

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 332
5452960

BETWEEN ERIN PATRICIA MILLAR
Applicant

A N D WHANGAROA HEALTH
SERVICES TRUST
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
D Grindle, Counsel for the Respondent

Investigation Meeting: 29 July 2014 at Kerikeri

Submissions Received: 29 July 2014 from the Applicant
29 July 2014 from the Respondent

Date of Determination: 8 August 2014

DETERMINATION OF THE AUTHORITY

- A. Erin Patricia Millar was unfairly disadvantaged by the Whangaroa Health Services Trust decision to place her on garden leave on 9 December 2013.**
- B. I decline to make any award because Ms Millar has not proven on the balance of probabilities that she has suffered any damage.**
- C. As the applicant was self-represented, no order as to costs shall be made.**

Employment relationship problem

[1] Erin Patricia Millar was employed by the Whangaroa Health Services Trust (the Trust) until she resigned on 6 December 2013. She was subsequently placed on

garden leave. She alleges she was unjustifiably dismissed and/or disadvantaged by this action.

Facts leading to dismissal

[2] Ms Millar was employed by the Trust as the Clinical Services Manager on 3 July 2006. The parties signed an individual employment agreement.¹ Clause 21.2 of the employment agreement provided:

21.2 Where the Employee terminates this agreement under this clause, the Employer may pay wages/salary in lieu of the Employee having to work out the notice period.

[3] Ms Millar was responsible for employing nurses and doctors in the respondent's GP practice and rest home, Kauri Lodge and ensuring quality and health and safety requirements were met.

[4] In November 2013, the Trust's Chief Executive Officer resigned. At the same time, two new interim Chief Executive Officers were appointed. These were Patricia Howitt and Paul Cameron.

[5] On 6 December 2013, Ms Millar handed Ms Howitt and Mr Cameron her resignation letter. The letter stated her last day of work was 6 January 2014, her pride in her work and that of her staff and her enjoyment of her job.

[6] That same day, she received a letter signed by both Chief Executive Officers. The letter stated:

Dear Pat

LETTER OF RESIGNATION

We are writing after receiving your letter indicating you will be resigning your position as Clinical Services Manager.

While we accept your letter and agree your last day of employment will be Friday 3 January 2014, we would like to acknowledge the last 7 years of service you have given to Whangaroa Health. Your contribution over the years has been significant and we believe your role in the organisation has always been an important part of providing a high standard of service to the Whangaroa community.

¹ Individual Employment Agreement between Whangaroa Health Services Trust and Erin Patricia Millar commencing 3 July 2006

On behalf of the staff and trustees we would like to thank you for your years of service and wish you all the best for your future employment.

[7] On 9 December 2013, Ms Millar attended work as usual. When she went to log onto her computer, she found she had no access. She contacted IT services and was told to speak to the Chief Executive Officers.

[8] Ms Millar went to the Chief Executive Officers' office. She was met by Ms Howitt and Mr Cameron. Ms Howitt asked Ms Millar "*how would you feel about taking a holiday?*" Ms Millar told her if that step was taken they should pay her out that day. There was an offer to host a morning tea which was declined. Ms Millar left thereafter.

[9] Up to and including 3 January 2014, Ms Millar received all of her wages including any leave entitlements through the usual pay cycle.

[10] In January 2014, Ms Millar started employment with the Te Tai Tokerau Public Health Organisation as a General Practice Facilitator.

[11] On 24 February 2014, Ms Millar sent a letter raising a personal grievance for unjustified dismissal. The letter set out the facts leading to her grievance including an agreement her last day would be 3 January, then being subsequently told she was not required to work out her notice and to leave that day and a conversation with a nurse who was told by a trustee Ms Millar was being asked to leave prior to 9 December 2013.

[12] At a teleconference before me on 27 June 2014. The parties agreed there was a sole issue for determination namely, whether Ms Millar was unjustifiably disadvantaged (as opposed to dismissed) by the actions of the Trust after her resignation on 6 December 2013.

Issues

[13] The following issues arise:

- (a) Was Ms Millar unjustifiably disadvantaged by the Trust's actions after her resignation on 6 December 2013, namely placing her on garden leave?
- (b) If so, what remedies (if any) should be awarded?

Was Ms Millar unjustifiably disadvantaged by the Trust's actions of placing her on garden leave on 9 December 2013?

[14] Ms Millar submits the Trust had agreed she could work out her notice period to 3 January 2014 and she had a reasonable expectation this would occur. She'd told staff members she was working to 3 January. The Trust's change of mind, the reasons for it and its subsequent actions was unfair and created an unjustified disadvantage. If it subsequently intended to place her on garden leave until the last day of employment, there was a duty to consult her prior to the action being undertaken. The applicant referred me to an Authority determination² in support.

[15] The Trust submits Ms Millar voluntarily resigned and was paid her full legal entitlement at the conclusion of her employment on 3 January 2014. Accordingly, she suffered no material or financial loss. Ms Millar's feelings of hurt, shame, humiliation and embarrassment at the way she left on 9 December 2013 did not amount to a "*disadvantage*" given her contractual arrangements. She was aware of clause 21.2 and had considered the possibility she might be sent home on garden leave. The Trust submits she had a reasonable expectation she might be sent home on garden leave and could not, after voluntarily resigning, be considered to have suffered a disadvantage. Ms Howitt invited some discussion about garden leave with her comment inquiring how she felt about going on holiday, but Ms Millar did not engage. Accordingly, the Trust could do no more.

[16] A claim for unjustified disadvantage arises where an "*employee's employment, or one or more conditions of the employee's employment ... is or are or was (during employment that has since terminated) affected to the employee's disadvantage by some unjustifiable action by the employer*".³

[17] It is common ground Ms Millar's employment agreement provided for termination by either party giving four weeks' notice in writing to the other (clause 21.1) and the employer may pay wages in lieu of Ms Millar having to work her notice period (clause 21.2).

² *Martin v Foodstuffs (Wellington) Cooperative Society Ltd* WA 136/05 23 August 2005

³ s.103(1)(b) Employment Relations Act 2000

[18] The exercise by the Trust of its discretion in clause 21.2, to bring forward an employee's last working day legally results in that employee being placed upon "garden leave" during the paid resignation notice period⁴.

[19] There is no express term requiring a duty to consult Ms Millar prior to placing her on garden leave in the remainder of the agreement. The usual grounds for implying terms into contracts are business efficacy, interpretation of the contract to find the reasonable expectations of the parties, custom and implication by law.⁵

[20] There is an implied term the Trust deal with Ms Millar fairly and reasonably based upon the statutory test for justification in s103A of the Employment Relations Act 2000 (the Act) below:

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.

[21] The Court has held that a contractual clause providing for payment in lieu of notice "must, within its defined limits – be exercised by the [employer] in any particular case in a fair and reasonable manner"⁶.

[22] The Trust's letter dated 6 June accepted the resignation and agreed her last day of employment was 3 January 2014. I reject the Trust's submission this referred to her last day of employment as opposed to the last day of work. The Trust's interim chief executive officer, Patricia Howitt, gave evidence that at the time she delivered the letter there was no consideration of garden leave. I find that there was an agreement between the parties Ms Millar would work until 3 January 2014.

[23] After the letter had been delivered, Ms Howitt became aware through her staff about "rumours" Ms Millar had made negative comments about the Trust. Her staff said they had been told by other staff (whom they would not name) Ms Millar had said "the place would be closed by Christmas". Ms Howitt undertook no other

⁴ *Westpac Trust v Stevens* [2002] 2 ERNZ 682 at paras.[66]-[68] in reliance on the House of Lords in *Delaney v Staples* [1992] AC 687 at pp.276-281

⁵ *Attorney-General v New Zealand Post-Primary Teachers' Assoc*[1992] 2 NZLR 209, [1992] 1 ERNZ 1163 (CA)

⁶ *Westpac Trust v Stevens* (supra) at para.[94]

investigation. She accepted her staff allegations about Ms Millar were truthful because “*the staff were loyal and unlikely to start these rumours.*”⁷

[24] Ms Howitt then considered placing Ms Millar upon garden leave. She told the trustees at a special meeting called for other purposes about these rumours and Ms Millar’s involvement. The trustee minutes record the below discussion:

<i>Subject</i>	<i>Discussion</i>	<i>M/S</i>	<i>Action</i>
...			
<i>Resignation of CPM</i>		<i>BT/LBro</i>	<i>Carried</i>
<i>Pats resignation</i>	<i>Empower CEOs to pay Pat off immediately, take her to get her bags etc. Take her off the IT system</i>		<i>Approved</i>

[25] Ms Howitt told me the above minutes did not accurately reflect what was discussed at the meeting, at least to the extent there was any inference the trustees as opposed to the chief executive officers had made a decision about garden leave. I have some reservation about Ms Howitt’s evidence on this point. The Minutes appear to reflect a decision by the trustees to place Ms Millar on garden leave. It may make no practicable difference given the above decision was subsequently confirmed by the chief executive officers.

[26] On 9 December 2013 at 8.30 am Ms Howitt and Mr Cameron met and determined to place Ms Millar on garden leave. Ms Howitt’s evidence why Ms Millar was placed upon garden leave were the employment agreement expressly allowed for garden leave, Ms Millar had been exhibiting a “*hostile attitude for some time*”, had made disparaging comments about the Trust to other employees including “*this place*

⁷ Oral evidence P Howitt 29/07/14

will be closed by Christmas”, showed no loyalty and had a bad attitude.⁸ None of these reasons were given to Ms Millar prior to the imposition of garden leave.

[27] Ms Howitt’s evidence of a hostile attitude was based upon email feedback from the District Health Board (DHB) in November 2013. No copies of those emails were produced. Ms Howitt did not ask the DHB for details of why they believed Ms Millar had a hostile attitude. Ms Millar was not given the email to comment upon.

[28] Ms Howitt’s evidence of no loyalty and a bad attitude related to an incident in August 2013. She alleged Ms Millar provided prevaricating information to the Trust about delays in doctor’s appointments. Ms Howitt was a trustee not chief executive officer at the time. Ms Millar was never disciplined for this. She outlined the information given and why it was difficult to identify the cause of the delays. Her information did not appear to prevaricate. In fact it appeared she did not have sufficient information to comment other than to speculate.⁹

[29] Ms Howitt also pointed to Ms Millar’s involvement in generating and possibly circulating letters on 15 October 2013 about the Trust’s treatment of a previous chief executive officer.¹⁰ This action occurred (again) prior to Ms Howitt’s appointment as chief executive officer and during her tenure as a trustee.

[30] Ms Millar gave evidence the Medical Director, not her, suggested drafting letters from the staff supporting the chief executive officer. The doctors drafted their own letter and Ms Millar drafted a letter for the staff. Another staff member gathered staff signatures.

[31] The letter drafted by Ms Millar inferred amongst other things, the chief executive’s termination was due to the outcome of a restaurant venture and some trustees wanted to get rid of him. Ms Millar was never disciplined for drafting this letter. It does not appear any of the staff were disciplined for signing or sending these letters.

[32] The Trust had commissioned a report in 2014 which referred to the Trust’s operations and *“the prevalence of gossip”* which was harmful to the organisation.¹¹

⁸ Witness statement Patricia Howlitt dated 29 July 2014 at para.13(a)-(d)

⁹ Oral evidence EP Millar 29 July 2014

¹⁰ Applicants Bundle of Relevant Documents pp 1 - 3

¹¹ Witness Statement in reply P Howitt 23 July 2014 para 7

Ms Howitt told me she was well aware of the culture of gossip prior to the report. If this was the case, the employer's willingness to accept rumours about Ms Millar, especially based upon what an unnamed staff member said to another staff member, was inexplicable in the circumstances. A reasonable employer having the knowledge Ms Howitt possessed would have investigated the rumours prior to taking any further action. Ms Millar's evidence was that another staff member had commented on the Trust closing by Christmas, not her.

[33] Ms Millar had a reasonable expectation based upon the agreement reached on 6 December 2013 that she would work until 3 January 2014 and not be placed upon garden leave. The Trust had bound itself to a course of conduct by its agreement on 6 December 2013 that Ms Millar may continue to work until 3 January 2014. It cannot resile from that position without taking adequate steps to justify such action. Those steps are set out in s103A(3) of the Act.

[34] While Ms Howitt may have asked Ms Millar about taking a holiday, this did not meet the requirements of s103A(3). In my view the Trust could have done more. There was no investigation of the Trust's concerns giving rise to its change in position about the garden leave. There was no opportunity for Ms Millar to respond. Subsequent action to place her on garden leave following an agreement she may work out her notice in the above circumstances, was not what a fair and reasonable employer could have done in all the circumstances.

[35] Ms Millar was disadvantaged by this action. There was an agreement the Trust would not exercise its discretion under clause 21.2. Ms Howitt confirmed the Trust took no steps to explain to Ms Millar or staff about her early departure.¹² Ms Millar had told staff she was leaving in January 2014 in reliance upon the agreement. Staff would have been left to speculate there was truth to the "*rumours*" justifying Ms Millar's early departure. Ms Millar had no basis to disagree because she did not know why the Trust had changed its position either. Ms Millar employment was affected to her disadvantage by the Trust's actions.

[36] Accordingly the application for personal grievance arising from an unjustified disadvantage is granted.

¹² Oral evidence P Howitt 29/07/14

What remedies should be awarded?

[37] Ms Millar seeks compensation for hurt and humiliation under s.123(1)(c)(i) of the Act. There is scant evidence in support of an award. She submits her mana and status within the Whangaroa community was affected by the Trust's decision to place her on garden leave. This was because rumours and speculation ran rife that she was let go for a reason other than garden leave.

[38] At best the evidence showed possible as opposed to probable reputational damage arising from rumours and speculation. Both parties accept this community was one prone to gossip.

[39] There does not appear to have been any impact upon Ms Millar's professional reputation. She found a job within the period of notice with another health organisation in the same area, presumably upon similar terms and conditions.

[40] A robust approach to these types of claims is needed. In the circumstances, I decline to make any award because Ms Millar has not proven on the balance of probabilities that she has suffered any damage.

Costs

[41] As the applicant was self-represented, no order as to costs shall be made.

T G Tetitaha
Member of the Employment Relations Authority