

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 18
5358145

BETWEEN MONIQUE TONI GALLAGHER
Applicant

A N D PRESBYTERIAN SUPPORT
SERVICES (OTAGO) INC
Respondent

Member of Authority: M B Loftus

Representatives: Werner van Harselaar, Counsel for Applicant
Rachel Brazil, Counsel for Respondent

Investigation meeting: 20 and 28 August 2012 at Dunedin

Submissions Received: 21 September 2012 from Applicant
28 September 2012 from Respondent

Date of Determination: 22 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Monique Gallagher, raised three grievances. The first is a claim she was unjustifiably dismissed (albeit constructively) from her employ with the respondent, Presbyterian Support Services (Otago) Incorporated (PSS). The second is that she was unjustifiably disadvantaged in her employment, although the events giving rise to this claim are the same as those which led her to conclude she could no longer remain in Presbyterian Support's employ.

[2] The third was that she was discriminated against due to her role as a union delegate but this claim was withdrawn during the investigation meeting.

[3] Presbyterian Support contends Ms Gallagher left of her own volition and denies doing anything that could give rise to a disadvantaged claim.

Background

[4] Ms Gallagher was employed by PSS as a caregiver for approximately six years.

[5] According to Ms Gallagher, problems commenced in February 2011 when a new manager, Ms Tina Koch, was appointed to the unit in which she worked- the Craig Unit. She says around that time she went to her supervisor, Ms Margaret Pearce, to complain about Ms Koch. She claims bullying as Ms Koch's response and her working environment deteriorated from there. The bullying took the form of the events outlines below.

[6] The first specific incident occurred in late February 2011. Ms Gallagher requested leave for 26 and 27 February to organise a birthday party for her daughter. She was told she could not have the time off and subsequently called in sick both days. During the same week the President of the Union, Ms Julie Hoy, was advised Presbyterian Support wished to hold a meeting the following week during which they would discuss serious and ongoing concerns. The staff wanted the union representation. Ms Gallagher says she contacted the union advocate, Mr Mike Hanifin, to explain the situation and he met with staff on 1 March 2011. Mr Hanifin convinced staff it would be desirable to have a union delegate. Ms Gallagher was chosen.

[7] Around 10 March Ms Gallagher said she was handed a letter dated 7 March while at first aid training. It required her attendance at a meeting to discuss her February absence and whether or not it constituted a breach of the code of conduct.

[8] The meeting occurred on 15 March. It was attended by Ms Pearce assisted by Mr Rex Askerud (the HR adviser), Ms Gallagher and two support people, one of whom was Mr Hanifin. The meeting did not go well. Ms Koch claims Ms Gallagher pulled a face at her and, inappropriately, she responded by rolling her eyes. Ms Gallagher also took exception to Mr Askerud and claims he was hostile and treated her unfairly. He denies the claim and contends he was simply doing his job.

[9] A second meeting was held on 23 March. It was, according to the evidence of Ms Koch, even more tense. She goes on to say:

When questioned, Monique stated she had been sick on Saturday and Sunday. She denied there had ever been a booking made at Chipmunks for her daughter's birthday on the Saturday, neither had she ever had any intention of having a party there and she had not been there on the Saturday.

She became intensely upset when I asked her why then, if that was the case, she had gone to all the trouble on Monday 21 February to request leave and provide me with details of the party at Chipmunks. She did not answer my question but became very angry and agitated and got up and left the room for several minutes.

During her absence Mike Hanifin started to harangue me verbally, attacking my credibility, questioning my leadership experience and ability and accusing me of disliking Monique...

I felt very intimidated and overwhelmed by the force of his words and made some attempt to defend myself. Not long after, the meeting concluded.

[10] The conclusion subsequently reached was Ms Gallagher had breached the code of conduct and her behaviour warranted a warning. That decision was conveyed by letter dated 1 April 2011. Having done that the letter goes on to say it was expected that Ms Gallagher would follow policies and procedures and in particular those relating to the taking of leave before citing two more requirements. They were:

- *Ensure that your behaviour towards your UNM and other staff is respectful and courteous at all times.*
- *Carry out your duties with professionalism, honesty and integrity, and to the best of your ability.*

[11] The latter points, which Ms Gallagher says had nothing to do with the alleged breach, were to be a source of aggravation over the following month.

[12] On 29 June the Union initiated a personal grievance on Ms Gallagher's behalf for the issuing of what it contended was an unjust warning. That was handled by Jan Samuel, the HR Director. She had been absent when the warning was issued but had subsequently returned. She decided to withdraw the warning but replaced it a letter dated 27 July. It states Presbyterian Support was replacing the warning with *this letter outlining the expectations below*. Five bullet points follow which outline *expectations of your performance and behaviour going forward*. Three were as listed in the original warning. The additional two are:

- *That you follow all reasonable work direction from your UNM, RM and EM.*

- *Ensure that you do not behave in a way that has an ongoing detrimental effect on your working relationships. It is not always possible to agree with another person's point of view, however it is my expectations that you work through your differences with us constructively and look at areas of compromise where possible to minimise rather than escalate conflict. Should you have difficulty in resolving conflict then I would expect that you let me know asap.*

[13] Ms Gallagher was aghast at this and considered the letter no better than the warning already held on her file. She also takes issue with the fact she was also asked if she would agree to a transfer to the Lindsey Unit. She responded by advising she was opposed to a transfer and regarded it as being worse than a warning.

[14] At the Union's request a further meeting was held on 8 August. It was attended by Mr Hanifin, Ms Gallagher and Ms Samuel. Prior to the meeting Mr Hanifin sent an email which aired allegations of bullying for the first time. Ms Samuel says this concerned her and she asked Mr Hanifin and Ms Gallagher what they wanted her to do about it. She goes on to say

Her reply was that she didn't want us to do anything. Ms Gallagher said to me that she could manage her relationship with Tina Koch, and said she would stand up for herself and keep out of her way. I asked if she would rather work with her old Unit Nurse Manger Shirley Hendry for a period of time. Ms Gallagher stated that she didn't want that.

I stated to her that she needed to ensure she was able to work with her Unit Nurse Manager and I asked what support she needed to do that. Ms Gallagher became heated at that point and said she wasn't at fault and she didn't need anything, it was the letter of expectation that was upsetting her.

[15] The meeting then turned to the letter and while it took some weeks, the result was another withdrawal. In the interim there had been another clash between Mesdames Koch and Gallagher. It occurred on 12 September and Mr Hanifin rang Ms Samuel about it the following day. They agreed to meet on 14 September.

[16] Ms Gallagher's evidence about the meeting is limited. She says she was distressed and frustrated by the time it occurred and the only specific she refers to is Ms Samuels request she take part in a mediation process.

[17] Ms Samuel says the meeting started out reasonably well. She says she asked what might help the relationship and mediation was discussed. She goes on to say:

As the meeting went on the interaction with Ms Gallagher became more difficult particularly around the time Ms Pearce was describing the role of a Unit Nurse Manager in making requests of staff. Ms Gallagher seemed to take exception and stated that Ms Pearce was defending Ms Koch. She got very upset and shouted at us 'well I am being bullied and I have proof' and she waved half folded documents at us.

At this point I said to Ms Gallagher that if that was the case we needed to investigate, she became more agitated and said she didn't want that. I asked her to calm down and Mr Hanifin asked her to calm down so we could discuss what best to do, it did not seem to improve the situation.

[18] Ms Gallagher left the room and it was at this point Ms Samuel conveyed her decision to remove the letter of expectation. Mr Hanifin and Ms Samuel continued to discuss the allegation of bullying with Ms Samuel reiterating a need to investigate. Mr Hanifin reiterated Ms Gallagher would not like that. They then discussed options for managing workplace safety while the issues were addressed with Ms Samuel saying Mr Hanifin was adamant Ms Gallagher would not consider any option which saw her moved from the Craig Unit.

[19] In the days following the meeting, Ms Samuel and Ms Pearce discussed the situation. They considered moving Ms Koch but rejected it as untenable.

[20] A couple of days later there was a telephone conversation between Mr Hanifin and Ms Samuel. Again issues of workplace safety were discussed and again Mr Hanifin was adamant Ms Gallagher was not to be transferred. That led to an agreement Ms Gallagher would receive an additional week's leave to give *time out* while the issues were investigated. PSS also asked for details of the bullying allegations be provided.

[21] Ms Samuel goes on to say:

On Monday 19 September 2011, after I had sought legal advice, I rang Mr Hanifin to confirm that a letter was being written to Ms Gallagher outlining; the withdrawal of the letter of expectation, the process, a request for specific details of the bullying allegations, agreement to additional leave and setting out the options for her return to work.

[22] In respect of the return to work arrangements, the letter states:

In the meantime, it has become clear that given the issues you have raised and your behaviour at your meeting that while we are working to resolve these matters, in order to ensure safety in the workplace for yourself and the unit nurse manager, it would be beneficial for you to work within another unit.

[23] Having been advised of that intention Mr Hanifin objected. When told, Ms Gallagher saw this as confirmation of a decision to transfer which had originally been aired at the meeting. She says she does not accept the safety rationale as genuine and she regarded a transfer as the worst possible outcome short of being dismissed.

[24] That led to further discussions between Ms Samuel and Mr Hanifin; a decision by Ms Gallagher that she would not return to work and an agreement to go to mediation.

[25] The mediation occurred on 12 October but there was no resolution of the differences between the parties and Ms Gallagher did not return to work due, she says, to continued attempts to transfer her from the Craig Unit.

[26] The mediation also led to further correspondence and, in particular, a long email from Mr Hanifin on 16 October. According to Ms Gallagher, the email raised serious concerns about the process and the decision to transfer her to another unit. She goes on to say she had another concern and which was PSS's decision to have Mr Askerud investigate her complaints. She found that unacceptable given a view Mr Askerud was not independent. Mr Hanifin says the objection stemmed from Mr Askerud's involvement in the issuing of unjustified written warnings and his alleged failure to interview witnesses during disciplinary investigations involving union members. He goes on to say Ms Gallagher now believed it was clear she would never be given a fair hearing or allowed to return to the Craig Unit.

[27] PSS's response came in a letter dated 18 October though it was not delivered till the following day. The letter advised the investigation into Ms Gallagher's concerns would be conducted by Mary Phillips (the operations support manager) and Mr Askerud. It asked Ms Gallagher to provide, in writing, specific details of her allegations by 4pm on 25 October. The letter goes on to note PSS had endeavoured to obtain Ms Gallagher's agreement to a relocation but that had not been forthcoming. It goes on to say:

Given the situation, for your own wellbeing we have decided that you will be relocated to Dunrowan Unit, on the same terms and

conditions of employment, as is allowed by your employment agreement until the investigation is completed at which time we will review the situation.

[28] The provision being referred reads:

You agree that you may be transferred from one work unit to another within the place of work provided your standard hours are not changed.

[29] Ms Gallagher's response came later the same day. It was in the form of a resignation and reads:

To whom it may concern, I am writing to put in my resignation as I feel I have no choice given the way I've been treated by PSO.

[30] About it Ms Gallagher says:

The decision to transfer me caused me great humiliation and it undermined my sense of safety at work. I felt that I couldn't properly raise any concerns on behalf of myself or other workers without facing adverse consequences. ... It finally left me with no other viable option other than to resign from my employment.

Determination

[31] Ms Gallagher claims she was constructively dismissed. She is required to establish the fact of dismissal before the company can be asked to justify it.

[32] In *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965 the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[33] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

c. A breach of duty by the employer causes an employee to resign.

[34] There must also be a causal link between the employers conduct and the tendering of the resignation (*Z v A* [1993] 2 ERNZ 469).

[35] While a simplistic summary of significantly more complex law, the assumption underlying the concept of constructive dismissal is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation.

[36] Ms Gallagher essentially cites four key events which she claims amounted to bullying and led her to conclude she could no longer remain in PSS's employ. The prime event, and that which was the final catalyst for departure, was the transfer. The other three were the issuing of the warning; advice of the employers expectations in both the warning and subsequent letter of expectation and Mr Askerud's alleged failings.

[37] When I consider the events and the evidence I conclude Ms Gallagher has failed to establish she was constructively dismissed.

[38] PSS had a contractual right to transfer and Ms Gallagher had agreed to allow it that right when she entered into her employment agreement. It is hardly repudiatory conduct to exercise a granted right, especially as the evidence shows PSS have, albeit rarely, exercised the right in the past. This was not a unique occurrence evidencing a vindictive attempt to target Ms Gallagher especially given a rationale which is, I conclude, valid. Ms Gallagher had laid a complaint that indicated she was under some form of threat. PSS was obliged to investigate the complaint and ensure Ms Gallagher's safety while it did so. It considered the alternate, which was the transfer of Ms Koch. It was, I conclude acting reasonably in the circumstances with the evidence suggesting it was Ms Gallagher who was acting unreasonably in not assisting the investigation by (a) resisting it and (b) failing to provide specifics.

[39] The conclusion PSS did not act inappropriately in respect to the catalyst which brought about the resignation may be sufficient to conclude this is not a constructive dismissal. That said, the other three events should also be discussed, especially given both the fact a constructive may arise form cumulative events leading to a proverbial straw that broke the camels back and the unjustified disadvantage claim.

[40] Ms Gallagher complains about an unjustified warning. Again I conclude the complaint lacks validity, or at least an insufficient base for a claim of constructive dismissal. PSS had concerns about Ms Gallagher's behaviour. Given the evidence, I conclude there were at least grounds for suspicion. PSS was, in the circumstances, entitled to investigate. It concluded its concerns had substance and issued a warning. Ms Gallagher challenged the warning and having considered its position PSS withdrew it. This is not repudiatory behaviour, nor is it the action of an employer who seeks an employee's cessation – such an employer would have left the warning and taken its chances with the grievance.

[41] There is then the addition of PSS's expectations to both the warning letter and the subsequent letter of expectation. Again, an employer is entitled to advise an employee of its expectations – indeed, the duty of good faith would suggest it is required to do so. Perhaps it was clumsy to do so as an adjunct to the warning but while clumsy may be inconsiderate and cause unhappiness it falls well short of repudiatory behaviour. Again this is confirmed by PSS's willingness to discuss Ms Gallagher's concerns, revisit its position and withdraw the letters. Again, this is not the behaviour of an employee seeking a resignation.

[42] Finally there is the issue of Mr Askerud and his alleged failures. This comes in two parts. The union is of the view his investigations (and not just the one into Ms Gallagher's absence) are incomplete. If that were true, and there was no evidence supporting the claim tendered in this investigation, there are ways of addressing it; namely the pursuit of a personal grievance.

[43] Ms Gallagher's complaint is Mr Askerud was biased given he had not supported her during the investigation into her absence but instead assisted PSS's managers. There is not much to be said to that other than that is his job. Having considered the evidence I conclude there is no validity to this complaint.

[44] The conclusion each of the four issues raised by Ms Gallagher fall short of providing sufficient justification for her subsequent resignation does not necessarily finish the matter. It may be that when consider in totality they do form sufficient justification though in this case I conclude not. Not one of them comes close to amounting to repudiatory behaviour with only one being perhaps inconsiderate. The total is the same – one instance of inconsiderate behaviour does not force a resignation or amount to a constructive dismissal.

Conclusion

[45] For the reasons given above, I conclude Ms Gallagher has failed to discharge the onus she carries of convincing me she was dismissed. The actions she relies on to evidence her claim are not repudiatory as is required. Her claim therefore fails.

[46] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority