

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 119/10
5070822

BETWEEN

MARY O'NEILL
Applicant

A N D

THE VICE CHANCELLOR
UNIVERSITY OF OTAGO
Respondent

Member of Authority: Paul Montgomery

Representatives: Jenny Beck, Counsel for Applicant
Barry Dorking, Counsel for Respondent

Investigation Meeting: 18 and 19 June 2008
27 May 2009

Submissions Received: 12 June 2009 for Applicant
23 June 2009 for Respondent

Determination: 12 May 2010

DETERMINATION OF THE AUTHORITY

[1] Ms O'Neill claims she was constructively dismissed from her position as Administrative Assistant in the University's Department of Mathematics following difficulties she experienced with the Head of Department (HOD) Professor Fenton.

[2] The applicant seeks a declaration her resignation was in fact an unjustified dismissal and she seeks remedies of either payment of the redundancy figure as discussed with the University, or in the alternative loss of wages suffered over a four month period; compensation for humiliation, distress and hurt in the sum of \$15,000 and costs.

[3] The respondent denies the difficulties which developed between Professor Fenton and the applicant constituted a serious breach of its obligations to Ms O'Neill

and her resignation was not foreseeable. It therefore declines to meet the remedy the applicant wants.

Brief history

[4] The initial problem arose in mid 2005 when Ms O'Neill alleges Professor Fenton sought her advice regarding a payment of funds to a staff member. When Ms O'Neill told him that the sum was additional to what was due and would need to be accounted for, she says he stormed out of her office. A few minutes later Professor Fenton summoned Ms O'Neill to his office where he told her that when he wanted her advice he would ask for it and that she was not to tell him how to run the Department. The applicant says the HOD was very angry but she put his uncharacteristic response down to a recent cycling accident in which Professor Fenton had suffered a blow to the head.

[5] A further incident occurred on 15 December 2005 when Professor Fenton asked Ms O'Neill to assume some responsibilities in the use of the Departmental credit card. The applicant told her HOD that she could not be involved with any aspect involving the authorisation of Departmental expenses. A short time later she was again called to the Professor's office. The applicant tried to explain the inappropriateness of the suggestion and stated that standard University procedures needed to be followed. Ms O'Neill says again Professor Fenton again reacted angrily and upbraided her for what he referred to as her *obstructive attitude*. He then began criticising other aspects of her work in what appears to have been an impromptu review of her performance. The meeting lasted over one and a half hours.

[6] Another issue arose in late March 2006 when a purchase order form was removed from the applicant's office. The applicant was not in her office at the time and access had been gained by the use of a master key. A carbon copy of the form signed by a Dr Lam and Professor Fenton was later found in the applicant's pigeonhole. The applicant says that following this incident the Professor became increasingly critical of her work and hostile towards her personally where she says she became uncomfortable when alone with him. She says the circumstances in which she found herself generated consistent stress causing a deterioration in her health, leading to her taking sick leave on 24 July 2006.

[7] There were other incidents which had heightened the applicant's anxiety which need not detain us here. Ms O'Neill contacted the Union and with its support arranged a meeting with the Pro Vice Chancellor for Sciences, Professor Vernon Squire on 27 July 2006. In the course of that meeting Professor Squire advised the applicant that when he had spoken to Professor Fenton about the management of the Department's financial resources, Professor Fenton had complained to him about the applicant and that he, Professor Squire, told the HOD Ms O'Neill was acting in accordance with the University's protocols.

[8] The applicant says this meeting led her to believe Professor Squire would be taking steps to have Professor Fenton moderate his attitude towards her but this did not eventuate.

[9] Ms O'Neill says she was forced to resign and that was done by letter of 3 September 2006. The applicant at the time requested she be paid the standard redundancy package however Mr Shearer, the Department's Human Resources Manager, declined such a payment as the position was not surplus to requirements. Ms O'Neill's personal grievance was notified to the respondent by her solicitor on 18 October 2006.

[10] The respondent says the behaviour of Professor Fenton towards Ms O'Neill is unlikely to have been as aggressive as the applicant describes, one witness describing his experience of Professor Fenton's personal style as akin to that of a Buddhist. Further, it says at no time was the issue of Ms O'Neill's health and the stress she was experiencing ever put to it. None of the respondent's witnesses can recall seeing any medical certificate confirming a diagnosis of work related stress which would have alerted them to the seriousness of the situation. There is no question such certificates existed at the time but were first seen by the respondent's witnesses in the course of preparation for the Authority's investigation.

[11] The respondent was aware of the friction between the two former good colleagues and believed Ms O'Neill's resignation was tendered because she wanted to be rid of it. It was not until Mrs Beck's letter of 18 October 2006 that the claim of constructive dismissal was raised.

The burden of proof

[12] In a case such as this where the relationship has ended by the tendering of a resignation, the initial burden of proof to establish the resignation in fact amounted to a dismissal rests with the applicant. Only after she has established she had no alternative but to resign does the burden transfer to the respondents.

[13] In this case the allegation rests on the applicant's contention that breaches on the part of the HOD justified Ms O'Neill repudiating the employment agreement and that the gravity of those breaches entitled her to walk away.

The test

[14] The test for justification was set out in s.103A of the Act and requires the Authority or Court to determine, on an objective basis, by considering whether the employer's actions and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

The investigation meeting

[15] At the investigation meeting the Authority heard evidence on behalf of the applicant from Ms O'Neill herself, and at the reconvened meeting from Mr Scott of AUS who was overseas at the time the investigation meeting was convened.

[16] For the respondent evidence was presented by Professor Fenton, Mr Jarrod Shearer, Professor Squire, Mr Brian Johnston, Administration Manager and Mr Bruce Dowland, Head of Internal Audit. Statements prepared as character references for both Ms O'Neill and Professor Fenton were received by consent of counsel.

[17] The Authority expresses its appreciation to all witnesses who gave evidence for their open and direct responses to questions whether put by the authority or by respective counsel. I also record my thanks to counsel for their detailed submissions which have been carefully considered in the preparation of this determination.

The issues

[18] To resolve this employment relations problem the Authority needs to make finding on the following issues:

- Was the applicant unjustifiably constructively dismissed; and
- If not, was she disadvantaged in her employment by some unjustifiable action or inaction on the part of the respondent; and
- If the applicant has a personal grievance to what remedies is she entitled.

Discussion and analysis

[19] Ms O'Neill is a woman of strong ethical principles who prior to these events held Professor Fenton in high regard and also enjoyed a sound working relationship with him. That relationship plummeted over the issues described above and led to the applicant's decision to resign. The evidence was that she had decided to resign in June 2006 and her resignation was finally tendered on 3 September 2006 after unsuccessful attempts to negotiate an exit package.

[20] While it appeared from the respondent's evidence that Ms O'Neill did not actually advise her employer that she was suffering from stress as a result of the strained relationship with her HOD, I have carefully examined the evidence around the medical certificates and in particular that issued by Dr Cynthia Buchanan, the applicant's General Practitioner on 11 August 2006. Counsel for the applicant put to Professor Fenton that the medical certificate specifically referred to Ms O'Neill being medically unfit for work due to a workplace induced illness. Counsel asked the Professor *did that put you on your guard?* Professor Fenton replied *not sufficiently. I thought it was only pro forma.*

[21] It is also clear from Professor Fenton's evidence that he had had no contact with the occupational health nurse whom Ms O'Neill had visited previously. That is not surprising since matters of privacy would have required the authorisation of the applicant to release that information to Professor Fenton or to the Human Resource Department. I am unsure why Mr Scott, who was acting as advocate for Ms O'Neill, did not address this matter with her to enable its discussion when they met with Professor Squire. I accept Professor Squire and Mr Scott were unaware of a medical certificate given to the occupational health nurse which referred to stress. Also I accept Professor Fenton's evidence that he could not recall ever seeing the certificate issued by Ms O'Neill's GP. However, his evidence before the Authority as noted

above clearly establishes that he had and, on the face of it, seriously underestimated its importance.

[22] Professor Squire made it quite clear he had been shown no medical certificates and was unaware Ms O'Neill was taking sick leave at the time she met with him and Mr Scott. At that time the applicant was working in the mornings and taking sick leave in the afternoons.

[23] According to Professor Squire that meeting was relaxed and pleasant. It was necessary for either Ms O'Neill or Mr Scott to squarely put Professor Squire on notice that the pressure her work was causing was serious and which if not addressed, would likely result in her resignation. The position would be vastly different had that interchange occurred at that time.

[24] While I find it somewhat remarkable Mr Scott was not up to date with Ms O'Neill's medical situation, and presumably, not aware of any thoughts she had of resigning, it is nonetheless a fact Professor Squire had no positive signal that the applicant was under stress and needed help. Nor did he have a request to consider a transfer of Ms O'Neill to some other role with the respondent.

[25] When questioned on this matter by the Authority Mr Scott said he could not recall whether this matter had been canvassed or not. On the balance of probabilities, I find it was not.

[26] It is clear from the copy of the 11 August 2006 medical certificate which came from the applicant's personnel file held at the University, Ms O'Neill had handed it in. I am satisfied on the evidence before the Authority that Professor Fenton had seen this and perhaps forwarded it to the HR Department who appear to have filed it in the belief Professor Fenton was apprised of its contents and would take whatever action he thought necessary in the circumstances.

Constructive dismissal

[27] Standing back and reviewing the relevant evidence on this thread of the applicant's claim, I am not convinced the behaviour of Professor Fenton was sufficiently serious to justify Ms O'Neill treating the employment agreement as ended. In her evidence Ms O'Neill said she felt she had no option but to resign however objectively judged, other options were available but were not pursued. Had

Professor Fenton taken a more perceptive view of the significance of the 11 August medical certificate or if Professor Fenton and Mr Shearer had been apprised of its existence and contents, those other options could have been investigated. Ms O'Neill has not met the initial requirement in a constructive dismissal claim of transferring the onus of proof to the respondent.

[28] However, that is not the end of the matter in this case. As noted above I am satisfied Professor Fenton did see the 11 August 2006 medical certificate and his regarding of it as simply *pro forma* effectively deprived Ms O'Neill the opportunity for support and the time to consider her options. The Professor's perception and consequent inaction in the face of a medical certificate identifying a serious medical condition falls short of what a fair and reasonable employer would have done in the circumstances that prevailed at the time.

[29] Accordingly I find Professor Fenton's failure to take action was unjustified and as a direct result, Ms O'Neill has suffered significant disadvantage.

[30] For the avoidance of doubt my decision on the matter of disadvantage is based primarily on s.122 of the Act given the particular circumstances of this case.

Determination

[31] Returning to the issues set out above I find:

- The applicant resigned and was not constructively dismissed;
- The applicant has suffered disadvantage as a result of the unjustified action on the part of the respondent;
- Ms O'Neill has a personal grievance and I now turn to the matter of remedies.

Remedies

[32] The only remedy available to Ms O'Neill is compensation for hurt and humiliation arising from the disadvantage identified above. In considering this issue I have focused on what was done or not done by the respondent from 11 August 2006 until Ms O'Neill's resignation.

[33] In the circumstances of this case I think it just to award the applicant the sum of \$6,000 under s.123(1)(c)(i) of the Act. This sum is higher than I would otherwise have considered due to her length of service with the respondent and the degree of detriment Ms O'Neill endured.

Costs

[34] Costs are reserved. Counsel are required to confer in an attempt to resolve the matter of costs between them. Failing reaching an agreement, leave is reserved to file memoranda with the Authority for its consideration.

Paul Montgomery
Member of the Employment Relations Authority