

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 270
3031034

BETWEEN GRANT SHAW
Applicant
A N D ELECTRIX LIMITED
Respondent

Member of Authority: Peter van Keulen
Representatives: Janet Copeland, counsel for the Applicant
Anthony Drake, counsel for the Respondent
Investigation Meeting: 1 November 2018
Submissions Received: 30 November 2018 and 21 December 2018 from the
Applicant
14 December 2018 from the Respondent
Date of Determination: 6 May 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Electrix Limited provides engineering, construction and maintenance services in the utility, industrial, commercial, resources and infrastructure sectors. These services include maintenance of hedges, trees and other vegetation growing close to high voltage power lines. Grant Shaw worked for Electrix as part of a team based in Gore providing this maintenance.

[2] Electrix first employed Mr Shaw as an arborist from January 2006. In September 2008, Electrix promoted Mr Shaw to a team leader role in the vegetation team based in Gore. In this role, Mr Shaw was responsible for overseeing the maintenance work of the team and this included supervising the staff who worked directly for him.

[3] In December 2017 one of Mr Shaw's team members complained that he was not being given enough hours work on the Elevated Work Platform (EWP) and he was concerned he would not fulfil the required number of hours to achieve a qualification in EWP operation.

[4] In February 2018, Derek Kooman, the Electrix Business Unit Manager for Gore, met with Mr Shaw to discuss this complaint.

[5] What transpired from this meeting was an escalation of matters between Mr Shaw and Electrix which involved:

(a) Mr Shaw raising concerns about Mr Kooman bullying him and being biased against him; and

(b) Electrix undertaking a formal disciplinary process with Mr Shaw resulting in Electrix issuing him with a written warning.

[6] This escalation culminated in Mr Shaw resigning on 8 March 2018 and raising a personal grievance for unjustified dismissal, claiming Electrix had constructively dismissed him.

[7] Electrix denies constructively dismissing Mr Shaw.

[8] I have investigated this unjustified dismissal grievance and have now determined the outcome, which I set out here. In doing so I have not recorded all of the evidence and submissions that I have received and considered. As permitted by s.174E of the Employment Relations Act 2000 (the Act), I have stated findings of fact and law, expressed conclusions on issues necessary to dispose of this matter and specified the orders I make as a result.

[9] My determination, reserved at the conclusion of a one day Investigation Meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

Issues for unjustified dismissal

[10] The issues for the unjustified dismissal grievance are:

- (a) Was Mr Shaw dismissed; and
- (b) If so, was the dismissal justified?

Dismissal

[11] Mr Shaw alleges that his resignation is a constructive dismissal because he resigned in response to Electrix's actions.

[12] In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*¹ the Court of Appeal set out three non-exhaustive categories of constructive dismissal:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign;
- (c) Where a breach of duty by the employer leads an employee to resign.

[13] Mr Shaw relies on the third limb of *Woolworths*.

[14] In *Wellington etc Clerical Workers etc IUOW v Greenwich*² the Court, when discussing constructive dismissal arising out of a breach of duty by an employer, stated:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[15] The Court of Appeal elaborated on the third category of constructive dismissal in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc.*³ The Court of Appeal stated at [172]:

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

¹ [1985] 2 NZLR 372 (CA) at 374-375

² [1983] ACJ 965

³ [1994] 2 NZLR 415 (CA)

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.

[16] Therefore, in order to determine if Mr Shaw was constructively dismissed under the third limb of *Woolworths*, I must consider:

- (a) Was there a breach of duty by Electrix as alleged;
- (b) Was that breach of duty sufficiently serious - repudiatory or dismissive - such that it was reasonably foreseeable that there was a substantial risk that Mr Shaw might resign in response to that; and
- (c) Did Mr Shaw resign in response to that breach of duty?

Justification

[17] If I determine that Electrix did constructively dismiss Mr Shaw, I must then consider the second issue for unjustified dismissal: was the dismissal justified, with the onus falling to Electrix to show its actions were justified in line with the test for justification and the duty of good faith set out in the Act.

Dismissal

Was there a breach of duty by Electrix as alleged?

[18] Mr Shaw says Electrix breached the duty it owed to him to not, without proper cause, act in a manner calculated to, or likely to, destroy or seriously damage the relationship of trust and confidence.

[19] Mr Shaw says the Electrix actions that give rise to this breach include:

- (a) Electrix failed to deal with the allegations he made against Mr Kooman; it failed to deal with his stress arising from the alleged treatment by Mr Kooman; and it allowed Mr Kooman to continue to manage the complaint by the team member despite Mr Shaw's concerns and complaints about Mr Kooman.

- (b) Electrix failed to conduct a fair process when it dealt with the complaint made by the team member. This included predetermining that Mr Shaw had acted as alleged; failing to investigate the complaint properly; failing to provide the relevant information to Mr Shaw; failing to set out Electrix's concerns about the nature of the alleged underlying behaviour; and changing the nature of the process from an informal discussion to a formal disciplinary process contemplating serious misconduct.
- (c) There was no substantive basis to justify escalating the team member complaint to a formal disciplinary process nor was there any substantive justification for imposing a written warning.

[20] Electrix says in response:

- (a) Mr Shaw cannot rely on the allegation of bullying by Mr Kooman to support his claim for constructive dismissal as the allegation concerns two incidences, which are not related, that occurred 12 months apart and there is no evidence to show this caused his resignation.
- (b) Mr Kooman was not biased toward Mr Shaw, evidenced by amongst other things the working relationship between Mr Kooman and Mr Shaw in the months prior to the complaint being made.
- (c) There was no intention to deal with Mr Shaw in an unfair manner in the process of dealing with the complaint from the team member.
- (d) The process adopted by Electrix was not unfair. Mr Shaw was given adequate time to prepare for the relevant meetings, he knew what the underlying complaint was about, what Electrix's issues were and he was given an opportunity to be heard on those aspects.
- (e) Electrix was obliged to investigate the complaint by the team member and it decided to adopt a formal approach once Mr Shaw instructed his lawyer in order to ensure Mr Shaw was afforded a fair process before a decision was made.

(f) Electrix's decision to issue Mr Shaw with a warning was an outcome a fair and reasonable employer could have come to in all of the circumstances.

[21] The first aspect of the respective arguments I need to address is counsel for Electrix's submission that Mr Shaw's bullying allegation against Mr Kooman cannot be a basis for a constructive dismissal claim. Counsel says the events complained of to support the bullying allegation are not sufficiently linked to support bullying and, in any event, the first incident relied on occurred over 12 months prior to Mr Shaw's resignation so it cannot be an incident that Mr Shaw can rely on because, amongst other things, he has affirmed the breach (if there was one) and did not act on it at the time.

[22] I accept that counsel has valid points about the timing of the first incident and therefore the proximity to the second and whether it can be relied on in terms of causation. However, Mr Shaw's constructive dismissal is not based on an allegation that he was bullied and he resigned in response to that. His claim is Electrix failed to deal with his complaint of bullying when he raised it in 2018 and that his treatment by Mr Kooman in terms of the disciplinary process in 2018 was unfair and biased (albeit that this sounded as a separate bullying complaint).

[23] The question is whether Electrix breached a duty it owed to Mr Shaw because it failed to deal with bullying and other allegations made against Mr Kooman and because it carried out an unfair process with Mr Shaw relating to the team member complaint which was unjustifiably escalated and concluded with a warning which was not substantively justified.

[24] I do not need to consider whether Mr Kooman did in fact bully Mr Shaw in 2017 and then subsequently, and if so whether Mr Shaw can rely on those actions. Rather, I must consider how Electrix dealt with Mr Shaw's complaints or allegations about Mr Kooman's behaviour and how it conducted the disciplinary process.

[25] I will now turn to consider the events that inform these two aspects of Mr Shaw's constructive dismissal claim.

[26] In December 2017 when conducting a performance review with one of the members of Mr Shaw's team, the team member advised Mr Kooman that he thought Mr Shaw was not giving him enough time on the EWP. And he believed other members of the team were being given enough time on the EWP with Mr Shaw's supervision.

[27] Mr Kooman was concerned about this and decided he needed to follow up with Mr Shaw.

[28] Mr Kooman had dealt with two other incidences in the past with Mr Shaw's management of work where team members had not been given particular work. In both of those incidences there was an underlying misunderstanding by Mr Shaw about the team members' qualifications and ability to do the work in question. Once Mr Kooman discussed the misunderstanding with Mr Shaw there were no further issues with allocating work to the particular team members.

[29] With this in mind, Mr Kooman believed he simply needed to discuss the team member complaint about working on the EWP on an informal basis and ask Mr Shaw to ensure the work on the EWP was shared fairly and that all team members were getting sufficient hours for their qualifications.

[30] The informal follow up did not occur until February 2018. Mr Shaw and Mr Kooman met on 12 February 2018.

[31] Mr Kooman says that when he explained that a team member had complained about not getting enough hours of work on the EWP, Mr Shaw responded by explaining why, in his view, it was difficult to give everyone in the team work on the EWP. Mr Kooman did not accept this explanation and said in evidence this was a red flag for him.

[32] Mr Shaw says that in the meeting, Mr Kooman accused him of being a bully and he told him that by not letting staff advance in their training he was bullying them. Mr Kooman also said he considered this bullying to be serious misconduct and a further meeting would be necessary and Mr Shaw might need to bring a support person with him to that meeting.

[33] Despite the conflicting evidence, it is clear to me that in the 12 February 2018 meeting Mr Kooman did discuss Mr Shaw's failure to advance team members' training by not giving them appropriate work, by reference to the current team member complaint and one of the previous incidences. Mr Kooman decided that this behaviour, if correct, was bullying and serious misconduct. He did not accept Mr Shaw's explanation for why the team member who complained might have had limited time on the EWP. Mr Kooman concluded that as the explanation was not credible, the actions by Mr Shaw in not giving the work to the team

member had occurred and were deliberate because Mr Shaw did not think the team member was suitable. And this was bullying which required a further meeting.

[34] For Mr Shaw, there were two prior incidences with Mr Kooman, which caused the meeting of 12 February to have a greater impact on him. First in early 2017 Mr Kooman had sworn at Mr Shaw shortly after he had returned from being absent from work for health reasons – in an altercation between them, Mr Kooman called Mr Shaw a “lazy cunt”. Second in late 2017, Mr Kooman had referred to bullying in a team meeting and inferred that there was a bully amongst the employees.

[35] After the 12 February meeting, Mr Shaw was shocked by what had occurred and concerned about what would happen next. He was worried about Mr Kooman’s attitude toward him given his previous experiences and he believed that Mr Kooman had already decided that he was a bully; that he was the employee that Mr Kooman had referred to as being a bully, in the previous team meeting.

[36] Mr Shaw described himself as being overwhelmed by the way he was treated and what was happening. Mr Shaw went to his doctor and was certified as unfit to work for five days.

[37] On Mr Shaw’s return to work his lawyer raised his concerns about his treatment and Mr Kooman’s actions. The letter of 22 February 2018 set out clearly:

- (a) That Mr Shaw had been off work because of stress arising out of Mr Kooman’s treatment of him and that Mr Shaw considered this treatment, including the incident of early 2017 amounted to bullying.
- (b) A request for additional, discretionary leave to be paid to Mr Shaw for the absences caused by this stress.
- (c) The concerns Mr Shaw had about the conclusions Mr Kooman had already reached regarding the team member’s complaint, in particular predetermining that Mr Shaw was a bully.
- (d) Concerns about the process adopted for the meeting including the lack of information provided to Mr Shaw to enable him to answer the complaint.

(e) That given the concerns about Mr Kooman's actions it would be inappropriate for him to continue to deal with the complaint.

[38] Mr Kooman dealt with this letter by discussing it with Electrix HR. In an email of 23 February 2018 he stated:

My thoughts are as follows – in no particular order:

- Re payment of additional leave for [Mr Shaw's] absence this week – we are not obliged to do so and in fact the stress [Mr Shaw] is under most probably arises from the feedback and involvement of the union rep and lawyer. Plus given the allegations now made by [Mr Shaw] there is little good will towards him. We should not agree to this.
- [Mr Shaw] has gone on the offensive. The original issue regards the issues raised by [team member] – covered off in the background issue below. This is what we are seeking to address and we need to progress that. Given that [Mr Shaw] has not denied or refuted those we believe that [Mr Shaw] has indeed been doing what was suggested. Accordingly it is now probably appropriate to invite Grant and his representative to a disciplinary meeting next week to review that matter.
- In regards to the information requested by the lawyer -

[39] A number of aspects are apparent from this email. First, there is no direct discussion of the bullying allegations against Mr Kooman and his continued involvement in the process with Mr Shaw. It would appear that a decision on that aspect had already been made separately. Second, Mr Kooman does not believe he or the process of dealing with Mr Shaw has caused the stress Mr Shaw complained of, rather he is dismissive of it suggesting it was caused by Mr Shaw's own advisors. Third, Mr Kooman is not happy about Mr Shaw going on the offensive and making allegations (which I infer to be the bullying allegation against him) and as a result, he has little goodwill for Mr Shaw. Fourth, Mr Kooman confirms that he has decided Mr Shaw has "indeed been doing what was suggested". Fifth, all of these four factors indicate very clearly that Mr Kooman has lost any objectivity in terms of Mr Shaw.

[40] Yet, despite this Electrix not only allowed Mr Kooman to continue with the process with Mr Shaw, it implemented his recommendation not to pay Mr Shaw any additional leave for his absences due to stress and it allowed Mr Kooman to decide that the bullying allegation against him was not credible and did not need to be actioned.

[41] This last aspect was not apparent from the email but in evidence Mr Kooman confirmed that he had discussed the complaint of bullying about him with HR and had decided that the complaint did not need to be actioned unless it was raised separately from the process with Mr Shaw and, in any event, it was not a credible complaint.

[42] So, Electrix decided two things, primarily through Mr Kooman, first that it did not need to deal with the allegation of bullying and bias made against Mr Kooman by Mr Shaw. And second, it was appropriate for Mr Kooman to remain in charge of the disciplinary process with Mr Shaw, a process Mr Kooman had chosen to escalate because of Mr Shaw's responses to the initial meeting, the allegations Mr Shaw made against him, and because Mr Shaw had involved his lawyer. And it decided both of these actions were appropriate despite the clear indication that Mr Kooman had lost any objectivity in terms of Mr Shaw's behaviour.

[43] What followed from this point was Electrix sent Mr Shaw a letter on 26 February 2018 inviting him to attend a formal disciplinary meeting on 28 February 2018. That letter set out brief details of the allegation but it did not frame Electrix's concerns about the actions complained of. That is, it simply stated that Electrix considered the matter to be serious and that if the actions were substantiated that may result in disciplinary action. It did not mention concerns that the behaviour was potentially bullying conduct, it did not mention that the behaviour might amount to discrimination, nor did it mention that if either of these conclusions were reached then the issue was one of serious misconduct, which could result in dismissal.

[44] As for the letter of 22 February 2018 that was simply left unanswered.

[45] The remaining events are reasonably straightforward. The meeting was postponed to a time suitable for Mr Shaw and his lawyer; it was conducted on 6 March 2018 and at the conclusion, Mr Shaw was issued with a warning. On 8 March 2018, Mr Shaw resigned.

[46] Based on this timeline of events I am satisfied that, in terms of Mr Shaw's complaint about Mr Kooman:

- (a) Electrix failed to deal with the allegations of bullying and bias made against Mr Kooman dismissing them as being not credible.
- (b) Electrix failed to deal with Mr Shaw's stress arising from the alleged treatment by Mr Kooman and left him exposed to further conduct by Mr Kooman.
- (c) Electrix allowed Mr Kooman to continue to manage the complaint by the team member despite Mr Shaw's concerns and complaints about Mr Kooman, concerns and complaints which were well founded.

[47] In terms of the process of dealing with the team member complaint Electrix failed to conduct a fair process:

- (a) Electrix pre-determined that Mr Shaw had acted as alleged based on the meeting of 12 February 2018 and Mr Kooman's previous dealings with Mr Shaw.
- (b) Mr Kooman failing to investigate the complaint properly, he simply checked with a couple of the other team members in very loose terms about use of the EWP. In fact the evidence showed that there were not actually any records of time spent on the EWP that were checked, nor did Mr Kooman check the time the EWP was even used.
- (c) Electrix failed to provide relevant information to Mr Shaw and it failed to properly set out its concerns about the nature of the alleged underlying behaviour, in particular its concerns that the behaviour might be discrimination and amount to serious misconduct.
- (d) Electrix changed the nature of the process from an informal discussion to a formal disciplinary process contemplating serious misconduct, without any obvious justification for doing so and in what appears to be retaliation for the allegations made against Mr Kooman and because Mr Shaw engaged a lawyer to assist him.

[48] In the circumstances, Electrix was not justified in issuing Mr Shaw with a warning.

[49] Cumulatively, I find that all of these failings amount to a breach of the duty to not, without proper cause, act in a manner calculated to or likely to, destroy or seriously damage the relationship of trust and confidence.

Was it reasonably foreseeable that Mr Shaw might resign in response to the breach of duty?

[50] The issue of whether it is reasonably foreseeable that an employee might resign in response to a breach of the duty to not, without proper cause, act in a manner calculated to or likely to, destroy or seriously damage the relationship of trust and confidence is reasonably straight forward. It is reasonably foreseeable.

[51] To put it another way - if an employer fails to deal with allegations of bullying and bias against a manager, then allows that manager to conduct a disciplinary process against the complainant, allows that disciplinary process to be conducted in an unfair manner and then supports a conclusion that is not substantively justified, it is reasonably foreseeable that the employee subject to those failings might resign.

Did Mr Shaw resign in response to the breach?

[52] Mr Shaw's resignation letter and evidence in the investigation meeting was clear – I accept that he did resign because of the breach of duty by Electrix.

Conclusion on dismissal

[53] In all of the circumstances I am satisfied that Mr Shaw's resignation amounts to a constructive dismissal.

Justification

[54] Having decided that Mr Shaw was constructively dismissed I must now consider if that dismissal was justified. The onus is on Electrix to prove that the dismissal was justified.

[55] The test of justification is set out in s 103A of the Act. Based on my findings in terms of the breach of duty, I conclude that Electrix did not meet the requirements of the Act and therefore it did not act in a justified manner toward Mr Shaw.

[56] Mr Shaw's dismissal was both procedurally and substantively unjustified.

Remedies

[57] As Mr Shaw was constructively dismissed I may award any of the remedies provided for under s 123 of the Act; Mr Shaw seeks compensation and reimbursement.

Compensation

[58] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act. This is about compensating Mr Shaw for the humiliation, loss of dignity and injury to feelings he suffered because of the actions giving rise to the grievance.

[59] Mr Shaw and his partner, Shelley Morgan, gave evidence of the impact of Electrix's actions on him. The evidence shows that as a result of the way he was treated Mr Shaw:

- (a) Was shocked and upset by how he was treated and the allegations made against him, especially that he had bullied a team member;
- (b) Felt so distressed and upset by what was occurring that he felt unsafe at work and required time off;
- (c) Was stressed and nervous and was unable to sleep;
- (d) Was humiliated by what occurred and deeply embarrassed, suffering from low self-esteem, loss of confidence and was depressed.

[60] In deciding the level of compensation Mr Shaw is entitled to for the loss of dignity, humiliation and injury to feelings described above, I have considered the recent decisions of the Employment Court which provide guidance on assessing compensation⁴.

[61] I assess the level of compensation to be \$18,000.00.

Reimbursement

[62] Mr Shaw seeks reimbursement for the earnings he has lost as a result of his unjustified dismissal pursuant to s 123(1)(b) of the Act.

[63] As I am satisfied that Mr Shaw has a personal grievance and he has lost remuneration as a result, then pursuant to s 128 of the Act I must award Mr Shaw at least the lesser of his lost remuneration or three months ordinary time remuneration.

[64] Mr Shaw says his loss arising from the dismissal includes \$6,619.37 of earnings resulting from him taking a lower paid job after his dismissal. It also includes \$3,744.00 of annual leave Mr Shaw used because of the time he took off work during the disciplinary process, as he had no available sick leave and Electrix elected not to pay him additional discretionary leave during this time.

⁴ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[65] I am satisfied that both of these amounts are remuneration Mr Shaw lost as a result of his grievance and Electrix must reimburse him for this, it being less than three months ordinary time remuneration.

Contribution

[66] As I have awarded remedies to Mr Shaw, I must now consider whether he contributed to the situation that gave rise to his dismissal.⁵

[67] This assessment requires me to determine if Mr Shaw behaved in a manner that was culpable or blameworthy, and this behaviour contributed to his grievances.⁶

[68] I have reflected on what occurred to Mr Shaw and how he acted in response to it and before the events occurred. I am satisfied that Mr Shaw did not act in a blameworthy or culpable manner.

[69] So, in conclusion there was no contributory behaviour from Mr Shaw that warrants a reduction in remedies.

Conclusion

[70] Electrix unjustifiably dismissed Mr Shaw. In settlement of this grievance Electrix must pay Mr Shaw:

- (a) \$18,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) \$10,363.37 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000.

Costs

[71] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

⁵ Section 124 of the Act.

⁶ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

[72] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority