

unjustifiable disadvantage. Two are claims of breach, one that during the employment relationship KBM breached its agreement with Ms Brocklehurst, and the other that KBM breached a provision of the Employment Relations Act 2000 requiring parties to an employment relationship to act towards each other in good faith.

[2] The four claims are founded on a single action alleged of KBM. This was carried out on 19 October 2009, the effects of it continuing during the employment until Ms Brocklehurst resigned on 25 January 2010. She complained of action taken by KBM was changing Ms Brocklehurst's position or job without her agreement. She claims her resignation was forced by KBM's action so that she was constructively dismissed and without justification. She claims KBM's unjustified action disadvantaged her while the employment continued and until she left her job. KBM's unilateral change of Ms Brocklehurst's job is claimed to have breached the employment agreement and, because there was no consultation about the change, breached the employer's good faith obligations.

[3] To resolve the two grievances Ms Brocklehurst seeks a declaration that she was dismissed and disadvantaged unjustifiably in both cases, and she seeks reimbursement of lost wages and compensation for hurt feelings, humiliation and distress. Ms Brocklehurst claims compensatory damages for the alleged breach of her employment agreement and penalties for breach of the statutory good faith provisions.

[4] This case has had an unusual and unfortunate history. The claims investigated by the Authority originated from events which occurred in late 2009. In the course of them advice given to Ms Brocklehurst by an advocate she retained in November 2009 (not counsel Mr Oliver), led to an Authority investigation in March 2010 which spawned another in September 2011. There was claim and counterclaim made between Ms Brocklehurst and her advocate, heard and decided in August 2010 by the Disputes Tribunal which found the advocate liable to Ms Brocklehurst for failing to carry out with reasonable care and skill the services she had engaged him to provide. An appeal to the District Court by the advocate was unsuccessful and Ms Brocklehurst had to take enforcement action against him in that forum to recover money awarded by the Disputes Tribunal. The collateral dispute between client and advisor even deteriorated to a point where in connection with it the District Court issued a warrant to arrest the principal of the advocate's firm.

[5] All the earlier proceedings in the Authority have been resolved so that the issues now to be determined are the substantive merits of the grievance claims and claims for damages and penalties for breach of contract and statute.

[6] The central events and circumstances against which the claims must be assessed, were as follows:

- (a) In March 2008 an employment agreement was entered into between KBM and Ms Brocklehurst for the position of Preventative Maintenance Coordinator (PMC) within KBM's business of servicing and maintaining food equipment. The pay rate was \$14 per hour for "core" hours of 40 per week.
- (b) In October 2008, after a three month trial, Ms Brocklehurst was employed by KBM under a new employment agreement in the position of Technical Coordinator (TC). The pay rate for 40 core hours was increased to \$19 per hour.
- (c) On Friday 16 October 2009, Ms Brocklehurst emailed to Mr Kevin Bignold, an owner and director of KBM, a message expressing disillusionment with her job and ability to perform it under some pressure she was feeling. Ms Brocklehurst referred to the need she had from time to time to perform the PMC role as well as the TC job and her increasing inability to cope with both. The message seemed to be a frank personal assessment of her situation and expressed no specific complaint about any particular action or inaction of Mr Bignold or KBM. Ms Brocklehurst also suggested to Mr Bignold that it might be time to end the employment relationship but that they both should "think about things" over the weekend and talk again at the beginning of the new week. Mr Bignold replied to the message giving reassurance that she was not at fault and agreeing to talk on Monday "and see if we can work things out".
- (d) On Monday 19 October during a meeting with Mr Bignold, changes were made to Ms Brocklehurst's position. As a result for the rest of her employment she performed only the PMC role she had at the start of employment with KBM. Her pay rate of \$19 per hour remained the

same and there was no new employment agreement produced and signed. Ms Brocklehurst has expressly acknowledged TC and PMC were similar roles.

- (e) On Tuesday 20 October Ms Brocklehurst advised Ms Bignold that she intended to resign from KBM once her application for permanent residence in New Zealand had been approved by the Immigration Service. She anticipated that might take up to six weeks. Under the agreements for both the TC and PMC positions the notice period was two weeks.
- (f) Between 16 October when she had first expressed her disenchantment with her employment and 13 November 2009, Ms Brocklehurst did not raise a grievance or make any complaint or protest to KBM about its actions or those of Mr Bignold towards her. In that period she continued to work without claiming to have been disadvantaged or forced to resign, and without raising with KBM any other dissatisfaction in any way with the changes made on 19 October 2009.
- (g) On 12 November 2009 in the course of investigating a complaint KBM had made that the firm's business computers and their operating system had been deliberately destroyed or seriously damaged by hacking, the Police interviewed Ms Brocklehurst at work and later, with her consent, went to her home and inspected her personal computer. Following the Police inquiry a former employee of KBM was charged and convicted of an offence. Ms Brocklehurst was not involved in any way with what he had done.
- (h) On about 13 November 2009 following the contact she had had with the Police, Ms Brocklehurst engaged her first advocate who advised KBM that she intended raising a personal grievance. When this was done on 18 November the grievance referred only to the interview she had had with the Police as the matter of complaint against her employer.
- (i) The effects of being questioned by the Police made Ms Brocklehurst unwell. From 13 November she was absent from work. Medical

certificates supplied to KBM stated she was unfit to resume duties until 19 December. She did not return to work at all, even after her medical certificates had expired.

- (j) On 4 December Ms Brocklehurst's advocate clarified with KBM that she had not given notice of termination of her employment although she remained absent from work. KBM responded by requesting her to return if that was the situation.
- (k) On 14 December Ms Brocklehurst and her family were notified that they had been granted permanent residence. Achieving this was described by her as having been "her biggest worry" up to then.
- (l) On 8 January she advised her advocate with reference to her newly acquired residence status that she had no need to go back to KBM and did not intend doing so. She said her employer "[did] not need to know that yet!" and she advised her advocate "I will resign once I have found alternate employment".
- (m) On 11 January two weeks notice of Ms Brocklehurst's resignation was given by her advocate. She did not return to work and the employment terminated on 25 January 2010.
- (n) In the next few months Ms Brocklehurst endeavoured to pursue the Police conduct grievance arising from the 12 November interview she had with them. In April 2010 after an investigation the Authority found that that particular grievance was not established and dismissed the claim - WA 62/10 of 12 April 2010, Member Denis Asher.
- (o) It was not until 30 July 2010 that Ms Brocklehurst through a new advocate, counsel Mr Oliver, raised with KBM dismissal and disadvantage grievances relating to events that had occurred on 19 October 2009, when her role had changed from TC to PMC which it had been originally.
- (p) Although the grievances raised were well outside of the statutory 90 day time period the Authority granted Ms Brocklehurst leave to

proceed with them on the grounds of exceptional circumstances –
[2011] NZERA Wellington 166, Member Rosemary Monaghan.

Claim of constructive dismissal

[7] This claim is founded on the change of position from TC to PMC that occurred on 19 October 2009.

[8] It is the clear finding of the Authority that the resignation of Ms Brocklehurst on 25 January 2010 was not forced or induced or caused by any action of KBM or by any way in which the employer had acted on 19 October 2009.

[9] I find that dissatisfaction with her job coupled with the anticipation of obtaining permanent residence led her to consider before 19 October whether to seek alternative employment as soon she was legally in a position to do so. On 16 October she raised the possibility of ending the employment by mutual termination because, she said, “I personally have nothing left to offer KBM.” Up until 12 November at least, the prospect of obtaining permanent residence was the predominant motivation Ms Brocklehurst had in forming her intentions for the future and advising her employer of those at various times.

[10] If there was any breach of her employment, as a matter of principle the events that occurred on 19 October 2009 did not amount to a breach of such seriousness as to make it foreseeable to KBM that she would not wish to continue working and would leave as a consequence. Ms Brocklehurst continued working after those events had occurred, without raising any grievance or making any complaint. It was only after her involvement with the Police, and because of that, that she raised a grievance about the 12 November events and remained away from work up to the time she resigned.

[11] It is clear that the contact Ms Brocklehurst had with the Police traumatically affected her. She has said she had never been so “insulted, humiliated and embarrassed at the accusations raised against me,” and she blamed KBM for making her feel “victimised, singled out and bullied.” An acute reaction to a stress situation was diagnosed by her doctor who advised her not to go to work until she felt better. Ms Brocklehurst’s husband gave graphic and compelling evidence about the physical and mental state she was left in after the Police had visited their home, where he said they had been “pretty rough on her.”

[12] Mr Brocklehurst also said that at this time obtaining permanent residence was the primary concern his wife had and more so than the tenure of her employment.

[13] I find that the resignation of Ms Brocklehurst, given with two weeks notice on 11 January 2010, was not caused by the change to her position of employment made on 19 October 2009. The resignation, I find, was mainly caused by a combination of the Police conduct towards Ms Brocklehurst on 12 November 2009 and her obtaining permanent residence in or about December 2009. The latter event left her free to seek other employment with a different employer instead of being tied to KBM, as she had been while her residence application remained under consideration.

[14] It has been held by the Authority and is now accepted by Ms Brocklehurst that Police actions she complained of during the computer sabotage investigation were not actions of KBM.

[15] After her position changed on 19 October Ms Brocklehurst gave notice of her intention to resign at some future time but conditional upon receiving confirmation from the Immigration Service that her application for permanent residence had been granted. Frustration and disillusionment with her performance of the TC position which had required her to perform as PMC at the same time led Ms Brocklehurst, I find, to advise Mr Bignold that she planned to resign in the future once she had obtained permanent residence.

[16] Her advocate confirmed to KBM on 18 November that she had not resigned or been told she had been dismissed. Her evidence was that she did not resign on 20 October but had said she intended to once her residence application had been granted. Although she emailed a former employee a message on 27 October saying she had resigned, that does not appear to be the instructions she later gave her first advocate.

[17] In the “Expected Outcome” part of the Statement of Events written by Ms Brocklehurst between in October and November 2009, even after what happened on 12 November she indicated willingness to continue working for KBM “until residence and alternate employment” is found. That is not the usual attitude of an employee forced to leave a job because of the employer’s conduct.

[18] In an affidavit sworn by Ms Brocklehurst on 5 July 2011 she agreed with the proposition that she might have stayed at KBM “but for the Police interview and Kevin’s treatment of me that day 12 November 2009”. She also implied that up to 3

December there had been some likelihood of her staying with KBM, although this diminished when she read an email of Mr Kevin Bignold's sent on that date.

[19] I find that the predominant or substantial cause of her resignation was not the change of job from 19 October but the supervening event of the Police interview on 12 November when they were investigating whether Ms Brocklehurst had been involved in the hacking into KBM's computer system and destruction of programmes and files in it. Her newly acquired permanent residence in or after December 2009 also provided impetus to leave KBM.

Disadvantage Grievance

[20] Ms Brocklehurst's claim is that the change of job on 19 October from TC back to PMC was imposed on her by Mr Kevin Bignold without consent or even prior consultation with her. The claim must be viewed cautiously because it was not raised with KBM until July 2010, some eight months after October 2009. It was prompted by the failure in April 2010 of the grievance claim about the Police conduct brought to the Authority.

[21] It seems that what Ms Brocklehurst complained of in November 2009 to her then advocate about what happened on 19 October, and what she said to a former employee, was not what she was saying at the time to KBM. She told the former employee that KBM had been told by her to "stick" the job, but that is a considerable embellishment of the advice she gave to Mr Bignold that she intended to resign.

[22] The Statement of Events prepared by Ms Brocklehurst contemporaneously with events that occurred on 16, 19 and 20 October 2009 and later dates should be given due weight in assessing the evidence. Ms Brocklehurst accepted that her written statement was likely to be more accurate than the oral evidence she gave about relevant events over two years after they had occurred.

[23] The Authority is left with an impression from the evidence overall that Ms Brocklehurst did, tacitly if not expressly, consent to the changes and that they were not unilaterally imposed or decided upon by Mr Bignold without any discussion. What occurred on 19 October must be viewed against the circumstance that the meeting of that day took place at the initiative of Ms Brocklehurst, following something of a cry for help she had made. The changes are not easily viewed as a disciplinary measure or response by an employer to poor performance. Discussion

about them occurred with Mr Bignold making it quite clear that he and his son Troy did not want Ms Brocklehurst to leave but wanted to help her overcome the difficult time she said she had been having doing her job. Her recent oral evidence to the contrary about that does not sit with her written statement made at the time events took place.

[24] The statement records that Mr Bignold had told her on 19 October, in response to a suggestion she made that she should leave, “that they did not want me to leave because I was good at my job, committed and had shown continued loyalty to the company.” Coupled with this was a lack of any protest or objection by Ms Brocklehurst to the change, even raised the following day when she advised of her intention to resign. If her application for permanent residence had been the most important thing at the time, it might be expected she would protest about any reduction by KBM of her position which could have put the application at risk.

[25] “Stick” the job was not something I find Ms Brocklehurst told KBM. Her written statement records that on 20 October after she had thought over the situation overnight Ms Brocklehurst explained to Mr Bignold that she felt she had nothing more to offer and that until her residence was granted for up to six weeks she would “continue to work to the best of my ability.” She said in evidence this was not regarded by her as giving notice.

[26] In my view if the change from TC back to PMC had been imposed under protest or duress she is likely to have given that change as the reason for wanting to leave and recorded that in her statement. What is recorded is that Mr Bignold “stressed that he did not want me to leave.” She repeated to his son Troy what Mr Bignold had said, and in doing so; “I stipulated again that there was no ill feeling or malice and that it was time to move on.” He asked “if there was any way I was going to change my mind and I said a resounding no.” The entry for 20 October finishes, “I continued to perform my duties to my usual high standard.” There are no further entries in the statement for eight days. After that the entries are about problems with the computer system which were beginning to emerge and which led to the Police interviewing Ms Brocklehurst on 12 November.

[27] Upon being asked by Troy Bignold what would change her mind about leaving Ms Brocklehurst had not responded by saying “reinstatement of my job.” I conclude that the change from TC to PMC and how that was brought about was not an

issue for Ms Brocklehurst at the time that happened. Even on 12 November when completing her written statement, under “Expected Outcome” the resolution sought by her was to do with the trauma outlined as having been suffered from the way the Police interviewed her that day. She stated “I have been left feeling I can no longer work at KBM,” implying she had had no difficulty doing that before 12 November even after the change to PMC had been made.

[28] I conclude that Ms Brocklehurst accepted the change from TC to the similar PMC position or at least affirmed it by her subsequent conduct, including working in the latter position and not protesting or objecting to the change when she had the opportunity to raise any objection.

[29] Failure to record her acceptance of the change in writing as required under the TC employment agreement did not by itself vitiate her consent to the variation.

[30] I find that Ms Brocklehurst was not disadvantaged in her employment by the change which was not the result of an unjustifiable action by KBM.

Breach of contract and breach of good faith claims

[31] It follows that there is no basis for the claim of breach of the agreement and it cannot succeed. There was adequate consultation by KBM with Ms Brocklehurst on 19 October and the claim of breach of good faith cannot succeed either.

Remedies if unjustified disadvantage grievance had been established

[32] These would have been limited. Ms Brocklehurst lost wages after her paid sick leave expired because she was not entitled to any more, and her loss after 25 January must be attributed to her resignation and not to any disadvantage earlier suffered. Reimbursement of lost wages is usually confined to ‘ordinary’ time remuneration. Between 19 October and 12 November while she remained at work Ms Brocklehurst’s core hours of 40 a week were maintained, as was the pay rate of \$19. Any loss was marginal only.

[33] Compensation for hurt feelings and distress would need to take into account the plain fact that most of that harm to Ms Brocklehurst resulted from the Police interview on 12 November, not the change of position from TC to PMC. Any award reflecting that circumstance would necessarily be at the low end of the scale.

[34] The remedies sought for breach of the agreement duplicate those in the disadvantage grievance and are not to be awarded twice. Any penalty for a deliberate, serious and sustained breach of good faith (up to a maximum of \$10,000 in 2009) would need to reflect the fact that Ms Brocklehurst was badly represented by her first advocate. Had he advised her to pursue a disadvantage grievance in November 2009 when he was first instructed, it is quite likely the grievance would have been quickly resolved without the need to apply to the Authority, particularly if it had resulted from confusion or misunderstanding between Mr Bignold and Ms Brocklehurst about what they had been trying to achieve when they met on 19 October. KBM had no responsibility for the quality of advice Ms Brocklehurst received. A small penalty may have been awarded at best and as usual may have been payable to the Crown.

Determination

[35] For the above reasons the Authority finds that Ms Brocklehurst does not have a personal grievance of any kind and KBM did not breach either her employment agreement or s 4 of the Employment Relations Act.

Costs

[36] Costs are reserved. Any application by KBM is to be filed and served within 21 days of the date of this determination. Any reply from Ms Brocklehurst is to be given within a further 21 days. The parties are encouraged to try and resolve the question of costs themselves by agreement.

A Dumbleton
Member of the Employment Relations Authority