

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 169/10
5115385

BETWEEN Carol Kerr
Applicant

AND Animalz Vetent Napier Limited
Respondent

Member of Authority: Denis Asher

Representatives: Tony Taunt for Ms Kerr
Bryce Quarrie for the Company

Investigation Meeting Napier, 30 September 2010

Submissions Received 7 October 2010

Determination: 22 October 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Ms Kerr unjustifiably disadvantaged and unjustifiably constructively dismissed by the respondent (the Company) following a disciplinary meeting and the issuing by the respondent of a memo to all staff that named the applicant?

[2] Mediation did not resolve this employment relationship problem.

[3] Each party seeks costs.

The Investigation

[4] During a telephone conference call on 23 March 2010 the applicant's then counsel, Mr John McDowell, explained that illness had caused a delay in bringing this matter on to an investigation.

[5] The parties agreed to a one day investigation in Napier. Agreement was also reached on timelines for witness statements and the provision of an agreed bundle of documents.

[6] Because of Mr McDowell's decision he would give evidence on behalf of the applicant and the non-availability of new counsel, Mr Allan Cressey, on the date originally agreed for the investigation (20 May), it was adjourned by agreement to 30 September. As it happened, Mr Cressey did not appear on the later date and Ms Kerr was represented by Mr Taunt.

[7] Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful.

Background

[8] Ms Kerr was employed by the Company as a vet nurse manager for 9 years.

[9] During that time there were changes in the ownership and management of the Company.

[10] As the contents of the agreed bundle make clear, during March 2007 an accusation was made that the applicant had bullied staff. The Company wrote to Ms Kerr on 5 March asking her to attend an investigation meeting, which took place on 20 March. Ms Kerr attended with Mr McDowell.

[11] At the 20 March meeting allegations of bullying were put to the applicant, together with related written material.

[12] Arising out of the meeting, and in a letter dated 30 March 2007, the Company advised Ms Kerr that it was placing her on a performance management plan with the aim of improving task outcomes and workplace relationships. It recorded its view that concerns raised earlier by the applicant had been worked through and there were no further problems, particularly as Ms Kerr had not lodged a further complaint. The Company offered also to pay for professional counselling to enable the applicant “*to address your stress levels and state of mind*” (doc 3.m in the agreed bundle). The same letter declined Ms Kerr’s request for mediation.

[13] Later, while on sick leave, Ms Kerr attended the clinic so as to obtain treatment for her dog. Shortly afterward, the Company issued an undated memo to all staff. Ms Kerr took strong exception to its contents and, by letter dated 30 March, raised a grievance in respect of the memo and other matters, including:

- A protest that no specifics were provided the applicant at the meeting on 20 March until after a complaint by her counsel;
- It was unjustifiable to commence an investigation process without properly and fully disclosing the allegations against Ms Kerr;
- That staff had been told by the respondent’s chief executive during a visit at the clinic at which Ms Kerr worked that he was dealing with a disciplinary issue involving the applicant;
- Despite stressing that the 20 March meeting was a preliminary meeting only the respondent’s chief executive made a decision Ms Kerr was at fault;
- Despite earlier advice as to specific concerns and the effect the issues were having on her, nothing was done by the respondent in respect of Ms Kerr’s concerns; and

- The prejudicial contents to the applicant of the Company's undated memo to staff.

[14] Later again, by letter dated 5 April 2007 from Mr McDowell, Ms Kerr advised she would "... *not be returning to work. The reasons for that are I believe ... clearly set out in my letter*" of 30 March (doc 4X, above).

Discussion and Findings

[15] Per s. 103A of the Employment Relations Act 2000, the relevant question of whether the dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[16] In *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, the full Employment Court, at para [37], observed that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[17] By way of application of this test, I accept Ms Kerr was unjustifiably constructively dismissed as a result of the cumulative effects of the outcome of the 20 March meeting and the undated memo distributed by the Company. I reach these conclusions for the following reasons.

[18] There is no evidence of any investigation by the respondent before or at the meeting with the applicant on 20 March, other than putting to Ms Kerr certain allegations and her denying them. For example, there is no record of the Company interviewing those critical of Ms Kerr or other employees so as to fully measure the allegations and any relevant context, and why it should not accept the applicant's account of relevant events.

[19] There is no evidence of the basis for the respondent's evident conclusion it preferred the written allegations to Ms Kerr's oral denials.

[20] The Company's decision therefore to take disciplinary measures in respect of Ms Kerr by placing her on an individual performance management plan so that she might "*achieve improved task outcomes and workplace relationships*" (doc 3 M, above) followed no adequate process and had no objective basis. There was nothing to support the Company's conclusions. It was therefore arbitrary and unjustified.

[21] I am satisfied the respondent's decision to take disciplinary measures reflects its unsupported view that the applicant was entirely responsible for the issues alleged to exist between her and other staff.

[22] Fair and reasonable employers, objectively assessed, do not impose disciplinary measures impacting on job security without having adequate grounds to do so. These unsubstantiated findings amounted to a serious breach of duty by the employer such that a substantial risk of resignation was reasonably foreseeable: see the Court of Appeal's judgement, *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

[23] In this instance, consistent with the principles set out in the *Auckland Electric Power Board* judgement (above), I find that the arbitrary outcome to the meeting on 20 March followed by the undated memo amounted to breaches of duty which caused Ms Kerr's resignation and were of sufficient seriousness to make her resignation reasonably foreseeable.

[24] My conclusion as to pre-determination is reinforced by the unchallenged evidence of Paul Unsworth, a vet of 31 years and a shareholder/owner of a Napier veterinary business subsequently purchased by the respondent, following which he was an employee of the Company for eight years. As his witness statement and oral evidence to the Authority made clear, Mr Unsworth worked with the applicant for a majority of that time. He reports in his witness statement a discussion he had with the Company's chief executive in which the latter said there were problems with the nursing staff. The comment stuck in Mr Unsworth's mind because the chief executive

“... commented to me a couple of times about those fucking bitches and said to me on one occasion after a string of expletives you sort them out or I will come and sort them out” (par 6).

[25] During the investigation, and by way of affirmed oral evidence, Mr Unsworth confirmed the reference to ‘fucking bitches’ was an actual quote, as was the direction to sort them out, and that the chief executive was referring to Ms Kerr and others.

[26] Properly and commendably, the chief executive, also by oral evidence, admitted he “*probably used those words, in a context of absolute frustration*”.

[27] However, notwithstanding the chief executive’s frank confirmation, the language is derogatory and inappropriate. It was also evidence of a view derived without the benefit of investigation and balanced consideration. It is evidence of the chief executive ‘sorting out’ a problem without attempting to identify blameworthiness.

[28] Second, Ms Kerr’s decision to resign also followed receipt of the undated memo from the Company. Coming as it did after clear notice the Company had reached unsupported, and critical, conclusions as to the applicant’s work performance and conduct meant that Ms Kerr’s resignation was almost inevitable, and entirely understandable. That is because the memo, amongst other things, publicly recorded that the Company had:

*... received a written complaint with serious allegations regarding the activities of another staff member. (And) ... after taking legal advice ... certain things had to be done including the conducting of a full investigation. This was activated by the required notice being sent to the staff member complained about. **That staff member chose to make details public It is clear that Carol has now chosen to make that meeting a matter for debate amongst selected staff.** ... I am not prepared to discuss the details of the investigation as confidentiality is an important aspect of the veterinary business **and while Carol may choose not to follow those rules I am not going to be drawn into a discussion about the matter. ... Carol appears to have now chosen to conduct a campaign against the business.** I would hasten to point out that **reports of what she is alleged to be suggesting are completely devoid of any truth.***

... I would ask that you all exercise restraint from believing everything that you are told. It is true that Carol should be supported through this process but support should not be interpreted as believing everything that one party has to say.

(emphasis added, doc 4 U, above)

[29] Despite protestations in the memo not to believe everything the person was told, I am satisfied a fair and reasonable but disinterested reader of the memo would promptly and clearly understand from it that Ms Kerr had made public confidential details, was not following rules, was possibly untruthful and was running a campaign against the respondent.

[30] These are all serious allegations which placed Ms Kerr in an invidious position in respect of her work colleagues and her employer: as the evidence before the Authority made clear, the chief executive had no basis to reach any of those conclusions. That is because he carried out no investigations other than to rely on telephoned information from another employer as to Ms Kerr's alleged behaviour. The evidence the chief executive gave of the hearsay report provided by the other employee simply provided no fair or reasonable basis for making the allegations set out in the undated memo or to support his claim (para 24 of his witness statement) that Ms Kerr has discussed aspects of the meeting (of 20 March) with other staff. However, his paragraph does confirm how distressed Ms Kerr was as a consequence of that meeting.

[31] There was and is no evidence of the applicant making confidential details public, breaking rules, being untruthful or campaigning against her then employer.

[32] The respondent's stance, as illustrated by its letter and memo of 30 March 2009 left Ms Kerr with every reason to fairly and reasonably conclude her employer had irreparably breached its duty to her.

Remedies

[33] The remedies sought by Ms Kerr in her statement of problem were lost wages and compensation for humiliation and distress of \$15,000. Lost wages sought by the

applicant total \$2,796.00 being the six-monthly difference between her new and old positions: as Ms Kerr explained during the investigation, she found alternate, but lesser paid work, immediately on the conclusion of her employment with the respondent.

[34] Ms Kerr provided clear evidence of the hurt she experienced as a result of her constructive dismissal. It included leaving employment as a veterinary nurse as her *“passion had been quashed because of the incidents”* involving the Company (par 29 of her witness statement). Unchallenged medical evidence from her general practitioner confirmed Ms Kerr had seen him because of difficulties she was experiencing at work. He concluded that the applicant *“was experiencing prolonged work related stress and had developed signs and symptoms of a reactive anxiety depressive state”* and prescribed medication (par 7, Dr Hudson’s witness statement).

[35] Some of Ms Kerr’s symptoms included lost of confidence, anxiety and panic attacks including waking in the night with a pounding heart.

[36] Having regard to the above I am satisfied that, in all the circumstances, Ms Kerr should be compensated fully her lost wages of \$2,796.00 gross and receive, for hurt and humiliation, the sum of \$13,000.

Contributory Fault

[37] There is no evidence of Ms Kerr contributing in any way to the situation that gave rise to her grievance. For example, there were no disciplinary issues raised with the applicant prior to the Company’s decision to place her under performance management and to issue its memo attributing to Ms Kerr the claim she was, amongst other things, campaigning against the business.

Determination

[38] The Company is to pay to Ms Kerr lost wages of \$2,796.00 gross and compensation for humiliation of \$13,000 (thirteen thousand dollars).

[39] Costs are reserved. Subject to submissions from counsel I can share this preliminary view: the investigation was standard and therefore, consistent with its duration, would typically attract a contribution to Ms Kerr's costs of \$3,000.00.

Denis Asher

Member of the Employment Relations Authority