IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 126
5417683

	BETWEEN	SHARRON BARCLAY Applicant
	A N D	RICHMOND SERVICES LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Warwick Reid, Advocate for Applicant Penny Shaw, Counsel for Respondent
Investigation Meeting:	24 and 25 February 2014 at Tauranga
Date of Determination:	4 April 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Barclay) alleges that she was constructively dismissed from her employment. The respondent (Richmond) denies that allegation.

[2] Ms Barclay had worked as a community support worker for Richmond and had been in that role or a like role since 14 August 2006.

[3] Although both parties note there were no disciplinary issues until about a year before the termination of the employment, it is nonetheless true that throughout the employment, Richmond had to speak to Ms Barclay from time to time about interpersonal difficulties that she was having with other staff, often following on from concerns raised by colleagues, and Richmond also had to address Ms Barclay's moodiness in the workplace.

[4] In October 2011 a work colleague complained about Ms Barclay's driving. The incident in question took place on 3 October 2011, when Ms Barclay was driving a Richmond vehicle carrying other Richmond staff. A variety of allegations were made about her driving. A first written warning was issued after the employer's disciplinary investigation.

[5] Another complaint was received involving Ms Barclay on 29 December 2011 wherein a supermarket worker complained to Richmond about the behaviour of a Richmond staff member assisting a Richmond client in the supermarket.

[6] At the time the complaint was made, it was not clear who the Richmond staff member was; in the result, Ms Barclay was identified after a process of investigation.

[7] By the time Ms Barclay had been identified as the person involved in the 29 December 2011 complaint, another complaint was received from a client of Richmond about Ms Barclay's behaviour in the same supermarket, the second complaint being dated 8 March 2012.

[8] Again there was an investigation of these two supermarket issues and again a written warning was issued.

[9] On 9 May 2012, Ms Barclay was alleged to have gone to bed at 9.40pm during a shift that was not due to end until 11pm She was supposed to be awake and working. In the resulting investigation, Richmond accepted that Ms Barclay was not asleep but was "resting her eyes" because she suffered from a medical condition called Blepharitis, an inflammation of the eyelids.

[10] However, Richmond also found proved an allegation that Ms Barclay had falsified her timesheet in that she had claimed payment for the period when she was not actually working. Again, this complaint came to the notice of Richmond as a consequence of a colleague of Ms Barclay's drawing it to management's attention. A final written warning was issued.

[11] On 9 September 2012, a Richmond client made a complaint against Ms Barclay alleging that Ms Barclay had spoken to her in a threatening manner and told the client that if she did not get into her pyjamas she would not be issued with her medication.

[12] The client who made the complaint subsequently became seriously ill and entered hospital, and having returned to Richmond after discharge, withdrew the complaint.

[13] Then the same client reiterated the original complaint. This happened on 5 October 2012.

[14] Richmond wrote to Ms Barclay by letter dated 7 November 2012 advising her of the allegations made and seeking a meeting to discuss matters.

[15] In the meantime, Ms Barclay's advocate provided detailed written comments on the allegation. A meeting between the parties took place on 16 November 2012.

[16] Two and a half weeks later on 5 December 2012, Ms Barclay resigned her employment, having been absent from work on sick leave from 9 November down to 26 November 2012.

[17] It is common ground that just prior to the resignation, there was an informal meeting between Richmond's service delivery manager and Ms Barclay at which each indicated to the other their hope that the latest complaint matter could be resolved. At the point at which Ms Barclay's resignation was received, Richmond was still investigating the allegations made by the client and had not escalated the issue into a disciplinary matter.

[18] On receipt of Ms Barclay's resignation, Richmond gave Ms Barclay 48 hours to reconsider her position, which she declined to do.

[19] A personal grievance was promptly raised alleging constructive dismissal after the resignation took effect.

Issues

[20] It will be convenient if the Authority considers each of the disciplinary/ investigative processes separately as Ms Barclay's case for constructive dismissal is based first on the accumulation of disciplinary warnings and then on the "final straw" of the client complaint of 9 September 2012.

[21] Accordingly, the Authority proposes to address the following questions:

(a) What happened with the first complaint of 3 October 2011;

(b) What happened with the second complaint of 29 December 2011 and 8 March 2012;

(c) What happened with the third complaint of 9 May 2012;

(d) What happened with the 9 September 2012 complaint; and

(e) Has Ms Barclay demonstrated the elements of a constructive dismissal?

What happened with the first complaint of 3 October 2011?

[22] Ms Barclay was driving a Richmond vehicle from Whakatane to Tauranga on 3 October 2011. There were a number of Richmond staff members in the vehicle. One of them made complaints about Ms Barclay's driving, alleging that she was speeding and driving dangerously, including following too closely behind another vehicle.

[23] The complaint was initially made to Anne Hohneck who was at the relevant time the Service Delivery Manager for Tauranga. Ms Hohneck was concerned about the allegation, thought it *"relatively serious"* and escalated it to the Regional Manager, Pamela Eru. Both the Richmond managers told me that they had never had such a complaint from a staff member before. Human resources advice was taken and a meeting with Ms Barclay was convened for 17 November 2011 at which Ms Barclay was represented by a union official.

[24] From Richmond's perspective, both Ms Eru and Ms Hohneck attended with Ms Eru running the meeting and Ms Hohneck taking notes.

[25] Ms Eru's evidence, which I accept because it is consistent with the notes of the meeting which were not protested about at the time by Ms Barclay or by the union official who represented her, is that Ms Barclay made admissions at the meeting to the effect that she had had an argument with the complainant while driving, that another staff member had told her she was driving too fast and asked her to slow down and that she was in fact speeding and was upset.

[26] On the basis of those admissions, Richmond decided not to make any further inquiries.

[27] In particular, Richmond did not talk to any of the other staff members in the car and having got the admissions from Ms Barclay, simply proceeded to give her a first written warning. Both Ms Eru and Ms Hohneck say that Ms Barclay accepted the outcome and said something to the effect that she thought it was fair. Certainly, the notes of the meeting record that is what Ms Barclay said.

[28] In answer to questions from me at the investigation meeting, Ms Barclay confirmed that the way in which Richmond had dealt with this complaint was *"okay"* which I take to confirm Richmond's evidence that she accepted the outcome of the disciplinary meeting.

[29] However, Ms Barclay also said at my investigation meeting that she thought that Richmond should have talked to the other staff members in the car before coming to the conclusion that it did. Of course, the reason that Richmond did not take that step was that she admitted the wrongdoing complained of and as a matter of law, the additional step of interviewing independent witnesses became unnecessary.

[30] However, I would observe that a prudent employer in this situation would be well advised to talk to all the available witnesses, even where there is an admission, in case there is some other information which is relevant even to the question of penalty.

[31] That said, I am not persuaded that those additional inquiries are required by law in circumstances where there is a straightforward admission of wrongdoing by the employee complained about, and given the clear evidence that Ms Barclay herself accepted the outcome of the disciplinary inquiry, and there is no evidence she raised the suggestion that Richmond should interview the other staff at the time, I am satisfied that this was a proper exercise of the employer's discretion and that there can be no complaint about the outcome.

[32] Ms Barclay quite properly accepted that, faced with a complaint of the sort just discussed, an employer had an obligation to investigate it and make a disposition of it appropriate to the circumstances.

What happened with the second complaint of 29 December and 8 March 2012?

[33] In February 2012, an employee accident/incident form was completed by one of Ms Barclay's work colleagues indicating that on 9 January 2012 the staff member was approached by an employee of the local Countdown supermarket who raised

concerns about the treatment received by a client of Richmond who I will refer to as Client A, from that client's Richmond caregiver. The accident/incident form was provided to Ms Hohneck who commenced an investigation. The first part of the investigation was to try to establish who the staff member concerned was in order that the matter could be progressed. As part of the inquiry, Ms Hohneck spoke personally to the Countdown staff member and took from her a written complaint. She also got a description of the Richmond staff member.

[34] Ms Hohneck then checked the roster and Client A's shopping docket for the day in question and was able to identify that the employee concerned was Ms Barclay.

[35] Ms Hohneck accepted in the evidence that she gave me that Client A could be difficult, but she also maintained that dealing with difficult clients was part of the job and that she had never had a complaint of this kind involving this client before.

[36] About the time that Ms Hohneck was finalising her initial inquiries into this complaint, she received another complaint also about Ms Barclay, this time alleging that the client felt *"unsupported"* by Ms Barclay whilst grocery shopping.

[37] Again, the complaints were escalated up to Ms Eru and a disciplinary meeting was set for 5 April 2012.

[38] Ms Barclay attended with a union official as her support person and Ms Eru ran the meeting with notes being taken by Ms Hohneck. On this occasion, Ms Barclay also filed a written statement with Richmond which was considered as part of Richmond's response.

[39] In relation to the first of the issues in time, Richmond found on the balance of probabilities that there had been an altercation between Ms Barclay and Client A. The decision-maker, Ms Eru, acknowledged that Client A could be difficult but told me that this was the first complaint she was aware of about shopping with this client and she felt Ms Barclay ought to have handled the matter better than she did.

[40] In relation to the second complaint in time involving Client B, Ms Eru relied in part on another admission made by Ms Barclay that she had lost contact with Client B in the shop and by the time she found Client B again, Client B had moved through the checkout and was outside the supermarket.

[41] Ms Eru concluded that another written warning should be issued rather than any consideration of dismissal. This clearly reflects Richmond's assessment of the seriousness of the complaint; in fact, the evidence I heard suggested that Richmond was more interested in trying to get Ms Barclay to moderate her behaviour so it was more consistent with Richmond's values and aspirations. Ms Eru says in her brief of evidence:

> *My major emphasis was on trying to correct Sharron's* [Ms Barclay's] *behaviours and provide her with the support and training to do so.*

[42] In her observations about the altercation with Client A, Ms Barclay concentrates on dealing with the subject matter of the dispute which concerned which meat to purchase. While that may have been the initial allegation, what Richmond found as a fact was that there had been some sort of argument between Ms Barclay and Client A and that that was simply inappropriate, whatever the provocation.

[43] Unlike the first complaint, Ms Barclay protests the fairness of this investigation and conclusion by Richmond.

[44] Ms Barclay thinks that the investigation was substandard, that the conclusions were not supported by any independent witness and that the outcome was *"predetermined"*.

[45] But I am not persuaded by Ms Barclay's view of the matter. In relation to Client A, where the complainant was effectively the Countdown staff member, Ms Hohneck received the complaint in the first instance from another Richmond staff member, then spoke personally to the Countdown staff member who had complained and took from her a written complaint. Ms Barclay complains that it was Ms Hohneck who did this, yet because Ms Eru was the decision-maker, she never saw the complainant or talked to the complainant. Certainly it would have been better if Ms Eru had spoken to the complainant, but Ms Eru would have had no reason to doubt what she was told by her subordinate, Ms Hohneck. This was not a situation where there was any great dispute about what the complaint was. The complaint had been made relatively informally by the Countdown staff member to another Richmond staff member and was then promptly followed up, as it should have been, by Richmond when Ms Hohneck spoke with the Countdown staff member.

[46] The Countdown staff member could have told Ms Hohneck that she had over-reacted, that she did not wish to make a formal complaint, or she could have somehow varied her story, but she did none of those things. She confirmed the nature of the original complaint and she put it in writing and signed it. On that basis, while I accept that good practice would normally suggest that a decision-maker ought to speak directly to a complainant, in this case I am not persuaded that that factor invalidates Richmond's process.

[47] Moreover, it seems to be entirely appropriate that Richmond should have regard to the fact of an outside complainant. Ms Eru makes it clear that she was influenced by the fact that a Countdown staff member *"had gone out of their way to raise a complaint and appeared to be quite offended by the behaviour"*. Given the complainant was the eyewitness to the behaviour complained about, it is fair and proper for Ms Eru to be influenced by that.

[48] It seems likely also that although this is just implied, Ms Eru was influenced by the fact that there had been no other complaints to her knowledge about staff dealing with this particular client on her shopping forays. Of course, that is relevant. If other staff are able to manage Client A without challenge, then Ms Barclay ought to be able to as well. She has the training, the skill set and the experience to do what other staff have been able to do without complaint and so that factor is a relevant factor in my judgment.

[49] Ms Barclay claims that the outcome was predetermined and that she was always going to be *"given the warning whatever my responses had been"*, but there is no evidence of predetermination. The evidence is that Richmond was confronted with two complaints about Ms Barclay in the same environment (the supermarket context) within a relatively short space of time, it did what it thought was appropriate to investigate the matter, spoke to the staff member affected and then reached a conclusion about a disposition of the matter.

[50] While I agree that Ms Eru, as the decision-maker, ought to have spoken to the Countdown staff member, I do not agree that the fact that she failed to do that invalidates the process. In relation to the other complaint concerning Client B, there is no fundamental difference between the parties on the facts; Ms Barclay acknowledged that she lost touch with Client B in the supermarket and whatever the challenges of the role, that is presumably precisely what she is supposed not to do.

[51] In all the circumstances, I am satisfied that looked at in the round, Richmond's process, while not perfect, was an acceptable process and the outcome of the matter is an outcome that a fair and reasonable employer could come to.

What happened with the third complaint of 9 May 2012?

[52] Ms Barclay worked a sleepover shift finishing at 11pm on 9 May 2012 and it is common ground that at about 9.40pm that night, Ms Barclay lay down on a bed and effectively remained there until the end of the shift. The allegation that Richmond was provided with by another staff member was that Ms Barclay had been asleep. Her explanation is that she was simply resting her eyes because of her condition of Blepharitis. Subsequently, some 12 days after this event, Ms Barclay filed a timesheet claiming payment for the whole shift.

[53] Again, Ms Hohneck received a report the following day indicating that Ms Barclay had *"gone to bed"* as soon as the registered nurse had left at 9.40pm the previous night. Again the issue was escalated to Ms Eru who identified that claims of staff sleeping on shift work were very rare indeed and that there were issues of integrity in staff being paid if in fact they were not working.

[54] There was another disciplinary meeting with Ms Barclay on 25 May 2012 to discuss this allegation. Ms Barclay explained about her eye condition which I have already referred to and Richmond accepted at face value that she was not sleeping but genuinely *"resting her eyes"*. Notwithstanding that, Ms Eru decided to issue a final written warning, not because she was sleeping but because she was unwell and ought to have declared that and either gone home or at least sought advice from her direct manager, Ms Hohneck. Moreover, Richmond was concerned at the trust issue in claiming payment for a period of time when, by common consent, Ms Barclay was not working.

[55] Again, there is complaint from Ms Barclay about a failure of Richmond to investigate, but what is there to investigate? It is common ground that Ms Barclay lay down from 9.40pm or thereabouts until the end of the shift (she admitted as much to the employer). The only dispute between the parties was whether she was sleeping or simply trying to rest her eyes as a consequence of her eye condition and the employer accepted her explanation that it was the latter.

[56] Ms Barclay was still given a warning because even if she was just resting he eyes, as she claimed and the employer accepted, she was doing that on the employer's time and if she was so unwell that she was not able to be upright and on duty, then she should either seek advice from her manager (which she did not do), or go home sick (which she did not do either). Moreover, she had claimed and been paid for the period when she was not actually working from 9.40pm until the end of the shift. Again, that is a matter of fact so it is difficult to see what could be investigated further.

[57] Ms Barclay also complains about the language used by the employer in the disciplinary meeting. In particular, I am directed to a passage in the handwritten notes available to me from this meeting where Ms Eru is quoted as saying *"you are on dangerous ground. You will be challenged at every inappropriate behaviour if it comes again … we do not want it to get to this …"*.

[58] Ms Eru acknowledges making those statements in her evidence before me, and she stands by them.

[59] However, Ms Barclay relies on that quoted passage as evidence for the view that the employer was putting unreasonable pressure on her to conform. But what is the employer to do? It is confronted with a senior and experienced employee who has had a succession of disciplinary issues over a relatively short period of time. If the employer had not been straightforward and direct with Ms Barclay about the likely outcome, it would have been failing in its duty. I do not find anything inappropriate in the way in which Ms Eru tried to make clear to Ms Barclay that she could not keep making mistakes that led to disciplinary outcomes. I am satisfied on the evidence I heard that Richmond's primary focus in dealing with Ms Barclay was not disciplinary at all but was in fact designed to try to remediate Ms Barclay's behaviour so as to have her continue to be a functioning member of the team.

What happened with the 9 September 2012 complaint?

[60] This matter is, from Ms Barclay's perspective, both the end of an accumulation of complaints about her and the final straw which she says resulted in her being forced to tender her resignation.

[61] On 9 September 2012, Client C made a complaint about Ms Barclay alleging that she was being bullied by Ms Barclay. Ms Hohneck received the complaint,

advised Ms Eru that she had received it but indicated that because Client C was now in hospital, the matter was *"on hold"*. Notwithstanding that, Ms Hohneck supplied a copy of the written complaint to Ms Eru on 20 September 2012.

[62] Client C had been unwell for some time leading up to the receipt by Richmond of the complaint and immediately after the complaint was made, Client C was admitted to the mental health unit of the hospital. Because she was unwell, Richmond, understandably in my view, declined to take the matter any further. Client C was released from the hospital on 28 September 2012 and Ms Hohneck discussed the complaint with Client C on her release and was told that Client C wished to *"let it go"* and not proceed with the complaint. It follows that no action was taken, and in particular Ms Barclay was not advised that there had been a complaint but that it had now been withdrawn.

[63] But the complaint was re-filed on 8 October 2012 when a further written complaint dated 5 October 2012 was received, complaining about Ms Barclay speaking to Client C in *"an inappropriate and aggressive manner stating that if* [Client C] *did not take her medication she would not get her sleeping tablets"*.

[64] Richmond was unsure initially about whether this was a reiteration of the original complaint or a new complaint. Ms Hohneck then spoke again to Client C who confirmed that it was the same incident which had occurred on 4 September 2012, was initially reported on 9 September 2012 and then reported again on 5 October 2012.

[65] Ms Eru told me (and I accept) that she was intent upon investigating this matter at first instance simply as a client complaint, not as a disciplinary matter. But of course in order to take any steps to investigate, she had to speak with Ms Barclay and so she wrote Ms Barclay a letter inviting her to a meeting. That letter, dated 7 November 2012 tries to make the point that this is an investigation into a client complaint rather than disciplinary process directed as Ms Barclay.

[66] The meeting between the parties took place on 16 November 2012. Ms Barclay complains that that meeting was dominated by questions from Ms Eru about the medication that Client C was taking and that she was bewildered by that line of questioning.

[67] But given that all Richmond was doing was trying to find out what had happened, the line of questioning does not seem odd at all. Richmond was not trying to consider whether there was a case against Ms Barclay, but only trying to find out what she knew about the circumstances in which the complaint was made.

[68] In her answers to my questions at the investigation meeting, Ms Barclay accepted that Richmond had an obligation to investigate complaints from clients, accepted that if proved the complaint was serious, accepted the right of the client to complain and even accepted that all Richmond was doing was trying to find out what happened, not going down the disciplinary trail.

[69] Despite those concessions, Ms Barclay says that when she got the letter from Ms Eru about the complaint received concerning Client C, she could not believe that she was now involved in a fifth disciplinary matter and her advocate suggested that the receipt of the letter concerning Client C's complaint would have arrived like *"a nuclear bomb"*. He alleged that Ms Eru had sent the letter before conducting any proper inquiries. But where would Ms Eru start those inquiries if not with the person who was being complained about?

[70] Two days after receipt of that letter, however it is described, Ms Barclay filed a medical certificate which absented her from the workplace from 9 November to 26 November 2012.

[71] On 5 December 2012, Ms Barclay submitted her resignation, allegedly because of *"bullying by Anne Hohneck"* in particular and because of *"several disciplinary processes by Pam Eru and Anne Hohneck"*.

[72] Richmond quite properly refused to accept the resignation for 48 hours but in the result Ms Barclay would not withdraw it and so the resignation stood.

[73] Ms Barclay maintained throughout her evidence that Richmond was out to get her, wanted her out of the employment and went out of its way to ensure that that happened. But Ms Barclay also conceded in her evidence at my investigation meeting that Richmond had an obligation to investigate complaints, especially from clients or about clients, and that it could not simply ignore complaints in case they caused affected staff members distress. So in the end, what I am being asked to do is to decide that a succession of disciplinary investigations involving Ms Barclay were not in fact a series of discrete examples of potential wrongdoing and a disposition after

investigation, but rather an orchestrated campaign by Richmond to get rid of somebody it had taken dislike to.

Has Ms Barclay demonstrated the elements of a constructive dismissal?

[74] I am not satisfied that Ms Barclay has demonstrated the elements of a constructive dismissal. I do not accept her contention that a succession of disciplinary inquiries made as a consequence of her workplace behaviour constitutes bullying and represents conduct with the dominant purpose of forcing Ms Barclay from the employment ; what it constitutes in my judgement is Richmond endeavouring, to the best of its ability, to investigate complaints made about Ms Barclay by co-workers and/or by clients.

[75] As I noted above, Ms Barclay accepted the right to complain, accepted the obligation of the employer to investigate complaints, and accepted that as part of that investigation, it was inevitable that she, as the person complained about, would need to be engaged in the process.

[76] The evidence I heard satisfied me that the course of conduct was no more than the employer endeavouring to do its job of investing complaints about the employee, and that the motive underpinning that process was a desire to fulfil its obligation to enquire into potential failures of the employee and to respond to those failures, where found, appropriately. I was unable to identify any evidence of the sinister motive attributed to Richmond by Ms Barclay. Indeed, to the contrary, the evidence suggested that Richmond sought throughout the process to try to remediate Ms Barclay's behaviour and not to respond as punitively as they might have.

[77] Evidence of this is to be found in the regular references, in the dispositions of the disciplinary matters, to training opportunities, additional support, mentoring and guidance, as well as the refusal of the employer to issue a final written warning after the second disciplinary matter resulted in a finding of fault against Ms Barclay. To my mind, none of this suggests a dominant purpose of removing Ms Barclay from the workplace.

[78] Moreover, it is also common ground that Ms Barclay presents her case as an example of *"final straw"* cases where, in effect, but for the event described as the final straw, there would not or might not have been a forced resignation.

[79] It is apparent that the incidents of a disciplinary nature referred to by Ms Barclay as part of the reason for her claim cannot of themselves constitute personal grievances without the consent of the employer and/or the authorisation of the Authority. As neither has been granted or sought, I proceed on the footing that the earlier instances are part of the factual matrix simply to demonstrate Ms Barclay's claim that there was a course of conduct by Richmond designed to effect her resignation.

[80] Richmond refers me to a recent decision of the Employment Court, *Pivott v. Southern Adult Literacy Inc* [2013] NZEmpC 263 where the Court accepted four principles relating to the determination of final straw cases, which emanate from English authority.

[81] Those four principles are:

(a) The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial;

(b) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he/she cannot subsequently rely on the earlier acts if the final straw is entirely innocuous;

(c) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the final straw consists of conduct which, viewed objectively as reasonable and justifiable, satisfies the final straw test;

(d) An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely (and subjectively) but mistakenly interprets the employer's acts as destructive of the necessary trust and confidence.

[82] I must decide whether Richmond's investigation of Client C's complaint constituted a final straw in the sense contemplated by the decision in *Pivott* above.

[83] The first point to reiterate is that even Ms Barclay accepted in answer to questions from me that the employer had to follow up on a complaint from a client and could not simply ignore it. It cannot be right that just because an investigation of a complaint will cause the complainant distress, an employer is precluded from conducting an inquiry. Plainly, the employer has an obligation to conduct inquiries. This is particularly the case in the present situation where Richmond is responsible for caring for vulnerable individuals who need support to live their daily lives.

[84] Next, I observe another point I have already made, that Richmond endeavoured to make it clear to Ms Barclay that it was not undertaking a disciplinary inquiry; it endeavoured to convey the message that it was simply trying to find out what happened, that is, trying to establish the factual matrix in order to determine if there should be a disciplinary inquiry.

[85] Then, Ms Barclay complains that Richmond's investigation took too long. I do not accept that claim. Ms Barclay was notified of the complaint on 7 November although it is common ground that the incident complained of happened some two months earlier, but there cannot be prejudice to Ms Barclay about the elapsed time between the complaint being received first, then withdrawn, and then reactivated, if Ms Barclay knew nothing about the complaint. I am satisfied on the evidence that Ms Barclay was told about the complaint for the first time on 7 November 2012.

[86] Richmond wanted to meet with her promptly; the meeting had to be put back to suit Ms Barclay's representative. The meeting took place on 16 November 2012. I emphasise there is nothing improper in a representative asking for a different date for an investigatory meeting involving their client. I simply make the point that having done that, it is unfair to use that delay as part of an argument for blaming the employer for taking too long.

[87] The elapsed time from the date of the meeting to Ms Barclay's resignation was less than 2½ weeks and it seems to me entirely unreasonable to complain about delay over such a short period. It is true that Richmond had not completed the investigation within that 2½ week period, but to be fair to Richmond, it might well have given the matter a great deal more priority in terms of timeliness if the inquiry was indeed a

disciplinary one. But in fact all Richmond was doing was gathering information to decide whether a disciplinary inquiry was necessary.

[88] I am satisfied that Ms Barclay simply *"jumped the gun"* in resigning when she did. Ms Barclay says that the employer knew that she was under stress and that she had taken some sick leave for much of the period from the notification to her of the investigation into the complaint and her resignation. But it is also fair to emphasise that during that period there was a one-on-one discussion between Ms Hohneck and Ms Barclay at which Ms Hohneck indicated that she hoped the matter could be resolved.

[89] Constructive dismissal, of the sort claimed here by Ms Barclay, requires a degree of foreseeability which I am unable to discern from the evidence. The law requires the resignation to be a reasonably foreseeable consequence of the employer's course of conduct. I am not persuaded that Ms Barclay has proved a course of conduct on the part of the employer with the dominant purpose of effecting her resignation, but equally, nor am I persuaded that her resignation was reasonably foreseeable by Richmond.

[90] On that latter point, the evidence is as plain as can be that Richmond was surprised by the resignation; both Ms Eru and Ms Hohneck gave evidence to that effect and I accept that evidence as truthful. Not only that, Richmond refused to accept the resignation for 48 hours to give Ms Barclay an opportunity to reconsider her position.

[91] Looked at in terms of the principles from the *Pivott* case, I find it difficult to conclude that Richmond's actions constituted the " final straw." In particular, I have difficulty in accepting that *"reasonable and justifiable conduct"* by Richmond (which I am satisfied the investigation into Client C's complaint was), equates to the final straw. This is because the principle I derive from *Pivott* is that only in an *unusual* case will the final straw be conduct which was reasonable and justifiable, and in my judgement, this is not such an unusual case.

[92] I have simply not been persuaded that Richmond did anything wrongly in respect of the final investigation that the parties were involved in. It had to conduct an investigation; it would have been failing in its duty if it did not, and Ms Barclay had to be part of that investigation because she was the person complained about. It

seems to me there really is no way around it, that whatever approach Ms Barclay was to take to the investigation of Client C's complaint, there must be an investigation and she must be part of it and unless that investigation is grossly improper, and I am satisfied this was not such an investigation, it is difficult to see how the employer's objective and reasonable approach to what might have been a serious complaint can be held to be *"the final straw"*.

[93] Even if I am wrong about that, for reasons that I have traversed at length earlier in this determination, I am not persuaded that there are any other straws on which Ms Barclay can rest her case. As to the first disciplinary matter, she herself accepted in questioning from me that it was proper and the result was fair. She raised no complaint about the first matter at the time and indeed appears to have been complimentary about the approach taken by Richmond. Complaints raised now about what Richmond did then can be discounted. If she had a problem with the way Richmond was behaving, she should have raised it at the time.

[94] In relation to the second pair of complaints, I have already advanced the view that Richmond could have done one part of that issue better; Ms Eru should have talked to the complainant herself. But as I have already indicated, I am not satisfied that that failure taints the outcome, particularly as in respect of that pair of complaints, Richmond's finding on the other part of that same complaint was based in part on admissions made by Ms Barclay.

[95] In relation to the third disciplinary inquiry, I have made it abundantly clear that there was nothing more for Richmond to investigate; Ms Barclay had confirmed that she had in fact lain down to rest her sore eyes and as a matter of fact she subsequently put in a claim for wages including for the period when she was not working.

[96] On the face of it then, I am not persuaded that Richmond had done anything wrongly in its investigations of Ms Barclay's various disciplinary issues. It is a fact that there were a number of disciplinary issues with Ms Barclay over a short period of time. It is also a fact that Richmond was under an obligation to investigate those matters and dispose of them appropriately which it did.

[97] Moreover, it would be wrong to see Richmond as taking a punitive approach to Ms Barclay's behaviour. Indeed, all the evidence suggests that Richmond was

trying to get Ms Barclay to improve her behaviour and keep out of trouble. It proposed a defensive driving course in one case, various additional training elsewhere, and a buddy system to try to address the problem. There were also various one-on-one discussions (one might call them fireside chats) between Ms Hohneck and Ms Barclay really designed to try to get Ms Barclay to focus on performing to her potential and keeping out of trouble. Ms Hohneck said that she thought she had a good relationship with Ms Barclay and seemed genuinely put out that Ms Barclay did not agree with that view of matters.

[98] In conclusion then, I have not been persuaded that Richmond undertook a course of conduct with the dominant purpose of effecting a resignation, nor am I satisfied the investigation into Client C's complaint constituted a final straw within the meaning that phrase has in the law. Moreover, I have not been persuaded that there were any earlier straws either because I am satisfied that Richmond had to investigate each and every one of the matters brought to its attention and dispose of them appropriately after addressing them with Ms Barclay, and while there is one deficiency I have identified in the process, I am not satisfied that is sufficient to invalidate that particular conclusion. Finally, I do not think that the evidence supports the view that Ms Barclay's resignation was reasonably foreseeable. Indeed, I think quite the reverse is the case.

Determination

[99] For reasons that I have canvassed extensively in the earlier paragraphs of this determination, I am not satisfied that Ms Barclay has any personal grievance and as a consequence she is not entitled to remedies.

Costs

[100] Costs are reserved.

James Crichton
Member of the Employment Relations Authority