

[3] Weston Milling resist all of Ms O'Connor's allegations, and in particular deny that she was constructively dismissed or indeed that she was bullied at all. Weston Milling say the proximate cause of Ms O'Connor's decision to resign was a personality conflict with a co-worker.

[4] On Friday 28 September 2011, there was a disagreement between Ms O'Connor and a co-worker Ms Bunting. It is common ground that these two women did not have a particularly good working relationship. However, Ms O'Connor did have a good working relationship with Mr Brotherton, her immediate manager.

[5] The evidence is that Ms O'Connor had complained to Mr Brotherton on a number of occasions about Ms Bunting and that he had used his best endeavours to try to resolve matters between the two women, but ultimately, those efforts had been unsuccessful.

[6] On 28 September 2011 when there was a further complaint from Ms O'Connor about Ms Bunting, Mr Brotherton asked for help from the then human resources manager, Mr Vlad Purgaric.

[7] Mr Purgaric's evidence is that he spoke to both women and, amongst other things, encouraged them to be open and straightforward with each other.

[8] Then, in an effort to promote just that kind of openness, he convened a meeting with the purpose of having the two staff members discuss their issues openly. At that meeting as well as the two protagonists were Mr Brotherton, Mr Purgaric and Mr Brotherton's manager, Mr Moodley.

[9] Weston Milling say that Ms O'Connor used the meeting to "rant" about "everything and anything" and accordingly, given Ms O'Connor's behaviour, Mr Purgaric drew the meeting to a close.

[10] Mr Purgaric then tried to institute one-on-one meetings with the two protagonists again but Ms O'Connor simply announced she would resign. Mr Purgaric encouraged her to think through her options but Ms O'Connor was as good as her word and resigned the next working day.

[11] The letter of resignation was given to Mr Brotherton who also encouraged Ms O'Connor to reflect on her determination to leave.

[12] Originally, Weston Milling wanted Ms O'Connor to work out her notice period. However, there was an incident on 7 October 2011 which encouraged Weston Milling to amend their position.

[13] Ms O'Connor was in the tea room on her morning tea break. Two co-workers expressed their sadness that she was leaving. Minutes later another co-worker, Jasmyn Sun came into the tea room and smiled at Ms O'Connor. Ms O'Connor retorted *you would have seen my resignation then – you are one of the reasons I am leaving.*

[14] Ms Sun then said something to the effect *how dare you say that to me, I'm going to see Vlad* (referring to Mr Purgaric).

[15] As a consequence of this incident, Weston Milling concluded that it would be best for all parties if Ms O'Connor did not work out her notice period as interrelationships between her and other staff were causing everyone distress.

[16] Accordingly, Ms O'Connor was assisted to leave the secure premises and the balance of her notice period was duly paid out.

Issues

[17] The Authority proposes to consider the following issues:

- (a) Was there a constructive dismissal?
- (b) Was there evidence of bullying?
- (c) Was there a healthy workplace culture?
- (d) Was Ms O'Connor embarrassed and humiliated by not working out her notice?
- (e) Did Weston Milling fail to investigate the lunchroom incident?

Was there a constructive dismissal?

[18] Despite Mr O'Connor's efforts on his wife's behalf, the Authority has not been persuaded that there is a constructive dismissal here on the evidence the Authority heard. The law on constructive dismissals is well settled. In effect, a constructive dismissal is a termination of the employment where, although the employee resigns, it is a resignation that is involuntary in that it is activated by the employer rather than by the employee. Further, the onus of proving the termination of the employment was caused by the employer is on the claimant employee.

[19] In the leading Court of Appeal decision on constructive dismissal, the early case of *Auckland Shop Employees Union v Woolworths New Zealand Limited* [1985] 2 NZLR 372, the Court identified three situations where a constructive dismissal might occur. The first was where the employee was given the choice of resignation or dismissal, the second is where the employer can be shown to have followed a course of conduct with the dominant purpose of effecting a resignation and the third was where a breach of duty causes the worker to resign.

[20] As to the first, there is no evidence at all that any such alternative was ever put to Ms O'Connor. As to the second, again there is nothing in the evidence to suggest a course of conduct pursued by Weston Milling with the purpose of effecting Ms O'Connor's resignation. Nor finally, is the Authority persuaded that there was any breach of duty which could reasonably have caused Ms O'Connor to bring the employment to an end.

[21] The evidence the Authority heard about the events surrounding the resignation support Weston Milling's thesis that Ms O'Connor resigned because of a personality conflict with another employee, or some other unknown factor outside of the behaviour of Weston Milling.

[22] Even Ms O'Connor herself seems to accept that in her email to Mr Brotherton of 7 October in which she thanks him for his words of comfort when she resigned and concluded by saying that ... *for me Athalie (Ms Bunting) has just been the last straw.*

[23] Moreover, at the point of which Ms O'Connor suddenly announced her intention to resign at the so called Board room meeting on Friday 30 September 2011, Mr Purgaric, the human resources manager, told her immediately that Weston Milling would not accept her resignation *as it was an emotional time and she needed to*

reconsider things over the weekend and get back to us on the following Tuesday which would be her first day back at work.

[24] If Weston Milling had been keen to get Ms O'Connor to resign her position, it is difficult to see why the human resources manager would have behaved in this way.

[25] Furthermore, when Ms O'Connor presented at work the following Tuesday, 4 October 2011, and handed her immediate manager, Mr Brotherton a letter of resignation, his immediate response was to send her back an email saying:

Are you 100% sure you want to do this??

I don't want to see you leave as you are a valued member of the team, is there anything that could be done to encourage you to stay??

[26] Again, Mr Brotherton's behaviour is inconsistent with any attempt by Weston Milling to get rid of Ms O'Connor.

[27] The only basis on which Ms O'Connor's claim could possibly be considered is the contention she makes that she was bullied at work. This particular aspect will be commented on in more detail in the next section of this determination but for present purposes the Authority must observe first that there is not a shred of evidence of bullying of Ms O'Connor and second, there is also no evidence before the Authority that Ms O'Connor ever complained about bullying. In those circumstances, and without any evidence of any alternative basis on which the "breach of duty" could proceed, the Authority is satisfied that Ms O'Connor has not been unjustifiably dismissed.

Was there bullying in the workplace?

[28] The Authority has already sketched its view of this particular contention. First, there is not a skerrick of evidence that Ms O'Connor ever complained that she was being bullied. She clearly was an assertive woman and had no difficulty at all about taking matters up on her own behalf. At her insistence, the Authority heard from a whole raft of current and former managers and staff of Weston Milling and not one of the managers would say on oath that she had ever complained that she was bullied. Conversely, the evidence was clear that she raised other matters but never about being bullied.

[29] A number of the managers who gave evidence, felt obliged to tell the Authority what a difficult woman she could be and without wishing to dwell on that aspect to any extent, the Authority is obligated to observe that Ms O'Connor's insistence on the Authority hearing the evidence of a large number of witnesses did nothing to assist her claim.

[30] As well as there being not a skerrick of evidence that Ms O'Connor ever complained about being bullied, there is equally not a shred of evidence that she was bullied. There is just nothing to ground any basis for her complaint that she was subjected to bullying.

[31] It is equally important for the Authority to observe that this was not an employer without any knowledge of bullying. First, it is a large and well resourced organisation with significant human resources personnel, and there was a clear and express bullying policy. As part of Weston Milling's Human Resources Policy, there was a commitment to an Integrity Hot Line which enabled employees to ring confidentially and pursue workplace issues.

[32] That policy is first of all incorporated in the employment agreements of staff by requiring staff to "...abide by all of the Employer's policies, rules, code of conduct and procedures as are detailed by the Employer to the Employee from time to time either as part of the overall house rules or as a stand alone, specific instruction....".

[33] As part of that package of material incorporated into the employment agreements of staff, is the "Workplace Harassment Policy" which in one clear A4 page, defines harassment, then defines bullying, then identifies the required course of action and then says what the employer will do about it. The concluding paragraph includes reference to further steps an employee may take, including reference to the Human Rights Commission.

[34] The steps the affected employee must take to engage the policy are to report the behaviour complained of to their manager and /or to a human resources manager. In addition, a complaint may be made under the "Company's Working Together with PRIDE Guideline".

[35] The Authority has found as a fact that Ms O'Connor did none of those things. Nor did she complain to the Human Rights Commission, as she was entitled to do.

[36] It is illustrative of the commitment of Weston Milling to its policy that the A4 document is signed by the Chief Executive and a copy of the policy “ ... is to be displayed at all work locations.”

[37] As well as having a bullying policy, Weston Milling also had had bullying complaints but not bullying of Ms O’Connor. What is so extraordinary about Ms O’Connor’s claim to have been bullied is that she was assertive enough to address issues to senior managers from time to time, and she herself was a witness participant to a bullying complaint involving another staff member, and so she would have been well aware of the availability of the process, had she chosen to avail herself of it.

[38] The evidence before the Authority suggests that this was a workplace that was full of “strong personalities” to use the phrase used by Mr Brotherton in his evidence to the Authority. There had been at least one bullying allegation dealt with in the recent past and, as the Authority has just noted, Ms O’Connor was a participant in that process and so would have been well aware of what needed to happen in order to engage the process.

[39] The Authority is not persuaded that Ms O’Connor was ever bullied or indeed that she ever complained that she was bullied. The employer was sufficiently large to have well developed policies on bullying, together with an active human resources department to deal with any such allegations and to promote training to avoid such incidents. The Authority heard evidence of training being recently provided in respect of bullying in this workplace.

[40] Not one of the senior managers called to give evidence in this matter would confirm that they had ever been advised by Ms O’Connor that she was being bullied. Even if they were mistaken about that, Ms O’Connor would have been well aware of the necessary process, and especially its formality, given that she had been a witness to a bullying allegation herself. Amongst other things, she was interviewed about what she knew concerning the other bullying allegation and, as an intelligent person, she would have realised there was a process to engage in. There was no paper trail put before the Authority to confirm that a complaint had been made; all that was suggested was that conversations she had had with managers ought to have been interpreted as a bullying complaint, when plainly, they were not.

[41] But not only is there no evidence of a complaint of bullying; there is also no evidence of the bullying itself, at least insofar as Ms O'Connor as victim is concerned. Given the nature of this workplace, which the Authority has already referred to, it is difficult not to conclude that this group of managers would be particularly attuned to bullying and to acting on it as soon as it became evident. This was after all, a workplace that not only had policies about bullying but had also had a recent case of a bullying allegation being made, and being investigated by the employer. In those circumstances, the Authority finds it difficult to believe that this employer would not be active and assertive in dealing with bullying that was identified, as it had been in the recent past.

[42] Lest the matter be in any doubt, the Authority has found no reason to disbelieve the collective evidence of this employer whose position starts from an understanding of the undesirable nature of workplace bullying, continues with a developed policy to seek to prevent it and to investigate it when it emerges, has in fact investigated a serious bullying allegation recently and denies knowing of any bullying directed at Ms O'Connor or indeed of her claiming to have been bullied.

Was there a healthy workplace culture?

[43] It might be thought that because of the "strong personalities" just alluded to by the Authority, this workplace was not a particularly healthy environment in which to work. But the Authority does not accept that conclusion necessarily follows. It does seem to be the case that there were a number of dominant personalities in the workplace but the employer had proper policies to deal with any undesirable consequences of those strong personalities.

[44] Moreover, all the evidence the Authority heard about the various complaints that Ms O'Connor made over the period of her employment suggests that all of the senior managers that she engaged with went out of their way to try to address the concerns that she had. Clearly, she was one of the "strong personalities" that Mr Brotherton was speaking about and yet there is no evidence that Weston Milling sought to encourage her to leave or indeed encouraged others with similarly strong personalities to leave. Indeed quite the reverse seems to be the case. Weston Milling seems to have devoted a reasonable amount of energy to dealing with interpersonal difficulties that arose within the workplace. That does not seem to the Authority to create an unhealthy environment. Indeed quite the reverse is the case arguably. The

evidence the Authority heard suggests that Weston Milling put a deal of energy into resolving workplace conflicts and given that no employer can legislate for perfect compatibility amongst its staff, the existence or otherwise of appropriate commitment and policies and procedures to deal with any issues, is the best barometer of a wholesome environment.

Did Weston Milling embarrass and humiliate Ms O'Connor?

[45] After the unfortunate episode in the lunchroom on 7 October 2011, Weston Milling decided it would be best to not require Ms O'Connor to work out her notice. Accordingly she was asked to leave the premises that day and was assisted to leave because Weston Milling is a secure workplace with swipe card access only.

[46] Ms O'Connor complains that this process humiliated her and that, in consequence she is entitled to remedies. The Authority does not accept that connection.

[47] A fair and reasonable employer has an obligation to act in good faith not just to one employee but to all of them. At the time of the lunchroom incident, Ms O'Connor was working out her notice. She had already indicated, by her resignation, that she wished to leave the workplace. Weston Milling judged that the best approach, not just for itself and its continuing employees, but also for Ms O'Connor herself, was to have her leave the workplace but continue to be remunerated until the end of her notice period.

[48] The Authority is satisfied with the deliberate and careful way in which the employer went about notifying Ms O'Connor of what was to happen. She was spoken to privately by Mr Brotherton who told her that she did not need to work out the remainder of her notice period and that she would be paid in lieu. She was told the reason for this was because of the incident in the lunchroom and that she had upset a lot of people.

[49] The Authority is satisfied that in taking the steps it did, Weston Milling complied with the test of justification in section 103A of the Employment Relations Act 2000 (the Act). In that regard, the Authority has concluded that a fair and reasonable employer could conclude that removing an unhappy employee from the workplace during her notice period so as not to cause her further distress or indeed allow her to upset other staff, was a proper and justified course of action.

Did Weston Milling fail to investigate the lunchroom incident?

[50] The Authority's conclusion is that Weston Milling undertook a sufficient enquiry in order to establish that it would be best for all concerned if Ms O'Connor left the workplace. For the purposes for which the enquiry was undertaken, the Authority is satisfied that it was sufficient.

[51] However, if Weston Milling were undertaking the sort of enquiry that would be required if disciplinary action were to be taken, then clearly the enquiry that it undertook on this occasion would have been insufficient. But, as the Authority has just indicated, for the purposes at issue here, namely establishing that it was in the best interests of an unhappy employee who had already resigned and the colleagues that she was upsetting, and the employer itself, to not require the balance of the notice period to be worked out, the investigation was perfectly satisfactory and sufficient. Again, in the particular circumstances of this enquiry by Weston Milling, the Authority is satisfied that Weston Milling met the test of justification in the Act.

[52] Weston Milling, through Mr Purgaric, took all proper steps to establish that there had been an incident, to establish that there had been a number of people upset, including people who were friends of, or supporters of, Ms O'Connor and in those circumstances Weston Milling took the decision to ask Ms O'Connor not to continue working out her notice.

Determination

[53] The Authority has not been persuaded by any of Ms O'Connor's various claims. It follows that her case fails in its entirety.

Costs

[54] Costs are reserved.

James Crichton
Member of the Employment Relations Authority