

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 135
3000114

BETWEEN MOIRA BRISCOE
Applicant

A N D OCEANIA DAIRY LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Timothy Jackson, Counsel for Applicant
Raewyn Gibson, Advocate for Respondent

Investigation Meeting: 24 and 25 May 2017 at Timaru

Date of Determination: 3 August 2017

DETERMINATION OF THE AUTHORITY

A. Moira Briscoe does not have a personal grievance for disadvantage occasioned by the unjustified actions of Oceania.

B. Moira Briscoe does not have a personal grievance for unjustified constructive dismissal.

Employment relationship problem

[1] The applicant (Ms Briscoe) was employed as a health and safety adviser with the respondent (Oceania). She commenced employment in that role on 31 March 2014, having previously signed the operative employment agreement on 27 February 2014. On 1 February 2016, the parties agreed to vary the individual agreement by changing the reporting line that applied to Ms Briscoe. The effect of that variation was to have Ms Briscoe reporting to just the Human Resources Manager and a new

Human Resources Manager was recruited at around that time and commenced employment on 15 February 2016.

[2] It is the relationship between Ms Briscoe and the new Human Resources Manager (Ms Karen Treloar) that is at the centre of the issue between these parties.

[3] Within a month of Ms Treloar's commencing employment with Oceania, Ms Briscoe was alleging that she was being "bullied" by Ms Treloar. Ms Treloar was offended by that allegation and denied it.

[4] A number of issues arose during the employment which Ms Briscoe thought were illustrative of the decline in the employment relationship. One was the change in the position of her work station so that she was co-located with the rest of the human resources team. There was a subsequent move as well which Ms Briscoe also thought was unhelpful.

[5] Ms Briscoe says that during a senior management meeting Mr Usmar, the General Manager, indicated that he wanted to "*get rid of*" Ms Briscoe; Mr Usmar denied that he said any such thing and also denied that there was any such intention.

[6] There was a meeting of staff which was addressed for a considerable period of time by Mr Usmar during which he referred to Oceania's poor health and safety record and used the word "collective" as evidencing a failure by everybody to keep Oceania's employees safe in the workplace.

[7] Mr Usmar said his purpose in addressing staff was certainly not to apportion blame to Ms Briscoe but simply to refer to the obligation that all staff had to keep each other safe.

[8] There was, it is conceded, an unfortunate reference by Mr Usmar to "*old Moira*" but Mr Usmar maintains that this was not an ageist comment but simply a colloquial reference to Ms Briscoe which he subsequently thought was ill-advised and apologised for it.

[9] Ms Briscoe refers to a disagreement about the key performance indicators for her role but the key performance indicators for the role were never agreed and so they were never implemented.

[10] There was a meeting of the human resources team which by then comprised Ms Treloar, Ms Briscoe and Ms Terpstra, who was appointed Training Coordinator on 1 February 2016. The meeting of the HR team was called by Ms Treloar because Ms Terpstra had complained to her about her inability to work with Ms Briscoe and vice versa. During the course of this meeting, Ms Treloar did say that if the two staff could not develop a good working relationship, she was concerned that one of them might leave. Ms Treloar's evidence is that that comment was not directed at encouraging Ms Briscoe to contemplate resigning but was rather prompted by Ms Terpstra indicating that if she could not develop a good working relationship with Ms Briscoe, she would leave.

[11] On 13 May 2016, there was a formal meeting proposed by Ms Treloar between Mr Usmar, Ms Treloar and Ms Briscoe to try to address some of Ms Briscoe's concerns. That meeting eventually took place on 31 May 2016 and amongst other things, Mr Usmar says that he used it as an opportunity to try to understand what specific behaviour Ms Briscoe maintained was bullying, but he was unable to get any such information.

[12] There was then an exchange of correspondence between the parties, Ms Briscoe went on sick leave on 5 July and by letter dated 15 July 2016 Ms Briscoe, through counsel, indicated her wish to resign her employment and she persevered with that stance, notwithstanding an immediate response from Oceania's representatives encouraging her to withdraw her resignation and provide Oceania with evidence of the issues that had provoked that step in order that they could be addressed. Mediation was offered as well as an alternative means of resolving matters.

[13] Despite those suggestions from Oceania, Ms Briscoe maintained her position and the resignation duly took effect.

[14] A personal grievance claim was filed subsequently, alleging both constructive dismissal and unjustified disadvantage. Both claims are resisted by Oceania.

The issues

[15] It will be convenient in this case to consider first whether there is evidence of Ms Briscoe having suffered any disadvantage as a result of unjustified actions taken by Oceania, and second whether Ms Briscoe was constructively unjustifiably dismissed by Oceania.

Was Ms Briscoe unjustifiably disadvantaged?

[16] I have not been persuaded that Ms Briscoe has suffered disadvantage and therefore does not have a personal grievance for unjustified disadvantage.

[17] The elements of her claim include a number of specific allegations of disadvantage and an overarching claim that Ms Briscoe was bullied by her manager, Ms Treloar.

[18] I deal first with the particular allegations and observe that none of them appear to have been raised within 90 days of the events complained of, and as that point was taken by Oceania, it does not fall to me to dispose of them. However, for the avoidance of doubt I think they can be commented upon and I now do that.

[19] In relation to the allegation that Ms Briscoe was deprived of the benefit of her performance appraisal that, simply put, misunderstands the position. Under the new management provided and led by Mr Usmar, all performance appraisal scores were moderated by the senior leadership team of Oceania. The same process applied to everybody. Ms Briscoe was not singled out. Other staff had their scores treated similarly to Ms Briscoe's score. Put shortly, even if it could be contended that Ms Briscoe had suffered a disadvantage because she ended up getting a lower score after moderation than would have been the case if moderation had not taken place, there is nothing unjustified about Oceania's actions. Many management teams operate on a similar basis and the moderation of personal appraisal scores is a standard business tool.

[20] The second specific claim is that the employer failed to treat Ms Briscoe with dignity and respect. I agree with Oceania that it is difficult for them to respond to that allegation, or indeed for me to deal with it because there is no particularity to the claim. I am simply invited to assess the totality of the evidence and conclude that Ms Briscoe was not treated with dignity and respect. I choose to progress this as part of the wider discussion about the overarching bullying complaint, but I do so in the context of recording again that in addition to protesting the lack of particularity about that claim, Oceania also maintains that this claim was not raised within the justiciable period either.

[21] Similar observations apply in relation to the suggestion that Ms Briscoe was "micro-managed" by Ms Treloar. The claim was not raised within the justiciable

period and there was no particularity which enabled Oceania to respond appropriately. However, it is fair to observe that this claim is effectively part of the wider bullying allegation and I deal with that later in this determination.

[22] All the evidence showed was that Ms Treloar sought to manage Ms Briscoe, who was a subordinate. Ms Briscoe's terms of engagement (as modified) very clearly identified Ms Treloar as her manager and as her manager, Ms Treloar was entitled to give direction to Ms Briscoe and to require explanation from Ms Briscoe about matters to do with Ms Briscoe's portfolio.

[23] What the evidence suggests is that while Ms Briscoe had a relatively free hand during the tenure of the previous human resources manager, Ms Treloar was seeking a more detailed and focused relationship in respect to health and safety, particularly in the context of Oceania's concern about health and safety failings within the business.

[24] None of that seems to me inappropriate from a management perspective and again I say that even if it could be alleged that Ms Briscoe had suffered a disadvantage because she was now being managed whereas previously she was given a relatively free hand, there is no evidence of anything unjustified in Oceania's behaviour. It is entitled to manage its staff and individual managers are entitled to develop their individual managing strategies with their direct reports.

[25] The final specific element of the disadvantage claim for Ms Briscoe is her allegation that Oceania failed to provide adequate information to her regarding the key performance indicators. Again, this claim was not raised within the 90 days required by law but even setting that point aside, it is difficult to see how this matter could constitute a disadvantage to Ms Briscoe because it was never even implemented, precisely because there was never agreement about the application of the key performance indicators.

[26] It is true that there was difficulty in obtaining the requisite information at first instance but it appears that information was eventually provided during the employment (after the 30 May 2016 meeting) so even if the employer party could be criticised for not having that information available immediately the key performance indicators were developed, that is not sufficient of itself to justify a claim that Oceania has committed an unjustified action; all that could be alleged is that Oceania has not been as efficient and effective as it ought to have been on this matter.

[27] I turn now to consider the bullying allegation which really underpins this whole case and which I choose to regard as being relevant both to the allegation of personal grievance through disadvantage on the one hand, and the allegation of constructive dismissal on the other. This is so despite the pleadings for Ms Briscoe proceeding on the basis that the bullying allegation is exclusively about her constructive dismissal.

[28] On the face of it, if Ms Briscoe was bullied, that could both ground her unjustified disadvantage personal grievance and her constructive dismissal grievance. However, for the avoidance of doubt, I am not satisfied that Ms Briscoe was bullied at all. What is clear is that at least with this aspect, she raised it promptly with the employer, although the employer's position is that she raised it in the context of a communication which lacked sufficient formality to constitute a proper claim of bullying.

[29] I do not accept the employer's position on that. Ms Briscoe's relevant email sent on 8 March 2016 said:

I feel the meetings with you (with Ms Treloar) had an element of bullying and I feel your approach is very aggressive. I am not comfortable with this style of management ...

[30] It seems to me as plain as can be that this this email uses the term bullying and it ought to be formal enough for any reasonable person to take this matter further.

[31] But it is not enough just to use the label "bullying" to make it so. Bullying is a term of art. That is to say it is a description of particular prohibited conduct and the evidence must support the existence of that course of conduct before there can be any suggestion that that behaviour has actually taken place. Put more simply, a simple allegation by an employee that they are being bullied must be supported by evidence that that is in fact what is happening. In the particular circumstances of this case, I am not persuaded that any of the conduct referred to, properly construed, is bullying behaviour.

[32] There are two relevant definitions of bullying. In Oceania's own policies the bullying and harassment guidelines define bullying as follows:

Bullying is the repeated undesirable treatment of one person by another or others. It includes behaviour that could be expected to intimidate, offend, degrade, humiliate, undermine or threaten.

[33] The definition then goes on to specify a non-exclusive list of overt bullying examples and a similar list involving covert bullying.

[34] The definition provided by WorkSafe New Zealand is as follows:

Workplace bullying is repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety.

[35] It will be useful to break down that definition into its constituent parts and consider each in turn.

[36] Before doing that however, the first question that must be addressed is when, in time, the conduct complained of is to be assessed. I conclude that the only proper answer to that question is that the conduct must be assessed at the date of the complaint and for context, in the period leading up to the date of the complaint. Events after the date of the complaint cannot be considered because they could not have been in the contemplation of the parties at the relevant time.

[37] That analysis raises an immediate difficulty for Ms Briscoe because at the point at which she for the first and only time referred to being bullied, the relationship between her and the alleged bully had endured for just a few weeks. That fact makes it difficult to contemplate that the conduct complained of was “repeated” as the definition postulates.

[38] Moreover, the nature of the conduct complained of, as well as being repeated, which I have just indicated seems to me less likely given the timeframe, must also be “unreasonable”. It is difficult to conclude that the conduct complained of was unreasonable. The evidence suggests that the conduct Ms Briscoe found difficult to cope with was no more and no less than a manager managing. Ms Treloar was Ms Briscoe’s manager. Oceania accepts that Ms Briscoe was given a much freer hand under the previous manager but that it wanted to improve its focus on health and safety matters and the only way to do that was to manage the area more directly.

[39] There is simply no evidence before the Authority of Ms Treloar doing anything in her relationship with Ms Briscoe other than trying to get the best possible outcomes for the wider Oceania staff.

[40] And as if that is not enough, the WorkSafe definition makes clear that a number of specific examples ought not to be regarded as bullying. Those specific examples include a manager setting high standards because of quality or safety issues (precisely on point here), a manager giving an employee constructive feedback (again precisely on point here), and a manager requiring reasonable work instructions to be carried (again on point in the present case).

[41] Finally in terms of the WorkSafe definition, the requirement is that the conduct complained of must “*create a risk to health and safety*”. Given the only evidence before the Authority suggests a normal management exchange with a senior subordinate, it is difficult to conclude that there is any risk to health and safety. Nor is there any evidence before the Authority that any particular health issues for Ms Briscoe were occasioned by what was happening in the workplace. There is no medical evidence before the Authority in respect to Ms Briscoe’s health that would enable one to make a connection between workplace issues and a decline in normal health.

[42] Indeed, the nearest that one gets to evidence that the workplace may have had some effect on Ms Briscoe is the evidence from a number of witnesses that Ms Briscoe did not appear to be as happy in the workplace in 2016 as she had been in previous times. But even if that evidence is accepted at face value, and I have no reason to doubt the veracity of it, it draws a very long bow to say that that of itself is all that one needs to conclude that the changed dynamic in Ms Briscoe’s relationship with her new manager was a risk to her health and safety.

[43] And again, while acknowledging that Ms Briscoe uses the word bullying in her 8 March 2016 email, as I have been at pains to point out already, simply using the label does not make it so, if the evidence does not support the conclusion. And, Oceania’s bullying policy makes it absolutely plain the complainant in a bullying matter must raise it informally with the alleged bully first, wherever that is practicable. That is precisely what Ms Briscoe did in her email of 8 March 2016. That email provoked an almost immediate response from Ms Treloar who met with Ms Briscoe two days later on 10 March 2016 to discuss her concerns. Mr Usmar, the General Manager, who was copied in on the 8 March 2016 email, met with Ms Treloar and gave her some guidance about trying to improve the relationship that

she had with Ms Briscoe, recognising no doubt that the relationship was barely a month old at that point.

[44] There is no actual determinative evidence that Ms Briscoe was bullied by Ms Treloar. There are no specific allegations of behaviours which conform to the WorkSafe definition or indeed the Oceania definition. There are no specific complaints of particular engagements between the two protagonists with dates, times and places and the identification of particular words or phrases which would support the allegation that Ms Briscoe was bullied.

[45] It is true that Ms Briscoe was being managed in the workplace, arguably for the first time in her career there and no doubt that was a different experience for her but being managed by one's manager does not equate to bullying.

[46] Even the communications that are before the Authority, both from Ms Briscoe to Ms Treloar and the other way around, support the conclusion that the relationship was generally respectful as between the two women. Even the 8 March 2016 email, accepting that it uses the word bullying, is written in a respectful tone and the response from Ms Treloar and in subsequent email exchanges that are before the Authority, all suggest an entirely appropriate relationship.

[47] I conclude therefore that Ms Briscoe has failed to satisfy me that she has suffered a personal grievance by way of disadvantage because of unjustified actions by her employer, Oceania.

Was Ms Briscoe constructively dismissed?

[48] As a matter of fact, Ms Briscoe resigned her employment. The question at law is whether that resignation ought to be treated not as a voluntary termination of the employment relationship at the behest of the employee but a resignation that was forced on the employee by the behaviour of the employer. To put the question another way, who took the initiative in bringing the employment relationship to an end? If there was a "sending away" by the employer or repudiatory conduct of such magnitude as to bring the employment relationship to an end, then the resignation must be treated as evidence not of a voluntary cessation of the employment by the employee but as a constructive dismissal.

[49] In this particular fact situation, it seems that Ms Briscoe is seeking to persuade me that she has suffered a constructive dismissal by either the traditional second limb of the three part constructive dismissal definition or the third limb. The second limb of course proceeds on the basis that the employer has undertaken a course of conduct with the dominant purpose of forcing the employee to resign her employment and the third limb contemplates a breach of duty or a series of breaches of duty by the employer which has the foreseeable effect of generating a resignation.

[50] As to the second limb, there is simply no evidence that Oceania had any wish to lose the services of Ms Briscoe. There was an attempt by Ms Briscoe to satisfy me that Mr Usmar had indicated to a senior managers' meeting that he wanted to get rid of Ms Briscoe but I was not persuaded by that evidence which Mr Usmar stoutly denied.

[51] Nor was I persuaded by other evidence which suggested that there was some sort of plan to make her leave the workplace because of various unspecific and widely sourced information that she was to be replaced.

[52] Indeed, all of the evidence suggests the reverse. There is evidence for instance that Mr Usmar was very straightforward with Oceania's Chinese owners concerning Ms Briscoe's occupation of her role. In addition, Ms Briscoe wanted me to accept that Ms Treloar had been referring to her leaving the workplace during a meeting that Ms Treloar convened involving herself, Ms Briscoe and Ms Terpstra. In fact, Ms Treloar's evidence was that she was referring not to Ms Briscoe but to Ms Terpstra as the person who might leave. This was because Ms Terpstra was having difficulty in her relationship with Ms Briscoe, finding her, to use Ms Treloar's description, "*prickly and cold*" and she (Ms Terpstra) had indicated to her manager (Ms Treloar) that unless that relationship with Ms Briscoe could be improved, she was contemplating leaving.

[53] So I conclude that there is no tangible evidence of any course of conduct from Oceania with the dominant purpose of effecting Ms Briscoe's resignation.

[54] I consider now the third limb where the most elegant formulation of that category of constructive dismissal is set out in the case *Auckland Electric Power Board v The Auckland Provincial District Local Authorities Officers' IUOW* [1996] 1 ERNZ 168.

[55] In the *Auckland Electric Power Board* case, the Court determined that the applicant must first establish there had been a breach of duty by the employer and if that breach was established the next question was whether the breach was of sufficient seriousness to make it reasonably foreseeable that the employee could not accept the conditions then prevailing and would resign.

[56] Finally, I am required to distinguish between inconsiderate conduct which causes some resentment or unhappiness and dismissive or repudiatory conduct by the employer of such magnitude as to justify the conclusion that the employment relationship could not be sustained.

[57] Ms Briscoe's claim for constructive dismissal is based on two propositions. The first is that the employer failed to investigate the bullying allegation and the second is the employer's conduct generally. I have said all I want to say about the employer's conduct generally. For present purposes, it is enough to restate that I am not satisfied there is any evidence of inappropriate conduct by Oceania.

[58] I deal now with the allegation of a failure to investigate. The first question really is investigate what exactly? Ms Briscoe had followed the Oceania policy on bullying by engaging with the alleged bully, indicating to her in her 8 March 2016 email that she felt she was being bullied and that provoked an immediate response from Ms Treloar. I am satisfied on the evidence that the matter of bullying was never raised by Ms Briscoe again. She says she raised it again at the meeting on 31 May 2016 but we have the transcript of that meeting (because Ms Briscoe taped it) and it is clear that the bullying issue was raised by Oceania's representatives at that meeting and not by Ms Briscoe. Oceania raised it because the employer wanted to be sure that it understood whether the issue was still alive and if it was, what exactly it was that Ms Briscoe was alleging. She took no steps in that meeting to give further and better particulars on the matter and as I say, in the intervening period between using the word bullying in the 8 March 2016 email and the meeting at the end of May of that same year, she never raised the subject again.

[59] She invites me to conclude that this is because she should only have to raise it once and having raised it, she is entitled to expect that there will be an investigation or inquiry.

[60] But an alternative explanation for her never raising the matter again is that she was satisfied with the result of her raising it in the first place. She had an immediate response from Ms Treloar, the two protagonists met two days after the email, and clearly had a productive discussion which focused on how they communicated with each other.

[61] As I have already made clear, there was no further evidence provided by Ms Briscoe, no medical evidence, no evidence of hurt or distress and no relevant sick leave until immediately prior to the resignation being issued.

[62] Put shortly, Oceania's position is that, after the meeting of 10 March 2016 between Ms Treloar and Ms Briscoe, it was entitled to conclude that there was nothing further required from it in terms of Ms Briscoe's bullying allegation.

[63] But not satisfied with that, Oceania in fact raised the matter again at the meeting on 31 May 2016 and gave Ms Briscoe yet another opportunity to provide further information which it is plain she declined to do.

[64] The 31 May 2016 meeting also agreed on a way forward between the parties which was essentially by exchange of letters. Ms Briscoe's counsel sensibly proposed that he set out what it was that was missing in Ms Briscoe's view with the parties achieving a professional working relationship, which was the joint outcome of the meeting at the end of May.

[65] Counsel for Ms Briscoe then wrote to Oceania a letter dated 10 June 2016. There is dispute between the parties about how that letter ought to have been treated. I have carefully reviewed that letter and have not been persuaded by submissions for Ms Briscoe that it seeks an investigation from Oceania. If it does so, it certainly does not say as much and indeed I would go further and say that there is not even an implication that any investigation is expected.

[66] The purpose of the letter was to identify the "gaps" in the professional working relationship that both parties seemed to desire from the 31 May 2016 meeting.

[67] The letter from counsel was responded to by a letter from Oceania's General Manager and so far as can be discerned, it is Oceania's response which Ms Briscoe chose to treat as repudiatory, presumably because there was no suggestion in

Oceania's reply that there would be an investigation into Ms Briscoe's claim or claims. Oceania's astute representative asked Ms Briscoe at hearing what she expected Oceania to do in response to her counsel's letter of 10 June 2016. Her response was simply that she expected Oceania to respond to it.

[68] That is precisely what Oceania did. Counsel's letter is detailed and Oceania's response is no less detailed. But there is no commitment to investigate because Oceania did not understand an investigation was still sought. It needs to be remembered that Oceania had specifically asked Ms Briscoe at the 31 May 2016 meeting to give details of her allegations and she had declined to. But it would not be unreasonable for Oceania to imagine that given the sensible suggestion of her counsel that he set matters out in writing, if Ms Briscoe wanted to have particular matters pursued by the employer, that was the forum in which she could make that clear.

[69] But rather than that, the letter effectively concludes with an elegant statement by counsel of the solution to the problem. At paragraph 73 of his letter he says this:

In our view the solution is straightforward. Our client is doing her job and should be permitted to keep doing so. Our client is not offensive or disrespectful and conducts herself politely. Workplace communications ought to be on the same basis. Whether the HR team has a "team environment" or is friendly is probably a luxury it cannot presently afford but with correct management, we are hopeful the tension and disharmony will dissipate.

[70] But this entirely sensible solution to the problem seems to have been lost sight of by Ms Briscoe and she somehow expected that when Mr Usmar responded to counsel's letter, he would commit to conducting inquiries on her matters notwithstanding the fact that she had not requested those inquiries. Oceania made it quite clear at the 31 May 2016 meeting that it was happy to investigate Ms Briscoe's claims if that was what she wanted and it sought further information from her to enable that to happen. She chose not to respond at the meeting and Oceania assumed that if it was being asked to take any steps, that would be communicated to it in counsel's letter. That is a not unreasonable assumption in my view.

[71] Moreover, when Ms Briscoe instructed counsel to resign her position by letter dated 15 July 2016, the alleged failure of Oceania to conduct an investigation was, as Oceania says in its closing submissions, not even identified as amongst the reasons for Ms Briscoe's resignation.

[72] But even if Oceania should have discerned that an inquiry was necessary, notwithstanding that one was never sought, Oceania's communication to Ms Briscoe through counsel in its letter of 18 July 2016, invited Ms Briscoe to withdraw her resignation to "*provide our client with the opportunity to deal with any issues which may have contributed to her decision to resign*", and that offer was not responded to. But as if that is not enough, Oceania also, in the same letter, proposed that the parties meet in mediation so that the issues between them could be canvassed and that "*with a view to her continuing her employment relationship with our client*".

[73] I agree with the submission of Oceania's representative that Ms Briscoe's failure to respond to those offers is fatal to her constructive dismissal claim.

[74] This is because even if Oceania failed absolutely in its duty to provide a detailed investigation of all the matters which Ms Briscoe had raised, the fact that it invited her to stay her hand when she resigned and gave her two separate processes for addressing her issues in order that the employment might continue, is enough to satisfy me that the employer has put right any default it may have inadvertently engaged in by its failure to conduct inquiries.

[75] It follows from the foregoing analysis that I am not satisfied there has been any breach of duty by the employer, during the course of the employment. If I am wrong about that and Oceania ought to have conducted inquiries and it did not, then I am satisfied it remedied its breach by offering two separate processes to Ms Briscoe which would have enabled the employment to continue when she offered her resignation.

[76] If the resignation of Ms Briscoe was reasonably foreseeable because Oceania failed to investigate, again I say that Oceania's response to the resignation inviting Ms Briscoe to stay her hand would remedy that default as well and I am not persuaded that anything this employer did was repudiatory conduct sufficient to ground a response from the employee bringing the employment relationship to an end.

Determination

[77] I have not been persuaded that Ms Briscoe has any personal grievance. Her claims as a consequence fail in their entirety.

Costs

[78] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority