IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 298/10
5293252

	BETWEEN	ELSA PAROHINOG Applicant
	AND	ANZ NATIONAL BANK LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Andre Lubbe for Respondent
Investigation Meeting:	14 June 2010
Determination:	25 June 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Elsa Parohinog resigned from her job as a personal banker with ANZ National Bank Limited ("the Bank") on 2 November 2009. She had not attended work since 26 August 2009 when she had arrived after her scheduled starting time of 8.30am and found she could not get into her workplace in Newmarket. The previous day her manager had advised all staff that those who did not arrive in time for the 8.30am staff meeting would not be let into the building until 9am.

[2] Ms Parohinog's resignation, in the form of a ten page letter, was given in response to a final written warning of which she was advised in a disciplinary meeting on 14 October 2009. The warning was delivered in a letter dated 20 October 2009.

[3] The warning was stated to be for:

> *"inappropriate behaviours including:*
>
> - *Refusing to do work requested by your managers*

- *Refusing to serve customers*
- *Challenging your co-workers and/or managers*
- *Continued unsubstantiated complaints about your managers and the Bank*
- *Repeated complaints about the same concerns which have already been investigated and outcomes given to you on several occasions, for example spam emails, voicemails and "fake" customers.*

[4] Ms Parohinog was advised to contact the Bank's human resources representatives if she had "*any genuine complaints based on truth and fact*" but was warned that

> *"any unsubstantiated complaints, false accusations or spurious or trivial allegations will be considered to be unacceptable behaviour and may result in further disciplinary action".*

[5] Ms Parohinog's letter of resignation asserted the final written warning was "*another form of victimization and bullying*". She described her resignation as a constructive dismissal arising from the warning, her treatment by her branch manager and a refusal to approve her requests for flexibility over starting times.

[6] These complaints formed the basis of Ms Parohinog's personal grievance application which has now been investigated by the Authority.

Issues and investigation

[7] The following issues were investigated:

(i) whether the final written warning was justified; and

(ii) whether Ms Parohinog's resignation was freely made or was a constructive dismissal caused by the Bank (a) breaching its obligations to her over work flexibility or (b) through bullying or (iii) through performance demands; and

(iii) whether Ms Parohinog was underpaid her annual leave entitlement.

[8] For the purposes of the investigation written witness statements were lodged by Ms Parohinog, her former branch manager Pam Pillay, the Bank's human resources advisor Sharon Morgan and the Bank's Auckland South and East regional manager Graham Meecham. Former Finsec union organiser Vicki Gordon (who had accompanied Ms Parohinog to some meetings with Bank representatives) and Phil

White, a personal manager at the branch at which Ms Parohinog had previously worked, both attended the investigation meeting under witness summons. All six witnesses gave evidence under oath or affirmation and answered questions from the Authority member. Ms Parohinog and Mr Lubbe each had an opportunity to ask additional questions of the witnesses and provided oral closing submissions, speaking to a written synopsis.

[9] During a break in the investigation meeting, and with the consent of both parties, I had a brief private telephone conversation with Ms Parohinog's general practitioner Dr Jane Buckley. This occurred on the basis that I would convey to the parties any information relevant to the matters before the Authority, which I did.

[10] In preparing this determination I have reviewed the parties' oral and written closing submissions, the witness statements, witnesses' answers to questions, and the many relevant background documents provided. As allowed for under s174 of the Act I have not recorded here all evidence and submissions received but state findings of facts and issues of law and express conclusions on the issues for determination.

[11] I note here one factor which I have not taken into account. In reading and listening to Ms Parohinog's evidence I was concerned at frequent references to having been followed by Bank customers and managers. She referred to her belief that a former flatmate connected with the Bank had spied on her using electronic surveillance through the internet and "*there was actually someone spying on me 24/7*". She also asserted Ms Pillay and others had engaged in organised bullying by sending her hoax emails and requiring her to deal with "*fake*" customers. Some former colleagues had told Ms Morgan in August 2009 that they believed Ms Parohinog needed "*professional help*". Ms Morgan told me she understood this to be referring to professional mental health treatment. The Bank's statement in reply referred to Ms Parohinog as paranoid.

[12] Bank representatives had made several requests in 2009 for Ms Parohinog to seek help through services provided by its Employee Assistance Programme (EAP). However the circumstances during her employment did not trigger any right for the Bank under its collective employment agreement to require Ms Parohinog to undergo a medical review of which it would be informed.

[13] Ms Parohinog gave evidence that she did not need any professional help and had no mental health issues which need to be addressed. Dr Buckley provided no information to the Authority about such issues. In the light of Ms Parohinog's insistence that she was well, and in the absence of any contrary evidence from a general practitioner or medical specialist, I have not weighed such concerns as a factor in making this determination.

Was the warning justified?

[14] The Bank's final written warning to Ms Parohinog will be justified if its decision to issue such a warning, and how it went about making that decision, is what a fair and reasonable employer would have done in all the circumstances at the time: s103A of the Employment Relations Act 2000 (the Act).

[15] Ms Parohinog says the warning was not justified because, to paraphrase her extensive evidence, she was being penalised for raising a series of legitimate complaints about her manager and her treatment at work.

[16] I find the evidence does not support that conclusion. Rather I consider a fair and reasonable employer would have, as the Bank did, investigated Ms Parohinog's allegations and reached the conclusion it was appropriate and necessary to warn her that her actions were seriously jeopardising the future of her employment relationship. The severity of that warning was not outside the range of discretion for a reasonable employer. I reach that view for the following reasons.

[17] Ms Parohinog had made a series of complaints about Ms Pillay and previous managers over an extended period. The Bank representatives had thoroughly investigated those complaints and provided plausible and cogent explanations for events about which Ms Parohinog had complained. For example, her accusation that she was sent "hoax" emails was a reference to receiving 'spam' email, some of which she found offensive. The Bank fairly explained that the spam filters in its IT system could not successfully catch all such material. She was not alone in having unwanted email getting through those filters and there was no evidence of any deliberate actions or omissions by the Bank resulting in her receiving those items.

[18] Her suggestion that she was subject to "*hoax*" customers arose from the demands of the area of the bank in which she worked. Her role required contact with 'walk in' customers, some of whom made requests for services which Ms Parohinog found vexing to complete. One example given was a customer who made repeated requests to vary the frequency of his bank statements. Others involved customers who opened accounts into which they did not then deposit funds. There were many more examples but none disclosed anything other than the normal range of work required in the role. Neither was there any plausible evidence that Ms Pillay or other managers deliberately arranged "*false*" customers to waste Ms Parohinog's time.

[19] It was also reasonable, I find, for the Bank to become increasingly concerned at the animosity which Ms Parohinog expressed towards Ms Pillay.

[20] The Bank's investigation began as a result of a complaint by Ms Parohinog to Mr Meecham. It then agreed to conduct a detailed survey of staff about Ms Pillay's management but the results indicated that a significant number of employees had real concerns about Ms Parohinog's behaviour. This led the Bank to review its relationship with Ms Parohinog.

[21] In doing so the Bank followed a process which involved meetings at which Ms Parohinog was supported by Ms Gordon. I accept Ms Gordon's evidence that she considered the Bank representatives had listened to Ms Parohinog, fully investigated her concerns and dealt with them in an appropriate manner.

[22] I also find no evidence – apart from Ms Parohinog's bare allegation – that a previous grievance she had raised some years earlier, which was the subject of Authority determination AA489/05 (19 December 2005), had any bearing on the Bank's investigation and decision in 2009.

Was Ms Parohinog constructively dismissed?

[23] Ms Parohinog's decision to resign would amount to a constructive dismissal if caused by the Bank breaching a duty to her, resulting in a foreseeable risk she would

resign in those circumstances, or if the Bank followed a deliberate course of conduct to coerce her resignation.[1]

Flexibility

[24] A direction from Ms Pillay on 25 August that staff who did not arrive in time for the 8.30am staff meeting could not enter the building until 9am was not, in the circumstances, a breach of the Bank's duty to Ms Parohinog. There were operational reasons for meetings being held at that time and they would be disrupted by having to let late staff in during them. The direction applied to all staff, not just Ms Parohinog. She was not alone on the morning of 26 August, when arriving late she found the door locked and no-one inside responded to her knocking. Another staff member was in the same predicament but that person stayed at work, while Ms Parohinog went home after being let in at 9am. From that day Ms Parohinog refused to return to work until her concerns about flexibility of her starting time were addressed to her satisfaction.

[25] Ms Parohinog's employment agreement required her to attend work by 8.30am. She said a previous manager had approved her coming late on some days in order to drop her son at childcare. Shortly after becoming the branch manager in February 2008 Ms Pillay checked with the previous manager and confirmed that this was only agreed on a temporary basis, not as a permanent arrangement. After clarifying this with Ms Parohinog, there were no significant problems regarding timeliness until June 2009. By then Ms Parohinog's son had started attending a nearby primary school. She explained repeated incidents of lateness as due to her son's reluctance to go to or settle in at school, his father with whom she shared custody turning up late for pick ups, and traffic congestion.

[26] Bank representatives made numerous attempts to address Ms Parohinog's request for flexibility around her working hours. These continued after the final written warning was issued in October. At a meeting on 29 October five options were canvassed. One included trialling reorganisation of the staff meetings so she could arrive later on three out of five days. No option was satisfactory to Ms Parohinog.

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[1] *Auckland Electric Power Board v Auckland Provincial District Local Authorities IUOW* [1994] 1 ERNZ 1 168 (CA) at 172.

[27] I find the Bank's efforts to accommodate her requests for work flexibility were reasonable and there was no breach of any term of her employment.

Bullying

[28] The evidence presented by Ms Parohinog does not confirm her allegation of bullying by Ms Pillay or any other manager. There is nothing which corroborates her claim of an orchestrated campaign to send her hoax emails, fake customers and subject her to additional scrutiny by mystery shoppers.

[29] In reaching this view I rely particularly on the evidence of Mr White. He was identified by Ms Parohinog as a staff member who could support her claims. A witness summons was issued to him at her request. His oral evidence to the Authority was that Ms Pillay did not single out Ms Parohinog for particular scrutiny or criticism. He observed that Ms Pillay had tried to accommodate Ms Parohinog's concerns but the matter of her starting time had become a "*sticking point*" and from then Ms Parohinog had lost trust in Ms Pillay.

Performance demands

[30] I find no performance demands were made of Ms Parohinog which breached the terms of her employment. She worked in what was described as "the front" or public service area of the branch which required a high level of contact with customers. There were some customers with whom she did not want to deal and they were served by two other staff. There was some evidence that at least one of those staff members resented what she saw as 'carrying' Ms Parohinog but it is also clear that Ms Pillay had advised Ms Parohinog to refer any customers whom she considered were behaving inappropriately to her or other staff.

[31] In the absence of any evidence supporting the allegation of breached terms or a course of conduct designed to coerce her resignation, I find Ms Parohinog's claim of constructive dismissal fails.

Was Ms Parohinog's annual leave entitlement underpaid?

[32] Ms Parohinog alleged she was short-changed on her annual leave entitlement in her final pay. However I accept the Bank thoroughly reviewed her entitlements and what leave she had received. The information presented to the Authority disclosed no shortfall in entitlements due to Ms Parohinog.

[33] Her claim rested on three misconceptions. Firstly, her actual entitlement was the 20 statutory days with an additional three days provided under the collective agreement for her service, not 26 days as she believed.

[34] Secondly, she misunderstood how leave was recorded on her payslip – with a gradual accumulation of hours of entitlement being identified through the year rather than having to wait until the end of a year of service for that year's entitlement to be allocated.

[35] Thirdly, the Bank need not reinstate annual leave taken between 22 September and 9 October because Ms Parohinog sought legal advice on her employment situation during those days. It was Ms Parohinog's decision not to attend work in that period and use some of her annual leave entitlement instead. How she spent that time was her choice, not the Bank's.

Determination

[36] For the reasons given I find Ms Parohinog does not have a personal grievance or leave entitlements due. Her application and claim for remedies is dismissed.

Costs

[37] The Bank does not seek any award of costs against Ms Parohinog. Costs are to lie where they fall.

Robin Arthur
Member of the Employment Relations Authority