

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 231
3001442

BETWEEN HEATHER McQUOID
Applicant

AND MJ & CM TE BRAKE LIMITED
t/a PAK' n' SAVE KAITAIA
Respondent

Member of Authority: Eleanor Robinson

Representatives: Micah Tawhara, Counsel for Applicant
Richard Mark, Counsel for Respondent

Investigation Meeting: 28 & 29 June 2017 at Taipa Bay

Submissions received: 1 May, 12 & 29 June 2017 from Applicant
28 April & 29 June 2017 from Respondent

Determination: 03 August 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Heather McQuoid, claims that she was constructively dismissed by the Respondent, MJ & CM Te Brake Limited t/a Pak'n'Save as a result of bullying and harassment.

[2] The Respondent denies that Ms McQuoid was constructively dismissed and claims that she resigned her employment on 15 April 2015.

Issues

[3] The issues for determination are whether or not Ms McQuoid was constructively dismissed by the Respondent.

Note

[4] At the Authority's investigation on 28 and 29 June 2017 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives have also submitted closing submissions on the facts and law.

[5] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result.

Background Facts

[6] Pak'n'Save is a national New Zealand owned and operated supermarket chain. The Respondent is owned and operated by the CEO Mr Maurice Te Brake, and employs approximately 170 employees in 12 departments (the Store).

[7] Mr Te Brake said that he and the Store Manager, Ms Christine Wilson, did daily walks around the Store, stopping at each department and speaking to the employees. He operated an 'open door' policy and employees were free to discuss any problems or concerns with him.

[8] Ms Wilson said she did not operate an 'open door' policy, but she would meet with the Department Managers regularly, and employees were welcome to see her by making an appointment to do so.

[9] Ms McQuoid commenced employment at the Respondent in 2011 in the Bakery department. She had suffered a workplace injury in 2012 and following a period of rehabilitation returned to work in the Deli department, subsequently requesting a transfer and moving to become a Checkout Operator shortly after her return. Ms McQuoid was promoted to the position of Checkout Supervisor on or about December 2013.

[10] During December 2014 Ms Corrina Clark was appointed as a Checkout Supervisor. Both Checkout Supervisors reported to a Checkout Manager.

Bullying allegations 2015

[11] Ms McQuoid said that she had a good relationship with Ms Clark initially but later developed concerns about Ms Clark's behaviour which comprised Ms Clark bullying her and criticising the Checkout Manager. On or about July 2015 she said that she complained to Ms Christine Wilson, the Store Manager, about these matters.

[12] Ms Wilson said that she did not receive any complaints from Ms McQuoid about bullying nor about Ms Clark criticising or trying to undermine the Checkout Manager. Nor was she aware of any difficulties in the relationship between Ms Clark and the Checkout Manager who in fact recommended that Ms Clark replace her when she resigned in July 2015.

[13] Due to the Checkout Manager leaving, Ms Wilson would be responsible for covering that position pending a replacement. She recalled receiving a telephone call from Ms McQuoid during July 2015 during the course of which she had asked Ms McQuoid to manage

the Checkout Department in her absence on holiday as Ms McQuoid had more experience than Ms Clark.

[14] This decision was ratified by Mr Te Brake at a meeting in July 2015 with Ms McQuoid and Ms Clark which was a roster planning meeting due to the Checkout Manager leaving, and coverage of that position whilst Ms Wilson was on leave. During the meeting Mr Te Brake had confirmed Ms McQuoid would be acting as the Checkout Manager during Ms Wilson's period of leave, and said that he had confirmed the decision because he had known Ms McQuoid longer than Ms Clark and he trusted her.

[15] During the 2 week period Ms McQuoid said that Ms Clark had undermined her authority in various ways including asking for time off work and refusing to comply with her instructions.

[16] Ms Clark said she had tried to support Ms McQuoid in the decisions she had made whilst acting as the Checkout Manager, and confirmed that she had been away from work sick on two occasions; one of those was when she had suffered an allergic reaction, and asked to leave to obtain some medication. She had intended to return shortly thereafter, but Ms McQuoid had told her not to return to work.

[17] The Checkout Manager had left at the end of July 2015 and Ms Wilson had advertised internally and externally for a replacement. Ms McQuoid and Ms Clark were the sole applicants for the position and she interviewed them both.

[18] During the interview with Ms McQuoid, she (Ms McQuoid) had told her that she did not want the job and had only applied because someone had told her to do so. As a result, Ms Clark had been appointed to the position.

[19] Following the appointment of Ms Clark as Checkout Manager Ms Wilson said there had been friction between her and Ms McQuoid. However whilst aware of the tension Ms

Wilson said that she received no complaint from Ms McQuoid that Ms Clark was bullying her, nor had she noticed any behaviours which would indicate that bullying was taking place.

[20] Ms McQuoid said that after Ms Clark had been informed she was to be the new Checkout Manager in early August 2015, she had met with Ms McQuoid and asked if she would support her and work with her. Ms McQuoid said she had replied: “*at this stage I will be seeking a transfer out of the department*”.

[21] Ms McQuoid alleged that the bullying had continued after Ms Clark was appointed as the Checkout Manager.

Accusation of stealing

[22] On 29 September 2015 Ms McQuoid said she had taken a toy horse from the rubbish and cleaned it up with the intention of giving it to her granddaughter. Ms Clark had accused her of stealing.

[23] Ms Clark said the toy horse had been lost property not rubbish, and she had told Ms McQuoid it needed to be taken to an office upstairs in the Store. She denied accusing Ms McQuoid of stealing.

Roster change

[24] Ms McQuoid had been unhappy when on 13 October 2015 Ms Clark changed her rostered hours from a 10 hour 4 day shift to an 8 hour 5 day shift. She said she had informed Ms Clark that this would create travelling difficulties for her but Ms Clark had been dismissive of these. She had spoken to Ms Wilson about the new roster, but Ms Wilson had informed her that she could not override a Checkout Manager.

[25] Ms Wilson said that Ms McQuoid had requested a 10 hour x 4 days shift pattern under the previous Checkout Manager but this had been refused because 10 hours in the Checkout Department was considered to be too long a period of time for a shift.

[26] In Ms Wilson's absence on holiday in July 2015 and when Ms McQuoid was the acting Checkout Manager, Ms McQuoid had arranged to change her own roster from five 8-hour days to four 10-hour days and had it approved by the Office Manager. This had not been discussed with Mr Te Brake who should have approved it during the period Ms Wilson was on leave.

[27] Ms Clark said that she had not been able to make the roster work successfully with Ms McQuoid working 10 hour x 4 day shifts, so she had restored the roster to what it had been under the previous Checkout Manager. She had discussed this issue with Ms McQuoid before she had done so, but said that there had been no discussion about Ms McQuoid's domestic arrangements.

[28] Ms Wilson had told Ms McQuoid that she would not interfere in Ms Clark's decision as the Checkout Manager, which was her normal policy. She confirmed that it was her policy to ask the departmental manager to confirm they had taken all relevant matters into account before changing someone's hours, and if they had considered all of the options and taken everything into account she did not override their decision.

Petrol Area Duty

[29] Ms McQuoid said she had been upset when Ms Clark instructed her to oversee the petrol sales area which she considered to be the duty of a more junior employee.

[30] Ms Clark said this was a duty which fell within the remit of a Checkout Supervisor and it was a duty she performed also.

[31] Overall Ms McQuoid said she had felt bullied in a number of lesser areas by Ms Clark.

Resignation October 2015

[32] Ms McQuoid said that because Ms Wilson would not interfere in Ms Clark's roster decision, she had asked for a transfer to another department, however, Ms Wilson had said

she had nothing available. As she had become upset with the situation she handed Ms Wilson her letter of resignation, who had responded that she perhaps ought to think about it.

[33] She said Ms Wilson had read the letter which she said concerned harassment and bullying by Ms Clark and Ms Wilson had said "*Leave it with me, I'll see what I can do*". She said Ms Wilson did not accept her resignation and suggested that she might want to: "*get rid of it*".

[34] Ms Wilson disagreed with Ms McQuoid's version of events, saying that she (Ms McQuoid) came into her office on 14 October 2015 and put an envelope in the corner of the desk. She had said "*If you can't give me a transfer I will need to give you this*", and told her it was her resignation. Ms Wilson said she did not open the envelope and so did not read the letter. The envelope remained on the desk during their discussion and she thought Ms McQuoid had taken it with her when she left the meeting.

[35] Ms Wilson said it was not unusual for employees to ask for transfers to other departments and this was the second time that Ms McQuoid had requested a transfer. As a result she would have investigated whether or not there was another job available for Ms McQuoid.

Transfer to the Produce Department

[36] On 18 October 2015 Ms McQuoid said Ms Wilson had informed her that there was a position in the Produce Department, working with the Product Manager, Ms Heather Foster. Ms McQuoid said she was not satisfied with the proposed hours and was concerned that her hourly rate would decrease because she would no longer be a supervisor. However as she felt she had no choice in the matter she took the job.

[37] Ms McQuoid said it had not been long after being transferred that it became obvious to her that Ms Foster was: "*hating on me as well*". She said that Ms Foster would yell at her

on occasion, telling her to get on with her work and stop talking. This would happen in front of customers.

[38] Ms Foster said she believed she had a reasonable working relationship with Ms McQuoid but confirmed that she had told Ms McQuoid to stop talking and get on with her work on more than one occasion, although she denied yelling at her in front of customers. This was because Ms McQuoid had consistently talked to staff and customers more than she should have done and this had been frustrating.

[39] Ms McQuoid agreed that she liked to talk, but said she carried on with her work whilst doing so.

[40] Mr Te Brake and Ms Wilson had been aware that Ms McQuoid was known for talking during her working day, but said that this had never presented a disciplinary issue. Ms Wilson said that she had not known that there were difficulties in the relationship between Ms Foster and Ms McQuoid and that in fact Ms McQuoid had told her she was enjoying working in the Produce Department.

[41] Ms McQuoid said that soon after transferring to the Produce Department and during working hours Ms Wilson questioned her about her religion and told her that her beliefs were strange and weird. She also noticed a difference in Ms Wilson's attitude towards her.

[42] Given that the alleged incident took place on or about early January, Ms Wilson said she may have asked about how Ms McQuoid's religion celebrated Christmas, but she did not recall this. She denied saying to Ms McQuoid that her beliefs were 'strange' or 'weird' and said there would have been no need to ask Ms McQuoid about her religion as it had been discussed when she was first interviewed for the job because there were days when Ms McQuoid had said she could not work.

Issues during January – March 2016

[43] Ms McQuoid said the issues that led up to her constructive dismissal began on 18 January 2016 when a customer came in and told her he had left a couple of his home-grown watermelons at the customer service desk with her name on one of them. She said Ms Clark had rudely asked her who had brought the watermelons into the Store and she had told her it was a customer who grew them. Ms Clark had said “*Well it has to be taken to the staff room for everyone to eat*”.

[44] Ms Clark explained that the reason she had advised Ms McQuoid to take the watermelons to the staff room was because it was of the same type of watermelons on sale at the Store and for that reason she told Ms McQuoid it ought to have been given to her outside of the store and/or had a staff sticker placed on it. However Ms McQuoid had not wanted a staff sticker placed on it.

[45] Ms McQuoid said that there were a number of incidents following this which were examples of Ms Clark bullying and harassing her. They were:

- (a) She was informed by another staff member that Ms Clark had instructed a security to watch her.
- (b) On 25 January 2016 Ms Clark had spoken to her and criticised her for not advising a supervisor that the operator processing her personal shopping did not know into which department to key a bottle of milk.
- (c) On 9 February 2016 Ms Foster had yelled at her to ‘shut up’ and fill shelves.
- (d) On 10 February 2016 Ms Foster shoved her trolley into her hip and yelled at her for talking again.
- (e) On 13 March 2016 Ms Clark made a snide comment and laughed at her when she left work. The following day she had stopped briefly at the Lotto kiosk and asked if she had won the lotto the night prior. Ms Clark had told her to move away and informed Ms Foster that Ms McQuoid was buying Lotto tickets in work time, following which

Ms Foster had told her not to go near the Lotto kiosk and not to talk to any of the checkout staff during work hours.

- (f) On 15 March 2016 Ms Foster told her that she was no longer allowed to take boxes to the checkout. She was directed not to talk to checkout staff or anyone at the checkout. Ms McQuoid said it was obvious to her that Ms Clark and Ms Wilson had told Ms Foster to make this instruction.

[46] Ms Clark said she had not instructed a security officer to watch Ms McQuoid, and did not recall the incident regarding the entering of the code for milk by a checkout operator, but confirmed that she had asked Ms Foster to tell Ms McQuoid not to talk to her checkout staff at length as her doing so was preventing them carrying on with their work.

[47] She agreed that she had told Ms McQuoid not to spend time talking to the checkout staff and that it was not part of Ms McQuoid's job to go to the Lotto kiosk during working hours.

[48] Ms Foster explained that it was necessary to tell Ms McQuoid not to go near the checkout area or the Lotto counter during working hours because she had become exasperated with Ms McQuoid talking to staff and customers during her working hours.

[49] Ms Foster said that she did not recall pushing a trolley which hit Ms McQuoid, although they worked in a small area. Moreover an incident of deliberate trolley pushing would be a health and safety matter and should have been reported.

[50] Ms Wilson said she had not instructed that Ms Clark or Ms Foster not to allow Ms McQuoid near the checkout area and in fact had asked Ms McQuoid if she would like to do the flower displays which were adjacent to the checkouts as she had noticed that she was good at that, and Ms McQuoid had agreed to do so.

[51] Ms Wilson said she had not been involved in, nor aware of incidents involving Ms McQuoid, Ms Clark and Ms Foster during the initial months of 2016.

Incidents in April 2016

(a) 10 April 2016

[52] Ms McQuoid said she bought three items on 10 April 2016 which needed to be staff stickered. Whilst she was doing so Ms Clark approached her and shouted, telling her to “*Move on!*” in front of customers and staff. In response she had replied: “*Who do you think you are – Hitler’s sister?*”

[53] Ms McQuoid then walked towards the staff room and Ms Clark followed her. When she had asked Ms Clark why she was following her Ms Clark had taunted and laughed at her. Ms McQuoid confirmed she had told Ms Clark “*You are nothing but a control freak and a nasty bitch and I’m so sick of you*”. She immediately walked to the Duty Manager’s office as Ms Clark also headed there and she was only about one metre behind Ms Clark who deliberately slammed the wind-stop door in her face.

[54] Ms Clark’s account of the incident was that she had approached Ms McQuoid when she was checking items through the self-checkout. Ms Clark said she did not look at or speak to Ms McQuoid at all but did ask the checkout operator if everything was alright because it looked as if Ms McQuoid was keeping the checkout operator from doing her job. Ms McQuoid had turned to her and told her to “*F ... off*” in front of customers and staff twice before she left the checkout.

[55] Ms Clark says she remained at the checkout area and Ms McQuoid walked off and she followed her a short distance to see where she was going as staff members are not permitted to walk around the store with their purchases. Ms McQuoid stopped and talked to her son-in-law who also worked in the Store and then told Ms Clark again to “*F... off*” and stop following her.

[56] Ms Clark said she decided to go to the Duty Manager’s office to report Ms McQuoid’s behaviour towards her because she was upset by Ms McQuoid’s offensive behaviour towards

her, and confirmed that she did go through the wind stop door which is spring-loaded and automatically closes behind a person. However, she was not aware that Ms McQuoid was behind her when she did so and said she had not deliberately closed the door on Ms McQuoid.

