

**Attention is drawn to the order  
prohibiting publication of certain  
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 52  
5545229

BETWEEN ANNE MACKAY  
Applicant  
  
A N D SPOTLESS FACILITY SERVICES  
(NZ) LIMITED  
Respondent

Member of Authority: David Appleton  
  
Representatives: Simonette Boele and Louise Taylor, Co-Counsel for  
Applicant  
Guido Ballara, Counsel for Respondent  
  
Investigation Meeting: 29 February and 1 March 2016 at Timaru  
  
Submissions Received: 22 March and 15 April 2016 for Applicant  
5 April 2016 for Respondent  
  
Date of Determination: 26 April 2016

---

**DETERMINATION OF THE AUTHORITY**

---

- A. The applicant was unjustifiably constructively dismissed and is awarded lost wages and compensation under s123(1)(c)(i) of the Employment Relations Act 2000.**
- B. Costs are reserved.**

**Prohibition from publication order**

[1] I prohibit from publication the names of members of staff of the respondent who were working in the kitchen of Timaru Hospital at the material time, save as expressly referred to by name in this determination.

[2] The reason for this order is that allegations of bullying were made against two of those members of staff who took no part in the Authority's investigation meeting and, so, were unable to give their own version of events. These staff members shall be known as Ms X and Ms Y respectively.

[3] There are a small number of other staff members who have been mentioned in the evidence but who, similarly, have not taken any part in these proceedings. Due to the allegations, in order to protect those other members of staff, I also prohibit publication of their names.

### **Employment relationship problem**

[4] Ms MacKay claims that she was unjustifiably constructively dismissed from her employment on or around 8 August 2014 due to acts or omissions of the employer in investigating her allegations of bullying by Ms X and Ms Y. Ms MacKay does not claim unjustified disadvantage in respect of the particular allegations of bullying.

[5] The respondent denies that Ms MacKay was unjustifiably constructively dismissed.

### **Brief account of the events leading to Ms MacKay's resignation**

[6] The respondent is a large company operating in Australia and New Zealand providing a variety of services to various industries. In this instance, it provided catering services to Timaru Hospital and employed a number of staff to deliver those services.

[7] Ms MacKay was one of those staff, having been employed by the respondent for twelve years in a variety of positions and work sites. At the material time, she worked as a kitchen assistant in the kitchen of Timaru Hospital. Her direct supervisor was Ms X, and Ms Y was a co-worker. Ms Y is also the daughter of Ms X.

[8] The respondent's manager with responsibility for the whole of the Timaru Hospital site, including food services, is Gwenda Norton.

[9] It is Ms MacKay's evidence that she initially got on well with Ms X but she began to have problems with her, and with Ms Y, once Ms X became the supervisor for the kitchen. She says that she witnessed Ms X and Ms Y essentially bullying various members of staff over time, but managed to largely avoid that treatment

herself by keeping out of the way. She says that she tolerated the occasions when she was spoken to by Ms X or Ms Y in a way that she did not like.

[10] Ms MacKay says that she had complained to Ms Norton on two occasions about Ms X's behaviour, mentioning her looks, attitude and manner and overall demeanour towards her, but that, on the first occasion, Ms Norton said it would be difficult to do anything about her concerns as they were difficult to pin down. Ms MacKay said that, on the second occasion that she complained to Ms Norton, she mentioned Ms X's looks and tone of voice and Ms X treating her like a child, rolling her eyes and loudly sighing when Ms MacKay spoke to her. She said that, on that occasion, Ms Norton said that she was not going to do anything and that Ms MacKay would just have to get over it as *Ms X was going nowhere*.

[11] Ms Norton essentially agreed in her evidence that Ms MacKay had expressed unhappiness about Ms X but said that Ms MacKay had not been able to give any specific examples. She denies that she said to Ms MacKay that she would just have to *get over it* or that Ms X was *going nowhere*. She also denies, as alleged by Ms MacKay, that she told Ms MacKay that all problems were to go through Ms X first and that Ms X would then come to her.

[12] Ms MacKay's concerns about Ms X came to a head on 9 June 2014 when, according to Ms MacKay, Ms X approached her with a bowl of porridge, showing her what appeared to be broken up potato in it. She says that Ms X claimed that it had come out of the soup cauldron that Ms MacKay had cleaned the previous evening. Ms MacKay says that Ms X had said she had taken photos of the bowl of porridge with the potato in it and that *there would be a written warning next time*, and then walked off.

[13] Ms MacKay's evidence is that she was greatly concerned by this because she knew that it was impossible that there would be potatoes left in the cauldron after she had cleaned it the night before and that Ms X could make anything up about her and get her into trouble. Her concern was also that she was not given any opportunity to defend herself.

[14] Around the same time, Ms MacKay had an altercation with Ms Y about whether Ms MacKay or another co-worker should move their respective trolleys.

Ms MacKay said that Ms Y spoke to her in an aggressive manner, speaking loudly, saying *I beg your pardon, I think you'd do better to learn to be quiet.*

[15] On another occasion, Ms MacKay and Ms Y had an altercation about incorrect desserts being given to certain patients, during which Ms MacKay says Ms Y spoke to her in a very condescending way, showing her by gestures that she should have scraped the top of some cheesecake *as though I were a child unable to understand.* Ms MacKay says that it had not been her responsibility to deal with desserts on that day. According to Ms MacKay, the person who had been responsible for the desserts had only followed instructions given by Ms X anyway. Ms MacKay also said that Ms Y made a point of not saying goodbye to her at the end of that particular shift.

[16] These issues caused Ms MacKay such concern that she wrote a detailed four page letter to Ms Norton, dated 18 June 2014.

[17] On 24 June 2014 one of the regular kitchen *safety toolbox meetings* took place, led by Ms Norton, at which Ms X and Ms Y, as well as Ms MacKay, attended. The notes of this meeting record that Ms Norton reminded everybody that they should

*... treat and speak nicely to each other. If someone speaks in a way that is offensive to someone else then that person should say "I don't like that. Please don't speak that way". If it continues they are encouraged to speak to Supervisor or Manager - As per the Spotless Professional Behaviour Policy.*

[18] It was the evidence of Ms MacKay that, while she was not aware of the details of this policy, it was available to read near the sign-in sheet. The Authority saw a copy of this document, which is a comprehensive policy dealing with how to recognise and deal with different types of unacceptable behaviour.

[19] On 25 June 2014 Ms Norton wrote to Ms MacKay acknowledging her complaint dated 18 June and inviting Ms MacKay to attend a meeting on 27 June to discuss it, at which she would be accompanied by Jason McLennan, the National Manager Health for the respondent. Ms Norton said that Ms MacKay could bring a support person with her.

[20] Mr McLennan and Ms Norton met with Ms MacKay as arranged and Mr McLennan recorded the meeting in an email he sent to Ms Norton the following

Monday. Ms MacKay agreed in her oral evidence that the contents of the email were an accurate record of that meeting.

[21] The notes indicate that the meeting with Ms MacKay was relatively lengthy and that the following was discussed:

- (a) That Mr McLennan advised Ms MacKay that the respondent had received letters from other staff regarding similar issues and allegations against Ms MacKay, and that they had been received prior to her letter of complaint to Ms Norton.
- (b) That these other staff had given their permission to give copies of their letters to Ms MacKay and that Ms MacKay agreed that a copy of her letter would be made available to the subjects of her complaint.
- (c) Ms MacKay was given the opportunity to comment on each of the concerns that she had raised in her letter and that questions were asked of Ms MacKay to clarify these complaints.
- (d) Mr McLennan stressed that the company took the allegations seriously and they wanted Ms MacKay to respond to the allegations contained in the letters of complaint about her.
- (e) That they asked Ms MacKay how the situation at work could be resolved, but her support person interjected saying that they should review the other letters before commenting.

[22] Mr McLennan's email recording the meeting showed that he also met with Ms X, Ms Y (who was the author of one of the letters of complaint about Ms MacKay), a relatively new staff member, who was the author of the other letter of complaint about Ms MacKay (which was actually in two parts) and three other members of staff who worked in the kitchen.

[23] It has been noted from the comprehensive notes made by Mr McLennan that he recorded that he coached Ms X on how best to approach another possible situation similar to that in which potato had been found in the porridge, and the terminology to use. He noted that, rather than talking about written warnings, it was better to say

something like *if this happens again then we may need to have an investigation/disciplinary process.*

[24] It was also to be noted that several staff members interviewed declined to agree that Ms Y was a bully but that most of them believed that she had a particular manner which involved her speaking what was on her mind. Mr McLennan noted that Ms Y stated herself that she *doesn't have a filter and generally what she is thinking comes out her mouth.* Mr McLennan recorded that he agreed with Ms X that Ms Y did need to have a filter and to think before she spoke and this was something that needed to be discussed with Ms Y.

[25] The notes also noted that Ms Y was willing to attend some form of mediation to restore a harmonious work environment.

[26] Unfortunately, these actions and conclusions by Mr McLennan about Ms X and Ms Y were not passed on to Ms MacKay. Ms MacKay also states that no-one had ever talked to her about obtaining support from EAP Services<sup>1</sup> and, in fact, she did not know during her oral evidence to the Authority what EAP Services were. I accept this evidence.

[27] On 3 July 2014 Mr McLennan wrote to Ms MacKay summarising the key parts of the complaint against her by Ms Y and the new staff member, inviting her to provide a response within the next seven days.

[28] Ms MacKay did provide a detailed response to Mr McLennan by email<sup>2</sup>. In this detailed response Ms MacKay effectively denied all of the allegations made against her. These allegations included that Ms MacKay had used insulting words to describe Ms X and Ms Y to the new staff member and had said to her that Ms Norton would effectively take Ms X's side in all matters.

[29] It is to be noted that in his letter of 3 July, Mr McLennan asked whether Ms MacKay would be willing to attend mediation *with the complainant*<sup>3</sup> *if required as part of the resolution to this issue.* It was Ms MacKay's evidence to the Authority that she did not wish to attend mediation at that stage, at least, because her experience

---

<sup>1</sup> EAP Services Limited's Employee Assistance Programmes (EAPs) provide to organisations confidential professional strategies and interventions for personal and workplace support of their employees.

<sup>2</sup> This response was not sent within seven days, although the respondent does not seem to have made an issue of this.

<sup>3</sup> It is not clear which complainant Mr McLennan was referring to.

of being interviewed by Mr McLennan was that he was biased and she did not see any point in attending a further meeting in which she anticipated the company would continue to be biased. It appears that Ms MacKay was not aware what mediation would entail or that an independent mediator would be present to facilitate the finding of the resolution.

[30] Whilst Ms MacKay said in her evidence to the Authority that she received no response to her lengthy email of 16 July, I note that Mr McLennan did acknowledge it by way of an email of 18 July in which he said he would respond by the end of the following week (25 July 2014).

[31] Unfortunately, during the respondent's investigation into Ms MacKay's complaints, and the complaints against her, Ms MacKay was largely absent from work due to her first having a sinus infection, and then breaking her foot. It appears that between 5 July and 8 August Ms MacKay attended work on only two days. Incidentally, she said that, even during those two days, she was falsely accused by Ms Y of spraying sanitiser on some vegetables that Ms Y was preparing and of deliberately bumping into Ms Y.

[32] In addition, Ms MacKay had an operation for carpal tunnel syndrome on 5 August which, she said, prevented her from being in a position to work for two weeks.

[33] During the period of her sick leave, on 25 July, Ms MacKay wrote a letter of resignation to Ms Norton in the following terms:

*To Gwenda Norton*

*Due to unresolved and ongoing issues within the kitchen of unacceptable behaviour, which makes it very difficult to work within, I am left with no choice but to give 2 wks notice of my resignation. Last day being Fri 8.8.14.*

[34] Ms MacKay's evidence to the Authority as to the reason for her writing this letter was that she had been getting no response from Mr McLennan as to a resolution. She was due to return to work soon and she did not want to go back under the same conditions. She had been hoping that, by 25 July, Mr McLennan would have had a resolution for her. It would seem that Ms MacKay's decision to write that resignation

letter was triggered by her expectation that Mr McLennan would have responded to her by 25 July (as he had stated he would in his email of 18 July).

[35] It was not clear whether and, if so, how the respondent responded to Ms MacKay's note of 25 July giving notice of her resignation. However, on 30 July, Ms MacKay wrote to Mr McLennan asking if she could put her resignation on hold in the hope that a resolution could be found. She also stated that she felt unable to work in the stressful environment, which she was finding intolerable, and that she needed urgent action and support from Mr McLennan to resolve the ongoing and worsening conflict.

[36] In her email she also stated that she had asked Ms X if she could change her shifts due to her foot still being fragile, but that Ms X had refused. Ms MacKay also proposed mediation to assist in resolving the workplace issue. She finished her email by stating:

*Also due to the above I would appreciate how you propose to resolve this conflict so I feel safe. I await your reply at your earliest convenience.*

[37] It seems that there were then a number of attempts to contact Ms MacKay by Mr McLennan (although Ms MacKay denies that he tried to contact her on a daily basis, as he suggests) and they finally managed to speak on 8 August.

[38] Mr McLennan sent an email to Ms Norton around 50 minutes after speaking with Ms MacKay, summarising the conversation. As this conversation led directly to the termination of Ms MacKay's employment, I replicate the email in full below:

*I spoke with Anne at approx. 4.10pm this afternoon.*

*I explained to her that she could not put her resignation "on hold" as per her attached email, and that she needed to either formally retract her resignation, or to keep it in place.*

*I then explained that we are still working through the complaint process, the issue being that we have complaints "in both directions" – from Anne, and against Anne; and in both instances the parties are disputing the allegations against them.*

*Anne then commented that she had heard today that someone at the hospital was collecting letters/statements from the staff which were against her – I advised that I could not comment on this, as I knew nothing about it. So whilst the Union Delegate had told her to "put her resignation on hold", Anne had decided that given everything that*

*she thinks is still happening (even in her absence) – she would like her resignation to “still stand” with her official last day being today – Friday 8 August.*

*I therefore accepted Anne’s resignation and advised her that Gwenda will process her final pay which is to be paid to her in the normal payrun next week.*

*Josh – at the end of the call I had asked Anne to drop me a quick e-mail to confirm her verbal advice. However after the call I decided that I would send the attached email to say that her resignation was officially accepted given what she had told me verbally.*

*Gwenda – if you could please proceed to process Anne’s final pay, and please liaise with her to return any company issued property.*

[39] The email that Mr McLennan sent to Ms MacKay was in the following terms:

*Hi Anne,*

*As per our telephone conversation this afternoon (at approx.4.10pm) in which you advised me that you would like your resignation to “still stand” with your official last day at Timaru Hospital being today, Friday 8<sup>th</sup> August 2014.*

*This email is to confirm that your resignation is therefore accepted, and I will ask Gwenda to process your final pay which will be paid in the normal run next week.*

*I wish you all the best for your future endeavours.*

[40] On 11 August 2014 Ms MacKay sent the following email to Mr McLennan:

*Subject: re phone call*

*Hi Jason. This is to confirm our telephone conversation re – resignation Friday 8 August 2014. As I said, I was advised to put my resignation on hold until this work conflict was resolved, (that being my union rep) as I felt it was extremely stressful and unsafe for me to work in. However, in our conversation you said Human Resources had said I could not do that, and that it had to be either resign or not.*

*As I mentioned I am left with no choice but to stand on my resignation, with the last day being Friday 8 August, as you said yourself, with new complaints about myself still coming in, it appeared to be hindering a resolve, even though I’ve only worked 2 days out of 4 wks due to personal injury.*

*Whenever I try to touch on the workplace being unsafe for me to work in your response is as above, your still getting complaints about me, so in effect leaving me in a vulnerable position, hence being left with*

*no choice but to stand on my resignation, that being the only safe thing to do for myself.*<sup>4</sup>

[41] Ms MacKay said that after she had written her original resignation letter on 25 July, she heard from two of her colleagues that a third colleague was circulating a piece of paper asking people to write comments about her on it. Ms MacKay regarded this as a type of petition against her. With respect to what she understood Mr McLennan to mean when he referred to *further complaints* during the conversation with her on 8 August, she says that he did not volunteer any information about what those further complaints were but she assumed that it was Ms Y raising further complaints orally about her following on from the altercations they had had when she had returned to work for two days during her sick leave, referred to above.

[42] When asked why she had asked to put her resignation on hold, Ms MacKay said this was because she had been advised by her Union representative that she should do so, but she said she was also hoping that Mr McLennan would figure something out to bring a resolution to the workplace issues. Ms MacKay had also wanted a reply from Mr McLennan to her responses to the written complaints about her.

[43] When asked during the Authority's investigation meeting why she had decided on 8 August to tell Mr McLennan that she now wanted her resignation to stand, Ms MacKay said it was because of the petition that a colleague had told her had been circulating about her, and Mr McLennan saying that he knew nothing about it. She said that she had had enough. In her evidence to the Authority Ms MacKay referred to the fact that Mr McLennan had said that he knew nothing about the piece of paper being circulated as *the straw that broke the camel's back*.

[44] Ms Norton gave evidence to the Authority with respect to this piece of paper that was being circulated inviting comments about Ms MacKay. Ms Norton said that she had been aware from Ms X that some staff had expressed concerns about Ms MacKay returning to the kitchen after her sick leave and that she had said that, if staff had concerns about Ms MacKay, they should put them in writing.

[45] Ms X had then told this to some staff but another staff member had taken it upon herself to speak to other colleagues, who in turn made some written comments

---

<sup>4</sup> The punctuation has been tidied up in order to assist comprehension.

about Ms MacKay. Ms Norton said that, when she found this out, she spoke to the staff member and told her she was not to continue. Ms Norton said she did not keep the comments as they were personal criticisms of Ms MacKay rather than work related issues. However, Ms MacKay says that Ms Norton had not advised her that this had been going on. The first she had found out about Ms Norton's role in the issue when she read Ms Norton's statement of evidence to the Authority.

[46] Mr McLennan released his report on his investigation on 15 August, finding that there had been no bullying, but that there appeared to be a clash of personalities and that Ms X and Ms Y had been spoken to about expectations of behaviour in the workplace and what was needed to create a more harmonious environment.

[47] The Authority also heard evidence from a co-worker who had resigned prior to the issues between Ms X and Ms Y and Ms MacKay arising. This witness, Neroli Arras, has brought her own claim of constructive dismissal before the Authority, which is yet to be determined. The purpose of allowing Ms Arras' evidence was because Ms MacKay claims that the respondent knew very well that Ms X and Ms Y were bullies and yet failed to put in place steps to safeguard her (Ms MacKay) and other staff. Ms Arras relies on alleged bullying by Ms X as part of her claim.

[48] In investigating Ms MacKay's claim, the Authority did not inquire in any detail into the specifics of Ms Arras' complaint. According to Ms Arras, she made an oral complaint to an HR adviser (Josh Coll) on 3 March 2014 and agreed to follow it up with a written complaint. That written complaint was sent in by Ms Arras a week later, on Monday 10 March 2014. Ms Arras said that she understood that Mr Coll was going to make a *senior manager* (Mr McLennan) aware of her concerns.

[49] Ms Arras' evidence was that she resigned on Wednesday 12 March as *she was not seeing* [the respondent] *do anything*. She says that this was because she had spoken to Mr Coll the day before, and he was very vague about what he was going to do. She said that she resigned because she could not go back into the working environment.

[50] Having considered the evidence, I am unable to conclude that the respondent unreasonably failed to address Ms Arras' concerns about Ms X. This is because the respondent did investigate the complaints after Ms Arras' resignation, and did

subsequently counsel both Ms X and Ms Norton as to the right process to adopt in similar circumstances.

[51] Ms Arras and the respondent should draw no firm conclusions from this with respect to the strengths or weaknesses of her claim in the Authority as I simply did not hear enough evidence to be able to determine that in any reasonable way. It is due to be investigated at a later date by a different Member.

### **The issues**

[52] In her submissions to the Authority, Ms Boele submitted that one of the issues to determine was whether there had been a breach of the employer's duties under the Health and Safety in Employment Act 1992<sup>5</sup> by subjecting Ms MacKay to bullying and/or failing to protect her from such bullying. However, I do not believe that this is the most appropriate way of characterising the Authority's issues to determine, as the Authority does not have any jurisdiction under the Health and Safety in Employment Act 1992.

[53] Even though that enactment has been incorporated into Ms MacKay's terms of employment by way of an express reference, as this is a claim of unjustified constructive dismissal, it is preferable to examine whether the respondent failed in its duty of good faith to Ms MacKay and, if so, whether that breach amounted to a repudiatory breach of Ms MacKay's employment agreement, which she was entitled to accept and resign. This enquiry into the respondent's alleged actions and omissions would encompass examining whether they amounted to a breach of the implied duty of trust and confidence and whether the respondent failed to provide a safe workplace.

[54] Therefore, in determining whether Ms MacKay was unjustifiably constructively dismissed from her employment I consider that the following sub-issues need to be examined:

- (a) Whether the respondent took reasonable steps to investigate Ms MacKay's letter of complaint dated 18 June 2014;
- (b) Whether the respondent was unreasonable in refusing to allow Ms MacKay to *put her resignation on hold*;

---

<sup>5</sup> This enactment has now been repealed by the Health and Safety at Work Act 2015. However, at the material time, the 1992 Act was still in force.

- (c) Whether Ms MacKay had affirmed any breach by the respondent; and
- (d) Whether the respondent was unreasonable in failing to tell Ms MacKay that it would investigate her claim that a *petition* was circulating amongst staff about her.

### The law

[55] I agree with Mr Ballara's summary of the fundamental legal principles relating to the law on constructive dismissal that the Authority must apply. These principles were enunciated in the Court of Appeal case of *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*<sup>6</sup>, which set out three non-exhaustive categories of constructive dismissal:

- (1) Where the employee is given a choice of resignation or dismissal;
- (2) Where the employer has followed a course of conduct with a deliberate and common purpose of coercing an employee to resign;
- (3) Where a breach of duty by the employer leads a worker to resign.

[56] Ms Boele submits that the third category applies in this case; specifically that the respondent breached its duty to take all practicable steps to provide a safe workplace. I agree that that is the category which is applicable, as does Mr Ballara.

[57] With respect to the third category of constructive dismissal referred to above, the Court of Appeal elaborated on that category in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc*<sup>7</sup>. The Court of Appeal stated at [172]:

*In such a case as this 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 the 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*

<sup>6</sup> [1985] 2 NZLR 372 (CA) at 374-375

<sup>7</sup> [1994] 2 NZLR 415 (CA)

*words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[58] The Authority must also take into account the duty of good faith in s.4 of the Act, and the principles of s.103A of the Act. The relevant parts of these sections are as follows:

***4 Parties to employment relationship to deal with each other in good faith***

*(1) The parties to an employment relationship specified in subsection (2)—*

*(a) must deal with each other in good faith; and*

*(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*

*(i) to mislead or deceive each other; or*

*(ii) that is likely to mislead or deceive each other.*

*(1A) The duty of good faith in subsection (1)—*

*(a) is wider in scope than the implied mutual obligations of trust and confidence; and*

*(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*

***103A Test of justification***

*(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

*(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

*Did the respondent take reasonable steps to investigate Ms MacKay's letter of complaint dated 18 June 2014?*

[59] Ms Boele submits that the investigation into Ms MacKay's complaint, and the communication with her during the process fell short of what a reasonable employer could have done.<sup>8</sup> In particular, Ms Boele submits that:

- a. the respondent did not investigate Ms MacKay's oral complaints made to Ms Norton;

---

<sup>8</sup> Ms Boele stated in her submissions that the investigation into Ms MacKay's complaint, and the communication with her during the process fell short of what a reasonable employer would have done. However, that wording derives from the old s.103A test of justification that was superseded on 1 April 2011.

- b. the investigation into her written complaint was unbalanced and lacked depth;
- c. the investigation spent undue time on the complaints against Ms MacKay;
- d. that Ms X was not properly interviewed about the specifics of Ms MacKay's complaints about her; and
- e. only existing staff were interviewed.

[60] I agree that Ms Norton should have taken steps to have investigated Ms MacKay's oral complaints and, if they lacked specifics, sought to establish those specifics. There is no doubt that facial expressions, gestures and demeanour can have a belittling or intimidating effect upon co-workers<sup>9</sup>. It is quite possible that, had Ms Norton taken these complaints more seriously, Ms MacKay would not have encountered further bullying.

[61] However, this is not an unjustified disadvantage investigation. I cannot go so far as to say that Ms Norton's insufficient investigation into Ms MacKay's oral complaints led, even partially, to her resignation as this did not feature as a reason for it in her evidence.

[62] As for the investigation into Ms MacKay's written complaint, I agree that the notes of the interview with Ms X appear to suggest that there was not a particularly in-depth investigation into the allegations by Ms MacKay against her. However, that was not known by Ms MacKay at the time she tendered her resignation on 25 July 2014. Indeed, Ms MacKay had received no substantive feedback at all up to the point when she wrote her resignation letter.

[63] With this in mind, whilst it would appear that there were some potential failings in the approach that Mr McLennan took, they could not have led to Ms MacKay's resignation as she was not aware of them.

[64] What did lead to her initial resignation letter was the fact that she had not heard from Mr McLennan with any feedback to her long email of 16 July. In essence,

---

<sup>9</sup> I refer to WorkSafe New Zealand's guide *Bullying - Preventing and responding to workplace bullying*

she was understandably seeking a resolution to the work issues and was impatient to hear the respondent's conclusions and approach.

[65] However, it is arguable that her resignation letter was sent too soon, in that Mr McLennan had stated in his email that he would respond by 25 July, and Ms MacKay sent her letter on that day. In other words, at that point, there does not appear to have been a repudiatory breach by the respondent of Ms MacKay's employment agreement. I presume that this would have been the reason that Ms MacKay was advised by her union representative to ask to put the resignation on hold.

*Was the respondent unreasonable in refusing to allow Ms MacKay to put her resignation on hold?*

[66] I believe that, in strict legal terms, putting her resignation on hold was not something that the respondent was obliged to agree to. What it effectively meant was that Ms MacKay was asking for indefinite notice, which created uncertainty for the respondent. I accept the respondent's evidence that Mr McLennan told Ms MacKay that she needed to either retract her notice or keep it in place. This was the correct approach in my view.

[67] However, what Ms MacKay was really asking for when she asked to put her resignation on hold was to know whether there was a resolution in sight. She was entitled to know that and Mr McLennan does not seem to have given her any comfort in that respect. He did not, for example, give her any comfort at all about addressing Ms Y's manner of speaking to people or advising Ms X that she could not threaten a written warning without due process having been followed. I accept, though, that that may have been his intention ultimately, had Ms MacKay not resigned.

[68] It was during the conversation with Mr McLennan that Ms MacKay agreed she would confirm her resignation instead of retracting it. It cannot be the case that Mr McLennan telling Ms MacKay that she could not put her resignation on hold was a breach justifying Ms MacKay's resignation. It is therefore necessary to look at the wider context of what was happening when she decided to confirm the resignation instead of retracting it.

[69] Prior to looking at that wider context, I need to examine whether Ms MacKay affirmed any breach by stating that she wished to put her resignation on hold.

*Did Ms MacKay affirm any breach by asking to put her resignation on hold?*

[70] I do not consider that this is a question that is relevant, as there was, up to the point when she had asked to put the resignation on hold, no breach to affirm.

[71] Ms MacKay had asked the respondent to investigate her complaints about Ms X and Ms Y, and it was in the process of doing so. She then resigned. She was then given advice that she should put the resignation on hold. It is not completely clear whether she had, in the meantime, heard about the *petition* being circulated about her, but I conclude that she had not, as she would have been very likely to have referred to that in her email of 30 July in which she had asked to put the resignation on hold<sup>10</sup>.

[72] Therefore, by 30 July, apart from Mr McLennan not having yet reverted to her in reply to her answers to the allegation against her, there had been no action or omission by the respondent that could be characterised as a breach for her to affirm. Indeed, Mr McLennan could be forgiven for not reverting to her after he had been advised of Ms MacKay's resignation letter on 25 July.

[73] In the alternative, I do not accept that asking to put a resignation on hold (as opposed to withdrawing it) amounts to an affirmation in any event, when Ms MacKay was asking for an urgent resolution to her concerns and mediation. All she was doing was seeking to give the respondent another chance to sort out her concerns. This, by the way, undermines Mr Ballara's submission that Ms MacKay herself was in breach of her duty of good faith by not wanting to pursue mediation. She may have been suspicious initially of mediation, but once she had taken advice from her union, she was clearly keen to try to resolve matters. That was the very reason why she sought to put her resignation on hold.

*Was the respondent unreasonable in failing to tell Ms MacKay that it would investigate her claim that a petition was circulating amongst staff about her?*

[74] I believe that this is a significant failing on the part of the respondent. Mr McLennan knew that Ms MacKay was both complaining about bullying and was also the subject of complaints. Therefore, there was clearly a dysfunctional situation

---

<sup>10</sup> She did, after all refer to Ms X refusing to let her change shifts in this email.

within the kitchen that needed to be investigated and resolved, whether or not he believed there had been bullying up to that point.

[75] Whilst he was in the process of investigating those issues, Mr McLennan was a senior member of the HR team and he should have been alerted to the potential of serious bullying when he heard from Ms MacKay on 8 August 2014 that someone was collecting letters/statements (or, as she puts it, a petition) against her. It does not matter that Ms MacKay was at that point on sick leave. In some way, her absence made it all the more important to get to the bottom of the issue as she was not in the workplace to defend herself.

[76] This scenario of adverse comments about her being petitioned by her co-workers is a classic example of mobbing which, in itself, is a classic example of bullying. Mr McLennan merely saying that he did not know anything about it without going on to say he would investigate the matter was a serious failing of his duty in my view. It was not for Ms MacKay to have to expressly ask for the matter to be investigated. Its seriousness spoke for itself. In other words, no fair and reasonable employer could have failed to have investigated that information urgently in all the circumstances, and to have told Ms MacKay that that was his intention.

[77] In addition, Ms MacKay says that Mr McLennan had also stated to her during the conversation that there were further complaints coming in about her, but did not tell her what they were about, or who they were from. Mr Ballara submits that this is not credible, and that the Authority should prefer Mr McLennan's denial that he said this. However, whilst his email to Mr Coll and Ms Norton of 8 August sent shortly after his conversation with Ms MacKay makes no mention of further complaints coming in, this is not surprising given that he was reporting in summary form information to the recipients that they were generally not already aware of. They would already have been aware of new complaints against Ms MacKay. On the other hand, it was important enough to Ms MacKay to refer to twice in her email to Mr McLennan of 11 August.

[78] A minute analysis of the emails, however, is not the best approach in establishing the likelihood of what Mr McLennan said. What is stark is that Ms MacKay felt sufficiently strongly during the conversation with Mr McLennan to decide she had to confirm her resignation. From this, I infer that it is more likely than not that Mr McLennan did refer to more complaints coming in.

[79] Mr McLennan telling Ms MacKay of more complaints about her coming in cannot on its own, of course, give rise to a right to resign and claim constructive dismissal. However, it appears that Mr McLennan did not tell Ms MacKay who had made these further complaints, and she assumed that these complaints were from Ms Y. However, I do not believe there is sufficiently cogent evidence to suggest that Mr McLennan failed in any significant way as it is more likely than not that he would have disclosed to Ms MacKay more details about the further complaints in due course, had she not resigned.

[80] Was Ms MacKay constructively dismissed? First, as I have found above, the respondent had failed in its duty of good faith when Mr McLennan did not take steps to investigate the *petition* and to advise her that he was going to do so.

[81] Second, this failure was significantly causative of Ms MacKay's resignation. She had already written a letter of resignation on 25 July, but had signalled afterwards that she wished to reconsider it, so as to give the respondent more time to resolve matters. At that point, there had been no repudiatory breach by the respondent in any event. However, my analysis of this situation is that, when she heard that Mr McLennan intended to do nothing about the *petition*, and that further complaints had been received which were hindering a resolution, she concluded that her fundamental concerns about the hostility she had been facing in the workplace were not going to be resolved after all, and that she faced, at best, an uncertain future in the workplace, or worse, further hostility which the respondent appeared not to be taking steps to protect her against.

[82] In such a situation, by saying that her resignation would *still stand*, she was communicating that she could not accept that situation, and had to leave after all. That is, her attempt to explore a resolution had come to naught and, in addition, there were further concerns to contend with (the *petition* and the further complaints).

[83] Third, against the context in which Ms MacKay clearly harboured concerns about the way she was being treated by her supervisor and by Ms Y, it was entirely foreseeable to any fair and reasonable employer that, in those circumstances, Ms MacKay would wish to resign when told that further bullying actions were occurring (the *petition*) but sees that the respondent was not prepared to do anything to investigate.

[84] In other words, it is my finding that such a resignation was in response to what was a fundamental breach of her contract; namely, the failure by the respondent to be prepared to take reasonable steps to ensure her safety against further bullying in the workplace. Furthermore, this was not an imagined threat she was facing; Ms MacKay's colleagues were entirely right when they had told her that a piece of paper was circulating inviting comments about her, as this has been confirmed by Ms Norton.

## **Conclusion**

[85] In conclusion, I accept that Ms MacKay was constructively dismissed. As the action that caused her to resign was an unjustifiable action that no fair and reasonable employer could have taken in all the circumstances, I also accept that that dismissal was unjustified.

## **Remedies**

[86] Having established that Ms MacKay was unjustifiably dismissed, I must now consider what remedies are due to her. Section 123(1)(a) to (c) of the Act provides:

### ***123 Remedies***

*(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*

*(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:*

*(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*

*(c) the payment to the employee of compensation by the employee's employer, including compensation for—*

*(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*

*(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.*

[87] Section 128 provides:

### ***128 Reimbursement***

*(1) This section applies where the Authority or the court determines, in respect of any employee,—*

*(a) that the employee has a personal grievance; and*

*(b) that the employee has lost remuneration as a result of the personal grievance.*

*(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*

*(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[88] Ms MacKay said that she did not have a job to go to when she resigned and that she did not get a job until November 2014. She claims, I understand, 14 weeks loss of wages, which Ms Boele said amounts to \$12,689 gross, including holiday pay and Kiwisaver. However, I accept the submissions of Mr Ballara that her loss for 14 weeks would be \$717.77 gross a week, amounting to \$10,048.78. Adding holiday pay at 8% and Kiwisaver at 3% would increase that loss to \$11,178.26.

[89] Mr Ballara asserts that Ms MacKay did not mitigate her loss because she told the Authority that she only looked for jobs in aged care. It seemed that she felt her age would have prevented her from working in a kitchen again. I do not follow that logic, as aged care work can be very physically demanding. I therefore have some sympathy with Mr Ballara's point. I also take into account that, on her own evidence, she was unable to work for two weeks due to an operation. I do not accept Ms Norton's speculation that the recovery would have taken six weeks; Ms MacKay is much more likely to know how long her recovery took.

[90] How much the Authority awards in terms of loss of wages is a matter of discretion. It is impossible to know how long it would have taken Ms MacKay to have found new work if she had spread her net a little wider, including kitchen and cleaning work, perhaps. However, a reduction should be made to take into account her failing to do so, and to take into account the two weeks she was unable to work due to her operation<sup>11</sup>.

[91] I believe that it is appropriate to award Ms MacKay lost wages for 10 weeks instead of 14. This amounts to the gross sum of \$7,177.70 for lost wages and the gross sum of \$824.00 for holiday pay and Kiwisaver. This makes a grand total of \$8,001.70 gross.

---

<sup>11</sup> I understand her sick pay entitlement would have been exhausted by then had she remained in employment and so would have received no pay in any event during those two weeks.

[92] Turning to compensation for humiliation, loss of dignity, and injury to Ms MacKay's feelings, she claims the sum of \$10,000. This sum lies somewhere near the midway point of the current range of awards for a moderate effect. Ms MacKay spoke of her skin crawling and her stomach churning when she went near Timaru Hospital because of what she had suffered while working there. My understanding of this evidence is that she refers to the treatment she received from Ms X and Ms Y.

[93] To be eligible for an award of compensation, the effects suffered must arise out of the personal grievance. Ms MacKay's personal grievance is that she was unjustifiably constructively dismissed when the respondent did not assure her it would take steps to investigate the *petition* being circulated. She said that she had felt better after she had resigned.

[94] Much of Ms MacKay's stress arose out of what she saw as bullying by Ms X and Ms Y, and then the *petition*. These form the context against which Ms MacKay felt she could not continue working. No compensation can arise from the alleged actions of Ms X and Ms Y, and the petition themselves, but they form the background against which Ms MacKay's decision was made. In that context, the respondent's breach of duty did cause Ms MacKay an adverse effect, which appears to have been short lived because resignation brought relief.

[95] It cannot be just, however, that an award of compensation is reduced or humiliation, loss of dignity, and injury to feelings are regarded as trivial or minor in circumstances where an employee is forced to resign to get away from an environment which caused distress, simply because the distress ceases as soon as the resignation takes effect.

[96] I therefore accept that Ms MacKay felt humiliation, loss of dignity, and injury to her feelings when Mr McLennan did not take steps to investigate the *petition*, and that that effect was at the lower end of moderate. I believe that an award of \$7,500 is appropriate.

[97] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal

grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[98] Mr Ballara says that Ms MacKay walked away from her employer instead of engaging in its process, and so contribution must be high. In addition, the complaints against her suggest she contributed to the situation she found herself in.

[99] I do not accept that walking away from her employer in circumstances of a constructive dismissal means Ms MacKay has contributed to the situation that gave rise to the personal grievance. I have found that Ms MacKay was entitled to resign, and so that resignation cannot be seen as a blameworthy action. Put another way, if the resignation had not been a constructive dismissal, there would have been no right to remedies for constructive dismissal in any event.

[100] With respect to the complaints against her, Mr McLennan finds that there had been a clash of personalities and that no disciplinary action was warranted. Therefore, Ms MacKay did not contribute in any blameworthy way to the situation that gave rise to the personal grievance on the respondent's own findings.

[101] Therefore, I decline to reduce the remedies awarded.

### **Orders**

[102] I order the respondent to pay to Ms MacKay the following sums:

- a. The gross sum of \$8,001.70 in respect of lost wages; and
- b. The sum of \$7,500 pursuant to s123(1)(c)(i) of the Act.

### **Costs**

[103] Costs are reserved. The parties should seek to agree how costs are to be dealt with between them, but if, within 28 days of the date of this determination, they are

unable to reach agreement, Ms Boele shall have a further 14 days within which to serve and lodge a memorandum of costs and Mr Ballara shall have a further 14 days within which to reply.

David Appleton  
Member of the Employment Relations Authority