

ATTENTION IS DRAWN TO THE
ORDER PROHIBITING PUBLICATION
OF CERTAIN INFORMATION
REFERRED TO IN THIS
DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 46
3095572

BETWEEN ITI
Applicant

AND SYC
Respondent

Member of Authority: Helen Doyle

Representatives: Nadia Tu'itahi, advocate for the Applicant
No appearance by the Respondent

Investigation Meeting: 21 January 2021 at Christchurch

Submissions [and further Information] Received: On the day from the Applicant and 25 January 2021
No submissions from the Respondent

Date of Determination: 10 February 2021

DETERMINATION OF THE AUTHORITY

- A ITI was unjustifiably disadvantaged and constructively dismissed from her employment with SYC.**
- B SYC is ordered to pay to ITI the following sums:**
- (i) Reimbursement of lost wages in the sum of \$533.90 gross.**
 - (ii) Compensation in the sum of \$20,000 without deduction.**
- C SYC breached the obligations of good faith and is ordered to pay a penalty in the sum of \$4000 within 28 days of the date of this**

determination. 80% is to be paid to ITI and 20% to the Authority for payment to the Crown.

D Ms Tu’itahi is to advise the Authority within ten working days of the date of this determination if there are any issues with unpaid wages and if not provide an gross amount of earnings as accurately as possible to calculate holiday pay from.

E Costs are reserved and will be dealt with in the determination about holiday pay and/or wages.

Prohibition from publication

[1] The applicant is concerned about the possibility of retaliatory action that may follow the determination of her employment relationship problems in the Authority. She took the step of advising the Police that she was attending the Authority investigation meeting.

[2] The applicant and the respondent both live in the same small town. Whilst the Authority did not hear from the respondent the evidence supported some basis for the apprehension on the part of the applicant.

[3] The Authority has given thought as to how it could reduce the applicant’s concerns. Identifying the name of the town and the names of the parties may inflame the situation because knowledge of the issues could become more widespread and there could be talk as a result. Non-publication of the names of the applicant and respondent and the location of the small town could alleviate that.

[4] The circumstances are unusual. The Authority concludes that they are such that a departure from the fundamental principle of open justice is required because of the specific adverse consequences.

[5] I prohibit from publication the name of the applicant and respondent and any details, including the town in which employment took place, under clause 10(1) of the Second Schedule to the Employment Relations Act 2000 (the Act).

[6] An online random letter selection tool has been used to select the letters in place of the parties' names and these do not bear any resemblance to their real names.

The investigation process

[7] SYC is an individual. She has only engaged with the Authority process following service of the statement of problem to the extent that she sent an email when there was an attempt to schedule a case management conference. In that email she explained amongst other matters that I will come to that she would not be able to attend the telephone conference. SYC did not lodge a statement in reply, attend the case management conference, lodge witness statements in accordance with the Authority notice of direction, or attend the investigation meeting. An Authority Officer sent an email to SYC to remind her about the investigation meeting but there was no response to his email.

[8] I am satisfied that the respondent was served with the statement of problem, advised about the case management conference, served with the notice of direction which followed the case management conference and served with the notice of investigation meeting. There was no appearance by the respondent at the investigation meeting. The Authority delayed the start of the meeting just in case SYC was running late.

[9] No good reason was provided as to why SYC did not attend the investigation meeting. In those circumstances the Authority commenced the meeting because there was no good cause shown as to why the respondent did not attend under clause 12 of the Second Schedule to the Act.

[10] Although the applicant wanted to attend mediation it did not take place.

The Issues

[11] The Authority needs to resolve the following issues in this matter:

- (a) Was ITI unjustifiably constructively dismissed?
- (b) Was there an unjustified action on the part of SYC by the failure to provide an employment agreement, time and wage and holiday records?

- (c) Was there a breach of the duty of good faith for which a penalty should be awarded?
- (d) If the personal grievances are established what remedies should flow and are there issues of contribution or mitigation.
- (e) Is there holiday pay owing?

Was ITI unjustifiably constructively dismissed?

Principles of constructive dismissal

[12] The Court of Appeal in *Auckland Shop Employees' Union v Woolworths (NZ) Ltd* stated that a constructive dismissal could arise in situation such as where:¹

- (a) an employee had given an employee an option of resigning or being dismissed;
- (b) an employer has followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or
- (c) a breach of duty by the employer led an employee to resign.

[13] The facts of this case fall into the third of the non -exclusive categories referred to by the Court of Appeal that a breach of duty is alleged.

[14] In such cases where a breach of duty is alleged the Court of Appeal in *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Officers (Inc)* stated the approach to take in establishing whether there has been a constructive dismissal or not.²

[15] The first question is whether the resignation had been caused by a breach of duty. This involves examining all the circumstances of the resignation. If the finding is that a breach of duty has caused the resignation then the next question is whether the breach was of sufficient seriousness to make it foreseeable that the employee would not continue to work in the prevailing circumstances.

[16] If the Authority gets to the point of finding that there was a dismissal then it will need to consider the justification of the dismissal.

¹ *Auckland Shop Employees' Union v Woolworths (NZ) Ltd* [1985] 372, (1985) ERNZ Sel Cas 136 (CA) at 374-375.

² *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 1ERNZ 168 at [419].

Reasons for resignation

[17] ITI commenced her employment on 28 November 2018 working 4 days a week 9am to 3pm. After 24 September 2019 she worked 5 days a week from 9am to 3pm until 15 November 2019 when she resigned. She was paid \$20 per hour. ITI said that she handed a resignation letter to SYC. ITI did not retain a copy of the letter but said in her oral evidence that it was “worded simply.”

[18] ITI said that she said that she resigned on 15 November 2019 for a variety of matters.

[19] In her oral evidence ITI said that one of the reasons for resignation was the failure, despite asking repeatedly, for an employment agreement to be provided. She found the absence of an employment agreement stressful having had one in other employment and she wanted to know the rules and responsibilities of her employment. Further she said that she never received pay slips despite inquiring on a regular basis and was unsure about her pay and annual holiday entitlements. She requested information from IRD to try to work out her payments however the IRD information only showed some of the payments she had received.

[20] Another reason ITI says that she resigned was that the work environment was very stressful, unhealthy and unsafe and that she was bullied on numerous occasions. ITI said in her evidence that in September 2019 whilst she was washing a client’s hair SYC threw a brush at her that had been used to mix hair dye and shouted “this is the wrong fucking brush.” ITI said in her oral evidence that she got some of the dye on her clothes and found the incident humiliating and was shocked.

[21] From August 2019 to November 2019 ITI said that SYC would often berate her in front of other customers while she was cutting hair. When I asked ITI how often comments were made that she described as nasty comments ITI responded “quite often most days.” On one occasion SYC said to ITI “I’m fucking sick of teaching you so many times how to cut hair.” SYC proceeded to snatch the scissors from out of her hand and ITI found this action unsafe.

[22] ITI said that she started to feel unsafe in work with the comments and other matters and began counselling to cope with the situation. She said that she raised with SYC that she

found the conduct unsatisfactory however it did not change. ITI said that she was committed to hairdressing and therefore stayed on.

[23] SYC's partner operated a business next to the business operated by SYC. ITI said that SYC and her partner argued daily and it caused distress to her and occurred in front of the customers.

[24] She also noted that SYC smelt of marijuana after leaving the salon to take her partner home for lunch but on being questioned by ITI denied that to be the case.

[25] ITI said that on occasions SYC would come into the salon and would yell at ITI to lock the door "he [her partner] is coming to get me." On 24 October 2018 ITI said she locked the door when instructed and SYC's partner yelled, smacked and kicked the door before going away. ITI advised SYC she was going to call the Police however SYC said that it was going to be "ok" and therefore ITI did not call the police. ITI said that she would tell SYC that she was feeling scared on these occasions which occurred she said about eight times but nothing was done about it.

[26] ITI kept some notes in a diary and said that she recorded days where there were fights and arguments between SYC and her partner. She said in her evidence that she would only make entries when something occurred at work. The Authority has seen several entries made in October and November. Although the entries were made in language other than English ITI said in evidence that they would have all related to incidents of arguing or fighting between SYC and her partner.

[27] On 13 November 2019 SYC had another argument with her partner and began to cry. She asked ITI to look after her client in the salon leaving ITI to manage the salon alone. When SYC returned later in the day ITI told her that she could not continue to work in the toxic environment. ITI says that she told SYC her actions and behaviours had stressed her out and the stress had increased over the previous six months. SYC said that if ITI left the salon that she would "top herself" and that it would be ITI's fault. The Authority has viewed a text message sent by the applicant in respect of the incident expressing her concern to the respondent. The Authority has also viewed the text message in response sent from the

respondent in which the respondent apologised and expressed she was stressed and that was why she had made the comment.

[28] ITI said that she started getting panic attacks and went to the counsellor that she had been seeing as a result of the work environment. The counsellor organised an emergency doctor's appointment the following day on 14 November and ITI was given a medical certificate until 14 December 2019.

[29] On 15 November 2019 ITI attended at the salon with a letter of resignation and the medical certificate. ITI said in her evidence that her resignation was immediate.

[30] I accept that the above matters cumulatively formed the reasons for resignation.

Was the resignation caused by a breach or breaches of duty?

[31] There were a number of breaches of duty that caused ITI to resign. ITI was not provided with an employment agreement despite what she says was repeated requests for one.³ She was not able to access information about her pay. A request for payslips would have been satisfied by ITI being able to access the wage and time record that is required to be kept under s 130 of the Employment Relations Act 2000. ITI says that she was not provided with any information to understand the deposits into her account when she asked for it. The IRD information that she resorted to requesting to understand the pays did not record all of the payments made to her.

[32] There is an implied duty that SYC treat ITI in a fair and reasonable manner and that she provide her with a safe and healthy work environment. ITI was subjected to behaviour, particularly in the last six months of her employment, in the form of unpleasant and nasty comments. There were two specific incidences that she recalled in front of clients that resulted in her feeling shocked and humiliated and she had safety concerns about one because it involved scissors. She said that she expressed her concerns about this to SYC but the behaviours continued.

[33] The impact of bullying on those who are subjected to it can be significant. In this case ITI started attending a counsellor whilst still employed to deal with the stress that she

³ Sections 63A, 64 and 65 of the Employment Relations Act 2000.

was experiencing. I have only heard evidence from ITI but I conclude that she was subjected to unreasonable behaviour directed towards her by SYC. It resulted in psychological harm. I am strengthened in my conclusion by SYC's own description of her behaviour in her email of 27 August 2020 to the Authority. In that email she explains stress as a reason for her behaviour in that she was unwell and "being bully."

[34] It is not a situation where there was a single instance of unreasonable behaviour. It was repeated behaviour. It is behaviour that falls within the Worksafe definition of bullying.⁴ In behaving in this manner SYC breached the obligations she had to provide ITI was a safe and healthy workplace.

[35] Another reason that ITI says she resigned was the fighting that ITI witnessed between SYC and her partner that on several occasions involved locking the doors to the business to keep SYC's partner outside. Whilst SYC understood that this scared ITI there was nothing to indicate this behaviour would stop and/or be managed in a way that did not impact on ITI in her employment. ITI was not provided in those circumstances with a safe work environment or with fair and reasonable treatment. That was a breach of SYC's obligations. Finally ITI says that it got too much. ITI told SYC that she could not continue to work in the environment and SYC threatened to "top herself" if ITI left. Although she apologised for that it was not clear from her text that her behaviour would change in the future. ITI started having panic attacks.

[36] I find that there were breaches of duty as set out above that caused the resignation.

[37] The breaches and in particular the bullying and unfair and unreasonable behaviour were sufficiently serious that a risk of resignation was foreseeable and that was indicated clearly to SYC on 13 November 2019.

[38] ITI was constructively dismissed from her employment with SYC from 15 November 2019.

Justification

⁴ Worksafe New Zealand "Preventing and Responding to Workplace Bullying: The Guidelines first published in 2014 and updated in 2017.

[39] I do not find that there was justification for the dismissal. If SYC was unwell then there was no evidence of any steps she took to make sure that her behaviour did not create an unsafe environment for ITI. The behaviours continued over an extended period.

[40] The dismissal was unjustified. ITI has made out her claim that she was unjustifiably constructively dismissed. She is entitled to consideration of remedies and I will return to those after considering the claims for unjustified disadvantage which overlap to a degree the finding of unjustified dismissal. I shall nevertheless make findings.

Unjustified disadvantage claims

[41] I accept ITI's evidence that she was not provided with an employment agreement or information about her pay during her employment. I was less clear about the request for holiday leave entitlements. I conclude the request was more likely made after employment ended. Although it is a statutory requirement to provide holiday and leave information I could not conclude ITI asked for holiday record information during her employment. I cannot conclude therefore there was a lack of justification in not providing the information during the period of employment.

[42] I find that the failure to provide ITI with a written employment agreement was unjustified. ITI asked many times for an employment agreement and was not provided with one. The absence of an agreement was a disadvantage. An employment agreement would have provided guidance on how to resolve employment relationship problems that arose during the relationship and clarified pay and other matters.

[43] ITI was unclear about what she was paid and was not provided with any information despite asking for this. ITI should have been provided with a copy of the wage and time record. The failure to do so was unjustified and disadvantaged ITI.

[44] Disadvantage grievances are established for the failure to provide a written employment agreement and wage and time information.

Remedies

Lost Wages

[45] Under s 123(1)(b) of the Act the Authority must, whether or not it provides other remedies, order the employer to pay to the employee the lesser of a sum equal to lost remuneration or to 3 months ordinary time remuneration.

[46] The Authority was only provided with IRD earnings after dismissal to 31 March 2020. After that date as I understand the evidence ITI's husband obtained employment and ITI reduced her work hours. In the absence of any medical evidence there was in all likelihood a break in the chain of causation with respect to lost earnings after that date.

[47] The figures provided by Ms Tu'itahi after the investigation meeting for earnings from one employer appeared to relate to the 2018 period rather than the period from November 2019. Until ITI was offered increased hours to 35 hours per week by SYC she also worked part-time hours with this employer. This stopped after September 2019. I have put the earlier figures to one side. That makes a significant difference to gross income after employment ended.

[48] Between November 2019 and 31 March 2020, a period of 19 weeks, ITI earned \$12,766.06 gross or \$671.90 per week following her dismissal. She would have received for 13 weeks from SYC calculated on the basis of 35 hours at \$20 per hour the sum of \$9100 gross or \$700 per week. Actual loss therefore is \$700 less \$671.90 which is \$28.10 per week for 19 weeks which is \$533.90. The lost remuneration is the lesser sum than three months lost wages.

[49] Subject to any issues as to contribution ITI is entitled to reimbursement of lost wages in the sum of \$533.90 gross. Although claimed I do not award interest on that sum.

Compensation

[50] I have assessed compensation on a global basis because there were a number of concerns and incidents that culminated in the decision to resign. The Authority heard significant and compelling evidence from ITI and her husband about humiliation, loss of dignity and injury to feelings.

[51] It was established that ITI had previously suffered from depression but had become well. Her treatment by SYC caused a further depressive episode, panic attacks and poor

sleep patterns. There was no evidence to support that the treatment and the issues with SYC's partner would be resolved. That caused considerable stress. ITI was prescribed medication.

[52] After dismissal ITI continued to suffer from a lack of motivation and the impact on her confidence was considerable. I heard from ITI's husband. He said that before termination ITI was "very scared" about going to work and concerned about her safety. After dismissal he thought that she may be better but that she was not. He described ITI staying in her room and he confirmed that she still takes antidepressants due to her time working with SYC. He said that she did not want to go out and work in front facing customer roles and had lost all of her confidence. ITI still struggles to sleep and quite often has panic attacks. He considered that she was still suffering from stress and that this manifested itself physically and emotionally. ITI also finds it difficult to go out because she is worried about the possibility of seeing SYC around town.

[53] ITI gave evidence that in November 2020 her new employer advised that he had a haircut and SYC had asked if ITI was working for him. SYC told ITI's new employer she was friends with ITI and that she had not done anything wrong but ITI was taking her to the Authority. ITI was questioned about this by her new employer and he suggested that she stop the Authority process. She felt that SYC was still impacting on and controlling her after the relationship had ended.

[54] I accept that the impact of the events leading to the resignation were significant. After her dismissal ITI became concerned about financial matters. ITI also said that there was a complete failure by SYC to respond to the raising of concerns and any matters related to the Authority process. She was very disappointed that SYC did not attend the Authority investigation meeting. Her concerns were exacerbated by the recent discussion she had with her current employer about a conversation he had with SYC.

[55] Subject to any issue about contribution ITI is entitled to an award for compensation in the sum of \$20,000.

Contribution

[56] I am not satisfied that there was any conduct on the part of ITI that could sensibly be described as contributing to the unjustified constructive dismissal grievance or the disadvantage grievances.

[57] There is to be no reduction of the above remedies under s 124 of the Act.

Penalty

[58] A penalty is sought for a breach of good faith. A penalty is available under s 4(A) of the Act if a failure by a party to an employment relationship to comply with the obligations of good faith is deliberate, serious and sustained or it was conduct intended to undermine the employment relationship or employment agreement.

[59] The duty of good faith includes parties to an employment relationship being active and constructive in establishing and maintaining an employment relationship in which parties are responsive and communicative. There were breaches of good faith in this case because of the behaviour towards ITI and the failure to be responsive to her concerns when she raised them about matters in the relationship that concerned her.

[60] I have paused in respect of deliberateness/intent in light of the mental health issues that SYC states she had at the time in the one email she sent to the Authority. I do conclude SYC was capable of some insight into her behaviour. For example SYC referred to being depressed and stressed in text messages to ITI at the time of the particularly inappropriate statement on 13 November 2019 and said “sorry.” She also acknowledged to the Authority in the one email sent as part of the process that she had been unwell and a bully. What SYC did not do is reassure ITI during employment how ITI’s concerns could be resolved and that the behaviour would stop. I cannot conclude that there was no ability for SYC to control her actions or resolve concerns. The requirements for a penalty for a breach of good faith are made out.

[61] The maximum penalty under s 135(2)(a) of the Act for an individual is \$10,000. I have had regard to the factors in s 133 of the Act which are non-exhaustive including the number and extent of the breaches, the seriousness and the vulnerability of ITI. No steps

were taken to reduce the adverse impact of the breaches on ITI. The impact of the conduct on ITI was particularly serious and there was some vulnerability for ITI. I conclude when assessed with other penalties awarded an appropriate penalty is the sum of \$4000, of which 80% is to be paid to ITI and the balance to the Crown within 28 days of the date of this determination.

Holiday pay and unpaid wages

[62] SYC was directed by the Authority in its notice of direction dated 28 August 2020 to lodge and serve within 20 days a number of documents. These included wage and time, holiday and leave records and advice as to what three payments made to ITI after her employment ended were for.

[63] There was no compliance with any of these requests.

[64] A further issue arose during the investigation meeting that whilst not a claim in the statement of problem ITI queried whether she had been paid appropriately. It is not readily apparent whether ITI was paid correctly or not. Payments were often consistent but from time to time did vary.

[65] ITI's bank accounts record all net payments made to her by SYC. It is clear when I compare those to the IRD records provided for the period of employment that not all payments made to ITI have been accounted for to IRD. For example although ITI started her employment on 28 November 2018 the first payment showing from SYC in the IRD record is for January 2019 in the sum of \$390.26 gross. ITI's employment continued until November 2019 however the IRD records only show payments made to ITI to 31 August 2019.

[66] ITI's employment ended within 12 months. Section 23 of the Holidays Act 2003 provides how holiday pay is to be calculated in those circumstances. In those circumstances subsection (2) provides:

- (2) An employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount –
 - (a) paid to the employee for annual holidays taken in advance; or

(b) paid in accordance with section 28.

[67] In ordinary circumstances the holiday pay calculation would be straightforward.

[68] I consider that there two payments received after the relationship ended should be credited to any holiday pay owing. These are the sum of \$602.82 and \$446.60. I am satisfied that payment of these amounts was in all likelihood for holiday pay and the third amount for \$10 was for something else.

[69] Additionally ITI says that she took four days annual leave in advance. The evidence supported this was before the arrangement for five days work each week. SYC has not provided any records to support leave otherwise taken. I accept ITI's evidence about leave that she has actually taken in the circumstances as I am entitled to do under s 83(4) of the Holidays Act 2003. An amount of \$480 would also need to be deducted from 8% of gross earnings calculated on the basis of 24 hours multiplied by \$20.

[70] Calculating the gross income from which deductions are to be made will involve clarification of whether ITI accepts the net payments she received in her bank account were the appropriate payment for her wages. If ITI does not accept that she was paid properly then any claim should be quantified and provided to the Authority and SYC so that SYC has an opportunity to comment because this was not part of the original claim.

[71] If ITI accepts that the net payments in her bank account reflect what she was owed then Ms Tu'itahi is to provide the Authority with as accurately as possible a gross income figure for the 8% holiday pay calculation before the above deductions are made. I accept that this is particularly difficult and an exact figure will not be possible.

[72] I will give Ms Tu'itahi 10 working days to advise the Authority of those matters.

Costs

[73] I will reserve the costs and determine them with the holiday pay and/or outstanding wages issue.

Orders made

[74] SYC is ordered to pay to ITI the sum of \$533.90 gross being reimbursement of lost wages under s 123(1) (b) of the Act.

[75] SYC is ordered to pay to ITI the sum of \$20,000 being the payment of compensation under s 123 (1)(c)(i) of Act.

[76] SYC is ordered to pay a penalty of \$4000 for a breach of good faith within 28 days of the date of this determination. 80% is to be paid to ITI and 20% to the Authority for payment to the Crown.

[77] Within 10 working days of the date of this determination Ms Tu'itahi is to confirm whether there are any outstanding issues about wages received and if not advise as accurately as possible a gross earnings figure for calculation of holiday pay.

[78] Costs are reserved and will be dealt with in the determination about any outstanding wage and holiday pay.

Helen Doyle
Member of the Employment Relations Authority