

[3] During 2007 Miss Koroi says that she became aware that her manager, Mr S, was inappropriately using Excel staff to undertake private contracts.

[4] Early in 2008 Ms Koroi was invited to attend a disciplinary meeting to answer allegations that she had failed to undertake her duties and may have misinformed Mr S regarding whether or not certain duties had been undertaken.. However before this disciplinary meeting could be held Miss Koroi, through her representative Mr Barry Nalder, lodged a protected disclosure statement with her employer setting out her concerns regarding Mr S's inappropriate use of Excel staff to carry out private work.

[5] After seeking legal advice the Company, appropriately, separated the disciplinary matters regarding Ms Koroi from the matters she had raised under the Protected Disclosure Act. The disciplinary matters were held in abeyance while the protected disclosure issues were investigated by the Excell's Chief Operating Officer, Mr Tony Fisher. While the protected disclosure investigation was being undertaken Ms Koroi was placed on leave on full pay.

[6] On 29 February 2008 Mr Fisher advised Mr Nalder that the protected disclosure investigation had been completed and that as a result Mr S. had resigned from his employment with the Excell.

[7] On 7 March 2008 the company's General Manager - Human Resources, Mr Philip Maguire, and the company's Operations Manager - Far North, Mr Steven Lang met with Ms Koroi and her representatives to discuss the disciplinary concerns that had been raised by Mr S. Following this meeting Mr Maguire advised Mr Nalder that the company had decided that *disciplinary action of any kind (was) not warranted*. It was then agreed that Ms Koroi should return to work on 13 March 2008.

[8] On 13 March 2008 Ms Koroi reported for work and met with her new manager Mr Maurice Wanakore. Ms Koroi says that Mr Wanakore told her that she *would never be employed as a supervisor again*, that *she was to have no contact with other staff* and *she was not getting her old job back*. She says he also told her that she would no longer have access to a company vehicle. Following this meeting Ms Koroi did not return to work as agreed but contacted Mr Nalder. Mr Nalder arranged for her to meet with Mr Lang on 16th of March.

[9] At the meeting on 16 March 2008 it was agreed that Ms Koroi would return to work on 19 March 2008, that she would occupy a non-supervisory role for approximately six weeks *to allow things in the far north to settle down*, and that all her other terms and conditions would continue to apply.

[10] Unfortunately this second attempt to return to work did not go well and, Ms Koroi says, Mr Wanakore advised her that she would need to start work at 4:30 a.m. and would be based in Kaikohe. Ms Koroi also says that the work she was allocated consisted of *sweeping streets and emptying rubbish bins* and that she felt humiliated and extremely embarrassed in front of other staff who she had previously supervised.

[11] Miss Koroi says that her blood pressure had again began to rise and she advised Mr Nalder that she felt she had no option but to resign. Mr Nalder says he advised Ms Koroi to *hang in there* as long as she could to give him an opportunity to negotiate with the company. However although the negotiations were continuing Ms Koroi formally resigned from her position on 3 April 2008. Ms Koroi says that she believes that the extreme difficulty she had in returning to work was a deliberate retaliation against her *blowing the whistle* on Mr S. She says that she was constructively dismissed from her position in that she had no option but to resign because of the unilateral change to the conditions of employment imposed by her employer.

The issues for determination

[12] The first issue for determination is whether or not Ms Koroi is entitled to reimbursement for the money she expended on establishing a vehicle depot at her private property and/or recompense for the use of that property and/or recompense for the re-establishing the area into pasture.

[13] The second issue for determination is whether the actions of her employer in handling her protected disclosure and her subsequent return to work were unjustified and caused her humiliation and embarrassment. If so, what remedies is Ms Koroi entitled to receive because of those actions.

[14] The third issue for determination is whether or not Ms Koroi was constructively dismissed and, if she was, what remedies, if any, is she entitled to receive.

Is Ms Koroi entitled to reimbursement for the cost of establishing and maintaining a parking area?

[15] Excell have argued that this matter is not within the jurisdiction of the Authority but is rather a commercial matter between the company and Ms Koroi. While they do not dispute that Ms Koroi did establish and maintain a parking area which was used by company staff to safely park company vehicles, they say that there is absolutely no record of any agreement between the company and Ms Koroi either that she should establish the parking area or that she should be reimbursed for doing so. They also point out that Ms Koroi does not appear to have followed up on any payment's due to her for the creation of the car park and that the provision of the car park was not a condition of her employment. The company says both of the managers named by Ms Koroi have since resigned and Excell do not know how to contact either of them. Ms Koroi accepts that there is no written agreement between herself and the company but is insistent that there was a clear understanding from the company's managers that she would be reimbursed for the cost of establishing the vehicle parking area.

[16] I do not accept the company's position that the Authority has no jurisdiction to decide this matter. It was clearly within the scope of an employment arrangement that the employer could have arranged with Ms Koroi for her to provide a parking area for company vehicles and that the cost of this would be reimbursed. Such an arrangement could be said to *be arising from the employment relationship*. While I am satisfied, however, that Ms Koroi did have an informal arrangement with her managers to provide the car parking as a convenience to the company and its staff, she has been unable to produce any correspondence or any supporting evidence that there was an agreement that she should be reimbursed for this expense. It is unfortunate that the managers concerned have not been able to be located. In regard to the provision of parking therefore, I find:

- a. An arrangement in the nature of that Ms Koroi says she entered into with her managers is within the jurisdiction of the Authority as an *employment relationship problem* being *a problem arising out of an employment relationship*..(Ref. Employment Relations Act, section 5.)
- b. No corroborative evidence has been produced to date to support Ms Koroi's claim that the company should reimburse her for the cost of establishing and maintaining the vehicle park or the restoration of that area to pasture.
- c. In the absence of corroborative evidence I decline to order Excell to reimburse Ms Koroi for the costs she is claiming.
- d. Leave is reserved, should further evidence become available, to put that evidence in front of the Authority for further determination. Such evidence might include sworn statements from the managers with whom Ms Koroi says she entered into this arrangement.

Were the actions of Excell in response to Ms Koroi's protected disclosure, and her subsequent return to work, unjustified?

[17] During the course of my investigation the parties agreed that there was no dispute between them regarding the events surrounding the company's investigation of Ms Koroi's protected disclosure or those matters which were the subject of the company's disciplinary investigation. Both parties agree that at the completion of the disciplinary investigation Ms Koroi was completely exonerated and that there was to be no disciplinary action of any sort taken against her. At that point, i.e. 11 March 2008, the way was clear for Ms Koroi to return to work with a clean slate and with the matters relating to her protected disclosure concluded.

[18] The Far North is a close-knit community. Despite Excell's best efforts to keep the matter confidential, it was inevitable that issues surrounding Ms Koroi's protected disclosure, and Mr S's departure, would become the subject of rumour and discussion. It was particularly important under these circumstances that the company make every effort to make Ms Koroi's return to work as smooth as possible. It is unfortunate that managing this transition was left to Mr Wanakore who, as the new manager knew little of the background and was working in geographical isolation from those who had managed both the protected disclosure investigation and the disciplinary process.

Mr Wanakore accepted, in response to questions from the Authority, that he did tell Ms Koroï that she could no longer use a company vehicle and that he may have used words that indicated that she would not return to her old position. Even after these initial difficulties were addressed by Mr Lang, Mr Wanakore appears to have requested Ms Koroï to undertake hours of work which were clearly outside of her usual roster and to require her to provide her own transport. On the other hand I also accept that Ms Koroï may have contributed to her own difficulties by making comments to other staff regarding her ongoing status.

[19] Excell cannot be faulted for the way in which they managed Ms Koroï's protected disclosure and the parallel disciplinary procedures. They can however be faulted for the way in which they've managed Ms Koroï's return to work. **The deficiencies in this aspect of the process amount to unjustified actions on behalf of Ms Koroï's employer and she has a personal grievance in this regard.** These unjustified actions caused Ms Koroï unnecessary stress and humiliation. She is entitled to compensation for that stress and humiliation.

Was Ms Koroï constructively dismissed?

[20] In *Auckland etc Shop Employees' etc IUOW v. Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes:

- a. where the employer gives the employee a choice between resigning or being fired, or
- b. the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or
- c. a breach of duty by the employer leads the employee to resign.

In *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] 1 ERNZ 168, the Court of Appeal said:

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

[21] Ms Koroi came to the conclusion that she had no option but to resign. There is no suggestion that her employer gave her *a choice between resigning or being fired*. Ms Koroi, in her evidence, suggests that there appeared to be a *deliberate course of conduct* by her employer aimed at *coercing her to resign* and/or her employer had *breached its duty* to her in such a way that she had no option but to resign. Her representative commenced discussions with her employer regarding an appropriate exit package. Before these discussions could be completed Ms Koroi submitted her resignation and did not return to work. This resignation was, I find, premature. While there were clearly difficulties and some misunderstandings regarding her return to work her employer had given every indication by its previous actions that they wished, over time, to restore Ms Koroi to the position she had previously held. They had maintained her salary throughout a period of several weeks that she was off work while the various investigations were conducted and they had agreed, during the transitional period, to honour her terms and conditions of employment.

[22] There is no evidence that Excell deliberately set out to force Ms Koroi to resign. While some of the instructions issued by Mr Wanakore may have resulted in a breach of Ms Koroi's employment agreement, Excel had clearly demonstrated that they wished to do everything possible to restore Ms Koroi to her previous position and status. Ms Koroi could have again asked Mr Lang to intervene as he had done previously. **Ms Koroi was not constructively dismissed. She does not have a personal grievance in this regard.**

Remedies

[23] I have found that no evidence has been produced to the Authority to date to support Ms Koroi's claim for reimbursement of the costs involved in establishing a vehicle park on her private property or the restoration of the car park to pasture. I have also found that she was not constructively dismissed. However I have found that some of the actions and statements of her manager hindered her return to work, were unjustified and resulted in unnecessary stress to Ms Koroi. In this regard she has a personal grievance and is entitled to be compensated for the hurt and humiliation caused to her.

Contribution

[24] In terms of section 124 of the Employment Relations Act, I am required to consider, when deciding the nature and extent of any remedies to be awarded to Ms Koroi, whether her actions contributed in any way to the situation that gave rise to her personal grievance. If I find that she did contribute to this situation and I am required to consider whether or not any remedies should be reduced to take account of that contribution. While the primary responsibility clearly fell on Ms Koroi's employer to ensure that her return to work went smoothly, Ms Koroi has to accept some responsibility for the difficulties which arose. I have no doubt that she could have been more circumspect in her comments to other staff. However Ms Koroi's contribution to the situation was, in my assessment, relatively small and I assess it at 10%. The compensation I am awarding has been reduced from what I would otherwise have ordered to take account of that contribution.

Compensation for hurt and humiliation

[25] The unjustified actions and comments of Ms Koroi's manager during her attempted return to work caused her stress and humiliation. Her position had been one of some status in her community and the apparent reduction in status and removal of her access to a company vehicle was clearly embarrassing. She is entitled to be compensated for this hurt and humiliation. **Excell Corporation is to pay Ms Koroi \$3600.00, without deduction, in terms of section 123(1)(c)(i) of the Employment Relations Act.** As noted above this amount has already been reduced to take account of Ms Koroi's contribution.

Costs

[26] Costs are reserved. The parties are requested to attempt to resolve this matter between themselves in the first instance. If they are unable to do so Ms Koroï may file and serve a submission in respect to costs within 28 days of the date of this determination. Excel will then be given 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority