

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 192
3000711

BETWEEN KAREN LEWIS
 Applicant

AND SOUTHERN DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Andrew Dallas

Representatives: Mary-Jane Thomas and Alex Boock, Counsel for the
 Applicant
 Janet Copeland and Jessica Frame, Counsel for the
 Respondent

Investigation Meeting: 10 May 2017 and 30 June 2017 at Invercargill

Submissions 30 June 2017

Determination: 9 November 2017

DETERMINATION OF THE AUTHORITY

- A. Karen Lewis was not unjustifiably constructively dismissed by the Southern District Health Board.**

- B. Ms Lewis was not subject to an unjustified action causing her disadvantage by Southern District Health Board.**

- C. Costs are reserved**

Employment relationship problem

[1] Karen Lewis was employed by the Southern District Health Board as a Staff Nurse and Duly Authorised Officer in the Southland Mental Health Emergency Team (SMHET). She was engaged under the terms and conditions of the District Health Boards/New Zealand Nurses Organisation Nursing and Midwifery Multi-employer Collective Agreement.

[2] During the period December 2015 to February 2016, Ms Lewis was subject to two complaints. The first complaint related to an alleged refusal by Ms Lewis to work with a replacement nurse over whose experience Ms Lewis had expressed concerns to a manager. The second complaint related to the alleged behaviour exhibited by Ms Lewis (and another Staff Nurse) towards a Court Liaison Nurse during a hand-over of client information.

[3] Ms Lewis would say as a result of these two complaints and the subsequent investigation by Southern DHD, she was subject to an unjustified action by her employer and was unjustifiably constructively dismissed.

[4] Ms Lewis, who now lives in the United Kingdom, did not seek reinstatement but did seek other remedies for monetary and non-monetary loss under the Act.

Issues

[5] The following are the issues for investigation and determination:

- (i) Has Ms Lewis been unjustifiably disadvantaged in her employment by the Southern DHB?
- (ii) Has there been a constructive dismissal of Ms Lewis by the Southern District Health Board (Southern DHB) by course of conduct and/or breach of duty that led her to resign?
- (iii) If (ii) is answered in the affirmative, was the dismissal justifiable in terms of the statutory test of justification under s 103A of the Employment Relations Act (the Act)?

- (iv) If Southern DHB's actions were not justified, what remedies should be awarded, considering:
 - (a) Lost wages; and
 - (b) Compensation under s 123(1)(c)(i) of the Act;
- (v) Did Ms Lewis contribute to the situation giving rise to her personal grievance?
- (vi) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[6] During the investigation meeting, I heard evidence from Ms Lewis and from the Southern DHB employees, Heather Casey, Nursing Director, Mental Health, Addictions and Intellectual Disabilities Directorate (MHAID), Tracey South, HR Advisor, MHAID and Adrienne Lee, Combined Services Manager. In addition, various documents were provided by the parties in the form of a common bundle and additionally at the request of the Authority.

[7] This determination, reserved at the conclusion of two days of investigation, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) 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 s174C(3)(b) of the Act.

[8] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during the investigation meeting. While I have not explicitly referred to all the submissions of the parties in this determination, I have fully considered them.

Relevant factual background*Southern DHB's preliminary investigation into allegations against Ms Lewis*

[9] In response to receiving the first complaint about Ms Lewis, Southern DHB wrote to her on 9 February 2016 providing a copy of the complaint and advising it would be formally investigated. The letter requested a meeting with Ms Lewis on 16 February 2016. It also put her on notice that if misconduct or serious misconduct was established, disciplinary action including a warning or written warning may result.

[10] In response to this correspondence, Ms Lewis' solicitors corresponded with Southern DHB on 16 February 2016 and requested that further information be provided before any meeting take place. However, while Southern DHB appears to have provided the information requested on the morning of 16 February 2016, Ms Lewis did not attend the meeting scheduled for that day.

[11] Southern DHB had organised cover for Ms Lewis' shift on 16 February 2016 assuming, incorrectly as it transpires, she would not be attending work.

[12] Ms Lewis turned up for her rostered afternoon shift. Ms Casey met with Ms Lewis, advised her alternative arrangements had been made for the shift and she could go home on full pay. During the discussion, Ms Lewis asked Ms Casey if Southern DHB had received an email from her solicitors sent earlier that day advising she would not be attending the meeting. Ms Casey confirmed she had seen earlier correspondence but as the requested information had been provided, it was assumed Ms Lewis would attend the meeting. Southern DHB confirmed this position in writing to Ms Lewis' representative in a letter dated 18 February 2016.

[13] The letter also advised Southern DHB intended to continue investigating the complaint, reiterated the possible sanctions for established misconduct and would advise Ms Lewis of a date for a meeting. Southern DHB offered Ms Lewis employee assistance program (EAP) counselling.

[14] On 26 February 2016, Southern DHB, in response to the second complaint against Ms Lewis, wrote to her solicitors enclosing a copy of the complaint and advising that it needed to be investigated. The letter put Ms Lewis on notice that if misconduct or serious misconduct was established, disciplinary action including a warning or written warning may result. Again, Southern DHB offered Ms Lewis employee assistance program (EAP) counselling. Reference was also made in the letter to the first complaint.

[15] In response to this letter, Ms Lewis' solicitors wrote to Southern DHB and requested Ms Lewis be placed on special leave until a meeting could take place because she was feeling 'unsafe': due to the two allegations and because she had been "stood down from work", for which she felt "upset and humiliated". Southern DHB responded to this letter, advised that it took Ms Lewis' allegations about feeling unsafe in the workplace seriously and asked her to provide further details.

[16] On 3 March 2016, Southern DHB provided Ms Lewis, via her solicitors, with an update about its investigation. The letter invited Ms Lewis to a meeting on 8 March 2016.

[17] In separate email communication, Ms Lewis' request for special leave was declined. In reply, Ms Lewis' solicitors advised she would be on sick leave until the meeting.

[18] Due to the unavailability of Ms Lewis' solicitors, which may or may not have communicated to Southern DHB, the meeting did not take place as planned on 8 March 2016. The meeting was re-scheduled for 15 March 2016.

[19] Southern DHB corresponded with Ms Lewis' solicitors on 10 March 2016 requesting a response to its letter of 3 March 2016 seeking to understand why Ms Lewis felt too unsafe to return to duty.

[20] On 14 March 2016, Ms Lewis' solicitors responded to Southern DHB's request. They advised Ms Lewis felt humiliated and upset for turning up to a rostered shift (on 16 February 2016), bullying within the SMHET team and the inaction of management to a toxic work environment.

[21] The meeting on 15 March 2016 took place as scheduled. Ms Lewis was represented during the meeting. The meeting was characterised as an “investigatory meeting” at the outset by Southern DHB. The meeting was recorded and subsequently transcribed.

[22] On 16 March 2016, Southern DHB wrote to Ms Lewis’ solicitors refuting that she had ever been stood down. The letter noted concern about the allegations of bullying made by Ms Lewis and offered to investigate any specific examples. The letter also advised Ms Lewis she was to be temporarily seconded to the community mental health team.

[23] Following promulgation of this letter, Ms Lewis’ solicitors furnished a medical certificate for a further period up to 3 April 2016. Southern DHB requested that Ms Lewis clarify whether she had been examined by a doctor or had “self-reported” her condition.¹ Southern DHB also requested that Ms Lewis’ doctor provide advice about how she might be safely reintegrated into the workplace.

[24] A further medical certificate was provided on 31 March 2016 covering the period 4 April 2016 to 5 June 2016. This certificate confirmed Ms Lewis had been examined by the doctor.

[25] On 5 April 2016, Southern DHB provided Ms Lewis with a further update on its investigation. A meeting was proposed for 7 April 2016. The meeting between the parties eventually took place on 12 April 2016.

Draft preliminary report

[26] A draft preliminary investigation report was provided to Ms Lewis on 6 May 2016. The draft report stated Southern DHB’s preliminary view was the first and second complaints were substantiated and considered a breach of Ms Lewis’ obligations under the Nursing Council of New Zealand Code of Conduct and the Southern DHB code of conduct. The report recommended the allegations made against Ms Lewis be elevated to a disciplinary level.

¹ Ms Lewis’ doctor confirmed on 1 May 2016 she had been examined.

[27] Southern DHB sought feedback from Ms Lewis on the draft report before it was finalised. Southern DHB advised Ms Lewis she would then have a further opportunity to provide a formal response to any finalised preliminary report.

Personal grievances raised

[28] On 11 May 2016, Ms Lewis' solicitors responded to the draft report and raised, in her view, a number of procedural concerns including taking Ms Lewis' responses out of context and inaccurately reporting her explanations. The letter went on to say that Ms Lewis had lost all trust and confidence in Southern DHB and that she was unable to return to work. The letter raised an unjustified action personal grievance relating to the process and outcome of the draft report and an unjustifiable constructive dismissal grievance arising out of Ms Lewis' loss of trust and confidence and fears about her safety in the workplace. The letter proposed "open" settlement terms for Ms Lewis' grievances.

[29] Southern DHB in a letter of response dated 24 May 2016 said, in effect, any procedural concerns could form the basis of a response to the draft report; no further information had been provided about Ms Lewis' safety concerns; it had not lost trust and confidence in her (and believed she had not in it); and, the references to her not being able to return to work and that she was constructive dismissal were "premature".

[30] Southern DHB also advised that while the draft report recommended the allegations made against Ms Lewis be elevated to a disciplinary level, it had decided that such a step may be counter-productive to Ms Lewis' return to the workplace. Southern DHB said it had made a decision not to take disciplinary action against Ms Lewis but rather set out its expectations of her in the final report.

[31] Southern DHB proposed Ms Lewis commence work in the community mental team for a period after which a review could determine whether she wished to stay there or return to her substantive position. This never occurred.

[32] Further correspondence would pass between the parties about the draft preliminary report. In her letter, dated 1 July 2016, Ms Lewis identified further procedural difficulties with the draft report. In its response, dated 7 July 2016, Southern DHB refuted these.

Ms Lewis' resignation

[33] On 7 July 2016, Ms Lewis' solicitors wrote to Southern DHB and advised Ms Lewis was "not able to return to [Southern] DHB – ever" because she had lost trust and confidence in her employer. The letter, while maintaining Ms Lewis had been constructively dismissed, enclosed a medical certificate covering a period of a further two months.

[34] As Ms Lewis had, by this stage, exhausted her sick leave, Southern DHB, through her solicitors, asked her if she wished to access her annual leave. In response her solicitors advised she would not be returning and requested her annual leave be paid out in a lump sum. On 11 July 2016, Southern DHB accepted Ms Lewis' resignation in writing.

Evaluation

Was Ms Lewis subject to an unjustifiable action to her disadvantage?

[35] Ms Lewis raised a personal grievance for an unjustified action causing disadvantage by Southern DHB, relating to the process and outcome of the draft preliminary report. In my view, this personal grievance was premature and, in any event, was unsupported by the presenting facts.

[36] Ms Lewis' personal grievance was raised in a letter dated 11 May 2016 responding to a draft preliminary report. I accept the submission of Counsel for Southern DHB that no decision or decisions had actually been made in the report which was capable of rendering it unreasonable and disadvantageous to Ms Lewis. The purpose of the draft report was to seek feedback from Ms Lewis and/or her representatives.

[37] It was open to Ms Lewis to identify any deficiencies in the draft report. Indeed, to some extent her representatives did this, including her claims of general and specific unfairness and collusion between witnesses. Hypothetically, if Southern DHB had subsequently promulgated a final report without taking into account Ms Lewis' concerns, she may well have had a personal grievance. However, in the present circumstances, I would find that any defects in the draft report, if any were found to exist, were cured by the decision made by Southern DHB to abandon its preliminary view to escalate Ms Lewis' alleged conduct to a disciplinary level.

[38] It is entirely uncontroversial that having become aware of complaints about Ms Lewis, Southern DHB was required to investigate them. Indeed, it was in Ms Lewis' interests to have such matters investigated and resolved. That said, there is little doubt employment investigation can be stressful and unsettling. However, the manifestation of such feelings would not, of themselves, give rise to a personal grievance. Conversely, an unduly lengthy investigation could, however, give rise to a personal grievance in some circumstances. However, I do not accept Southern DHB's investigation was particularly lengthy within a public sector context and to some extent the unavailability of Ms Lewis' representatives contributed to the length of time it took to produce the draft preliminary report.

[39] For these reasons, I find Ms Lewis' personal grievance relating to the process and outcome of the draft preliminary report is unsustainable.

[40] For completeness, to the extent to which these were formally raised with Southern DHB, I find Ms Lewis did not have disadvantage grievances arising out of: (i) Southern DHB questioning her medical certificate on 18 March 2016 because her employer's inquiries in this regard were legitimate or (ii) arising out of her alleged "stand down" on 16 February 2016, because she was not, in fact, stood down.

Was Karen Lewis unjustifiably constructively dismissed?

[41] Ms Lewis claimed to have been unjustifiably constructively dismissed by the Southern DHB.

Legal principles

[42] The leading cases on constructive dismissal are decisions of the Court of Appeal. In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*², the Court of Appeal found there were effectively three situations in which a constructive dismissal may arise:

- (i) Where an employee was given a choice between resigning and being dismissed; and
- (ii) There has been a course of conduct followed by the employer with the dominant purpose of inducing the employee to resign; and
- (iii) Where there was a breach of duty by the employer that caused an employee to resign.

[43] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers Industrial Union of Workers*³, the Court of Appeal observed:

... we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

² [1985] 2 NZLR 372 (CA)

³ [1994] 1 ERNZ 168 (CA)

[44] In *Wellington Clerical Workers IUOW v Greenwich*⁴, the Arbitration Court examined the nature of the inquiry to be conducted

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[45] In summary, the inquiry into an allegation of constructive dismissal comes down to: has there been a course of conduct or breach of duty on the part of the employer which has caused the resignation, and if so, was the breach sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation - that is, would there be a substantial risk of resignation?

[46] Ms Lewis said her allegation of constructive dismissal by Southern DHB came within the ambit of situations (ii) (course of conduct by the employer) and/or (iii) (breach of duty by the employer) identified in *Woolworths* above. To amount to a constructive dismissal then Ms Lewis' resignation must be a proportionate and reasonable response to a course of conduct or sufficiently serious breach of duty by Southern DHB given in circumstances where she had no other option.

A breach of duty?

[47] The inquiry into Ms Lewis' allegation of constructive dismissal requires an examination of whether there has been a breach of duty by Southern DHB towards her and if so, was the breach sufficiently serious so as to make it reasonably foreseeable by Southern DHB that there was a substantial risk of Ms Lewis' resignation.

[48] For the reasons that follow, however, I do not accept Southern DHB breached a duty to Ms Lewis.

⁴ [1983] ACJ 965

[49] I accept the submission of Counsel for Southern DHB that the DHB was under an obligation to investigate the complaints made about Ms Lewis. In and of itself, this could not give rise to an unsafe workplace for Ms Lewis and a breach of duty by Southern DHB such to make it reasonably foreseeable there was substantive risk of her resignation.

[50] I also accept the submission that if Ms Lewis believed she was unsafe in the workplace she was under obligation to advise her employer of this and the reasons underlying this belief. Southern DHB also submitted, which I accept, it gave Ms Lewis ample opportunity to particularise her concerns when it became aware, after being put on notice by her representatives on 3 March 2016, she was feeling unsafe.

[51] Further factors weigh against a breach of duty by Southern DHB towards Ms Lewis. They include:

- (i) Southern DHB consistently offered Ms Lewis EAP counselling;
- (ii) While Southern DHB declined her application for special leave it proposed she access her annual leave when she had exhausted her sick leave;
- (iii) Southern DHB abandoned the possibility of taking disciplinary action against her;
- (iv) Southern DHB offered to re-deploy her to the community mental health team; and
- (v) DHB offered her an opportunity, in a non-contrived manner, to re-consider her resignation.

A course of conduct?

[52] Ms Lewis' allegation of a course of conduct being pursued by Southern DHB with the dominant purpose of eliciting her resignation does not survive close examination.

[53] The reasons for this are given above in relation to Ms Lewis' disadvantage grievance. In addition, I also accept the submission of Counsel for Southern DHB that its conduct towards Ms Lewis was, in effect, the antithesis of a course of conduct designed to illicit her resignation.

[54] For completeness, some of the matters complained of by Mr Lewis during the investigation meeting in respect of the “toxic environment” within SMHET, to the extent these were actionable, if at all, were not formally raised by her as personal grievances with Southern DHB.

[55] I find Ms Lewis was not unjustifiably constructively dismissed by Southern DHB. Her resignation was freely made on 7 July 2016 and, after a request of its re-consideration, was accepted by Southern DHB on 11 July 2016.

Conclusion and remedies

[56] Having found Ms Lewis does not have personal grievances against Southern DHB, it is not necessary to consider the issue of remedies.

Costs

[57] Costs are reserved. The parties are encouraged to resolve the issue of costs between themselves. If unable to do so, either or both parties may apply to the Authority for a timetable for exchange of memoranda on costs. If asked to do, the parties can expect the Authority to apply its daily tariff approach adjusted upwards or downwards for relevant factors.⁵ The current tariff is \$4500.00 for the first day of an investigation meeting and \$3500.00 for each day thereafter.

Andrew Dallas
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].