

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Dianne Kenehan (Applicant)
AND Waikato District Health Board (Respondent)
REPRESENTATIVES Simon Menzies, for Applicant
Doug Alderslade, for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 18 August 2005
ADDITIONAL INFORMATION RECEIVED 29 August 2005
SUBMISSIONS RECEIVED 16 September 2005
DATE OF DETERMINATION 21 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Dianne Kenehan was employed by Waikato District Health Board (“WDHB”) as a part-time occupational therapy assistant (“OT assistant”). There is a dispute as to whether the agreement was for a fixed term contract or not.

[2] Soon after she commenced employment Ms Kenehan suffered a medical reaction to the use of the cleaning solution, hyposal. Hyposal is a cleaning agent similar to Janola. The instructions on the use of the product state that the product should be diluted to the ratio of 1:50, although the instructions also state that the product can be used undiluted.

[3] Ms Kenehan’s reaction to Hyposal was acute and became ongoing. Ultimately, Ms Kenehan claims that she was either unjustifiably dismissed or she resigned from her position in circumstances which give rise to an unjustified constructive dismissal.

[4] Ms Kenehan further claims WHDB failed to provide a healthy and safe work environment and this led to an unjustified disadvantage and also that WDHB breached its duty to act in good faith toward her.

[5] In response WDHB says Ms Kenehan's employment ended by virtue of Ms Kenehan's resignation or alternatively as a result of the fixed term employment agreement coming to its natural conclusion. WDHB denies any breaches in relation to the provision of a healthy and safe work environment or the good faith provisions of the Employment Relations Act 2000.

[6] Issues for determination

- did the employment relationship end as a result of a dismissal or resignation?
- if there was a resignation, do the circumstances give rise to a constructive dismissal?
- did Ms Kenehan suffer a disadvantage in her employment?
- did WDHB breach its obligations relating to good faith pursuant to the Employment Relations Act 2000.

Did the employment relationship end as a result of a dismissal or resignation?

The employment agreement

[7] The Employment Relations Act at section 66 provides for employees and employers to enter into fixed term employment agreements provided the employer has genuine reasons for entering into such an arrangement. The employee must be informed of how the employment will end and the reasons for the fixed term agreement.

[8] WDHB told the Authority that the manager of the clinical support requested that the OT assistant positions be reviewed, after one of the two OT assistant positions became vacant. The vacant position was advertised as a temporary position with the purpose of having the position filled while the review took place.

[9] Ms Kenehan applied for the advertised temporary position and attended an interview.

[10] Ms Linda Shaw, team leader of the acute occupational therapy team, was on the interview panel and says she advised all interviewees that the position was being reviewed to determine whether the physiotherapy and OT assistant positions could be combined. Ms Karen McCabe, an Occupational Therapist was also on the interview panel. Ms McCabe gave evidence on behalf of Ms Kenehan. Ms McCabe confirmed that the temporary nature of the employment was discussed at the interview.

[11] Shortly after the interview Ms Kenehan received a telephone call from Ms Shaw. During this call Ms Kenehan says she was offered the position and also told that employment would be ongoing. Ms Shaw conceded at the investigation meeting that her advice to Ms Kenehan that there should be ongoing employment for her after the fixed term could have been taken to mean that employment would continue, but that she never intended that to be taken as a guarantee of ongoing employment.

[12] I have concluded that it is more likely than not that Ms Kenehan was fully aware that the position she had applied for was a temporary position for the purpose of allowing time for a review of the OT assistant positions to be undertaken. I am satisfied that Ms Shaw did indicate in a general way that the position may not be limited to the fixed term, but that was dependent on the review to be undertaken during the tenure of the agreement.

[13] Consistent with my conclusion, Ms Kenehan received a letter of appointment which states "...the position is temporary while the position is under review" and provides for the employment to end on 20 December 2004. For the first 30 days of her employment, Ms Kenehan was covered by the WDHB Allied Health, Clerical, Technical and Related Employees Collective Agreement.

[14] The collective agreement defines fixed term employment as being for a finite period (clause 4) and states that where an employee is contracted for a fixed term there is no implied or express obligation by either party to ongoing employment (clause 64).

[15] Ms Kenehan signed the offer of employment accepting all the terms and conditions as set out in writing to her. Ms Kenehan did not question WDHB about the fixed term nature of the employment agreement she was signing. I find that this is consistent with her accepting that the position on offer was a temporary position only.

[16] I find that at the time of entering into the employment agreement Ms Kenehan could not have a legitimate expectation of ongoing employment, however, she was aware there was to be a review and that there was a possibility that she could be employed in a different way following the expiry of the fixed term agreement.

Health and safety issues

[17] Ms Kenehan's work included sanitizing soiled OT equipment, including raised toilet seats by spraying a solution of Hyposal using a plastic spray bottle. The washroom was a small room about the size of a shower box. Ms Kenehan was issued with personal protective equipment in the form of gloves, apron and goggles to assist her in her washroom tasks.

[18] Within a couple of weeks of her employment commencing, Ms Kenehan began to develop a severe reaction to the use of Hyposal.

[19] On 14 September 2004 Ms Kenehan attended a review meeting with her supervisor Ms Philippa Cosquiff. The notes of this meeting indicate that discussion centred on Ms Kenehan's duties, communication with team members, study day, incident form for home visits and computer login including access to the intranet for Ms Kenehan's ongoing use. The notes indicate that Ms Kenehan felt things were going well. Ms Kenehan says she also raised with Ms Cosquiff the reaction she had suffered from her work with Hyposal but that wasn't written down in the notes.

[20] It is more likely than not Ms Kenehan did not raise with Ms Cosquiff, on 14 September 2004, the reaction she had experienced as a result of exposure to Hyposal. Consistent with this conclusion and in a letter dated 11 October 2004, Ms Kenehan states that while she had started having symptoms in August the first acute symptoms occurred on 19 September 2004.

[21] Following the acute reaction on 19 September 2004, Ms Kenehan was off on sick leave for 6 days. On 6 October 2003 she reported to Ms Shaw her view that her ill health was related to the use of Hyposal. Ms Shaw contacted the health and safety department at WDHB immediately. Mr Stuart Irwin, WDHB health and safety adviser, then made direct contact with Ms Kenehan and reviewed the cleaning space with her. Mr Irwin then contacted WDHB's occupational health specialist and arranged a medical assessment of Ms Kenehan.

[22] In the meantime Ms Shaw completed an incident/accident notification form (a copy of which was used by Ms Kenehan to attach her 11 October letter) and contacted the infection control department to enquire into whether alternative cleaning solutions could be used. During that conversation Ms Shaw was advised that Hyposal should be wiped not sprayed. Ms Shaw also made enquiries about whether an alternative room could be used for the cleaning.

[23] It was common ground that Ms Kenehan was taken off cleaning duties, on or about 12 October, following her assertions that the acute symptoms were related to the use of Hyposal on 11 October 2004.

[24] On 22 October 2004 in a second meeting with Ms Cosquiff, Ms Kenehan is recorded as raising health and safety issues relating to the cleaning of equipment. The notes from the meeting confirm that Ms Kenehan was to see the health and safety doctor the following week.

[25] On 26 October Ms Kenehan was reviewed by Dr. Geraint Emrys, a medical adviser to OSH. Dr Emrys has particular expertise in biological monitoring with an interest in toxicology, material safety data sheets, occupational asthma and inhalation irritants, including chlorine. In relation to his review of Ms Kenehan and the area in which Ms Kenehan worked Dr Emrys told the Authority:

I was asked by WDHB in October last year to review Ms Kenehan who was suffering from a mixture of symptoms, some of which I would describe as non-specific. Her symptoms included blood shot eyes, headaches, a rash, tiredness, aching and nausea.

...

I considered that some of Ms Kenehan's acute symptoms, such as the bloodshot eyes, could well have been due to exposure to Hyposal. However, the effects of Hyposal would have resolved with no physical after effect once Ms Kenehan had been removed from the environment. Therefore it was my concluded view that many of her non-specific symptoms such as fatigue, aching and a rash could have been due to alternative conditions such as a concurrent viral infection.

[26] Dr Emrys was unequivocal in his evidence at the investigation meeting that Ms Kenehan's symptoms were only short term and should have resolved quickly once she was removed from the exposure to Hyposal.

[27] On 27 October 2004 Mr Irwin advised the OSH service of the Department of Labour ("OSH") of a serious harm incident relating to the acute symptoms experienced by Ms Kenehan as a result of her exposure to Hyposal.

[28] Even though Ms Kenehan was taken off all cleaning duties she continued to suffer from symptoms she had associated with the use of Hyposal.

[29] On 10 November Ms Shaw met with Ms Kenehan and discussed her health status. Ms Shaw commented on the good job Ms Kenehan was doing with all her tasks (except the cleaning which she was no longer doing). Ms Shaw, told Ms Kenehan that her health and how to get the cleaning done were her two important priorities. Ms Shaw identified some possible options regarding Ms Kenehan's immediate future. Those options were:

- that Ms Kenehan stay in the current position as occupational therapy assistant and WDHB find another way to cover the cleaning of equipment;
- Ms Kenehan consider reducing her hours by 5 hours per week to enable the savings in wages to be attributed to the employment of an additional employee to wash the equipment;
- Ms Kenehan request WDHB to look for an equivalent position within WDHB; or
- Ms Kenehan resigns from her existing position.

[30] Ms Shaw asked Ms Kenehan to consider the options outlined and also to consider any other suggestions regarding the washing of equipment. There has been no suggestion by either party to this problem, that the options discussed, were to be taken as an ultimatum for Ms Kenehan to resign.

[31] Ms Kenehan considered the options and advised Ms Shaw that her preferred option was to reduce her hours. Ms Shaw investigated this option further but before she could put anything in place events overtook her.

[32] A meeting was held on 12 November with Mr Irwin, Ms Shaw and where Ms McCabe was present as a support person for Ms Kenehan. The notes recorded from this meeting indicate that the most pressing issue for Ms Kenehan were issues relating to whether or not other staff were at risk of exposure. The notes show that Mr Irwin and Ms Shaw discussed in some detail the controls which had been put in place since Ms Kenehan's reaction had been brought to their attention.

[33] During the course of the investigation it became apparent to me that Ms Kenehan felt very strongly that she had not been believed by either Ms Shaw or Mr Irwin as to the seriousness of her situation. 12 November 2004 at a meeting, Ms Kenehan raised this as an issue. Mr Irwin's notes of the meeting show that he ...reaffirmed the message that he originally gave to [Ms Kenehan] that all possible causes should be considered i.e. do not rule anything out.

[34] EAP assistance was made available to Ms Kenehan and an email from Ms Shaw to Mr Ralph Tyrrell on 25 November shows that efforts were made to ensure EAP was provided.

[35] I am satisfied that Ms Shaw and Mr Irwin took the situation with Ms Kenehan very seriously indeed and can find no evidence on which I could conclude that they did not believe Ms Kenehan.

Ending of the employment relationship

[36] The next key event occurred on 3 December. Ms Kenehan says Ms Shaw contacted her at home to discuss her contract and that she felt so pressured that she had no option but to resign. Ms Shaw says Ms Kenehan told her that her [Ms Kenehan's] doctor had put her off work permanently. Ms Shaw says it was in relation to her question about what Ms Kenehan wanted to do that she informed Ms Shaw that she wanted to resign.

[37] At the investigation meeting Ms Shaw told me she did not accept the resignation immediately as she wished to seek advice. She immediately sent an email to the HR department advising of the resignation which was to be confirmed in writing. In her email Ms Shaw states that Ms Kenehan did not wish to have her employment agreement renewed. Ms Shaw received no response to her email on 3 December and sent a further email on Monday 6 December asking permission to find a replacement for Ms Kenehan.

[38] Before Ms Kenehan could confirm her resignation in writing Ms Shaw, after receiving advice from the HR department, wrote to Ms Kenehan advising her that a written resignation was unnecessary as the employment agreement was to end on 20 December in any event. Ms Kenehan was provided with the option of working out a period of notice up to 20 December.

[39] The employment agreement required Ms Kenehan to end the relationship by providing not less than one months notice (clause 51). If WDHB had insisted on Ms Kenehan providing the notice required by the employment agreement, it would, as Ms Shaw rightly advised her, take her beyond the expiry of the employment agreement. Ms Shaw was correct to point this out to Ms Kenehan and to explain to her that as her employment agreement was due to expire nothing further was necessary except to ascertain Ms Kenehan's wishes in relation to the treatment of the period between 6 and 20 December 2004.

I find that Ms Kenehan resigned from her employment but was not required to provide the full one months notice due to the end of the fixed term agreement being imminent.

Did the resignation amount to a constructive dismissal?

[40] In coming to any conclusions under this head I must determine the following issues:

- was Ms Kenehan's resignation caused by a breach of duty on the part of the WDHB? And
- if there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk of Ms Kenehan resigning? (*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA)).

Was Ms Kenehan's resignation caused by a breach of duty on the part of the WDHB?

[41] The basis of Ms Kenehan's claim for constructive dismissal is that she resigned as a result of a breach of duty on the part of her employer, which is the third of the three non-exhaustive categories of constructive dismissal referred to by the court of Appeal in *Auckland Shop Employees Union v Woolworth's (NZ) Ltd* [1985] 2 NZLR 372.

[42] The conduct amounting to a breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. (*Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 3 All ER 1 (CA)).

[43] The Health and Safety in Employment Act 1992 requires all employers to ensure the safety of employees by taking all practicable steps to provide and maintain a safe working environment.

[44] There is also an implied term in every employment agreement that the employer has a duty to take reasonable steps to maintain a safe workplace (*Attorney-General v Gilbert* [2002] 2 NZLR CA 342).

[45] WDHB does not dispute the seriousness of Ms Kenehan's reaction to her exposure to Hyposal. OSH investigated the notified serious harm incident relating to Ms Kenehan's employment and produced a report in April 2005. In his report Mr James Napier concluded that the use of Hyposal by Ms Kenehan, while used at a higher concentration than provided for in the WDHB policy, was within the range provided for on the product label.

[46] Mr Napier acknowledged that WDHB removed Ms Kenehan from exposure as soon as it was suggested that there could be a link between the product and her adverse health and that WDHB modified the method of application from spraying to wiping, thus eliminating any airborne mist. Mr Napier also acknowledged that WDHB modified the ventilation system to remove steam and improve worker comfort.

[47] Mr Napier referred to a report received from Dr Karalus who opined that while the acute symptoms experienced by Ms Kenehan were caused by the exposure to Hyposal, her ongoing complaints were not. This concurs with the evidence provided by Dr Emrys at the investigation meeting.

[48] However, Mr Napier was critical of WDHB for not providing Ms Kenehan with copies of the MSDS sheets for Hyposal. Evidence at the investigation meeting demonstrated that Ms Kenehan was not aware of WDHB's policy that Hyposal be concentrated at the ratio of 1:50. Ms Kenehan had written an instruction which had been placed on the wall in the cleaning room that the ratio was 1:10.

[49] In June 2004 (prior to Ms Kenehan's employment) another employee had suffered from headaches and nausea while working in the OT washroom. An incident/accident notification report was completed by the employee. The matter was dealt with, as a heat issue which resolved after the employee had been exposed to some fresh air. No link was made at the time by WDHB as relating to the use of Hyposal. Mr Napier, in his report, refers to this incident and concludes that the actions of WDHB were reasonable given the information available at that time from the Hyposal MSDS sheets and the heat in the room.

[50] I am not satisfied that the evidence indicates a breach by WDHB of any statutory or contractual obligation (express or implied). Further, I consider that if there was a breach at all it was not one of sufficient seriousness to have caused a dismissal of Ms Kenehan constructively. It was not reasonably foreseeable, I find, that there was a risk of Ms Kenehan resigning. Ms Kenehan had indicated she wished to retain her employment at WDHB on reduced hours. Ms Shaw had entered into discussions with another department where an employee had indicated she wished to reduce her hours. The hours from that employee had been offered to Ms Kenehan so she would not have to reduce her hours. The work did not involve cleaning but was clerical in nature. Ms Kenehan gave no reason as to why she declined this offer.

I find that Ms Kenehan's resignation does not amount to a constructive dismissal.

Did Ms Kenehan suffer a disadvantage in her employment?

[51] Ms Kenehan is required to show on the balance of probabilities that one or more of her conditions of employment were affected to her disadvantage by an unjustifiable action by WDHB (s.103(1)(b) Employment Relations Act 2000).

[52] The Employment Court has found that disadvantage grievances arise out of the employment activity, the on the job situation. The words "are affected" are related to physical conditions of employment, the environment in which the work is carried out, the amenities and facilities available, the payment to the employee and matters of that kind (*Wellington Area Health Board v Wellington Hotel IUOW* [1992] 2 ERNZ 466).

[53] In determining whether Ms Kenehan's employment was affected to her disadvantage, it is necessary to focus on the employment, considering the changes that occurred and assessing their impact on the employee (*Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994).

[54] Ms Kenehan says she was exposed to high concentration levels of Hyposal during the first couple of weeks of her employment. She told me that when she started there was a backlog of cleaning to be done and that required her to be exposed to Hyposal for longer periods during her initial employment than would normally have been the case.

[55] It is common ground that Ms Kenehan was never told at the commencement of her employment about the hazards associated with the use of Hyposal. Mr Menzies, on behalf of Ms Kenehan, submitted this failure, combined with the failure to warn Ms Kenehan of the difficulty suffered by the previous employee gives rise a personal grievance for disadvantage.

[56] I am satisfied that Ms Kenehan was exposed to high levels of concentration of Hyposal and that this caused an acute reaction, but the levels of exposure were not outside the acceptable concentrations as provided for on the MSDS sheets. Also, as soon as a possible link between Ms Kenehan's medication reaction and the use of Hyposal was brought to the attention of WDHB, Ms Kenehan was removed from the situation.

[57] Finally, I can not disregard the information provided by two independent specialists, both of whom state categorically that once removed from exposure Ms Kenehan's health problems should have resolved.

[58] There has been no explanation as to what has caused Ms Kenehan's ongoing health problems. WDHB requested Ms Kenehan to undergo further tests in an effort to ascertain the cause of her health problems. Ms Kenehan refused to have the tests.

Ms Kenehan does not have a personal grievance for disadvantage.

Did WDHB breach its obligations relating to good faith pursuant to the Employment Relations Act 2000?

There is no evidence at all to support the contention that WDHB breached its obligations of good faith.

Determination

[59] For the reasons given above the conclusion of the Authority is that WDHB has no legal responsibility for the resignation of Ms Kenehan or for the events that lead her to resign. Her employment relationship problem is not one that should be resolved by making orders against her former employer.

[60] Before concluding I wish to stress to Ms Kenehan that my findings in this matter are in no way intended to minimise the seriousness of her health problems and the effects they have had on her life.

Costs

[61] The parties are to attempt to reach agreement on the matter of costs, failing which leave is reserved for the matter to be put to the Authority.

Vicki Campbell
Member of Employment Relations Authority