

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 188
3098572

BETWEEN STACEY JAMIESON
 Applicant

A N D CANTERBURY BULK
 FREIGHT LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Danielle Mills-Godinet, counsel for the Applicant
 Paul Brown, advocate for the Respondent

Investigation Meeting: 26 November 2020

Submissions Received: 15 December 2020 from the Applicant
 24 December 2020 from the Respondent

Date of Determination: 7 May 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Stacey Jamieson worked for Canterbury Bulk Freight Limited (CBF) from 4 December 2017 in an office and warehouse support role. In this role Ms Jamieson worked closely with Sonia Rawson, CBF's Office Manager.

[2] Ms Jamieson says she was bullied by Ms Rawson and when she raised her concerns, both with Ms Rawson directly and then Alex Cowdell, the director and shareholder of CBF who was effectively the General Manager, CBF did not do anything about it and after a short lapse the bullying continued.

[3] Ms Jamieson says the bullying came to a head in May 2018 and she spoke to Mr Cowdell about it; his response was to advise her that her role was being reduced and she would work part time in the office and there would be some additional hours of work available helping on the trucks with deliveries. Ms Jamieson was not prepared to work part time and was not able or willing to do the additional work on the trucks as this did not fit with her child care responsibilities, so she resigned.

[4] Following her resignation, Ms Jamieson raised personal grievances for unjustified dismissal and unjustified action causing disadvantage.

[5] CBF denies any liability for Ms Jamieson's personal grievances. It says Ms Jamieson performed poorly in her role, which caused frustration for her and Ms Rawson. It dealt with Ms Jamieson's poor performance as it arose and often Ms Jamieson responded well to this by accepting responsibility and trying harder. But there was a disconnect between Ms Rawson's supervision and instructions and Ms Jamieson's ability to improve – this was not bullying by Ms Rawson, rather it was supervision and instruction that Ms Jamieson ultimately took exception to because she could not do her role without making mistakes.

[6] After reflecting on what was occurring, CBF formed the view that part of the problem was the structure of the two roles filled by Ms Rawson and Ms Jamieson. There was insufficient separation of tasks that led to duplication of work and conflict over how work should be done. CBF says it decided that restructuring the roles to reduce the work done by the office and warehouse support role and increasing the work done by the office manager would create the needed separation as there would be less supervision, less cross over of work and ultimately less chance of conflict between Ms Rawson and Ms Jamieson. It also took the view that it could offer Ms Jamieson additional work on the trucks as a drivers assistant in order to keep her employed full time.

[7] CBF decided that it would explore this restructure and change of roles with Ms Jamieson. It did this by consulting with her and allowing Ms Jamieson to trial the work on the trucks. When it decided to implement the proposed restructure Ms Jamieson then decided she did not want the full time role (made up of the part time office role and the part time truck role) and she resigned – but it says that cannot be an unjustified dismissal.

The claims

[8] Ms Jamieson's statement of problem claims:

- (a) She was unjustifiably dismissed based on constructive dismissal. This arises out of CBF's failure to protect her from bullying by Ms Rawson and its unilateral decision to change her full time role, which led her to resign.
- (b) CBF acted in an unjustified way that caused disadvantage to her employment. This being because it failed to protect her from the bullying by Ms Rawson.
- (c) CBF failed to pay her correctly for two days she did not work during her notice period when CBF told her not to come into work.

Unjustified action causing disadvantage

[9] Section 103(1)(b) of the Employment Relations Act 2000 (the Act) sets out that an employee may have a personal grievance against their employer where that employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.

[10] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustified action causing disadvantage personal grievance are:

- (a) What does the employee say the employer did and did the employer act as alleged?
- (b) If so, did these actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions justifiable?

What does Ms Jamieson say CBF did?

[11] Ms Jamieson's complaint is that she was bullied by Ms Rawson and CBF did not protect her from this; acknowledging that bullying by a colleague does not give rise to an unjustified action grievance against an employer per se, rather it is the failure to protect the employee from that behaviour that gives rise to the grievance.

[12] So I will consider if Ms Jamieson was bullied by Ms Rawson and then if she was I will consider if CBF failed in its obligations to protect her from that bullying.

Was Ms Jamieson bullied by Ms Rawson?

[13] Ms Jamieson and Mr Cowdell both acknowledge that when Ms Jamieson was employed by CBF she had little prior experience in office and administrative work. But CBF was committed to giving Ms Jamieson a chance as she was keen to learn and Ms Rawson would be able to train and supervise her in her role.

[14] CBF had employed office staff before and had trained those employees with what it described as on-the-job training, that is, employees being shown what to do by Ms Rawson and then being supervised in doing the tasks.

[15] Ms Jamieson was apprehensive about being trained this way and felt she was not learning the job properly. Despite this, she acknowledged that for the first month or so of her employment things went smoothly and she seemed to respond to the training and supervision.

[16] However, over time this on the job training became problematic:

(a) From Ms Jamieson perspective she believed there was a deterioration in Ms Rawson's conduct toward her. Ms Jamieson described this deterioration as primarily manifesting in comments from Ms Rawson when she got something wrong or did not know how to do something, which made her feel stupid and impacted on her self-esteem. These comments included retorts such as "it's just common sense" and "I don't know why you're not getting it".

(b) From CBF's perspective it believed Ms Jamieson's performance deteriorated and she made increasingly more mistakes and did not respond to instruction and direction from Ms Rawson. Ms Rawson acknowledged that she became frustrated by this and did say the occasional comment such as "it's just common sense" but this was not meant to be an insult.

[17] Having considered the evidence on what occurred I find the following:

(a) Despite starting positively in December 2017 by February 2018 Ms Jamieson was making mistakes at work and her performance was erratic.

(b) CBF dealt with some of the performance issues informally and Ms Jamieson responded well to this, including being positive about her role and her future with CBF, but her performance did not improve overall and she continued to make mistakes.

(c) Ms Rawson became frustrated with Ms Jamieson and began to question how she could train and supervise her. At times Ms Rawson was abrupt with Ms Jamieson in response to her mistakes and on occasion she did respond by simply completing tasks herself rather than going over the work again with Ms Jamieson.

[18] Ms Jamieson responded to the deterioration in her relationship with Ms Rawson and her poor performance at work on 24 March 2018 when she sent an email to Ms Rawson acknowledging her poor performance at work and identifying concerns from her perspective about why and how that was occurring. This was essentially a communication that indicated she took responsibility for her failings and the deteriorating work relationship; Ms Jamieson acknowledged that she should be making fewer mistakes and that her response to her failings was to shut the communication down creating a cycle of frustration and anger for both of them.

[19] This is a key piece of evidence from my perspective. It shows an objective assessment by Ms Jamieson of the problem and contemporaneously encapsulates what was happening. It indicates, as does the other evidence I have summarised above, that Ms Rawson was not bullying Ms Jamieson but rather trying to manage and supervise her, albeit in a limited way that was informed by Ms Rawson's own personality and frustration at what was occurring. The end result was the working relationship and management was not ideal and did not work for Ms Jamieson but I do not find that this amounted to some adverse or unacceptable behaviour such as bullying.

[20] As a result of this finding the action complained of – that CBF did not protect Ms Jamieson from bullying – did not occur. Based on this I do not need to assess any of the further aspects of the personal grievance; Ms Jamieson cannot have a personal grievance for unjustified action causing disadvantage.

Unjustified dismissal

[21] Ms Jamieson's grievance for unjustified dismissal arises because she resigned when her role was changed by CBF.

[22] The first point about Ms Jamieson's unjustified dismissal grievance is that there was no dismissal in the normal sense. A dismissal requires an action by the employer amounting to a sending away.¹ That was not the case here as Ms Jamieson resigned.

[23] However, resignation can be a dismissal in certain circumstances; this is a constructive dismissal. In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* the Court of Appeal set out three categories in which a resignation can amount to a constructive dismissal.²

[24] Counsel for Ms Jamieson submits that two of these three categories apply:

(a) CBF followed a course of conduct with the deliberate and dominant purpose of causing Ms Jamieson to resign.

(b) CBF breached a duty owed to Ms Jamison causing her to resign.

[25] Both of these allegations arise from the events leading up to Ms Jamieson's resignation whereby CBF changed Ms Jamieson's role.

[26] The relevant events occurred from the end of March 2018, shortly after Ms Jamieson's email to Ms Rawson which I described above. Whether the actions of CBF were in response to that email or just an overall view of the poor work performance by Ms Jamieson and her deteriorating relationship with Ms Rawson is not clear.

[27] On 28 March 2018 Mr Cowdell sent an email to CBF's HR advisor which stated:

I am going to have to move the office role to a part time basis as it is simply not working having two people trying to cover the job.

[Ms Rawson] believes she is doing the bulk of the role herself. Their inability to follow procedural systems is becoming tiresome and is impacting service delivery.

On Tuesday I will meet with [Ms Jamieson] to discuss her role possibly becoming part time from the start of may. (sic) If [Ms Jamieson] wants to

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

² *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374-375.

remain in full time employment I will suggest that we move her onto one of the trucks as a driver assistant to top up her hours.

While I do not believe [Ms Rawson] is able to cope with the workload I believe if I keep Andy local he should be able to move into a partial support role. I am hopeful that it will only take a couple of months to get someone else up to speed to operate in a support role. It will limit [Ms Rawson's] ability to be away from Christchurch but I cannot allow the current friction to continue.

[28] Then on 3 April 2018 Mr Cowdell met Ms Jamieson and discussed the potential change to her role. He produced a draft employment agreement shortly after this meeting which indicated what was proposed. And following the meeting Ms Jamieson did work on the trucks on occasion as a driver assistant – I am not satisfied that this was an extensive trial period of this new role as Mr Cowdell suggested.

[29] On 23 April 2018, after Ms Jamieson had worked as a driver's assistant a few times Ms Jamieson raised a concern with Mr Cowdell about the hours of work required and the lack of certainty about finishing times when she was out on deliveries, as she had childcare commitments that would be impacted by any finishing time after 5:00 pm. Despite this conversation Ms Jamieson continued to do some work as a driver's assistant. On at least one occasion when she was doing this role Ms Jamieson was late returning to the CBF depot and had to make alternative arrangements for child care.

[30] Mr Cowdell acknowledges that Ms Jamieson raised a concern over finishing hours when working as a driver's assistant but says despite this Ms Jamieson indicated she wanted to spend more time on the trucks. Ms Jamieson says that at some point she told Mr Cowdell she did not want to keep working as a driver's assistant as the hours would not work out for her.

[31] On 21 May 2018 Mr Cowdell met Ms Jamieson and told her there was not enough work to continue to employ her in her office role. Mr Cowdell says he told Ms Jamieson that as result of her continuing performance issues there was no scope for her to grow into managing other areas of the operations.

[32] Ms Jamieson says her recollection of this meeting was she was told she had made mistakes in her office role and as a result Ms Rawson was picking up her work. This meant

there was not enough work for her to continue full time and her role was being downsized. Ms Jamieson says she thought she was being made redundant.

[33] Ms Jamieson then called Mr Cowdell later on 21 May 2018 and asked him if she was being made redundant. Mr Cowdell told Ms Jamieson she was not being made redundant.

[34] On 22 May 2018 Ms Jamieson met Mr Cowdell again and he confirmed her office role was being reduced to part-time hours and she could take on additional work as a driver's assistant. Ms Jamieson then resigned.

[35] There was some conflict between Ms Jamieson and Mr Cowdell about the events of 21 and 22 May 2018. Having reflected on the evidence and having considered what is credible in terms of the contemporaneous documents and how the events hang together as a narrative of what is likely to have occurred, I conclude the following in respect of 21 and 22 May 2018 events:

- (a) In the 21 May 2018 meeting Ms Jamieson was told her office role was being reduced to part time because parts of her work were now being done by Ms Rawson. She was also told there was no scope for CBF to develop her skills to expand the part time office role back to full time – i.e. there was no prospect of additional office based work for her.
- (b) In the 21 May 2018 phone call, Ms Jamieson asked if she was being made redundant because her role had been reduced. I think this was about her saying if I do not accept reduced hours what will CBF do. Ms Jamieson was told CBF would not make her redundant – so following this conversation Ms Jamieson was left thinking she had three options, accept the reduced part-time office role only, accept the hybrid role of part-time office role supplemented with the driver's assistant work or resign.
- (c) On 22 May 2018 Ms Jamieson's views were confirmed as Mr Cowdell told her she was not redundant because whilst her role had been reduced there were additional hours to make up her work to a full-time role. Ms Jamieson resigned because she could not do just do the part-time office role and she could not do the additional role of driver's assistant.

[36] Based on my factual findings, I am not satisfied that CBF undertook a course of conduct with the deliberate and dominant purpose of causing Ms Jamieson to resign.

[37] However I am satisfied there is a breach of duty in the way CBF carried out the restructure of Ms Jamieson's role because:

- (a) CBF restructured Ms Jamieson's role because of performance concerns; the restructure was a sham to move Ms Jamieson into a lesser and different role so CBF did not have deal with any ongoing performance issues. This is clear from Mr Cowdell's email of 28 March 2018 where he describes additional support being needed for Ms Rawson and not allowing the current friction to continue i.e. there was work that needed to be done by an office assistant but he could not tolerate Ms Jamieson continuing full time in that role because of the friction caused, presumably by her poor performance. This is also confirmed in the meeting of 21 May 2018 when Mr Cowdell discusses performance in the context of office work not being available for Ms Jamieson to undertake.
- (b) CBF did not consult properly over any proposed restructure. There was no formal consultation where information was provided in advance about the proposed restructure and the reasons for it so Ms Jamieson could consider it, provide feedback and then CBF could consider properly that feedback before coming to a decision. Ms Jamieson was essentially just told her performance was such that her work was being taken over by Ms Rawson and as there was no scope for further development the end result was the work she was left with was only part time.
- (c) CBF effectively made a unilateral decision to reduce Ms Jamieson's role and then imposed that on her leaving her with two unworkable options in terms of ongoing employment.

[38] Having found there is a breach of duty I now need to consider two other aspects identified by the Court of Appeal as being necessary to establish a constructive dismissal arising from that breach.³ These are:

- (a) Was the breach of duty sufficiently serious that it was reasonably foreseeable that there was a substantial risk that Ms Jamieson might resign in response to that breach; and
- (b) Did Ms Jamieson resign in response to that breach of duty?

[39] These two aspects are relatively easy to resolve:

- (a) It was foreseeable that Ms Jamieson would resign in response to a flawed restructuring that effected a unilateral change to her role leaving her with only part time work.
- (b) Ms Jamieson did resign because of this breach.

[40] So, in conclusion I am satisfied that CBF unjustifiably dismissed Ms Jamieson.

Remedies

[41] As Ms Jamieson has been successful with her unjustified dismissal grievance I may award any of the remedies provided for under s 123 of the Act. Ms Jamieson seeks compensation and reimbursement.

Compensation

[42] Dealing with compensation first, this is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and is made pursuant to s 123(1)(c)(i) of the Act.

[43] I must quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings Ms Jamieson suffered as a result of the unjustified dismissal. I do this by assessing

³ *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

where Ms Jamieson's harm and loss sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed and where that corresponds to the spectrum of quantum awarded as compensation.⁴

[44] I note at this point that the evidence Ms Jamieson gave about the impact of CBF's actions on her include her responses to the ongoing performance concerns and the strained relationship with Ms Rawson. I have separated out that evidence from my analysis as I have found Ms Jamieson does not have a grievance based on these events.

[45] Ms Jamieson's evidence of the humiliation, loss of dignity and injury to feelings she suffered because of CBF's actions resulting in her dismissal include:

(a) She felt depressed and anxious and had trouble sleeping; and

(b) Her self-esteem suffered, her confidence was effected and she felt useless and inadequate.

[46] Based on this evidence, I quantify that harm and loss at \$15,000.00 and award this amount as compensation pursuant to s 123(1)(c)(i) of the Act.

Reimbursement

[47] Ms Jamieson also seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal pursuant to s 123(1)(b) and s 128 of the Act

[48] As I am satisfied that Ms Jamieson has a personal grievance and she has lost remuneration as a result, then pursuant to s 128 of the Act I must award her the lesser of her lost remuneration or three months ordinary time remuneration unless I am satisfied that it is appropriate to exercise my discretion to award more up to this full loss.

[49] Ms Jamieson's actual loss is greater than three months ordinary time remuneration as she was unable to find new employment for over 18 months. So my starting point is three months ordinary time remuneration, which is \$9,880.00.

⁴ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[50] I must now consider if I will exercise my discretion to award Ms Jamieson a greater sum than this. In exercising my discretion I must keep in mind that there is no automatic entitlement to full loss. This loss merely represents the upper award. I must decide whether I should exercise my discretion to award more than three months ordinary time remuneration and if so how much more, up to the actual loss. In doing this I should recognise that moderation is appropriate, my assessment should be individualised to the circumstances of the case and I must allow for any contingencies that might have resulted in termination of the employee's employment such that they would not have earned the total amount of the claimed loss.⁵

[51] Applying these consideration in this case I do not think it is appropriate to award any more than three months ordinary time remuneration.

Contribution

[52] As I have awarded remedies to Ms Jamieson, I must now consider whether she contributed to the situation that gave rise to her dismissal.⁶ This assessment requires me to determine if Ms Jamieson behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievances.⁷

[53] I have reflected on what occurred to Ms Jamieson and how she acted throughout the events. I am satisfied that Ms Jamieson did not act in a blameworthy or culpable manner.

[54] So, in conclusion there was no contributory behaviour from Ms Jamieson that warrants a reduction in remedies.

Wage arrears claim

[55] Ms Jamieson's wage arrears claim is straight forward. During her notice period CBF told Ms Jamieson not to attend work on two days. CBF subsequently paid her for these two days using her holiday entitlement. This is wrong as the two days were not holidays; therefore Ms Jamieson is now entitled to be paid for two days work. This is \$304.00.

Conclusion

⁵ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

⁶ Section 124 of the Employment Relations Act 2000.

⁷ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

[56] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief of the Authority this would occur he decided, as he is permitted by s174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174D(2) of the Act.

[57] CBF unjustifiably dismissed Ms Jamieson. In settlement of this personal grievance CBF must pay Ms Jamieson:

(a) \$15,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and

(b) \$9,880.00 for lost remuneration pursuant to s 123(1)(b) of the Employment Relations Act 2000.

[58] CBF incorrectly paid Ms Jamieson for two days work out of her holiday entitlement. It must now pay her for those two days, this being the sum of \$304.00.

Costs

[59] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[60] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority