

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 31
5593425

BETWEEN BROOKE SMITH
 Applicant

AND THE TRUSTEES OF THE
 WANGANUI EAST POOL TRUST
 Respondent

Member of Authority: M B Loftus

Representatives: Steve Emslie, Counsel for Applicant
 Maureen Doyle, on behalf of Respondent

Investigation Meeting: 18 January 2017 at Wanganui

Submissions Received: At the investigation meeting with further information up
 to and including 24 February 2017

Determination: 1 May 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Brooke Smith, claims she was unjustifiably dismissed from her employment with the Wanganui East Pool Trust (the Trust). She also claims she was unjustifiably disadvantaged as a result of the Trust's failure to take action in respect of her complaint she was subjected to workplace bullying in the form of unwanted attention of a sexual nature by another employee.

[2] The Trust denies Ms Smith was dismissed and says the disadvantage claim has no merit.

Background

[3] Ms Smith commenced working as a lifesaver at the Wanganui East Pool which was administered by the Trust in February 2014. She says soon after starting there as an inappropriate physical approach from another employee and when she remonstrated with him she was subjected to abuse. She says she raised this in writing with the Trust's chair, Maureen Doyle. Ms Doyle denies she never received or saw such a letter.

[4] Ms Smith's tenure was relatively short as the pool operation is seasonal. She recommenced in November.

[5] On 13 December 2014 Ms Smith received a text message from the pool's manager, Warren Webber, advising that if she could not produce a first aid certificate by 21 December it ... *will be your last day*. There was a short exchange about who would pay before Ms Smith advised Mr Webber she would complete a revalidation course on 16 December. The text also asks which shift she would be working that week.

[6] The following day, Ms Smith sent a text message reading:

Hi Warren I now have a revalidated first aid cert. Still waiting on a reply to confirm what shifts I'm working this week. Thanks.

[7] The response reads:

Hey Brooke. been a busy day. Yup please bring in your first aid certificate tomorrow when you and your dad come in to have a talk and we will discuss your shifts. Cheers.

[8] It is unclear what *talk* is being referred to but there is no evidence of a meeting involving Mr Smith on 17 December.

[9] Ms Smith goes on to say the training provider through whom she performed the first aid certificate revalidation advised a hard copy of the certificate could not be printed until the New Year but an email would be sent to her manager to advise she had completed the training. It is not known if the email was sent but one confirming the certificates renewal was sent to Ms Smith via her mother's e-mail. It records Ms

Smith had ... *successfully completed her first aid training assessed to unit standards 26551 and 26552 wef 16 December 2014.*

[10] Ms Smith gave a copy of the e-mail to Mr Webber but say he told her, via a telephone call on 19 December, the e-mail was not acceptable and she would not be given any more hours at the pool. She responded by sending a text message asking for written confirmation of the decision and asked why she no longer had a job.

[11] Mr Webber replied to Ms Smith's text by advising *you will receive written confirmation after Sunday's Trust meeting. Thanks.*

[12] Around this time Ms Smith's mother had also heard her daughter's future was going to be discussed at a Trust meeting on Sunday 21 December 2014. Arrangements were made for her, Mr Smith and Ms Smith to attend.

[13] Suffice to say the meeting did not go well. Indeed it did not formally commence becoming instead a heated poolside argument between Mr Smith and a couple of Trust members. It appears Mr Smith voiced his view Ms Smith was being sexually abused at work. He says he became angrier when one of the Trust members defended the alleged perpetrator. He says this led to both he and his daughter being evicted from the pool but not before one of the Trust members stated *we don't have to tell you why we're sacking your daughter.*

[14] About the meeting Ms Doyle accepted the meeting was heated though she has no memory of a discussion about sexual harassment. She accepts Ms Smith's employment status was discussed and says she advised the hours were flexible and work depended the numbers in the pool and *what Warren [Mr Webber] wanted.* When pushed she said she was not denying Mr Smith's claims but could not recall the detail.

[15] As events transpired Ms Smith received no more work though the Trust claims she was not dismissed. In a response to the grievance dated 18 March 2015 it says:

Brooke was never dismissed rather she was removed from the roster until her certificate was produced.

[16] The letter of 18 March also reiterated the Trust's views that since it and Ms Smith's then representative commenced corresponding in January 2015 it had taken the approach there had been a misunderstanding and stated more than once

Ms Smith could return. The Trust is of the view that did not occur as Ms Smith failed to respond to the offer.

[17] Ms Smith says by then she had approached the Police with her concerns. She says while they chose, for whatever reason, not to act on her complaints they did advise she not return. She acted on that advice.

Determination

[18] Ms Smith has two claims. Her prime claim is she was unjustifiably dismissed. The second claim is she was sexually harassed and bullied and the Trust failed to respond adequately when she complained about it.

[19] Dealing with the dismissal first. The defence is Ms Smith was not dismissed but stood down till she renewed her first aid certificate. For the following reasons I do not accept that and conclude Ms Smith was dismissed.

[20] First Ms Smith was told should she not produce a first aid certificate by 21 December it would be her last day. Those are words which clearly indicate cessation at the instigation of the employer should the certificate not be forthcoming and in my view the resulting actions (namely refusing to accept the e-mail stating Ms Smith had renewed the certificate followed by a refusal to offer work) constitute confirmation of a decision to cease Ms Smith's employment.

[21] Second there is Mr Smith's evidence that on 21 December words were uttered which constituted advice Ms Smith was being dismissed. The Trust did not challenge this statement let alone offer contrary evidence. I therefore accept his claim in this regard.

[22] Third Ms Smith asked on 19 December why she no longer had a job. Not only did Mr Webber not challenge the assertion Ms Smith no longer had a job, he advised confirmation of the reasons would follow.

[23] When these events are considered in totality I conclude there can be no conclusion other than the Trust decided to cease Ms Smith's employment and advised accordingly more than once. That is a dismissal.

[24] The conclusion there was a dismissal means the Trust must justify its decision and offer evidence it complied with the requirements of s 103A of the Employment Relations Act 2000 (the Act).

[25] Procedurally s 103A requires the Authority consider whether, having regard to the resources available to the employer, the employer sufficiently investigated its concerns. A sufficient investigation requires, as a bare minimum, the employer put the issues, allow an opportunity to respond and consider the response with an open mind.

[26] The Trust has offered no evidence it complied with these requirements and I conclude a potential lack of resources¹ does not assist it. First the Trust did not offer any evidence it was hobbled by a lack of resource or expertise and second I note the Court's conclusion in *The Salad Bowl Ltd v Howe-Thornley*² that such all-encompassing failures are neither excusable nor minor (s 103A(5) of the Act).

[27] The only justification being offered is Ms Smith did not have a first aid certificate and possession of one is mandatory under the Trust's Pool Risk Management Plan. This argument fails for two reasons. First it is undermined by the fact the Trust engaged Ms Smith without seeking confirmation she had the certificate and was willing to employ her without one for some weeks. Second the Trust chose to ignore, or at least not investigate further, strong evidence she had renewed the certificate. A fair and reasonable employer would not, I conclude, have acted this way.

[28] For the above reasons the dismissal must be considered unjustified.

[29] Turning to the disadvantage claim. Ms Smith says she was sexually harassed and bullied and the Trust failed to respond adequately when she complained. It has long been held that for an employer to have committed a disadvantageous act in respect to bullying and harassment by a complainant's co-worker it must first be made aware of the issue and then fail to act (as is alleged here).

[30] That then raises the question of when Ms Smith brought her concerns to the Trust's attention. She says she did so, in writing, in February 2014. Ms Doyle, the alleged recipient of the complaint denies receiving it. Indeed she denies any

¹ Section s 103A(5) of the Employment Relations Act 2000

² [2013] NZEmpC 152 at [94] and [95]

knowledge this was a potential issue until the grievance was raised. While they were not called as witnesses I gained the parties permission to approach Mr Rhodes, a senior Trust member who Mr Smith says was aware of the issue and Mr Webber. Both adamantly deny any knowledge of the claims prior to 21 December.

[31] On this I prefer the Trust's evidence and do so for a number of reasons. First Ms Smith accepts she cannot produce the letter she says she gave Ms Doyle. Second and while the Trust denials are adamant, Ms Smith's oral evidence was uncertain and at one stage she undermined her assertion a written complaint had been made by saying the complaint was oral. Third Ms Doyle's denial which appeared genuine was not seriously challenged via questioning from Mr Emslie and Ms Smith declined an opportunity to reopen the investigation and challenge the denials made by Messrs Rhodes and Webber.

[32] I therefore conclude the complaint was made on 21 December. It was then the dismissal occurred. A claim under s 103(1)(b) requires an action that occurs in the employment and which affects the employment to the employees disadvantage. Furthermore when, as is the case here, the accusation is the employer failed to address the issue it must first be aware of it. In this instance I have accepted the Trust was not aware of the claim until after the employment ceased which negates the possibility of a successful claim under s 103(1)(b). The claim therefore fails.

[33] I have found Ms Smith has a grievance in that she was unjustifiably dismissed. That raises the question of remedies. She seeks three months lost wages and compensation pursuant to s 103(1)(c)(i) of the Act.

[34] Section 128(2) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration.

[35] Here the evidence shows the pool closed at the end of February 2015 which limits the period Ms Smith could have expected to work to ten weeks. In unchallenged evidence she says she averaged 40 hours a week at \$15.50 an hour. That would mean a loss of \$6,200.00 to which she is entitled under s 128(2).

[36] The amount claimed as compensation has never been specified. Add to that the fact the evidence regarding hurt attributable to the dismissal was weak with the bulk of Ms Smith's expressed angst a result of the abuse she says she suffered. As already said there is nothing in that respect which can be attributed to the Trust in a

way that establishes entitlement to an award under s 103. That said the dismissal was conducted in such an arbitrary manner it must have negatively impacted Ms Smith and warrants an award of compensation. Having considered the evidence and the way Ms Smith expressed herself and her feelings I conclude \$5,000 to be appropriate.

[37] The conclusion remedies accrue means I must, in accordance with s124 of the Act, address whether or not Ms Smith contributed to her dismissal in a way that warrants a reduction in remedies. I conclude the answer is no and note that when told about the issue with her first aid certificate she addressed it with alacrity.

Conclusion and orders

[38] For the above reasons I conclude Ms Smith has a personal grievance in that she was unjustifiably dismissed.

[39] As a result I order the respondent, The Wanganui East Pool Trust, pay the applicant, Brooke Smith;

- a. \$6,200.00 (six thousand, two hundred dollars) gross as recompense for wages lost as a result of the dismissal; and
- b. a further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i).

[40] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority