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Ryan v South Pacific Meats Limited (Christchurch) [2011] NZERA 430; [2011] NZERA Christchurch 87 (20 June 2011)

Last Updated: 7 July 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011]NZERA Christchurch 87
5157965

BETWEEN JUNE MARIE RYAN

Applicant

A N D SOUTH PACIFIC MEATS

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

Helen Doyle

Sarah McKenzie, Counsel for Applicant Graeme Malone, Counsel for Respondent

5 April 2011 at Invercargill

27 April 2011 from Applicant

3 June 2011 from Respondent

Date of Determination:

20 June 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] June Ryan was employed to work as a receptionist in April 2007 at South Pacific Meat Limited at its Awarua Plant in Invercargill. I shall refer to South Pacific Meat Limited as either South Pacific or Awarua. Prior to this, Ms Ryan had been working on the production line in the boning room at South Pacific. She had cut her finger at home during this time and was only able to perform light duties. There were no light duties on the production line and therefore Ms Ryan was offered work as a receptionist with South Pacific.

[2] Ms Ryan entered into an individual employment agreement with South Pacific on 4 April 2007. She reported to the plant manager who was at that stage Harry Hansen.

[3] At the time that Ms Ryan commenced her role, other roles had been disestablished in the administration area including the plant accountant role. Another employee, Kirsty, had been filling the reception and accounts payable and purchasing

roles from in or about mid-2006 but had been finding this too much. Ms Ryan, when employed, was able to deal with the reception tasks, freeing Kirsty up to concentrate on her other roles. In May 2007, all the accounts payable work was transferred to the Christchurch branch of South Pacific and Kirsty also transferred to Christchurch.

[4] In December 2007, Mr Hansen ended his employment as plant manager in Invercargill. A new plant manager, Malcolm Hampton, was employed from February

2008.

[5] Ms Ryan said that difficulties occurred following the return of the accounts payable work from Christchurch and the employment of plant accountant, Kelly Hibbs, at Awarua in August 2008. Ms Ryan said that Ms Hibbs added additional duties to her role and she then became unable to complete the required tasks in a day. She said that although she requested help it was not forthcoming and South Pacific would not allow other employees to assist her and did not take her concerns seriously. Ms Ryan also said that she was subjected to bullying and unreasonable demands between August 2008 and March 2009 resulting in her becoming stressed and anxious. Ms Ryan went off on stress leave on 10 March 2009 and resigned on 26 May 2009 in circumstances that she says amount to an unjustified dismissal.

[6] Ms Ryan alleges that there were a number of unjustified actions that disadvantaged her during her time with South Pacific as set out below:

- Increased employment duties to such a point that she could not complete the tasks required of her in a working day;
- Failed to give assistance or training when requested;
 - Expressly refused for others to help her and failed to listen to her concerns;
- Did not assist with time management;
 - Bullied her and treated her in a demeaning way. In particular, Ms Hibbs mocked and teased her and was rude and dismissive towards her;
- Excluded her from an office worker uniform order; and
- Disregarded her concerns regarding the way Ms Hibbs was treating her.

[7] Ms Ryan also alleges that the breaches were so serious that it would have been foreseeable to the company that she would have had no option in May 2009 but to resign in the nature of a constructive dismissal. Ms Ryan claims \$20,000 for compensation for humiliation and distress and lost wages in the sum of \$18,600 of which the submissions lodged state \$2,480 is in lieu of a notice period, together with costs.

[8] South Pacific denies that it subjected Ms Ryan to undue stress, bullying or unreasonable demands. It says that she was not performing to an acceptable level and this was brought to her attention on a number of occasions. It says that regular meetings were held to discuss work flow and requirements but Ms Ryan would not accept criticism and was obstructive. South Pacific says that it acted appropriately both before and after she went on sick leave and does not accept that it dismissed Ms Ryan in circumstances amounting to an unjustified constructive dismissal.

Issues

[9] The issues for the Authority to determine are as follows:

- Does Ms Ryan have a personal grievance that her employment was affected to her disadvantage by the actions that she alleges were unjustified;
- Was Ms Ryan unjustifiably constructively dismissed from her employment with South Pacific?

The role itself

[10] The first matter to consider is whether the size of the role was such that it was too large for one person. When Ms Ryan first commenced her employment, she said in her written evidence that she undertook reception duties that involved:

- Greeting and organising visitors;
- Dealing with staff queries;
- Ordering lunches, booking flights, accommodation and rental cars;
- Placing stationery, first aid and coffee orders;
- Processing mail;
- Organising couriers and doctors' appointments;
- Laminating and photocopying;
- Accruals for invoicing;
- Standing and book orders;
- Data sheets for engineering;
- Spreadsheets for Kiwi Rail and pallet credits;
- Backup tapes;

- Coding if time permitted.

[11] Ms Ryan said that some additional tasks were added when Mr Hampton commenced employment in February 2008 of data entry and invoicing for all the books. The evidence supports that Ms Ryan was happy to undertake those additional tasks. She produced a typewritten note that she had taken shortly after Mr Hampton started as plant manager. In her note, amongst other matters, she records that Mr Hampton asked her if she was enjoying her job and she responded that she *"loved it"* and she also recorded that Mr Hampton told her he was happy with her data entry and invoices.

[12] Mr Hampton spoke to Ms Ryan before Ms Hibbs commenced her employment to inform her that a plant accountant would now be employed at Awarua. Ms Ryan said in her written evidence that she thought this would be a great idea as *"invoices disappeared when they got to Christchurch"*.

[13] After Ms Hibbs commenced her employment, Ms Ryan said the following tasks were added to her duties:

- Entering invoices into Cheque Write;
- Matching statements to invoices;
- Matching requisitions to statements/invoices;
- Vendor applications;
- Adding supplier to Cheque Write;
- Copying Invercargill City Council invoices;
- Copying 7117s;
- MAF returns;
- Filing.

[14] Ms Hibbs did not agree that all of the above tasks were new duties. She did agree that entering invoices into Cheque Write was a new duty and that some of the tasks added such as MAF returns only involved printing a one page report weekly. She said that Ms Ryan was already undertaking some filing before she commenced employment.

[15] To assist in my understanding of the size of the role and to determine as best I could whether the workload was beyond the capability of one person I heard from Mr Hampton who, by agreement, was connected to the Authority investigation meeting by telephone link and Tony Miles, the operation manager for AFFCO New Zealand Limited (AFFCO). South Pacific is a subsidiary of AFFCO and Mr Miles is responsible for the operation of the South Pacific plant. Mr Hansen used to report to Mr Miles and Mr Hampton currently reports to him. I also heard from Stacey Cowan, who is now undertaking the role that Ms Ryan performed.

[16] Mr Hansen said in his view when he was plant manager Ms Ryan was already very busy without the additional tasks that she advised him were added. He indicated in his written statement that Kirsty was busy and doing less than Ms Ryan was. He said that Ms Ryan also did a *"little bit of filing"* when he was manager and when the accounts payable were transferred to Christchurch, Ms Ryan would match up the orders with the invoices and send these to Christchurch. She would also, when there were missing invoices, chase up whoever had arranged the work or the supplier. Mr Hansen also said that it was the receptionist's role to clear and distribute facsimiles as they arrived.

[17] In summary, Mr Hansen's view was that Ms Ryan would have been too busy with the tasks he was advised had been added to her role and that the tasks she was asked to perform was more than Kirsty had been undertaking without the reception assistant.

[18] Mr Miles said that originally when Ms Ryan was taken on in her role she undertook very few tasks and had a low workload. He said that it was never intended that her role be one of reception duties only and that such a role would never have been contemplated by South Pacific. He agreed that there was an increase in Ms Ryan's work following the appointment of Ms Hibbs but did not believe that the tasks had grown too much. Mr Miles said that before Mr Hampton's appointment, there had been difficulties at Awarua with the standard of accounts and purchasing and he provided some documentary evidence about that. He said that the focus in Awarua was to improve the administration side of the organisation. Mr Miles felt that replacing Kirsty with a plant accountant would enable a better qualified and trained person to oversee and assist Ms Ryan which should have been of assistance. In support of his view that the duties Ms Ryan was undertaking were not too onerous or out of step with other plants he managed, he said that the Awarua plant was unusual in that it had a full time wage clerk, full time plant accountant and a production coordinator who assisted in the daily office tasks as well as a receptionist. He said plants of similar or larger size did not have this level of support.

[19] Ms Cowan has been employed in Ms Ryan's role as receptionist at the Awarua plant since 1 March 2010. She started initially on a temporary contract basis but is now a permanent employee. Ms Cowan had worked in receptionist/administration roles for a number of companies for about eight years previously. She set out in her written statement of evidence the roles she undertook in her position at Awarua. These included all the tasks that Ms Ryan undertook and in addition the cheque run that Ms Hibbs undertook whilst Ms Ryan was employed. Ms Cowan said that she was also required to do some additional tasks in relation to orders that occupied her for one or two hours a day. She accepted, under questioning from Ms McKenzie, that she was not required to do as much of the invoice chasing as Ms Ryan had undertaken

and I accept such chasing up of invoices would have been time consuming.

[20] Whilst Ms Cowan said her role was a busy one she said she would not have wanted anything less to do. She said in her written evidence that there were times when it got busy towards the 20th of the month and the cheques had to be written but she did not believe that her workload was excessive. She explained that many of her tasks were not time critical, such as ordering supplies, and could be fitted into the day as time allowed. Others, she said, were required to be done on a weekly or monthly basis and that if she kept generally up-to-date with entering invoices and other information as it arrived, it did not matter if she got tied up on a particular day as there was time to undertake these tasks at a later period. Ms Cowan said that she had to prioritise tasks but usually got everything done. She said she knew when the busy times of the month were and could prepare for those. Ms Ryan said that she found the workload unrealistic as the additional tasks were added and she could not get through it all in a day and was also interrupted frequently from her accounts tasks she said by her reception duties.

[21] There are a number of elements to consider in terms of determining whether this excessive for one person to carry out. In doing so, I note that the content of a role does not usually remain exactly the same forever. I accept that it was never envisaged that Ms Ryan's task would simply be that of reception. Ms Cowan, for example, said that although it was difficult to give an accurate view of the time spent on reception duties, she would put those duties at about 30% of the overall time. As best I am able to conclude I consider that is probably a fair indication of what percentage of time the receptionist duties required in the position.

[22] I find that the main increase to the workload since Ms Hibbs' appointment was the invoice input into the Cheque Writer and there was some other data input and spread sheets required. Obviously, to enter information into Cheque Write there had to be a gathering and ordering of it and this is where the matching and chasing up of invoices, statements and requisitions came in. The work involved with some other tasks that were added was fairly minimal, such as the MAF slaughter returns in January 2009 which involved printing a one page report weekly and completion of the cheque reconciliation involved printing a report once the account had been reconciled.

[23] It has to be recognised too that, as well as the tasks increasing with the employment of Ms Hibbs, it was the first time at Awarua that Ms Ryan had worked with an experienced plant accountant so that would have taken her some getting used to.

[24] Objectively assessed, Ms Ryan's position was one where there were reasonably high demands placed on her in circumstances where she had limited control over the demands from reception side of the role. The ultimate responsibility, though, for accounting outcomes fell to Ms Hibbs and Mr Hampton. The evidence supports there were busy periods of the month but that the tasks were such that some were daily, some weekly and some monthly.

[25] Ms Ryan and Mr Hansen compared the situation in terms of the workload to the situation when Kirsty was employed and Ms Hibbs took over the reception duties to show that the workload was unmanageable. I am not satisfied that, when properly analysed, such comparison is as helpful as it may have seemed at first. When the accounts payable work returned to the Awarua plant, Ms Ryan was not left completely alone to undertake the accounts and reception work. Ms Hibbs was employed as plant accountant at the same time the work returned, so there was another person at the plant more experienced than Kirsty if issues arose and importantly Ms Hibbs was ultimately responsible for doing or ensuring work related to the accounts was done.

[26] Ms Cowan was obviously more experienced performing administration and reception duties than Ms Ryan. Objectively assessed, Ms Ryan would have needed time to get used to her new workload and used to working to daily, weekly and monthly deadlines.

[27] The evidence does not satisfy me when objectively assessed that the role undertaken by Ms Ryan was too large for any one person. This employment relationship problem therefore, in terms of the workload, falls to be considered on the basis that Ms Ryan was not coping with her work and in light of that whether the steps taken by South Pacific in terms of any knowledge they had of her difficulties was reasonable.

Increase in work duties

[28] On 14 November 2008, Ms Ryan wrote to Ms Hibbs and asked for a pay increase. She set out in her letter that initially she processed invoices, arranged flights, accommodation, rental cars, answered the phone and was the first point of contact for visitors and staff coming on site. In her letter, she said that over the previous six months her workload and duties had increased and she set out these additional tasks as spreadsheets for engineering, data input and invoices put into the Cheque Writer. Ms Ryan concluded her letter by stating that she had met these extra duties head on and with a smile and that her extra effort and loyalty should be rewarded by way of a pay increase and she considered a 10% increase would be appropriate in terms of the increase of the workload.

[29] I accept, as Mr Malone submits, that it is appropriate for the Authority to analyse if there was any change to Ms Ryan's workload in the month or so preceding or following the date of the letter requesting a pay increase that would have led her to the view that there was an unreasonable increase in duties. There is no dispute that Ms Ryan's workload did increase after

Ms Hibbs commenced her employment in August 2008 and the accounts came back to the Awarua plant. I agree though with Mr Malone's submission that, on analysis, there was no significant increase in work required in the month or so before November 2008 and after that date only minor matters were added to the workload that involved printing off of reports in the main. A further increase in duties, however, was foreshadowed by Ms Hibbs and this may well have led Ms Ryan calling a halt to that against what she saw as a workload she was having difficulty with anyway.

When did Ms Ryan first raise issues with her workload?

[30] Ms Ryan thought that she first mentioned concerns about her workload in late November 2008. I find that it was not until 16 December 2008 that Ms Ryan told Mr Hampton that she had lots of extra work given to her and that it was not until 4 February 2009 that the fact she could not manage her workload was clearly articulated to South Pacific. In reaching that view, I have analysed the following interactions on particular dates.

26 November 2008

[31] On 26 November 2008, Ms Hibbs received a complaint from the health and safety manager, Kirsten Newton, about Ms Ryan's actions after being asked to transport to hospital another employee who had suffered a cut. Ms Hibbs spoke to Ms Ryan about the matter and Ms Ryan explained that the injured employee had wanted to drive himself to hospital. I find that the handwritten notes that Ms Hibbs took on the complaint itself support that she listened to Ms Ryan's response but nevertheless felt that Ms Ryan should have followed the manager's instruction to drive the employee to hospital and advised her of this. There was reference to a written warning for not following a manager's instruction but in any event one was not issued. I do not find anything unreasonable about Ms Hibbs' approach in relation to that matter, although the reference to it in both the evidence and in some of Ms Ryan's own notes confirm that she saw this as a concerning matter.

[32] Later that same day, a further meeting took place between Ms Hibbs and Ms Ryan. Ms Hibbs produced diary notes of meetings that she had had with Ms Ryan. Ms Ryan also made notes of the meetings. I have found the records of the meetings taken by both Ms Hibbs and Ms Ryan to be particularly helpful.

[33] Ms Hibbs' diary note reflects a discussion about the need for Ms Ryan to clear faxes and telephone messages, that after discussion about a wage increase with Mr Hampton it was not felt a pay increase was warranted, that Ms Hibbs was working on a current job description for the receptionist/accounts payable role and it was felt that this role was only starting to reach its full potential. There was some discussion about the amount of time Ms Ryan spent on personal issues such as calls and Ms Hibbs expressed that she was concerned about that.

[34] Ms Ryan's main focus in her note, notwithstanding there were a number of matters discussed, was on the hospital event and the personal calls. From Ms Ryan's note, it is clear that she did not consider her personal calls excessive and she recorded that she had not had a smoko break in months and she worked in her lunch break answering the phone and attending to the counter. She also noted that Ms Hibbs now wanted her to watch out for the fax "*as if I don't have enough to do*". Although Ms Ryan said in her written evidence that clearing the fax was an additional responsibility, I am not satisfied that it was. Mr Hansen said that when he was plant manager, the receptionist would retrieve a fax and give it to the person it was addressed to.

[35] I find it less likely when both notes are considered that Ms Ryan advised Ms Hibbs that she was not coping with her workload. It was clear from Ms Hibbs's diary notes that she felt Ms Ryan was not keeping up-to-date with her tasks as there was reference to this in relation to personal issues.

15. December 2008

[36] On 15 December 2008, Ms Ryan was late to work. She had forgotten that she had a family event on that morning and said that she did not have Ms Hibbs' or Mr Hampton's number and instead telephoned Jacqueline Collins who had been employed to work as a payroll clerk at the Awarua plant from November 2008 until May 2009 through a replacement agency. Ms Collins had become friendly with Ms Ryan and they car pooled to work as they lived close to each other. She asked Ms Collins to advise Ms Hibbs that she would be late into work. Mr Hampton expressed surprise in his written evidence that Ms Ryan did not have his or Ms Hibbs' telephone numbers.

[37] When Ms Ryan eventually arrived at work, Ms Hibbs told her that she should have contacted her if she was going to be late. Ms Ryan was clearly upset by the reprimand and said that Ms Hibbs said things like work should come before family. Ms Hibbs said that she would not have said that because she does not believe it and I find it unlikely. I find Ms Ryan told Ms Hibbs that she thought a reprimand was unfair because she did not take smoko breaks and worked so hard and attended the counter during her lunch break.

16. December 2008

[38] Ms Ryan met with Mr Hampton the following day on 16 December 2008 and advised him what Ms Hibbs had said to her about her being late. She also had been told about some comments by Ms Collins that Ms Hibbs had allegedly made about her.

Mr Hampton recalls the conversation they had and I accept that Ms Ryan raised with Mr Hampton her that she had lots of extra work put on her and was trying to do everything Ms Hibbs asked of her and not having smoko breaks and answering the telephone during her lunch breaks.

[39] Both Ms Ryan and Mr Hampton agree that Mr Hampton responded "*don't worry about it*". I find, however, that Mr Hampton's focus was on the comments made by Ms Hibbs about being late and because Ms Hibbs had informally dealt with that issue he did not consider it to be a significant matter. I accept Mr Malone's submission that the conversation was such, when assessed against that context it would not raise clear concerns that the workload was unmanageable or that Ms Ryan was finding it so.

[40] Before Christmas, Ms Ryan said she was feeling stressed and had a stomach upset. She had some medical tests undertaken in relation to this but the tests were clear.

[41] Ms Ryan had a week's annual leave from 5 January 2009 until 12 January 2009.

12 January 2009

[42] On 12 January 2009, there was a quick catch up meeting between Ms Hibbs and Ms Ryan. Again, this meeting was recorded by both of them. Ms Hibbs' diary notes reflects that the meeting was held to discuss the week's tasks and there was discussion that the cheque run would be run on Friday and that all invoices were to be entered by Thursday and reconciled to statements. Ms Hibbs records that she advised Ms Ryan that it was time to step up and begin taking full ownership of the accounts payable process and there was some discussion about cheques requisition and for Ms Ryan to complete those that month. Ms Hibbs said that she would give training about this and begin to implement more and more of the process in the following months. There was also discussion about the MAF slaughter returns, a small task that Ms Ryan was asked to complete. Ms Ryan was advised that Ms Hibbs would run through it with her later in the day and Ms Ryan was to complete the creditor filing.

[43] In her note, Ms Ryan refers to the quick catch up and that Ms Ryan noted she needed to catch up some data entry and was not given the time and that Ms Hibbs kept telling her to manage her time better. Ms Ryan records that this was easier said than done when you are constantly interrupted during the day at reception. Ms Ryan also wrote a concern that she had come back from holiday to a week's invoices that had not been done and was expected to keep up with all her other work. She ends her note with "*enough is enough*".

[44] I am not satisfied at that meeting there was a clear concern raised that Ms Ryan's workload was unmanageable. I am strengthened in that view because it was not until the next meeting that Ms Hibbs was aware, after asking, that the order database had not been updated since November.

26 January 2009

[45] On 26 January, there was a further short meeting to discuss the week's tasks. Ms Hibbs' notes reflect the creditors' filing had still not been completed and that was to be done by the end of the week. There was a discussion about the order database and Ms Ryan advised Ms Hibbs that it had not been updated since November 2008. Ms Hibbs advised Ms Ryan that that was unacceptable and there was some discussion about why there was a need to keep the database updated daily. Ms Hibbs wanted the database updated as soon as possible and by the end of the week. There was also discussion about the end of month invoices to be entered into the Cheque Writer by the end of the week to allow accurate financial information for the month's end.

[46] Ms Ryan's notes of the same period reflect that she stated the following, and this leads me to believe that it was again not made clear that Ms Ryan was simply not coping with the workload:

Meeting with Kelly to go over weeks work wanting to give me more work, meeting short came away thinking need to have another meeting re workload. Went on about database tried again to tell am not getting the time was told again to manage my time better. I am feeling quite stressed and not enjoying work the same.

[47] Ms Ryan pulled a muscle in her leg at work while she was lifting a bag of sugar. She was away from 27 January 2009 to 4 February 2009. Ms Ryan was unhappy that South Pacific was going to dispute her workplace injury.

4 February 2009

[48] On 4 February 2009, Ms Ryan requested to meet with Ms Hibbs and I find for the first time clearly expressed to her that she was not coping with her workload. At the same meeting she advised Ms Hibbs that she was unhappy that South Pacific was going to dispute her workplace injury claim. She told Ms Hibbs that she thought she did not like her and Ms Hibbs responded that there was nothing personal but that she had a busy workload and a lot of work to complete and that was not helped by the fact that Ms Ryan's work was not up to standard and completed in a timely way. Ms Hibbs advised that South

Pacific had now accepted Ms Ryan's ACC claim.

[49] I accept that Ms Hibbs' diary notes accurately reflected what was discussed and that she asked Ms Ryan at that meeting if Ms Ryan needed help to establish a weekly or daily task list to ensure she got the work completed when Ms Ryan made it clear that she felt she had too much work and was not coping with her workload. There was a discussion about the tasks Ms Ryan currently undertook and Ms Hibbs said that she would take the information away and mull it over to see if she could come up with suggestions or improvements to streamline her workload. Ms Ryan told Ms Hibbs she was going to start keeping a list of what was performed on a daily basis.

[50] In her notes, Ms Hibbs records that she entered all the current invoices into Cheque Writer for the month, however she required the accruals to be analysed and completed by lunchtime the following day. Ms Ryan's notes reflect that no invoices were processed while she was away. I accept her evidence as more likely that no invoices were entered whilst she was on a week's leave over the Christmas period. Equally however there is no evidence that she asked for that work to be undertaken and it is not unusual for employees to return to some build up of work after leave. I have formed a different view from the evidence about Ms Hibbs entering invoices whilst Ms Ryan was on ACC. I find it more likely at that time that Ms Hibbs had entered some of the invoices and that it was why she recorded that in the notes. Ms Hibbs did accept under questioning from Ms McKenzie that she had not entered all the invoices.

[51] Ms Ryan's notes of the meeting reflect that she was told to manage her time better and to have less chit chat and personal calls and that there was no suggestion of any help as to how she could manage her time better. I prefer Ms Hibbs notes in this respect that there was an offer to assist with time management but Ms Ryan did not see her workload issue as one of time management. Ms Ryan also records that Ms Hibbs asked *if she was coping* and she recorded responding that she *was finding the work a great challenge and loved it but was only one person who did not have enough hours in the day to do all the extra work done that had been put on her*.

[52] On 5 February 2009, Ms Ryan had a meeting with Mr Hampton to talk about her concerns that arose from the meeting with Ms Hibbs on 4 February 2009. Ms Collins had told Ms Ryan that other employees, including Ms Hibbs, had said or been present when others had said unpleasant things about her. Ms Ryan did not hear any of these comments. When I questioned Ms Collins about this she said that she could not recall Ms Hibbs making the first comment but she expected Ms Hibbs to stop those making comments and that did not occur. Ms Ryan told Mr Hampton what Ms Collins had told her. Mr Hampton's view was that Ms Hibbs and Ms Ryan needed to get on and Ms Ryan did agree with that. Ms Ryan told Mr Hampton that she had asked for Ms Hibbs' help and it had fallen on deaf ears. Mr Hampton undertook to speak to Ms Hibbs.

[53] Ms Ryan said in her evidence that she continued to suffer from stomach upsets but felt she could not tell Ms Hibbs or Mr Hampton about this and did not advise them of this. I find, therefore, that the reasonableness of any steps taken by South Pacific in light of the knowledge that Ms Ryan was having difficulty coping with her work has to be assessed without this knowledge.

What steps were taken from that point?

[54] Mr Hampton and Ms Hibbs both discussed the issues with Ms Ryan before 9 February 2009. They decided that Ms Ryan was not performing her work to an acceptable performance standard that they concluded she could attain. Ms Hibbs felt the answer was in Ms Ryan managing her time better. Mr Hampton said that both he and Ms Hibbs shared a concern that Ms Ryan saw any criticism as a personal attack and Ms Hibbs felt that Ms Ryan seemed to resent her position. They decided that the only way to deal with the matter was to introduce a performance plan and work through it over the following months. They felt that such a plan would enable them to deal with the matter in a transparent way to identify areas that needed improvement, monitor workload and the way it was undertaken and assist Ms Ryan in completing workload through proper time management and, if necessary, through adjustment of workload and future training. Ms Hibbs, in particular, felt that working through the matters in that way would enable Ms Ryan to see that the issues were not personal but were work issues.

9 February 2009

[55] On 9 February 2009, there was another meeting with Ms Hibbs and I find that Ms Ryan was advised there would be a performance plan undertaken. Again, there are two sets of notes taken at this time.

[56] I find that Ms Hibbs' notes record her awareness that Ms Ryan felt she was not able to undertake further work and was struggling to keep up with her work as it was. There was discussion about the invoice filing and cheque run and Ms Ryan was advised that South Pacific had accepted her workplace injury claim.

[57] A meeting to discuss the performance plan was organised for 11 February at 3pm and Ms Ryan was invited to have a support person present.

[58] Ms Ryan's notes reflect that she was told by Ms Hibbs she would be having a three months work performance [plan] done on her and she should bring along a support person. Ms Ryan's notes reflect she was told quite bluntly that she would

be getting more work and would need to be able to manager her time better.

[59] Whilst Ms Hibbs was dissatisfied at the level of work Ms Ryan was producing it was clear that she knew Ms Ryan felt she was unable to undertake any further work and was struggling to keep up with the work as it was. The only conclusion I can draw is that Ms Ryan's comment in her notes was directed to the future.

[60] The meeting was not able to take place on 11 February because Ms Ryan's solicitor, Ms McKenzie, was unavailable until 13 February 2009. There was some evidence from Ms Ryan that she was unaware that this meeting was to discuss a performance plan. I think Ms Hibbs made this as clear as she could but accept there may have been some room for confusion. In any event, the meeting on 13 February 2009 did not significantly progress matters. Ms McKenzie wanted to have a record of what the performance concerns were before proceeding further.

[61] On 17 February 2009, a letter was provided to Ms Ryan for her solicitor that set out these concerns. These were set out as:

- Less personal calls;
 - Following specific instructions of management staff, e.g. clearing phone messages;
 - Less time spent participating in office chit chat and therefore providing more time to complete tasks;
- Keeping the purchase order database up-to-date;
- Not following up on non-processed purchase orders;
- Matching of documentation with credit invoices;
 - Ensuring that all routine office procedures are fulfilled, e.g. opening company mail in a timely manner, distributing incoming faxes to appropriate people, putting away orders in a timely fashion;
- Keeping up-to-date with creditor filing;
- Keeping copies of required invoicing;
 - Following up on age creditors and ensuring that all accounts are paid up-to-date;
- Communicating directly with Ms Hibbs as Ms Ryan's manager.

[62] Ms Hibbs also noted in her letter that Ms Ryan had discussed separately with Mr Hampton that she felt the issues Ms Hibbs raised were personal in nature, e.g. not related to performance at work, and that in any case she did not have the time to complete the work that was assigned to her. Ms Hibbs noted in the letter that they would like to discuss that aspect with Ms Ryan and explore reassigning some work (in the short term) so that important financial matters had the highest priority for completion. The aim was set out as to have an agreed plan in place at the end of the meeting, a summary of what had been agreed, a timeframe to achieve improvements and any specific action (e.g. additional training that would be needed to be taken).

[63] Ms Ryan, in her evidence, referred to an incident that day where Ms Hibbs had advised her that Mr Hampton was "*pissed off with her for double entry of an invoice*". Ms Hibbs denied that that comment was directed at Ms Ryan and said it could well have been her who entered the invoice twice. I am not satisfied that the comment was directed at Ms Ryan.

[64] Although the meeting on 13 February had been rescheduled for 20 February, it did not take place until 27 February 2009. I was provided with handwritten notes taken by both parties at that meeting although Ms McKenzie's were only made available later on in the investigation meeting. There was a discussion about performance concerns and then Ms Ryan's concerns about her workload being too large. As a result of her concerns about breaks it was agreed that Ms Ryan would be given fixed breaks for morning and afternoon tea and lunchtime and Ms Collins would cover the reception over that period so the break could be uninterrupted. There were some tasks removed from Ms Ryan to be undertaken by Ms Hibbs in the short term. Whilst Ms McKenzie and Ms Ryan considered too few tasks had been removed there was clearly going to have to be an assessment as to whether the role was too large and I am not satisfied that more tasks would if required have been removed.

[65] One of the alleged unjustified actions involved Ms Ryan not getting a uniform shirt after one was initially ordered for a number of employees including her. Mr Hampton explained that a late decision had been made to only give them to management. It is clear from Ms McKenzie's notes that that was discussed at the meeting as she has recorded *Uniform- June can order one*. If there was any unjustified action around that issue then I am satisfied it was resolved at the meeting. Another issue raised in Ms Ryan's evidence was that Mr Hampton as relayed to her by Ms Collins had said her position was untenable. I formed the view from Ms McKenzie's notes that this was also discussed at the meeting because there is the same response as that Mr Hampton gave in his evidence that he was referring to Ms Collins situation and not to Ms Ryan. This was in the context of Ms Collins approaching him feeling compromised about providing a letter of support about Ms Ryan to Ms McKenzie. Ms Collins wanted a permanent role with South Pacific. I am not satisfied that either Mr Hampton or Ms Hibbs felt that Ms Ryan's role was untenable.

[66] Ms Ryan said that while she understood further assistance would be given to her following that meeting in terms of training and work allocation, no help was forthcoming before she left on 10 March 2009 never to return again.

2 March 2009

[67] A meeting took place on this day. I find Ms Hibbs came to the meeting with an accountant's calendar and a list of tasks, daily, weekly and monthly. She recorded in her notes that she was disappointed that Ms Ryan did not have her own schedule with her own ideas about how to manage her time as had been discussed at the 27 February 2009 meeting she would do. Ms Hibbs had formed a view that Ms Ryan did not want to take any advice from her in terms of managing her time to properly perform and prioritise her work. Nevertheless, she said she gave Ms Ryan another week to have a schedule in place.

[68] The evidence at the Authority's investigation meeting supports that Ms Ryan had written a daily list of tasks. The meeting notes do support that Ms Ryan was also to look at a schedule for managing her work.

6 March 2009

[69] Ms Ryan said that on 6 March Ms Collins had finished her work and went to help Ms Ryan. There is no dispute that Ms Hibbs intervened and explained to Ms Collins that Ms Ryan's workload was being assessed and therefore was not to be given assistance. Ms Hibbs said in her evidence that it was not possible to properly analyse Ms Ryan's workload and whether she could undertake the necessary tasks in the time allocated if somebody else assisted her. Ms Ryan found this interaction upsetting. She did not accept that Ms Hibbs advised her she could approach her if she needed assistance with specific tasks.

[70] Having assessed the evidence, I find that it was more likely that Ms Hibbs did make this offer. One of the concerns for Ms Hibbs was that Ms Ryan did not approach her directly when she was having difficulty undertaking tasks and was more likely to go to Ms Collins for assistance. Ms Hibbs wanted Ms Ryan to approach her directly about her difficulties. Ms Ryan went to see her doctor at this time. I heard from Dr Allen who said that she presented with stress and anxiety at that consultation and was prescribed doxepin to assist with sleeping.

9 March 2009

[71] There was another weekly meeting on 9 March 2009. On Wednesday Ms Ryan and Ms Collins had had lunch together while Ms Hibbs was out of the office. Ms Hibbs expressed that this was not in accordance with Ms Ryan having an uninterrupted lunch break as agreed at the meeting on 27 February. Ms Ryan suggested that she talk to Ms Collins who could take breaks when she wanted. There was also discussion about Ms Ryan not allocating her work to other employees and that all job allocations came through Ms Hibbs as Ms Hibbs needed to be aware of the issues. Ms Hibbs also inquired about the work schedule and Ms Ryan advised she currently had it at home. Ms Hibbs was disappointed and said that she felt Ms Ryan was not making an effort to ensure she could meet the expectations of the role.

[72] At this meeting, Ms Ryan was provided with an improvement programme to commence from Monday, 2 March and to end on Friday, 17 April. It set out the improvements required and that assistance to be provided through Ms Hibbs.

[73] Ms Ryan said that at this stage she was quite unwell and she went to see her Dr Allen again suffering from stress. Dr Allan provided Ms Ryan with a medical certificate putting her off work to 22 March 2009. On 19 March and 6 April 2009 Dr Allan saw Ms Ryan again and both times provided a medical certificate for a fortnight sick leave for workplace stress.

[74] On 17 March 2009, a personal grievance was raised on Ms Ryan's behalf that there had been unjustified actions that had caused Ms Ryan disadvantage. Ms McKenzie wrote in her letter that the matters should be dealt with at mediation. South Pacific wrote back to Ms McKenzie and advised that whilst it rejected the notion of a stressful workplace, it was agreeable to attend mediation.

[75] On 26 May 2009, the mediation took place and Ms Ryan resigned her employment on that same day.

Determination

Unjustified action causing disadvantage

[76] South Pacific owed Ms Ryan a duty to provide a safe and healthy workplace. This included taking reasonable steps to safeguard both her physical and mental health. Clause 9 of Ms Ryan's employment agreement provided:

Health and Safety. The company is committed to ensuring that its business is conducted safely. The achievement of this objective requires the dedication of all employees to see that their work is performed safely and without harm to themselves, other persons, property and the community. The company will provide appropriate training, safety equipment and facilities in support of a safe and healthy work environment.

[77] Ms McKenzie in her submissions also refers to the obligations in s.6 of the [Health and Safety in Employment Act 1992](#) to take all practicable steps to ensure the safety of employees while at work and there was also reference to the Court of Appeal judgment in *Attorney-General v. Gilbert* [\[2002\] NZCA 55](#); [\[2002\] 1 ERNZ 31](#) where there was discussion of the nature of the duty to provide a safe and healthy workplace:

The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable

steps which are proportionate to known and avoidable risk ... The reasonableness of the employer's conduct must therefore be measured against knowledge reasonably obtained by employers mindful of their own responsibilities.

In some cases a risk may not be apparent without specific information about the vulnerability of a particular employee . but it does not follow that in all cases the risk will need to be matched to the particular employee. If the risk is one which applies generally, the knowledge of specific vulnerability may be irrelevant. If the employer unreasonably failed to take all steps practicable to remove or manage the risk and it is reasonably foreseeable that any employee may suffer harm as a result, then the employer will be in breach of the term of the contract to maintain safe working conditions.

[78] In assessing whether the actions of South Pacific were unjustified, the Authority is required to apply the test set out at [s.103A](#) of the [Employment Relations Act 2000](#). This requires the Authority to determine, on an objective basis, if the action was one a fair and reasonable employer would have taken in all the circumstances. This test must be read against the obligations that the parties act in good faith towards each other.

[79] South Pacific owed a duty to Ms Ryan to provide a safe and healthy workplace for her. It was required to take reasonable steps to safeguard her health at work proportionate to known and avoidable risks. The reasonableness of any steps taken to avoid or minimise risk has to be assessed against what is known of the risk.

[80] It was recognised in *Gilbert* that an employer does not guarantee to cocoon employees from stress and upset and neither is the employer a guarantor of the safety and health of the employee. As described in *Gilbert* there are *formidable obstacles* a potential plaintiff must overcome in establishing a breach of a contractual obligation in terms of an employee's safety and health.

[81] I accept that it would have been apparent on occasion that Ms Ryan was unhappy during February 2009 but there were other issues occurring at the time between when it first became clear to South Pacific that Ms Ryan was not coping with her workload on 4 February 2009 and 9 March 2009 that would have impacted on her enjoyment of the role. There was the ACC matter, the fact that Ms Ryan did not accept that her personal calls were excessive and that she felt that Ms Hibbs did not like her. Other matters occurred such as Ms Hibbs not wanting Ms Collins to assist Ms Ryan because of the need to assess her workload. There was also some criticism of both Ms Ryan and Ms Collins taking a lunch break together. On top of that, there was a suggestion that, in the long term, South Pacific wanted to increase Ms Ryan's workload so that she could become further responsible for more of the accounts payable roles. Aside from some awareness of unhappiness and knowledge from 4 February 2009 that Ms Ryan felt unable to cope with her workload South Pacific was unaware of the physical and stress-related symptoms Ms Ryan was suffering from until after she had left the workplace from 10 March 2009 and provided medical certificates. I am not satisfied that they would have been aware of any particular vulnerability on her part before then.

[82] I find that there are two broad matters that I am required to objectively assess in terms of the reasonableness of steps taken by South Pacific. These are the workload issues and the relationship with Ms Hibbs.

[83] South Pacific had clear knowledge of the difficulties Ms Ryan had with her workload from 4 February 2009 and was also at that stage dissatisfied with her performance. I would have found a performance management plan that did not recognise Ms Ryan's stated difficulties with getting through her work insufficient. I am satisfied, however, that South Pacific did sufficiently recognise that Ms Ryan was having difficulty, some work was removed and no further work added. There was to be an attempt to objectively assess whether Ms Ryan's workload was too large for her to fulfil what was required by South Pacific or whether with guidance, support and increased experience she could perform as required. Ms McKenzie submitted the work removed on 27 February 2009 was inadequate; however, there was no reason why there could not have been assessment and reflection on that as matters progressed because there were to be regular weekly meetings.

[84] Ms Hibbs and Mr Hampton saw that time management was the key to Ms Ryan's performance improving to get through her tasks. Where there were tasks to be completed at different times of the month I find that conclusion reasonable. Ms Hibbs supplied some material to Ms Ryan on 2 May 2009 to assist with time management and I have found offered some assistance with that at an earlier meeting. I accept that rather than no assistance being available the evidence supported that Ms Ryan did not see that time management as helpful because she saw her workload as too large and measured tasks on a daily basis. Such a daily measure would not help in assessing whether the workload was too large because some tasks were to be completed daily but others weekly and monthly.

[85] Ms Ryan said that Ms Hibbs did not help her. The performance plan was the start of a process to identify what help was required after objectively assessing whether the workload was too large. The Authority is not able to sensibly conclude that there was no help available between the start of the performance plan process on 27 February and 9 March 2009. Whilst accepting that it would have been difficult for Ms Ryan to have Ms Hibbs advise her that Ms Collins could not help her on 6 March I do not objectively assess such an action as unjustified. In order to be able to properly review and assess the workload Ms Hibbs would have to know about how it was performed. That was the reason given at the time. I am not satisfied from the evidence that Ms Ryan was not able to go to Ms Hibbs after 27 February 2009 with a specific request for assistance.

[86] Ms Ryan had raised breaks as a concern and I find that setting breaks down when Ms Ryan would not be required to

attend to her duties was a reasonable way of dealing with this concern.

[87] Objectively assessed, I am not satisfied that the actions of South Pacific were unreasonable and can be said to be in breach of the duty owed to Ms Ryan to provide a safe and healthy workplace with South Pacific. I do not find that Ms Ryan suffered an unjustified action in terms of an increase to her employment duties. There was only a minor increase to her duties after she had requested a pay increase in November 2008. I do not find that there was no training or assistance provided. I find that where new tasks were required to be undertaken then training and assistance was given. Ms Ryan did not see the assistance offered by Ms Hibbs in terms of time management as helpful. I find that a fair and reasonable employer would have approached the workload issues in the way that South Pacific did in circumstances where it was unaware that Ms Ryan was suffering or was at risk of suffering mental or physical harm.

[88] I do not need to consider issues of causation in terms of the stress to Ms Ryan in the circumstances.

[89] I now turn to the allegations about Ms Hibbs in her relationship with Ms Ryan. Ms Ryan raised with Ms Hibbs, most appropriately, in my view the comments that she had been told about by Ms Collins. Ms Hibbs did not accept that she had made such comments and said that she was always professional in her dealing with Ms Ryan. Ms Ryan never heard the comments herself. Ms Collins in her evidence felt that the fault was more that Ms Hibbs did not stop the comments and she did not recall Ms Hibbs making the first comment. Ms Collins did not mention the comments or Ms Ryan's unhappiness to Mr Hampton because she said she was worried that she would not get a permanent role. This was a serious allegation. Ms Hibbs appeared to me to deal with Ms Ryan in a professional way in her meetings. I cannot be satisfied from the evidence that Ms Hibbs made demeaning comments about Ms Ryan behind her back or mocked her. I am further not satisfied that the evidence supports Ms Hibbs being dismissive or rude to Ms Ryan. I find that South Pacific were aware of how Ms Ryan felt she was being treated by Ms Hibbs and that she thought Ms Hibbs did not like her. That was going to impact on progressing performance issues and was part of the reasoning behind having a performance plan. I do not find that unreasonable.

[90] Ms Hibbs did accept that she had to keep asking Ms Ryan for work as it was not done. Ms Collins said that Ms Hibbs did not have a pleasant manner when she asked but when I asked her whether Mr Hampton also asked Ms Ryan for work she replied along the lines that Mr Hampton *should expect work on his desk*. Ms Hibbs though was Ms Ryan's immediate manager and she required work from Ms Ryan to perform her own role. There is a risk in performance management of micromanagement and that can place undue stress on an employee. Ms Hibbs though was only requesting work she required from Ms Ryan and the weekly meetings provided an opportunity for further discussion about work flow. When South Pacific became aware that Ms Ryan was unwell there may have had to have been further discussion and reflection on interactions but Ms Ryan did not return to work.

[90] I am not satisfied that South Pacific disregarded Ms Ryan's concerns about Ms Hibbs and that that formed part of the thinking in terms of the performance plan. The steps taken in that regard were reasonable to separate out any personal issues from performance issues. I am not satisfied that Ms Hibbs was bullying toward Ms Ryan.

[91] In conclusion I do not find that the allegations of unjustified actions causing disadvantage are made out and the claims are dismissed.

Constructive dismissal

[92] The claim for unjustified constructive dismissal is based on the third category in *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 that South Pacific breached duties which caused Ms Ryan to resign. The factual matrix against which this is to be assessed remains the same as for the other disadvantage claims there was only limited exchanges for payroll type information after 10 March 2009 and then a mediation on 26 May 2009 the same day as Ms Ryan resigned about which the Authority cannot hear evidence.

[93] The evidence supports that Ms Ryan resigned because of how she felt at South Pacific and that being away from work her stress and symptoms reduced and then disappeared. I have found that on becoming aware that Ms Ryan found her role too large to cope with the company took reasonable steps to reduce some work, monitor performance and work flow. I do not find any breach in this regard. I have not found behaviour of a bullying nature. In those circumstances I do not find that there were breaches on the part of South Pacific and therefore it would not have been reasonably foreseeable to the organisation that Ms Ryan would resign.

[94] I do not find the claim for unjustified constructive dismissal made out and it is therefore dismissed. There is nothing further I can do to assist Ms Ryan.

Costs

[95] I reserve the issue of costs. It may be that the parties can reach agreement on costs failing which Mr Malone has until Tuesday 12 July 2011 to lodge and serve submissions as to costs and Ms McKenzie has until 2 August 2011 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority

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