

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 506
3114812

BETWEEN FLORA LIU
 Applicant

AND CHILLEX SERVICES LIMITED
 Respondent

Member of Authority: Michael Loftus

Representatives: May Moncur, advocate for the Applicant
 Angela Hansen and Noah Kemp, counsel for the
 Respondent

Investigation Meeting: 14 July 2021 at Auckland

Submissions Received: At the investigation meeting with further information up
 to and including 13 August 2021

Date of Determination: 15 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Flora Liu, claims she was unjustifiably dismissed, albeit constructively. There are also claims of unjustified disadvantage though these mirror the events that Ms Liu says prompted her resignation.

[2] Chillex Services Limited (Chillex) is of the view Ms Liu's decision to resign was freely made and then confirmed by the fact she rejected an opportunity to reconsider.

[3] Chillex denies the disadvantage claims, which essentially amount to allegations of bullying, have validity.

Background

[4] Ms Liu was employed by Chillex as a Quantity Surveyor between January and June 2020. The employment agreement purports to be fixed term and originally expired on 17 April 2020. It was, however, extended and Ms Liu says she never challenged the purported fixed term. The parties are of the view, and I agree, that this need be taken no further as there was no attempt to enforce this aspect of the agreement.

[5] Ms Liu states that as part of her job she also viewed various emails of her predecessor and the content of some concerned her as they contained abusive language directed at the predecessor by Chillex's Director, Cam Crawford.

[6] Ms Liu also states, more by way of background, that she witnessed Mr Crawford bullying the company's Accountant during a meeting. She says he was yelling, shouting and questioning her for not knowing payment details. Ms Liu says that following the meeting Chillex's Human Resource (HR) manager approached and asked about her view of the meeting. She attributes this to the HR manager having heard Mr Crawford yelling and says she replied it was fortunate she was not the recipient of the bullying behaviour.

[7] Ms Liu goes on to say *however my luck did not last long*. She says there was a meeting attended by herself, Mr Crawford and the Commercial Manager during which Mr Crawford was rude, bossy and refused to listen to her input and explanations about issues he was raising. She says he repeatedly pointed his finger at her shouting *stop, stop, now, listen to me, listen to me*. She says she was embarrassed and frustrated.

[8] Ms Liu also refers to other meetings she attended where colleagues were allegedly called *useless* and *stupid*. She says that after both witnessing and experiencing these incidents she tried to avoid dealing directly Mr Crawford.

[9] Ms Liu continued working during the first Covid lockdown, which commenced in late March 2020 and says that in April a rift developed over the way she prepared various reports. It is clear Mr Crawford had a particular view about what he wanted with the debate being escalated by an e-mail he sent on 1 April. It reads:

I don't give a flying f..k what their claim is mate!
GET IT IN OUR FORMAT CORRECTLY AND BALANCED LIKE A
PROPER QS
Get Tracey to do something.

[10] It is also clear Ms Liu had a contrary view and she replied advising, amidst other things, that *there's nothing wrong*. That Ms Liu retains a view she was doing things correctly and it was the employer's requirements that were faulty was confirmed by her evidence during the investigation. Suffice to say Chillex retains a different view.

[11] The exchange continued the next morning when, at 7.58am, Mr Crawford sent an e-mail to Ms Liu copied to various managers as well as a colleague, Tracey, which read:

Absolutely f**king hopeless Flora
 Are you not listening mate?? Are your ears painted on??
 Where are the job numbers?? I asked you, Tracey and that useless lump mila
 to put the job numbers on ALL BCTI and PROGRESS CLAIMS going forward
 GET THEM ON NOW !

[12] That was followed by a further communication 4 minutes later to the same recipients though Tracey became a 'To' as opposed to being 'CC'd'. It reads:

I want that f...ing BCTI OUT THIS MORNING – DON'T F... ME AROUND
 TODAY AS I AM NOT IN A GOOD MOOD!
 Be plenty of people looking for work at the moment as my competitors have
 been telling me they are laying off staff plus we are looking for more savings
 and culling staff numbers is a good place to start so I suggest you GET ON
 WITH IT NOW.
 When done get me the EMS one PRONTO – suck off his text and phone calls
 AND PS DON'T SEND ME ANYTHING YOU TWO NOODLE NUTS
 WITHOUT THE F...ING JOB NUMBERS ON!

[13] Ms Liu says she felt humiliated and deeply hurt by what she perceived as the racist and abusive approach of her employer in the above exchanges. She also comments about being scared about losing her job given both the pandemic and the comment about *culling staff*. She says she therefore phoned her manager, Jody Hunt (one of those cc'd into the exchanges), explained she had not made any mistakes and should not be treated this way. Ms Liu goes on to say she assumes Mr Hunt then phoned Mr Crawford as the latter stopped pursuing the issue.

[14] In claiming she was constructively dismissed Ms Liu relies solely on two events with the above exchange being the first of them. The second occurred on 4 June 2020 with Ms Liu claiming she was again the target of Mr Crawford's bullying. She says:

[Mr Crawford] yelled me into [Mr Hunt's] office, referring me as fucking stupid QS. I was trying to explain why I did the Excel sheet in the way, he told me to "stop talking, get it down before I lose my temper".

[15] Ms Liu says Mr Crawford then instructed her to print the Excel sheet he was mad about so she went to her desk. She says while she was searching for the file on the computer Mr Crawford shouted *go quick, hurry up* and then left the office. She says that as others had witnessed this she felt too humiliated and distressed to continue working and simply sat at her desk shedding tears for some time. Ms Liu says in the end the emotion and pain she felt caused her to prepare a resignation letter. It was sent to Chillex's HR Manager just after 4pm and reads:

Please accept this letter as formal notice of my resignation from my position as Quality Surveyor at Chillex Service. My last day of employment will be 18 June 2020.

Thanks for Chillex giving me the opportunity to work in this position for the past half year. I have thoroughly enjoyed working and learning new knowledge from different trades here. However, I have decided it is time for me to take a break.

I would like to do anything I can to help with the transmission. If I can be of any other assistance during this time, please let me know.

Thank you again for the opportunity, and I wish you and Chillex Service all the best for the future.

[16] Notwithstanding the positive tone of the resignation the covering e-mail sent a different message. It read:

Please see my resignation.

It is a pity that I don't even have a good conversation with you since you came on board.

I guess you will ask me reasons, I think about it, and can be summarised as followings:

1. Don't feel being protected. Whenever sth. happened, big or small, no one in whole department stands up and speaks sth, good or bad.
2. My personality doesn't fit the work environment. I am a stubborn person. If I am upset, the whole day or even days I won't be able to be productive, it is a loss for the company.

[17] The following day, Friday 5 June, the HR Manager replied saying *Thank you for this. Would you like to come and see me so we can actually meet? I would like to also do an exit interview.*

[18] Ms Liu says she then took two days stress leave before seeking advice from a Ministry of Business Innovation and Employment (MBIE) hotline which, she claims, told her she did not have to resign given the workplace bullying. She says she was advised to withdraw the resignation and lodge a complaint with the HR manager instead.

[19] On 9 June Ms Liu met with the HR manager to discuss her resignation. She says that by then only two people knew of the resignation, the HR manager and Mr Hunt. She says that while there had yet to be formal acceptance of her resignation, it appeared HR did not appear to see that as necessary with the Manager simply suggesting she should work from home during the notice period.

[20] Ms Liu says that the following day she spoke to Mr Hunt and asked he withhold the resignation as she wanted to resolve the workplace bullying issue with management. The following day she phoned the HR manager to both formally withdraw the resignation and lodge a formal bullying complaint. Ms Liu states the HR manager replied “Is mediation what you want – to talk to Cam with someone else there” and she, Ms Liu, then said “Yes.” She adds she then asked why she had been treated so badly and what was it that Mr Crawford wanted her to improve.

[21] Ms Liu states shortly after she spoke to Mr Hunt over the phone about the impact of events he replied by e-mail saying:

Hi Flora, i am busy. How are you? My apologies if you felt that i wasn't sticking up for you the other day. I went and spoke to him about it and explained the situation. Its a shame you are resigning as i thought you had taken control of both projects that were a mess when you arrived. Appreciate all your input and help.

[22] That was followed by a reply from Ms Liu reading:

i am okay. i still can't swallow the whole thing, each time i think of what happened i am very upset and anxious. this is work bullying, against New Zealand law. and this is not the 1st time. i believe there will be more happening again, so please hold on announcing my resignation. the company should seek for dispute resolution, otherwise it is unfair. why i am the victim and i am the person who have to suffer everything. i believe as an employee i am entitled to certain rights. the PCBU has duty to create a safe and health workplace for employees. i will seek the legal advice to see what rights an employee has.

[23] At 11.16am on 11 June Ms Liu sent another email to the HR Manager and Mr Hunt. It is entitled ‘Subject formal complaint’. It reads:

As per phone calls today, this is formally to withdraw my resignation and lodge a complaint.

A Mediation procedure internally is accepted. If it is within a small group, in a very relaxing environment, I probably bring one of my family member as my support. If we are going to have a very professional procedure, Professional Mediators involved, I will bring my lawyer as my representative. So just let

me know in detail, and what the company's expectations, I will be very cooperative.

Hi Jody, As for work, I will start catching up from tomorrow, and work some hours this weekends, so next week I will be back to work with you on subcontractors Payment schedule.

[24] That email was accompanied by a form entitled "Bullying Formal Complaint Form".

[25] The next communication occurred mid-afternoon on Monday 15 June. It was an email from HR Manager to Ms Liu advising:

Hi, Flora.

Thank you for this. The company chooses to honour your resignation you previously submitted.

I have received your complaint and am investigating and will be in touch in due course.

{Mr Hunt} is happy to provide a positive verbal reference for you for your time at Chillex. If you have any questions or concerns, please contact me as soon as possible.

[26] Ms Liu responded stating she was *...very/super disappointed to know that Company "honoured" my resignation. I can hardly go to sleep with the decision. I will explain why.*

[27] Having then aired her understanding of events Ms Liu says:

If the whole thing is under investigation, any decision should be made after being investigated, not before in the process of investigating.

[28] During this time Ms Liu had continued to work from home and that remained the case until her last day which was 18 June.

[29] Ms Liu then contacted her advocate having been referred by a friend. That led to the formal raising of a grievance by letter dated 23 June 2020.

[30] Finally it should be noted Mr Crawford suffered a medical event and took no part in events after 4 June. He was unaware of the exchanges that occurred after that date.

Discussion

[31] As already said Ms Liu claims she has been both unjustifiably disadvantaged and then unjustifiably dismissed a result of having been the victim of workplace bullying.

[32] While Ms Liu attempted to paint Mr Crawford as a serial bully by reference to her perception of the experience of others (paragraphs [5] and [6] above) there was no evidence supporting the occurrence of such events and they were not relied upon. Ms Liu made it clear, as already said at [14] above, that her claims relied on two events – the exchanges of 1 and 2 April and that of 4 June with its subsequent exchanges. Here I have to observe it is a pity the more generic approach was aired as it clearly antagonised Mr Crawford to an extent he was unwilling to settle a matter that I must suggest should have been resolved.

[33] I return to the events Mr Liu relies upon and whether or not they constitute a disadvantage. Chillex does not dispute the April exchanges occurred and while neither Mr Crawford nor Mr Hunt remember the exact words used on 4 July both concede “words were said” (Mr Hunt’s evidence). Mr Crawford accepts he was angry and swore. Neither says he can dispute Mr Liu’s version of events.

[34] Instead Chillex attempts to rely on two main approaches. The first is that Ms Liu’s deficiencies were costing the company serious money and this had to be viewed in the context of the first covid lockdown and the extreme effect this was having on cashflow. As Mr Crawford claimed when giving evidence the exchanges of April were, “when considered in context, perfectly acceptable” though he immediately conceded they “would be unacceptable at any other time.”

[35] The second is the concept of a robust workplace where behaviours that might not be acceptable on one workplace are commonplace in others.

[36] On both points I disagree. Mr Crawford conceded the exchanges of April were unacceptable with, he asserted, one exception which was the pressure exerted by the covid lockdown which excused it in this one instance. No! Unacceptable exchanges are unacceptable and nothing excuses them. If there were pressures, and I accept the evidence shows there were, they should be addressed in a constructive rather than aggressive and abusive way.

[37] Turning to the second point and while I acknowledge caselaw recognises the concept of a robust workplace, I note that applies to the general conduct of all in a generic type of way. I know of nothing that condones profanity and abuse targeted at a specific and identifiable individual which the evidence leads me to conclude is what occurred here.

[38] This is the twenty first century and the idea such behaviour remains acceptable is a concept now consigned to history. A person should not be subjected to such behaviour and abuse in the workplace. There can be no justification for the content of the e-mails sent on 1 and 2 April with allegations of being “f...in hopeless”, emphasised comments which effectively scream at the recipient and threats of dismissal. Similarly an employee should not be told by their boss they are “f...ing useless” in an angry way as I accept occurred on 4 June.

[39] That Ms Liu felt disadvantaged, with her employment both at risk and her enjoyment thereof seriously diminished is clear from her evidence. Accordingly I conclude the two events by which she says she was disadvantaged occurred. The justification offered for the April events had been rejected and none was offered with respect to June.

[40] Having concluded the two events constitute an unjustified disadvantage the next question is whether or not Ms Liu was constructively dismissed.

[41] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. It is for the applicant to convince me that is the case. There must also be a causal link between the employer’s conduct and the tendering of the resignation¹ and the possibility of resignation should be foreseeable.²

[42] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*³ the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

¹ *Z v A* [1993] 2 ERNZ 469

² *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

³ *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

(c) A breach of duty by the employer causes an employee to resign.

[43] It is the third of these upon which Ms Liu relies. It is not difficult to conclude the unjustified proffering of abusive and aggressive comment is a breach. It is also clear from the evidence the second such event caused the resignation. An employee simply should not have to put up with such behaviour and it is foreseeable they might react and a resignation might result. This is a constructive dismissal.

[44] Even if that were not the case I would, for the following reasons, conclude Ms Liu was actually dismissed.

[45] Chillex is of the view that not only did Ms Liu resign, she confirmed her decision by rejecting an opportunity to reconsider. In saying this Chillex relies on an e-mail written by the HR manager to Chillex's lawyers after the grievance was raised. Therein it is claimed:

I asked her to confirm her resignation after thinking about it over the weekend and offered garden leave to her via phone on 5 June, if she chose to continue. I also asked her to confirm her resignation. She said after Queen's birthday that she wanted to continue with her resignation and work through her notice. We offered WFH (work from home) with [Mr Hunt] in his his office 9/6.

[46] I do not accept this. Firstly Ms Liu denies this occurred and the HR manager did not give evidence. I also note it is inconsistent with the HR managers e-mail of 5 June which, while it asks the two meet, talks about an exit interview and not a reconsideration. I also note the claim was not supported by Mr Hunt's evidence. He had no recollection of the alleged conversation on 9 June and stated he had no knowledge of any attempt to get Ms Liu to rethink her resignation. Neither does Ms Hunt have any recollection of the conversation Ms Liu says they had on the 10th.

[47] I also note Mr Hunt's repeated evidence that even if such conversations had occurred nothing would have changed. He said he became aware of the resignation when the HR manager told him, in all probability on the morning of the 5th. He says he is of the view that "once you've resigned, you've resigned" and he immediately "moved on" and gave no thought to trying to contact Ms Liu.

[48] The conclusion Ms Liu was not given a chance to reconsider returns me to the events of 4 June. The parties agree the conversation that day was heated though the evidence is the heat was injected by Mr Crawford and not Ms Liu. This was due to his view Ms Liu was

performing inadequately which was unacceptable given the pressure of covid. As a result of that heated conversation Ms Lui resigned though she immediately raised flags which might have warned the resignation as not entirely voluntary via the content of the covering e-mail. The uncontested evidence is she then tried to withdraw the resignation though that had little chance of success given Mr Hunt's view a resignation is a resignation and the fact that in the absence of Mr Crawford he was now running Chillex.

[49] In such circumstances I am cognisant of Couch J's words in *Kostic v Dodd*⁴ and the cases upon which he relied. In essence he concluded it is fraught to accept a resignation tendered in the heat of the moment and to do so without reconsidering can amount to an unjustified dismissal. This is especially so where, as here, the employee then makes it clear resignation was not intended.

[50] For these reasons I conclude Ms Liu was dismissed and reliance on the purported resignation meant there was no attempt at justification. Even if this were not a dismissal I would have found Ms Liu had been subjected to a further disadvantage by reason of the employer's failure to respond to the issues she was raising in the days after it had subjected her to an unjustified personal attack and following her resulting resignation. A fair and reasonable employer would surely have followed up on these issues and the effect of this disadvantage would have been the same as a dismissal – Ms Liu left.

[51] The conclusion Mr Liu had been both unjustifiably disadvantaged and unjustifiably dismissed raises the question of remedies. Those sought were global and not reliant on any particular finding in respect to Ms Liu's various grievance claims.

[52] Ms Liu seeks wages lost as a result of the dismissal and compensation for hurt and humiliation.

[53] With respect to lost wages s 128(2) of the Employment Relations Act 2000 requires the payment of three months wages or the actual loss, whichever is the lesser.

[54] As events transpired Ms Liu obtained a replacement job and commenced five weeks after leaving Chillex. Accordingly Ms Liu seeks five weeks wages on the basis she was on a salary of \$68,000. While that was originally correct she subsequently agreed to reduce her salary to \$54,400 due to the pressure Chillex was under as a result of covid and that was the

⁴ *Kostic v Dodd* EMC Christchurch CC14/07, 11 July 2007 Judge Couch at [87]

rate payable at the time of termination. Five weeks pay at that rate is \$5,230 and s 128(2) means this is payable.

[55] Ms Liu also sought what she claimed to have been the difference between her earnings at Chillex and a lesser amount she earned at her new job for a further six months. That said she conceded, under cross examination, that her calculations failed to recognise the agreed salary reduction and that her new employer paid more than she was earning when she left Chillex. It follows there shall be no award under this head given her acceptance there was no indication as to when her pay might have increased had she remained at Chillex.

[56] Turning to compensation pursuant to s 123(1)(c)(i). Mr Liu seeks \$20,000.

[57] From my conclusions above it is clear Ms Liu was the victim of unjustifiable and inappropriate abuse both in early April and on 4 June. That she felt injured was often referred to in her brief. For example and in respect to early April she talks about being ... *humiliated and deeply hurt by the racist and abusive approach adopted by my employer*. She also refers to the threat to her job and the angst that caused.

[58] About 4 July she refers to the distress and humiliation along with the stultifying effect it had on her ability to work that day. Ms Liu's oral evidence supported these assertions and it was clear from her words and the way they were presented that she was deeply hurt.

[59] In my view the evidence supports a significant award and \$20,000 is no longer out of the ordinary. Furthermore I do not think Ms Liu should be penalised for proposing a reasonable sum that the evidence supports by having it reduced. I therefore conclude it appropriate I award the amount sought.

[60] Finally, and having concluded Ms Liu has a grievance and remedies accrue I am required to consider whether or not those remedies should be reduced by reasons of contributory conduct.⁵

[61] Chillex claims *Ms Liu's behaviour contributed to the situation she found herself in, such that a claim for compensation is not warranted*.⁶ No detail is added though the evidence

⁵ Section 124 of the Employment Relations Act 2000

⁶ Closing submission at [56]

would suggest the argument is that she contributed by failing to produce reports in the format sought. For two reasons I disagree.

[62] The first is that performance deficiencies should be addressed in a constructive way and not through abuse and belittling. There is no evidence of any formal process designed to address Ms Liu's alleged deficiencies. Second, and more importantly, I am cognisant of Mr Hunt's e-mail comment that it is a pity Ms Liu was resigning as she had had taken control of projects that were a mess when she arrived (paragraph [21] above). That he considered her work acceptable was reiterated in oral evidence. Such sentiments are not indicative of a deficiency warranting a reduction in remedies.

Conclusion and Orders

[63] For the above reasons I conclude Ms Liu has a personal grievance in that she was both unjustifiably disadvantaged and unjustifiably dismissed. As a result I order the respondent, Chillex Services Limited, pay Ms Liu:

- (a) \$5,230.00 (five thousand, two hundred and thirty dollars) gross as recompense for wages lost as a result of the dismissal; and
- (b) A further \$20,000.00 (twenty thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[64] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority