

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 401
3073072

BETWEEN JESSICA WILLIAMS
Applicant

AND AWF LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Phillip de Wattignar, advocate for the Applicant
June Hardacre, counsel for the Respondent

Investigation Meeting: 7 July 2020

Submissions Received: 7 July 2020 from the Applicant
7 July 2020 from the Respondent

Date of Determination: 6 October 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jessica Williams worked for AWF Limited at Select Recruitment in Dunedin from 9 October 2017. In 2019 Ms Williams began experiencing difficulties at work with her manager, which culminated in her complaining about bullying.

[2] Ms Williams raised a personal grievance for unjustified action causing disadvantage based on the alleged bullying behaviour and AWF's failure to deal with her complaints appropriately.

[3] AWF responded by arranging for Ms Williams to work from home whilst it conducted an investigation into her complaints.

[4] The AWF investigation found that Ms Williams had been bullied by her manager but that AWF had responded appropriately to Ms Williams' complaints.

[5] AWF then sought to resolve the bullying issues with Ms Williams, including agreeing terms for her return to work in the Select Recruitment office. AWF and Ms Williams were unable to agree suitable arrangements for Ms Williams' return to the office and AWF brought negotiations to an end by placing Ms Williams on unpaid leave and requiring her to return all company property to it.

[6] Ms Williams took these actions as a dismissal and the day after being advised of them she raised a further personal grievance for unjustified dismissal.

[7] AWF denies the personal grievances, claiming it responded appropriately to alleged bullying once it was raised and that it cannot be responsible for bullying occurring that it was not aware of i.e. behaviour occurring before the complaints were raised. AWF also says it did not dismiss Ms Williams but rather she remained on leave without pay as she chose not to return to work on the terms offered to her.

[8] In summary Ms Williams' personal grievances, that I have now investigated and this determination resolve, are:

- (a) Unjustified disadvantage, arising from the bullying that occurred and AWF's alleged failure to deal with Ms Williams' complaints of bullying appropriately; and
- (b) Unjustified dismissal arising from the alleged dismissal by failing to provide suitable terms for Ms Williams to return to work and then placing her on unpaid leave.

Identity of two key employees

[9] Ms Williams' manager did not participate in my investigation and did not provide any evidence. Likewise another manager who is relevant to this claim, the Business Manager (during May, June and July 2019) did not participate in my investigation and did not provide any evidence. I have made findings about the behaviour and actions of these two managers based on evidence from other witnesses and from admissions AWF has made. This evidence

and my findings may reflect badly on each of them and as they have not been able to influence or address those findings I have decided not to identify them in my determination. I will refer to Ms Williams' manager as YHD and the Business Manager as EVC.

Unjustified disadvantage

The alleged basis for Ms Williams' personal grievance

[10] Section 103(1)(b) of the Employment Relations Act 2000 (the Act) sets out that an employee may have a personal grievance against their employer where that employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.

[11] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustified action causing disadvantage personal grievance are:

- (a) What is it that is complained of in terms of the employer's actions and did the employer act as alleged;
- (b) If so, did the actions cause any disadvantage to the employee's employment or a condition of employment; and
- (c) If so, were the employer's actions justifiable?

What is the behaviour Ms Williams complains of in terms of the AWF's actions and did AWF act as alleged?

[12] Turning to the behaviour complained of, there are two parts to this; the bullying itself and the failure to deal with the complaints.

[13] So firstly, the question of whether the employer acted as alleged becomes, did AWF bully Ms Williams? The fact that Ms Williams was bullied by YHD is not in issue in this matter. AWF concedes she was bullied as this was its own finding after investigating Ms Williams' complaint. But based on this it follows that AWF, the employer, did not bully Ms Williams; the actions of an employee are not necessarily the actions of an employer and that is the case here. YHD was responsible for the bullying behaviour and it is not behaviour that is attributable to AWF as the employer.

[14] Bullying behaviour toward an employee by a colleague does not give rise to an unjustified action causing disadvantage grievance per se.¹ However, the bullying may still give rise to an unjustified action causing disadvantage grievance if the employer failed to deal with the bullying behaviour where it knew of it or the possibility of it happening.

[15] In *FGH v RST*² Judge Corkill dealt with the issue of an employer failing to deal with bullying in the workplace, stating that this may give rise to an unjustified disadvantage grievance. Judge Corkill said:

[201] An employer's failure to address bullying in the workplace may give rise to an unjustifiable disadvantage claim. This can be seen as an aspect of the duty to provide a safe workplace.

[16] The duty to provide a safe workplace referenced by Judge Corkill is an obligation to take all reasonable practical steps to maintain a safe workplace, a workplace that meets health and safety requirements.³

[17] The question of what are reasonable practical steps is informed by foreseeability and the circumstances prevailing at the time. As the Court of Appeal said in *Attorney-General v Gilbert* at [83]:⁴

... The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[18] In terms of a duty to provide a safe workplace an employer need only protect employees against a risk of harm that is foreseeable and what the employer must do to protect employees against that harm is take steps that are proportionate to the known risk, i.e. do what is reasonably practical in the circumstances.

[19] So, for Ms Williams' unjustified action causing disadvantage grievance the question of what the behaviour is that is complained of and did AWF act as alleged is did AWF fail to provide a safe work place for Ms Williams. This breaks down to following questions:

¹ In the same way that sexual or racial harassment by a person other than the employer of the complainant must be notified to the employer before it can be liable for a personal grievance – see ss 117 and 118 of the Employment Relations Act 2000, .

² *FGH v RST* [2018] NZEmpC 60.

³ *FGH* above n 1 at [191] – [199].

⁴ *Attorney-General v Gilbert* [2002] 1 ERNZ 1.

- (a) Was Ms Williams bullied by YHD as alleged;
- (b) If so, was the bullying by YHD a foreseeable risk;
- (c) If so, did AWF take reasonably practicable steps, in the circumstances, to protect Ms Williams against that bullying?

Was Ms Williams bullied by YHD?

[20] As I have already stated Ms Williams was bullied by YHD.

Was the bullying by YHD a foreseeable risk – what happened?

[21] The question of whether this bullying was foreseeable turns on consideration of the events during the period Ms Williams was bullied.

[22] Ms Williams first began working for YHD in December 2018 as a candidate consultant and HR analyst. Ms Williams says she was apprehensive about taking this role as she had seen how YHD had treated the previous employee in that role. To her credit, Ms Williams raised her concerns with YHD and YHD assured her that their working relationship would be fine as it would be based on good communication and Ms Williams had already proved herself to be a better level of worker than the previous employee, plus they already had a solid working relationship.

[23] However, the assurances were of little value when in 2019 billings for the commercial desk that both YHD and Ms Williams worked on were low. It is clear from Ms Williams' evidence that YHD took out her displeasure at the underperformance of their desk on Ms Williams in the way in which she interacted with her.

[24] Ms Williams tolerated the behaviour toward her from YHD for some time but by May 2019 she decided to speak up. Ms Williams first spoke to Helen Duffy the Dunedin Office Manager about her concerns arising out of YHD's behaviour to her and others within the office. Ms Duffy advised Ms Williams to speak to Donna Lynch the General Manager for AWF and Ms Duffy arranged a meeting between Ms Williams and Ms Lynch.

[25] Ms Williams met Ms Lynch on 3 May 2019. I heard evidence from both Ms Williams and Ms Lynch about this meeting and they largely agree about what was discussed. Ms Williams raised her concerns about YHD's behaviour, particularly her interactions with her and other employees and they discussed some examples and why this might be occurring.

[26] However Ms Williams and Ms Lynch disagree on one key aspect; what it was that would happen after the meeting. Ms Williams says she told Ms Lynch that something needed to change with YHD's behaviour and that management might need to have a conversation with her to get their relationship back on track. In contrast Ms Lynch says that Ms Williams told her she did not need any support at that time as she had the skills to deal with YHD and knew YHD well enough to know that the things occurring were simply how YHD is.

[27] I have considered the evidence from both Ms Williams and Ms Lynch and other relevant evidence, including notes taken by Ms Lynch of the meeting and evidence from Ms Williams' father, Bryan Williams, of conversations he had with Ms Williams at the time. I have also considered the circumstances giving rise to the meeting. From this analysis I am satisfied that both witnesses recollection of the discussion of this aspect i.e. what did Ms Williams want AWF to do, are correct:

- (a) From Ms Williams' perspective I found her to be a credible witness whose recollection of events including this meeting appeared accurate and consistent with the overall events. I am also persuaded by Mr Williams' evidence of what he discussed with Ms Williams at the time, which was consistent with Ms Williams account of the meeting. And finally when I think about the context of the meeting, Ms Williams raising concerns about YHF's behaviour to senior managers in AWF it seems more likely that she was doing so because she wanted AWF to intervene – why raise an issue like this simply to put it on the record?
- (b) In contrast Ms Lynch was also a credible witness, a senior manager who was professional in her approach, clear on what her obligations were as a General Manager of AWF and clear on what she said and did in this matter. Ms Lynch also took notes of the meeting (and other meetings with Ms Williams) after the

meeting, representing her recollection of the discussion. And these notes record that Ms Williams did not want AWF to intervene at this stage.

[28] So, I have no basis to prefer one witness over the other and I conclude this is one of those situations where both participants in a conversation came away with a different understanding and recollection of what was said. This is because neither participant clearly articulated who would do what following the meeting. In this case Ms Williams believed she had set out her concerns and AWF was going to intervene by speaking to YHD. Ms Lynch believed she had heard Ms Williams' complaints but Ms Williams was not asking her to intervene rather she just wanted AWF to be aware of the difficulties in the relationship so that if it continued or deteriorated then AWF might have to act.

[29] What is clear from the meeting is that Ms Williams raised concerns she had about how she was being treated by YHD. One other aspect of the meeting which is relevant is that Ms Williams and Ms Lynch both agree that Ms Lynch told Ms Williams that if she had further concerns about how she was treated by YHD then Ms Williams should notify either Ms Lynch or EVC, the Dunedin Business Manager.

[30] This is exactly what Ms Williams says she then did. Then through May 2019 and June 2019 Ms Williams says she discussed continuing concerns she had about how YHD treated her with EVC. Ms Williams says that in addition to ongoing work related conversations she had with EVC in which she mentioned YHD's behaviour there were three meetings on 7 May 2019, 10 June 2019 and 26 June 2019 that she had with EVC in which she specifically raised concerns she had about the ongoing adverse treatment she was receiving from YHD.

[31] AWF disputes this except for the 26 June 2019 meeting; AWF says Ms Williams cannot have discussed her concerns about her treatment by YHD with EVC as EVC never escalated complaints and he would have known to do this, evidenced by the fact that he did escalate Ms Williams' complaint after the 26 June meeting.

[32] I do not accept the AWF position; I am satisfied that Ms Williams did raise concerns she had about YHD's behaviour towards her at the time (in May and June 2019) with EVC. The reasons for this are:

- (a) EVC was not available to give evidence in my investigation, so I have largely uncontested evidence of conversations between EVC and Ms Williams from Ms Williams.
- (b) I have already outlined that I found Ms Williams to be a credible witness, who gave an accurate account of all interactions (except where she got the date wrong for one meeting with EVC, but conceded this mistake when it was raised with her).
- (c) Ms Williams' evidence was also supported by evidence from her father who discussed matters with Ms Williams at the time. Mr Williams' evidence is that Ms Williams told him at the time that she had discussed concerns about YHD with EVC.
- (d) Ms Williams' actions in speaking to EVC about her concerns were exactly what Ms Lynch told her to do in the 3 May 2019 meeting.
- (e) AWF accepts that one of the meetings described by Ms Williams, the meeting on 26 June 2019, did occur.

[33] So, Ms Williams did raise concerns she had about YHD's behaviour with EVC in May and June 2019. In particular in the meeting on 10 May 2019 Ms Williams told EVC that YHD's behaviour was taking a toll on her and making her anxious about being at work. She asked EVC to intervene.

[34] Following this meeting Ms Williams saw EVC meet with YHD on several occasions. Ms Williams does not know if EVC was discussing her concerns with YHD and attempting to resolve the issues. Ms Williams was not invited to any meetings with YHD and EVC and she was not updated on EVC's attempts to intervene, if there were any. What did happen though was there was no change in YHD's behaviour toward Ms Williams and Ms Williams felt more isolated by the meetings between YHD and EVC.

[35] Then in a meeting on 26 June 2019 with EVC, Ms Williams again raised her ongoing concerns about YHD's behaviour toward her and described it as bullying. It appears that this statement caused EVC to escalate matters to Ms Lynch.

[36] On 27 June 2019 Ms Lynch, EVC and Ms Williams had a conference call to discuss YHD and Ms Williams' working relationship with her. In this call Ms Williams described her concerns and again stated that she believed the behaviour she was experiencing from YHD was bullying.

[37] After some discussion about YHD's behaviour and bullying, Ms Lynch advised she would speak to YHD, which she did on 3 July 2019. Ms Lynch then spoke to Ms Williams on 3 July 2019. In this telephone call Ms Lynch and Ms Williams discussed Ms Lynch's call with YHD, in which it appeared that YHD had raised concerns about Ms Williams' work. They also discussed Ms Williams' concerns about the ongoing behaviour of YHD, with Ms Williams advising she was getting less work from YHD and for the past couple of weeks no work. Ms Williams again said she believed YHD's behaviour was bullying and that she felt trampled by YHD. Ms Lynch advised that she would put a plan together to deal with the issues which would involve meetings (both one on ones and a group discussion) and then she would monitor the relationship.

[38] However, before Ms Lynch's plan was developed and actioned, two things occurred on the afternoon of 5 July 2019. First, Ms Williams saw EVC and YHD discussing something in a meeting room in the office and when they left the meeting room YHD stated, loud enough for Ms Williams to hear, that "she has not had any engagement with my desk for over three weeks". EVC then spoke to Ms Williams asking her about her engagement with the commercial desk and what work she had been doing.

[39] Then later in the afternoon on 5 July 2019, Ms Williams discovered an email from YHD to Ms Lynch which had been left on a printer. This email recorded various things about YHD's views of the work, or lack of work, Ms Williams was doing on the commercial desk with her. The email was clearly in response to the 3 July 2019 call between Ms Lynch and YHD where Ms Lynch had raised Ms Williams' concerns with YHD. And it was also clear from the email that YHD blamed Ms Williams for any issues because from YHD's perspective Ms Williams was not engaging properly in work for the commercial desk. Ms Williams described the email, from her perspective as a systematic character assassination of her which detailed that YHD had no interest in managing Ms Williams as YHD believed it would not return any benefit for her.

[40] At this point Ms Williams says she was devastated – and I accept this. Ms Williams had tolerated bullying behaviour from YHD for months, trying to accommodate YHD’s behaviour and hoping she could change it. When she could not do any more and the behaviour continued, she raised it with the appropriate managers expecting them to intervene. Initially that intervention was non-existent and if it did occur with EVC it had no effect. Ms Williams had to reiterate her concerns and label them bullying to make her views very clear. When Ms Lynch then intervened matters were turned on their head with YHD accusing Ms Williams of being the problem because of her work ability and lack of engagement in the commercial desk – a view which EVC seemed at least initially to take up with Ms Williams.

[41] Ms Williams reflected on all of this and on 10 July 2019 she met with Ms Lynch and presented a personal grievance based on bullying from YHD and the failure of AWF to respond to her complaints when raised. She raised with Ms Lynch her view that she could not work with YHD and that she wanted to discuss an exit strategy as she felt that was her only option.

[42] Ms Lynch responded by authorising an independent investigation to take place through the AWF HR team and, with Ms Williams’ agreement, arranging for her to work from home to avoid ongoing interaction with YHD.

Was the bullying by YHD a foreseeable risk – conclusion

[43] Reflecting on my account of what occurred, it is my conclusion that Ms Williams raised issues with YHD’s behaviour toward her from early May 2019 when she first spoke to Ms Duffy and then Ms Lynch. Ms Williams continued to raise concerns about YHD’s behaviour through May and June 2019 with EVC. It is also my conclusion that the issues raised by Ms Williams were raised in such a manner that it would have been foreseeable to AWF that there was a risk of bullying occurring by YHD toward Ms Williams.

Did AWF take reasonably practicable steps, in the circumstances, to protect Ms Williams against YHD's bullying?

[44] The answer to the question of whether AWF took reasonably practical steps to protect Ms Williams from the foreseeable risk of bullying from YHD, is that overall it did not. Specifically:

- (a) When the issues were first raised with Ms Duffy she escalated them appropriately – this was a reasonably practical step, but not enough on its own to protect Ms Williams from bullying.
- (b) Ms Lynch met with Ms Williams but did nothing further in response to the issues raised in the 3 May 2019 meeting, although this was on her understanding that Ms Williams did not want any action taken – this was not a reasonably practical step.
- (c) There is no evidence that EVC responded to the ongoing issues raised by Ms Williams though May and June 2019 except that he escalated matters to Ms Lynch on 26 June 2019 – there were no reasonably practical steps taken by EVC.
- (d) Ms Lynch responded after the 27 June 2019 meeting but her intervention left Ms Williams exposed to potentially further bullying from YHD, which appears to have occurred – this was not a reasonably practical step.
- (e) Ms Lynch responded appropriately to the 10 July 2019 personal grievance, including by removing Ms Williams from any further potential harm – this was a reasonably practical step.

As AWF failed to provide a safe work place for Ms Williams – by not taking reasonably practical steps to protect her - did this cause a disadvantage to her employment or a condition of her employment?

[45] The failure to provide an employee with a safe workplace does cause a disadvantage to that employee's employment.

Were AWF's actions, in failing to provide a safe workplace, justified?

[46] When considering whether AWF's actions in failing to provide a safe workplace were justified, I want to start by recognising the inherent difficulty that AWF, and Ms Lynch in particular, faced. It is not uncommon for employees to complain about a colleague's behaviour and insist they do not want anything done about it and this will be a considerable factor for employers when deciding what steps to take. And this is exactly what Ms Lynch faced on her understanding of the meeting on 3 May 2019. However, in some circumstances it is not okay for an employer to say, the employee complained but they do not want us to do anything so we will not do anything.

[47] In this case I understand AWF to be saying that when the risk of bullying became foreseeable Ms Williams did not want it to do anything or, further down the track, Ms Williams agreed with the steps it did propose and it says the action it took were in line with its own policy on bullying. So therefore AWF is saying, not taking reasonably practical steps to prevent bullying was justified because that is what Ms Williams wanted and it is what the policy provided for.

[48] There are three problems for AWF with this position:

- (a) I have found that Ms Williams complained to EVC about bullying behaviour from YHD and he did not respond appropriately and Ms Williams did not agree with this lack of response.
- (b) I believe the circumstances of the complaints by Ms Williams required AWF to do more initially, notwithstanding what Ms Lynch thought Ms Williams wanted it to do. Victims of bullying are in a vulnerable position and are already suffering from the behaviour they are experiencing – it seems to me that there is a heightened risk that they are unlikely to make decisions about how to resolve the issues that are realistic or appropriate. For example, they may want to avoid any further bullying by having the issues aired with the person they are complaining about or they may have an unrealistic view that the bullying is their issue to resolve or might be fixed by them changing their

own behaviour. Therefore in some cases doing nothing, even at the employee's request, is not justifiable – and I think this was one of those cases.

- (c) The AWF policy on bullying requires AWF to investigate any workplace bullying. Specifically it states “AWF will investigate any reported/identified instances of workplace bullying....” AWF said it did not immediately investigate Ms Williams' complaints because she did not want it to and because Ms Williams had not made a formal complaint. The policy does not make a distinction between formal or informal complaints nor does it say an investigation will only occur if the complaining employee wants that to occur. The AWF policy does not support AWF's position that its decision, to not take any reasonably practical steps to prevent Ms Williams from being bullied, was justified.

Unjustified action causing disadvantage grievance - conclusion

[49] In the circumstances I find:

- (a) AWF failed to take reasonably practical steps to protect Ms Williams from bullying by YHD in circumstances where that bullying was foreseeable.
- (b) AWF's failure to take those steps caused a disadvantage to Ms Williams' employment.
- (c) AWF's failure to take those steps was not justified.

[50] Ms Williams has a personal grievance for unjustified action causing disadvantage.

Unjustified dismissal

[51] Ms Williams grievance for unjustified dismissal arises from the following circumstances:

- (a) On 26 July 2019 Ms Williams was informed that the investigation into her bullying complaint had found that YHD had acted inappropriately toward her,

but she had not been disadvantaged by the way in which AWF managed the situation.

- (b) AWF also advised at that point that its view was that it could work with both YHD and Ms Williams as originally planned so that Ms Williams could continue to work in her role.
- (c) Ms Williams then discussed her return to work with AWF, with the assistance of her advocate. In these discussions it became clear that AWF expected Ms Williams to return to working in the office in the same role, being managed by YHD.
- (d) When pushed on how Ms Williams returning to work for YHD would work, AWF said YHD had been disciplined, it would communicate with YHD about its expectations of her, they hoped YHD and Ms Williams could “draw a line in the sand” and there was a new Business Manager in Dunedin.
- (e) AWF then produced a return to work plan which involved a series of meetings over the first week and then ongoing support from the new Business Manager.
- (f) Ms Williams expressed concern with the return to work plan, raising various concerns including the fundamental concern that she could not work with YHD. Ms Williams’ advocate also made the observation that the return to work plan was focussed on AWF’s needs and did not address the impact of YHD’s behaviour on Ms Williams and what that meant for her. The advocate then suggested the parties attend mediation to see if the impasse could be resolved.
- (g) AWF rejected the offer to mediate, suggesting if Ms Williams lodged a statement of problem based on the grievance of unjustified disadvantage she had raised, then it would attend mediation – this misses the point as Ms Williams was clearly asking to mediate the issues arising out of the return to work (and perhaps the ongoing issue of the grievance).

- (h) AWF's answer to Ms Williams' concerns about the return to work plan was to advise her that she was being placed on leave without pay and that she should return all AWF property to the office. This was a clear statement for Ms Williams that the only option was to return to the office and work with YHD or she would have to stay at home and not be paid, and this was not negotiable not even in a mediation.
- (i) Ms Williams treated herself as being dismissed by AWF's actions of putting her on leave without pay and raised a grievance for unjustified dismissal.

[52] The first point about Ms Williams unjustified dismissal grievance is that there was no dismissal in the normal sense. A dismissal requires an action by the employer amounting to a sending away.⁵ That was not the case here. AWF's action of concluding negotiations was not a dismissal.

[53] However, by raising a personal grievance for unjustified dismissal based on AWF's actions I believe Ms Williams was actually resigning in response to what she saw as a breach of duty by AWF and this means the grievance raised becomes one of constructive dismissal.

[54] In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*⁶ the Court of Appeal set out three categories in which a resignation can amount to a dismissal; a constructive dismissal. One of the categories, which is relevant here, is where there is a breach of duty by the employer that leads an employee to resign.

[55] The Court of Appeal has also discussed this category of constructive dismissal in other cases⁷ and, based on that case law, the issues to consider for Ms Williams' claim for unjustified dismissal are:

- (a) Was there a breach of duty by AWF as alleged;

⁵ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

⁶ In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374-375.

⁷ *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

(b) Was that breach of duty sufficiently serious - repudiatory or dismissive - that it was reasonably foreseeable that there was a substantial risk that Ms Williams might resign in response to that; and

(c) Did Ms Williams resign in response to that breach of duty?

[56] The breach of duty Ms Williams relies on is not the failure to provide a safe work environment i.e. she did not resign because she had been bullied. Ms Williams resigned because AWF did not provide her with an acceptable return to work plan and then it sought to impose that on her by giving her an ultimatum; return to work as proposed or stay at home on leave without pay.

[57] AWF says the return to work plan was acceptable and workable and there was no other option as there was no other role for Ms Williams than the role working on the commercial desk with YHD.

[58] A fair and reasonable employer could not conclude that the proposed return to work plan was acceptable because:

- (a) The investigation report draws the conclusion that the relationship between YHD and Ms Williams was irreparable, yet AWF believed both parties should just draw a line in the sand and work together.
- (b) Ms Lynch's interactions with YHD showed that YHD was not willing to change, she was probably unable to change and that she blamed Ms Williams for the break down in the relationship. It is difficult to see how a few one on one meetings, one group discussion and some support for Ms Williams from another manager would change YHD's opinion or behaviour.
- (c) By 10 July 2019 things had got to such a point for Ms Williams that she raised a grievance and told AWF that she thought she had to leave. So AWF knew that having been bullied for months and with the prospect of continuing to work for YHD in a situation where AWF had not done enough to prevent the bullying behaviour, Ms Williams had wanted to leave. Now, all that had changed was AWF had recognised Ms Williams had been bullied; yet it

insisted it had done nothing wrong in responding to Ms Williams' complaints despite the bullying continuing.

- (d) AWF was not able to give much if anything by way of reassurance for Ms Williams that she would not be bullied again other than saying a line would be drawn in the sand and there would be more support for both of them.

[59] Looking forward there was nothing in the investigation report, the return to work plan, or AWF's response to dealing with Ms Williams' concerns about that plan that gave any assurance that AWF could manage the relationship to protect Ms Williams from the bullying by YHD occurring again. On this basis I also fail to see how a fair and reasonable employer could conclude that effectively imposing that on an employee was acceptable.

[60] Ms Williams' advocate articulates this breach of duty as a breach of the employer's duty not to conduct themselves in a manner likely to destroy or seriously damage the relationship of trust and confidence between and employer and employee.⁸

[61] I accept that submission and agree that AWF breached it by trying to impose the return to work plan on Ms Williams.

[62] I also accept that it was foreseeable that Ms Williams might resign in the circumstances and that she did resign because of this breach.

[63] In conclusion AWF unjustifiably dismissed Ms Williams.

Remedies

[64] As Ms Williams has been successful with her grievances I may award any of the remedies provided for under s 123 of the Act; Ms Williams seeks compensation and reimbursement.

⁸ *Rodkiss v Carter Holt Harvey* [2015] NZEmpC 34.

Compensation

[65] Compensation is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and is made pursuant to s 123(1)(c)(i) of the Act. Ms Williams seeks \$20,000.00 in compensation.

[66] As I have set out before when dealing with compensation, I view my task in this situation as being to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of AWF's unjustified actions and the dismissal. Recent decisions of the Employment Court provide guidance on this exercise of quantification.⁹

[67] From these decision I conclude that I must consider the effects of the dismissal and the unjustified behaviour on Ms Williams. Then I must identify the harm caused to Ms Williams and the loss she suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed. Then I must consider the quantum to be awarded as compensation.¹⁰

[68] Ms Williams' evidence was clear on the impact of YHD's bullying on her and the impact or effect of AWF's unjustified actions (in failing to provide her a safe workplace), both in her evidence to me and in descriptions of how she felt at the time when she spoke of YHD's behaviour to EVC and Ms Lynch. Mr Williams also described what he saw happening with Ms Williams during this time. The evidence shows

- (a) Ms Williams became unhappy in her work and unhappy about how she was treated as well as confused about what was happening and concerned about it recurring.
- (b) This then developed into feeling isolated and underappreciated. It also included feeling embarrassed and undermined.
- (c) Ms Williams was hurt by the treatment, felt defeated by it, and was reduced to tears at times. She felt "trampled" by YHD and saw working with YHD as a stressor.

⁹ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

¹⁰ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

(d) Ms Williams' confidence and self-esteem were eroded.

[69] Ms Williams describes the effects of her dismissal as furthering her feelings of isolation, further loss of self-confidence creating self-doubt and losing professional confidence. Ms Williams says she questioned others' intentions and felt judged by them. Overall she described enduring a physical and mental toll.

[70] Reflecting on this I assess the level of harm and loss described to be around the middle of the spectrum, and consider that the compensation should reflect this. Therefore I have no difficulty in awarding Ms Williams the \$20,000.00 she seeks.

Reimbursement

[71] Ms Williams also seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal. I am satisfied that Ms Williams is entitled to be reimbursed for lost remuneration. Therefore, I must calculate and award the appropriate sum for reimbursement pursuant to s 123(1)(b) and s 128 of the Act.

[72] I have considered the requirements of ss 123 and 128, including whether I should exercise my discretion to award more than three months ordinary time remuneration and I conclude that three months ordinary time remuneration is the appropriate award.

Contribution

[73] As I have awarded remedies to Ms Williams, I must now consider whether she contributed to the situation that gave rise to her dismissal.¹¹ This assessment requires me to determine if Ms Williams behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievances.¹²

[74] I have reflected on what occurred to Ms Williams and how she acted throughout the events. I am satisfied that Ms Williams did not act in a blameworthy or culpable manner.

[75] So, in conclusion there was no contributory behaviour from Ms Williams that warrants a reduction in remedies.

¹¹ Section 124 of the Act.

¹² *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

Conclusion

[76] AWF unjustifiably dismissed Ms Williams. In settlement of this grievance AWF must pay Ms Williams:

- (a) \$20,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) Three months ordinary time remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000.

Costs

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

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

Peter van Keulen
Member of the Employment Relations Authority