

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 94
5464148

BETWEEN SHARON RUTH WALLACE
Applicant

A N D TITOKI SECURITIES TRUST
Respondent

Member of Authority: T G Tetitaha
Representatives: Applicant in person
P Swarbrick, Counsel for Respondent
Investigation Meeting: 20 February and 2 March 2015 at Auckland
Submissions Received: 3 March 2015 from Applicant
3 March 2015 from Respondent
Date of Minute: 27 March 2015

DETERMINATION OF THE AUTHORITY

- A. Sharon Ruth Wallace was not unjustifiably disadvantaged by Titoki Securities Trust because there was no failure to provide a safe workplace on 6 March 2014.**
- B. Sharon Ruth Wallace was not unjustifiably dismissed by Titoki Securities Trust.**
- C. Section 318 of the Accident Compensation Act 2001 removes my jurisdiction to inquire into personal injury caused by a work-related gradual process such as chemical exposure over 2 ½ years.**
- D. The personal grievance is dismissed.**
- E. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of**

this determination. The other party shall have 14 days to file and serve a reply.

Employment Relationship Problem

[1] Sharon Ruth Wallace alleges she was unjustifiably disadvantaged by Titoki Securities Trust (the respondent) because a condition of her employment that she was provided with a safe workplace was affected to her disadvantage by the respondent's health and safety failures. She further alleges she was subsequently unjustifiably dismissed on 20 May 2014.

Facts leading to dispute

[2] In February 2012 Ms Wallace commenced employment with the respondent as a casual supervisor/trainer. Her job involved training new franchisees both in her home and on site at customer homes. Her work hours varied but on average comprised 9 hours per week.

[3] On 6 March 2014 Ms Wallace was providing training to a franchisee at a customer's home in Mt Albert. She subsequently became unwell.

[4] On 7 March 2014 Ms Wallace advised the respondent the Mt Albert home was leaky and she was unwell with nasal issues.

[5] On 9 March 2014 the respondent undertook an investigation and advised Ms Wallace not to return to the home.

[6] On 10 March 2014 the respondent reported its findings to her about the steps taken. In its view her safety was not comprised. The same day Ms Wallace saw her General Practitioner and a medical certificate was provided diagnosing *sinus congestion* and included a comment *environment exposure to dust and building demolition*. Ms Wallace was deemed unfit to return to work until 13 March 2014.

[7] Between 10 and 20 March 2014 the parties exchanged correspondence about Ms Wallace's health, the Mt Albert customer's home and a face to face meeting.

[8] On 17 March Ms Wallace sent an email alleging, amongst other things, "*systematic OSH, HSE and other failures by the respondent*" breaching her

employment contract specifically clause 4.1 and *“it is now questionable whether I will be able to work with chemicals again. Before the Select Group Accident I had perfect health”*. She concludes that the email serves as formal notification of a personal grievance. The same day the respondent’s lawyer emailed Ms Wallace seeking a meeting, clarification about the personal grievance and enquired about her ability to resume normal duties.

[9] On 21 March 2014 the parties met at Ms Wallace’s home. One of the topics discussed was her return to work.

[10] On 28 March 2014 Ms Wallace sent an email seeking settlement by payment of \$12,000 and her resignation.

[11] On 1 April 2014 the respondent’s lawyer sought her advice if she wished to resume work, refused any payment and saw no reason for her to resign.

[12] On 2 April 2014 Ms Wallace contacted WorkSafe New Zealand to complain about the Mt Albert home visit on 6 March 2014.

[13] On 10 April 2014 the respondent’s lawyer emailed Ms Wallace’s then legal representative seeking advice on her return to work by 14 April and clarification of her claims.

[14] On 15 April 2014 Ms Wallace obtained a medical certificate that stated she was unfit to work until 4 May 2014. The same day the respondent’s lawyer emailed Ms Wallace seeking her intentions regarding her return to work and other matters. The email was sent back on 17 April marked *“Return to Sender”*.

[15] On 22 April 2014 the respondent directors, Sylvia and Graeme Norton emailed Ms Wallace seeking an *“urgent answer to the question of whether you intend to return to work”*.

[16] On 24 April 2014 the respondent’s lawyer emailed a letter dated 23 April seeking whether she intended to return to work or not. The email was sent back on 28 April marked *“Return to Sender”*.

[17] On 5 May 2014 Ms Wallace obtained a further medical certificate stating she was fit to work *normal hours from 06/05/2014 until 19/05/2014*. The medical certificate included physical restrictions of *office work only – with no exposure to*

inhaled chemicals/fumes/mould. The respondent did not receive this medical certificate until 25 May.

[18] On 9 May 2014 the respondent sent a letter stating its view that it was unreasonable to hold Ms Wallace' job open beyond the end of May. It sought her comments on when she would return to her full normal duties and whether it should continue to hold her job open beyond the end of May. Ms Wallace was given until 15 May 2014 at 5pm to provide information.

[19] On 16 May 2014 the applicant provided her written reply.

[20] On 18 May 2014 WorkSafe New Zealand wrote to the respondent advising the outcome of its investigation and that it had closed its file.

[21] On 20 May 2014 the respondent advised Ms Wallace it could not hold her job open and her employment would be terminated. A further opportunity was offered to provide information during the notice period which might enable it to reconsider its decision.

[22] On 25 May 2014 Ms Wallace replied stating she could undertake light duties. She also attached a copy of a medical certificate dated 5 May 2014.

[23] On 26 May 2014 the respondent's lawyer emailed Ms Wallace that despite their requests Ms Wallace had still not provided an indication of when she would return to her full normal duties. As a consequence it was unwilling to revoke its decision and her employment would terminate on 2 June 2014. The email was sent back on 30 May marked "*Return to Sender*".

[24] On 30 May 2014 Ms Wallace raised a personal grievance of unjustified disadvantage due to failure to provide a safe workplace.

[25] On 2 June 2014 her employment terminated.

[26] On 15 August 2014 Ms Wallace raised a further personal grievance of unjustified dismissal.

Issues

[27] At the start of hearing the parties agreed the following issues were for hearing:

- (a) In respect of the personal grievance pertaining to the incident on 6 March 2014:
- (i) Whether the applicant was unjustifiably disadvantaged by the failure to provide a safe workplace on 6 March 2014;
 - (ii) Was the applicant's conduct leading to dismissal what a fair and reasonable employer could have dismissed her for;
 - (iii) Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances;
- (b) In respect of the personal grievance pertaining to chemical exposure over 2½ years:
- (i) Whether the applicant raised a personal grievance with the respondent within 90 days regarding the chemical exposure over 2½ years?

[28] By Minute dated 2 March 2015 the parties were directed to address a further issue about my jurisdiction to hear claims involving personal injuries. The alleged chemical exposure falls within the definition of a personal injury caused by a work-related gradual process pursuant to the Accident Compensation Act 2001. Section 318 of the Accident Compensation Act 2001 appeared to prohibit me from hearing and/or awarding compensation for unjustified disadvantage grievances arising from personal injury. This issue shall be determined prior to issue (b) above. If I do not have jurisdiction to determine that type of grievance, the issue of when the personal grievance was raised does not matter.

Was the applicant unjustifiably disadvantaged by the failure to provide a safe workplace on 6 March 2014?

[29] I have received and considered both parties submissions which were directed to be filed. Ms Wallace has also filed further evidence that in the interests of disposing with this matter I have read as well. I understand from the Authority Officer the respondent does not object to this.

[30] A personal grievance of unjustified disadvantage arises under s.103(1)(b) of the Act. The employee must show that one or more of the conditions of their

employment was affected to their disadvantage by some unjustifiable action by the employer.

[31] As noted in my Minute dated 2 March 2015, the parties agreed at hearing the unjustified disadvantage claim allegedly arose from:

- (a) Breaches or lack of health and safety policies;
- (b) Breaches of the Health and Safety in Employment Act and ‘regulations’;
- (c) Lack or failure to provide safety equipment;
- (d) Lack of training; and
- (e) Inadequate assessments of the workplace by Gina Hammond.

[32] Given these were the agreed incidences giving rise to the alleged disadvantage, my determination will address these only.

Alleged breaches or lack of health and safety policies

[33] Copies of the respondent’s health and safety policies were produced. Ms Wallace accepted she had been sent a copy of these prior to 6 March. Her principle complaint was that they were written for franchisees and were confusing. In her evidence she accepted she never raised concerns about those policies until now.

[34] No specified breaches of those health and safety policies were identified by Ms Wallace other than their being allegedly confusing. Ms Wallace’s submissions refer to a letter from Worksafe regarding its file review of her complaint dated 13 August 2014.¹ The Worksafe letter does not state there have been breaches. It recommended the respondent review its systems to ensure hazards of biological agents and hazardous substances are identified, assessed and controlled. This does not evidence any lack or breach of health and safety policies.

[35] Therefore there cannot be any disadvantage arising from alleged breaches or lack of health and safety policies.

¹ Applicants submissions entitled “Sharon Wallace Summing Up” received 9 March 2015 (Applicants submissions) at p5.

Alleged breaches of the Health and Safety in Employment Act and Regulations

[36] I have no jurisdiction to consider claims about breaches of the Health and Safety in Employment Act 1992 and its Regulations.

[37] The Authority was created by statute. As such, it “... *can only do what the statute creating it has authorised it to do*”². My jurisdiction is defined within the Employment Relations Act 2000. It does not expressly include Health and Safety in Employment 1992 offences and/or breaches.

[38] Breaches of that Act and its regulations are criminal offences incurring possible penalties of imprisonment of up to 2 years and fines not exceeding \$500,000.³ An offence of this nature is classified as a category two offence and is within the jurisdiction of the District Court.⁴

[39] Any claim for unjustified disadvantage arising from breaches of the Health and Safety in Employment Act 1992 and its Regulations cannot succeed.

Alleged lack of or failure to provide safety equipment

[40] The parties evidence confirmed all recommended safety equipment was provided with the exception of safety glasses. This was raised by the applicant at the meeting of 21 March and was promptly rectified. The respondent accepts this omission which was inadvertent.

[41] There is no evidence establishing a causal link between the lack of safety glasses and the alleged harm suffered by the applicant. Her complaint is sinus congestion not eye irritation. There cannot be any disadvantage to Ms Wallace as a consequence of the prompt rectification of an inadvertent omission to provide safety glasses.

Alleged inadequate assessment of the workplace by Gina Hammond

[42] Ms Hammond was not called by either party to give evidence. Her account of what she did in assessing the worksite was contained within emails.⁵ During the

² *Reid v NZ Fire Service Commission* [1996] 1 ERNZ 228 at 238

³ Section 49 Health and Safety in Employment Act 1992

⁴ Section 6 and 72 Criminal Procedure Act 2011

⁵ Respondent’s Bundle of Documents, Document 4

investigation, statements were also obtained from the franchisee⁶ the applicant was with at the worksite and the building site manager.⁷ None of that evidence indicates defects in Ms Hammond's assessment of the worksite prior to 6 March 2014. None of that evidence supports Ms Wallace's assertion the worksite was a "*rotten leaky home*".

[43] The unjustified disadvantage arising from the alleged inadequate assessment of the workplace by Gina Hammond must also fail.

[44] I determine Sharon Ruth Wallace was not unjustifiably disadvantaged by Titoki Securities Trust because there was no failure to provide a safe workplace on 6 March 2014.

Was the applicant's conduct leading to dismissal what a fair and reasonable employer could have dismissed her for?

[45] Ms Wallace submits any justification for her dismissal (if it is to be procedurally valid) must be on the basis of medical incapacity. She denies the reason for her dismissal was extended absence and uncertainty about her ability or intention to return. She submits her employer injured her in a debilitating manner and constantly put her and others at risk.⁸

[46] An employer is not bound to hold open a job indefinitely for an employee who is unable to work⁹. An employer will be justified in dismissing an employee for a long term absence where it can be shown that the decision was substantively and procedurally justified¹⁰.

[47] Where an employer affords a genuine opportunity to the employee to explain their actions but the employee refuses or fails to make an adequate explanation then a dismissal may be justified¹¹.

[48] There are decisions indicating that "fault" on the part of the employer in causing the incapacity may limit their ability to dismiss the employee¹².

⁶ Respondent's Bundle of Documents, Document 9

⁷ Respondent's Bundle of Documents, Document 5 and 7

⁸ Applicants submissions at p6

⁹ *Canterbury Clerical Workers Union v. Andrews & Beavan Ltd* [1983] ACJ 875

¹⁰ *Motor Machinists Ltd v. Craig* [1996] 2 ERNZ 585

¹¹ *Northern Club Auckland v. Northern Hotel etc IUOW* [1989] 1 NZILR 764 (LC)

[49] From the evidence before me, there is no certainty this employer was at fault for Ms Wallace's injuries. She relies upon the report by Dr David Black, Occupational and Environmental Medicine Specialist, dated 26 June 2014.¹³ The report has been criticised as lacking evidential foundation. He referred to Ms Wallace "*for 2 ½ years and gradually over time ... suffering from intermittent, leading to chronic, sinus congestion*". Her medical records and own statements confirm she never received medical treatment for sinus issues prior to 6 March 2014.¹⁴ This casts doubt upon his conclusion she "*suffered escalating upper respiratory irritation from the use of these products which has predisposed her to an allergic reaction when she was exposed in the index event on the 6th March which may also have included sensitisation to moulds.*"¹⁵

[50] An email from Dr Black's assistant did not clarify how he came to the conclusion in absence of evidence.¹⁶ Dr Black was not called as a witness to be questioned about his report.

[51] I further understand Dr Black did not visit the site nor had any other evidence than that provided by Ms Wallace. Dr Black's evidence contradicts the statements of Ms Hammond, the franchisee and the building site manager regarding the safety of the 6 March work site.

[52] At the time the decision to dismiss was made, the applicant had been absent from work for some three months. The respondent's evidence was that it needed to replace her. It had already temporarily redeployed Ms Hammond to undertake some of the work the applicant used to do. One of the respondent directors, Graeme Norton, was undertaking Ms Hammond's work. He was unable to perform his usual work tasks as a consequence.

[53] In the circumstances, I cannot find on the balance of probabilities fault by the respondent for the applicants prolonged absence or illness. I accept this employer could no longer hold her job open in the circumstances.

¹² *Canterbury Clerical Workers IUOW v. Printing & Packaging Corp Ltd* [1988] NZILR 1213 (LC); *Auckland and Tomoana Freezing Works etc IUOW v. Wilson Foods Ltd* [1990] 3 NZILR 939 (LC)

¹³ Statement of Problem Appendix C Letter Dr D Black to Dr S Crombie 26 June 2014 at p2

¹⁴ Applicants Brief of Evidence p 179 Email H Kilpatrick to S Wallace dated 30 October 2014

¹⁵ Statement of Problem Appendix C Letter Dr D Black to Dr S Crombie 26 June 2014 at p3

¹⁶ Applicants Brief of Evidence p 179 Email H Kilpatrick to S Wallace dated 30 October 2014

Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances:

[54] Ms Wallace accepts she played some part in “*matters going wrong*”. However, she submits that everything was made hard for her by the respondent’s accusing email of 11 March, engagement of a lawyer “*feigned misunderstanding*” of her position and emails, ignoring her requests for sick pay, false statements made to colleagues and predetermination of the decision to dismiss due to her complaints to WorkSafe and ACC.

[55] There were substantial opportunities given to Ms Wallace to explain her ability to return to work. I have reviewed the correspondence and with respect disagree with Ms Wallace’s views. There were at least eight direct inquiries made of Ms Wallace between 17 March and 9 May 2014 about whether she would return to work and when that would occur evidencing their confusion about her health status. Instead, Ms Wallace engaged in what I would term ‘vitriolic’ correspondence, attacking the respondent’s lawyer and directors as opposed to answering those direct inquiries. As a result, she failed to take the opportunities being offered to address the return to work.

[56] It was not until after the decision to dismiss had been made that Ms Wallace provided a copy of her 5 May medical certificate and notified the respondent she was capable of returning to work upon light duties. Prior to 25 May 2014, her employer was unaware she could return in any capacity.

[57] I do not accept the respondent or its lawyer’s correspondence “*feigned misunderstanding*” or was harassing and/or bullying. The nature and tone of the correspondence was respectful and professional. The subject matter was appropriate and primarily about whether she intended returning to work.

[58] The issue about sick pay was not raised as part of the personal grievance before me. In any event the respondent was unsure if Ms Wallace was sick or simply did not intend to return to work. It is unsurprising they did not deal with this issue as a consequence.

[59] There is no evidence of false statements to colleagues. There is no evidence of a predetermination to dismiss due to Worksafe New Zealand complaints or ACC matters.

[60] It may have been that Ms Wallace did not wish to return to work, evidenced by her view she had been constructively dismissed on 20 March 2014 and request for compensation of \$20,000,¹⁷ reduced to \$12,000 on 28 March 2014.¹⁸ If this was the case she ought to have either terminated her contract and/or brought the matter before the Authority. Employees also have a duty to act in good faith including being proactive and responsive.

[61] Having considered the evidence, I determine the process leading to dismissal was what a fair and reasonable employer could have done in all the circumstances.

[62] Sharon Ruth Wallace was not unjustifiably dismissed by Titoki Securities Trust.

In respect of the personal grievance pertaining to chemical exposure over 2½ years: whether the applicant raised a personal grievance with the respondent within 90 days regarding the chemical exposure over 2½ years?

[63] I have no jurisdiction to determine claims arising from personal injuries covered by the Accident Compensation Act 2001.

[64] The alleged chemical exposure falls within the definition of a personal injury caused by a work-related gradual process pursuant to the Accident Compensation Act 2001. Section 318 of the Accident Compensation Act 2001 prohibits me from hearing and/or awarding compensation for that type of grievance:

318 Proceedings for personal injury caused by work-related gradual process, disease, or infection

(1) This section applies to proceedings for damages arising directly or indirectly out of personal injury caused by a work-related gradual process, disease, or infection that is—

(a) personal injury covered by this Act;

...

¹⁷ Respondents Bundle of Documents Document 11 at p107 Email S Wallace to G Norton et.al dated 20 March 2014

¹⁸ Respondents Bundle of Documents Document 13 at p117 Email S Wallace to P Swarbrick dated 28 March 2014

(5) *However, no court, tribunal, or other body may award compensation in any proceedings referred to in subsection (4) for personal injury of the kinds described in subsection (1).*

[65] Section 318 of the Accident Compensation Act 2001 removes my jurisdiction to inquire into personal injury caused by a work-related gradual process such as chemical exposure over 2 ½ years.

[66] The personal grievance is dismissed.

Costs

[67] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority