IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 112
5347887

BETWEEN	LIANA JOHNSTON Applicant
A N D	BOARD OF TRUSTEES OF SOUTHERN REGIONAL HEALTH SCHOOL Respondent

Member of Authority:	M B Loftus
Representatives:	Janie Kilkelly, Counsel for Applicant David Burton, Counsel for Respondent
Investigation Meeting:	20 and 21 May 2014 at Dunedin
Submissions Received:	At the investigation
Date of Determination:	30 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Liana Johnston, claims she was unjustifiably dismissed by the Southern Regional Health School (the School) on 16 December 2011. Ms Johnston also has two claims of unjustified disadvantage.

[2] The School accepts it dismissed Ms Johnston but contends its actions were justified. It denies it disadvantaged Ms Johnston.

Background

[3] The School provides for the education of children who, for various reasons, are unable to attend conventional schools. It is based in Christchurch but provides services from various locations throughout the South Island. Ms Johnston was based

in Dunedin. Dunedin normally had two teachers though there have, at times, been three.

[4] Ms Johnston commenced with the School in June 2001 as an Assistant Principal. Shortly thereafter she was promoted to Deputy Principal and remained so till 2009. A desire to spend more time with her family led to a renegotiation of her terms of employment in June 2009. That saw a return to Assistant Principal, reduced hours and an agreement they be worked flexibly and sometimes from home.

[5] Toward the end of 2010 a colleague and subordinate, Kate Atchison, first voiced dissatisfaction about Ms Johnston's conduct to the then Deputy Principal, Helen Mantell. She says:

> *I felt that Liana was unreliable, had a lack of clarity around working responsibilities and roles, displayed a lack of professionalism and respect, and was dishonest.*

[6] Ms Atchison goes on to say that while she voiced her concerns she did not raise them as a formal complaint. This was due to a belief Ms Johnston and the then Principal were inappropriately close. She therefore thought a complaint would not be properly investigated and/or have negative repercussions.

[7] Ms Atchison may have misunderstood the relationship between Ms Johnston and the Principal as around the same time Ms Johnston laid a formal complaint about his behaviour. It was investigated by an external resource and led to the Principals' departure. As a result Ms Mantell became Acting Principal in February 2011.

[8] In the interim Ms Atchison's disquiet increased. Given the Principles' absence during his investigation process Ms Atchison had a brief conversation with the Board's Deputy Chair, Murray Strong, in which she voiced concerns about Ms Johnston and her work ethic. That was followed by a written complaint to the then Chair of the Board of Trustees, Chris Bridges, on 10 February 2011.

[9] Mr Bridges responded by letter that day. He referred to the fact the Board was already investigating Ms Johnston's complaint and advised Ms Atchison's letter had been referred to the investigator of part of that investigation.

[10] A conversation between Mr Bridges and Ms Atchison followed on 18 February 2011. The two discussed the current investigation and the fact it was

consuming both time and resources. Ms Atchison says she agreed her complaint be put on hold and dealt with once the investigation was concluded. Ms Atchison chose, however, to keep a log of events she found concerning.

[11] As already said, it was around this time Ms Mantell was appointed Acting Principal but she was not advised of Ms Atchison's complaint. She did not become aware of it until May 2011 and Ms Johnston was not told of its existence till later.

[12] On 22 February 2011 Christchurch was struck by a major earthquake. That caused significant disruption and saw both management and governance personnel concentrating on ensuring the School continued to deliver its services. As a result Ms Johnston was performing additional tasks she would not normally have completed.

[13] In the absence of any action on her complaint, Ms Atchison's dissatisfaction continued to fester and, if anything, worsened. On or about 17 May 2011 she forwarded a second letter to Mr Bridges. It is five pages in length and reiterated her dissatisfaction with Ms Johnston and her performance. Attached was Ms Atchison's log ([10] above) along with the vehicle log for the schools Dunedin car.

[14] Having considered the complaint, Mr Bridges forwarded it to Ms Mantell with an instruction she deal with it. On 27 May 2011 Ms Mantell wrote to Ms Johnston advising her of the complaint. The letter gave a proposed meeting time at which the complaint could be discussed. It also advised Ms Johnston of her right to have a support person present and that she:

> *... should know that a possible outcome of this process may be that a warning and disciplinary action may be taken against you, this may involve a performance management plan.*

[15] Attached to the letter were copies of Ms Atchison's complaints along with the documents appended in May and Mr Bridges' response of 10 February 2011.

[16] It was then lawyers became involved. On 30 May Ms Johnston's solicitor wrote to the School. The letter contained a demand that *actual allegations* be identified to which Ms Johnston might respond.

[17] The School's response, dated 31 May 2011, was:

> *At this stage there are no specific allegations to which Liana needs to respond. I understand your concerns, but I had only intended to have a low level discussion with Liana about Kate's complaint.*
>
> *If, after discussing Kate's complaint with Liana and Liana's response with Kate, I feel that there is substance to Kate's complaint, I will initiate disciplinary proceedings and this will include providing Liana with specific allegations to which she will need to respond.*

[18] The meeting proceeded as scheduled on 2 June 2011. Ms Johnston was accompanied by her solicitor while Ms Mantell was assisted by a member of the Board of Trustees. The meeting was not a success, with Ms Mantell claiming that was due to the solicitor's unwillingness to allow Ms Johnston to respond to her *low level inquiries*. That said, it is clear from the evidence Ms Mantell did get a response which was an absolute denial of any wrongdoing by Ms Johnston. The meeting concluded with a suggestion Ms Johnston and Ms Atchison attend mediation in an attempt to repair their now fraught relationship.

[19] A Department of Labour Mediator was approached and while he spoke to both antagonists, he could not get them together in the same room. The process proved unsuccessful and the School chose to abandon it around 12 July. This would appear to be because of three factors: the mediations failure, Ms Atchison's statement of 12 July she no longer wished to formally pursue her complaint and the possibility of another means of addressing the issues in the near future.

[20] The alternate was Ms Johnston and Ms Atchison's participation at a professional development and team building workshop held in Hanmer Springs between 1 and 3 August. The facilitator was advised of the situation and it would appear he took it into account when conducting the programme. Unfortunately, that not only failed to assist but further aggravated the situation. It appears Ms Atchison reacted visibly, vocally and negatively to some of Ms Johnston's statements. That led to Ms Johnston absenting herself from part of the workshop and when the two returned to Dunedin Ms Mantell ensured they not travel from the Airport together as originally intended. Even Ms Mantell accepted, when questioned, that the team building exercise had been totally destructive.

[21] Ms Mantell, still concerned there was a broken relationship and determined to address the situation, then attempted to arrange further mediation. It was scheduled for 16 August but did not occur as Ms Johnston went on sick leave on 11 August.

[22] On 12 August 2011 she initiated her first disadvantage claim.

[23] She was absent for some four months with most, but not all, of the absence being covered by various medical certificates though they did not shed much light on her condition. Four were essentially generic and advised Ms Johnston had been seen by a doctor and was unfit for work for a specified period. The first also added the reason for the absence was … *stress secondary to current employment issues known to Southern Regional Health School*.

[24] There was also considerable correspondence between the parties' solicitors. This essentially saw the School seeking further details about Ms Johnston's condition and prognosis but little being offered in reply.

[25] On 24 November 2011 the School repeated a request Ms Johnston return various items of property which had been made as a result of earlier advice her absence would be a prolonged one. The reply, dated 25 November, states the property would be returned but, in reference to another request the parties meet to discuss Ms Johnston's prognosis, advises:

> *Our client has consulted with a Specialist* [actually a GP] *and a prognosis report is to be produced ...*
>
> *It would be unproductive to meet until such time as the report is finalised unless you propose that a meeting also address a possible resolution of our client's personal grievance.*

[26] By this time the School had had enough. On 1 December its solicitor wrote to Ms Johnston's solicitor demanding a meeting on 9 December. Ms Johnston acceded but produced another medical certificate that day. It states:

> *The person above named was seen and examined by me on 01 Dec 2011. She is currently unable to work as a teacher for the Southern Regional Health School. Her difficulties are stress related and directly attributable to her work environment. She has developed significant depressive and anxiety symptoms from her work situation. This situation is unlikely to change in the foreseeable future (3 - 6 months) unless the work environment issues are appropriately resolved.*

[27] The meeting of 9 December 2011 proceeded as planned. Both parties portray it as positive and by its end they envisaged the implementation of a rehabilitation plan

which would see Ms Johnston return at the commencement of the new school year in February 2012.

[28] Unfortunately, the euphoria did not last. After the meeting Ms Mantell considered the situation and began questioning how Ms Johnston's prognosis could suddenly change. From being unable to return for possibly six months, she was now able to do so in the not too distant future. She consulted the School's solicitors who wrote to Ms Johnston's on 12 December 2012. The letter concludes with:

> *In summary, it is difficult to identify any positive changes that would assist the parties sufficiently to undertake the necessary rebuilding of the relationship between Liana and Kate that would not continue to affect Liana's health. As this is not a risk that the School would want to take, the School has formed the preliminary view that the employment relationship should terminate for medical incapacity.*
>
> *The School would like to hear any feedback on the proposal that Liana may have by close of business 14 December 2011.*

[29] Ms Johnston's solicitors responded on the14th. In conclusion they say:

> *… we want to close by stating for the avoidance of doubt:*
>
> *(a) Our client's health has improved.*
>
> *(b) Our client's health has improved since the latest medical certificate as a result of your client's engagement and proposal to formulate a rehabilitation plan.*
>
> *(c) If required we are happy to provide written confirmation from our client's medical adviser as to his support for the plan also.*

[30] There was further correspondence the following day with Ms Johnston's lawyer advising work was underway to get the medical clearance but the School chose to act. On 16 December 2011 its lawyers wrote and confirmed Ms Johnston's dismissal. The School concluded Ms Johnston had, by then, exhausted her sick leave and was on unpaid leave. As there would be no further payments dismissal was immediate and took effect that day.

Determination

[31] Ms Johnston has three claims. There are two claims of unjustified action causing disadvantage while the third is a challenge to the dismissal.

[32] The first unjustified action claim relates to Ms Atchison's initial complaint (10 February) and the School's failure to address it with alacrity. There is an ancillary claim Ms Atchison was instructed to spy on Ms Johnston and her log was the result.

[33] For such a claim to succeed the claimants' employment must be affected to their disadvantage and that must be attributable to an unjustifiable act of the employer (s.103(1)(b) of the Employment Relations Act 2000 (the Act)).

[34] The evidence confirms Ms Johnston's employment was affected to her disadvantage. The relationship between her and Ms Atchison became untenable. Both gave evidence of acrimony and expressed a view the workplace had become unsafe due to psychological pressure caused by disharmony. That was reiterated in both Ms Johnston's medical certificates and Ms Atchison's evidence which, along with her demeanour, clearly illustrated how bad things had become. Their relationship was destroyed, the workplace dysfunctional and the animosity evident.

[35] Being required to work in such an environment is, I hold, disadvantageous, especially as this was a new phenomenon and represented a detrimental change.

[36] That raises the question of whether or not the change was the result of an unjustified action by the employer. I conclude the answer is yes.

[37] The evidence suggests a factor underlying Ms Atchison's concern was a view Ms Johnston was not pulling her weight and this arose, in part, from Ms Johnston's absences from the workplace. The negative impression was then reinforced by the log which often recorded what Ms Atchison saw as Ms Johnston's unacceptable hours of attendance.

[38] Had the complaint been addressed when first raised the log would not have existed. Ms Atchison might also have become aware Ms Johnston was not shirking but working in accordance with terms she had agreed with her employer.

[39] I find the School cannot justify its decision to delay an investigation if, for no other reason, no rationale was expressly tendered. It is implied through Mr Bridges' letter and the subsequent conversation with Ms Atchison the reason may have been a lack of resources or that the School was distracted by the investigation into the Principal ([10] above). However Mr Bridges did not appear and there is no evidence either proposition has validity.

[40] Furthermore the duty of good faith requires an employer be constructive in maintaining a productive relationship and this includes a duty to be responsive and communicative (s.4(1A)(b) of the Act). Not advising Ms Johnston of the complaint or otherwise acting on it was a failure to communicate which allowed a bad situation to fester and deteriorate. I conclude that represents a failure to comply with the statutory duty imposed by s.4. That such a failure is an unjustifiable act has been established by the Court (*Jinkinson v Oceana Gold (NZ) Ltd* (No 2) [2010] NZEmpC 102).

[41] For the above reasons I conclude Ms Johnston has been unjustifiably disadvantaged in her employment.

[42] Turning to the claim Ms Atchison's log was a response to an instruction she spy on Ms Johnston. Ms Atchison denies the claim. Ms Johnston is unable to produce any evidence supporting her claim or dent the denial. This will therefore be taken no further.

[43] The second cause of action (also an unjustified disadvantage claim) relates to the way in which the second complaint was handled and, in particular, the manner in which the School continued to address the relationship issues after Ms Atchison's complaint was withdrawn.

[44] This is not a claim which I uphold. While, given the evidence, I accept the Schools' attempts to address the problem may have been uncoordinated and haphazard and undoubtedly contributed to Ms Johnston's state of health and subsequent leave, I find it difficult to conclude its acts unjustified.

[45] As already said, an employer is under a duty to be constructive in maintaining a productive relationship. That must include addressing possible impediments to, and negative influences on, the relationship. The fact Ms Atchison advised she was withdrawing the complaint did not necessarily mean the underlying concerns had been addressed and resolved. Furthermore both antagonists had indicated the friction was having an adverse effect on their well-being. Essentially it constituted a hazard as defined by the Health and Safety in Employment Act 1992 and, therefore, had to be addressed.

[46] Ms Johnston's third claim is a challenge to her dismissal. The Schools accepts it dismissed Ms Johnston. It therefore accepts it is required to justify the decision.

[47] The justification is *medical incapacity*.

[48] Section 103A of the Act, states the question of whether a dismissal is justifiable:

> *... must be determined, on an objective basis,* [by considering] *whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.*

[49] In applying the test the Authority must consider the extent to which the employer aired its concerns and considered any responses given by the employee prior to taking action.

[50] Similar obligations exist in respect of termination due to incapacity which caused a prolonged absence precluding a jobs performance. As was held in *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585:

> *(2) Where illness or injury occurs which prevents an employee from returning to work the employer is not necessarily bound to hold that employee's job open indefinitely. However, if the employer chooses to dismiss the employee, its action must be justified at the time in accordance with the established jurisprudence. The employer must have substantive reasons for the dismissal and must show that the procedure it followed in carrying out the dismissal was fair. This ensures that the employee is not dismissed without the opportunity to provide information, such as medical reports, to prevent the employer taking such action, while at the same time allowing the employer to end the contract without needing to establish that the contract was frustrated.*

[51] Here we have a situation that had continued for some time and then, with the prospect of resolution and the imminent arrival of evidence Ms Johnston would be fit to return the School decided to terminate. This was not, I conclude, the action of a fair and reasonable employer in such circumstances.

[52] The School had been seeking information about Ms Johnston's prognosis for some time. It should therefore have waited when production of that which it sought appeared imminent, especially given *Motor Machinists*. The purpose of the process is to ensure an employee has an opportunity to rebut a conclusion they are unable to return to work within a timeframe acceptable to the employer yet here the School suddenly chose to dismiss when it knew such evidence was likely to be forthcoming.

It should have awaited that evidence or at least given a reasonable timeframe in which it had to be produced.

[53] When asked why act when it did Ms Mantell said she had come to question how Ms Johnston could produce a clearance to return when its content would, in her view, be at odds with earlier statements. As she put it when answering questions – *there were inconsistencies*.

[54] To then act on the perceived inconsistencies faces three crucial problems. The first is the School's concerns should have been put to Ms Johnston and a response sought. Ms Mantell accepts that did not occur, at least in a way that made it clear what was in her mind.

[55] The second is that by the time Ms Mantell advised the preliminary decision to dismiss she had closed her mind to Ms Johnston's return and dismissal was, I conclude, preordained. Support for this conclusion came in the last answer she provided on day one of the investigation. When asked why issue the letter of 14 December rather than wait another couple of days the answer was brutally clear – *I'd had enough.*

[56] The third reason, and perhaps another factor in Ms Mantell's closed mind, lies in her advice under cross examination that the entire School Board was involved in the decision to dismiss. This raises two issues. First it suggests Ms Mantell was acting under instruction and could not change the outcome. Second, and more importantly, it confirms Ms Johnston was not given an opportunity to address all decision makers and this is a clear breach of the requirements of s.103A of the Act.

[57] For the above reasons I conclude the dismissal was unjustified.

[58] The conclusion the dismissal was unjustified raises the issue of remedies. Ms Johnston seeks wages lost as a result of the dismissal and compensation for hurt and humiliation. She also seeks payment for the period from 21 September to 16 December 2011 during which time she was on unpaid sick leave.

[59] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or three months ordinary time remuneration.

[60] Ms Johnston's wage claim is for the period 17 December 2011 to 1 February 2012. 1 February 2012 is the date upon which she would have returned had the rehabilitation programme proceeded. It is also around the time the evidence suggests she made a decision to remain unemployed and instead spend time with her family and assist at her daughters' school on a voluntary basis.

[61] The loss was incurred and the period for which Ms Johnston seeks recompense is less than the three months specified in the Act. The amount sought, $6,351.78, is payable.

[62] Ms Johnston seeks $50,000 as compensation under s.123(1)(c)(i) of the Act but there was no argument as to why I should award a sum considerably in excess of one which would normally be considered by the Authority. That said, Ms Johnston did offer evidence about the hurt she felt and the traumatic effect these events had on her. This extended to the decision not to seek reemployment as she felt she was not adequately healed, along with the effect of no longer filling a role about which she was passionate.

[63] To that I add the fact Ms Johnston was not only unjustifiably dismissed but also disadvantaged and the difficulties, which were causing the hurt, continued for some time. Finally there is the angst caused by the fact the School sent conflicting signals about a number of factors which would have caused confusion and added to the stress and therefore hurt felt by Ms Johnston. Examples include the purpose of the meeting of 2 June 2011 – low level fact finding or a precursor to disciplinary action; confusing signals about the status of Ms Atchison's complaint after July which are evidenced in the correspondence and decisions to resile from a potential settlement in both September and December.

[64] Finally there is a clear evidence Ms Johnston was made to feel guilty of alleged wrongdoing due to the fact the accusations remained unsubstantiated as the investigation into Ms Atchison's complaints never proceeded yet there was never formal closure or completion of the process. Hurt must emanate from that.

[65] Having weighed the evidence I conclude a significant sum is warranted and order the payment of $12,000.

[66] Turning to the issue of reimbursement for the period of unpaid sick leave. The amount sought is $12,013.15 gross.

[67] This is a claim that creates some difficulty. On one hand it is clear there is no contractual entitlement to the claimed amount. Sick leave is generally an exhaustible commodity and once used further absence is unpaid. That is what occurred here. Opposing this is a clear indication the School's actions, and the way in which it dealt with Ms Johnston, contributed to her absence.

[68] Having weighed the issues I conclude the amount is not payable with the contractual considerations outweighing the others for two reasons. First, and while the first medical certificate refers to a linkage between the illness and stress created by the workplace issues it goes no further. It does not say which issues and falls short of the evidence required to hold the employer solely responsible for Ms Johnston's absence.

[69] Second is my conclusion a potential hazard existed ([45] above). The School was bound to continue its enquiries and try to resolve the tension between its Dunedin staff. It could not allow Ms Johnston to return to an unsafe workplace and the correspondence indicates she must take some blame by not participating fully in attempts to resolve the situation until the meeting of 9 December. She chose to avoid the School's information requests, instead demanding her first grievance be resolved.

[70] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Johnston contributed to her dismissal in any significant way. The rationale for termination, medical incapacity, automatically infers no fault and there is no evidence of validity to Ms Atchison's original complaints which were the catalyst for all that followed. The answer is therefore no.

Conclusion and Orders

[71] For the above reasons I conclude Ms Johnston has a personal grievance as she was both unjustifiably disadvantaged and unjustifiably dismissed.

[72] As a result the respondent, Board of Trustees of Southern Regional Health School, is ordered to pay the applicant, Liana Johnston, the following:

i. $6,351.78 (six thousand, three hundred and fifty one dollars and seventy eight cents) gross as recompense for wages lost as a result of the dismissal; and

ii. A further $12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act;

[73] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority