

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2016] NZERA Auckland 16  
5560231**

BETWEEN                      WENDY RAHIRI  
   Applicant  
  
AND                                BAY OF PLENTY DISTRICT  
   HEALTH BOARD  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:             Jacqueline Stephenson, Counsel for Applicant  
   Gail Bingham, Counsel for Respondent  
  
Investigation Meeting:        12 January 2016 at Tauranga  
  
Submissions received:        11 December 2015 and 12 January 2016 from Applicant  
   23 December 2015 and 12 January 2016 from Respondent  
  
Date of Determination:        13 January 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem.**

[1]     The Applicant, Ms Wendy Rahiri, claims that she was unjustifiably constructively dismissed by the Respondent, Bay of Plenty District Health Board (BOPDHB).

[2]     BOPDHB denies that Ms Rahiri was unjustifiably constructively dismissed and claims that she was a casual employee who resigned voluntarily.

**Issues**

- [3]     The issues for determination are whether or not Ms Rahiri:
- a.    was employed as a casual employee and paid for all the hours she worked;
  - b.    was unjustifiably constructively dismissed by BOPDHB

## Background Facts

[4] Ms Rahiri has been employed in the health care industry for over 20 years, primarily as a Health Care Assistant. During that time she said there had been no issues with her work standards.

[5] Her employment with BOPDHB commenced on 9 September 2013. Ms Rahiri was employed as a Casual Health Care Assistant to the Nursing Bureau. Her employment was confirmed in a letter dated 5 September 2013 and outlined the terms of employment as including:

- the letter of 5 September 2013;
- the BOPDHB Code of Conduct, and the provisions of the New Zealand Nurses Organisation, Nursing and Midwifery Multi-Employer Collective Agreement, 1 March 2012 to 28 February 2015 (the MECA);
- *Hours:* Your hours of work will be as requested by the employer and subject to acceptance by the employee.

[6] The letter had been signed by Ms Rahiri on 7 September 2013 confirming that she had: “*read and understood the offer of employment*” and had received the documentation noted in the letter.

[7] Ms Rahiri reported to Ms Kim Quatermain, who in turn reported to Ms Julie Williams, the Hospital Coordinator. Ms Williams said that her role was to provide oversight to the coordination of additional nursing staff requirements, via the internal nursing bureau, at Tauranga Hospital.

[8] Ms Williams explained that the process relating to working hours was that once a month, a sheet was sent to all casual employees on which they would record the dates they were available to work for the following month. The sheet was normally sent out a month in advance.

[9] The information received would be recorded in a spreadsheet and approximately 24 working hours prior to a shift, the Bureau Clinical Nurse Manager and/or the Bureau administration staff would consult the completed sheet, telephone and book the required number of Casual Healthcare Assistants.

[10] The number of Bureau employees required would be dictated by patient occupancy. Ms Williams said there was no guarantee that work would be available, or that an employee would be available for the shift offered.

[11] Ms Rahiri said that she would complete the sheet indicating her availability for shifts monthly. If BOPDHB required her to work, she would receive a telephone call to check her availability, and if available, she would be booked to work. The telephone call could be made a week, or a day, or even 5 minutes in advance.

[12] If she had indicated that she was available for a shift, but her circumstances changed and she was unable to do so, she would normally advise BOPDHB of this.

[13] Ms Rahiri confirmed that initially she had worked differing shifts each week, varying between morning, afternoon and night shifts with no set pattern, however over the course of her employment a pattern developed and she generally worked 7-8 shifts per fortnight, and from mid-January 2015 only worked nightshifts due to her personal circumstances. She said she was always offered a shift when she was available to work it.

[14] Ms Williams confirmed that the night shifts were difficult to fill and therefore any employee prepared to work night shifts was likely to develop a pattern in relation to shifts worked, but that days and ward assignments varied according to demand.

[15] Ms Williams said that casual employees accumulated leave in accordance with the Collective Agreement, and if a casual employee wished to take annual leave, they advised BOPDHB that they were doing so, and would advise that he or she was available for shifts following that leave.

[16] Casual employees would often use their accrued annual leave entitlement to supplement their income on weeks when shifts were not made available to them. Ms Rahiri said she had done so on occasion.

[17] Ms Williams said that if a casual employee was booked to work a shift, but had to cancel the booking due to sickness; BOPDHB would pay the employee for that shift.

[18] BOPDHB would also pay the casual employee who was a Registered Nurse when he or she undertook the requisite training to maintain his or her qualification, and pay bereavement leave.

*Incident on 12 March 2015*

[19] Ms Williams said that on 12 March 2015 Ms Lynne Hansen, Duty Manager, verbally reported to her about an incident involving Ms Rahiri. Ms Williams asked Ms Hansen to complete a Reportable Event Form (REF), and she received this duly completed on 13 March 2015.

[20] The REF reported an incident which occurred between Ms Rahiri and Ms Hansen when Ms Rahiri was caring for a patient during the night shift she had worked on 8 March 2015. The 'Consequences' section of the REF stated: 'Minor', which Ms Williams explained meant the consequence to the patient

[21] Ms Williams said she telephoned Ms Rahiri on 13 March 2015 and advised her that a REF had been lodged in relation to her treatment of a patient on the night shift on Sunday 8 March 2015. Ms Williams advised that she was going on annual leave for a week and would investigate the complaint when she returned the following Monday.

[22] Ms Williams said she had made it clear to Ms Rahiri that she would not lose her job as a result of the issue, and she (Ms Williams) would like the issue resolved as soon as possible on her return.

[23] Ms Rahiri said that when Ms Williams telephoned her on 13 March 2015 she had told her that two complaints had been made about her, and that one was a from a patient and related to the nightshift on 8/9 March 2015.

[24] Ms Rahiri said she had been extremely upset to hear that a patient had raised a concern about her, and immediately asked Ms Williams for more information about the nature of the complaints and who had made them in order that she could understand what may have caused them.

[25] Ms Williams had responded by advising that she could not say more at that stage, and that Ms Rahiri would only be offered morning shifts when there were more employees as she would be under observation: "*for everybody's safety*". At the investigation meeting Ms Williams said she did not recall using the phrase: "*for everybody's safety*", but that she definitely recalled using the word '*safety*'. Ms Williams explained that this was standard practise while a complaint was being investigated.

[26] Ms Rahiri said that because of her personal family circumstances, she could not work morning shifts and had informed the Bureau administrative employees of this.

[27] Ms Williams said Ms Rahiri declined to explain why she could not work morning shifts, nor was she able to ascertain from Ms Rahiri's colleagues the reason for this.

[28] Ms Williams said she had no indication from Ms Rahiri that she was upset about the proposed process.

[29] Ms Williams was aware Ms Rahiri had been offered a morning shift on 17 March 2015, and had declined this. Ms Rahiri said she had been offered morning shift work on 17 March 2015 by a BOPDHB Coordinator. She had advised she could not commence work at 7.00 a.m. but could commence at 9.00 a.m., the Coordinator said she would consult Ms Williams and let Ms Rahiri know the result, however she had heard nothing further.

[30] Ms Rahiri said that as she had received no information about the complaints, and knowing Ms Williams was away on annual leave, she telephoned and left a message on Ms Williams' voicemail.

[31] Ms Williams said she found no message from Ms Rahiri on her voicemail when she had returned to work after her period of annual leave on Monday 23 March 2015.

[32] Ms Rahiri said she was very anxious about the complaints and having received no further offer of work, she visited the BPPDHB HR Department on 25 March 2015, and again on 27 and 30 March 2015 to try to ascertain what was happening.

[33] On 25 March 2015 Ms Sheryl Overington sent an email to Ms Quartermain and another employee, stating that Ms Rahiri had visited the HR Department to enquire about the preliminary investigation into: "*a recent complaint. ... I have provided Wendy with a copy of our investigation policy and an EAP form.*" Ms Overington advised Ms Rahiri had asked for an update on the situation and that she would appreciate it as soon as possible.

[34] Ms Williams called Ms Rahiri on 25 March 2015 to arrange a meeting, and left a message asking Ms Rahiri to return her call, however she had not done so

[35] On 30 March 2015 Ms Williams said she had been contacted by the HR Department who told her that Ms Rahiri had been to collect some documents. This had triggered her memory that she had not heard from Ms Rahiri, and she called her and left a message asking Ms Rahiri to return her call.

[36] Ms Rahiri said that during her third visit to the HR Department on 30 March 2015, having had no contact from Ms Williams, she asked for an email to be sent to the director of nursing, and requested that all further contact with her about the complaints be in writing.

[37] Ms Rahiri said that after this visit she received a telephone call from Ms Williams who left a message asking her to call back, however she had not done so as she felt aggrieved at the way she had been treated and by Ms Williams ignoring her request for communication with her to be in writing.

[38] Ms Williams said she rang Ms Rahiri a third time on 31 March 2015 and asked her to return the call. When Ms Rahiri did so, she told Ms Williams that she wanted all communication to be in writing and terminated the call.

[39] Ms Williams wrote to Ms Rahiri by letter dated 31 March 2015 in which she stated:

*Thank you for returning my call. You have requested ongoing communication in writing. This is not an ideal approach in the interests of the employee's obligation to be active and constructive.*

*I would like to meet with you to further discuss the Reportable Event relating to an incident on the 9 of March. Please call me .... to arrange a suitable time.*

*You are very welcome to bring a support person with you.*

[40] Ms Williams said in accordance with normal procedure the letter would have been posted the following day, 1 April 2015.

[41] Ms Rahiri said that as she had heard nothing she made a complaint to the Board of BOPDHB.

[42] When she received the letter from Ms Williams on 7 April 2015 she waited to respond until she had consulted a solicitor, and as a result a meeting took place on 15 April 2015.

*Meeting held on 15 April 2015*

[43] The meeting held on 15 April 2015 was attended by Ms Williams, Mr Nick Cockcroft, HR Manager, and Ms Rahiri and her support person. Ms Rahiri was provided with a copy of the REF and said she was relieved to see that it was marked 'Minor'. She noticed that there was only one complaint and it was from a colleague, not a patient. When she asked Ms Williams where the other complaint was, Ms Williams had responded that there had only been one, and she had never referred to there being more than one.

[44] Ms Williams said that Ms Rahiri was very agitated and tearful during the meeting and the process had been discussed, with the advice that there would be a letter forwarded confirming the discussion and plan.

[45] Ms Williams said she had discussed EAP support and Ms Rahiri had been aware of this. Ms Williams said that she had repeated it was a minor issue, and Ms Rahiri was unlikely to lose her job, and BOPDHB wanted the matter resolved as soon as possible. However because during the meeting, Ms Rahiri had denied all aspects of the complaint and there appeared to be a lack of insight and accountability into her actions; she was advised that there would need to be a formal investigation. Ms Rahiri was provided with copies of all information, and asked to call Ms Williams once she had an opportunity to review the REF and arrange a further meeting.

[46] In the letter dated 15 April 2015 Ms Williams confirmed that she would be conducting a formal investigation into the allegations detailed on the REF, and that Ms Rahiri would advise her by telephone of a time when she would be available to meet to progress the letter.

[47] Ms Williams stated: *“You are advised that the allegation is serious and that a potential; outcome is disciplinary action up to and including dismissal.”* The letter concluded by advising Ms Rahiri of the availability of EAP, and to contact Ms Williams in the event that she required further reasonable support from BOPDHB.

[48] Ms Rahiri said she was very upset to read that dismissal was a possible outcome.

#### *Meeting held on 24 April 2015*

[49] The meeting held on 24 April 20145 was again attended by Ms Williams, Mr Cockcroft, Ms Williams and her support person. During the meeting Ms Rahiri provided her version of events, however she considered that Ms Williams was not interested in her explanation.

[50] Ms Williams said that Ms Rahiri was upset during the meeting, and left the room a few times during the meeting. Ms Rahiri also said that she wished to resign.

[51] Ms Rahiri confirmed that she considered that Ms Williams’ actions throughout the process had undermined her trust and confidence in the employment relationship, and informed Ms Williams and Mr Cockcroft that whatever the outcome of the process, she was unable to return to work as a result of BOPDHB’s treatment of her.

[52] The meeting finished with no formal resolution of the matter.

[53] Ms Rahiri resigned by letter dated 6 May 2015 stating that:

*I tender my resignation from the position of Casual Healthcare Assistant, giving you two weeks' notice,....*

*The process followed by you, my employer, in dealing with the complaint made against me on 9 March 2015 has caused me considerable distress, mental ill health and has resulted in a total breakdown in the good faith relationship between us.*

*I have been with left no option but to resign from my employment.”*

[54] Ms Williams responded on 7 May 2015 stating:

*I do not agree that the investigation process was flawed and also remind you that it is not complete. I do accept that being the subject of an employment investigation can result in feelings like stress, you have been offered reasonable support in the circumstances.*

*I accept your resignation, however should you wish to reconsider your resignation between now and 20 May I will give that favourable consideration.*

[55] The parties subsequently attended mediation, but this was not successful in resolving the problem. On 21 September 2015 Ms Rahiri filed a Statement of Problem in the Authority.

## **Determination**

### **Was Ms Rahiri a Casual Employee or a permanent part-time employee when employed by BOPDHB during the period 10 April 2013 to 7 June 2014?**

#### *Intention of the parties*

[56] In deciding whether a person is employed under a contract of service the Authority must consider all relevant matters which include the intention of the parties.<sup>1</sup>

[57] The parties do not dispute that Ms Rahiri was initially employed on a casual employment basis. Ms Rahiri claims however that over a period of time a pattern had

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<sup>1</sup> S6 Employment Relations Act 2000

developed such that her employment was consistent and highly predictable and had become permanent part-time in nature.

[58] In particular Ms Rahiri claims that during the last 3 months of her employment, she had worked a regular pattern of shifts, and that both parties had developed a reasonable expectation of work being offered and accepted.

[59] Ms Williams confirmed that night shifts were difficult to fill and as a consequence any employee willing to work night shifts was likely to develop a pattern in relation to the shifts worked, but that wards and day assignments varied according to demand.

[60] The letter dated 5 September 2013 confirmed Ms Rahiri's position as a Casual Health Care Assistant effective 9 September 2013, however conditions of employment may vary over a period of time, and on that basis I find the Employment Agreement alone is not determinative of the real nature of the employment relationship between the parties, and I need to examine that pattern of working and the expectations of the parties.

[61] As His Honour Judge Couch said in *Jinkinson v Oceania Gold (NZ)*<sup>2</sup> in respect of the matter of determining the real nature of an employment relationship:

*All relevant matters must be taken into account in making that decision and the parties' description of their relationship is not to be treated as determinative.*

*Analysis of the distinction between casual and on-going employment*

[62] The Employment Court judgment of *Jinkinson v Oceania Gold (NZ)*<sup>3</sup> contains a helpful examination and analysis of the distinction between casual employment and ongoing employment.

[63] In this judgment, His Honour Judge Couch analysed in detail the lines of authority derived from other jurisdictions, these being English, Australian and Canadian, in addition to that of New Zealand. These common law principles are complemented by the statutory framework in New Zealand, in particular that of the Employment Relations Act 2000.

[64] The judgment highlights that a major determinant of the distinction between casual and ongoing employment is the extent to which there exist between the parties "*mutual*

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<sup>2</sup> CC/09, 13 August 2009 at para [37]

<sup>3</sup> *Jinkinson v Oceania Gold (NZ)* CC/09. 13 August 2009

*employment related obligations between periods of work*”<sup>4</sup> The essence of casual work lies in a series of engagements which are complete in themselves, whilst ongoing employment contemplates a continuing pattern of regular and continuous work.

[65] Judge Couch quoted with approval a decision of the Canada Labour Relations Board in which the Board said<sup>5</sup>

*In the notion of casual work, there is an element of chance or a chance factor which requires that the voluntary and immediate availability of a potential employee coincide with the unforeseen need of an employer to have work done. Conversely, as soon as the need is foreseeable only part-time work is automatically created: the employee is not a casual worker but a part-time one.*

[66] A list of factors designed to assist in the analysis of an employment relationship originated from the Australian authorities to which Judge Couch referred and these are outlined in the judgment. These include:

- a. The numbers of hours worked each week
- b. Whether work is allocated in advance by a roster
- c. Whether there is a regular pattern of work
- d. Whether there is a mutual expectation of continuity of employment
- e. Whether the employer requires notice before an employee is absent or on leave
- f. Whether the employee works to consistent starting and finishing times.

[67] I have therefore proceeded to analyse the employment relationship between Ms Rahiri and BOPDHB against those factors.

*i. The number of hours worked each week*

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<sup>4</sup> Ibid at para [40]

<sup>5</sup> *Bank of Montreal v United Steelworkers of America* 87 CLLC 16,044

[68] The hours that Ms Rahiri worked during the last three months of her employment averaged 7.5 hours on the 7 – 8 nights she worked each fortnight. This is confirmed by the records as submitted.

[69] Ms Williams agreed that for employees who were prepared to work a nightshift, they were more likely to establish a pattern of working. Whilst the wards and day assignments might change, Ms Rahiri was more likely than not to be allocated shifts when she had indicated availability, and the average shift was 7.5 hours.

*ii. Whether work was allocated in advance by a roster*

[70] The work was not allocated in advance by a roster. It is not disputed that availability of employees to work a particular shift was indicated on a sheet, and there was no guarantee that he or she would be offered that shift. Indeed Ms Rahiri confirmed that notification might only occur 5 minutes before a shift took place.

*iii. Whether there was a regular pattern of work*

[71] Ms Rahiri worked a fairly consistent number of shifts throughout the 1.7 years she was employed by BOPDHB, averaging 7/8 per fortnight. Initially these covered morning, afternoon and evening shifts, but latterly were predominantly night shifts.

[72] I find there was a regular pattern of working.

*iv. Whether there was a mutual expectation of continuity of employment*

[73] Ms Rahiri had an expectation during her last three months of employment that she would be rostered for those night shifts for which she had indicated availability.

[74] Ms Williams' evidence is that she had hoped the REF incident could be resolved as soon as possible which I find indicates that she also had an expectation that the relationship would continue.

[75] Moreover the letter dated 15 April 2015 anticipates potential outcome of a disciplinary process which indicates an ongoing employment relationship which might be terminated by reason of dismissal, but otherwise would continue.

[76] I find a mutual expectation of continuity of employment.

*v. Whether the employer requires notice before an employee is absent or on leave*

[77] I find that BOPDHB did not require Ms Rahiri to advise of her unavailability in circumstances in which she had previously indicated availability for a shift, although she chose voluntarily to do so.

[78] In addition Ms Rahiri accrued and used an annual leave entitlement. Casual employees fall into the category of employee in s.28 Holidays Act 2003 (s28 (1)(ii)) as being those employees who work for the employer on such intermittent or irregular basis that it is impracticable for the employer to provide them with four weeks' annual holidays.

[79] I note that the use of the word “*may*” indicates that this is not a mandatory requirement under the Holidays Act 2003, and in this case, BOPDHB adhered to the provisions of the Collective Agreement, thus that I find the method of awarding annual leave entitlement is not indicative of the employment relationship.

[80] However I note that the pay records indicate that BOPDHB had paid Ms Rahiri for sick leave and bereavement leave on occasion, which I find is more indicative of a permanent employment relationship than a casual one.

*vi. Whether the employee works to consistent start or finish times*

[81] The shifts were morning, afternoon or night shifts which present a clear demarcation of start and finish times. Ms Rahiri worked a consistent number of hours on each shift.

[82] I find that Ms Rahiri worked to consistent start and finish times.

[83] Examining the indications of a real employment relationship, I find that, whilst there are contending factors, there are several indicators that the employment of Ms Rahiri was more consistent with a continuous or permanent employment arrangement than with a casual arrangement.

[84] In light of these indicia, I conclude that Ms Rahiri was a permanent part-time employee with BOPDHB.

**Was Ms Rahiri unjustifiably constructively dismissed by BOPDHB?**

[85] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action or actions of the employer.

[86] In the Court of Appeal case *Auckland Shop Employees Union v Woolworths (NZ) Ltd*<sup>6</sup> Cooke J listed three situations in which a constructive dismissal might occur, although he noted that these were not exhaustive. The three situations were:

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<sup>6</sup> [1985] 2 NZLR 372

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

[87] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*<sup>7</sup> the Court of Appeal said regarding the correct approach to constructive dismissal:<sup>8</sup>

*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 notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[88] Therefore in examining whether a constructive dismissal has occurred the two relevant questions are:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation. To determine that question all the circumstances of the resignation have to be examined, not merely the terms of the notice or other communication whereby the employee has tendered the resignation.
- ii. and secondly if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[89] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*<sup>9</sup> observed in describing this type of constructive dismissal:<sup>10</sup>

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<sup>7</sup> [1994] 1 ERNZ 168

<sup>8</sup> Ibid At p 172

<sup>9</sup> [1983] ACJ 965

<sup>10</sup> at [975]

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

(i) Was there a breach of the duty owed to Ms Rahiri by BOPDHB?

[90] All employers and employees are subject to the good faith requirements set out in s 4 of the Employment Relations Act 2000 (the Act). In addition BOPDHB operates in the public health sector and in that situation Schedule 1B of the Act: “Code of Conduct for public health sector” is applicable. The purpose of the Code is to: (s(2):

(a) *To promote productive employment relationships in the public health sector;*

(b) *To require that parties to make or continue a commitment –*

...

(iii) *to engage constructively and participate fully and effectively in all aspects of their employment relationships;*

[91] In s 4 of Schedule 1B of the Act the Code states that in their employment relationship the parties must:

(2)(b) *create and maintain open, effective, and clear lines of communication, including providing information in a timely manner,*

[92] BOPDHB also have a Staff Management Protocol in respect of investigation processes. Clause 2.2 states that a preliminary investigation process must be commenced within three working days, and completed within seven working days unless varied on consultation with the employee.

[93] Ms Williams contacted Ms Rahiri on 13 March 2015 to tell her that at least one complaint had been made about her. Ms Rahiri’s evidence is that she understood that there were two complaints, and that one of these had been made by a patient.

[94] Ms Williams did not provide Ms Rahiri with a copy of the REF. Had she done so, Ms Rahiri would have been aware from the outset of the nature of the complaint, that the consequence to the patient was designated ‘minor’ it was a sole complaint and, most significantly for her, it had been made by a colleague not by a patient.

[95] This may have had the effect from the outset of allaying Ms Rahiri's very real concern that she had been the subject of a patient complaint.

[96] However Ms Williams, despite Ms Rahiri's request for more information did not provide any, instead advising her that she would be offered only morning shifts for reasons of 'safety' until the matter was resolved. Clearly this advice had the effect of exacerbating Ms Rahiri's concerns.

[97] Ms Williams then went on annual leave, and although she advised Ms Rahiri of this, I find that there was no clear advice to Ms Rahiri of when the preliminary investigation meeting would take place. During the intervening period Ms Rahiri sought more information from the HR Department but was not provided with any.

[98] I find this failure to provide Ms Rahiri was information relating to the complaint was a breach of the good faith requirements set out in s. 4 of the Act and also of Schedule 1B s(4)(2)(b) of the Act in addition to being a breach of the Staff Management Protocol.

[99] Ms Williams returned to work on 23 March 2015, but did not contact Ms Rahiri until 25 March 2015, 2 days later. When Ms Rahiri failed to return her telephone call, she did not make any further contact until prompted by HR. I find this failure in contact to advise Ms Rahiri of the next steps was a breach of the good faith requirements set out in s. 4 of the Act and also of Schedule 1B of the Act, in addition to being a breach of the Staff Management Protocol.

[100] I find this not to have been acting in the requisite good faith towards Ms Rahiri.

[101] Whilst I find that Ms Rahiri's subsequent request for written communication only may not have been acting in a: "*responsive and communicative manner*" pursuant to s. 4 (1A) of the Act, I find that this is directly attributable to the failure of BOPDHB as the employer to be responsive and communicative in relating to Ms Rahiri during this period.

[102] Ms Williams acknowledges in her evidence that Ms Rahiri was: "*agitated and tearful*" during the meeting on 15 April 2015, and in her view showed a lack of insight and accountability into her actions. In that situation I believe this was an unsafe view to form in circumstances in which Ms Rahiri was demonstrably upset, had only just been provided with the REF and was not provided with a fair opportunity to absorb the allegation against her and provide a reasoned response.

[103] Moreover the letter dated that same day stating that in fact: “*the allegation is serious*” I find to have been a direct contradiction of Ms Williams’s previous her verbal assurances to the contrary.

[104] Whilst employers should advise employees in any disciplinary process of all possible outcomes, I consider that BOPDHB’s actions up to and including the letter dated 15 April 2015 constituted a breach of the duty of good faith which it owed to Ms Rahiri.

(ii) *Was the breach of sufficient seriousness to make it foreseeable that Ms Metcalfe would resign?*

[105] I find that in circumstances in which:

- Ms Rahiri had asked for more information at the outset of the process on 13 March 2015, but did not receive a copy of the complaint until 15 April 2015, over a month later;
- Ms Rahiri had visited the HR Department on more than one occasion to request further information on the process without receiving a response, a process of which Ms Williams had been made aware;
- Ms Williams failed to act in a timely manner upon her return from annual leave on 23 March 2015 by not contacting Ms Rahiri until 25 March 2015, and subsequently failing to make further contact until 31 March 2015 after contact from the HR Department prompted her memory of the matter; and
- Despite knowing that (i) Ms Rahiri was very upset about the issue during the meeting held on 15 April 2015, (ii) unable to provide a reasoned response or explanation on a complaint, the details of which she had only just become aware, and (ii) having previously advised Ms Rahiri that the matter was unlikely to result in the loss of her job; sent her a letter following the meeting stating that it was a ‘serious allegation’ with the potential for dismissal,

It was reasonably foreseeable that Ms Rahiri would lose trust and confidence in BOPDHB’s duty to behave in good faith towards her, and resign.

[106] I determine that Ms Rahiri was constructively dismissed by BOPDHB.

## **Remedies**

[107] Ms Rahiri has been unjustifiably dismissed and she is entitled to remedies.

### *Lost wages*

[108] Ms Rahiri was under a duty to mitigate her loss during the period following her resignation. Although she obtained some employment during the second month following her resignation, it is clear she took no steps to do during the first few weeks. Although Ms Rahiri said she was too unwell to seek work, there is no medical evidence to support that claim.

[109] In these circumstances I find that there is no compensation for lost wages is payable to her. However as I find she was constructively dismissed by BOPDHB, I find that she is entitled to the contractual two weeks' notice.

[110] I order that BOPDHB pay to Ms Rahiri two weeks' notice based upon the average amount earned in the 3 months prior to 13 March 2015. The parties are to resolve this amount between themselves, but if they are unable to do so, leave is reserved for them to return to the Authority.

### *Compensation*

[111] As a result of the process followed by BOPDHB I find that Ms Rahiri has suffered significant humiliation, loss of dignity and injury to feelings. I accept Ms Rahiri's evidence that there were also severe financial difficulties experienced by her throughout the period since 13 March 2015.

[112] BOPDHB is ordered to pay Ms Rahiri the sum of \$7,500.00 in respect of humiliation, loss of dignity and injury to feelings pursuant to s 123(1) (c)(i) of the Act.

### *Contribution*

[113] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[114] Ms Rahiri did not contribute to the situation in which she found herself and there will be no reduction in the penalties awarded.

## **Costs**

[115] I note that Ms Rahiri is legally aided so any question of costs is subject to the requirements of sections 45 and 46 of the Legal Services Act 2011.

[116] The Investigation Meeting constituted just over half a day of hearing time. If Ms Rahiri had not been legally aided, then, applying the normal daily tariff of \$3,500.00, an award of costs would have been made in her favour in the sum of \$1900.00.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**