

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 147
5413230

BETWEEN SHOMILLA SIDAL
Applicant

AND ASPIRE INCORPORATED
Respondent

Member of Authority: Trish MacKinnon

Representatives: David Collins, Advocate for the Applicant
Alexander Watt, Solicitor for the Respondent

Investigation Meeting: 3 September 2013 at Wellington

Determination: 20 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Shomilla Sidal began working as an advocate for Aspire Incorporated in June 2010, originally on a part-time basis. As her employment progressed she took on extra hours and different roles. In October 2011, Ms Sidal took up the role of Team Leader of the Clubhouse, a venue operated by her employer.

[2] Ms Sidal claims she was unjustifiably disadvantaged by Aspire Incorporated in September 2012 when she was forced to take a week's sick leave. She says this constituted suspension from her employment. She returned to the workplace for approximately 2 weeks before leaving after an incident involving a volunteer who complained she had bullied him, and an ensuing discussion with her manager.

[3] On 7 January 2013 Ms Sidal resigned from her employment. She claims she was forced to do so by the actions of her employer and that her resignation was in reality a constructive and unjustifiable dismissal. Ms Sidal's advocate has submitted that Aspire Incorporation management's failure to make her workplace both

psychologically and physically safe gave her no alternative other than to resign. She would have been subjected to continued bullying and intimidation if she had returned.

[4] Ms Sidal seeks compensation for hurt and humiliation in the sum of \$15,000 as well as reimbursement of lost wages. Additionally, she claims wage arrears arising from an alleged short payment in her final pay. Costs are also sought.

[5] Aspire Incorporated (Aspire) is a non-profit community organisation funded by Capital and Coast District Health Board. It supports those with mental health problems and drug and alcohol addictions, who are referred to as "consumers". Aspire has 7 paid employees and a number of volunteers, at least some of whom are consumers of the services it provides.

[6] Its clubhouse in Newtown, Wellington, is open from Monday to Friday each week, operating as a "drop in" venue for consumers. Up to 50 consumers use the venue daily. At the time of Ms Sidal's employment, Aspire provided advocacy and support for those consumers.

[7] Aspire rejects Ms Sidal's claims and says she resigned of her own volition in January 2013, after almost three months of paid and unpaid leave. It denies that any of its actions caused her resignation. Aspire also denies that it suspended Ms Sidal in September 2012. It says she agreed to the suggestion made by its General Manager, Karen Sale, that she take paid sick leave from work for a week.

[8] Counsel for Aspire, Mr Watt, submitted that it was important to understand the full context of the Newtown Clubhouse and the types of consumers it served. He referred to evidence provided by Aspire's General Manager of it being a challenging environment with high needs consumers from the margins of society.

[9] Working at the Clubhouse entailed being able to deal with difficult consumers. Managing their challenging behaviour was an expectation of the job. It required understanding their needs and building relationships. While acknowledging this did not absolve Aspire of responsibility for providing a safe workplace, counsel pointed out the importance of understanding Aspire management's actions in light of these circumstances.

The employment relationship

[10] Ms Sidal gave evidence of various problems she had encountered throughout her employment with Aspire. She had raised a number of issues related to her pay, and had been embroiled in a disciplinary process at one time. That appeared to have been resolved in-house in or around March 2012. Many of the matters raised in Ms Sidal's two Statements of Problem provided background information about the employment relationship and were not being pursued as discrete personal grievances. This was clarified in a telephone conference before the investigation meeting.

[11] The particular matters that gave rise to her personal grievances began in September 2012 when Ms Sidal says she was verbally abused by a volunteer at the Clubhouse, whom I shall refer to as "X", and his partner, who is a member of its Board. I shall refer to her as "Y". Both are consumers of Aspire's services and Y is also a volunteer. Neither was asked to give evidence before the Authority, and there is no purpose to be served by disclosing their identities.

[12] The background to the abuse was an allegation that alcohol was being consumed in the Clubhouse, contrary to Aspire's rules. Ms Sidal was told of this and passed on the information in an email to Ms Sale on 10 September 2012. She named a number of consumers, volunteers and one Board member who were "*parties to keep a look out on*".

[13] Ms Sale responded to Ms Sidal the following day. She had spoken to most of the members on the list, all of whom had emphatically denied any involvement in drinking in the Clubhouse. Ms Sale asked Ms Sidal to provide the name of the person who had advised her of their involvement. She wished to talk to that person about the evidence they had for their allegations. Ms Sale also asked Ms Sidal to advise her availability for a chat to discuss the matter.

[14] On 12 September 2012 Ms Sidal says she was first verbally abused at the Clubhouse by Board member Y and volunteer X. X's name was included on the list of those emailed to the General Manager on 10 September 2012. Ms Sale says Ms Sidal told her Y had given her the list of those allegedly consuming alcohol, which Y denied when Ms Sale asked her about it, taking care not to name Ms Sidal. Y had guessed that Ms Sidal had named her as the source of the list and had confronted Ms

Sidal and allegedly made threats about her to third parties. X also verbally abused her.

[15] On 14 September 2012 Ms Sidal reported these incidents to the Police because she had concerns for her safety. She notified Ms Sale that she had done so when they met to discuss the matter and Ms Sidal's complaint about the abuse. Conray Tepuru Samuel, a support worker at Aspire, also attended the meeting to provide support for Ms Sidal. Mr Samuel was asked to investigate Ms Sidal's complaint, which he proceeded to do over the next several days.

[16] Ms Sidal confirmed her communication with the Police in an email on Monday 17 September 2012, sent to both the General Manager and Financial Controller of Aspire. Her email ended by thanking them for their support in the matter. The same day Ms Sidal says she was again verbally abused by Y outside the Clubhouse and, in a separate incident, by X.

[17] Ms Sale wrote to X and Y on 17 September 2012 standing them both down from the Clubhouse while the complaint allegations were investigated. Y was permitted to enter the Clubhouse for the purpose of Board business.

[18] On 21 September 2012, Ms Sidal says that X attempted to intimidate her immediately outside the Clubhouse. She says she was concerned for her safety and contacted the Police who attended the scene and asked X to move on. The General Manager became aware of this when she sighted Police on the premises.

[19] Following their departure, Ms Sale asked to speak to Ms Sidal in her office. Ms Sidal used the recording function of her mobile phone to record their discussion, unbeknown to Ms Sale. A transcript of the recording was provided before the investigation meeting, and the recording itself was produced, and played, in the meeting. Counsel for Aspire reserved Aspire's position on whether it should be accepted but, apart from noting the prejudicial effect of such key evidence being withheld for so long, made no further submissions on the matter. I have decided to allow it, although I have reservations about the ethics of the recording being made by Ms Sidal without the knowledge or consent of her manager.

[20] In the recorded discussion, Ms Sidal expressed concern that her safety was compromised in the Clubhouse and that her General Manager was not taking sufficient steps to remedy this. Ms Sale made it clear she was trying to support

Ms Sidal but also pointed out that, as Team Leader of the Clubhouse, Ms Sidal was expected to manage such situations. She expressed surprise that Ms Sidal was suddenly feeling unsafe with people she had worked with over recent years without incident.

[21] Ms Sidal also raised a number of unrelated issues and concerns she had in her employment relating to her pay and some current difficulties she was having with the Financial Controller. During their discussion Ms Sale suggested to Ms Sidal that, if she did not think her manager was dealing with the situation adequately, she should make a complaint to the Board.

[22] Ms Sale also suggested that, if Ms Sidal felt unsafe, she could take a period of sick leave. That part of the discussion was as follows:

Karen: My last suggestion is that if you feel unsafe and until I can get a resolution, I would suggest that you take a week's sick leave.

Shomilla: I don't have any sick leave and um

Karen: You can take a week's advanced sick leave.

Shomilla: Okay when did I need to start that?

Karen: Well I feel sooner rather than later.

[23] Following that discussion, Ms Sidal left the premises and spent the next 5½ days on sick leave. During that time, she consulted a lawyer who notified Aspire of Ms Sidal's personal grievances for bullying and intimidation, and for being ordered on "*involuntary sick leave*". She regarded this as an unjustified suspension.

[24] Ms Sidal returned to work on 1 October 2012. She said that on her return she was unhappy to find a new job description on her desk. She asked Ms Sale to discuss the matter with her but says no discussion took place. Ms Sale says the job description was a draft given to Ms Sidal for her comment. The suggested amendments were pragmatic ones that reflected changes that had already occurred. They also proposed transferring responsibility for volunteers to Mr Samuel in light of Ms Sidal's current difficulties with X and Y. There is evidence of email correspondence between Ms Sale and Ms Sidal about the job description on 1 October 2012.

[25] During her absence Mr Samuel had, on 24 September 2012, produced his report on the alleged drinking incident. It was described by the General Manager as “*inconclusive*”. Mr Samuel had found it difficult to ascertain where the truth lay between the conflicting accounts of those he had interviewed.

[26] On 16 October 2012, Ms Sidal says she was sitting in her office, which had no door, when X entered and began to mop the floor. It was common ground that cleaning was part of his volunteer work at the Clubhouse. Ms Sidal says she got up from her desk to allow X better access for cleaning. She moved out of the office into the main Clubhouse area where she sat down to speak with one of the consumers.

[27] She says X followed her and started mopping around her, hitting her chair with the mop in an aggressive manner. Ms Sidal told him to leave her alone but he did not move until Mr Samuel came over and asked him to mop elsewhere. At that point, X went upstairs, where the management offices were situated, and complained to the General Manager that Ms Sidal was bullying him.

[28] Ms Sale came down to Ms Sidal’s office and engaged in a discussion with her. Ms Sidal recorded this discussion on her mobile phone, again unbeknown to Ms Sale. In the course of it, Ms Sidal informed Ms Sale that she wanted protection from X whom she regarded as bullying her. She complained that nothing was being done about his bullying and demanded to know what Ms Sale intended to do.

[29] The discussion became heated on both sides, with Ms Sale accusing Ms Sidal of wanting her job, creating dissension, and acting childishly over the mopping incident. She told Ms Sidal that she needed to accept some personal responsibility. For her part, Ms Sidal complained that X had moved to where she was sitting in the Clubhouse just to annoy her. She told her General Manager that she should “*tell him to get out if he’s not doing his job properly*”. Ms Sale repeated that Ms Sidal wanted her out so she could take over her (General Manager's) job, just as she had done to two former General Managers whom she named.

[30] The meeting ended without resolution, and Ms Sidal left the premises some time thereafter. Her verbal evidence in the investigation meeting was that she had left to get a medical certificate and some breathing space.

[31] Ms Sidal did not return. She obtained a medical certificate that day which she submitted. She also submitted successive medical certificates up to 5 December

2012. The parties attended mediation on 6 November 2012 but were unable to resolve the issues between them.

[32] The text of Ms Sidal's letter of resignation dated 7 January 2013 is reproduced below:

This letter is to advise Aspire Inc that I will be resigning from the position as Team Leader of the Clubhouse effective immediately.

I feel that Aspire Inc has made working at the Clubhouse very unsafe due to General Manager breaking confidentiality with staff/members and bullying in the workplace by a board member and her partner. Aspire has made no attempts to try and resolve the matter and to ensure my safety in the workplace. Due to my treatment, I have experienced health issues relating to stress and therefore have no alternative but to resign as I feel Aspire Inc has no desire to resolve any issues I have raised regarding my employment with Aspire Inc.

This letter is also to advise that I will also be taking this matter to the Employment Relations Authority.

[33] Aspire says that throughout the period until her resignation in January 2013, Ms Sidal was welcome to return to work. Ms Sale says the door was always open for her to return and she expected her to do so after taking some time out.

Issues

[34] The issues for the Authority to determine are:

- (a) Whether Aspire suspended Ms Sidal from her employment on 21 September 2012, and if so, whether that suspension unjustifiably disadvantaged Ms Sidal;
- (b) Whether Ms Sidal's resignation on 7 January 2013 was brought about by the actions of her employer and was in reality a constructive and unjustifiable dismissal; and
- (c) Whether Aspire owes Ms Sidal wages relating to her final payment.

First issue: Did Aspire suspend Ms Sidal from her employment on 21 September 2012?

[35] Ms Sidal relies on the transcript and recording of her discussion of 21 September 2012 with the General Manager to establish her claim to have been suspended from her employment for 5½ days from that date.

[36] Ms Sale says her suggestion of a week's paid sick leave was not meant as a standing down or suspension. It sprang from her genuine concern for Ms Sidal's wellbeing. She regarded Ms Sidal as a friend and had been concerned for some time that Ms Sidal was not coping emotionally. She thought if Ms Sidal took a few days off she might get back on track. Ms Sale referred to "*compassion fatigue*" which she said was a very real phenomenon in the mental health field. She thought it might be a factor in Ms Sidal's concerns at that time.

[37] The transcript shows that Ms Sidal expressed concern about the presence of Y in the Clubhouse. She said this indicated that the General Manager, who had told her that Y was banned from the Clubhouse while the matter was investigated, was not taking her safety seriously. She also referred to X being on the street outside the Clubhouse, which she found threatening.

[38] Ms Sale explained that Y was one of the people Mr Samuel was interviewing as part of his investigation, and that was the reason for her presence in the Clubhouse. X was not in the Clubhouse, in compliance with the ban. In a discussion over Y, and whether Ms Sale was taking Ms Sidal's concerns over her seriously, Ms Sale noted that "*this is a mental health industry there are threats all the time you have to weigh up which ones are actually viable and where safety is an issue*".

[39] Ms Sidal's demeanour in the investigation meeting indicated that she was a confident person who was not reticent about asserting her views. The transcript of her discussion with Ms Sale on 21 September 2012 and, more particularly, the recording of that discussion, confirmed that impression.

[40] Ms Sidal made no objection, at the time, to the General Manager's suggestion that she take a week's sick leave. The only concern she raised about it was that she had no paid sick leave available. She readily accepted the offer of "*advanced*" sick leave from Ms Sale, and raised no objection to starting it "*sooner rather than later*" as suggested by Ms Sale.

[41] Ms Sale did not require, or direct, Ms Sidal to leave her employment for a week. She suggested it as a means of allaying Ms Sidal's immediate concerns, particularly about Y, while Mr Samuel completed his investigation. There was no implication that any adverse consequences would ensue if Ms Sidal rejected the suggestion. Ms Sidal seemed happy to accept the offer of "*advanced sick leave*."

[42] After the discussion, Ms Sale confirmed the advanced sick leave in an email to Ms Sidal, who had commenced her leave immediately after their discussion. Ms Sidal responded later in the afternoon, stating that she felt she was on unjustified sick leave as she was not sick, and advising that she would be taking legal advice. Subsequent events show that she carried out that intention the following week.

[43] Had it not been for Ms Sidal's recording of her discussion with Ms Sale, I may have accepted her claim to have been put on forced sick leave for 5½ days, particularly in light of her email to Ms Sale in the late afternoon. However, I am satisfied from the evidence that Ms Sale did nothing more than make a suggestion after considerable discussion, and that Ms Sidal was quick to accept that suggestion.

[44] I find that Ms Sidal was not suspended from her employment. That was a later interpretation she put on events. It may be relevant that documents submitted to the Authority by Ms Sidal show that she sought information and/or advice from the former Department of Labour (now the Ministry of Business, Innovation & Employment) Contact Centre (DOL) between leaving her workplace and sending that email. The documents also show that the DOL record of the factual scenario she recounted differed quite significantly from that presented to the Authority. This may have affected her interpretation of the information the Department provided to her.

Second Issue: Was Ms Sidal constructively dismissed?

[45] An employee may be constructively dismissed when the employer uses no explicit words of dismissal. The Court of Appeal in *Auckland Shop Employees' Union v. Woolworths (NZ) Ltd*¹ held that constructive dismissal includes, but is not limited to, situations where:

- (a) An employer gives an employee a choice of resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;
- (c) A breach of duty by the employer causes an employee to resign.

[46] There was no suggestion from Ms Sidal that her employer had given her a choice between resigning and being dismissed, or that Aspire had followed a course of conduct with the deliberate and dominant purpose of coercing her to resign. Her

¹ [1985] 2 NZLR 372, (1985) ERNZ SelCas 136 (CA)

claim fits into the third category, i.e. that her employer's breach of duty in failing to take seriously the safety concerns she had raised caused her to resign. In her written evidence in response to that of Ms Sale, Ms Sidal stated that the only consumers she had concerns with were X and Y.

[47] To determine whether the employer's breach of duty did cause Ms Sidal to resign, it is necessary to consider all the circumstances leading to that event, including the communication of her resignation². If a breach of duty did cause her resignation, the question becomes whether it was sufficiently serious a breach that it was reasonably foreseeable to Aspire Ms Sidal would resign.

[48] Ms Sidal blames Ms Sale for the first incident of verbal abuse from X and Y. This is because of her claim that Ms Sale told Y Ms Sidal had named her as the person who had given her the list of possible Clubhouse alcohol users. This was "*breaching confidentiality*" according to Ms Sidal and led to Y calling her a "*nark*" and X calling her other unpleasant names. Ms Sale denies having disclosed the source of the list and says Y guessed it had come from Ms Sidal.

[49] Ms Sidal may have wanted confidentiality, but did not request it in her email of 10 September 2012 to Ms Sale and Ms Pattavi, in which she named "*parties to keep a look out on*". It was unreasonable of Ms Sidal to blame her manager for the verbal abuse she received from X and Y in that instance.

[50] I find that Ms Sale took seriously the information from Ms Sidal about alcohol consumption in the Clubhouse. I accept that she took care not to implicate Ms Sidal in her discussions with those named as potential users, or with Y. She informed Ms Sidal of her progress.

[51] After the first verbal abuse incident of Wednesday 12 September, Ms Sale spoke with Y and warned her to keep away from Ms Sidal. She then met with Ms Sidal on Friday 14 September, with Mr Samuel in attendance, to discuss the matter and how to address Ms Sidal's concerns.

[52] Ms Sale asked Mr Samuel to investigate the matter. Ms Sidal subsequently criticised the General Manager's choice of investigator, on the basis that he had been her support person in the meeting. I accept the validity of Ms Sale's reason for

² *Weston v Advkit Para Legal Services Limited* [2010] NZEMPC 140 at [28]

stepping back from carrying out the investigation herself. She had a long association with Y which could have been perceived as compromising her impartiality. She saw Mr Samuel as someone with a more neutral perspective.

[53] On 17 September 2012, the day Ms Sidal alleged further incidences of verbal abuse occurred, Ms Sale wrote separately to both X and Y, standing them down from the Clubhouse. Ms Sale's letter to Y noted that she took seriously any threats against staff or members, and the stand down was to "*make sure their safety is not compromised*". She also noted that Y would need to access the Clubhouse for Board business during that period, but should leave after completing her business in a timely manner. She should not make contact with Ms Sidal "*in any way, shape or form*" during this period.

[54] Ms Sale's letter to X noted that his stand-down was because he had "*verbally abused a staff member, Shomilla Sidal*". Ms Sidal questioned the authenticity of those letters and whether they were actually sent on 17 September 2012. She advanced no good reason for her suspicions and I accept that the letters were sent at that time.

[55] On 21 September 2012 Ms Sidal called the Police to the Clubhouse after she claimed to have felt intimidated by X who was sitting outside. Following the ensuing discussion between Ms Sale and Ms Sidal, the latter was away from the workplace for 5½ days, returning on Monday 1 October 2012. This was the period claimed by Ms Sidal to be a suspension. I have already rejected that claim. I prefer Ms Sale's perspective that it was leave suggested by her for Ms Sidal's wellbeing. It meant she was not in the workplace while Mr Samuel completed his investigation.

[56] Ms Sidal said in oral evidence that she returned to work because she was the only provider in her family. She was waiting to be told the outcome of Mr Samuel's investigation, and was not given a copy of his report. I note that it was Mr Samuel's evidence that he had given a copy of his report to Ms Sidal. Ms Sidal acknowledged in the investigation meeting that she had not followed up, or asked about, the outcome. She said this was because she was too busy dealing with matters relating to her job description and "*other more pressing stuff*".

[57] This apparent lack of interest about the outcome of Mr Samuel's investigation is inconsistent with Ms Sidal's claim to have been concerned about her personal safety in the workplace. I find the genuineness of Ms Sidal's concerns is undermined by her

view that quibbling over elements of a job description and attention to other undisclosed matters took precedence. There is also an inconsistency between the distress Ms Sidal expressed in an email to Ms Sale at being "*barred from the workplace*" and the reluctance to return to work that she expressed to the Authority.

[58] There was no evidence of Ms Sidal experiencing difficulties with either X or Y over the next 2 week period between her return to work on 1 October and the incident of 16 October 2012. Ms Sidal gave little evidence about that period of her employment.

[59] Ms Sale said she had spoken with both X and Y before their period of stand down from the Clubhouse ended. She had told X he was to have no interaction with Ms Sidal other than that required by his job, which was cleaning. She had told Y to stay away from Ms Sidal and not to engage in conversation with her.

[60] The 16 October 2012 incident involving X mopping floors close to Ms Sidal resulted in X complaining to Ms Sale of being bullied by Ms Sidal, and Ms Sidal claiming to have been bullied by X's behaviour. This led to Ms Sale and Ms Sidal having their second discussion that was recorded by Ms Sidal on her mobile phone without Ms Sale's knowledge.

[61] The recording and transcript show that the discussion was robust and heated on both sides. Ms Sale, who had been dealing with X's complaint about Ms Sidal, was clearly exasperated by the situation. She thought the episode with the mop was a trivial event that both players had built into a major incident. She noted that X did a good job of the cleaning "*and didn't have much in life to be proud of*". The cleaning was very important to him and he got upset if he was unable to do it properly.

[62] In her evidence Ms Sale referred to the challenging nature of the work, noting that the Clubhouse was "*a drop-in venue for consumers at the very margins of society – those who are unlikely to ever find a job and have nowhere else to go*". She said that many had "*very challenging behaviours*" which staff were made aware of from the outset of their employment. Many consumers had difficult backgrounds that often involved violence. The Clubhouse was a place where they could be themselves, within stipulated expectations and rules.

[63] She described X as difficult, and someone who shouted a lot. However, Ms Sale said it was important to look past the externals, and she did not think he posed a

threat to Ms Sidal. She had never seen him attack a staff member or a fellow volunteer.

[64] In her oral evidence to the Authority Ms Sale was commendably honest in her assessment of how she handled the 16 October 2012 discussion with Ms Sidal. She said it had become clear to her that Ms Sidal regarded her as being completely incompetent. This affected the previously good relationship she believed they had had, and her ability to talk over matters with Ms Sidal.

[65] Underlying tensions, such as her belief that Ms Sidal wanted her job as General Manager, and the difficulties of managing two people who were each complaining about the other's bullying behaviour, found expression in her part of the discussion. She told Ms Sidal it was childish of her not to move when X was trying to mop the floor where she was sitting, and she needed to accept personal responsibility. Ms Sidal was insistent that X had bullied her by mopping around the place where she was sitting, and he had done it to annoy her.

[66] Parts of the discussion would have been audible to others in the Clubhouse, and it was not an ideal location to hold it. Ms Sale said she was dissatisfied that she had not tried harder to talk this issue through with Ms Sidal on 16 October and felt partly as though she had let Ms Sidal down. She had not expected her to leave and not return, however. She expected they would have further discussion when the immediacy of the event had passed.

[67] I do not consider that the discussion on 16 October 2012 formed grounds for a constructive dismissal. There were unfortunate aspects to the discussion which Ms Sale could have managed better. Her frustration with the triviality of the complaint by X, and with Ms Sidal's reaction to the situation that led to it, showed in her response which, in the early stages of the discussion at least, was not measured. As she acknowledged in her oral evidence, she was reacting to the situation.

[68] While not wishing to belittle Ms Sidal's distress over the incident with X, I note that she was thinking clearly enough to make the decision to record her unscheduled discussion with Ms Sale. Her evidence was that Ms Sale was shouting as she came down the stairs. It must have been at that time Ms Sidal turned on the recording device of her mobile phone. At the start of the recording, Ms Sale can be heard to say quite loudly that it was becoming harder and harder to run a service.

[69] While Ms Sidal referred to X bullying her, there was no independent evidence of his having done so. He was carrying out his volunteer cleaning duty, and Ms Sale had no reason, other than Ms Sidal's assertion, to believe other than that he was simply mopping the floor. As Ms Sale pointed out in the discussion, Ms Sidal could simply have moved when he reached that part of the Clubhouse where she was talking with another consumer.

[70] I find this to have been a situation where both parties' behaviour could have been better. I have some sympathy for Ms Sale's view that Ms Sidal should have been able to manage the situation with X, given her training and qualifications. Ms Sidal referred in her evidence to the training she had undertaken that had been paid for by Aspire. She noted that she was always keen to up-skill and had taken any opportunity for training. She estimated that she attended training "*at least once every two months*". The courses and workshops she attended included some dealing with mental health issues, while others entailed first aid, privacy and advocacy.

[71] The Clubhouse is not an ordinary environment. Ms Sidal was fully aware of that and of the challenging behaviour of the mental health and drug and alcohol-addicted consumers. She gave evidence of having a social work degree and CYF certificates in dealing with challenging behaviour. Ms Sidal was experienced and knowledgeable in that field. It was reasonable for her employer to expect her to be able to manage difficult people in the course of her daily work, including the incident with X on 16 October 2012.

[72] I find that the steps taken by Aspire to ensure Ms Sidal's safety in the workplace were sufficient. Ms Sale did not take Ms Sidal's fears lightly, and she put in place measures to manage the only two people about whom Ms Sidal had expressed concerns. Those measures were successful in relation to Y whose behaviour had not caused Ms Sidal to express concern since returning to work on 1 October 2012. I note also that Ms Sidal did not inform her General Manager what steps she wished her to take, other than on 16 October 2012 when she told Ms Sale that she should tell X "*to get out if he's not doing his job properly*". That was not a helpful suggestion given the circumstances.

[73] Ms Sidal's advocate, Mr Collins, submitted that Ms Sidal had not received any communication from her employer while she was on paid and unpaid leave about the outcome of the September 2012 investigation, or about how the workplace could be

made safe for her to continue her employment. He also noted that Aspire had not offered her counselling during that time and that she had had to obtain financial support from WINZ once her paid leave expired at the end of October 2012.

[74] As noted previously, Mr Samuel's evidence was that he had given Ms Sidal a copy of the September 2012 investigation report. In any event, Ms Sidal made it clear in her oral evidence that she did not follow up on the investigation when she returned to work on 1 October 2012 because she was more concerned with other issues.

[75] Ms Sidal submitted 2 medical certificates referring to workplace stress in the 3 weeks between 16 October 2012 and the mediation that took place on 6 November 2012. Quite properly, no evidence about the mediation, other than its occurrence, was provided to the Authority.

[76] I do not find that Aspire was remiss in its duty to Ms Sidal by not offering her counselling. The duty of good faith³ that obliges the parties to an employment relationship to be responsive and communicative applies in equal measure to employees and employers. If Ms Sidal had wanted counselling she should have informed her employer and asked that it be provided to her. I have seen no evidence that she made such a request.

[77] Nor am I satisfied that any of Aspire's actions, or any inaction on its part, constituted a breach of duty such that Ms Sidal was forced to resign. I find that she chose to resign and note her evidence that, at the time she did so, she was undertaking training for a position with another employer.

Third issue: did Aspire short-change Ms Sidal in her final pay?

[78] Ms Sidal claims that the 5½ days' sick leave she took in advance of her entitlement between 21 September 2012 and her return to work on 1 October 2012 was deducted from her final pay. Aspire says that did not happen, and it was annual leave taken by Ms Sidal in advance of her entitlement that was deducted from her final pay.

[79] The pay records for 30 September 2012 show that Ms Sidal was paid sick leave for her absence to that date, leaving her sick leave balance in deficit. Her payslip for the fortnight to 28 October 2012 shows she was paid for the hours she

³ S. 4 Employment Relations Act 2000

worked up to 16 October, plus one day's public holiday, being Labour Day, and 7 days' holiday pay.

[80] Ms Sidal's annual holiday entitlement fell due on 8 June 2012 and was 9 days in deficit at that time. Most of the 7 days' annual holidays for which she was paid on 28 October 2012 was in advance of her entitlement. Following her resignation in January 2013, her final pay was calculated in accordance with s. 23 of the Holidays Act 2003. The amount of \$922.42 was debited from the total annual holidays due to her. This comprised the 6.428 days of annual holiday leave Ms Sidal had been paid in advance, calculated at her daily rate of \$143.50.

[81] I am satisfied that Aspire correctly calculated and paid Ms Sidal her final pay. It did not claw back the 5½ days of sick leave she had taken in advance of her entitlement in September 2012.

Determination

[82] As Ms Sidal was not suspended from her employment on 21 September 2012, her claim of unjustifiable disadvantage fails. She was not constructively dismissed by Aspire and her final pay was correctly calculated.

Costs

[83] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority