

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Bridget Hunt (Applicant)
AND Mercury Consulting Group Limited (Respondent)
REPRESENTATIVES Melanie Brewer for the Applicant
Peter Cullen and Laura McKenzie for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Wellington, 23 November 2005
SUBMISSIONS 1, 2 & 5 December 2005. Joint Memorandum submitted on 5
December 2005 (see paragraph 47).
DATE OF DETERMINATION 13 February 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant commenced employment with Mercury on 21 June 2004 as a Career Services Sales and Service Executive. She signed off an employment agreement. The focus of her employment involved updating CVs and presenting them professionally, rather than actual recruitment, which was another role. Targets were set. There is a conflict about whether or not these were a guideline and if she was to worry about them.

[2] Ms Hunt reported to Mr Jon Barlow, the Business Development Manager. The business was overseen by Mr Vinod Govind, the managing director.

[3] Upon starting Ms Hunt was given an opportunity to care for her children: that involved finishing work early and working from home. Whatever the arrangement was did not work out and she was required to commence working regular office hours.

[4] The applicant worked in a building called Optimisation House in Grey Street where the business leased floor space. Mercury and the landlord had entered into negotiations, before the

applicant commenced, to buy out Mercury's lease for another tenant to use its floor. The negotiations could not be concluded and a significant increase in rent was proposed by the landlord in a rent review in March 2004. This was an on going issue when Ms Hunt commenced her employment. Much later new premises were arranged and a move occurred in mid December 2004.

[5] In August 2004 Ms Hunt asked for a support person.

[6] Messrs Barlow and Govind went overseas for 6 working days at the end of September and beginning of October 2004 and for 4 working days at the end of November 2004.

[7] During their absence Ms Hunt says that she became concerned about the security of her job when Mercury was given one week's notice by the landlord, of the Grey Street premises, to move out because of unpaid rent. She says that during their absences she was required to deal with the rent problems with the landlord and then organise the shift to new premises. Also, she says her work volumes increased. She took on medical recruitment work for a bonus entitlement to earn more money. She was left work to do while Messrs Barlow and Govind were overseas, and they expected her to take responsibility for it, and do what she could, or leave it, and to telephone them on matters outside her responsibility. Another problem that arose concerned an irate contractor who had not been paid. Messrs Barlow and Govind say that this was not an issue they expected the applicant to deal with.

[8] During September and November Mr Barlow and Ms Hunt worked on a business plan to engage a support person. Mr Barlow then convinced Mr Govind of the viability of employing a support person.

[9] Ms Hunt became medically unfit for work from 9 to 11 December 2004. The medical certificate mentioned stress over an increased workload.

[10] On 13 December 2004 another person was engaged to help for 21 hours in career services with the applicant. Work was shared between Ms Hunt, the new person, and Messrs Barlow and Govind.

[11] During the Christmas break of 2004 and the beginning of 2005 Ms Hunt's medical recruitment reduced because probably there was not much work in that activity. This is supported by Messrs Barlow and Govind suggesting rearrangements in the work organisation

[12] Mr Barlow says he became concerned when Ms Hunt started to show difficulties in maintaining her work and taking considerably more time to complete CVs. He says that he considered the possibility of Ms Hunt having personal or health problems.

[13] Mr Barlow says that because another employee was having difficulties coping with Ms Hunt's behaviour he took her out to lunch on 31 January 2005 to discuss work and any other issues she had. He says she raised a matter to do with a car park that he undertook to take up with Mr Govind, and a few personal problems. An explanation was given about the car park that Ms Hunt had access to at the old premises because it was available there but not available in the new premises and was not part of her remuneration package. Mr Barlow did not think that he had anything else to follow up. Nothing more was made of the car park issue. Ms Hunt does not dispute being taken out to lunch but not necessarily on that date.

[14] During January 2005 there was an issue about Ms Hunt's pay being late because of a problem with the cash flow, and instead of the pay being made one day before the pay was actually due as it was normally done, it was paid on the contractual date. Mr Govind offered to lend Ms Hunt some money until she was paid the next day.

[15] In January 2005 Messrs Barlow and Govind became aware that Ms Hunt was being treated by a GP and having tests at the hospital about what was making her feel unwell.

[16] They say that they discussed their concerns, and decided, although her problems were having a significant impact on the business, to give her some space and await the results of the tests (Barlow 84).

[17] In March 2005 Ms Hunt had an appointment with a neurologist. Mr Barlow disputes her telling him about the appointment in early March. He says that he became aware of the neurologist and other medical matters later in March. On 24 March Ms Hunt and Messrs Barlow and Govind met to discuss ways to help Ms Hunt achieve the targets and her mix of work that involved workloads and changing targets. Ms Hunt says she raised her workload being unmanageable and unrealistic: Messrs Barlow and Govind deny she raised these. At another meeting on 30 March between Ms Hunt and Mr Barlow there was a discussion about stress and health issues. Ms Hunt's evidence was that the discussions occurred at the same time.

[18] Mr Barlow says that he became aware Ms Hunt's medical tests had come to an end and he called a meeting to discuss her health. He says that she raised stress caused in the workplace and he was given a doctor's certificate for her to be away from work from 24 March to 4 April. He says she informed him that her stress was from Mr Govind telling her that if she did not reach the targets then the CV services would be closed and that she would not have a job. Mr Barlow says that at the meeting on 24 March Mr Govind definitely did not say this. Mr Govind denies saying it. At the point she raised the matter of stress in the workplace at the meeting on 30 March, Mr Barlow says that he went to get Mr Govind to join them, and upon doing so informed him what Ms Hunt was saying. Ms Hunt agreed to continue the meeting but became upset and left the meeting momentarily. She returned and Messrs Barlow and Govind say that they tried to explain what was happening in the business and its organisation and the division of work. They deny Ms Hunt's allegation that they immediately started to outline to her what she needed to do to justify her job despite her evidence that they agreed to drop her targets and meet everyday to discuss the workload. Mr Barlow denies making any comment to her to "*just snap out of it*".

[19] The parties disagree on whether or not these meetings achieved anything. Mr Govind decided to seek advice on what to do. He advised Ms Hunt by telephone that he wanted her to go to a psychologist and the company would pay. She chose to go to Dr Mariette Hopman, a name she obtained from the phone book. She saw Dr Hopman on 7 April 2005. Before the meeting Ms Hunt says the situation at work got worse when Messrs Barlow and Govind would not talk to her. They deny this. They say that Ms Hunt deleted her emails from her computer and cleaned out her desk. She says she tidied her desk.

[20] Messrs Barlow and Govind met with Dr Hopman a couple of days after she had seen Ms. Hunt, although their preference would have been to meet her before she met the applicant. They were told by Dr Hopman that her opinion was that Ms Hunt had clinical depression caused by workplace related stress. Contributing factors mentioned by her were unrealistic targets, undue pressure dealing with issues when Messrs Barlow and Govind were away and work overload. They were concerned that no mention was made of their efforts to help Ms Hunt and that Dr Hopman had only relied upon information given to her by Ms Hunt.

[21] They never saw Ms Hunt again. However Dr Hopman recommended further sessions with Ms Hunt and them to develop a more effective working relationship once she responded to medication. She conceded that a usual comprehensive assessment was not conducted due to time constraints and Ms Hunt's illness. Dr Hopman told them that she did enquire about Ms Hunt's

domestic issues and former employment and in her view these did not relate to her stress levels and did not contribute to her illness (26 May). She then qualified her assessment further on 9 June 2005 that there were a range of other variables that may have impinged on how Ms Hunt had coped with workplace stress such as early childhood events, prior employment experiences, social support, personality etc.

[22] Ms Hunt says that she produced a medical certificate that Messrs Barlow and Govind say they never received. This has not been explained any further.

[23] On 20 April 2005 they received from Ms Hunt's lawyers a claim for personal grievance because of workload and stress and decision not to return to work. They received a complaint from Ms Hunt's lawyers two days later for not replying in that time. They sought time to reply and to get advice including exploring workplace stress issues with OSH. They replied on 5 May 2005 denying the claims and raised a number of her personal issues to defend themselves from the claims of causing workplace stress. These included: being weepy at work that Mr Barlow says Ms Hunt told him it was because of a distressful divorce, her partner walked out of a job when Messrs Barlow and Govind were overseas, personal matters at home and monetary issues.

[24] On 10 May Ms Hunt then alleged that Mr Barlow had sexually harassed and bullied her; claiming that he yelled at her, that he said to her that he "*was going to get really pissed off*", and that he said other things of a sexual nature and that he behaved inappropriately at various times. He has accepted that he did say things that were inappropriate. He denies sexually harassing Ms Hunt.

[25] The parties attended mediation on 10 June 2005 but the matter was not resolved.

Discussion and findings

[26] The applicant's statement of problem encompasses causes of action that are summarised as follows: the respondent did not provide the applicant with a safe work environment, breached its obligations under the employment agreement and did not comply with the provisions of the Health and Safety in Employment Act. The respondent denies the claims. Furthermore the applicant claims she was sexually harassed by her manager, Mr Barlow. She claims she has a personal grievance for the employer's unjustified action from the above causing disadvantage. The applicant says that the respondent breached its duty and obligations of trust and confidence and good faith towards the applicant culminating in a constructive dismissal.

[27] The nature of the problem as it has been outlined has caused me to pay attention to the correspondence from the applicants' lawyers: 20, 22 & 26 April 2005, 2 and 10 May 2005, on what really is the issue. All of the claims have been denied by the respondent.

[28] I determine that the heart of this matter is related to the reasons why the applicant left her employment. Many of the rest of the issues the applicant has raised I am satisfied serve as background in the matter. The outcome of my investigation of the facts and the evidence placed before me will determine whether or not remedies are necessary to resolve the employment relationship problem.

[29] I agree with the respondent that the aggressive legalistic approach taken by the applicant in this matter has not assisted in supporting the employment relationship or in fixing any of the problems complained about by the applicant, if they had any substance. Her instructions that her lawyers correspond with the respondent aggressively has not been helpful.

[30] There are many issues of a factual nature that have come into dispute. I will deal with them as I have to.

[31] Primarily, this is a problem involving the reasons for the applicant's decision not to return to work. There are issues about whether or not the employer has breached the employment agreement and not complied with the Health and Safety in Employment Act. Finally, what significance do the allegations of sexual harassment and bullying have in the problem?

Has the employer breached the applicant's employment agreement?

[32] The applicant has claimed that the respondent breached clause 12 (d) of the employment agreement. Clause 12 (d) makes provision for:

"It shall be the responsibility of the employer to instruct and inform on all matters of safety and to provide protective clothing and equipment necessary for the protection of employees in the work situation".

[33] There is no evidence of any actual breach from the circumstances raised. The applicant was never been denied assistance and sick leave. She was offered assistance with a support person and

suggestions were provided to help her with her work. Upon the applicant notifying the employer that she was sick, and that her sickness could relate to stress in the workplace, the employer took action to get diagnosis. I will return to this upon commenting on the claim for constructive dismissal.

The claim of a breach of the Health and Safety in Employment Act

[34] There was no evidence that the applicant's role was inherently stressful or that the events she claims caused her stress would be outside the normal stressors of her job. Upon being notified of the possibility of stress in the workplace the employer requested an assessment and the applicant chose to go to Dr Hopman. I accept that the employer, upon receiving the assessment, and personal grievance being raised, set about getting advice. Unfortunately the applicant's legalistic approach to the problem meant that any other options had become problematic.

The medical evidence

[35] Dr Hopman's information, which was in a draft statement prepared, cannot be relied upon. I conclude that her assessment of the applicant was one sided as it did not take into account any information from the respondent. Indeed Dr Hopman failed to appear at the Authority, under summons, and could not be contacted. I am satisfied she was served with the summons, (affidavit produced including that she had been paid a travel fee to get to the investigation meeting), and would have known about the Authority's investigation meeting taking place. I cannot rely on her assessment. There is uncontested evidence that the assessment was not thorough and one sided.

[36] The applicant called two medical witnesses; Messrs Peter Gillies GP and Kevin Garner, registered psychologist. I find their evidence has not assisted the applicant's claim either. This is because Kevin Garner in his report dated 9 October 2005 made findings that the applicant had a history of susceptibility to stress related illnesses through out her life (document 21 produced).

[37] Dr Gillies could only relate what the applicant told him. He made no further enquires and did not seek any professional input. His medical notes of 8 April 2005 (document 31) say that the applicant was still stressed from doing the work of three people. His consultation with the applicant occurred nearly three months after the applicant's medical recruitment work had reduced and when she had an assistant to help with the workload.

[38] In view of the one-sided nature of the medical evidence I cannot accept the applicant's claim that any stress she suffered was caused by her workplace. It has not assisted the applicant refusing to provide her medical records of the relevant period without conditions. I was not prepared to accept her suggestion that I receive information which the respondent was not able to view and comment on. What is clear is that the applicant has a history of suffering from depression and or anxiety and she is susceptible to these types of injury. She was also prescribed a strong anti depressant that caused exhaustion and yawning at work. If the drug is discontinued too quickly it can cause panic attacks. This is a factor that may have affected the applicant's ability to cope at work. It was not necessarily prescribed because of the effects of her work place. The records provided have portions omitted in respect of her period of employment and there appears to be information missing from Dr Gillies' notes on 5 October 2004 and 14 January 2005. I accept the respondent's submission that the question of relevance is a legal one, and not a medical decision, where Dr Gillies determined the medical relevance of the notes omitted: See *Lloyd v Te Papa* (unreported) Judge Shaw 5 September 2003 WC 27/03. The applicant referred to other personal problems and matters in her life to Mr Barlow when they went to lunch. Other evidence produced supports that the applicant was stressed about money (document 19). In conclusion there is evidence of other factors potentially bringing about the applicant's medical condition. These included the suggestion by the employer of personal, family and relationship issues. Dr Hopman qualified her assessment further on 9 June 2005 that there were a range of other variables that may have impinged on how Ms Hunt had coped with workplace stress such as early childhood events, prior employment experiences, social support, personality etc. She was not clear in the information provided by her what the causes of the workplace stress she diagnosed could have been or what the levels of acceptable workplace stress would have been.

[39] Without disclosure of the medical records and with the one sided medical diagnosis provided I cannot determine whether the applicant's illness was caused by her workplace and any actions of Messrs Barlow and Govind. Therefore I determine that the applicant has not established any linkage between her illness and work.

[40] The time lapse between the medical certificate of 9 December 2004 and the meeting on 30 March does not assist the applicant because no other action on the doctor's comment was raised directly with Messrs Barlow and Govind. Furthermore at about the same time a support person was employed, there is the probability of a reduced work load and discussions occurred on the work organisation and arrangements.

The sexual harassment and bullying claims

[41] I have reflected on the evidence as to whether it was in the nature of the applicant not to have raised these matters earlier because of any embarrassment or effect of them on her. There is no evidence of this. I am supported by the fact that she did not raise such issues with Drs Hopman, Garner and Gillies, preceding the legal process. Mr Govind never received any complaint about Mr Barlow from Ms Hunt during her employment. There is no secondary and corroborating evidence of any harm (not that that condones inappropriate behaviour) or of the applicant complaining. There was no grievance raised or sufficient details provided of dates and time to establish a grievance independently of the claims only being relevant to the background. I conclude that Ms Hunt has not established that Mr Barlow's alleged behaviour and the behaviour that he has accepted as being inappropriate caused her to leave her employment. I have not been convinced that she was that concerned until she received the letter of 5 May from the employer in a legal setting that included matters she did not agree with. Without any medical diagnosis in regard to the claims of bullying and sexual harassment and any complaints made earlier I can not draw any linkage between them and any stress the applicant suffered in her work place.

[42] The applicant did not complain at the time or raise any grievance in respect of her claims about sexual harassment and bullying. Depending on when these occurred raises issues about the 90 day rule for raising a personal grievance. Her only complaint has been made through formal legal correspondence from 10 May and in a statement of problem, well after the relationship had broken down and the personal grievance was raised. This supports my conclusion that a linkage cannot be drawn between the claims and any stress the applicant says she suffered in the workplace.

Was the applicant constructively dismissed?

[43] It has been suggested that the employer embarked on a deliberate course of conduct to coerce the applicant to resign. The evidence does not establish this at all. The relevant test is whether or not there was a sufficiently serious breach by the employer that raised a substantial risk of a resignation being foreseeable. This has not been established for the following reasons:

- The respondent has not been found to have breached the employment agreement.
- The respondent has not breached its obligations under the Health and Safety in Employment Act. I accept the first time that the employer properly became aware that Ms Hunt had an issue about stress in the workplace was at the meeting on 30 March. Mr Brown became aware that the applicant had some personal problems and was undergoing tests. He presumed they were personal and decided to wait on the outcome of the tests. Ms Hunt had

taken sick leave. Nothing else of any particular note was raised to make it reasonably foreseeable that there was some cause for concern regarding stress in the workplace.

- The time lapse between the medical certificate of 9 December 2004 and the meeting on 30 March 2005. The explanation given by Messrs Barlow and Govind that at about the same time a support person was employed, there was a reduced work load and discussions occurred on the work organisation and arrangements, I find was plausible.
- The respondent sought to help the applicant:
 1. It engaged her in developing a business plan to employ a support person. A support person was appointed on 13 December in her area.
 2. The applicant agreed to undertake medical recruitment. It probably reduced when there was less work in the activity over Christmas 2004 and New Year 2005.
 3. Monetary targets were a guideline and the applicant was told by Mr Barlow not to worry about them and they were dispensed with having regard to the applicant's terms and conditions of employment.
 4. Mr Barlow and Ms Hunt agreed to meet each day.
 5. There were assurances given to Ms Hunt that there was no intention to close the CV services.
 6. The respondent engaged the services of a psychologist selected by the applicant, i.e. Dr Hopman.
 7. Ms Hunt was not prevented from taking sick leave.
- The respondent provided plausible explanations for the applicant's concerns about the rental for the premises, the relocation of the premises, the irate contractor and the late payment of the applicant's wages. On the first three she had no responsibility and in Messrs Barlow's and Govind's absence she was expected to ring them. There is conflicting evidence about the security of her position and the financial situation of the respondent that the applicant says stressed her. On the wages matter, Mr Govind offered to give her a loan for the payment that was one day late but in the contracted time. His action mitigates the applicant's claims about the effect of this on her. Also, Ms Hunt's belief that her security of employment and position were under threat because of the financial situation of the business can not assist her due to the time lapse of the events she has referred to about the premises, the irate contractor and unsupported conversations she says occurred between her and Messrs Barlow and Govind, who denied threatening her. Such actions would have been inconsistent with their decision to engage a psychologist and Mr Brown's reaction to get Mr Govind to join the meeting when Ms Hunt raised her stress on 30 March 2005.

[44] I also conclude that in all the circumstances it was not foreseeable that the applicant would resign from her employment. She agreed to attend a psychologist. She did not return to work after the consultation. No process had been put in place about what would happen after the consultation. A process had been started that the applicant agreed to when she chose Dr Hopman to assess her. There had at least been one meeting between the applicant and Messrs Barlow and Govind and the applicant had given no signal that she would resign accepting the suggestion to visit a psychologist. It was open to Messrs Barlow and Govind to expect a diagnosis and a subsequent process for any recuperation instead of foreseeing that the applicant could resign. She did not return to work after the appointment with Dr Hopman. Dr Hopman's involvement has been sharply criticised especially by Messrs Barlow and Govind. The employer denies receiving a medical certificate and appears to have become involved in some conflict with Dr Hopman about the applicant and her future that explains their actions or omissions in the short time before receiving the applicant's lawyer's letter.

[45] The applicant's claims are dismissed.

[46] I leave open for consideration the matter of Mariette Hopman's failure to appear on a properly served summons.

[47] Costs are reserved.

Joint Memorandum

[48] The parties' Counsel have advised me that the parties have agreed that the issue of any sick leave and annual leave will not involve either party claiming against the other on sick leave and annual leave payments. Also, they have requested that the details be withheld. I agree accordingly, by consent not to investigate the issue.

P R Stapp
Member of the Authority