

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Helen Francis Procter (Applicant)

**AND** Northland Disabilities Resource Centre Trust Matapuna Hauora  
(Respondent)

**REPRESENTATIVES** Roger Bowden, for Applicant  
Rodger Pool, for Respondent

**MEMBER OF AUTHORITY** Y S Oldfield

**INVESTIGATION MEETING** 2 May 2006

**DATE OF DETERMINATION** 15 May 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The respondent in this matter (now known as “Northable”) is a charitable trust in the disability services sector. From February 1999 until March 2005 it employed Ms Procter as a Service Coordinator/Needs Assessor. For most of that time, the working relationship was a good one. Then, in mid February 2005, issues surfaced about Mrs Procter’s leave arrangements. As Ms Procter sees it, Northable’s handling of these issues over the course of the next month destroyed her trust and confidence in her employer and left her with no option but to resign. She gave her notice on 17 March 2005, and finished work on 31 March.
- [2] Northable acknowledges that it had concerns about Ms Procter’s leave arrangements. It says it raised them, as it was entitled to do, and attempted to resolve them by legitimate means. It says that it had barely started this process when the applicant resigned and that nothing had occurred to warrant this resignation. Ms Procter, on the other hand, believes she was subject to unjustified actions to her disadvantage which taken together led to a constructive dismissal. The issues for me to determine in this case are therefore whether personal grievances of unjustified dismissal or disadvantage have been made out.

Unjustified disadvantage claims

- [3] In March 2004 Ms Procter had an annual remuneration and leave review with Suzanne Scanlen, who was at that time General Manager of Northable. It was agreed that in order to address her need to have school holidays off, Ms Procter could have ten weeks leave a year. This was made up of five weeks annual leave and one weeks leave in lieu of overtime worked, with the balance “*up to four weeks per annum*” being covered by accumulated sick and domestic leave.

- [4] Ms Proctor duly took off, on pay, all the school holidays in 2004. By the time of the anniversary of her employment in February 2005, her annual, sick and domestic leave all stood at a nil balance. Over the coming year, Ms Proctor would accrue a further five weeks annual leave, one week in lieu and a total of three weeks sick and domestic leave. Northable permitted staff to use leave entitlements as they accrued, rather than waiting until the anniversary of employment. However, even assuming that neither she nor her children were sick during that year, she would still be one week short of a full ten weeks paid leave in 2005.
- [5] Meanwhile, in August 2004, Ms Scanlen had been replaced by a new General Manager, Mr Matthews. Northable is a not for profit organisation that relies on various Government funding sources for survival. When Mr Matthews arrived it was running a significant deficit. He called the staff (17 in all) to a meeting and told them that the organisation and its administration were under review. Soon after the meeting, Ms Proctor informed Mr Matthews of her leave arrangements, and told him that she was prepared to renegotiate them.
- [6] Mr Matthews and Ms Proctor disagree about when this renegotiation was expected to occur. Mr Matthews told me he understood it was to be in February, at the anniversary of Ms Proctor's employment, or soon after. This was also the time when her annual review would normally take place. However, when Ms Proctor and Ms Scanlen had their discussions in 2004 they agreed that the next review would be pushed out to July 2005. Mr Matthews told me he understood that the extension applied only to the review of the pay rate, and not the annual leave, because the most logical time to look at that was on the anniversary of employment. Ms Proctor considered that the leave arrangements, like the pay rate, would be discussed in July and not before.
- [7] As things turned out, Ms Proctor's immediate supervisor, Ms Eilering, raised the issue with her on 15 February 2005, during a performance assessment meeting. She did so in the context of a discussion about Ms Proctor's failure to meet some of her KPIs, and Ms Eilering's belief that one of the reasons for this was that Ms Proctor was taking such a lot of time off. Ms Eilering also said that the issue had already been discussed by the respondent's board and that the four weeks' special leave was no longer a given.
- [8] At this, Ms Proctor felt fearful that her conditions were under threat. She also took exception to the fact that the issue was raised, as she sees it, prematurely and at an inappropriate time and place. After 15 February, Ms Proctor heard nothing more from her employer and by 1 March, she was becoming anxious to know where she stood. She approached Ms Eilering for clarification of what was happening, and Ms Eilering invited Mr Matthews to join her and Ms Proctor in a discussion about it.
- [9] Mr Matthews then asked Ms Proctor a number of questions about the reasons why she had wanted the leave and why it had been agreed to. He told me that he wanted to understand this as it would help the process of coming up with a new arrangement that would suit both Ms Proctor and Northable. However, Ms Proctor felt she was being asked to justify something that had previously been agreed, and pressured to accept a reduction in her leave entitlement.
- [10] Mr Matthews told Ms Proctor that changes were needed and that a process of negotiation on this would begin. He advised that a meeting would be scheduled for this purpose as soon as possible and it was agreed that both parties would bring representation to that meeting. Ms Proctor told me she felt pressured to make changes to her agreement and to make decisions about this sooner than she had expected or was prepared for.
- [11] Later that day (1 March) Ms Proctor submitted an application for leave form in which she requested annual and special leave for the period 18 April to 29 April.

[12] On 7 March Ms Eilering wrote to Ms Proctor as follows:

*“Further to our meeting Tuesday 1<sup>st</sup> March regarding your leave entitlement. I would like to meet with you to discuss this matter further.*

*As discussed with you, we need to meet to formally progress this matter forward so that a mutual agreement can be reached regarding your leave entitlements for this year.*

*Failing to reach agreement around this matter may result in the position being subject to a review process to establish its feasibility to the organisation.*

*As advised, you are free to bring representation to the next meeting, which is at 9.00am on Tuesday 15<sup>th</sup> March 2005 in the General Manager’s office.”*

[13] Ms Proctor felt that the letter contained a clear threat in that she was being told that if she did not agree with what her employer required, her position would be reviewed.

[14] On Monday 14 March Ms Eilering sent Ms Proctor an email stating:

*“Helen I am in receipt of your application for April 2005.*

*Due to the current review of leave allocation it is impossible to process this further until a satisfactory resolution has been agreed.”*

[15] Ms Proctor says that this refusal to process her leave claim further disadvantaged her by creating uncertainty about where she stood regarding arrangements for her children during the April school holidays, which were fast approaching. She says that both the email and the letter of 7 March were unnecessary and unjustified and left her feeling unsupported and pressured.

### **Determination**

[16] Ms Proctor feels that she was disadvantaged by several unjustified actions on the part of her employer. These include the time and place that the issue of her leave arrangements was raised, what she saw as intrusive inquiries from Mr Matthews, and what she saw as a fixed attitude on his part as to what the outcome of any discussions would be.

[17] As Ms Proctor’s representative has acknowledged in submissions, if the claim of disadvantage had been based only on these factors it would not have been strong. Ms Proctor’s anniversary was in February, she had used up the accumulated sick and domestic leave which covered the previous year’s leave and she had already signalled her willingness to negotiate something different for the coming year. Given this background, it was not a major error for the issue to be mentioned during a performance review in mid-February. It was also reasonable for Mr Matthews to acquaint himself with Ms Proctor’s needs so that he could begin thinking about proposals which might suit both parties. Finally, I am satisfied that the attitude he expressed was one of determination to find a solution and not simply to change Ms Proctor’s conditions to suit Northable.

[18] However, as Ms Proctor’s representative has also argued in submissions, the correspondence of 7 and 14 March raises more serious issues.

[19] Ms Proctor construed the letter of 7 March as threatening to her employment. Ms Eilering has told me that she did not intend it this way. She said a review of Ms Proctor's position could have involved a number of options which may have suited Ms Proctor very well. For example, Ms Proctor had expressed an interest in part time work, and this was a possibility. Unfortunately, Ms Eilering did not say this to Ms Proctor. Against the background of Northable's financial difficulties, I consider Ms Proctor's interpretation to be entirely reasonable and conclude that the letter disadvantaged Ms Proctor by causing her to fear for her job. Northable was not justified in linking the possibility of a review of her job to the issue of her leave entitlements. I am satisfied that the letter of 7 March did amount to an unjustified action to Ms Proctor's disadvantage.

[20] As for the leave application, this was made on 1 March, well in advance of the school holidays. Ms Proctor needed certainty, one way or the other, so that she could make the necessary arrangements for her children. It was reasonable for Northable to want to meet with her before approving her leave but it was incumbent on them to have the meeting promptly so that Ms Proctor had an answer in enough time to complete her arrangements. It was not reasonable for it to delay two weeks in responding to the leave application. By doing so it caused Ms Proctor unnecessary and avoidable uncertainty and anxiety. I am satisfied that the email of 14 March also amounted to an unjustified action to Ms Proctor's disadvantage.

### Constructive Dismissal

[21] Between 7 March and 9 March the parties exchanged emails about arrangements for the meeting of 15 March. Northable advised Ms Proctor of the purpose of the meeting and who would be in attendance and confirmed to her that she could bring representation if she wished. I am satisfied that at the end of this exchange Northable had clarified the process it proposed to follow.

[22] On the morning of 15 March Ms Proctor arrived at work with her representative to find that the meeting had been postponed because Mr Matthews had left to attend a Tangi. It was subsequently established that he had emailed her with this information the previous morning but for reasons which remain unknown, Ms Proctor did not receive his email. She first learnt that the meeting was not going ahead when she saw an email that Ms Eilering had sent to her the night before, advising that the meeting could not proceed on 21 March, because there was a Hui on that date. At the time the reference to 21 March made no sense but we now know that this was the alternative date Mr Matthews had suggested in his email of the day before.

[23] Ms Proctor told me in her witness statement that:

*"Upon reading the email I went to Ms Eilering's office to ask if the meeting was still possible, particularly as neither Ms Eilering nor Ms Ryan [the other attendees at the meeting] were at the Hui. Ms Eilering was with another staff member, Pam Arbon, and told me that the meeting was cancelled because Mr Matthews was away. I informed her that I had arranged for my representation to be present at the meeting and that it was too late to cancel. Ms Eilering replied that Mr Matthews had to attend the tangi because the deceased was a member of his whanau. I replied in a loud voice "I don't care. I don't give a shit" walked out of the office and returned to my desk."*

[24] Ms Proctor accepted that it was possible that she may have used even stronger language than this. As it turns out the deceased person was someone who had been very close to Mr Matthews in childhood and who had died suddenly.

- [25] That afternoon and the next morning there was an exchange of emails between Ms Proctor and Mr Matthews which eventually cleared up the miscommunication about the postponement. In addition, Ms Proctor asked for “*a copy of the procedure they were following regarding the negotiations.*” I asked Ms Proctor what she meant by this as I considered that email exchange of 7-9 March had already clarified what was planned. She told me that she expected to see some sort of written policy setting out a standard procedure. (No such thing exists however.)
- [26] Ms Proctor was out of the office on fieldwork most of the day of 16 March. Late in the day, after she had returned, Mr Matthews called her to his office. Mr Matthews told me that he intended to do three things in this meeting: apologise for the fact that the meeting of 15 March had not gone ahead, arrange an alternative time for it, and let Ms Proctor know that others in the office had been upset by her outburst the day before (he had been told of it while she was out.) In relation to the third point, he said in the circumstances he did not wish to make a big issue of it, but could not let it go entirely as others were concerned.
- [27] He also told me he expressly did not want to discuss anything else in relation to the issues between Ms Proctor and Northable because he felt that this should wait for the properly constituted meeting, in line with the arrangements that had already been made.
- [28] However, some discussion did eventuate because Ms Proctor raised those issues. Ms Proctor had assumed the meeting was to talk about her request to see a standard procedure and upon her arrival she reiterated that she wanted clarification about “*the exact process that was being followed regarding my case. He took a copy of the Employment Relations Act 2001 [sic] off his shelf and dropped it onto the table and said “this is what we are following. The law. This Act.”*”
- [29] Mr Matthews told me he referred to the Employment Relations Act as a way of stressing that Northable intended to honour its obligations. Ms Proctor then began to raise concerns she had about the renegotiation of her agreement, saying that it had been thrust upon her during her performance appraisal. Mr Matthews made some comments about the fact that her leave entitlements were more generous than those of other staff and that this had caused “bad blood.”
- [30] He then went on to express his concerns about Ms Proctor’s behaviour the day before. Staff had told him they were frightened by her outburst, and that such behaviour (which she had displayed before) had to stop. However he would not tell her who had complained. Finally, they discussed possible dates for the meeting which had been cancelled, before going their separate ways.
- [31] Ms Proctor told me that the meeting of 16 March was a big factor in causing her to resign. She told me she had found the previous month very stressful and: “*at this point I felt totally disillusioned with the way the negotiations had been handled from the start...I was really upset with how I had been treated.*” She was also concerned, given the comment about “bad blood” that her remuneration might have been discussed with other staff “*in order to ...isolate me from them and put more pressure on me to agree to accepting a reduction in leave entitlement.*”
- [32] On 17 March, she gave notice of her resignation. Her final day at work was 31 March. There were no problems during the period of notice and she declined offers from Mr Matthews to reconsider her decision. Another staff member left at the same time. Northable hosted a large gathering to farewell the two staff, inviting over sixty people from outside the organisation at Ms Proctor’s request.
- [33] Ms Proctor summarised her reasons for leaving as follows:
- “*The NDRC [Northable] had breached my contract by denying me my leave entitlement.*”

- *It had been indicated to me that the NDRC would continue to breach my contract until I agreed to accept a reduction in my leave entitlement.*
- *That if I did not agreed [sic] to a reduction in my leave entitlement then I would be “restructured” out of my job.*
- *That throughout the process the NDRC conducted themselves in a manner that destroyed the relationship of trust and confidence between employer and employee.*
- *That the terms of my contract were discussed openly with other employees causing me to believe that there was an orchestrated campaign to isolate me in the workplace.”*

[34] In the first two or three months after she left Northable, Ms Proctor applied for two jobs which were suitable for someone of her skills and experience, but was unsuccessful. After this she decided for family reasons to take part-time work, as she had considered while still with Northable.

### **Determination**

[35] Although Ms Proctor was very concerned about the correspondence of 7 and 14 March, she arrived at work on the morning of 15 March prepared to meet with her employer. At that point, she had not reached the stage where she felt she had to resign. She was still prepared to discuss the issues which had arisen between them. Two days later, as she told me, she had changed her mind about this and no longer believed there was any purpose to such a meeting. The question for me is therefore whether anything happened, or came to her attention, between the morning of 15 March and the morning of 17 March, to cause her to lose all trust and confidence in her employer. I have not been satisfied that it did.

[36] The first significant event to occur was the cancellation of the meeting of 15 March. I accept that it was essential for Mr Matthews to attend and he was unavoidably prevented from doing so. Immediately after the funeral he made a priority of responding to Ms Proctor’s concern that she had not been informed in a timely manner about his absence. Although it was never clear quite how the miscommunication had occurred, it was established that it was not his fault. It was unfortunate that this meeting had to be cancelled but no blame attaches to Northable as a result.

[37] Next, Ms Proctor was entitled to know that the meeting would be rescheduled as soon as possible. At the meeting of 16 March Mr Matthews discussed alternative dates for the meeting. Once again, I consider that this met Northable’s obligations.

[38] This leaves for consideration the rest of the discussion at the brief meeting on the afternoon of 16 March. Again, I do not consider that there was anything in Mr Matthews’s conduct to precipitate a resignation. He was entitled to raise the issue of her behaviour the day before (Ms Proctor does not dispute that it was inappropriate and that she owed Ms Eilering an apology.) Mr Matthews did not make a great deal of fuss about this and there was no suggestion that the matter would go any further. As for the brief exchange about the substantive matters between the parties I am satisfied that Ms Proctor initiated this. Mr Matthews halted discussion on the basis that it should wait until a formal meeting. I consider this to have been the right thing to do, and do not consider his comments about the Employment Relations Act to be out of line in any way.

[39] When she talked to me about her grievance Ms Proctor said she was certain that Northable intended to vary her terms of employment unilaterally. I think it was too soon to tell. (Mr Matthews told me that if this had been his plan he would have got on and done it.) I consider that Ms Proctor’s resignation was premature. She acted hastily without waiting to see what might come out of the proposed meeting. As well, the orderly completion of the notice period

and the send-off given Ms Proctor and her colleague indicate that the relationship had not broken down irretrievably.

**[40] I am not satisfied that Ms Proctor has established any breach of duty by the employer sufficient to lead her to resign. She has not established a personal grievance of constructive dismissal.**

### Remedies

**[41] I accept that the correspondence of 7 and 14 March caused Ms Proctor anxiety and uncertainty. She is entitled to a modest award of compensation for hurt and humiliation arising out of her disadvantage grievances. Northable is ordered to pay to her the sum of \$1,500.00 in total pursuant to s.123 of the Employment Relations Act 2000.**

### Costs

[42] I leave it to the parties to discuss this issue however if a determination is sought from the Authority application should be made within 28 days of the date of this determination.

Y S Oldfield  
Member of Employment Relations Authority