

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 102

File Number: 5308342

BETWEEN JASMINE COOPER

Applicant

AND SECRETARY for
EDUCATION

Respondent

Member of Authority: Denis Asher

Representatives: Ms Cooper represented herself with the assistance of her
husband, Daniel Cooper
Trish MacKinnon for the Secretary

Investigation Meeting Wellington, 8 February & 24 May 2011

Submissions Received 12 June 2011

Determination: 14 June 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Ms Cooper, as she alleges, unjustifiably constructively dismissed by the respondent (the Ministry)? If she was, what if any remedies are appropriate?

[2] The Ministry denies the allegations and says she was neither unjustifiably constructively dismissed nor unjustifiably disadvantaged; that it was responsive and supportive of the applicant throughout her employment; and that Ms Cooper voluntarily resigned her employment which it could not have reasonably foreseen.

[3] Mediation did not resolve this employment relationship problem.

The Investigation

[4] During a telephone conference call on 27 September 2010 the parties agreed to a one-day investigation on 8 February 2011. Timelines were agreed for witness statements and the provision of agreed bundles of documents. All page references are to the agreed bundle.

[5] At the end of the first day the parties agreed to reflect on whether they would file final submissions or seek a resumption of the investigation at a later date so as to obtain further evidence in the meantime and present it, if required, at a resumed hearing. Ms Cooper subsequently confirmed her request that the investigation continue on 24 May.

Background

[6] The following is not in dispute.

[7] Ms Cooper commenced employment with the Ministry's Maori Language Education Team (MLET) in February 2008, in its Wellington national office.

[8] Issues developed between Ms Cooper and her manager and others in the MLET.

[9] During 2009 Ms Cooper raised various concerns with her group manager.

[10] Because of health and personal family issues, Ms Cooper's manager sought and was granted a 3-month secondment to another office; the secondment eventually extended to May 2010.

[11] During February 2010 the Ministry offered facilitation through its EAP service to Ms Cooper and her manager, in an effort to achieve improved communications, and to work through the applicant's allegations of bullying and harassment. The Ministry says it hoped the process would restore a professional working relationship between Ms Cooper and her manager (par 2.14 of the statement in reply received on 30 August 2010).

[12] The facilitation process was ongoing, and almost complete, when – in April 2010, Ms Cooper tendered her resignation. The applicant was urged to reconsider her notice by the Ministry but Ms Cooper subsequently confirmed her decision and left the Ministry on 21 May 2010.

Applicants' Position Summarised

[13] Ms Cooper says that at the point of resigning her employment she had no other option open to her as a result of a series of actions and inactions by the Ministry over the previous eleven month period (final submission dated 30 May 2011).

[14] Specifically, she was subjected to undue work-related stress over a prolonged period and bullying by her manager. These issues were raised with the Ministry but it failed to address Ms Cooper's concerns.

[15] The group manager did not undertake a full and fair investigation of the applicant's complaint; and failed to report back to Ms Cooper the outcome of the investigation he did undertake and what steps were available to the applicant.

[16] The Ministry failed to provide a safe working environment.

[17] The Ministry failed to follow its own harassment prevention policy and standards.

[18] The final straw was the respondent pre-empting the outcome of the facilitation process and arranging the return of her manager.

[19] Ms Cooper says her resignation was foreseeable.

Respondent's Position Summarised

[20] Because I am adopting and adapting the respondent's position (for reasons set out below) there is no need for me to summarise its position.

Discussion

[21] Having scrutinised the evidence provided by the parties, I am satisfied that the following is an accurate summary of key events.

[22] Ms Cooper first raised her concerns with her group manager on 26 May 2009 (par 2, pg 3 of the statement of problem received on 13 August 2010): she told him she considered the team to be poorly managed, that it was dysfunctional and, as a result, she was experiencing stress. The group manager responded by offering Ms Cooper the option of working from home. He also advised the Ministry was contemplating a restructure that might resolve her concerns. The group manager also arranged, shortly afterward, a secondment of Ms Cooper's manager to another office, in Lower Hutt (effective from the end of July 2009) at which point he assumed management of the MLET.

[23] Ms Cooper reiterated her concerns to her group manager in a letter dated 10 July 2009 (pg 31 in the agreed bundle). The penultimate paragraph contains the following:

I have also contacted HR about the harassment policy in an attempt to take the appropriate steps to handle and deal with the situation.

[24] The group manager says, amongst other things, that he took from that advice Ms Cooper was no longer seeking his assistance.

[25] Ms Cooper did not make it clear in any of her communications during this period that failure by the Ministry to adequately respond to her concerns would result

in her taking a personal grievance; nor did she advise that its responses were unacceptable to her.

[26] In response to the applicant's ongoing concerns, and in December 2009, Ms Cooper's group manager proposed that she work out of another team (pg 73); the applicant was not happy with the proposal (pg 77).

[27] Around the same time Ms Cooper met with an HR representative and put to that person, for the first time, her various concerns: the HR representative then provided the applicant with relevant advice as to how she might deal with her issues.

[28] Shortly afterward details of the EAP facilitation option were put to Ms Cooper.

[29] Both the applicant and her manager agreed to undertake a facilitated process option, as set down in the Ministry's harassment policy.

[30] Meetings were held with relevant parties (pgs 83 & 93).

[31] Relevant material as to her concerns was also sought from Ms Cooper and reviewed by the facilitator so that recommendations might be made on a way forward (pg 85).

[32] A "*Mediation Needs Analysis*" was drafted and provided to the applicant (pgs 101-106 inclusive): on 8 March 2010 Ms Cooper was encouraged to go through the report and confirm if it was accurate (pg 99) and raise any questions or concerns with the facilitator (pg 95).

[33] The author concluded, amongst other things, that:

It is clear from the information obtained that issues have been occurring over a significant period ... and have not been defused by the separation of the (applicant and her manager). Based on the high emotions demonstrated by both individuals during their sessions, it is also clear that both are becoming increasingly distressed and angry and both have reported feeling "unsafe" with each other.

...

The recommendations outlined below are those that (in our opinion) will provide optimum opportunity for successful resolution, whilst at the same time providing the organisation with protection in terms of its responsibilities under the Employment Relations Act and the Health and Safety in Employment Act.

Author Recommendations

- *That the Ministry considers the issues raised by each party and make a decision as to whether any of these need further or more formal investigation.*
- *That should the Ministry decide that the issues are largely non-substantive and are the result of a personality clash, it is recommended that this be clearly communicated to both parties with clear expectations of future conduct outlined, e.g. acknowledgement of manager/employee relationships*

...

- *That a mediation process is undertaken to allow both parties the opportunity to develop and present their issues ... in a safe, non-threatening environment*
- *That the mediation process culminates in the development of a written conduct agreement/moving forward strategy clearly defining the expected behaviours of each individual. This will enable the Ministry to effectively manage any future breaches of appropriate conduct*

...

(pg 105)

[34] By email on 23 February 2010 Ms Cooper was advised her manager would be remaining in the Lower Hutt office, “*Until processes are worked through ...*” (pg 110).

[35] By email dated 17 March the applicant, her manager, group manager and others, were advised by the facilitator that Ms Cooper and her manager were “*both working through their professional and management development programmes Both have also sighted a draft conduct agreement and we are working towards developing a final version that can then be presented to both individuals for sign off*” (pg 112).

[36] A meeting with the applicant was scheduled for 7 April.

[37] As agreed, Ms Cooper provided the facilitator with a communication plan; it is dated 2 April 2010 (pgs 113-120 inclusive). It properly details the applicant’s concerns arising out of her two years’ employment. It includes the applicant’s view that,

The Current Situation

I feel that I have been hugely disadvantaged in my current role. I have been subjected to working in a dysfunctional team with a manager who has been unable to lead and manage the team effectively. I have also been subjected to bullying as a result of raising an umber of issues and have suffered hugely from work-related stress, becoming at times withdrawn and isolated within the team.

...

As you know (facilitator’s name) I was quite reluctant to undertake the mediation exercise but committed to it in good faith as strongly recommended. I have retained throughout that this is not a case of ‘mis-communication’ between a manager and staff (member). For me this has always been about what I see as serious mis-management of a Ministry team and its allocated resources.

(pg 119)

[38] By letter dated 23 April Ms Cooper submitted her resignation.

[39] As it happened, 3 days later, and not knowing of Ms Cooper’s resignation (and by email dated 26 April), the facilitator sent Ms Cooper, her manager, the group manager and one other, a copy of a draft “*Final Conduct Agreement*”:

the objective of which is to discuss the attached document and to ensure that you are both happy to commit to (it). The next step will be to arrange a session that the two of you will attend here at EAP ... which will provide each of you the opportunity to discuss your expectations of one another, sign the agreement and this will then conclude the mediation process. I am aware there is a possibility within the new team structure that you may not be working in a manager-employee relationship however as explained to you both, the EAP process is working on the assumption that this is the case and should your structure change obviously the Conduct Agreement will no longer apply. I am hoping to have this process finalised by 7 May... and I believe it will be of benefit to you both to have this part of the process concluded as quickly as possible.

(pg 126)

[40] Ms Cooper cancelled a proposed meeting to discuss the draft advising she was leaving the Ministry and therefore “*this part of the mediation process is redundant*” (pg 130).

[41] Ms Cooper was asked by the respondent to reflect on her resignation but subsequently advised it stood (pg 141).

Findings

[42] I do not accept that Ms Cooper was unjustifiably disadvantaged or unjustifiably constructively dismissed for the following reasons:

[43] The case law in respect of raising a personal grievance is clear. In *Creedy v Commissioner of Police* [2006] 1 ERNZSA A1 [36] the Chief Judge said,

[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[44] In *The Chief Executive of the Department of Corrections v Waitai* [2010] NZEmpC 164, Travis J found at par 48:

... the communications must, objectively viewed, have involved reasonable steps taken by the employee to make the employer aware that the employee alleged a personal grievance that the employee wanted the employer to address, with sufficient specification to enable the employer to address it.

[45] In a nutshell, and by application of an objective assessment, Ms Cooper cannot be said to have (orally and in writing) served notice of a personal grievance until her letter of 23 April 2010 (pg 125).

[46] As it was, and preceding that advice, the applicant had expressly agreed to subject all of her concerns to a facilitated process, under the auspices of the respondent's EAP provisions, and to attempt to mediate a resolution with her manager.

[47] Put another way, the respondent can, objectively assessed, rely on its belief that, because of her agreement to the facilitated process, it had fairly and reasonably met Ms Cooper's concerns.

Events Around 23 April 2010

[48] In her resignation letter of 23 April 2010 Ms Cooper said that,

As you are aware ... I recently agreed to participate in a mediation process in the hope that this might help to resolve the problems that I have been facing in my job.

I agreed to this process in good faith on the understanding that should this not result in a satisfactory outcome, I would still have other avenues to pursue.

As you also know, I recently submitted to the Ministry my written account of the issues that I have been facing and have been waiting for the Ministry's response.

I understand that the Ministry needs to be allowed fair time to respond. However, I am astounded and dismayed that a decision appears to have been made before the mediation process has been completed.

(Ms Cooper's manager's) appearance, after 9 months absence, at the morning tea this morning to farewell (name) from the floor, coupled with the email received today from the Acting Group Manager, Te Reo Schooling indicate clearly that (Ms Cooper's manger) is returning to her role. Yet there has been no communication with me about the decision or what it might mean for me.

Because of this I no longer have faith in the process being able to result in a satisfactory conclusion. I feel that I have been hugely disadvantaged and am effectively forced into a position amounting to constructive dismissal.

I therefore ... feel I have no option but to resign and pursue a personal grievance. ...

(pg 125)

[49] An objective scrutiny of the events leading to Ms Cooper's letter of resignation does not support the claim set out in the letter, i.e. that a unilateral decision had been made to return the applicant's manager to her former role. That is because, as Ms Cooper admitted during the Authority's investigation, she did not attend the morning tea but relied on reports of what the group manager was reputed to have said (which he disputes), and because an assessment of the email itself (provided by the respondent in its letter of 9 February 2011) discloses no such decision by the Ministry.

[50] Ms Cooper did not attempt to clarify her concerns by referring them to the respondent, but resigned instead.

[51] As there was no decision of the sort claimed by the applicant, the Ministry cannot have acted unjustifiably and in breach of any obligation to Ms Cooper: her claim of an unjustified constructive dismissal therefore cannot succeed.

Summary

[52] Ms Cooper did not raise any personal grievance until her letter of 23 April 2010 (pg 125). Prior to that date her allegations of bullying, etc were – by agreement – the subject of a facilitation process. Ms Cooper brought that mediation to a premature close by resigning her employment. There is no evidence to support the applicant's claim that the respondent had decided to return the applicant's manager to her previous role, and thus no evidence to support a resignation based on this.

Determination

[53] Ms Cooper's allegations of unjustified disadvantage and unjustified constructive dismissal are dismissed.

[54] As requested, costs are reserved.

Denis Asher

Member of the Employment Relations Authority