

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 509/10
5292954

BETWEEN ARIEL FORSBREY
 Applicant

AND WAITANGI NATIONAL
 TRUST
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
 Don Mackinnon, counsel for Respondent

Investigation Meeting: 9 November 2010

Determination: 14 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the termination of an employment relationship between the applicant, Mrs Ariel Forsbrey, and the respondent, the Waitangi National Trust. Mrs Forsbrey resigned in July 2009 from a permanent position of Assistant Accountant she had held for about two years. Before then she had worked for several months as a casual employee of the Trust.

[2] The focus of the investigation has been Mrs Forsbrey's claim that her resignation amounted to an unjustified constructive dismissal by the Trust.

[3] Mrs Forsbrey went on sick leave in June 2009 and did not return to work. She gave notice about two weeks later, on 9 July 2009, and raised a personal grievance about her resignation on 19 September 2009 in a letter to the CEO of the Trust, Mrs Jeanette Richardson,

[4] In the letter Mrs Forsbrey claimed that the Trust had failed to provide a safe workplace as required by the Health and Safety in Employment Act 1992, and that the relationship of trust, confidence and fair dealing required between employer and employee had been destroyed. She claimed this occurred because the Trust had failed to investigate and act upon her complaint that Mr Anthony Loggie, the Trust's Financial Manager, had humiliated, intimidated and abused her over a long period.

[5] To resolve her grievance Mrs Forsbrey sought an apology from the Trust and an assurance that its future employees would be protected from the treatment complained of. She also sought payments for lost wages, counselling services and compensation for loss of dignity and humiliation. By the time of the Authority's investigation meeting Mrs Forsbrey had quantified her claim as \$41,416 (for 66 weeks) loss of wages and \$15,000 compensation.

[6] The Trust rejected the claim that Mrs Forsbrey was dismissed. Its response to the claim is that she resigned, an action that was premature and unnecessary in the circumstances.

[7] The parties tried but were unable to resolve the personal grievance by mediation.

[8] I have considered the issues for determination in this case against the test to be applied in constructive dismissal cases, particularly those where it is alleged that a breach of duty by an employer has led an employee to resign. That test is set out in the leading case of *Auckland Electric Power Board v. Auckland Provincial Local Authorities Officers' IUOW* [1994] 1 ERNZ 168 (CA). The Court of Appeal held the first relevant question in a claim such as this is whether the resignation of the employee has been caused by a breach of duty on the part of the employer. To determine that question all the material circumstances have to be examined, including the way the resignation was communicated. If it is found that a breach of duty has caused the resignation, a second question is whether the breach 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 but would resign and leave.

[9] Accordingly, an issue the Authority must consider is whether there was conduct or behaviour by Mr Loggie towards Mrs Forsbrey over the period of

employment which breached her right to work in a safe and healthy environment. An equally important issue is whether the Trust knew or ought to have known Mrs Forsbrey was experiencing bullying and intimidating behaviour from another employee and, if it did know that, whether the Trust failed to investigate and take reasonable steps to protect Mrs Forsbrey from any recurrence of that unlawful conduct.

[10] Mrs Forsbrey felt compelled to resign because after she had left work upset on 26 June 2009 and had consulted her doctor and been put on sick leave for two weeks, the Trust had advised she would have to continue working with Mr Loggie her supervisor. This was unacceptable to Mrs Forsbrey.

[11] Mrs Richardson first heard the complaints about Mr Loggie on 7 July 2009. She undertook to investigate them and take any action required while Mrs Forsbrey remained on sick leave. Before Mrs Richardson had an opportunity to start Mrs Forsbrey made it clear that either Mr Loggie would have to leave, or no longer be in charge of her, or she would go. Mrs Richardson advised that the Trust's operations and the roles of Mr Loggie and Mrs Forsbrey in them made it impracticable to keep the pair apart in the workplace. Mrs Forsbrey resigned despite Mrs Richardson telling her she did not want her to leave and giving her encouragement to stay with a proposal to investigate and respond to the complaints against Mr Loggie.

[12] For several months before she resigned Mrs Forsbrey had been under pressure to perform her job satisfactorily. The Trust's concerns about her performance had led to a meeting with her on 25 March 2009. Mrs Forsbrey was advised in advance that matters about her performance to be discussed at that meeting were:

- An inability to identify and complete routine tasks on a daily basis;
- An inability to perform daily tasks with accuracy and consistency;
- An inability to complete monthly tasks in a timely manner within predetermined deadlines;
- An unwillingness to ask for assistance and explanations from others in the performance of your duties;

- A lack of feedback to management as to the completion status of tasks and the ability to meet deadlines;
- A lack of concern for the roles of others who are dependent on the satisfactory performance of your role;
- A lack of understanding of the consequences of the failure to meet deadlines;
- An unwillingness and refusal to do extra work when requested to do so.

[13] After the meeting Mr Loggie gave Mrs Forsbrey a letter he described as containing a written warning. A copy of it was placed on Mrs Forsbrey's personal file. Amongst other things the letter advised Mrs Forsbrey of a requirement needed to be met in her position, "to complete daily, weekly and monthly tasks accurately, consistently and in a timely manner within predetermined deadlines."

[14] In his 3 April letter Mr Loggie advised Mrs Forsbrey that he viewed the meeting of 25 March as having been positive, because the focus of it had been on remedying the performance issues and because Mrs Forsbrey had shown a willingness to improve and overcome the problems discussed. Mr Loggie concluded by advising that the Trust would assist Mrs Forsbrey to do this by helping her with planning and providing training, and that there would be a meeting after a month to look at her progress and review her performance. He also gave a warning that failure to achieve and maintain the standards required would result in further disciplinary action.

[15] I find that after receiving the letter of 3 April over the next few weeks Mrs Forsbrey was fully conscious that Mr Loggie was observing and assessing her performance. She was fully aware that she needed to improve to the standards required and maintain those. At the start of June she seemed to have responded to the discussions held earlier and had made noticeable efforts to improve her performance. She felt she was making progress and sought reassurance about this from Mr Loggie. I find that on one occasion in mid-June she asked him whether he thought she could do the job. Mr Loggie had replied that he did think so, and Mrs Forsbrey thanked him for that.

[16] It goes to the credibility of the claim made by Mrs Forsbrey that she was chronically and persistently bullied, intimidated and abused by Mr Loggie, that in early June 2009 she had felt safe enough to suggest having regular meetings with him and another staff member, to discuss matters concerning the working of their team. Mrs Richardson approved of this as being a good idea.

[17] Mrs Forsbrey's evidence was that, as at 5 June, she had felt able to function well enough around Mr Loggie to be able to have those meetings. She confirmed that between 5 and 26 June, when she left work and was put off for two weeks by her doctor, nothing untoward had happened at work in her relationship with Mr Loggie.

[18] On 26 June Mrs Forsbrey had what she called an emotional meltdown. That day she found a note for her from Mr Loggie, who had written it by hand on data sheets she had been working with the day before. There is no dispute that while doing the work she had made a basic mistake, entering financial data against April activity when it belonged to June. Across the bottom of the data sheet with the entry of the incorrect month, Mr Loggie's note read:

DO NOT DO THIS AGAIN APRIL CLOSED!!!

[19] Mrs Forsbrey described getting the note as the straw that broke the camel's back. In her evidence she said that upon seeing it she had thought "Oh my God I've made another mistake." She left work and saw her doctor who provided a medical certificate putting her off work for two weeks. She did not return except to have a meeting with Mrs Richardson on 7 July, after which she formally resigned two days later.

[20] Mrs Forsbrey confirmed that the meeting with Mrs Richardson on 7 July was the first time that she had raised with the Trust any complaint about Mr Loggie. She advised Mrs Richardson the following day that she could not return to work if Mr Loggie was still there, or was still supervising her. She confirmed her resignation in writing on 9 July.

[21] The Trust provided the Authority with copies of email correspondence between Mr Loggie and Mrs Forsbrey written over the many months they worked together. None of it gives any sign of bullying or intimidation on the part of Mr Loggie. They are all ordinary, straightforward matter-of-fact communications to do with everyday work matters. Mr Loggie's note on 26 June bluntly expressing

disapproval at the mistake made by Mrs Forsbrey is not matched by anything like that in the correspondence and seems to have been a one-off.

[22] It is understandable that Mr Loggie was exasperated by the discovery of Mrs Forsbrey's mistake, as it caused him a great deal of time and effort to correct and was a repetition of performance he and the Trust had been trying hard to get her to correct. It had been pointed out by Mr Loggie in his letter of 24 March that he was concerned she seemed not to appreciate the roles of others who were dependent on the satisfactory performance of her role and that she had been failing to perform daily tasks accurately and consistently.

[23] In complete contrast to the cordial email correspondence is the extreme criticism made by Mrs Forsbrey of Mr Loggie in her statements and other documents presented to the Authority. In them he is said to have subjected her to "torment" she endured for two years. She asserted that over this period he had been rude, arrogant, sarcastic, and that he was engaged on a crusade of bullying to control and punish her. She described him as having "relentlessly humiliated" her daily, and had abused her in the extreme.

[24] I find that this account given by Mrs Forsbrey is not consistent with the circumstances shown by other evidence, including that of Mr Loggie and Mrs Richardson and the trail of correspondence and emails. Mrs Forsbrey, a mature woman, did not present as someone likely to suffer for two years without saying anything to anyone at work about the sort of behaviour she described. I do not consider she became cowed by ill treatment and was left powerless to complain to her employer about it.

[25] I consider that Mrs Forsbrey has advanced a theory about why she gave up her job, but it is not based on the most likely cause, her distress or anxiety at finding she still could not perform to her employer's standards.

[26] I do not consider that the cause of her strain was unreasonable behaviour of any kind by her supervisor, Mr Loggie, who had responsibility for seeing that she performed to the standards required of her position. The nature of accounting work especially requires attention to accuracy and detail, as well as organisation and ability to meet deadlines. Mrs Forsbrey was being closely monitored by Mr Loggie, as she knew. He had warned her that further disciplinary action could be taken if she did

not improve her performance. There is no evidence that Mr Loggie did anything except perform his job to a high standard and expect staff he supervised to do the same.

[27] It may be that Mr Loggie was considered by some as having a direct and earnest style of addressing those he supervised, but that is hardly a basis for a complaint of bullying, abuse, intimidation or victimisation. Neither is it any basis for a claim of constructive dismissal.

[28] From the evidence it is apparent to the Authority that Mrs Forsbrey transformed her anxiety or frustration at being unable to fully cope with her job into hostility towards her supervisor Mr Loggie.

[29] A major difficulty with Mrs Forsbrey's personal grievance claim is that even if there had been behaviour as complained of by her, in two years she did not tell the Trust about it and only complained after going on sick leave and just before resigning. When Mrs Forsbrey did complain she did not give the Trust a fair opportunity to properly investigate and take such steps including disciplinary action as might have been considered appropriate in the circumstances.

[30] I find that when Mrs Forsbrey informed Mrs Richardson of her complaints about Mr Loggie, they were listened to carefully and replied to with an undertaking they would be looked into. Mrs Forsbrey unfortunately simply did not allow Mrs Richardson a chance to investigate and properly address the complaints. To be able to do that Mrs Richardson obviously needed to speak to Mr Loggie before making any decisions about what had occurred and what should be done about it. A measure she did offer to take was to become more directly involved in the management of the finance section herself. The ability of Mrs Richardson to move Mr Loggie and Mrs Forsbrey out of the way of each other, except perhaps temporarily for the period of sick leave Mrs Forsbrey was then on, was negligible given the nature of the Trust's business, its scale and the particular work Mr Loggie and Mrs Forsbrey were engaged in.

[31] Just as Mrs Forsbrey's hostility misdirected at Mr Loggie was unreasonable and unfounded, her criticism of Mrs Richardson's involvement as being "too late" was completely unwarranted. I find that Mrs Richardson, on behalf of the Trust, acted immediately and appropriately in the circumstances as soon as she was informed of

the complaints by Mrs Forsbrey against Mr Loggie. Although Mrs Forsbrey felt she had no support from her employer, the Trust did not know there was a problem in respect of which it needed to offer support until about the same time that Mrs Forsbrey resigned. She gave Mrs Richardson no chance to do anything before then.

[32] To the point where Mrs Richardson did investigate the complaints by talking to staff, she found no evidence of bullying or similar behaviour. No disciplinary action has been taken by the Trust against Mr Loggie or anyone else.

[33] Despite Mrs Richardson's assurances, encouragement and advice as to steps she proposed to take to address the complaints, Mrs Forsbrey decided to resign within two days of first making her complaint about Mr Loggie. I find no evidence of any breach of duty by the Trust causing that resignation. It follows that there was no breach of sufficient seriousness to make it reasonably foreseeable to the Trust that Mrs Forsbrey would resign rather than put up with the breach. There was no conduct of Mr Loggie I find that amounted to a breach of duty by him or by the Trust, and there was no failure on the part of the Trust to respond to the concerns raised about Mr Loggie that forced Mrs Forsbrey to resign.

Determination

[34] For the above reasons, I find that a personal grievance has not been established by Mrs Forsbrey. She was not dismissed. Her resignation was a course she freely decided to take and was not one forced upon her by any breach of duty or unreasonable action by either Mr Loggie or the Trust.

Costs

[35] Costs are reserved. An application on behalf of the Waitangi National Trust may be made in writing no later than 21 January 2011. Mrs Forsbrey may reply in writing no later than 7 February 2011.