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Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN A (Applicant)

AND The Attorney-General in respect of The Chief Executive Officer of
The Child Youth & Family Services (Respondent)

REPRESENTATIVES Rodney Hooker and Lisa Douglas for the Applicant
Aaron Martin and Janine Basile for the Respondent

MEMBER OF AUTHORITY P R Stapp

INVESTIGATION MEETING Wellington, 6, 7, 8 & 13 September and 20 October 2005

DATE OF DETERMINATION 22 December 2005

DETERMINATION OF THE AUTHORITY

Suppression orders

1. The applicant's name has been suppressed. The reason for the suppression order of the applicant's name is based on the medical evidence provided, related to her state of health and to ensure her privacy while she is recuperating. The names of third parties referred to during the course of the investigation, but not named in this determination, are also protected permanently by an order suppressing their names from publication.

Employment relationship problem

2. The background to this matter can be summarised as follows.
3. The applicant was employed by the respondent (CYFS) in 1998 and moved between its various offices. One of the moves involved being closer to her partner's place of work and university. As of 21 March 2001 she was employed as a social worker. The applicant transferred again to another regional office on or about 12 September 2002. Her terms and conditions of employment were contained in the PSA Collective Agreement (effective 1 October 2001). Various policies and manuals apply.

4. From 12 September 2002 the applicant had supervision sessions on: 6, 14, 22, 28 November and 5 & 18 December 2002, 16 January, 4, 7, 20 & 27 February 2003, 6, 14, 24 & 31 March 2003 and 7 April 2003.
5. The applicant took paid study leave to complete her Masters thesis from Tuesday, 22 April until Monday 14 July 2003. However, she returned from study leave on 7 July 2003. During the period of the study leave the applicant became ill. CYFS understood this to be a physical illness. However, the applicant subsequently told Julian Reeves, a Clinical Psychologist, ten days into the study leave that she was not coping. [Bundle of Documents, Vol.12, 639] The applicant remained on study leave but got a deferral to complete the degree requirements. The applicant returned to work but had further periods of sick leave following surgery on 20 August 2003.
6. Medical certificates were provided to CYFS on 2 June, 10 July, 16 September, 15 October, 7 November and 4 December 2003 and 5 January 2004.
7. Between 15 July and 4 December 2003 the applicant worked approximately 12 weeks, the last five weeks were on reduced hours.
8. During 2003 the applicant experienced marital difficulties; she took on responsibility for caring for grandchildren and there were other family problems involving the applicant's mother who was staying with the applicant.
9. The 15 October medical certificate disclosed that the applicant,

Was seen and examined by me on 15 October 2003. Her condition is slowly improving and she will be able to return to work on 28 October 2003. However, initially she will be able to work only four hours per day for five days per week and this will be reviewed after the first two weeks. In view of her condition, her work should initially not involve "critical front-line work".
10. During this time, on 4 November 2003, CYFS raised a performance issue with the applicant. At some stage before 12 November 2003 the applicant engaged a representative to assist. She continued to consult her doctor, Dr Janet Vaughan. Dr Vaughan wrote to CYFS on 10 November indicating the existence of stress related issues for the first time. There had been no prior indication of such issues in the GP's notes, no medication was prescribed, there was no referral to a specialist and the medical certificates did not disclose what the problem was.

The applicant did not take time off work. There was a 10 day delay in CYFS responding and the applicant was never removed from front-line social work.

11. The applicant and her union met on 17 and 18 November. A meeting was then held with a CYFS manager on 19 November. They discussed performance and health issues and there was agreement reached on the applicant's hours of work. The applicant consulted the GP again on 21 November.
12. On 4 December 2003 the applicant told her GP that she needed sick leave and disclosed a wish to look for another job. On 12 December 2003, the applicant's lawyer wrote to CYFS for the first time. This letter indicated the applicant's current workload was unreasonable "*until such time [as the applicant] can be redeployed*" [BOD Vol.3, 824, para.1].
13. The applicant never returned to work after 4 December 2003.
14. In December 2003 the applicant raised a personal grievance with CYFS. A medical report was enclosed. She claims that she was not supported in her work, her supervision was inadequate, and her work as a social worker was hazardous without proper monitoring and identification of hazards. She claims that CYFS breached its obligations under the collective employment agreement and manuals and policies in regard to providing a safe place of work and the consequential stress caused to her, including the pressure of the work, resulted in her termination of employment.
15. The applicant's health deteriorated markedly in the first half of 2004. She had further sick leave that continued until 12 January 2005 and was given leave without pay. During this period the applicant was referred to a CAT team, admitted to respite, referred to the Department's Uniservices and admitted to Ashburn clinic in Dunedin. She was discharged on 23 September 2004 from the Ashburn clinic.
16. The applicant was medically retired from work as a social worker and her employment terminated on 13 April 2005 with 3 months notice.
17. The respondent has accepted it has obligations under the collective agreement and the Health and Safety in Employment Act to take reasonable care to avoid causing injury to its employees' physical and mental health; in other words to provide a safe place of work.
18. The applicant has not challenged her employment being terminated but claims her employer breached the conditions of her employment agreement (SOP) and that her employer's

action/inactions/omissions were unjustified, disadvantaging the applicant in her employment (12 December 2003: BOD 00821). She has remained unfit for work.

19. A number of significant personal, family and medical issues were identified in the applicant's clinical notes. A specialist, Dr Jan Reeves' evidence was that there were at least 17 factors relevant to the causation of the applicant's illness, apart from her perception of her work environment.

The issues

20. What was the cause of the applicant's illness and in particular did her work place cause or contribute to the applicant's illness?
21. Did the employer act as a good employer and meet its obligations to the applicant under the statutory requirements, collective employment agreement and the Department's manuals and policies? In other words did the Department breach any of its obligations under the statutory requirements, collective employment agreement and the Department's manuals and policies? In particular was there adequate supervision provided to the applicant? What was the extent of the applicant's work load? Was there any monitoring and identification of hazards in the work place likely to lead to mental and psychological illness/injuries?

The nature of social work and the applicant's health

22. It is common ground that social work is inherently stressful. This was acknowledged by the Department in Dr Geraint Emrys' evidence. Dr Emrys is a specialist occupational physician. His evidence was that CYPS "*is a level 4 hazard working environment*". This means that social work is inherently stressful.
23. The applicant was unwell. She had taken time off work. She had provided sick leave certificates and consulted doctors and specialists. She suffered a major depressive illness. Dr Emrys provided a medical assessment for CYPS on the applicant, and he provided a report for the department dated 13 December 2003 and subsequent clarification dated 21 January 2004. It was his opinion that the applicant's diagnosed depression appeared to be idiopathic in origin, in other words, of an unknown cause. However, he related the applicant's situation to an underlying vulnerability or of a reactive nature related to family and marital or study related issues with work being the less likely cause of her depression.

24. The applicant was also referred to Professor Desmond Gorman, Professor of Medicine, through the Department's Return to Wellbeing Programme, in June of 2004. The purpose of the referral was to develop an exercise programme for the applicant as part of a rehabilitation plan. The applicant was also reviewed by Dr Jan Reeves, Adult and Child Psychiatrist and Mr Julian Reeves, registered Psychologist. Together they discussed the applicant's health problems, and for these proceedings a joint written report was produced dated 18 August 2005 (the Joint Report): Dr Reeves and Mr Reeves and Professor Gorman.
25. Written statements of the managers involved during the applicant's employment and over the period of her supervision, study leave and sick leave, were received in advance of the Authority's investigation meeting. I will refer to their evidence as I need to in my discussion.

Supervision and work load in the applicant's employment

26. The applicant has claimed that CYFS did not adequately provide her with supervision. However, the evidence shows supervision being given to her. The applicant had a passion for applying a bi-cultural approach. She made this known upon her appointment as a social worker. She was aware that in her new office there was no bi cultural team. A person was appointed to provide bi cultural supervision and she had some collegiate support provided to her.
27. The applicant has claimed there was difficulty in getting a supervision contract with her supervisor. Nevertheless a contract was signed. She says that her supervision was poor and the supervision never covered the terms of her supervision contract and that the supervision was irregular and inadequate. The following factors influence the applicant's claims:
 - The applicant's assessment of the quality of her supervision. Comparing her office with the previous one (which she says was more favourable) she says she had to rely upon a previous supervisor but that person had been the subject of criticism in a significant external report prepared by the Commissioner of Children.
 - The applicant wrote to the Chief Social Worker before taking study leave. Moreover, the applicant did not raise any health issues and did not make any complaints about her supervision and caseload.
 - Health and safety issues were not raised by the applicant in file notes. File notes have to be read in context and statements in documents at the time are

inadequate to whether the applicant was receiving support from the practice manager and her supervisor or not.

- The applicant's case load is open to interpretation on whether her numbers were within the range of acceptable limits and whether they were the lowest in the team.
- There was a supervision contract between the applicant and her supervisor for the period 14 March 2003 to 30 July 2003. Any failure to have a contract with other supervisors has not proven to be causative of any illness and failure to conduct supervision sessions, I hold.
- The applicant described one of her supervision sessions as excellent on 20 November.
- The applicant was able to take TOIL: 21 November to attend a Maori university students' hui.
- Supervision sessions on 30 October and 20 November provided an indication of the applicant's number of files in her case load that were active and requiring attention. She was no longer responsible for two major files.
- The applicant had a lengthy period on approved study leave during the time.
- Underpinning the applicant's view of her supervision and work load was a performance management issue. Various performance issues were raised with the applicant, to which she responded with a grievance.

28. Because of the above factors I am not satisfied the applicant has established her claim that breaches by CYFS as alleged materially caused her illness at work.

29. There is evidence to support some work being taken from the applicant and the level of her files reduced. Therefore, I am satisfied that CYFS has been able to support its contention that the applicant's work load was reasonable.

What was the cause of the applicant's illness and in particular could her work place been part of the cause of her illness?

30. I find that the cause of the applicant's illness related to a number of personal factors in her life (Dr Reeves). The evidence from the medical practitioners has been conflicting with different

opinions as to the part her workplace played in her illness (Drs Reeves and Emrys and Mr Julian Reeves and Professor Gorman). It also emerged during the Authority's investigation that the applicant was probably not suited to employment as a front line social worker in the first place.

31. While work was identified as a factor which may have contributed to the applicant's illness, the expert witnesses were not in a position to say whether or not any particular alleged breach of the employment agreement or alleged failure of CYFS might have been a factor. Indeed the applicant had previous bouts of illness and became ill during her study leave while she was not at work. There are also a number of other factors that could be attributed to her illness associated with her moving when she was not working as a frontline social worker in early January 2004. In this regard she probably had no intention of returning to work at CYFS. She was working for "extra money" from her brother and sister in law and cleaning and looking after their houses. She felt her family was taking advantage of her. She found the care of her brother and sister in law's boys difficult in addition to keeping clean and looking after two large houses. Her sister went overseas in February 2004. There is evidence of family conflict, discord and distress. There were difficulties in her personal relationship with her husband.

Has there been any breach by CYFS of its statutory obligations and the terms of the employment agreement and policies and manuals, including meeting its obligation to be a "good employer" and provide a safe and healthy workplace?

32. CYFS, I hold was not in breach of its obligation to act as a "*good employer*" and to provide a safe and healthy workplace as alleged. This is because:
- The applicant has not been able to support the supervision she was provided with was inadequate. I accept that she has been critical of it, but CYFS has also provided a context to the applicant's claims and supported supervision occurring and being arranged.
 - CYFS provided services to assist the applicant before she took extended sick leave and was admitted to Ashburn Hall. Her health deteriorated while she was not at work over a considerable period from 2004.
 - The applicant has not been able to establish that her workloads were unreasonable.

33. However, on one issue raised, that is the monitoring and identification of hazards in the workplace, the applicant was able to establish that the inspection process did not effectively take place. The applicant was never properly asked about stress and safety, and no monitoring took place. Stress in CYFS is an occupational issue. There seems to be no application of a policy in regard to mental or psychological injuries.

The matter of the delay in CYFS' response to the 15 October and 10 November 2003 medical certificates/advice

34. The medical certificate dated 15 October 2003 referred to earlier was not acted upon in regard to the recommendation that "*her work should initially not involve 'critical front-line work'*". The manager could not recall seeing the certificate. The supervisor conducting supervision was not shown it. The advice was not taken up. This was unjustified, considering the applicant's background of illness and the stressful nature of the work environment.
35. The manager could not recall when he first saw the medical certificate dated 10 November 2003. The 10 November medical certificate/advice identified the diagnosis of a stress related illness, the need to alter the applicant's work environment, reduce the workload and recommended the discontinuation of front line work. There was a 10 day delay in CYFS responding and the applicant was never removed from front-line social work. This delay and inaction was unreasonable given the applicant's circumstances, previous medical certificates and medical interventions. Indeed other witnesses expressed surprise at the delay. It was unjustified.
36. The evidence from the practice manager responsible at the time was that he was responsible for managing sick leave. He did not follow up the cause of the applicant's illness when she returned to work. He did not open up any line of communication with the doctor. There is an issue about the extent of the applicant continuing to work in front line social work and the employer being on notice of the risk of any consequences if it failed to respond with reasonable and practical steps. There was an obligation to take some action and the evidence indicates this did not occur. The applicant then became too ill to work and after taking further leave did not return.

The nature of the employment relationship problem

37. The applicant has not disputed her termination of employment: She says her employment relationship problem is based on CYFS's conduct allegedly not providing her with a safe and healthy workplace and failing to monitor mental or psychological injuries. I am not satisfied

the evidence supports that claim, despite the accepted stressful level of the work involved. The applicant claims that CYFS breached its requirement to be a good employer, and that it also breached the terms of the employment agreement and its manual and policies, and thereby caused the applicant injuries and illness. However, the breach by CYFS not monitoring and identifying hazards, in the circumstances where material causation has not been established, cannot give rise to a personal grievance.

38. But, the employer's unjustified actions of not acting on the 15 October 2003 medical certificate and the delay in responding to the 10 November 2003 doctor's letter/medical certificate have affected the applicant's employment to her disadvantage. A fair and reasonable employer could be expected to take up the matter immediately given the doctor's letter. This is because there were options open to the employer that a fair and reasonable employer would be expected to take to ensure the wellbeing of the applicant. This is supported by the requirement of CYFS to take all practical steps to avoid putting an employee in a stressful environment. The applicant was ultimately to lose her job and work has been cited as a factor but was not determinative as a material cause of the applicant's illness. However, a fair and reasonable employer would be expected to pick up that the applicant was not suited to front line social work. In this respect CYFS had a responsibility to deal with the applicant as it found her, and if the supervision sessions had been more thorough, maybe this would have been picked up and able to be dealt with. On the other hand CYFS had no reason to act, in the absence of the applicant taking some responsibility, before it was advised of the deteriorating and seriousness of the applicant's situation reasonably from October 2003.
39. The applicant has a personal grievance. I now turn to remedies. She is not entitled to wages because she was unable to work and her employer had medically terminated her employment, which has not been disputed. Any subsequent loss of wages can not be linked to the two actions I have found unjustified.
40. CYFS is not liable for future lost earnings in the form of damages as claimed. This is because a process was followed in regard to the medical termination of employment and the applicant has not established her claim that the alleged breaches of CYFS duties related to the cause of her illness.
41. CYFS has no responsibility for the claim for retraining. The applicant has not been able to establish her claim for a loss of benefit relating to her professional standing as a social worker. CYFS does not have any liability on the claim for Ashburn Hall medical costs or the applicant's rehabilitation and ongoing counselling.

42. I accept there has been an impact on the applicant as it related to CYFS failure to make any inquiry of the applicant and respond to the medical certificate of 15 October 2003. Also I accept that CYFS failure to respond in a reasonable time and to pick up on the advice of the 10 November 2003 doctor's letter/medical certificate had an impact on the applicant. Her entitlement must be contrasted with not having an entitlement for any compensation for the loss of her job and illness. Also the applicant took on the ownership of her work without taking any action herself to minimize her risk before October 2003. My assessment is that the impact on her of the two unjustified actions of CYFS warrants compensation. This is difficult to assess because the full claims in the statement of problem would have created huge expectations (arguably unrealistic expectations) that have not been realised. Also, the time between the causes of action occurring until the applicant left work for the last time is a relatively short period. The applicant reasonably could have expected more to happen than it did. I am satisfied there has been an impact on her by CYFS failure and how she felt and upon not returning to work some loss attributed to her disadvantage. Also I accept that she reached a conclusion that she believed she would not be listened to and that trying to talk about her situation fell on deaf ears. She says that she tried to talk to her supervisor about not coping and that when she did talk about her feelings and what it meant feeling unwell she was given "a big hug". I assess a sum of \$15,000 under section 123 (c) (i) of the Act to resolve the employment relationship problem involving a personal grievance.
43. Costs are reserved. For guidance I would expect the parties to attempt to settle costs, which I surmise could be considerable. The parties' attention is drawn to the Employment Court's recent decision on costs in the Authority to help: *PBO Limited (formerly Rush Security Limited) v Eneida Leonor Christs Da Cruz* (unreported) Full Court, 9 December 2005, AC 2A/05.