ms Bailey she thought was fine. She did say that she had pulled back personally after Ms Bailey's behaviour towards Z at the Electric Avenue festival and because of behaviour at a few work functions when socialising.

[69] I accept that Ms McNab could have returned to Ms Bailey after she had undertaken her informal investigation with her views. When I considered the conduct in the workplace and other key policies document before modification there did not appear to be a requirement for that even if it could have been desirable.

[70] Under questioning from Mr Shingleton, Ms McNab said that with the information in front of her she had acted in carrying out informal investigation in the best possible way and was satisfied that Ms Bailey had not been subjected to unprofessional behaviour or inappropriate behaviour. She felt that she had acted in a way that was consistent with the level of severity with the way the situation had been discussed by Ms Bailey.

[71] Ms Young said in her evidence that Ms Bailey in conversation with her "did not hide her dislike of Ms Harrison' but she did not want to take her concerns further or put concerns in a formal manner. Ms Bailey said that the advice not to escalate concerns was only in

relation to an issue when employees had attended at the graveside of the previous branch manager on the anniversary of her death in October. She felt Ms Harrison had made a comment directed to her. Ms Bailey said that she was leaving at that time and there seemed little point in escalating the concern. Ms Harrison denied that the comment made by her at that time was in any way directed to Ms Bailey.

[72] I find that the evidence supports the concerns from Ms Bailey were put in a relatively low level manner to Ms McNab with a focus on the change in relationship between her and Ms Harrison. The level of investigation reflected the way the concern was raised. I agree Ms McNab could have returned to Ms Bailey about her informal investigation and that could have been desirable. Ultimately however she had a view that Ms Harrison was still professional and courteous and the law requires no more as Ms Oberndorfer submits.<sup>5</sup> Emails presented between Ms Bailey and Ms Harrison in the common bundle reflect professional exchanges.

[73] I am not satisfied that Ms McNab's actions could be said to be unjustified so as to conclude disadvantage was caused and not what a fair and reasonable employer could have done in all the circumstances. Ms Bailey accepted that she had not asked for a particular action to be taken when verbally raising her concerns about Ms Harrison.

### **Was Ms Bailey's resignation caused by a breach of duty on the part of Tradestaff**

[74] Mr Shingleton confirms this matter falls within the third of the non-exhaustive situations where a constructive dismissal might occur as set out in *Auckland Shop Employees IUOW v Woolworths (NZ) Limited*.<sup>6</sup> That is where a breach of duty by the employer leads an employee to resign.

[75] The Authority needs to consider whether the resignation was caused by a breach of duty on the part of Tradestaff by examining all the circumstances of resignation. If causation is satisfied then there is a need to consider whether the breach of duty was sufficiently serious to make it reasonably foreseeable that Ms Bailey would no longer be prepared to continue to work at Tradestaff.<sup>7</sup>

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<sup>5</sup> *New Zealand Woollen Workers IUOW v Distinctive Knitware New Zealand Ltd* (1990) ERNZ Sel Cas 791 at 803

<sup>6</sup> *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374

<sup>7</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415 (CA) at 419

[76] Neither the letter of resignation nor the subsequent letter provided to Ms McNab and the director of Tradestaff provide any indication that Ms Bailey was leaving because of the breaches of duty she now alleges. Ms McNab understood from Ms Bailey when she resigned that she wanted a break from the recruitment industry and a change professionally. In short something new. There was an option mentioned of starting a cake baking business with her sister and another business development role. Ms Bailey did write a draft letter that mentions issues with Z and Ms Harrison however after talking to Ms Young did not provide the letter. Ultimately the decision was always Ms Bailey's about what she would do. The draft letter was never provided to Tradestaff.

[77] Ms McNab asked on 23 October if Ms Bailey had anything lined up as she was to be away on Ms Bailey's final day. Ms Bailey said that she had not. Ms McNab said to Ms Bailey that the door was always open for her to return. In fact Ms Bailey had been applying for jobs in the recruitment industry for some time and started a role in the recruitment industry the following week. Although Ms McNab suggests that the grievance was raised in direct response to Tradestaff taking actions for breaching contractual obligations I have placed no weight on that.

[78] I accept that Ms Bailey may well have become unhappy at Tradestaff. As many employees do she looked elsewhere for a new role. I have not found breaches of duty made out in my analysis of the facts that she says led to her decision to resign. Further there was no evidence that Tradestaff could have reasonably foreseen the resignation.

[79] I find that Ms Bailey has not established that her resignation was effectively a dismissal.

### **Failure to provide a safe workplace**

[80] For the reasons set out above in my analysis of the grievances above this claim is also not made out.

## **Costs**

[81] I reserve the issue of costs. Ms Oberndorfer has until 8 November 2019 to lodge and serve submissions as to costs and Mr Shingleton has until 22 November 2019 to lodge and serve submission in reply.

Helen Doyle  
Member of the Employment Relations Authority