[57] Ms McQuoid said that evening she had returned to her home and her husband and family were worried about her as she was very stressed and upset.

(b) *11 April 2016*

[58] The following day, 11 April 2016, Ms McQuoid went into work and took a bag of product to the Customer Service desk to ask the checkout operator for a price check. The checkout operator told her that she was not allowed to talk to Ms McQuoid.

[59] During the morning her husband, Mr Kevin McQuoid, had come into the store and asked her how her day was going. She had informed him about the incident with the checkout operator after which he left and she continued with her job. Ten minutes later Mr McQuoid returned and told her he had spoken to Ms Clark and told her to stay away from her (Ms McQuoid).

[60] Mr McQuoid said he was aware that Ms McQuoid had a difficult relationship with Ms Clark and he had stopped to speak to Ms McQuoid who had told him about more bullying and harassment and that she was not allowed to talk to anyone in the checkout department.

[61] He said he had felt very upset about this and that no-one was protecting Ms McQuoid so he had asked another employee where Ms Clark was to be found. He had then approached Ms Clark and told him to leave his wife alone or he would take her to task.

[62] When Ms Clark had asked him who he was he had told her she was a bully and repeated his message again. As Ms Clark walked away he called out after her in an assertive voice "*Leave my wife alone or I will take you to task*". She had asked if he was threatening her and he had responded "*No, take it as a public warning*".

[63] Ms Clark's version of the incident was that a large man had rushed up to her on 11 April 2016 and asked if she was Ms Clark. She confirmed that she was and the man then told her to leave his wife alone. At that point he was aggressively pointing his car keys towards her face.

[64] Ms Clark said she asked the man who he was as she did not know and he explained that he was Ms McQuoid's husband and if she did not leave Ms McQuoid alone she would have to deal with him. Ms Clark said she asked the man if it was a threat and he replied that she could take it as she liked. He then told her it was a public warning.

[65] As Mr McQuoid was behaving in a very aggressive manner towards her she told him to leave the Store and then moved behind the customer service desk in order that she could telephone Mr Te Brake. As she did so Mr McQuoid again shouted at her "*Take this as a public warning*". Ms Clark said she was worried about the threat which made her feel unsafe, and concerned that Mr McQuoid would wait for her outside in the carpark when she left work or return to the Store and abuse her.

[66] Mr Ben McPherson, a Store customer, said he had entered the Store on 11 April 2016 and was near the checkout area when he heard Ms Clark telling a man to 'Get Out' of the Store. He said the man was pointing towards her with an object in his hand and saying words that he was giving her a 'public warning'. He said the man's manner was very aggressive. The man concerned he identified as Mr McQuoid.

[67] The following day Ms Clark lodged a formal complaint about Ms McQuoid's behaviour in swearing at her in front of customers and members of staff and Mr McQuoid's behaviour towards her which she had found threatening. Mr Te Brake advised her that the complaint should be forwarded to the police.

Trespass Order 12 April 2016

[68] Ms Wilson had been absent on 11 April but returned to work on 12 April 2016 and was informed about Ms Clark's complaint relating to Mr McQuoid's visit to the Store. She had viewed the digital video footage of the incident, and believing that it showed Mr McQuoid had acted in a very aggressive manner towards Ms Clark, spoke to Mr Te Brake about it and asked for a trespass order to be issued.

[69] Mr Te Brake said he had been concerned at the complaint made by Ms Clark relating to Mr McQuoid's behaviour and that as he had a duty to ensure that she had a safe working environment, he had agreed that a trespass order be made. As a result Ms Wilson had telephoned the local police station and spoke to the duty officer to ask for a trespass order to be issued against Mr McQuoid.

[70] Police Constable (PC) David Gemmell who had been the duty officer that day said Ms Wilson informed him that one of her staff members had been threatened at work by the partner of one of the Store's other employees and asked him to serve a trespass notice on Mr McQuoid.

12 April 2016

[71] PC Gemmell said he had served the trespass notice to Mr McQuoid in his home on 12 April 2016 and explained that he was trespassed from the Store. While PC Gemmell was with Mr McQuoid, Mr McQuoid had telephoned his wife, explained that he had been trespassed from the Store, and that she should get their son-in-law and to leave the Store.

[72] Following receipt of the telephone call Ms McQuoid said she had told the Produce Department supervisor she was leaving. After she arrived home she had telephoned Ms Wilson and said she would not return until her grievance was resolved. At the Investigation Meeting Ms McQuoid confirmed that by 'grievance' she had meant the trespass order against Mr McQuoid.

[73] Ms Wilson confirmed that Ms McQuoid had told her that she had left the Store because Mr McQuoid had been served with the trespass order and she would not return until it was lifted.

[74] Ms Wilson said she had explained that Mr McQuoid had threatened Ms Clark. Ms McQuoid had responded that Mr McQuoid had not threatened anyone but that he did warn Ms Clark. Mr McQuoid had also spoken to her and asked to have the trespass order rescinded but she had told him that would be Mr Te Brake's decision. She had spoken to Mr Te Brake who had asked her to have Ms McQuoid put her concern in writing.

Letter of Complaint

[75] The following day Ms McQuoid saw her doctor who said she was suffering from acute stress and signed her off work for two weeks. She had taken her medical certificate together with the letter Ms Wilson had requested and had given them to Mr Te Brake on 13 April 2016.

[76] Mr Te Brake said that the letter had consisted of some 4.5 pages and had been written by both Mr and Ms McQuoid. The letter referred to both the trespass order and made allegations of bullying and harassment by Ms Clark.

[77] The letter concluded by stating:

What about it Maurice?

You could start by dealing with the trespass order, because Heather and Sione are not returning to work while that exists.

I cannot enter your property to hold this meeting with you. ...

When and where then is this promised meeting to take place. You can contact us on

[78] Mr Te Brake said he had not been aware of any complaint about bullying and harassment made by Ms McQuoid prior to receiving this letter, despite her having had the

opportunity to raise such concerns with him at any time prior to that date. He had been concerned by the content of the letter and immediately sought legal advice as to the appropriate procedure to be followed.

[79] Before he had received the advice sought, Ms McQuoid emailed her resignation on 15 April 2016 and delivered a hard copy to the Store. The resignation email stated:

Dear Maurice,

I wish to formally tender my resignation from Pak'n'Save as of 15/04/2016. As you have wished, your management has bullied me out, because of the bullying harassment and intimidation from Corina Clark and Christine Wilson with no support from health and safety officer Frances Lyle either. So much for my loyalty to you Maurice.

[80] Following receipt of legal advice Mr Te Brake commenced an investigation into the allegations made by Ms McQuoid in her letter dated 10 April 2016. He advised Ms Clark of the allegations against her by a letter dated 22 April 2016 in which he stated:

Investigation meeting

A former employee, Heather McQuoid, has alleged that she was subjected to bullying, harassment and intimidation by you at Pak'n'Save Kaitaia. As an allegation of bullying has been made, it is necessary to investigate whether there is any substance to the allegation.

[81] The letter invited Ms Clark to attend a meeting on 4 May 2016 to be attended by Ms Wilson and Mr Te Brake. The allegations made by Ms McQuoid were set out in some detail in the letter.

[82] Ms Clark said she had attended the investigation meeting on 4 May 2016 and provided her explanation of the allegations which had been made by Ms McQuoid.

[83] Mr Te Brake said that having considered the matter fully and having listened to the explanation from Ms Clark, he had concluded that there was no proof of bullying or harassment and was satisfied that Ms Clark had been carrying out her duties as expected.

[84] On 1 July 2016 a formal personal grievance was raised on behalf of Ms McQuoid by her lawyer.

Determination

Was Ms McQuoid constructively dismissed by the Respondent?

[85] An employee is usually entitled to resign from their employment on a unilateral basis. In this case, the individual employment agreement signed by Ms McQuoid on 8 September 2011 made provision for this situation at clause 1 (a) which required the employee to provide two weeks' written notice of termination.

[86] The agreement of the employer to such unilateral notice is not required, the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. As observed by Goddard CJ in *Stiffe v Wilson & Horton*:¹

Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.

[87] There is no obligation on the employer to dissuade the employee from leaving, although they may choose to do so in some cases. An employee who has resigned has not been dismissed.

[88] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

¹ 5/12/00 AC 94/100, AEC 106/00 at para 21

[89] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.²

[90] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*³ there are three fundamental situations in which a constructive dismissal claim may arise:

- i. An employee is given a choice between resigning and being dismissed;
- ii. There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;
- iii. There had been a breach of duty by the employer which causes an employee to resign.

[91] Ms McQuoid is claiming a breach of duty on the part of the Respondent by failing to respond or deal with the issues of bullying and harassment raised by Ms McQuoid.

[92] The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*⁴. The Court of Appeal in examining the question of constructive dismissal observed:

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

² Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd (1983) ERNZ Sel Cas 59, as referred to in Wellington etc Clerical etc IUOW v Greenwich (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

³ (1985) ERNZ Sel Cas 136; [19785] 2 NZLR 372

⁴ [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

have to be examined, not merely of course the terms of 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.

[93] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[94] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*⁵ observed in describing this type of constructive dismissal:⁶

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[95] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where he or she had no other option.

⁵ [1983] ACJ 965

⁶ at [975]

A Breach of Duty

[96] Ms McQuoid claims that she repeatedly informed Ms Wilson of bullying and harassment on the part of Ms Clark. Ms Wilson denies that Ms McQuoid made any complaint of bullying to her during her employment.

[97] Although she was aware that there was a degree of tension between Ms McQuoid and Ms Clark, Ms Wilson said this was not an uncommon occurrence in an organisation of 170 employees and she had not been made aware that Ms McQuoid was being bullied by Ms Clark.

[98] She had been unaware of any of the incidents described by Ms McQuoid during 2016 and no complaint had been made to her about them by Ms McQuoid.

[99] Mr Te Brake's evidence was that Ms McQuoid had every opportunity to make a complaint to him on either his daily walks around the Store, or by going to see him in his office. However she had not taken any steps to advise him of concerns of bullying by Ms Clark until he received the letter dated 10 April 2016 on 13 April 2016.

[100] There is a duty on both parties to be responsive and communicative pursuant to s 4(1A)(b) of the Employment Relations Act 2000 and it has long been accepted that where an employee is of the view that he or she is being subjected to bullying or harassment he or she is under a duty of good faith to bring that to the notice of the employer. I find no evidence that Ms McQuoid did so prior to the letter dated 10 April 2016.

[101] I observe that the Respondent had alerted Ms McQuoid to the fact that it would address any problem or grievance pursuant to clause 22 of the individual employment

agreement issued to Ms McQuoid and signed by her on 8 September 2011 (the Employment Agreement). In addition an explanation of the relevant procedures is contained in pages 16-17 of the Employment Agreement. Harassment was also addressed in clause 30 of the House Rules of the Respondent which states:

The company has in place procedures to deal with discrimination and harassment and any complaints regarding these must first be brought to the management's attention. Prompt action will be taken to address any complaints.

[102] However there is no evidence that Ms McQuoid made a complaint relating to bullying and/or harassment to Ms Wilson or Mr Te Brake prior to the letter dated 10 April 2016.

[103] I have considered whether or not Ms Wilson should have realised that there were issues of bullying between Ms McQuoid and Ms Clark in the absence of a formal complaint. Ms Wilson has confirmed in her evidence that Ms McQuoid did put an envelope on her desk which she said was her resignation; however Ms Wilson claims not to have opened the letter, which subsequently disappeared, Ms McQuoid could offer no explanation and did not keep a copy of the letter.

[104] I note that the issues related to bullying and harassment of Ms McQuoid by Ms Clark appeared to have gained prominence following the appointment of Ms Clark as the Checkout Manager. It is clear from Ms McQuoid's comment that she intended to seek an immediate transfer because she was unhappy at the appointment and Ms Wilson admits that she was aware that there was tension between the two women after this date.

[105] However some unhappiness on the part of the employee does not constitute repudiatory behaviour on the part of the employer, and although Ms Wilson was aware of some resentment by Ms McQuoid at the appointment of Ms Clark as Checkout Manager,

there is no evidence to support the Respondent being aware that Ms McQuoid was the focus of bullying in the absence of a complaint prior to the letter dated 10 April 2016.

[106] I accept that following receipt of the letter dated 10 April 2016 Mr Te Brake could have contacted Ms McQuoid and advised her that he would be investigating her concerns as soon as he received the letter, but I note that he did take the complaint seriously and immediately sought legal advice on the correct procedure to adopt.

[107] I consider that in light of what was a lengthy and detailed letter raising serious issues, this was a reasonable response.

[108] Before he had had an opportunity to receive legal advice and respond to the letter, Ms McQuoid had resigned from her employment within two days following delivery of the letter on 13 April 2016, giving the reason as bullying on the part of Ms Clark and Ms Wilson.

[109] I have considered the reason given for her resignation by Ms McQuoid. The evidence is that following a telephone conversation with Mr McQuoid, Ms McQuoid left her place of work on 12 April 2017 and refused to return until the trespass order against Mr McQuoid was rescinded. The trespass order was a matter solely between the Respondent and Mr McQuoid, and was not a breach of good faith towards Ms McQuoid.

[110] It was not until Ms McQuoid wrote the resignation letter delivered by email on 15 April 2016 that she raised the issue of bullying as the reason for her leaving her employment.

[111] I find it more likely than not that the trespass order against Mr McQuoid was the trigger for Ms McQuoid's resignation. Ms McQuoid confirmed at the Investigation Meeting that the trespass order was the reason for her leaving her place of work and the letter written

jointly by Mr and Mrs McQuoid contained the statement: “*You could start by dealing with the trespass order, because Heather and Sione are not returning to work while that exists.*”

[112] It is clear that Ms McQuoid is telling the Respondent what is going to happen. As observed by Goddard CJ⁷:

Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.

[113] However in any event I find no evidence to support Ms McQuoid’s assertion that she had raised the question of bullying by Ms Clark as an issue to either Ms Wilson or Mr Te Brake prior to the letter dated 10 April 2016 and delivered on 13 April 2016.

[114] In respect of the allegation of bullying on the part of Ms Wilson, there is no evidence that she had made any complaint about Ms Wilson bullying her until the letter of resignation.

[115] Moreover I note that Ms Wilson appointed Ms McQuoid to cover her holiday leave in July 2015 and there is no evidence that she would not have made a recommendation that Ms McQuoid be appointed as a permanent replacement for the Checkout Manager. In addition she acted upon Ms McQuoid’s request to transfer to another department within a timely manner and requested her to arrange the flowers for the Produce Department, an accolade to Ms McQuoid’s ability in that area, after she had transferred to that department.

[116] Having fully considered the matter, I find no evidence to support a breach of duty on the part of the Respondent in failing to respond or deal with the issues of bullying and harassment during Ms McQuoid’s employment. Nor do I find any evidence that the Respondent managed events with the intention to cause Ms McQuoid to resign.

⁷ 5/12/00 AC 94/100, AEC 106/00 at para 21

Reasonably foreseeable

[117] Having already found no breach of the duty owed to Ms McQuoid by the Respondent, I further find there was no any fundamental breach of duty so serious to make it reasonably foreseeable to the Respondent that Ms McQuoid would resign.

Costs

[118] Costs are reserved. I note that the Applicant is legally aided and while it is unlikely that a recovery of a contribution to its costs is available, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority should it wish to do so. In this event, the Applicant has a further 14 days to file and serve submissions in response.

[119] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority