



[3] Mr Lundon went on leave and Ms Corbett returned to work while he was on leave. Mr Laws prepared a written “determination” and gave Mr Lundon a copy, but did not give a draft to Ms Corbett.

[4] Following a disciplinary meeting held with Mr Lundon steps were taken to keep Mr Lundon and Ms Corbett apart and Mr Lundon was disciplined with a warning and he was required to apologise to Ms Corbett and attend a course to improve his relationships, and he returned to work.

[5] An unjustified action disadvantage personal grievance was raised by Ms Corbett based on the events of 19 June and Mr Laws’ “determination” because she disagreed with the outcome.

[6] On 7 August the parties attended mediation, and following this, Ms Corbett returned to work aware that steps would be taken to keep Mr Lundon away from her. One of the steps to keep them apart was an office change and this occurred in early to mid August. Another was that they would have separate lunch times to use the lunch room. Mr Lundon was instructed by Mr Laws to keep away from Ms Corbett.

[7] Ms Corbett obtained another job and resigned.

[8] Ms Corbett claimed that she has a personal grievance in regard to the 19 June incident, and that the hotel acted in breach of its duty of good faith and in breach of its duty to protect her health and safety in her employment. Ms Corbett says she decided she had no choice but to leave her employment with the hotel.

[9] The hotel denied Ms Corbett’s claims and says it took appropriate and adequate action. It says Ms Corbett resigned of her own choice to work elsewhere.

### **The Issues**

[10] There are a number of issues that have emerged because of the complexity of the applicant’s statement of problem, the claims raised and many factual differences. I have decided the issues are:

- (1) Whether or not the hotel did enough to follow up Ms Corbett’s complaint?

- (2) Were there any flaws in Mr Laws' procedure adopted for his investigation?
- (3) Did the hotel act as a fair and reasonable employer would act?
- (4) What is the nature of any personal grievance?
- (5) Was there a constructive dismissal?
- (6) Was there a breach of good faith and failure by the hotel to provide a safe place of work?

**What did the hotel do to follow up Ms Corbett's complaint?**

[11] I find that Mr Laws set about to investigate the matter. He interviewed the main people involved. However, he did not interview Ms Rachel Johnson, Ms Corbett's supervisor. Ms Corbett believed she would have been of some assistance given Ms Johnson's knowledge of Mr Lundon's prior behaviour. I find that a fair and reasonable employer would have decided to interview Ms Johnson and come to some conclusion about the relevance of any information she might have been able to provide.

[12] It is not relevant that Ms Johnson now says she witnessed the 19 June incident because Mr Laws was not to know that at the time, but because he did not interview her he did not make sure there was any other information likely to assist him. Mr Laws now relies upon his belief that Ms Johnson was not a safe witness. However, he did not establish that at the time and did not give Ms Corbett the opportunity to comment.

[13] Mr Laws sent Ms Corbett a written statement from Mr Lundon, and a written statement from Mr Fernandez and that statement was different to one that Mr Fernandez agreed to sign for Ms Corbett at the time. Mr Laws provided Ms Corbett with a written reassurance about her safety in the workplace, and informed her that no decision about disciplinary action would be taken until a full investigation was completed. On that point Mr Laws' action was correct, I hold. However I hold that his decision not to give Ms Corbett an opportunity to comment and have some input into the procedure of the investigation, given she had an interest in the outcome, was not the action of a fair and reasonable employer, especially over the witnesses to be interviewed, the timing of the investigation and questioning Mr Fernandez.

[14] Mr Fernandez's role was compromised as an independent witness, being the one person who had witnessed the incident. He had signed a statement of events for Ms Corbett. There was nothing wrong with Mr Laws requiring him to write another one if Mr Laws wanted to test what it actually was that Mr Fernandez witnessed. This is because Mr Fernandez signed Ms Corbett's statement despite being told by Marie Magnusson, the hotel's personnel co-ordinator, not to sign it when he showed her it at the time. Mr Fernandez now says that he signed it under duress. Ms Magnusson did not know until the Authority's investigation meeting that Mr Fernandez had signed Ms Corbett's statement. He subsequently signed another statement used by Mr Laws in his investigation. However, Mr Laws' decision to only rely on that second statement and not to make an assessment why Mr Fernandez changed his mind was not the action of a fair and reasonable employer to ensure a fair process and to get to the truth. This is especially so considering Mr Fernandez had to work with Mr Lundon. Mr Fernandez struck me as equivocal when he answered questions in the Authority's investigation.

[15] Mr Lundon admitted swearing at the time when he provided Mr Laws with his version of the events. However, Mr Laws remained with a problem about credibility in regard to Mr Lundon's allegation that Ms Corbett swore during the incident. Mr Laws accepted during the Authority's investigation that Ms Corbett probably did not swear, thus bringing into some doubt Mr Lundon's version when he said that Ms Corbett did swear. A fair and reasonable employer would have made such a conclusion at the time. As such Mr Lundon's version of the alleged assault would be difficult to reconcile given Ms Corbett's adamant claim that Mr Lundon put his hands on her.

[16] Next, Mr Laws prepared his "determination" on the issues and gave Mr Lundon the opportunity to have his input on a draft. The same opportunity was not provided to Ms Corbett. That was unfair.

[17] Mr Laws concluded in his determination a number of outcomes including:

- *There will be no future one to one contact between Ms Corbett and Mr Lundon. As Ms Corbett has no direct report function to Mr Lundon this should easily be achieved.*
- *Any enquiries re invoices will be conducted through an intermediary such as "RF", Rachel Johnson, myself or by internal email.*
- *Set times for both employees to use the staff dining area will be established to eliminate contact.*

- *Whilst there may still be the chance of being in the main office together at some time it is unlikely that Ms Corbett would be alone with Mr Landon.*
- *It is envisaged that Ms Corbett will be given her own office separate to the conference manager.*

[18] In making his “determination” Mr Laws was entitled not to accept Ms Corbett’s position that the hotel should agree to any precondition regarding terminating Mr Landon’s employment. The above conclusions support Mr Laws taking some action, in addition to disciplining Mr Landon.

[19] Ms Corbett has complained it took Mr Laws four weeks to complete his investigation. During the four weeks Ms Corbett took some time off and Mr Laws replied to Ms Corbett’s lawyer reiterating the hotel’s concerns. In respect of the complaint that no notice was being taken of Ms Corbett’s medical circumstances, Mr Laws said the hotel understood its responsibilities and gave an assurance that:

*Issues of workplace safety and respect are important to the hotel and your client’s complaint is being fully investigated and is taken very seriously by the hotel. Please accept our assurance that the safety of all members of staff is important to us and we are making it plain to all management staff that the company will not compromise on issues of work place safety.*

*I have already spoken to Leah regarding some suggested changes to help address her concerns.*

*It would help us with our investigation if we could speak further with Leah and we wish to do that. Could you please contact us at your earliest convenience so that we can arrange to speak with Leah. We presume you will attend the meeting and you are welcome to do so.*

*We would like to work with Leah to facilitate a speedy return to work.*

[20] I am satisfied that Mr Laws responded to the complaint and properly set about to investigate the matter. I hold that there was no prejudice to Ms Corbett in the time that the investigation took because she went on leave, decided not to go to work when Mr Landon was there and arrangements were put in place, including mediation, when Mr Landon returned from his leave.

[21] Ms Corbett has also been critical that she was not given copies of notes of Mr Laws’ interviews. Ms Corbett should have been given any notes to comment on and have the opportunity to have someone present when Mr Laws interviewed Mr Fernandez a second time, given she was the complainant.

[22] These factors would have had an influence on Mr Laws' decision. A fair and reasonable employer was required to determine the facts about what happened, and the matter was made the more complex because it involved the rights of both employees. Therefore, it was reasonable for Ms Corbett to expect to have had some involvement, more than what was afforded to her, I hold. As a consequence her complaints about the process have some merit.

[23] Of course if Ms Corbett and her representative had a different involvement they could not have expected that Ms Corbett could dictate an outcome. Any outcome was for the employer to decide.

[24] In the absence of the employer following a fairer course it was reasonably open to Ms Corbett to pursue her concern for her safety at work after the determination was made by Mr Laws where she had a genuine belief that she had been assaulted physically and verbally. However, Ms Corbett was provided with certain options that Mr Laws reasonably considered were appropriate to take and Ms Corbett indeed did return to work.

[25] Mr Laws did respond to Ms Corbett's concerns. Firstly he investigated them, albeit a fair and reasonable employer would have ensured a more open and inclusive investigation. Secondly, he made some options to minimise contact between Mr Landon and Ms Corbett. Indeed he outlined a course of measures in his "determination" and then followed them up, albeit not in a manner the applicant would have wished, but he nevertheless did follow up his decision and informed Mr Landon to avoid any contact with Ms Corbett.

[26] There were a number of incidents in the period after the determination such as: Mr Landon allegedly was at the coffee machine and allegedly said to Ms Corbett "*...are you making me one too*", and Mr Landon approached Ms Corbett and asked her if she had any problems with the hotel's IT system. There was no evidence that Ms Corbett properly complained about these matters at the time. I would have reasonably expected them to have been raised with Mr Laws because of his direct involvement in the relationship between Mr Landon and Ms Corbett. As they were not directly raised I hold that they cannot form the basis of any complaint now.

### **What is the nature of the personal grievance?**

[27] Ms Corbett has claimed an unjustified disadvantage personal grievance. It is hard to comprehend what exactly it is that she has claimed because such a broad approach has

been taken in the complaint. However, I agree that the decision taken by Mr Laws on the process of his investigation did not involve Ms Corbett's participation in having any input into the process as the complainant, and this was unjustified, when she had a direct interest in regard to a very serious allegation of assault impacting on her employment. Also, Mr Laws' reliance on Mr Fernandez's second statement without scrutinising both his statements and evaluating what Mr Fernandez said he witnessed was not what a fair and reasonable employer would have done. As such she was disadvantaged by the process, and where the outcome may have been different if a fairer course was followed by Mr Laws. An example is where Mr Laws conceded in the Authority's investigation that he doubted Ms Corbett would have sworn and this may have made a difference in an assessment of credibility considering he believed Mr Lundon. In this regard Ms Corbett was exposed to a work environment where she had to continue working with a person she alleged put his hands on her and verbally abused her.

#### **Was there a constructive dismissal?**

[29] The reasons given for Ms Corbett's resignation are:

- Mr Lundon approaching her despite Mr Laws' stated intention to avoid any contact between them.
- Mr Lundon's behaviour standing outside Ms Corbett's office and clearing his throat.
- The initial incident.
- The employer's approach to the investigation and the outcome were unsatisfactory and unjust.

[30] It is my decision that there cannot be a constructive dismissal for the following reasons:

- The incident on 19 June 2007 was between two employees and a complaint was made by Ms Corbett and an investigation was put in place. The employer responded to the complaint.
- Mr Laws' determination would not lead to a repudiatory breach just because Ms Corbett disagreed with the outcome, particularly where some

notice had been taken of her complaint and it was Mr Laws express intention to minimise contact between Ms Corbett and Mr Lundon.

- The timing of the resignation on 7 September distances the causal link with the events on 19 June. Indeed Ms Corbett's lawyer at the time wrote:

*“Although the employment problems raised by our client have not been resolved, our client believes that the parties have a better understanding of one another's situation. She looks forward to the implementation of the proposal contained in the employer's determination for establishing and maintaining set times for both employees to use the staff dining area”.*

- Efforts were made to keep Mr Lundon and Ms Corbett from needing to have contact with each other.
- There is no evidence that the occasional contact that Ms Corbett has referred to involving Mr Lundon was deliberate on his part, given that he has denied the coffee machine incident and denied standing outside her office and clearing his throat. It is conceivable that contact in the lunch room was possible. On its own it would not have been enough to repudiate the employment relationship.
- Mr Laws raised with Mr Lundon the stated intention that there was not to be any contact between Mr Lundon and Ms Corbett and arrangements were made to ensure contact they avoided contact.
- Ms Corbett found another job before resigning.
- Action was taken against Mr Lundon including getting a warning, he was requested and complied with providing an apology and he was sent on a course to improve how he related to other employees. I was referred to an earlier complaint about Mr Lundon and I agree that this complaint was too distant to be regarded as a signal of on-going problems and that the employer needed to take action to have prevented the occurrence of the 19 June event.

[31] It is my conclusion there was no constructive dismissal. The claim is dismissed.

### **The Remaining Claims**

[32] The last claim made by the applicant was that the hotel breached its obligations under the Health & Safety in Employment Act (H & S E Act). Firstly there is no jurisdiction to claim a penalty under the H & S E Act in the Authority.

[33] Secondly the complaint made by Ms Corbett that the employer did not take all practical steps to provide and maintain a safe place of work is only applicable as background for the claim of a personal grievance. The incident between Mr Landon and the applicant on 19 June was the first incident between the two of them involving a complaint. There was no complaint beforehand from Ms Corbett about Mr Landon's behaviour likely to cause a risk to her in her employment. The employer took action to investigate her complaint and stated an intention to try and minimise contact between Ms Corbett and Mr Landon.

[34] The other incidents that Ms Corbett referred to after Mr Laws issued his determination did not involve her making a formal complaint for more attention.

[35] Those issues have more to do with these proceedings being pursued. As such there is no basis for this ground to be relied upon for her grievance claim.

### **Conclusion**

[36] Ms Leah Corbett has a personal grievance on the grounds that the employer acted unjustifiably in the process it followed in investigating Ms Corbett's complaint and she was disadvantaged in her employment because the outcome had an impact on her in regard to her employment, and this is underpinned by the gravity and seriousness of her complaint.

[37] Ms Corbett is entitled to remedies but these have to have a causal link to the employer's unjustified action. There can be no lost wages because Ms Corbett continued to work until she resigned to take up new employment. She lost no wages.

[38] I accept that she has a claim in regard to how she felt about the situation, but this in my assessment involves a modest amount in the sum of \$7,000. The Brentwood Hotel Limited is to pay Leah Corbett the sum of \$7,000 for the impact on her feelings due to the employer's action affecting her employment to her disadvantage.

[39] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority