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Burrows v Otara Health Centre Limited (Auckland) [2018] NZERA 8; [2018] NZERA Auckland 8 (10 January 2018)

Last Updated: 19 January 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 8
3007812

BETWEEN MICHELLE BURROWS Applicant

AND OTARA HEALTH CENTRE LIMITED

Respondent

Member of Authority: Vicki Campbell

Representatives: John Burley for Applicant

Simon Meikle for Respondent

Investigation Meeting: 22 September 2017

Submissions Received: 6 and 18 October 2017 from Applicant

13 October 2017 from Respondent

Determination: 10 January 2018

DETERMINATION OF THE AUTHORITY

A. Ms Burrows was not unjustifiably constructively dismissed.

B. Otara Health Centre Limited did not breach its obligations of good faith.

C. Costs are reserved.

Employment relationship problem

[1] Ms Michelle Burrows was employed as the Practice Manager for Otara Health Centre Limited for just over 6 years. Otara Health, if not insolvent, was bordering on insolvency from about 2015. Despite a number of actions taken by Otara Health and

Ms Burrows to rectify matters the financial situation of Otara Health remained dire. In November 2016 Ms Burrows resigned from her employment.

[2] Ms Burrows claims her resignation was in reality a dismissal which she claims was unjustified. Ms Burrows also claims Otara Health has breached its statutory obligations of good faith. Otara Health denies the claims.

[3] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act) this determination has not recorded all the evidence and submissions received from Ms Burrows and Otara Health but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[4] To resolve Ms Burrows' employment relationship problem I must determine the following issues:

- a) Was the resignation actually a dismissal?
- b) Was Ms Burrows' resignation reasonably foreseeable?
- c) Did Otara Health breach its statutory obligations of good faith and if so, what if any penalty should be imposed?

Was the resignation actually a dismissal?

[5] Ms Burrows resigned from her job on 14 November 2016 and claims that her resignation was in law a constructive dismissal.

[6] A constructive dismissal is an apparent resignation which is, in reality, an employee's response to an act or omission of the employer of such significance that it amounts to a repudiation of the contract of the employment and entitles an employee to accept that repudiation by resigning the employment.

[7] Included in the instances of employer conduct that may amount to constructive dismissal is a sufficiently fundamental breach of duty by the employer.¹ The Court of Appeal has concluded: ²

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

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

[9] In deciding whether an employer's conduct amounted to a constructive dismissal it is essential to examine the facts of the case to see whether the conduct of the employer can fairly and clearly be said to have crossed the line between inconsiderate conduct causing some unhappiness from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.⁴

[10] Ms Burrows claims the cumulative effect of the conduct of Otara Health over a lengthy period left her with no option other than to resign. Ms Burrows says the conduct included breaches of Otara Health's statutory obligations of good faith, failure to investigate allegations of bullying by a director of another Health centre and failure to provide a safe and healthy work environment.

Breach of good faith

[11] The statutory obligation of good faith requires the parties to an employment relationship to be active and constructive in establishing and maintaining productive

¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW*

[1994] NZCA 250; [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA).

² Ibid at p172; p 419.

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

⁴ *Wellington etc Clerical Workers Union IUOW v Greenwich*

employment relationships in which each are, among other things, responsive and communicative.⁵

[12] Ms Burrows was employed in the role of Practice Manager on 25 March 2010. The terms of Ms Burrows' employment

were based on the terms and conditions contained in an expired multi-employer collective agreement dated 1 August 2012 to 31 July 2014.

[13] Ms Burrows' duties included managing clinical and non-clinical employees, managing and sourcing contracts entered into by Otara Health to provide services, overseeing the management of the accounts and the preparation of all employee wages and salaries. Ms Burrows reported to the Board of Directors.

[14] At the time Ms Burrows started working for Otara Health there were three directors, Mr Gavin Bell, Ms Jennifer Francis and Ms Jill Ovens. At that time Mr Bell was the Chairman of the Board. Ms Francis resigned as a director on 31 October

2011 and was not replaced. This left Mr Bell and Ms Ovens as the only two directors of Otara Health. Mr Bell resigned as a director during 2016 and retired on 2

December. On 10 November two new directors, Mr Greg Fitzpatrick and Mr Maurice Davis were appointed as directors. Neither of the new directors was involved in the matters giving rise to this determination.

[15] Concerns about the financial viability of Otara Health were discussed by Otara Health's accountant, Mr Jeff Muir with Mr Bell, Ms Ovens and Ms Burrows from about June 2015.

[16] Between late 2015 and mid 2016 Mr Bell and Ms Ovens were exploring options to address the financial crisis. Those options included consideration of a merger between Otara Health and Workers Health Care Limited, which operates a clinic in Waitakere, or a possible sale of Otara Health to Turiki Healthcare.

[17] The possible sale to Turiki Healthcare did not progress, but discussions continued with respect to the possible merger between Otara Health and the Waitakere centre. The decision not to merge the two centres was made on or about

10 October 2016.

5 [Employment Relations Act 2000](#), s 41A(b).

[18] Ms Marina Kokanovic is a qualified chartered accountant and is a director of the Waitakere centre. The Waitakere centre had been through similar financial issues and had successfully been turned around to become a viable operation. At the request of Mr Bell and Ms Ovens, Ms Kokanovic agreed to assist Otara Health and did so throughout 2016.

[19] On 7 July 2016 Mr Muir wrote to Ms Burrows and Mr Bell enclosing the financial statements for review and comment. Mr Muir advised Ms Burrows and Mr Bell that Otara Health was trading while insolvent and the situation could not continue. He asked Ms Burrows and Mr Bell to advise him of the steps being taken to address the situation. He advised them to develop and implement a plan to improve the company's financial position.

[20] The following day Ms Burrows forwarded a copy of Mr Muir's email to Mr

Bell and Ms Ovens and reminded them that Mr Muir had submitted a plan in October

2015 to bring Otara Health back to a financially viable position. The plan included a change of management for both Otara Health and the Waitakere centre and to change both clinics to charitable status or not for profit.

[21] Ms Burrows pointed out other issues that needed to be addressed including employees' concerns that the collective agreement had expired in 2014 and a rollover of the expired collective agreement had not been agreed to. Ms Burrows told Mr Bell and Ms Ovens that employees felt the directors of Otara Health were not concerned about them.

[22] In her email Ms Burrows also identified steps she had taken to reduce costs including gaining agreement that where an employee was absent a locum would not be engaged except for one or two days per week to cover busy periods. This situation had been in place for some time and Ms Burrows pointed out her concern that the situation was creating stress on those picking up the additional tasks.

[23] In her response on 11 July 2016 Ms Ovens told Ms Burrows that both she and Mr Bell had been busy with a merger of three unions since 2015 and while agreement had been reached to merge Otara Health and the Waitakere centre further approvals were required.

[24] Ms Ovens also explained that she had had to travel to the US to deal with family issues and except for two months from April to June 2016 when she returned briefly to New Zealand she was needed in the US until at least August. Ms Ovens told Ms Burrows that she supported a rollover of the collective agreement but Mr Muir had advised against it given the insolvency of the centre.

[25] In August and September 2016 Otara Health had to borrow funds to ensure Otara Health's financial commitments including the payment of wages to employees could be met. Ms Burrows told me that managing the operations of the clinic under the financial circumstances had become extremely difficult.

[26] Ms Burrows took two weeks off work in September 2016. The Medical Certificate provided by Ms Burrows indicates that she was unfit for work due to work related stress. Ms Burrows asked for and was granted approval to take the two weeks off as special paid leave rather than sick leave.

[27] In October 2017 the National Hauora Coalition PHO (the PHO) advised Otara Health that unless it considered ways to reduce its financial liability it would no longer invest in the clinic.

[28] At a meeting on 17 October 2016 Ms Burrows was told to "...whisper in the ear..." of a contact that Otara Health was considering moving to another PHO. The hope was that the information would get back to the current provider PHO and that would encourage it to invest more money in the clinic. Ms Burrows was concerned she was being asked to act in a duplicitous manner and did not follow the suggested course of action.

[29] At that same meeting Ms Burrows was asked to take the following matters to the employees for discussion:

- a) A reduction in compensation entitlements that each employee had accumulated in the event of redundancies at the clinic;
- b) Reducing the level of service provided by the clinic;
- c) A trial walk-in service at the clinic; and
- d) A change in PHO.

[30] Ms Burrows met with the employees on 21 October and communicated their views to Mr Bell and Ms Ovens in an email dated 27 October 2016. A copy of the email was also sent to others including Mr Muir.

- a) Reduction in compensation entitlements - after consulting with their union representatives, seeking legal advice and talking to family, employees would not consider a reduction in their compensation entitlements. Employees would consider this option if the Unions no longer had ownership of the business.
- b) Reduction in level of service - employees would not consider any steps that would compromise the care of patients. Ms Burrows asked Mr Bell and Ms Ovens to define what they considered "reducing the level of service". Ms Burrows advised that the team would look at all expenses and find areas where time could be better managed and finances reduced. Four options for increased revenue were suggested.
- c) Walk-in service – there was a general willingness to trial this suggestion and proposed that it be trialled two mornings each week to enable any problems arising from the trial to be resolved.
- d) A change in PHO – Ms Burrows pointed out this would be the third time in three years other PHO's had been approached and raised concerns about the impact this would have on the reputation of Otara Health. Ms Burrows also explained that if the PHO changed Otara Health would lose the Inequalities Contract and the funding associated with that contract.

[31] In her email Ms Burrows advised the directors that she was seeking legal advice out of concern that Otara Health was failing to react to a critical situation and was critical of the directors for not taking action sooner given that the situation had been known to the Board for over a year.

[32] As set out below steps to provide assistance to Ms Burrows in turning the company's financial situation around were put in place. Despite these steps, Ms

Burrows resigned on 14 November. At the time of her resignation Ms Burrows provided no explanation of why she was resigning. That did not occur until 6

December when Ms Burrows raised her personal grievance.

[33] Managing a business that is technically insolvent is inherently stressful. It is not clear what Ms Burrows wanted Mr Bell and Ms Ovens to do to reduce the effect the financial situation was having on her management of the business. I find the directors took active steps to endeavour to resolve matters by attempting to sell and/or merge the business. By October 2016 the directors had arranged for others to provide assistance directly to Ms Burrows with ideas that had worked for the Waitakere centre.

[34] On 28 November Ms Burrows was invited by Ms Ovens to extend her notice period from 9 December to 21 December. This was so Ms Burrows could work with a temporary practice manager to put in place actions to improve the financial viability of the centre. Ms Burrows initially agreed to do this but on the advice of her doctor withdrew her agreement and her employment ended in accordance with her notice, on

9 December.

[35] I do not accept the directors have acted in breach of their statutory duty of good faith such that it was reasonably

foreseeable there was a substantive risk Ms Burrows would resign.

[36] Ms Burrows was fully aware of the financial situation and was tasked with the responsibility to manage it as Practice Manager. She had frequent discussions with Mr Muir discussing the financial position and options to try and improve Otara Health's financial viability. Mr Muir prepared cash flow projections to assist Ms Burrows to manage the expenditure to ensure there were sufficient funds to cover the outgoings as they fell due.

[37] It was August 2016 when the financial situation became dire. Otara Health borrowed funds in August and September to ensure it could meet all its outgoings. During October there was an increase in the number of meetings being held as well as the engagement of Ms Kokanovic and her team from the Waitakere centre to provide assistance in turning the business around.

[38] Ms Burrows was critical of Mr Bell and Ms Ovens for not taking active steps earlier to rectify the financial situation. While it is arguable that the lack of active involvement by Mr Bell and Ms Ovens during the period October 2015 to July 2016 contributed to the financial viability problems, Ms Burrows did not resign because of the financial problems.

Failure to investigate alleged bullying by Ms Kokanovic

[39] The Waitakere centre had suffered from financial difficulties in the past and had successfully turned its business around. Ms Kokanovic was a director of the Waitakere centre when it had to address its financial viability issues. She invited two of the senior employees from the Waitakere centre, Ms Michelle Te Kira and Ms Siobhan Trevallyan, to meet with Ms Burrows to see if they could provide any useful suggestions of steps Otara Health could take to address its financial crisis.

[40] Ms Te Kira is the Practice Manager at the Waitakere centre. She made contact with Ms Burrows on 18 October confirming she was more than happy to help turn Otara Health around. Ms Te Kira told Ms Burrows that she had asked a friend to identify the PHO that would best suit Otara Health and would get back to her about that and also suggested someone Ms Burrows could talk to in the meantime. Ms Te Kira told Ms Burrows she had been asked to help re-brand the centre. She suggested they get some signage made up as they had for the Waitakere centre and offered to take photos when she met with Ms Burrows the following week. Ms Te Kira also mentioned she had a friend who could do the signage very cheaply. Ms Te Kira suggested more revenue streams needed to be found.

[41] Ms Kokanovic was copied on the email and replied to all, including Ms Burrows, thanking Ms Te Kira for summarising the discussion they had had. Ms Kokanovic pointed out that it was generous of Ms Te Kira and Ms Trevallyan to offer to help and hoped that Ms Burrows would accept the offer with an open mind.

[42] The meeting with Ms Trevallyan, Ms Te Kira and Ms Burrows took place on

27 October. Following the meeting Ms Te Kira sent an email to Ms Kokanovic, Ms Ovens and Ms Burrows setting out the discussion including all suggestions on actions to be taken. The actions included analysing all data including a list of the types of data to be analysed. Ms Te Kira set out the specific suggested other actions that could

be taken discussed at the meeting including identifying opportunities Ms Burrows could explore for additional revenue streams.

[43] Ms Te Kira provided Ms Burrows with copies of communications she had sent to various parties, forms, process documents and other information to assist her in analysing the data and to assist in putting the suggested actions in place. Ms Te Kira provided email addresses for Ms Burrows to assist her in corresponding with organisations with a view to building patient numbers. She also suggested Ms Burrows set up a website and facebook page. Ms Te Kira included a link to the Waitakere centre's website and facebook page to help with possible ideas Ms Burrows could use for similar pages for Otara Health as part of a marketing strategy.

[44] Ms Kokanovic responded to Ms Te Kira's email (with a copy to Ms Ovens and Ms Burrows) and stated:

Thanks Michelle for this document full of great ideas. I hope that Michelle will embrace it and implement it as soon as possible.

[45] On 28 October Ms Burrows emailed Ms Kokanovic with a copy to Ms Ovens referring to both emails from Ms Kokanovic. Ms Burrows viewed the statement from Ms Kokanovic on 18 October that she hoped [Ms Burrows] would accept the offer with an open mind, and the comment on 28 October that she hoped [Ms Burrows] would embrace the ideas and implement them as soon as possible, to be bullying. Ms Burrows told Ms Kokanovic "I very much want to work with you to sort this mess out but there has to be respect for each other."

[46] Ms Kokanovic was surprised with Ms Burrows' response and emailed her to assure her that her email was to convey how thrilled she was with the ideas Ms Te Kira and Ms Trevallyan had suggested. Ms Kokanovic pointed out that she had

approved two employees to use their time from the Waitakere centre in assisting Otara Health and she, herself, had given her own time voluntarily to assist. Importantly Ms Kokanovic told Ms Burrows that she had huge respect for her and that was why she was giving her time to the centre.

[47] Ms Burrows says that when she raised with Ms Ovens the allegation that she had been subject to bullying by Ms Kokanovic her allegations should have been investigated and the failure to do so was a breach of duty by Otara Health.

[48] Ms Ovens was copied into the email communications. She determined there was no bullying and did not consider it necessary to undertake any investigation.

[49] Having considered the statements complained about, it is difficult to see what an investigation would have achieved. The comments by Ms Kokanovic were not unreasonable and could not be seen as creating a health and safety risk to Ms Burrows. After Ms Kokanovic saw Ms Burrows' allegations, she had no further contact with Ms Burrows. Therefore any risk to Ms Burrows' health and safety was removed immediately upon Ms Burrows raising her concerns.

[50] I am satisfied the decision not to formally investigate Ms Burrows' allegations was reasonable in all the circumstances and was not a breach of duty by Otara Health.

Healthy and safe work environment

[51] In her email to Ms Kokanovic, which she copied to Ms Ovens on 18 October, Ms Burrows advised that employees were reporting to her that they were stressed largely because they were unsure of their futures.

[52] Ms Ovens acknowledged there was uncertainty and pointed out that everything that had been tried to date to change the financial situation of the business had failed. In reply Ms Burrows told Ms Ovens she was feeling unsafe and pointed out that, as the Manager of the centre, if an employee raised such a concern she would address it. Ms Ovens invited Ms Burrows to meet with her the following Monday to discuss the issues she had raised.

[53] Ms Burrows agreed to meet and asked if she could bring a support person. Ms Ovens, while initially uncomfortable with the idea that a support person was necessary, eventually agreed. As events transpired Ms Burrows changed her mind and advised Ms Ovens she would meet without a support person.

[54] Concurrently with these email discussions Ms Burrows emailed Ms Kokanovic with a copy to Ms Ovens, explaining that she had been asked by one of the centre's doctors what a meeting between the doctor, the PHO and Mr Bell was in regard to. Ms Burrows did not know about the meeting and was unable to shed any light on it. Ms Burrows asked Ms Kokanovic to advise her so that she could inform

the doctor. Ms Ovens replied by email advising Ms Burrows they would discuss it at their meeting on Monday.

[55] Ms Ovens and Ms Burrows met on 31 October. By this time the two new directors had been appointed and Ms Burrows was advised of their appointments at the beginning of the meeting. Ms Ovens and Ms Burrows discussed the doctors meeting with the PHO and then went over the significant number of actions Ms Burrows intended taking in an effort to turn the business around.

[56] Ms Burrows did not raise any safety concerns either during the meeting or after the meeting. The notes I have reviewed and which were taken at the meeting indicate the meeting was positive with specific actions agreed to address the financial issues.

[57] Ms Burrows says there were other aspects of the conduct of Otara Health that contributed to her being unsafe at work including a comment from Mr Bell that Ms Burrows "make someone redundant ... we need to be seen to be doing something", the "whisper in the ear" comment and incorrect advice from Ms Ovens that Ms Burrows was the employer of the staff at the centre.

Make someone redundant comment

[58] There is no dispute that Mr Bell did tell Ms Burrows that they needed to be seen to be doing something and Ms Burrows should "...make someone redundant". Ms Burrows did not raise any issue with this comment until after she had resigned from her employment. As a result of Mr Bell's advice to her Ms Burrows drew up a schedule of employees and their respective redundancy costs which she provided to Mr Bell. No action was taken to implement any decisions to make employees redundant and no further discussions on this topic were held.

Whisper in the ear comment

[59] Ms Kokanovic denies making the comment attributed to her. She told me she did advise Ms Burrows to start talking to the PHOs and that when that happened Otara Health's PHO would find out. Ms Kokanovic told me that some PHOs will fund 70% of a contract while others would fund 90%. It was about finding the best PHO funding for Otara Health.

[60] I have preferred the evidence of Ms Kokanovic in relation to what was said in the meeting on 17 October. I am satisfied the advice Ms Kokanovic gave to Ms Burrows was given as a positive suggestion as a way to improve the revenue streams of Otara Health. The advice is similar to that which was given by Ms Te Kira in her initial email to Ms Burrows on 18 October.

Ms Burrows as the employer

[61] Ms Ovens stated to Ms Burrows at least twice that she was the employer of the employees employed at the centre. In her brief of evidence Ms Ovens acknowledged that this was a mistake and that it was Otara Health that was the employer. Ms Ovens told me that as the Manager Ms Burrows was expected to manage the centre. Ms Burrows says that when she was told she was the employer she believed Ms Ovens was putting all the blame on her for the financial state of the business.

[62] Ms Ovens' statements are clearly inaccurate. Ms Burrows did have direct responsibility for the day to day management of the business and its financial sustainability. While the statements made by Ms Ovens were unfortunate, after reviewing all of the evidence I am satisfied neither Mr Bell nor Ms Ovens viewed the financial situation of the business as being the responsibility of Ms Burrows.

Conclusion

[63] Ms Burrows has not established to my satisfaction that Otara Health breached any duty owed to her or embarked on a course of conduct that crossed the line to become dismissive or repudiatory sufficient to justify the termination of the employment relationship.

Was a resignation foreseeable?

[64] To be successful in a claim for constructive dismissal Ms Burrows must establish that any breach or breaches of duty by the employer are of such character as to make Ms Burrows' resignation reasonably foreseeable.⁶ While I have found Otara Health has not breached any duty owed to Ms Burrows, for the sake of completeness I

have considered whether her resignation was reasonably foreseeable.

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

[65] As early as 12 September 2016 Ms Burrows was contemplating resigning. When she met with her doctor on 12 September the doctor recorded that Ms Burrows had advised that she would be happy to resign if it would help, but there would need to be a plan to move forward that would work for the staff and solve the crisis in funding. Ms Burrows did not resign at that time because she believed it would not assist the centre. The doctor's record of what Ms Burrows reported was provided to Otara Health on 6 December when Ms Burrows raised her personal grievance.

[66] After Ms Burrows resigned and prior to her raising a personal grievance, Ms Ovens met with her on 28 November. By this time the PHO had agreed to provide a resource to assist Otara Health to address the financial situation of the centre. Ms Ovens asked Ms Burrows if she would extend her notice period to work with the PHO resource until 21 December. At the meeting Ms Burrows agreed but later withdrew her agreement.

[67] Ms Burrows says Ms Ovens should have known she was going to resign because of her statements to Ms Ovens in her email communications in late October that she did not feel "safe". Ms Burrows did express that she was feeling unsafe at work. In response Ms Ovens agreed to meet to discuss her issues which they did on

31 October. The notes from the 31 October indicate the conversation was positive and Ms Burrows did not raise any further concerns about her safety at work.

[68] Ms Burrows gave Ms Ovens no indication that she might be contemplating leaving her employment. Quite the opposite. On 31 October Ms Ovens and Ms Burrows had a positive discussion agreeing on actions to be taken to achieve financial stability. There were no further communications from Ms Burrows between 31

October and 14 November, when she resigned, raising any further concerns or seeking to have unresolved issues addressed.

[69] In all the circumstances I find Ms Burrows' resignation was not reasonably foreseeable.

Breach of good faith

[70] I have already found there was no breach of good faith by Otara Health, therefore no penalties will be imposed.

Costs

[71] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Otara Health shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Burrows shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[72] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell

Member of the Employment Relations Authority

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