Note: This determination contains an order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2024] NZERA 293
3182739

	BETWEEN	XLL Applicant
	AND	EGA Respondent
Member of Authority:	Rowan Anderson	
Representatives:	Steph Dyhrberg and Paddy Miller, counsel for the Applicant Joshua Kimpton and Bonnie Simmonds, counsel for the Respondent	
Investigation Meeting:	5 and 6 September 2023 in Wellington	
Submissions received:	15 and 27 September 2023 from the Applicant 22 September 2023 from the Respondent	
Determination:	17 May 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] XLL was employed by EGA as a Technical Support Specialist based in Wellington, having commenced employment in May 2020. XLL claims that they were unjustifiably constructively dismissed and seeks compensation for lost wages and humiliation, loss of dignity and injury to feelings. XLL also seeks damages in relation to the legal expenses they have incurred.

[2] XLL communicated their resignation, which they recorded as being "forced", by text message on 15 December 2020. In that text message, XLL cited a breach of

good faith. That was said to have arisen from phone conversation earlier that same day in which XLL alleges there was a failure by a team leader (Team Leader A) to provide XLL an assurance that a request XLL made for stress leave would not be communicated to two particular staff members. The text message also stated that EGA had broken XLL's trust and referred to XLL as being emotionally stressed and there having been "other awful experiences along the way".

[3] During XLL's employment, XLL became aware of allegations of sexual harassment relating to three different employees. XLL complained to EGA about its handling of sexual harassment allegations.

[4] XLL contends that they were constructively dismissed arising from four alleged breaches of duty by EGA. Those breaches are said to relate to XLL's complaints about workplace health and safety concerns relating to EGA's handling of sexual harassment issues, EGA's investigation process relating to the complaints, EGA's actions in seeking to have XLL work from the office rather than from home, and an alleged failure to provide the assurance sought from Team Leader A on 15 December 2020. It is claimed by XLL that the actions on 15 December 2020 were the "final straw" leading to their forced resignation.

[5] EGA denies the claims made and say that XLL was not constructively dismissed from their employment and that XLL is not entitled to remedies.

Issues

[6] The issues identified for investigation and determination are:

(a) Should any permanent non-publication orders be made?

(b) Was XLL unjustifiably (constructively) dismissed from their employment?

(c) If EGA's actions were not justified what remedies should be awarded, considering:

  (i) Lost wages;

  (ii) Compensation under section 123(1)(c)(i) of the Act.

(d) Is XLL entitled to an order for special damages relating to their legal fees?

(e) Should either party contribute to the costs of representation of the other party?

The Authority's Investigation

[7] Written witness statements were lodged in accordance with directions issued. Statements were received from XLL, XLL's partner, and Employee A (a former employee of EGA alleged to have been subjected to sexual harassment) in support of XLL's claims. A report was also provided by Anne Holleron, Psychotherapist, on a basis agreed between the parties including various redactions.

[8] XLL's Team Leader (Team Leader A), two Senior Team Leaders (Senior Team Leader A and Senior Team Leader B), and EGA's New Zealand Country Leader (Manager A), provided written witness statement in support of EGA.

[9] On 3 August 2023, I issued a Minute declining an application by EGA to strike out or exclude evidence relating to the sexual harassment allegations. In doing so, I declined to exclude proposed evidence contained in the written statement of Employee A. I also made interim non-publication orders.

[10] An investigation meeting was held on 5 and 6 September 2023 in Wellington, with written submissions being lodged afterwards in accordance with a timetable agreed between the parties. All witnesses, except for Ms Holleron, attended the investigation meeting and answered questions under oath or affirmation.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. The Chief of the Authority has decided that exceptional circumstances exist such as to allow this determination to be issued outside of the three month timeframe required by s 174C(3) of the Act.

Non-publication

[12] XLL submitted that non-publication orders should not be made in relation to either their name or that of EGA. XLL submitted that non-publication orders should be made for all other persons in relation to which interim non-publication orders were made.

[13] XLL contends that there is no reasonable basis to suggest, as EGA has, that the identification of EGA might inadvertently lead to identification of those persons alleged

to have been subjected to sexual harassment or of the person against whom allegations were made. Counsel for XLL submitted that EGA is a large corporation with hundreds of employees across New Zealand, and that the relevant events occurred approximately three years ago with most of those involved no longer working at EGA.

[14] EGA submitted that permanent non-publication orders should be made in relation to those persons alleged to have been subjected to sexual harassment, the person against whom allegations were made, the parties', and any current or former employee of EGA. It also submitted that a permanent non-publication order should be made as to the content of any pleadings, statements, and documents to the extent they deal with the sexual harassment allegations.

[15] EGA submitted that it is in the interests of justice for the non-publication orders to be made, including because XLL's claim is not one that they were subjected to sexual harassment and therefore those matters are of no substantive relevance to XLL's claims. It contends that making the orders would not adversely affect XLL's case or access to justice.

[16] EGA also submitted that it was not in the public interest for relevant names and identifying details to be disclosed. It submitted that the individuals concerned were not parties to the proceedings, their names were not material, and that the allegations are of a sensitive nature and publication is likely to cause reputational damage to the individual against which the allegations were made.

[17] EGA submitted that its name and identity should not be subject to publication, and those of other present and former employees, should not be published because there is a risk that that would inadvertently identify those persons alleged to have been subjected to sexual harassment. It also submitted that publication of its name would disproportionately harm EGA's brand and commercial reputation.

[18] I am satisfied that there are good reasons to depart from the principle of open justice having regard to the circumstances of this matter. Such departure should be limited to that necessary to protect the interests of certain individual persons. However, in this particular matter I am satisfied that orders of a broad nature are appropriate to protect the interests of some individuals that might otherwise be identifiable.

[19] I do not consider that non-publication orders are warranted as to the identity of EGA based on potential reputational harm as submitted on its behalf. However, the interests of seeking to prevent the publication of details that might lead to the identification of the individuals involved or subject to the sexual harassment allegations is a more compelling submission. I consider that the making of orders on that basis necessary to protect the identity of the relevant individuals.

[20] I am also satisfied that it is necessary and appropriate that the identities of all current or former employees of EGA be subject to non-publication orders. I also consider it appropriate that a non-publication order be made in respect of the identity of the applicant. I do so for the same reasons, including the protection of the identity of those alleged to have been subject to sexual harassment.

[21] A non-publication order is to be made as to the subject matter of the sexual harassment allegations. They are not, as such, central to the issues requiring investigation and determination by the Authority. An order is also made as to access to the Authority's file. I consider those orders, in conjunction with the orders made as to the identity of individuals persons, are appropriate in the circumstances.

[22] I am satisfied that there is a risk of identification of the persons alleged to have been involved in, or that were allegedly subjected to, sexual harassment that would arise from any more restricted orders. Such identification has the real potential in my view of causing significant distress and damage to those individuals.

[23] I order, pursuant to clause 10 of schedule 2 of the Act, a prohibition on the publication of:

(a) the names, identify, and any identifying details of any person alleged to have been subject to sexual harassment (including Employee A, Employee B, Employee C) and the person against who those allegations were made (Employee D);
(b) the names, identity, and any identifying details of all witnesses and employees (current or former) of EGA; and
(c) all of the evidence (including witness statements, evidence given orally, and any documents) and pleadings filed to the extent that they concern sexual harassment allegations, other than to the extent they are recorded in this determination.

[24] The Authority's file is not to be inspected by any person without leave of an Authority Member.

Additional background

[25] In July 2020 XLL said they were told by Employee A that Employee A had been sexually harassed by Employee D and that Employee A was hesitant to raise their concerns with EGA.

[26] XLL said they were then told by Employee B in October 2020 that Employee B was being sexually harassed by Employee D, that Employee B had told XLL about alleged conduct by Employee D towards Employee B, that Employee B had tried moving to another team, and that Employee B had, when they first commenced working in the office, been warned to be careful of Employee D.

[27] On 19 October 2020, XLL attended EGA's office and requested a meeting. A meeting was convened at which XLL informed Senior Team Leader A and the Senior Operations Manager that two individuals had been sexually harassed by Employee D. XLL named at least one of the relevant individuals at that meeting.

[28] XLL said the main purpose of the meeting on 19 October 2020 was to raise the concerns they had relating to Employee A and Employee B. Senior Team Leader A took notes during the meeting, said the meeting lasted approximately 30 minutes, and said that XLL was visibly stressed and anxious.

[29] The meeting started with discussion about shift patterns, with XLL expressing a lack of confidence regarding the shift patterns. XLL explained that they were unhappy with how Employee D had treated them in relation the shift pattern issue. XLL also explained at the 19 October meeting that the situation had started to take a significant toll and XLL asked for, and was granted, a week of leave.

[30] Approximately three or four days after the 19 October meeting, XLL says that Employee B told them that they had asked to take stress leave and that the Senior Operations Manager had responded by asking Employee B whether they wanted to discuss the allegations about Employee D. Employee B told XLL that they felt they had to say yes, that the Senior Operations Manager had suggested that their concerns did

not amount to sexual harassment, and that Employee B's request for leave was initially declined.

[31] XLL claims that the process started to cause them significant stress and that they emailed the Senior Operations Manager on 23 October 2020 stating they remained unwell and would return to work on 21 October 2023.

[32] On 23 October 2020, Senior Team Leader A sent an email to the Senior Operations Manager noting that they had received a text from XLL requesting an additional leave and that XLL would return to work on 31 October 2020.

[33] XLL evidence is that they were later told by a colleague that Employee C had been sexually harassed and that they then talked to Employee C on 27 October 2020. XLL said that Employee C told them that they had raised an issue with their team leader and that they were told to "just stay away" from Employee D, that other staff had responded saying "that's just [Employee D] for ya", and that they hadn't raised the issue with human resources (HR) due to the dismissive attitude about Employee D's behaviour.

[34] On 27 October 2020, Senior Team Leader A sent an email to the Senior Operations Manager noting that a request had been made by Employee B for stress leave, noting that it followed the request by XLL and that it was the first they had heard about Employee B feeling stressed at work, and suggesting that it might be related to XLL and that XLL might be having an influence on others.

[35] On 28 October 2020, XLL emailed an employee from the People Solutions Team (PSBP A) stating that they wanted to inform them of sexual harassment allegations and seeking information about the process to follow.

[36] On 29 October 2020, XLL sent a text message to Senior Team Leader A asking for a copy of the notes from the meeting that was held on 19 October 2020. Senior Team Leader A provided the notes to XLL by email on 30 October 2023.

[37] On 2 November 2020, Team Leader A took over the team in which XLL worked. XLL attended a meeting that same day as one of Employee B's support persons.

[38] On 9 November 2020, XLL emailed PSBP A asking for the email address for the CEO. XLL then emailed the CEO, the same day, asking that various matters be investigated. Those matters included the alleged actions by the Senior Operations Manager and PSBP A which were in effect said to be show that the complaints of sexual harassment had not been dealt with appropriately by them.

[39] XLL raised concerns with the CEO by email on 9 November 2020. The issues raised included:

(a) an assertion that EGA was required to engage outside legal counsel trained in dealing with sexual harassment;

(b) an allegation that senior management had interfered with the process;

(c) a request that the Senior Operations Manager be excluded from the process on the basis that they had downplayed sexual harassment claims made by Employee B in a closed room without anyone else present and had denied Employee B fundamental rights including that Employee B was entitled to support;

(d) an allegations that PSBP A had not dealt with the issues raised appropriately, including by saying it was "unfair" and the relevant individuals were "adult woman" when XLL pointed out that they were "teenagers" and by declining to answer a question from XLL as to whether the Senior Operations Manager's conduct was inappropriate;

(e) asking that a proper process, including an impartial investigation, be conducted to ensure the health and safety of the claimants.

(f) raising concerns about there being "no visible representation of women" in the workplace.

(g) asking why the complainants were "brushed off", why the Senior Operations Manager interfered, and why HR did not immediately recognise the need for independent legal counsel; and

(h) asking for an investigation into the sexual harassment allegations.

[40] The CEO responded the same day asking for clarification about some of the matters raised. Following a further response from XLL, the CEO advised that Manager A would investigate the matters and that a global HR representative had been made aware and would work through what had happened with the local site.

[41] Manager A emailed XLL on 11 November 2020 about the investigation process relating to XLL's complaints. XLL then attended an interview over the phone on 12 November 2020.

[42] XLL said that they received a call from Team Leader A in early December 2020 during which they were asked about working from the office. XLL had been working from home for a period prior to that.

[43] XLL attended a further meeting on 3 December 2020 to discuss Manager A's investigation findings and report relating to the concerns raised by XLL. At that meeting, there was discussion between Manager A and XLL about recommendations and action points contained in the report. There was also discussion, and agreement, that XLL would be involved in reviewing draft communications intended for employees relating to sexual harassment.

[44] On 8 December 2020, XLL sent a text message to Senior Team Leader A saying "Sorry [Senior Team Leader A], I'll be back tomorrow, just need some time, it's been a draining process."

[45] Team Leader A sent an email on 10 December 2020 to "key Wellington [EGA] staff". That email noted that Team Leader A was starting the process of bring XLL "back on site to assist with managing attendance and performance" and asked about any required notice period that might be applicable to that process. XLL only found out about the email after a Privacy Act request was made.

[46] XLL and Manager A bumped into each other in the Wellington office on 4 December 2020 where they agreed that they would have a meeting over the phone the following week.

[47] XLL met with Manager A on 10 December 2020 by telephone. XLL was told by Manager A that work had commenced with the communications team to draft staff communications and that XLL would be provided the drafts for review. XLL was offered EAP and there was discussion during which Manager A thanked XLL for being involved and XLL acknowledged that by saying "Okay, not a problem. Alright, well thanks for your time, I do appreciate it" at the end of the call.

[48] On 15 December 2020, there were two phone calls between XLL and Team Leader A. The Authority was provided with partial transcripts and audio recordings on those calls that were made by XLL. The first call centred around the request by XLL for stress leave and an assurance that XLL sought that Senior Team Leader B and Analyst A (two employees that XLL says were friends of Employee D) not be told of the leave request.

[49] During the first call, XLL asked Team Leader A for stress leave. XLL communicated that there were confidential reasons for the request that could not be shared with Team Leader A. XLL was insistent, throughout the call, that Team Leader A should not go though Senior Team Leader B or Analyst A in relation to the request for stress leave. Team Leader A did not commit to that and said that they would find out some more information and come back to XLL.

[50] Prior to the second phone call on 15 December 2020, XLL sent a text message to Senior Team Leader A as follows:

> I'm resigning
>
> I won't work for a company that doesn't respect its employees.
>
> I specifically asked [Team Leader A] not to refer me to [Senior Team Leader B and Analyst A] as they are friends of [Employee D].
>
> I told [Team Leader A] it was confidential, [Team Leader A] has dismissed my concerns.
>
> [EGA] has broken my trust several times over.
>
> I'm so emotionally stressed from this experience and now I am forced to resign for my own health, as well as the clear breach of good faith, among other awful experiences along the way.
>
> Regards
>
> [XLL]

[51] During the second phone call, Team Leader A explained that XLL was able to use sick leave and noted that an absence of three or more days required a doctor's note. XLL, when asked what XLL wanted to do, said the following:

> Well, if [the Senior Operations Manager] is not going to give me any time off, right, because of high call volumes, right? [The Senior Operations Manager is] aware of what's going on, so what I'm going to do is I'm resigning, right – because you've made it – [EGA] has made it – untenable for me to work there. Okay, and I've already sent my resignation to [Senior Team Leader A].

[52] XLL went on to confirm that they had already resigned, following which Team Leader A requested that XLL send email confirmation of that.

Was XLL unjustifiably (constructively) dismissed from their employment?

Constructive dismissal principles

[53] The burden is on XLL to establish that the resignation was actually a dismissal.

[54] In *Auckland Electric Power Board v Auckland Provincial District Local Authority's Officers IUOW (Inc)*[1] the Court of Appeal addressed the approach to be taken in breach of duty constructive dismissal cases:

> In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach….

[55] Subsection 4(1A)(b) of the Employment Relations Act 2000 (the Act) provides that the duty of good faith:

> Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative…

[56] In *Auckland Electric Power Board*[2] the Court of Appeal found there was an implied term that an employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

[57] A helpful summary of the principles relating to "final straw" cases was provided in *Spotless Facility Services NZ Ltd v Mackay:*[3]

> (1) The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.

---

[1] *Auckland Shop Employees Union v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415 (CA) ("*Auckland Electric Power Board*") at 419.
[2] *Auckland Electric Power Board* at 419
[3] *Spotless Facility Services NZ Ltd v Mackay* [2016] NZEmpC 153 at [72]; *Pivott v Southern Adult Literacy Inc* [2013] NZEmpC 236 ("*Spotless"*), [2013] ERNZ 377 adopted from *Triggs v GAB Robins (UK) Ltd* [2007] 3 All ER 590 (EAT).

(2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.
(3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.
(4) An entirely innocuous act on the part of the employer cannot be the final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's acts as destructive of the necessary trust and confidence.

[58] It is not necessary that the "last straw" itself be repudiatory.[4] The following statement in the Employment Court's judgment in *O'Boyle v McCue*[5] helpfully summarised, after referring to the principles relevant to "final straw" cases as above, the approach to be taken:[6]

> **[185]** For present purposes, these principles show that last straw events may not in of themselves provide a justification for an employee to resign constructively; rather, such events need to be assessed carefully in the context in which they arose, with a view to determining whether or not a series of events has ultimately resulted in a breach of duty.

Submissions

[59] XLL claims that they were unjustifiably constructively dismissed on 15 December 2020. XLL contends that they resigned following the first phone call with Team Leader A during which Team Leader A failed to provide XLL the confidentiality assurance sought that Team Leader A would not discuss a request for stress leave with Analyst A and Senior Team Leader A. XLL said that Team Leader A's "…dismissive attitude and failure to give me assurance was the final straw", that XLL felt like they had no choice but to resign, and that there were a serious of events and incidents that lead to their being unjustifiably constructively dismissed.

[60] XLL contends that EGA breached its duty of good faith and that its continued breaches resulted in a loss of trust and confidence in EGA leaving XLL with no choice but to resign on 15 December 2020. XLL contends that constructive dismissal occurred on the basis that EGA breached duties leading to their resignation.[7]

---

[4] *Spotless* at [72].
[5] (2020) 17 NZELR 681.
[6] (2020) 17 NZELR 681 at [185].
[7] The third of the non-exhaustive categories of constructive dismissal as outlined in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

[61] XLL relies on four alleged breaches of duty in establishing that they were constructively dismissed. Drawing on XLL's submissions, I summarise those as follows:

(a) a consistently dismissive and minimising attitude by EGA when XLL raised workplace health and safety concerns;
(b) the poor investigation process conducted by EGA in relation to XLL's allegations;
(c) an unreasonable course of conduct in EGA requiring XLL to work from the office; and
(d) Team Leader A's dismissive attitude and failure to provide the assurance sought by XLL on 15 December 2020.

[62] XLL submitted that the first allegation above amounted to a breach of the duty of good faith in that EGA failed to be "active and constructive in maintaining a productive employment relationship" and "responsive and communicative" and that EGA failed to address XLL's health and safety concerns. The nature of the duty alleged to have been breached in relation to EGA's investigation was not specifically stated in submissions as being other than by reference to EGA's good faith obligations.

[63] XLL submitted, in relation to the alleged unreasonable course of conduct in directing XLL to work in the office, that EGA's actions were unreasonable. The fourth of the alleged breaches was said in XLL's submissions to be the final straw that destroyed XLL's trust. It was submitted that the action was not reasonable and justifiable, and that it constituted a breach of good faith.

[64] Counsel for XLL also referred to the implied term recognised in *Auckland Electric Power Board* that an employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

[65] EGA denies the claim that XLL was constructively dismissed and submitted that none of the categories of constructive dismissal as set out in *Woolworths* apply to the present circumstances. It submitted that it acted in good faith and as a fair and reasonable employer in response to the complaints raised by XLL and that it otherwise did not breach any duty owed to XLL that had the effect of repudiating XLL's employment agreement.

[66] EGA submitted that no weight should be given to the evidence of alleged sexual harassment. It contends that that evidence is wholly irrelevant to XLL's claims, that XLL was not a party to the complaints, that XLL was not a witness to the complaints and that XLL's involvement in the investigation was limited to acting as a support person, and that XLL was not aware of the full investigation processes followed nor the outcome.

Analysis and discussion

Allegations that EGA were dismissive and minimised XLL's health and safety concerns

[67] XLL relied on a number of events as establishing that EGA's actions were in a breach of a duty on the basis that EGA was consistently dismissive and minimised concerns XLL raised as to health and safety in the workplace. Primarily, the relevant actions were said to arise from:

(a) PSBP A providing indirect and evasive responses to XLL's queries about EGA's processes for handling sexual harassment complaints;
(b) PSBP A appearing to downplay Employee B's sexual harassment allegations;
(c) Manager A being dismissive when questioned by XLL about an alleged inconsistency relating to an interview with another team leader as to allegations that they had previously warned others to stay away from Employee D;
(d) Manager A not interviewing Employee B; and
(e) the actions of the Senior Operations Manager in dealing with Employee B and how that was dealt with in Manager A's report.

[68] Submissions for XLL also referred to PSBP A as having suggested that it was fine for Employee D to be contacting Employee B outside of work, PSBP A refusing to accept that the complainants were teenagers, Manager A saying that an inconsistency between Employee C's account and that of the team leader said to have warned Employee C didn't matter, Manager A not amending their report despite seemingly agreeing to issues raised by XLL, and Manager A stating that the complainants would not be provided the report.

[69] XLL emailed PSBP A on 28 October 2020 stating that they wanted to inform PSBP A of sexual harassment allegations and seeking information about the process to

follow. PSBP A responded explaining in general terms the process to be followed, including that it would usually involve complaints being provided in writing, the clarification of any matters by the People Solutions Team, interviews, and the completion of an investigation and a report.

[70] In the email exchange that followed, XLL asked who would investigate such a complaint, and how complaints would be protected in that process. PSBP A responded stating that it would be determined once a concern was raised and that the process would be confidential. XLL responded asking about representation, who the investigator would be, any interview protocols, whether staff were trained in dealing with sexual harassment complaints, about resources such as posters in the workplace, and a hypothetical question about management misconduct in dealing with a sexual harassment claim. PSBP A responded to the questions about representation, said that "Confidentially Speaking" could be contacted if there were any concerns with the process or the way things were handled. PSBP A confirmed that People Solutions were equipped to deal with such complaints.

[71] Having considered the relevant correspondence and evidence, I find that PSBP A was not evasive or indirect in their responses. PSBP A provided responses to XLL's questions. XLL may not have liked the responses and XLL may have considered that further detail should have been provided, but PSBP A responded in a reasonable manner.

[72] The above finding in my view is confirmed by PSBP A's later response when XLL emailed on 4 November asking for a copy of EGA's sexual harassment policy. PSBP A responded approximately two minutes later providing a copy of the policy.

[73] XLL also claims that PSBP A was dismissive and repeatedly refused to provide the email address for the CEO when requested. PSBP A responded to XLL's email by explaining that if it related to a sexual harassment complaint that Manager A or the People Solutions Director could be contacted. XLL said they thought it important that the CEO was made aware of serious misconduct by senior employees, that the matter went beyond sexual harassment, and felt that their concerns would be "brushed away" by the Senior Operations Manager. PSBP A then provided the email address for the CEO approximately 11 minutes later. I do not consider PSBP A's or EGA's actions to have been dismissive, nor do I find that they were unreasonable.

[74] On 2 November 2020, XLL attended a meeting as one of Employee B's support persons at which XLL said that there were attempts by PSBP A to downplay the allegations, including by saying that it was fine for Employee D to be contacting Employee B outside of work. XLL was also critical of Manager A's investigation and PSBP A's response to Manager A in relation to a question about why they couldn't answer a question XLL had asked PSBP A about whether it was "ok for a Senior OM to take a young staff member into a room to discuss a sexual harassment allegation".

[75] The investigation by Manager A included an interview with PSBP A in which PSBP A explained their position on the "teenager" issue and why they couldn't answer a question from XLL about whether the Senior Operations Manager had acted inappropriately. The notes reflect that PSBP A accepted that the individuals concerned were teenagers but explained that PSBP A took issue with XLL describing the complainants as "young girls" rather than, for example, "young women". PSBP A also explained that they thought that XLL had wanted them to agree that the Senior Operations Manager had acted inappropriately and that PSBP A was not prepared to answer that question without having the relevant background information.

[76] XLL was critical of the response given by PSBP A and said that the reasons for not answering the question were not explained to XLL at the time. In relation to suggestions PSBP A had minimised Employee B's concerns, PSBP A said that they were seeking clarification during the meeting, that they were trying to understand the situation, and that they had confirmed at the meeting that Employee B should not have been made to feel the way they were. The answers given also explained, in effect, that with some of the issues raised by Employee A and B, that those employees agreed that the conduct was "not great" but was not "sexual harassment" when looking at the definition.

[77] I do not consider there any reasonable basis on which a finding could be made that PSBP A's or EGA's actions were unreasonably dismissive of the concerns raised by XLL. My finding would not be any different if I accepted XLL's evidence that the disagreement centred around the term "teenagers" as opposed to "young girls". Further, I find that PSBP A's actions were consistent with EGA being communicative and responsive to the concerns raised. XLL was not ignored, and the complaints were

escalated and investigated. Further, I do not consider it was unreasonable for Manager A to rely on the explanations provided by PSBP A.

[78] XLL was also critical of numerous aspects of the investigation reports interview notes so far as they related to Manager A questioning of PSBP A. XLL's evidence was clear that XLL was not provided the records of interviews with the Senior Operations Manager and PSBP A until reviewing Manager A's statement. XLL's commentary on those documents is not of any significant relevance to the issues to be determined by the Authority given XLL was not aware of their contents at the time. In any event, I do not consider they support the proposition that EGA acted in breach of its good faith obligations.

[79] XLL referred to an email sent by PSBP A on 3 November 2020. XLL took exception to the email sent by PSBP A and claimed that, because Manager A was copied into the email, that XLL said they were concerned that Manager A was given the impression XLL was a troublemaker, and given that Manager A was later appointed to investigate XLL's complaint.

[80] In that email, PSBP A expressed some concern about XLL's approach in relation to the accusations being made. This included that XLL had used the terms "grooming young girls" and "serial predator", XLL having stated that the Senior Operations Manager had covered up claims of sexual harassment and should be dismissed, and that XLL had been asked for, but had not provided, details of the sexual harassment claims. The email also noted that XLL had not named the other employees said to have been subject to the alleged sexual harassment. The email sought guidance on how to deal with the situation, including XLL's behaviour.

[81] Those statements attributed to XLL were being made before any investigation was conducted and without XLL having all of the relevant information.

[82] XLL also submitted that being told by Manager A not to talk about Employee D as a "serial predator" because it was unsubstantiated and defamatory shows that EGA was "preoccupied with protecting [Employee D]". Manager A accepted that they had asked XLL to not say things about Employee D that might be defamatory. The transcript shows Manager A suggested such actions might expose a person to allegations of bullying or otherwise result in rumours in the workplace.

[83] PSBP A's concerns were not unreasonable having regard to the statements that had been made and in the context of seeking advice on dealing with the relevant issues. I find Manager A's actions were also entirely reasonable. I do not accept that Manager A's instruction was in any way unreasonable. Neither the content of the email or the later instruction evidences a dismissive or minimising approach as having been taken by EGA. I address the issue of the alleged impact of the email on Manager A further below.

[84] XLL said that Manager A appeared dismissive about XLL's concerns with how the complaints were treated and said that they raised concerns that Manager A did not interview Employee B about their meeting with the Senior Operations Manager. Manager A said that they decided not to interview Employee B because they considered it unnecessary to involve Employee B and put them through another investigation process. Manager A said they acknowledged to XLL that they could have asked Employee B whether they wanted to be interviewed. Manager A maintained that they did not consider it was necessary in determining whether correct process had been followed.

[85] The Senior Operations Manager was interviewed by Manager A. The Senior Operations Manager responded to various questions as to his meeting with Employee B, including noting that Employee B had initiated the meeting and that he had asked Employee B whether they wanted the door open or closed. The notes from the interview reflect that the Senior Operations Manager answered the allegation, that being that he had minimised Employee B's concerns, by explaining that he was seeking to empower Employee B to say "no" if asked to do anything they were not comfortable with. The notes also reflect that the Senior Operations Manager said that he disagreed with XLL's perception of the situation and that he thought he had done the right thing by listening to Employee B and by providing guidance, and by seeking Employee B's permission to raise the issues with HR to investigate.

[86] The report prepared by Manager A included findings that the Senior Operations Manager had not infringed Employee B's rights but that the Senior Operations Manager should have stopped the conversation when Employee B started talking about potential sexual harassment. Manager A found that the Senior Operations Manager had not brushed aside Employee B's concerns, had raised the issues with People and Culture,

and that had the Senior Operations Manager not listened to Employee B he may have been seen as 'brushing off' the concerns.

[87] Manager A, in questioning from counsel for XLL, accepted that the Senior Operations Manager was not equipped to question Employee B. Manager A said advice was taken about whether Employee B should have been offered a support person and that XLL was later advised it was not a requirement. Manager A also accepted that it was not the first complaint of that nature received by EGA, but that EGA's processes had not failed previously. Manager A maintained that the Senior Operations Manager had done the right thing by raising the issue with people solutions.

[88] I do not consider the approach taken by Manager A and EGA to have been unreasonable having regard to all of the circumstances, including the findings reached and recommendations made in Manager A's report. To the extent Manager A expressed any agreement with points raised by XLL on 3 December 2020, Manager A was not obligated in any way to amend his report. The actions taken were not in breach of EGA's good faith obligations and were not otherwise unfair or unreasonable to XLL.

[89] XLL accepted in questioning that they had a reasonable opportunity to set out their concerns at the meeting of 12 November 2020, but maintained that they were minimised. XLL agreed that they thanked Manager A for dealing with the complaint but said that was before the 3 December 2020 meeting and that they had thought Manager A was taking the matter seriously at the time. XLL accepted that Manager A sent XLL a copy of this notes from the meeting and offered to have another conversation if anything had been missed.

[90] Manager A's evidence, which I accept, is that they wanted to meet with XLL on 3 December 2020, including because they had found that XLL's complaints were not substantiated, to talk through the reasoning with XLL. Manager A said that they expected XLL to disagree with parts of the report and said that their view was that XLL was comfortable disagreeing. Manager A said they explained the process followed, the findings, and the reasons for them. They said they thought it important for XLL to feel that they were involved in the communications proposal so that XLL could see the actions being taken.

[91] XLL accepted that Manager A re-explained the process at the 3 December meeting, that Manager A travelled from Auckland to meet with XLL face to face, and

that Manager A engaged with XLL about the findings. Nonetheless, XLL maintained that their concerns were minimised. However, XLL also accepted in questioning that the report from Manager A identified opportunities for improvement.

[92] XLL also said that a comment by Manager A that men get harassed too was derisive, condescending and minimising. Manager A said that XLL had taken the comment out of context and that the comment had followed and exchange where Manager A explained that they had sons in response to XLL's asking if Manager A had daughters. I accept Manager A's evidence, and in any event find that the statement does not otherwise indicate that the concerns raised by XLL were not taken seriously or that they were minimised, including in the context that investigations into both XLL's concerns and the relevant claims of sexual harassment were being progressed.

[93] Manager A said they disagreed with XLL's suggestion that they were dismissive of XLL's concerns and that they responded to XLL's questions and concerns at the 3 December meeting as best he could without breaching the privacy of those involved in the ongoing sexual harassment investigation. For example, Manager A said they would personally guarantee they would be arranging something for the Senior Operations Manager in response to XLL's question as to whether the Senior Operations Manager would be undergoing training on sexual harassment. Manager A also denied deliberately trying to distract XLL at the meeting on 3 December 2020.

[94] XLL made much of a statement by Manager A at meeting of 3 December 2020 that "it doesn't matter", and the report's findings in relation to whether Employee C's Team Leader told Employee C to stay away from Employee D. Manager A's evidence was that Employee C had left their employment and that EGA had reached out to them but that they had not received a responded. Manager A explained that they acted on the assumption that the allegation was true and concluded that additional training was required. I consider that the explanation was not unreasonable. It is also the case that EGA was not obliged to detail every detail of the approach taken to the investigation.

[95] XLL referred to the CEO, in an email on 9 November 2020, referencing a need to speak to each of the three individuals alleged to have been subject to sexual harassment. I do not consider that not actually doing so in relation to XLL's concerns about the handling of complaints necessarily evidences a defective process. That is

particularly so having regard to the fact that the investigation of the actual sexual harassment allegations was occurring separately.

[96] XLL said that they reluctantly agreed to a proposal that they work on three pieces of communications about workplace health and safety. XLL said they thought there was a coverup and that this was an attempt to placate them. XLL did not raise either of those concerns with Manager A at the time. XLL said he was upset after the meeting and felt like the concerns were being "brushed under the rug by [EGA]" and said they felt like they had been "painted a 'troublemaker' by EGA and all of their concerns were downplayed and minimised. While I accept that the offer was likely made in part to try and make sure XLL could be satisfied that something came out of his complaint, I do not consider that in of itself to untoward in any way. XLL no doubt genuinely felt the way he did about it. However, I do not consider the approach was merely designed to placate him when all of the circumstances are considered objectively.

[97] As to whether XLL had a duty to raise the concerns, Manager A said that it was appropriate for XLL to raise concerns about sexual harassment and that XLL was not discouraged from doing so. I accept Manager A's evidence and find that XLL was not discouraged from raising any complaints, his complaints were not unduly minimised, and that EGA's actions were not unreasonable. I also consider that XLL was entitled to raise the concerns he did and that it was appropriate for him to raise any concerns as to alleged sexual harassment that he became aware of.

[98] XLL said that while the Senior Operations Manager had said that it was the first time they had heard about such behaviour from Employee D, that the Senior Operations Manager "must have known about it" prior. XLL conceded in questioning that they had no evidence at the time that the Senior Operations Manager had any prior knowledge of such issues and that they had been speculating.

[99] The Senior Operations Manager's actions in relation to Employee B were not in my view a response to any complaint or concern raised by XLL. It cannot in my view be seriously suggested that the Senior Operations Manager's actions resulted in, or contributed towards, a breach of good faith (or any other duty) EGA owed to XLL.

[100] XLL was provided an opportunity to review Manager A's investigation report, including the findings made. XLL was provided with the outcome of the complaint

raised. Having regard to all the circumstances, including that there were ongoing investigations into the actual sexual harassment claims, I do not consider there was anything unreasonable about the approach taken by EGA. To the extent XLL takes issue with Manager A's comments about the provision of any outcomes to Employees A, B, and C, I do not consider any such comments to have been dismissive of XLL's complaints.

[101] I do not consider that a breach of good faith has been established. EGA did not exhibit a "consistently dismissive or minimising attitude" in response to XLL raising concerns about the handling of sexual harassment complaints, nor were its actions otherwise inconsistent with those that were open to a fair and reasonable employer.

The investigation process

[102] Manager A said that after being emailed by the CEO with XLL's concerns, it was decided that there should be two separate investigations. XLL agreed in questioning that there were two separate investigations. One investigation was to deal with the concerns raised by XLL, the other investigation was conducted in relation to the actual sexual harassment allegations. The second of those investigations was said to be ongoing at the time XLL's employment ended.

[103] Manager A's evidence was that they emailed XLL the draft terms of reference for the investigation on 11 November 2020 and asked XLL for any thoughts or proposed changes. Manager A said XLL did not propose any changes.

[104] Manager A said that overall, the investigation showed that EGA had managed the matters raised appropriately and that EGA had appropriate reporting avenues. However, they said they had concerns about the time it took for individuals concerned to come forward and found that there were areas of improvement in how EGA's reporting avenues were communicated to staff. Manager A proposed changes be made to ensure employees felt empowered to come forward early, and to better equip managers to take appropriate action.

[105] XLL was particularly critical of EGA's actions in not appointing an independent investigator to deal with the complaints and raised that with Manager A. XLL said their concern was that Manager A was not independent and would be concerned about

EGA's reputation, and that they were concerned that the Senior Operations Manager would be involved.

[106] While it may well have been advisable for EGA to engage an independent investigator it was not mandatory, nor in my view did the decision not to do so amount to a breach of any duty owed to XLL. It may have been preferable, but it was not XLL's decision to make.

[107] XLL took issue with not having been given a copy of Manager A's final investigation report. XLL also took issue with Manager A's conduct at the meeting of 3 December 2020 and said that Manager A talked loudly when XLL was trying to read the report and that it was hard to focus. XLL confirmed in questioning that they had not raised those issues in the meeting and that XLL had asked Manager A questions about aspects of the report at that meeting. The transcript shows that XLL asked several questions about the content of the report and findings.

[108] XLL was taken to the transcript of the meeting where they were told that they could read the report but would not be provided a copy. In that meeting, Manager A explained that the report had "a lot of people's names in it who would not be comfortable with it in the Dominion Post" and that the report would stay with Manager A. XLL responded saying "Yeah, fair enough., yep, yep". I find EGA's actions in not permitting XLL to retain a copy of the report were neither unfair no unreasonable. Further, I do not consider the criticism made of Manager A's conduct during the 3 December 2020 meeting was justified. While Manager A did not give XLL the answers XLL wanted, I do not consider the approach taken to have been, or to have contributed to, a breach of good faith.

[109] XLL also referred to evidence in the Authority's investigation as confirming XLL's genuine concerns about the investigation process. This included that the Senior Operations Manager was absolved of wrongdoing. Manager A's report found that the Senior Operations Manager had done the right thing by escalating the issue to Human Resources. Manager A's evidence addressed training to be given to the Senior Operations Manager, and changes recommended as to the training of managers in dealing with the raising of concerns about sexual harassment. The matters referred to in submissions for XLL do not in my view establish that a finding of wrongdoing necessarily should have been made against the Senior Operations Manager.

[110] XLL also took issue with an email sent by PSBP A that Manager A was copied into in which they expressed some concern about the approach being taken by XLL. I accept Manager A's evidence that they were not influenced by the content of the email, that it had no bearing on the investigation, and that their role was to investigate the actions of management, not XLL's conduct.

[111] XLL also said that Manager A, as the investigator, should have pressed PSBP A for a direct answer as to whether they had told Employee B that they "could have said no" to Employee D's advances. XLL was critical of PSBP A seemingly taking an approach of determining that the conduct wasn't sexual harassment, something that was not PSBP A's role. I consider the questions raised by XLL to have been fair ones and that the concerns were justified. However, that does not in any way mean that EGA's response was unreasonable. Ultimately recommendations were made including as to the provision of relevant training to managers and those in "positions of influence". The investigation of the sexual harassment claims were being investigated and Manager A's conclusion that PSBP A's team had taken the issue seriously was otherwise supportable.

[112] I find that EGA's actions in undertaking the investigation did not breach any duty of good faith owed to XLL. The complaint was taken seriously, a senior manager who had no direct involvement in the relevant alleged conduct was instructed to investigate the concerns raised, Manager A communicated and engaged with XLL as to draft terms of reference, Manager A made decisions as to the investigation process and communicated those decisions to XLL, and Manager A explained their findings to XLL. While XLL did not agree with all of the findings or the process followed, and notwithstanding that there may objectively have been imperfections in the investigation process, I do not consider that EGA failed to be responsive and communicative, nor that it otherwise breached any duty owed to XLL.

Direction to work from the office

[113] XLL contends that for most of their employment they were not required to attend the office and instead worked from home. They said they were not an "office-based employee", that there was no solid foundation for EGA to direct that XLL work from the office, and that EGA were harsh and uncaring in the manner they went about it. XLL submitted that in circumstances where they had not consistently worked from

the office, and where XLL had been suffering significant stress, that EGA's actions were unreasonable.

[114] EGA submitted that XLL had worked predominantly from home but that that was due to COVID-19 lockdowns and was not intended to be permanent. Team Leader A's evidence supported that being the case.

[115] Team Leader A's evidence was that one reason they wanted XLL to work from the office was that XLL had taken a lot of unplanned leave and that they had some concerns about performance, including XLL's CSAT (customer satisfaction score) scores. While a proposed return to the office had been discussed, including on the basis that it would be a gradual process, Team Leader A's evidence was that they had not actually been directed XLL to return to working in the office as at the time of XLL's resignation.

[116] There was some evidence of the CSAT scores provided to the Authority. Team Leader A said that the documents did not reflect the rolling scores at the relevant time. XLL said that nobody at EGA raised any performance concerns with XLL, including during a performance review in September 2020, and XLL's CSAT scores were consistently over 88%.

[117] Team Leader A took the position that it was necessary for XLL to work from the office. Team Leader A said that the conversation with XLL about returning to working from the office was tense and that XLL was argumentative and that no direction was given, and that they only became aware during the Authority's investigation that XLL was taking leave as a result of stress. In response to questioning as to other staff working from home, Team Leader A's response was that were not aware of that and that they were focused on their team.

[118] XLL said the discussion came as a shock and explained that they did not want to work in the office. XLL said that they didn't want to be back in the office because of how they had been treated by EGA and did not want to tell Team Leader A the specifics of that. XLL said they wouldn't remember what reasons were provided, but said they were distressed that Team Leader A thought he needed coaching.

[119] To the extent that Team Leader A's evidence went to what they would have said, as opposed to did say at the time, I consider that to be no more than a reflection of

significant time that had elapsed since the relevant conversations took place. Indeed, Team Leader A readily accepted in questioning from me that where they had used the term "would have" that they could not specifically recall whether they did or not.

[120] Manager A's evidence, which I accept, is that they had no involvement in any decision by Team Leader A to require XLL to return to working at the office. Senior Team Leader B's evidence, which I also accept, was that they were only aware that Team Leader A was proposing to address attendance and performance issues with XLL from the evidence lodged in the Authority and that they were not involved in that process at the time.

[121] I accept that Team Leader A had some concerns about attendance and performance. The validity of those concerns may be questioned, but I accept that they were genuinely held and that there was no underlying or improper basis for Team Leader A's actions. I find that XLL was not directed to return to the office and that EGA's conduct in seeking to progress XLL's return to working from the office was not otherwise unreasonable.

[122] I am not satisfied that EGA's actions were untoward in any way. EGA had a solid foundation for requiring XLL to work in the office, that being the location of XLL's workplace as specified in their employment agreement,[8] and they were entitled to take steps towards that.

[123] I am not satisfied that there was any breach of duty in relation to EGA's approach in seeking to have XLL return to working from the office. There was nothing harsh and uncaring in the approach taken by Team Leader A, nor was the conduct calculated or likely to destroy the relationship of trust and confidence when looking at EGA's conduct as a whole.

Failure to provide the assurance sought – the "final straw"

[124] XLL said that Team Leader A's dismissive attitude and failure to provide an assurance on 15 December was the "final straw" having regard to cumulative events. XLL submitted that they were not provided with an assurance that the request for confidentiality would be honoured, contends that that Team Leader A was dismissive,

[8] The work location being "[EAG's] offices in Wellington, or such other location as may be required from time to time.

and that that exacerbated the breach. XLL submitted that the conduct was objectively not reasonable and justifiable and that it constituted a breach of good faith.

[125] EGA accepts that Team Leader A did not provide the assurance sought by XLL and submits that that was not a breach of duty owed to XLL. EGA submitted that XLL did not provide XLL sufficient information about the stress leave request for Team Leader A to be able to provide such an assurance. It said that Team Leader A could not rule out needing to discuss the issue with Analyst A for IT purposes. It also submitted that XLL was talking over Team Leader A considerably during the call and did not allow Team Leader A the chance to explain that. It was submitted that Team Leader A had to resort to ending the call in order to seek some advice on the request. EGA submitted that there was no breach of XLL's confidence and Team Leader A did not discuss the leave request with Senior Team Leader B or Analyst A.

[126] Such as it might be asserted that there was an actual breach of confidence, I find that was not the case. XLL had not disclosed any personal details of other information as to the alleged cause of XLL's illness or absence other than informing Team Leader A that XLL was requesting stress leave. I accept the evidence of Team Leader A and Senior Team Leader B that the stress leave request was not discussed with them.

[127] It was submitted by XLL that whether Team Leader A actually spoke to Senior Team Leader B or Analyst A about XLL's leave request was irrelevant and that it was the refusal to provide the assurance sought that was the significant issue. XLL referred in submissions to Team Leader A's acceptance that they did not provide the assurance sought and submitted that Team Leader A did not inform XLL of the reasons later said to have been relevant in declining XLL's request. XLL contends that it was reasonably open to XLL to assume that the request would not be honoured, and that Team Leader A made no effort to provide support or assurance to XLL during the relevant phone call.

[128] XLL accepted in questioning that they talked over Team Leader A and said that it was because Team Leader A failed to provide the assurance XLL sought. During the first call on 15 December 2020, Team Leader A asked XLL to put together an email with further information. The transcript and recording show that XLL interrupted Team Leader A at that point and I find that XLL's conduct was otherwise unreasonably demanding and aggressive during the call. XLL may have made a request that Team

Leader A not discuss the matter with their senior colleagues. However, Team Leader A was not obligated, on the spot, to comply with what was in effect a demand from XLL.

[129] I consider that Team Leader A's actions in the circumstances were reasonable and that the criticisms made of Team Leader A by XLL are unfounded. It would have been completely imprudent of Team Leader A to provide the assurance sought without making further inquiries, including because such commitment may not have been capable of being kept. So far as there is criticism of Team Leader A's approach in not providing all of the reasons for declining to immediately provide the assurance sought, I do not consider Team Leader A was required to do so. Team Leader A clearly did not have all the answers at the time, their approach of advising that they would make enquiries and revert to XLL was reasonable, and Team Leader A followed through with that commitment.

[130] XLL said during the second call that it was untenable for them to work there and then proceeded to ask questions about whether the assurance sought had been complied with. Team Leader A explained that XLL was able to use sick leave subject to requirements regarding the provision of medical information for longer absences. During the second phone call XLL made it clear that they had already sent their resignation by text message to Senior Team Leader A.

[131] XLL's submissions referred to EGA as accepting XLL's resignation with "alacrity". I do not accept that was the case, nor that Team Leader A's acceptance that XLL had resigned as evidence of the same. XLL was adamant they had already resigned and I do not consider Team Leader A's actions or responses to have been in any way lacking or unreasonable.

[132] I find that EGA did not breach any duty to XLL by failing to provide the assurance sought during the first phone call on 15 December 2020, nor did it otherwise breach any duty through the actions of Team Leader A on that call. In conclusion, in relation to the conduct said to have amounted to the "final straw", I find that EGA's actions were not objectively unfair or unreasonable.

[133] I also find that the series of events, including considering the alleged "final straw" in the context of those events and other actions of EGA, did not have the cumulative effect of breaching the relationship of trust and confidence.

What caused the resignation and was it foreseeable?

[134] I have found that there was no breach of duty. Given that, it cannot be said that there was any breach of duty that was causative of XLL's resignation. However, I make the following observations as to whether, if I had found that there was a breach of duty, I would have found that causative of XLL's resignation.

[135] Establishing causation requires consideration of more than just the text of the resignation and involves consideration of XLL's motivation in ending the employment relationship, which is to be assessed objectively.[9] In the resignation, XLL made clear reference to the confidentiality issue arising on 15 December 2020 and that they considered they were "forced to resign". While reference was made to trust being broken on "several occasions" and "other awful experiences", what those matters involved is unclear on the face of the text alone.

[136] EGA submitted that the text of the resignation provided no causal link between the alleged breaches of duty associated with the sexual harassment concerns or the proposal to work from the office and XLL's decision to resign. XLL submitted that the resignation "cited the confidentiality issue as a key reason for [XLL's] resignation".

[137] I consider XLL's concerns about conduct relevant to the first two of the alleged good faith breaches, that being the treatment of health and safety concerns and EGA's investigation, were in such proximity to the resignation that it could not be said that the causal chain was broken.

[138] The same cannot be said of any alleged breach of duty in relation to XLL being asked to work from the office. XLL did not, in the resignation text message or otherwise, suggest that Team Leader A's seeking to have XLL work from the office was a reason for the resignation. Even if I had found that there was a breach of duty, I would have found that the resignation was not caused by any breach of duty relating to the proposed return to work.

[139] In submissions for XLL, a range of information said to have been obtained as part of the Authority's investigation was referred to as supporting XLL's concerns as to the actions of EGA. So far as those matters are concerned, I find that they cannot be said to have been causative, in the sense of being part of XLL's motivation, of XLL's

[9] O'Boyle v McCue (2020) 17 NZELR 681 at [181].

resignation. I also find that the transcript of the second phone call on 15 December 2020 reflects that the resignation, at least in part, was a result the further stress leave being declined. While that occurred after XLL had sent the resignation text, the resignation text arguably referenced a future resignation.

[140] As to whether the resignation was foreseeable, EGA submitted that XLL indicated on several occasions, including on 3, 4 and 10 December 2020, that XLL wanted to be actively involved in actions to be taken following its investigation of the complaints, and that that in turn indicated no intention to resign.

[141] EGA submitted that even if there were a breach, it was not sufficiently serious to amount to a repudiatory breach of XLL's employment agreement such that it was foreseeable that XLL would resign. It submitted that the primary basis for XLL's constructive dismissal claim was an alleged breach confidence on the day of the resignation. It submitted that the broader evidence relating to XLL's complaint of 9 November 2020 should be given little weight as the issues raised were peripheral to the alleged breach of confidence, and that XLL did not articulate that the decision to resign was due to EGA's handling of the complaint.

[142] The transcript of the 3 December meeting shows that Manager A explained that there would be a project including communications that empower people to come forward and associated outcomes. Manager A then commented "I'm more than happy to have you involved in reviewing the comms and the strategy around that if that's what you want to do". XLL responded "yep", and after Manager A said he would be happy to have XLL involved, XLL then said "[y]ep, I'd love to get involved in that, yep". There was then discussion about also involving counsel.

[143] Manager A said they bumped into XLL at the Wellington office on 4 December 2020 and that XLL asked when they could meet to discuss the next steps and that they agreed to have a meeting by phone the following week. Manager A then spoke to XLL on 10 December and updated XLL on the communications proposal. During the call, XLL said they looked forward to reviewing the communications in the next couple of weeks and thanked Manager A for their time. Manager A said they were surprised by XLL's resignation and that there was nothing about XLL's actions and tone on 10 December 2020 that indicated they were going to resign or that they felt aggrieved in any way.

[144] After receiving a text message from XLL on 8 December 2020 saying XLL would be back the following day, Senior Team Leader A then did not receive further contact from XLL until receiving notice of XLL's resignation on 15 December 2020. Senior Team Leader A said they were surprised to receive the resignation text because they were not XLL's team leader, and XLL did not report to them. Senior Team Leader A also said they did not know what XLL was referring to as a "breach of confidence". Senior Team Leader A responded to the resignation text asking XLL to think about their decision overnight.

[145] I find that the statements made by XLL as to future involvement, including on 3, 4 and 10 December 2020 support a view that resignation was not imminent or otherwise likely. While not determinative in themselves, those statements, including those made by XLL on 10 December 2020 as to XLL looking forward to reviewing EGA's draft communications, and when considered objectively, indicate that while XLL did not agree with all of the findings, that XLL was keen to be involved in some of the implementation of some of the report's recommendations. I consider this reflects that there was no indication that XLL might resign from their employment.

[146] While XLL referred in submissions to statements made at the end of the meeting on 3 December 2020 to the effect that XLL's reaction to the findings would be based on firm action being taken by EGA, I consider it clear from the engagement between XLL and Manager A at the time that XLL was willing to engage in steps proposed by XLL. Considering the circumstances and actions on an objective basis, I that a substantial risk of resignation would not have been foreseeable.

[147] XLL had also, on a number of occasions, made EGA aware that they considered they were stressed as a result of their involvement in the process and events that had occurred. However, I do not consider the fact that XLL had taken such leave as objectively indicative of any potential resignation arising from EGA's actions, let alone any breach of duty.

[148] I also accept that XLL expressed views in relation to several matters that indicated dissatisfaction, disagreement, stress, and that they held concerns. However, I do not consider that those signs arose from any breach of duty of such seriousness such as would lead to a conclusion that a substantial risk of resignation was reasonably foreseeable.

[149] I have found no breach of duty, either cumulatively or when each of the claimed breaches are considered separately, has been established. Had I found that EGA had breached any duty owed to XLL, I would have concluded that XLL's resignation was not caused by any actions relating to being required to work from the office. I would also have found that it was not reasonably foreseeable that XLL would resign from their employment because of any of the other the alleged conduct.

[150] I conclude that XLL was not constructively dismissed from their employment with EGA and was not unjustifiably dismissed.

Is XLL entitled to remedies?

[151] I have found that XLL was not constructively dismissed from their employment and was not unjustifiably dismissed. XLL is not entitled to the remedies sought.

Is XLL entitled to an order for special damages relating to their legal fees?

[152] XLL has been unsuccessful with their claims and is not entitled to damages relating to their legal fees.

Conclusion

[153] XLL's claim that they were unjustifiably constructively dismissed is unsuccessful.

Costs

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

[155] If the parties are unable to resolve costs, and an Authority determination on costs is needed, EGA may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum XLL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[156] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[10]

Rowan Anderson
Member of the Employment Relations Authority

[10] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1