

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 108
5561650

BETWEEN RHONDA KAY TOSH
 Applicant

A N D BUPA CARE SERVICES (NZ)
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Evan Tosh, Advocate for Applicant
 Shelley Eden, Counsel for Respondent

Investigation Meeting: 23 June 2016 at Dunedin

Oral Indication Given: 23 June 2016

Date of Determination: 12 July 2016

DETERMINATION OF THE AUTHORITY

The oral indication

[1] At the conclusion of the hearing of the evidence and the consideration of the parties' submissions, I indicated my intention to give an oral indication in terms of s.174B of the Employment Relations Act 2000 (the Act).

[2] The burden of that oral indication was that I had not been persuaded that the applicant (Mrs Tosh) had a personal grievance by reason of having been constructively unjustifiably dismissed but that I wished to give further consideration to the question whether Mrs Tosh had sustained a personal grievance by reason of having been disadvantaged by unjustifiable actions of the respondent employer (BUPA).

[3] Because one of the effects of this determination is to confirm the provisional conclusions I had reached and advised the parties of in my oral indication, it is unnecessary for me to repeat what I said in the oral indication at the conclusion of the investigation meeting. The effect of this determination is simply to reiterate those same conclusions and to add to them the conclusions that I have reached in reflecting on the other personal grievance raised by Mrs Tosh.

Employment relationship problem

[4] Mrs Tosh alleges that she was unjustifiably constructively dismissed and suffered a disadvantage as a consequence of unjustified actions of BUPA.

[5] Mrs Tosh had been employed by BUPA in a rest home in Dunedin called Red Roofs since July 2007 although while the employment was continuous, BUPA had only been the employer for some of that period of time.

[6] On 5 November 2014, a co-worker of Mrs Tosh complained to a registered nurse employed at Red Roofs that she was considering resignation because of bullying behaviour from Mrs Tosh and another staff member. The registered nurse encouraged the complainant to see the Red Roofs' manager and the complainant did that and subsequently filed a formal written complaint the following day. Two further unsolicited complaints from other co-workers then followed.

[7] BUPA decided that given the serious nature of the allegations, there should be a formal investigation. Mrs Tosh was notified of that formal investigation, provided with copies of the written complaints, advised to seek advice and representation, offered EAP counselling services, and told that she would have an opportunity of responding to the allegations in due course.

[8] BUPA's Red Roofs' manager (Ms Hood) engaged with an HR adviser from BUPA head office in Auckland (Ms Hamilton) to guide her through the process. Interviews were conducted with the complainants. Further potential complainants were identified and spoken with. Two of those additional potential complainants declined to be involved.

[9] Mrs Tosh was advised throughout the process of progress in respect of the investigation and given copies of all information that was gathered as part of the process.

[10] Mrs Tosh had been on sick leave, alleging workplace stress, since the original receipt of the letter from BUPA advising Mrs Tosh of a formal investigation into her behaviour. Mrs Tosh was due to return to duty on 25 November 2014 but the day before that, Ms Hood contacted Mrs Tosh and offered her the opportunity to remain on paid leave until the disciplinary issues had been resolved rather than returning to work, as Mrs Tosh intended. Mrs Tosh declined BUPA's offer and returned to duty on 25 November 2014.

[11] Mrs Tosh worked in her normal role performing her usual duties on 25 November 2014 down to the date of the disciplinary meeting, 3 December 2014.

[12] At that meeting, Mrs Tosh was represented by an organiser from the Service & Food Workers Union and had her husband present as a support person.

[13] The meeting took four hours and it is common ground that Mrs Tosh gave a good account of herself. By way of summary, Mrs Tosh denied the most serious allegation of workplace bullying but admitted to a number of the specific allegations made against her short of the claim of workplace bullying.

[14] The meeting adjourned after four hours and reconvened the following day. At the 4 December 2014 meeting, BUPA, having reflected on the matter overnight, accepted Mrs Tosh's position in respect of the allegation of bullying and found that that most significant claim was not made out. However, BUPA also noted that Mrs Tosh had made a significant number of admissions and as a consequence, a disciplinary finding of serious misconduct was still arrived at but by virtue of the bullying allegation not being made out, the sanction reduced from the possibility of dismissal to a first written warning.

[15] In addition, certain remedial measures were to be applied, such as requiring Mrs Tosh to be performance managed to address the behaviours complained about, giving Mrs Tosh access to EAP sessions to enable her to reflect on and develop appropriate skills for resisting the sort of behaviour complained about, a proposal that there be a mediated meeting between the protagonists, that Mrs Tosh apologise to the original complainant and that Mrs Tosh change her roster temporarily to avoid the necessity for her to work with the principal complainant until the mediated meeting could have taken place.

[16] It is common cause that Mrs Tosh accepted all of those outcomes with the exception of the roster change and that she made her views clear on those matters at the 4 December 2014 meeting.

[17] She was given time to think about the roster change issue and was supposed to come back to BUPA through her representative but in the result that did not happen for whatever reason and accordingly BUPA wrote a letter dated 10 December 2014 which set out the outcome but referred to the mediation as being a proposal only and to the roster change as being proposed as well.

[18] The reason that BUPA says the roster arrangement was referred to in the letter as only a proposal was that Mrs Tosh had obtained another medical certificate again alleging workplace stress and that medical certificate meant that she was to be off work for effectively a calendar month until 6 January 2015 and on that basis, there may have been no need for any change in Mrs Tosh's roster because her continued absence from work enabled BUPA to contemplate the arranging of the proposed mediation as a necessary precursor to Mrs Tosh returning to her usual roster.

[19] Then, Mrs Tosh resigned her employment by letter dated 19 December 2014. There is dispute about whether the letter was posted or simply put under the door of the manager's office while the manager was herself on leave; either way, nothing turns on the mode of delivery as it is common ground that the letter was dated 19 December 2014.

[20] Because Ms Hood, Read Roofs' manager, was away on annual leave when the letter of resignation was received, she did not physically sight it until she returned to duty on 5 January 2015 and forthwith on reading the letter, Ms Hood wrote to Mrs Tosh offering her the opportunity to reconsider and withdraw her resignation.

[21] There was no response to that proposal and accordingly on 7 January 2015, BUPA accepted Mrs Tosh's resignation. A personal grievance was subsequently raised on 19 February 2015 alleging both constructive dismissal and disadvantage caused by unjustifiable actions of BUPA.

The issues

[22] It will be convenient if I assess whether there has been a constructive dismissal and then consider if BUPA's process can be criticized.

Was Mrs Tosh unjustifiably constructively dismissed?

[23] I have not been persuaded that Mrs Tosh has been unjustifiably dismissed from her employment by way of constructive dismissal. Put shortly, even if all of Mrs Tosh's allegations about the purported inadequacies of BUPA's process were made out, it seems evident that the only issue that she had with the final resolution of the disciplinary process was the prospect that she might need to change shifts for a short period and Mrs Tosh resigned her employment before that matter could be appropriately progressed. Indeed, she resigned her employment during a period when she had obtained another medical certificate saying that she was suffering from workplace stress and had been put off work from 8 December 2015 down to 6 January 2015 and by agreement with the employer, that leave was a charge on her annual leave because she no longer had any sick leave left.

[24] So even if all of her complaints about BUPA's process were made out, the receipt of her resignation effectively precluded the parties from resolving the only matter in dispute, namely the question whether Mrs Tosh would need to change her shift, or not. All other matters associated with the resolution of the disciplinary process were, by common consent, accepted by Mrs Tosh.

[25] What is more, forthwith on Ms Hood's receipt of the resignation letter (albeit sometime after the letter was drafted (because of Ms Hood's holiday leave)), Ms Hood caused a letter to be written to Mrs Tosh declining to accept her resignation and offering her an opportunity to withdraw it, a proposal which Mrs Tosh did not even bother to respond to.

[26] On the face of it then, BUPA did everything it reasonably could to put Mrs Tosh on notice that it did not seek her resignation, did not wish to accept it, and wanted to give her an opportunity to rethink her position.

[27] So even if all of Mrs Tosh's complaints about BUPA's process can be made out (and I do not accept that for a moment), Mrs Tosh has effectively determined the outcome of the matter herself by resigning prematurely, in circumstances where the only matter that was still in dispute was the question whether she would have to change her shift for a short period, or not.

[28] The three commonly identified kinds of constructive dismissal are where the employee is offered the option of resigning or being dismissed, where the employee is

subject to a concerted campaign by the employer with the dominant purpose of effecting a resignation or where there is a significant breach of the employer's duty of such magnitude as to be causative of the employee's resignation and to make that resignation reasonably foreseeable.

[29] On the facts as I heard them, there is simply no evidence at all to support the first two kinds of constructive dismissal; there is nothing to suggest that Mrs Tosh was given the option of resigning or being dismissed; indeed, all the evidence suggests that BUPA wanted to retain Mrs Tosh's services because, despite the interpersonal difficulties that were the subject of the disciplinary process, BUPA accepted that Mrs Tosh was a good caregiver and wanted her to continue in the employment.

[30] As to the second kind of constructive dismissal, I had not understood, until I heard the submissions for Mrs Tosh, that it was suggested that she maintained that BUPA sought to remove her from the employment and as I said at the end of the investigation meeting, I did not hear any evidence at all to suggest any such conclusion was capable of being arrived at.

[31] Despite that, Mrs Tosh's submissions begin with this statement:

The disciplinary process is a charade employed to get rid of an employee – to end a contract of service. It has no other purpose.

[32] That leaves us with the third kind of constructive dismissal where it is said that there is a breach of duty of such magnitude as to be causative of a resignation and to make the resignation reasonably foreseeable. I will deal with the question whether BUPA's behaviour can be categorised as constituting a breach of duty in the next section of this determination. But, for present purposes, I want to deal here with the issue of causation first and then the issue of foreseeability.

[33] As to causation, it would seem the proximate cause of the resignation, dated as it was 19 December 2014, was the receipt by Mrs Tosh of BUPA's letter of 10 December 2014. As I said at the investigation meeting, the 10 December 2014 letter is carefully drafted and I, having looked at it dispassionately, was at a loss to understand how anybody could take offence at the way in which it was expressed.

[34] As I have already made clear, the only outstanding issue on the disciplinary process was the question of whether Mrs Tosh would need to change shifts to keep

her away from the complainant and, as I have been at pains to emphasise, that issue had not been resolved one way or the other at the point at which Mrs Tosh resigned.

[35] However, it is appropriate that I reiterate that the BUPA letter of 10 December 2014 still talks about a proposed roster change and the reason that it talks about a proposed change is because, given the very recent intimation that Mrs Tosh was going to be away from the workplace again as a consequence of alleged workplace stress, the possibility was that there would never need to be a roster change. But even if the roster change were in prospect, the fact of the resignation brought any possibility of the parties further engaging on that matter to an end.

[36] What is more, the employer conceded during my investigation meeting that it had to reflect on whether it had the capacity, legally, to change an employee's roster where the employee protested that. Again, I simply make the point that that issue had not been resolved at the point at which Mrs Tosh resigned her employment.

[37] Moreover, as soon as the employer was seized of the resignation (on Ms Hood's return from annual leave), BUPA immediately wrote to Mrs Tosh and asked her to reconsider. So even if BUPA's behaviour is somehow culpable (and that is not my conclusion for reasons I have already made clear), then it has done everything it reasonably could to remedy that default by offering Mrs Tosh the opportunity of withdrawing her resignation.

[38] Turning now to the question of foreseeability, I am satisfied on the evidence I heard that Mrs Tosh's resignation was completely unexpected and in no sense foreseen by BUPA. Mrs Tosh herself had made no suggestion that she was contemplating resignation and it is difficult to see how a resignation was reasonably foreseeable given the factual matrix in this case. After all, Mrs Tosh had had a reasonably successful engagement with the disciplinary process; she had seen off the central allegation that she was a bully and as a consequence, got the prospect of being dismissed off the table altogether. The only issue that separated the parties after the disciplinary process was the question whether Mrs Tosh would have to change her shift for a short period so that she and the principal protagonist were not able to confront each other in the workplace.

Can BUPA's process be criticised?

[39] Having reflected on the matter, I have not found any substantial deficiencies in the process that BUPA undertook in proceeding against Mrs Tosh.

[40] One of Mrs Tosh's principal complaints about BUPA's process is that it had the option to adopt a less formal process and Mrs Tosh says that would have been more appropriate. Put shortly, Mrs Tosh urged on me the proposition that all BUPA should have done was get the aggrieved parties and her together and facilitate a better understanding.

[41] But I do not accept that that is an appropriate characterisation of the situation. This was not just a simple misunderstanding between co-workers. This was a serious allegation of bullying by a number of co-workers of Mrs Tosh and arguably the very nature of the allegation might require a formal process.

[42] In her evidence, Ms Hood told me that the issues that encouraged BUPA to adopt the formal process were as follows: the fact that there were formal written complaints; the fact that the principal complainant was contemplating resignation because of the way she had allegedly been treated; the fact that the principal complainant evidenced significant health consequences because of the way she had allegedly been treated; the fact that the complaints were, in the main, entirely unsolicited; and the fact that they included a very serious allegation, namely of bullying by one staff member of others.

[43] In addition to that evidence, Ms Hamilton, the HR professional for BUPA, told me that 80% to 90% of complaints would be dealt with on a formal basis and in giving that evidence, Ms Hamilton emphasised that it would be unfair to Mrs Tosh not to give her a formal process and not to allow her a proper opportunity to respond appropriately to the allegations that were made against her.

[44] Next, Mrs Tosh alleges that there was somehow impropriety in BUPA conducting an investigation first to see if there was a case for her to answer. Mrs Tosh appears to have formed the view that she should have been given the opportunity to comment at an earlier stage but that would have precluded BUPA from conducting a proper inquiry and establishing if there was anything for Mrs Tosh to respond to at all. Moreover, Mrs Tosh was given the opportunity to put BUPA in

touch with any other witnesses that Mrs Tosh thought BUPA should speak to but she did not avail herself of that offer.

[45] I am satisfied that the proper place for Mrs Tosh to engage with the employer is in a formal disciplinary meeting once the employer has formed a view that there is a case for the employee to respond to. That is the reason that BUPA is entitled to conduct its inquiries first without having to engage directly with the employee complained about. Unless BUPA has formed a complete picture of all of the matters that it needs to seek responses from Mrs Tosh to, it is failing in its duty to Mrs Tosh not giving her a proper opportunity to respond to everything that is of concern to the employer.

[46] Mrs Tosh was given an ample opportunity to respond to all the allegations that BUPA had identified and indeed, on the evidence, Mrs Tosh did a commendable job of disposing of the most serious allegation and the most serious possible disciplinary consequence.

[47] Mrs Tosh had fully five hours of engagement with the employer (four hours on the first day and another hour on 4 December 2014), and I am satisfied that that sufficiently fulfils the obligation of a good and fair employer.

[48] Next, Mrs Tosh maintains that there was bias and a lack of independence by the decision-makers. It is common cause that the decision-makers were Ms Hood and Ms Hamilton acting together. Ms Hood is the manager of Red Roofs and Ms Hamilton is an HR specialist from BUPA's head office. Mrs Tosh says that because both of them were employed by BUPA, they are biased.

[49] But there is no evidence of bias or lack of independence and the law is clear that the simple fact of an employer representative conducting an inquiry does not of itself create a lack of independence or evidence of bias.

[50] Indeed, the evidence suggests quite the reverse; the two BUPA representatives were persuaded by Mrs Tosh that the most significant allegation and the most significant disciplinary consequence ought to be put aside and they were.

[51] Although not pursued by Mrs Tosh, I would also observe that BUPA gave Mrs Tosh ample evidence in advance of what the allegations were by providing statements of witnesses and setting out in detail what it was up to, that BUPA

investigated the matter thoroughly by talking to all the relevant witnesses, that BUPA encouraged Mrs Tosh to get legal representation and that she was given ample opportunity to respond to the allegations and that she did respond and successfully resisted the central allegation.

[52] In all the circumstances then, I am not persuaded that there has been any breach of duty by BUPA which could potentially ground the basis for a constructive dismissal and on the same factual matrix, I am also not persuaded that BUPA did anything wrongly in its management of the disciplinary process.

[53] In particular, I do not think that there is any evidence whatever that BUPA committed any actions which were unjustified and therefore the question whether Mrs Tosh suffered a disadvantage rather falls away.

[54] Clearly, the outcome of the disciplinary process can be construed as a disadvantage to an employee even where, as in this case, the majority of the outcomes are accepted by the employee. But the short point is that unless and until the employer can be proved to have conducted an investigative and disciplinary process which constituted unjustified actions then a personal grievance in reliance on that factual matrix must fail.

[55] Put shortly, I am satisfied that a good and fair employer in BUPA's position could have conducted the sort of investigation and disciplinary process that BUPA did in fact undertake and could have reached the conclusions that BUPA reached.

[56] It is important that I emphasise, as I did at the investigation meeting, that all that is required for the purposes of the test for justification is that the approach undertaken by this employer was one of the approaches that a good and fair employer could undertake.

[57] It is not the law that the Authority must determine that this is the only approach that a good and fair employer could take; it is enough that the approach undertaken is one of the approaches that a good and fair employer could contemplate.

Determination

[58] Given those conclusions, Mrs Tosh's claims against BUPA fail in their entirety.

Costs

[59] BUPA is entitled to look to Mrs Tosh for a contribution to its costs. Given the imbalance in the relative resources of the parties, BUPA may feel able to not seek to pursue costs.

[60] If costs are sought, and the parties are unable to resolve costs on their own terms, BUPA has to file and serve its submissions and Mrs Tosh has 14 days from her receipt of those submissions to respond.

[61] I will then fix costs in accordance with the Authority's standard process.

James Crichton
Chief of the Employment Relations Authority