

BETWEEN

MICHELE ROTA-TAWHA  
Applicant

A N D

RADIUS RESIDENTIAL  
CARE LIMITED  
Respondent

Member of Authority: K J Anderson

Representatives: R Te Ao, Advocate for Applicant  
S Leftley, Advocate for Respondent

Investigation Meeting: 14 May 2013 at Hamilton

Submissions Received: 11 June 2013 from Applicant  
7 June 2013 from Respondent

Date of Determination: 28 August 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] The applicant, Ms Michele Rota-Tawha, resigned from her employment on 30 October 2012 and she says that the resignation was, effectively, an unjustifiable constructive dismissal. For completeness, it is recorded that Ms Rota-Tawha also claimed that she was disadvantaged in her employment by an unjustified action by her employer. However, it is accepted by her that the circumstances relating to this claim are directly related also to the constructive dismissal claim and are to be treated as such by the Authority.

[2] The respondent, Radius Residential Care Limited (Radius) denies that Ms Rota-Tawha was dismissed and says that she resigned without giving appropriate notice.

**Background**

[3] Ms Rota-Tawha was employed as a Healthcare Assistant at Radius Maeroa Lodge in Hamilton; commencing her employment in March 2010. The Manager of Maeroa Lodge, since March 2011, is Ms Judy Green-Philpott. The evidence of Ms Green-Philpott

is that during her time as Manager of the Maeroa Lodge, she became aware of a number of items “going missing” from the facility. Ms Green-Philpott attests that despite numerous investigations, she was unable to identify that any member of the Maeroa Lodge staff was responsible for the removal of various items, and no names were ever mentioned as being associated with the absence of the chattels involved. Ms Green-Philpott says that she contacted the local community police and informed them, and as a consequence, Constable William Cuthers became a liaison person for the Maeroa Lodge and he came to the facility to investigate the loss of property. Constable Cuthers did several “walk throughs” of the facility to ensure that the staff were aware of his involvement.

[4] The further evidence of Ms Green-Philpott is that in September 2012, thefts from the Maeroa Lodge appeared to increase. Ms Green-Philpott told of an allegation from the family of a dying resident, regarding money that had been taken from the resident’s wallet. Ms Green-Philpott also referred to a resident reporting that their laptop computer had been stolen and she attested to crockery and food disappearing from the kitchen of the facility. But despite further investigation by Constable Cuthers, it was not possible to identify who was responsible.

#### **Information received**

[5] Ms Green-Philpott testified that she was approached by a staff member on 9 October 2012. This person indicated that she was concerned about events that she had witnessed and she agreed to recount her observations only after receiving an assurance from Ms Green-Philpott that her identity would not be revealed. The staff member (the informant) also had a support person present when she met with Ms Green-Philpott. The informant told Ms Green-Philpott that some chairs from the Maeroa Lodge facility were in the possession of Ms Rota-Tawha; in her dining room. The informant also alleged that Ms Rota-Tawha had told her that she (Ms Rota-Tawha) was in possession of pots and pans from the kitchen of Maeroa Lodge and that these had been given to her when they were no longer required by the facility.

[6] Upon receiving this information, Ms Green-Philpott contacted Constable Cuthers via an email sent on 9 October 2012. As evidenced by the content of the email, the aforementioned staff member, in addition to the allegations against Ms Rota-Tawha, also related to Ms Green-Philpott incidents of the smoking of marijuana and the sale (dealing) of the drug by other staff members. Ms Green-Philpott told the Authority that the staff

member had made allegations against three employees in total; one of whom was Ms Rota-Tawha.<sup>1</sup>

[7] On 10 October 2012, Ms Green-Philpott met with Constable Cuthers and informed him of the information she had received from the staff member, including the names of the three employees that allegations had been made against. Relative to the allegations made against Ms Rota-Tawha, Constable Cuthers was shown the dining room chairs at the Maeroa Lodge. Ms Green-Philpott attests that although nothing had been given away to the staff at Maeroa Lodge, the allegation regarding the pots and pans could not be pursued as there was no way of identifying them from any others.

[8] The evidence of Ms Green-Philpott is that she did not feel that she could accuse Ms Rota-Tawha (or the other employees) named by the informant, without any evidence. Ms Green-Philpott attests that she knew that if she commenced a formal investigation into the allegations, she would have to reveal the identity of the informant and this was not possible as she had given an undertaking not to do this.

[9] However, Constable Cuthers informed that he could make a visit to the homes of the three employees based on the information received and report back to Ms Green-Philpott as to the outcome in due course. Ms Green-Philpott says that Constable Cuthers led her to believe that the visit to Ms Rota-Tawha's home would be "informal" in nature and she understood that Constable Cuthers would not make any reference to the possibility of a theft of the chairs.

#### **The visit by Constable Cuthers to Ms Rota-Tawha's home**

[10] Due to his other work commitments, Constable Cuthers was not able to visit Ms Rota-Tawha's home until 24 October 2012; some two weeks after his discussions with Ms Green-Philpott. The affidavit evidence of Constable Cuthers is that he parked his patrol vehicle a number of houses from Ms Rota-Tawha's address, as it is his habit not to park directly outside a relevant address when making an enquiry.

[11] It is the common evidence of Constable Cuthers and Ms Rota-Tawha that he was invited into her home. It is also established that Constable Cuthers informed Ms Rota-Tawha that he had information that she had allegedly taken items from the workplace. It is Ms Rota-Tawha's written evidence that Constable Cuthers made specific mention of pots and pans. At the investigation meeting Ms Rota-Tawha also told the Authority that

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<sup>1</sup> The allegations against Ms Rota-Tawha only related to pots and pans and dining room chairs.

Constable Cuthers asked her if she was aware of “stuff” going missing from the workplace and that he made mention of pots and pans before he was invited to come into the house. The further evidence of Ms Rota-Tawha is that she was confident of her innocence and she allowed Constable Cuthers to have a look around in her house. Having done so, he informed her that he was satisfied that there was no stolen property at her premises.

[12] Constable Cuthers duly reported to Ms Green-Philpott that while the dining room chairs at the home of Ms Rota-Tawha were similar to those at Maeroa Lodge, they were a slightly different colour.<sup>2</sup> Constable Cuthers had no further involvement with Ms Rota-Tawha.

### **The resignation of Ms Rota-Tawha**

[13] The evidence of Ms Rota-Tawha is that she was “shocked and disturbed at these allegations” that she may have taken items from the workplace. Upon consulting her advocate, a meeting took place with Ms Green-Philpott on the afternoon of 25 October 2012. Also present was Ms Rota-Tawha’s advocate, Mr Te Ao, and the Regional Manager for Radius; who happened to be visiting Maeroa Lodge that day.

[14] The evidence of Ms Green-Philpott is that Ms Rota-Tawha stated that she was traumatised following the visit of Constable Cuthers because he had accused her of stealing pots and pans. Ms Rota-Tawha informed that because of the effect on her of the allegations, she would be taking sick leave on 25 and 26 October 2012.

[15] A further meeting took place on Monday 29 October 2012 at which Ms Rota-Tawha’s advocate tabled a written complaint relating to the visit of Constable Cuthers.

While an explanation was given regarding the position of Radius and the involvement of Constable Cuthers, the outcome of the meeting was that Ms Rota-Tawha resigned. This was confirmed in writing the next day (30 October 2012) thus:

I Michelle Rota due to recent events that have wrongfully taken place against me, I find I have no option but to resign. I give notice of my resignation to take effect as from receipt of this letter.

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<sup>2</sup> It appears from the evidence of Mrs Dawn Tawha, the mother of Ms Rota-Tawha, that the chairs were white plastic outdoor chairs that Mrs Tawha had given to her daughter some years ago.

[16] Ms Rota-Tawha says that her resignation was, effectively, a constructive dismissal due to the actions of the employer creating a situation where she no longer had sufficient trust and confidence to continue in her employment.

### **Analysis and conclusions**

[17] Given the claims that Ms Rota-Tawha brings to the Authority, the first matter for determination is:

#### **Was the resignation of Ms Rota-Tawha, in reality, a constructive dismissal, and if so, was the dismissal unjustifiable?**

[18] As was held by the Court of Appeal in *Auckland Electric Power Board v Auckland Local Authorities IUOW*<sup>3</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 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 a 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.

[19] Applying the above dicta of the Court of Appeal to the circumstances of Ms Rota-Tawha, the first question is:

#### **Was the resignation caused by a breach of duty on the part of the employer?**

[20] As established by the Court of Appeal in *Auckland Electric Power Board*, when considering whether there has been a breach of duty on the part of the employer, all of the circumstances of the resignation have to be examined. In Ms Rota-Tawha's case, the circumstances are that without any warning, a Police Constable arrived at her home and informed her that he had received information from her employer that she may be in possession of property belonging to Maeroa Lodge; namely pots and pans. There was no mention of there being a further issue in regard to dining room chairs, albeit it is established that Constable Cuthers took particular notice of Ms Rota-Tawha's chairs when he visited her home. As the Authority understands it, Ms Rota-Tawha only became aware that there was an issue over missing chairs when she met with Ms Green-Philpott on 25 October 2012.

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<sup>3</sup> [1994] 1 ERNZ 169

[21] The evidence of Ms Green-Philpott is that because the informant who made the allegations against Ms Rota-Tawha wished to have her identity protected, a formal investigation into the allegations could not be undertaken. Rather, Ms Green-Philpott decided to involve Constable Cuthers and she told the Authority that she understood he would be undertaking an “informal” investigation.

[22] While it can be accepted that Ms Green-Philpott, most probably, genuinely thought that this was an appropriate course of action. Regrettably it was not. It is not difficult to understand the shock that Ms Rota-Tawha experienced when a Police Constable arrived at her home and informed of the allegation from her employer that Ms Rota-Tawha may be in possession of her employer’s property: namely pots and pans. It is odd that these were even mentioned by Constable Cuthers given the evidence of Ms Green-Philpott that the pots and pans could not be identified in any event. Furthermore, there does not appear to be any evidence at all about the specific nature of their character.

[23] The problem that arises with the course of action adopted by Ms Green-Philpott is that at best, she had received allegations from an informant, who was not subsequently prepared to be identified, about unidentified pots and pans, and a less than accurate identification of chairs that were alleged to be in Ms Rota-Tawha’s possession. It appears that Ms Green-Philpott acted on what were very nebulous allegations from a possibly unreliable informant whom, presumably, was not prepared to make any real commitment to giving tangible evidence. At the very least there was an obligation on Ms Green-Philpott to firstly conduct an investigation as to whether Maeroa Lodge could confirm that there were specific pots and pans and specific chairs actually missing, before taking the matter further. There is no evidence before the Authority relating to the absence of specific chattels. All of the mention of chattels that were allegedly missing has been couched in very broad terms indeed.

[24] While Ms Green-Philpott alludes to Constable Cuthers acting at his own initiative rather than at the behest of Radius, I doubt that this is so. It appears that Constable Cuthers knew that Ms Rota-Tawha was not rostered on duty on the day of his visit to her house. While it has to be accepted that it is appropriate that the Police should investigate any criminal wrong, it is simply not appropriate to involve them when tangible evidence relating to the purported chattels in question, and possible misconduct by Ms Rota-Tawha, was totally absent. The allegations by the informant were not supported by any meaningful evidence at all. And given that the informant was not prepared to be identified or make a written commitment pertaining to the allegations; it is difficult to see how

matters could fairly and reasonably be pursued against Ms Rota-Tawha, without some tangible evidence being available.

[25] In summary, I conclude that the resignation of Ms Rota-Tawha was caused by a breach of duty by her employer. This is because she came under suspicion and investigation by the Police, who subsequently came to her home, on the basis of an allegation made by her employer, acting on very nebulous information that she may have been involved in dishonest activity that warranted the involvement of the Police. All of which was proven to be unfounded.

[26] The breach of duty by the employer is that by involving the Police in the manner that occurred, without any material evidence of any wrongdoing, was clearly conveying to Ms Rota-Tawha that it did not have trust and confidence in her as an employee.

[27] The next question for determination 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?**

[28] It is obvious that Ms Rota-Tawha was (justifiably) upset that her employer suspected her of being dishonest, without any material evidence for that suspicion. The evidence of Ms Rota-Tawha is that she no longer had any trust in the management of Maeroa Lodge and she said that she would not feel safe again in that environment. It has to be said that this would be a perfectly natural reaction for most people placed into similar circumstances. I conclude that by involving the Police and allowing the visit to Ms Rota-Tawha's home, it would have, or should have, been reasonably foreseeable to the employer that this would have a substantial effect upon Ms Rota-Tawha and that resignation from her employment was a distinctly possible outcome.

[29] It follows that I find that the resignation of Ms Rota-Tawha was in fact, a constructive dismissal brought about by a serious breach of duty on the part of Radius. The breach of duty was of sufficient seriousness to make it reasonably foreseeable that Ms Rota-Tawha would find it difficult to continue in her employment.

[30] The actions of Radius were not what a fair and reasonable employer could have done in the circumstances<sup>4</sup> and I find that the constructive dismissal of Ms Rota-Tawha was unjustifiable.

### **Remedies**

[31] Having found that the dismissal of Ms Rota-Tawha was unjustifiable and hence she has a personal grievance, pursuant to s.123(1) of the Employment Relations Act 2000 (the Act):

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for one or more of the following remedies ...

[32] Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings. Then at s.128(2) of the Act, if the Authority determines that an employee has a personal grievance and there has been lost remuneration because of the grievance, the Authority:

... must, whether or not it provides for any of the other remedies provided in section 123 order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

### ***Reimbursement of lost wages***

[33] Ms Rota-Tawha seeks to be awarded the remedy of three months' loss of wages. She has an obligation to mitigate her loss of income by making a meaningful attempt to obtain new employment. Ms Rota-Tawha told the Authority that she had an interview with another rest home and was asked why she had left her employment at Radius. It appears that Ms Rota-Tawha mentioned to this prospective employer that she was involved in a "court trial" and this would, most probably, not have been viewed particularly favourably. Ms Rota-Tawha also said she applied for a role with the Waikato Hospital but did not hear anything back.

[34] While I conclude that Ms Rota-Tawha was not particularly active in seeking alternative employment, the evidence is that she did make some attempt to mitigate her loss and hence it is appropriate to award the statutory minimum loss of wages as required by s.123(1)(b) of the Act; for a period of three months.

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<sup>4</sup> Section 103A Employment Relations Act 2000

***Compensation***

[35] Ms Rota-Tawha seeks an award of compensation of \$5,000 pursuant to s.123(1)(c)(i) of the Act. Her evidence is that she felt ashamed, shocked, embarrassed, humiliated and victimised as a result of the allegations against her and the actions of her employer. In the circumstances, I accept that the sum of \$5,000 is most appropriate in the circumstances.

***Contribution***

[36] Pursuant to s124 of the Act, I have given serious consideration to whether Ms Rota-Tawha may have contributed to the circumstances that gave rise to the personal grievance, in that her resignation was given in a rather hasty manner. However, in the round, I conclude that her resignation in the circumstances cannot be seen as blameworthy conduct that would warrant a reduction to the remedies awarded.

**Determination**

[37] For the reasons set out above, I find that:

- a. Ms Rota-Tawha was constructively dismissed and the dismissal was unjustifiable.
- b. Pursuant to s.123(1)(b) and s.128(2) of the Act, Radius Residential Care Limited is ordered to pay to Ms Rota-Tawha a gross sum equivalent to three months' ordinary time remuneration.
- c. Pursuant to s.123(1)(c)(i) of the Act, Radius Residential Care Limited is ordered to pay to Ms Rota-Tawha compensation of the sum of \$5,000.

**Costs**

[38] Costs are reserved. The parties are invited to resolve this matter between them. In the event that a resolution cannot be arrived at, the applicant has 28 days from the date of this determination to file a costs memorandum. The respondent has a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**