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Hazelden v Howick Village Optometrists Ltd AA 342/07 (Auckland) [2007] NZERA 692 (31 October 2007)

Last Updated: 19 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 342/07 5082500

| | |
|---------|--|
| BETWEEN | SUSAN HAZELDEN Applicant |
| AND | HOWICK VILLAGE OPTOMETRISTS LIMITED Respondent |

Member of Authority: Marija Urlich

Representatives: Michelle Dean, for Applicant Gary Pollak, for Respondent

Investigation Meeting: 13 August 2007

Submissions and further information received:

13, 14, 16, 21, 24 August and 4 October 2007 from Applicant

13, 23 and 27 August from Respondent

Determination: 31 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mrs Hazelden was employed as a receptionist in Howick Village Optometrists Limited's ("HVO") optometry practise from July 2005 until her resignation on 9 March 2007.

[2] Mrs Hazelden suffered a serious injury to her wrist in June 2006 requiring time off work to recover, during which she received accident related compensation. She says HVO pressured her to return to work before her wrist was properly healed with threats of dismissal and took and/or threatened to take unreasonable and unjustifiable disciplinary action after her return to work. Mrs Hazelden says it was this course of conduct and/or serious breaches of duty which led to her resignation. She seeks remedies consequent to her alleged unjustified constructive dismissal and

requests the Authority impose a penalty on HVO for failure to provide her with a written employment agreement.

[3] HVO says Mrs Hazelden was not constructively dismissed and that it has acted in good faith towards her. It says further that Mrs Hazelden has breached her obligations of good faith and raises a counterclaim penalty for lack of

notice.

Course of conduct/Breach of duty

[4] HVO is owned and run by Frith and Graham Jenkins. Mrs Jenkins is the practise manager and Mr Jenkins works as a dispensing optician. The practise is busy and employs ten staff including three receptionists, one of whom was Mrs Hazelden. The receptionist role was described as a key front line position for which a professional and friendly manner was expected.

[5] Mrs Hazelden has had many years experience as a medical receptionist and was well able to handle the role at HVO when she was appointed in July 2005. Mrs and Mr Jenkins described her as a well liked and capable employee. Mrs Hazelden said she enjoyed her job with HVO very much and had hoped that she would be able to work there until her retirement.

[6] Mrs Hazelden did not have a written employment agreement. There is no dispute that the core terms of employment were known to the parties ie, hourly rate and hours of work, and that a job description was introduced after Mrs Hazelden's return to work after her wrist injury.

(i) Wrist injury

[7] On 20 June 2006 Mrs Hazelden slipped in her garden and seriously injured her right wrist, breaking it and damaging the ligaments. Mr Hazelden telephoned HVO and advised of the accident. At 9am the following morning Mrs Jenkins visited Mrs Hazelden at home with some items for lunch. Mrs Hazelden was, understandably, in bed and the visit was carried out in her bedroom. Mrs Hazelden says a comment made by Mrs Jenkins during the visit has stuck in her mind; she says Mrs Jenkins told

her to get in touch with ACC and laughed "*because we won't pay you.*" Mrs Hazelden says this comment set the tone for HVO's dealings with her.

[8] The following day, 22 June 2006, Mrs Hazelden returned home from a medical appointment, concerning a health matter other than her wrist, and Mrs Jenkins arrived to inquire as to the outcome. Mrs Hazelden said she felt Mrs Jenkins was imposing on her but she did not say anything. Mrs Jenkins said she made the visit out of concern for Mrs Hazelden's welfare.

[9] Over the next month Mrs Hazelden was off work recovering from her injury. She visited a number of medical professionals in relation to her wrist injury. Medical certificates were duly provided to HVO.

[10] On 20 July 2006 Mrs Jenkins drove Mrs Hazelden to an appointment with her hand specialist. Mrs Jenkins said she wanted to sit in on the appointment with Mrs Hazelden. Mrs Hazelden asked the hand therapist what she thought of Mrs Jenkins' request. She said it was not appropriate and this was relayed to Mrs Jenkins who sat in the waiting room during the appointment and then drove Mrs Hazelden home.

[11] Later Mrs Hazelden was told by her hand therapist that the receptionist had overheard Mrs Jenkins make a telephone call to Mrs Hazelden's ACC case manager in the reception area and that her injury was discussed. Mrs Hazelden says this telephone call was made without her permission and was relayed to her by someone in the clinic who over heard the conversation. Mrs Jenkins says no such call took place. Mrs Hazelden did not raise this issue with Mrs Jenkins during her employment.

[12] On the evening of 25 July 2006 Mr and Mrs Jenkins visited Mrs Hazelden at home to ask when she would be returning to work. Mrs Jenkins said she needed to ask this question because Mrs Hazelden's absence was causing difficulties at work and she did not wish to engage a temp because she did not have the time to train one and HVO did not wish to incur the cost.

[13] Mrs Hazelden said she was taken back by this discussion and until then had not realised that her position with HVO was in jeopardy. Mrs Hazelden says this

meeting marked the beginning of a very stressful period which eventually led to her resignation.

[14] In August 2006 Mrs Jenkins wrote to Mrs Hazelden advising that she wished to collect some information from ACC and her healthcare providers about her injury and prognosis with a view to establishing when Mrs Hazelden would be returning to work. The letter advised that HVO had engaged a human resources consultant, Mr Ross Henderson, to carry out these inquiries and that Mrs Hazelden should send the consent forms directly to him. Mrs Hazelden completed the requested forms on 7 August 2006.

[15] Mr Henderson then wrote to Mrs Hazelden asking for the latest information about her injury and likely return date. He also wrote to the health professionals involved in the treatment of her wrist injury asking for details of the injury, Mrs Hazelden's recuperation, likely return to work date and attendant risks, if any.

[16] Mrs Jenkins spoke with Mrs Hazelden on 15 August 2006 and emailed Mr Henderson a summary of the conversation; Mrs Hazelden said she really wanted to get back to work, that she felt as if she had done something wrong, that her pain management was successful, that she had an appointment with her orthopaedic surgeon the following evening and hoped he would give her the all clear, that this situation was stressful for Mr Hazelden and that she understood HVO would not want her back at work unless she was fit to return to work but she was willing to sign a declaration that she would resign if she returned and was unable to perform her duties satisfactorily. Mrs Jenkins records in the email that she let Mrs Hazelden speak and said they would need to hear from her orthopaedic surgeon before making any decisions and that there was a process to follow.

[17] Also on 15 August 2006 Mr Henderson wrote to Mrs Hazelden advising that her absence from work had become protracted and was impacting on the business, that she would have to be 100% fit to return to work (because of occupational health and safety reasons and the nature of the role), that a decision as to Mrs Hazelden's continued employment would have to be made and HVO was waiting on information from Mrs Hazelden's medical specialists before making that decision.

[18] Mrs Hazelden says there was no reasonable basis upon which HVO could conclude that her absence from work had been protracted or was impacting on their business. She says there was no reasonable basis upon which HVO could question the nature of her injury and that it was unreasonable to make inquiries as to her likely return to work date.

[19] At about this time Mr Henderson, on behalf of HVO, declined an ACC fully-funded work trial. Mrs Hazelden is very critical of this decision. She says it was unjustified and unreasonable.

[20] The reasons for declining the return to work trial are set out in Mr Henderson's letter to Mrs Hazelden dated 15 August 2006:

"...because of the attendant risks and the absence of alternative tasks for you to complete."

[21] I can appreciate that this situation was stressful for Mrs Hazelden, as she expressed to Mrs Jenkins during the telephone conversation of 15 August 2006. However, I do not accept that advising Mrs Hazelden that her absence was impacting on the business and requesting information as to her health status and likely prognosis for the purposes of considering her employment status was unjustified or unreasonable. Mrs Hazelden did not raise any such concerns at the time and complied with all requests for information. Mr and Mrs Jenkins were up front with Mrs Hazelden about their concerns about her absence and it was reasonable that they should wish to make inquiries of her medical treatment providers as to the nature of her injury and when she would return to work.

[22] I accept Ms Dean's submission that as a general proposition an absence from work of 8 to 10 weeks due to illness does not trigger an inquiry into the viability of the ongoing employment relationship. An employer acting reasonably would consider each case on its merits. In this case Mrs Hazelden had suffered a serious injury which required her to have a considerable amount of time off work, I accept Mr and Mrs Jenkins' evidence that her absence was impacting on the business and in such circumstances it was reasonable that inquiry was made as to her likely return to work date.

(ii) return to work

[23] Mrs Hazelden returned to work on 22 August 2006. She said she should not have returned to work then but felt she had to keep her job with HVO. There is no evidence to support Mrs Hazelden's statement that she returned to work too soon. She had a medical clearance from her doctor. I am satisfied that she was fit to perform the duties for which she had a medical clearance.

[24] Mrs Hazelden says her return to work was not pleasant. She says on her first day she was not given the welcome back she would have expected after two months away on sick leave, that she did not receive the reorientation referred to in a letter from Mr Henderson, that Mrs Jenkins presented her with a job description on the morning of her return to work and asked her to comment on it (when she had never had a job description before) and told her if anyone asked where she had been she should say she had broken her wrist, that she was back at work now and not to elaborate.

[25] On the second day after Mrs Hazelden's return to work Mr Jenkins walked into the reception space and said loudly "Whose writing is this?" Mrs Hazelden said this made her feel very uncomfortable because it was her writing on the card, she was writing with the injured hand and Mr Jenkins would have known it was her writing.

[26] Mrs Hazelden did not raise her concerns about any of these issues with Mr or Mrs Jenkins.

[27] During Mrs Hazelden's absence the recording system for loading spectacles into the database had changed. A coding error was made and the person who had made the data entry could not be identified. Mrs Hazelden suggested sign-ins for each staff member to make identification easier. Her suggestion was not taken up. Mrs Hazelden said she felt vulnerable to blame for other staff members' errors because data entry was part of her role.

(iii) first disciplinary meeting – the boot collection

[28] About eight weeks after Mrs Hazelden's return to work at HVO she was rostered the Saturday of Labour Weekend along with the junior part-time receptionist. Mrs Hazelden asked the young woman to pick up a pair of boots for her from the boot-maker. The boot-maker was closed and the young woman repeated the task later that morning, again at Mrs Hazelden's request. Mrs Hazelden said her request was not unreasonable because reception was quiet at the time and the young woman agreed to the task.

[29] The young woman was uncomfortable about the request and voiced her concern to Mrs Jenkins. She told Mrs Jenkins she did not think Mrs Hazelden's request was right but did not know what to do because Mrs Hazelden was a more senior employee.

[30] Mrs Jenkins took the matter seriously. Mrs Hazelden was given a written request to attend a meeting on the following Monday or Tuesday (Mrs Hazelden to select a day) with a support person to discuss a progress report since her return and misuse of company time. Upon receiving the letter Mrs Hazelden attempted to speak with Mrs Jenkins about the issue but Mrs Jenkins said the discussion would have to wait until the meeting.

[31] Mrs Hazelden attended the meeting on Monday, 30 October 2006 accompanied by a family friend. He took detailed notes of the meeting which have been provided to me. I accept they are an accurate record of the meeting.

[32] The first part of the discussion concerned Mrs Hazelden's return to work. Mrs Jenkins said she thought Mrs Hazelden had fitted in well since her return to work and asked if Mrs Hazelden was still taking pain relief. Mrs Hazelden confirmed she was and that she was managing the pain. Mrs Jenkins asked and Mrs Hazelden confirmed that she was comfortable and managing her workload.

[33] The discussion then moved to the job description. Mrs Hazelden was asked if she wanted to add any duties to the list. She said she could not see any issues with it at that time.

[34] An aspect of the job description was personal telephone calls. Mrs Hazelden was asked to keep them to a minimum and to only make them during breaks. Mrs Hazelden was not told why this issue was being raised. During the meeting it was not made clear if HVO had a particular concern about Mrs Hazelden making personal telephone calls and if so why that concern was held. Mrs Hazelden said she felt singled out by this request because she observed other staff making personal calls unchecked. She never raised this concern with Mr or Mrs Jenkins.

[35] The issue about the collection of the boots was then put to Mrs Hazelden and she explained that she had asked the young woman to do the task because it was quiet and she thought it was best if she (Mrs Hazelden) remained because she was a more senior employee and something may come up that she was more experienced to deal with. Mrs Jenkins told Mrs Hazelden that she was upset about the incident and Mr Jenkins said in his view it was as if Mrs Hazelden had put her hand in the till. Mrs Hazelden apologised for any problem her request had caused and assured Mr and Mrs Jenkins it would not happen again. Mrs Hazelden then asked what would happen next. Mrs Jenkins said they would think about it, that the options were to accept Mrs Hazelden's explanation or issue a formal warning and that they would get back to her by the end of the week.

[36] This reference to the formal warning is the first indication Mrs Hazelden had that this matter could have disciplinary consequences. This was not fair; Mrs Hazelden should have been put on notice from the outset as to the possible disciplinary consequences of the meeting. Likewise Mr Jenkins' comment that Mrs Hazelden's conduct was akin to having her hand in the till was unreasonable and unfair. It was not conduct befitting a relationship characterised as one of good faith to speak to Mrs Hazelden in such exaggerated terms.

[37] Mrs Hazelden said during the course of her evidence that she could not understand why Mr and Mrs Jenkins were dealing with the matter so formally or why the young woman had not declined her request if she was uncomfortable with it. This meeting presented Mrs Hazelden with an opportunity to raise any concerns she may have had about such issues or her return to work. The meeting covered matters other than the disciplinary meeting and Mrs Hazelden was directly asked how she was settling back into work. She did not raise any concerns.

[38] The following day, 31 October 2006 Mrs Hazelden visited her doctor. Mrs Hazelden told him she was very stressed about her employment issues in addition to having to cope with her chronic pain. He prescribed her an antidepressant to help manage the pain (Mrs Hazelden had already completed a course of this antidepressant beginning early August 2006) and advised her to take a period of stress leave. Mrs Hazelden began the prescribed course of antidepressants but did not take any stress leave.

[39] HVO issued a warning letter to Mrs Hazelden on 8 November 2006. It is deficient in that it does not explain why Mrs Hazelden's explanation and apology were not accepted, does not indicate a time frame for the warning and does not clearly state the disciplinary consequences of the oral warning. Mrs Hazelden did not raise any concerns after she received the written oral warning.

[40] Mrs Hazelden said that from this point on she felt she was under scrutiny and was no longer trusted. By way of example Mrs Hazelden said the evening till balance duty was removed from her and taken by Mr Jenkins. Mr Jenkins said he had always balanced the till. The job description does not list till balance as a duty. Mrs Hazelden did not raise this concern about the till balance duty with Mr and Mrs Jenkins.

(iv) second proposed meeting – the data entry error

[41] On Wednesday, 28 February 2007 Mrs Hazelden received a letter asking her to attend a meeting on Monday, 5 March 2007, or other convenient time, to discuss a data entry error. The letter attaches details of the data entry error at issue, records that a similar issue had previously been discussed with Mrs Hazelden and records that a stock take was a consequence of the error, noting concomitant costs. The letter does not state that the meeting is disciplinary or that disciplinary consequences could follow. The letter does not frame the matters to be discussed in terms of alleged misconduct.

[42] Mrs Hazelden says this letter made her feel stressed. She said it was the last straw. Her daughter telephoned Mrs Jenkins to advise she was too unwell to attend work on Monday.

[43] Mrs Jenkins wrote to Mrs Hazelden that day advising that she understood she would not be at the meeting scheduled for that evening because she was unwell and rescheduled the meeting to Wednesday, 7 March 2007 at 5.30pm. Mrs Hazelden said she felt at her wits end when she received this note advising the meeting was rescheduled.

[44] Mrs Hazelden attended her doctor on Monday, 5 March 2007 who wrote the following medical certificate:

To whom it may concern Dear Sir/Madam,

Re: Susan Hazelden

This is to certify that the above lady has come to see me today regarding her work situation being too stressful and is affecting her tremendously, making her very tensed [sic] and jittery, crying and making her life a misery.

I have previously examined Sue before on 31.10.06 when something happened at work and she was stressed up in a similar manner. After examining her again today, I have advised her not to go to work under the present stress and the way it affects her as she may end up with a nervous breakdown.

Thank you for your attention

...

[45] On Tuesday, 6 March 2007 the medical certificate was delivered to Mrs Jenkins with the following note:

Dear Mrs Jenkins

I am writing this letter on behalf of Susan Hazelden.

Please find enclosed a copy of the Doctors certificate which is self explanatory. Due to this she will be unable to attend the meeting scheduled for Wednesday night.

Either myself or Susan will contact you later in the week to advise further. Yours faithfully

...

[46] On Wednesday, 7 March 2007 Mrs Jenkins wrote to Mrs Hazelden expressing her concern at her ill health, asking if she could write an explanation for the data entry error and raising the details of another data entry discrepancy for which an explanation was sought. The letter has a "ps" advising Mrs Hazelden that she has three sick days owing.

(v) alleged constructive dismissal

[47] The following day Thursday, 8 March 2007, Mrs Jenkins wrote again to Mrs Hazelden. The letter replies to the issues raised in the medical certificate:

- (i) expressing surprise and concern at the seriousness of Mrs Hazelden's health issues;
- (ii) recording that HVO had no knowledge of these health issues;
- (iii) recording that the medical certificate does not indicate when Mrs Hazelden would be returning to work and asking for such an indication;
- (iv) denying that Mrs Hazelden's illness is work related;
- (v) that Mrs Hazelden showed no signs of stress when the notice of the 28 February meeting was given to her or at any time prior to the end of the working day;
- (vi) accepting that Mrs Hazelden was not feeling well and expressing understanding that she may not wish to provide answers to the questions while away on sick leave;
- (vii) restating the alternative that Mrs Hazelden may wish to provide a written answer to the raised because of the concern and resources expended "*because of your mistake*"; and
- (viii) asking that HVO be kept up to date with her condition and likely return, that she would have to have clearance from a mental health specialist and advise that Mrs Hazelden had one day sick leave available.

[48] Mrs Hazelden said when she received this letter she felt that she had no option but to resign, which she did through her lawyer in a letter dated 9 March 2007, which advises:

- (i) Mrs Hazelden resigns from her employment with HVO;
- (ii) that her resignation is not voluntary and results from coercion of HVO since her wrist injury in June 2006;
- (iii) that coercion is particularised as lack of support from Mr and Mrs Jenkins, undue pressure to return to work when her injury had not

properly healed and intense and unfair scrutiny of minor issues since her return to work;

- (iv) that the campaign of coercion culminated in HVO's letter of 8 March 2007 expressing a conclusion that the stock error in question was due to Mrs Hazelden's mistake;
- (v) that Mrs Hazelden denies the error is her responsibility and believes the matter has been blown out of proportion;
- (vi) that Mrs Hazelden cannot continue to work in such an environment; and
- (vii) her resignation constitutes an unjustifiable constructive dismissal.

[49] The letter set out the background of Mrs Hazelden's claims, as detailed in the above narration.

[50] On 12 March 2007 Mr Henderson provided a detailed reply to the letter of 9 March 2007. The letter runs to six and a half pages and responds to each of the concerns raised on Mrs Hazelden's behalf.

Determination – was Mrs Hazelden unjustifiably constructively dismissed?

[51] A termination of employment brought about by a resignation can amount to a constructive dismissal if it falls within one or more of the following categories:

- (a) the employee is told to resign or be dismissed; or
- (b) the employer follows a course of conduct with the deliberate and dominant purpose of coercing an employee to resigning; or
- (c) a breach of duty on the part of the employer caused the resignation, and the breach was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing¹

[52] The last two situations apply here and the Authority must determine whether or not the actions of Mr and Mrs Jenkins justified Mrs Hazelden's resignation and

¹ *Auckland Shop Employees IUOW v Woolworths (NZ) Limited* [1985] 2 NZLR 372; *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 2 NZLR 415 [1994] NZCA 250; , [1994] 1 ERNZ 168

thereby amount to an unjustifiable constructive dismissal². Mrs Hazelden says Mr and Mrs Jenkins' adopted a course of conduct from June 2006 which undermined her confidence in her ability to do her job and her confidence that Mr and Mrs Jenkins' would treat her fairly and reasonably.

[53] Mrs Hazelden points to three categories of conduct which, she says coerced her into resigning from her employment; her employer's reaction to and management of the issues around her hand injury from June to August 2006, the issues leading up to and including the first disciplinary action in October 2006 and the inquiry into the data entry error in March 2007.

[54] To establish this ground of constructive dismissal Mrs Hazelden would have to show that her resignation was the dominant motivator for Mr and Mrs Jenkins' actions towards her. Given the discrete nature of these events, the lack of any link between them and the span of time involved this cannot be established. The evidence does not support Mrs Hazelden's claim that Mr and Mrs Jenkins engaged in a course of conduct designed to coerce her resignation.

[55] Mrs Hazelden asserts that each of the incidents she relies on amounts to a breach of duty sufficiently serious to make her resignation reasonably foreseeable.

[56] While, in my view, Mrs Jenkins' unannounced visits to Mrs Hazelden immediately after her accident and her request to attend the hand therapy session could reasonably be considered intrusive, they do not amount to a breach of duty. They are awkward attempts to balance what Mrs Jenkins understood where her obligations to the business and to Mrs Hazelden.

[57] I accept Mrs Hazelden was vulnerable and in pain at the time in question, but it is unclear why she invited Mrs Jenkins' into her home or accepted her offer of a lift to the hand specialist when she was under no obligation to do so. Mrs Hazelden successfully deflected Mrs Jenkins' attentions when she raised her concern with the hand specialist. If Mrs Hazelden had genuine concerns about Mrs Jenkins' conduct towards her she could have raised those concerns directly with her or through a representative. She did not and has not provided a reason why she did not.

² *Yong t/a Yong & Co v Chin Perkins J, AK AC 37/07, 20 June 2007*

[58] HVO had no legal obligation to accept the return to work trial and its reasons were expressed to Mrs Hazelden. She did not challenge those reasons and took steps to address the concerns expressed by HVO which resulted in her return to work.

[59] There is no evidence that Mrs Hazelden's return to work was not successful; the first disciplinary meeting records both Mrs Hazelden's and Mrs Jenkins satisfaction at her return to work and management of the work load. The job description was provided to all staff; there is no evidence that Mrs Hazelden was singled out. Mrs Hazelden considered and accepted the job description which was offered to her.

[60] The disciplinary investigation concerning Mrs Hazelden's request to the junior staff member concerned a serious issue. Mrs Hazelden's apology and undertaking not to repeat the conduct in question demonstrates that she accepted the issue was serious. I have set out above my concerns about the manner in which the meeting was conducted and the warning that was issued. Those matters cannot be taken any further because Mrs Hazelden did

not raise a personal grievance in relation to them within the statutory 90-day time limit.

[61] The next matter which Mrs Hazelden points to in support of her claim is the letters inviting her to attend a meeting on 5 March 2007 and the letters which followed on 7 and 8 March 2007. She describes these letters as the last straw.

[62] The letter of 5 March 2007 is not a disciplinary letter. It does not contain any threat to Mrs Hazelden's ongoing employment. While I accept the disciplinary nature of the October meeting was not revealed until the end of the disciplinary meeting and that Mrs Hazelden could reasonably query if the same "MO" would be employed by Mr and Mrs Jenkins' on this occasion, this query was never put to the Jenkins' and I do not accept, based on the letter, that Mrs Hazelden could conclude that the meeting would result in disciplinary conduct threatening her employment.

[63] Mrs Hazelden says the letters of 7 and 8 March 2007 were unreasonably persistent requests for an explanation on the data error. She says they were unreasonable because they were made in the knowledge that she was suffering from work place stress. I do not accept this. The letters ask if Mrs Hazelden is well enough

to provide a written response. They do not require a response. If Mrs Hazelden was unable to provide a written response then she could have said so.

[64] Mrs Hazelden is also concerned by the statement in the 8 March 2007 letter that the data entry error was her mistake. I accept that if this was a disciplinary investigation then this statement would indicate that Mr and Mrs Jenkins' had decided the outcome and that would be unfair because at this stage Mrs Hazelden had not had an opportunity to provide a response. However, for the reasons set out above I do not accept that Mrs Hazelden could reasonably conclude, at this stage, that this was a disciplinary investigation.

[65] I accept the principle that the cumulative effect of an employer's conduct towards an employee may amount to a breach of duty founding a constructive dismissal even if one or more of the component incidents relied on does not amount to a breach.

[66] Even if I accept that Mr and Mrs Jenkins' conduct amounted to repeated breaches of duty I would have difficulty making a finding that it was reasonably foreseeable that Mrs Hazelden could no longer work under the prevailing circumstances. Mrs Hazelden did not raise any concern with Mrs and Mr Jenkins that their conduct towards her was causing her stress and breached the obligations owed to her. The evidence of communications of stress pointed to in submissions do not refer to Mr and Mrs Jenkins conduct towards Mrs Hazelden. They refer to the understandable concern Mrs Hazelden had about the future of her employment. I have already found that the raising of these concerns was reasonable and justified in the circumstances.

[67] The evidence does not establish that Mrs Hazelden's decision to resign her employment was motivated by the unjustifiable actions of Mr and Mrs Jenkins. I accept that the procedural approach they adopted to employment matters did not sit easily with her. I have found they were entitled to adopt that approach and as Mrs Hazelden did not raise her concerns with Mr and Mrs Jenkins they were not in a position to address them.

Penalty – failure to provide a written employment agreement/provide notice

[68] Mrs Hazelden was employed by HVO for 18 months and during that time she did not raise a penalty claim for lack of an employment agreement. The penalty claim was foreshadowed in the resignation letter of 9 March 2007 and pleaded in the amended statement of problem filed in August 2007. An objection to this late pleading has been raised. There are no statutory requirements of form of pleading for a penalty other than the 12 month limit³. The objection is declined.

[69] Mrs Hazelden's evidence was that she asked for an employment agreement and Mrs Jenkins told her it was not necessary given the size of the business. Mrs Jenkins did not deny saying this. Mrs Jenkins was wrong; Mr and Mrs Jenkins' were legally required to provide Mrs Hazelden with a written employment agreement.

[70] I decline to order the penalty sought by Mrs Hazelden. There is no evidence that the lack of a written employment agreement created a problem between the parties. This decision should not be taken as acceptance of Mr and Mrs Jenkins' conduct in failing to provide the written employment agreement; they were legally obliged to do so and failed to fulfil that legal obligation. However, grounds to award a penalty do not exist.

[71] The claim for a penalty for lack of notice is declined. Given the respondent failed its statutory obligation to clearly state in writing the terms of employment at the outset of its relationship with Mrs Hazelden and had no evidence of damage consequent to the asserted breach this claim is baseless.

Costs

[72] Costs are reserved. The parties are invited to try to resolve this issue themselves. If they are unable then application may be made for a timetable to be set.

Marija Urlich

Member of the Employment Relations Authority

3 Section 135 [Employment Relations Act 2000](#)

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