

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 421
3049793

BETWEEN	DIPIKA MACKENZIE Applicant
AND	HUNTINGTON'S DISEASE ASSOCIATION (AUCKLAND) INC Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Adam Mapu, Advocate for the Applicant Michael Headifen, Counsel for the Respondent
Investigation Meeting:	8 and 9 July 2019
Determination:	17 July 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Dipika Mackenzie, claims that she was constructively dismissed from her employment with the Respondent, Huntington's Disease Association (Auckland) Limited (HDA) on 9 May 2019.

[2] Ms Mackenzie further claims that she was unjustifiably disadvantaged by HDA failing to investigate the complaint raised by her about Ms Dysart on 9 May 2019.

[3] HDA denies that Ms Mackenzie was constructively dismissed and claims that she abandoned her employment.

[4] HDA denies that it failed to protect Ms Mackenzie's health

The Authority's investigation

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[6] The issues requiring investigation and determination are whether or not—

- (a) Ms Mackenzie was constructively dismissed by HDA or whether she voluntarily abandoned her employment;
- (b) Ms Mackenzie was unjustifiably disadvantaged by HDA failing to investigate her complaint.

Background

[7] HDA is part of the Huntington's Disease Associations in New Zealand which aim to provide support and advocacy for those with Huntington's disease, provide information support to family members and associates, and act as a source of information for professionals and raising public awareness on Huntington's disease.

[8] HDA had three employees, namely Ms Jo Dysart, Manager, Ms Dysart's daughter, Jenna, an administrator, and Ms Mackenzie. Mr Chris Malcolm was the chairman of the HDA during the early part of Ms Mackenzie's employment and his position was subsequently filled by Mr Matt Hobbs.

[9] Ms Mackenzie commenced employment at HDA on 3 February 2016 as a part-time community support worker. In that position she provided care to HDA clients and her role also involved increasing public awareness of Huntington's disease, specifically by helping to distribute pamphlets at brain days and assisting at conferences. Ms Mackenzie became a full time employee at the end of 2016 and said she had taken on some administrative duties at that time.

[10] Ms Mackenzie had been issued with an individual employment agreement dated 3 February 2016 which she had signed and dated (the Employment Agreement).

Relationship between Ms Dysart and Ms Mackenzie prior to 2018

[11] Ms Mackenzie worked closely with Ms Dysart whom she knew socially prior to joining HDA and the evidence is that they enjoyed a strong, supportive and positive relationship during the first part of their employment together.

[12] Between July 2017 and August 2017, Ms Mackenzie was on sick leave suffering from pneumonia. During that time Ms Dysart transported her to GP appointments and to the hospital when she was admitted, subsequently visiting her at hospital.

[13] Whilst Ms Mackenzie was on sick leave recovering from her illness, she was out with her friend and was assaulted by two males and one female. As she had already used her allocated five days statutory sick leave, HDA granted her compassionate leave so she did not have to worry about work commitments. Ms Mackenzie was also paid during that additional period.

[14] During that period, after release from hospital, Ms Mackenzie said she had also been provided with accommodation at Ms Dysart's home.

[15] Ms Dysart said Ms Mackenzie had made her aware that she suffered from a situation of domestic violence. Ms Dysart said she had been supportive to Ms Mackenzie regarding her situation, putting Ms Mackenzie in touch with Shine, Women's refuge. Ms Mackenzie confirmed that Ms Dysart had provided the contact with Shine from whom she had received counselling in regard to her domestic violence situation. In addition, Ms Mackenzie said that Ms Dysart had offered her shelter at her (Ms Dysart's) home during that period.

Complaint 2017

[16] Mr Hobbs said that the HDA Committee (the Committee) received a complaint from a family member of a client in late 2017. In the complaint there were a number of references to conversations with Ms Mackenzie where she had discussed HDA information and also opinions and gossip about Ms Dysart. He said the complaint had been forwarded to Ms Dysart but only after all comment referencing Ms Mackenzie had been redacted from the complaint. This had been done by him with the intention of preserving Ms Mackenzie and Ms Dysart's working relationship.

[17] The Committee further decided that a member of the committee, Ms Lyn Dyson, would meet with Ms Mackenzie to discuss boundaries with clients and clients' families, and reinforce that it was inappropriate to discuss HDA's private information with third parties.

[18] Ms Dyson confirmed that she had met with Ms Mackenzie on 27 February 2018, following which she prepared a report on the meeting and sent it to the Committee. She said the report included some recommendations such as Ms Mackenzie attending care and support work education courses.

[19] The report written by Ms Dyson on 27 February 2018 set out Ms Mackenzie's acknowledgement of her behaviour as inappropriate, and recorded Ms Mackenzie as saying that: "Overall that she mainly enjoyed her job and the people she helped care for and wanted to do more for them".

Accusations of inappropriate financial behaviour involving Ms Dysart

[20] Ms Mackenzie said that during the latter part of 2017 she had become concerned following her awareness of some financial matters involving Ms Dysart.

These included:

A client incident August 2017

[21] An incident in August 2017 when a client who had been in hospital following a car accident, and was to be moved to a rest home. Ms Mackenzie said Ms Dysart had told her to go to WINZ and inform it that the client was still in his flat. She had said it was not the right thing to do but Ms Dysart had insisted that it was just until he got funding.

[22] Ms Dysart explained that when a client is placed into a rest home due to an inability to care for themselves as was the case with this client, it was usual practice to place them on a respite care basis initially.

[23] Following a full assessment it would be decided if the rest home needed to become a permanent rather than a temporary placement, during which time the client's original accommodation was maintained in case he or she was able to return to his home. The assessment process could take three to four months.

[24] Ms Dysart said that that was the reason for a continued application to WINZ as the client was entitled to remain in his or her accommodation during the assessment period, the process being to preserve the client's well-being. Should the assessment subsequently be that the patient would be moved on a more permanent basis to a rest home that was the point at which WINZ would be informed.

The attendance of Jenna at a Huntington's Disease Papal Visit 2017

[25] Ms Mackenzie said that Ms Dysart employed her daughter and the two of them had attended a HDA supported conference, however, Ms Dysart's daughter was never present in the workplace.

[26] Ms Dyson confirmed that the Committee had approved the recruitment and employment of her (Ms Dysart's daughter) and that she had been issued with an individual employment agreement.

[27] Ms Dysart said that the conference which she and her daughter had attended had been a Papal visit for Huntington's disease sufferers and supporters from all over the world in May 2017. Five of the eleven delegates went from New Zealand to Rome and they needed physical assistance with wheelchairs to be provided during the trip.

[28] She and her daughter accompanied the HDA clients who were able to travel. Her daughter had self-funded her trip and volunteered her time to assist with the five HDA clients who needed assistance during the trip. As her daughter was an employee of HDA, she had been attending the papal visit in an official capacity.

Credit Card Usage

[29] Two credit cards had been issued to HDA, one of which was in Ms Dysart's name, the other in Ms Mackenzie's name. Ms Dysart explained that the interchanging use of the credit cards often occurred as the monthly limit was conservative due to HDA having limited funding and income. As a result of one credit card reaching its credit limit, the other credit card would be used for further expenditure to ensure the overall HDA credit limit was not breached.

[30] Ms Mackenzie said that she had been told by Ms Dysart to take a \$500.00 cash advance on her work visa credit card and to give the cash to her. She believed that Ms Dysart had wanted this money for the papal visit trip to Rome.

[31] Ms Dysart said that the cash advance of \$500.00 had been taken from the credit card to cover such expenditure as meals and immediate necessities for the clients attending the papal visit trip to Rome. It had been changed into euros and was to provide for the 11 people who went to the Rome trip for their meals.

[32] The cash withdrawal had been approved at Committee level and was documented by the HDA accountant.

[33] Ms Mackenzie confirmed when questioned at the Investigation Meeting that she had not been expected to account for the specific \$500.00 cash withdrawal from the HDA credit card issued in her name.

Ready Prepared Meals

[34] Ms Mackenzie said that she had noticed an invoice for ready prepared meals for a client which she had thought strange because she had not seen ready meals in the client's fridge and the delivery address on the invoices was Ms Dysart's home address.

[35] Ms Dysart said that she had obtained ready prepared meals for herself and had thought that they might be suitable for the client's use also. However, whilst the ready prepared meals had been delivered to the office and kept there until she went home at the end of the day, she had paid for the ready prepared meals herself and the accounting for those had been quite separate to the accounting for the client's ready meals.

Weekend trips

[36] Ms Mackenzie said that when she and Ms Dysart went on work trips out of Auckland, Ms Dysart would stay on over the weekend and her husband would go and stay with her. Ms Mackenzie inferred that this was expenditure charged to HDA.

[37] Ms Dysart confirmed that her husband did join her for the weekend occasionally when a HDA visit had taken outside of Auckland. However on those occasions her husband paid for his own expenses during that time and there was no charge to HDA.

Invoice Submission

[38] Ms Mackenzie also claimed that Ms Dysart had been acting inappropriately by purchasing items for personal use using the HDA account and by submitting the same invoice several times.

[39] Ms Dysart denied that this was the case.

HDA's knowledge of the financial complaints May 2018

[40] Ms Mackenzie had made no complaint about the allegations until May 2018 which was the first date when Mr Hobbs said the Committee had become aware that Ms Mackenzie had made allegations regarding the inappropriate use of the office credit cards by Ms Dysart, the employment of Ms Dysart's daughter and allegations regarding whether Ms Dysart had used Association funds improperly.

[41] Mr Hobbs said that a previous employee had made similar complaints which had been properly investigated by an independent committee, not including Ms Dysart, and the investigation had been thorough. He said the HDA accounts are checked regularly by the Accountant and are regularly audited.

[42] There had been no evidence of any inappropriate financial transactions being undertaken by Ms Dysart to support the allegations made by Mrs Mackenzie. When questioned at the Investigation Meeting Ms Mackenzie confirmed that she had no evidence to support her allegations about Ms Dysart making inappropriate financial transactions at HDA.

Inappropriate comment/Bullying Behaviour by Ms Dysart

[43] Super Clinics are attended by HDA clients who have appointments to see a doctor. Ms Mackenzie said that she had once attended a Super Clinic with Ms Dysart and on that occasion Ms Dysart had told her she was lucky that Ms Dysart had: 'got her out of the gutter' and that previously Ms Dysart had told her she was unemployable. Ms Mackenzie could not recall at which Super Clinic or the approximate date when the comment had been made.

[44] Ms Dysart explained that appointments at the Super Clinics are made in advance and there is very little time between appointments as the doctors are busy. She said generally there was little time to have any conversation and therefore she not only denied having made such comments to Ms Mackenzie, but said that she found it difficult to believe that a

conversation of the nature claimed by Ms Mackenzie could have taken place at a Super Clinic.

[45] Ms Dyson said that she recalled Ms Mackenzie telling her about the comments that she alleged Ms Dysart had made to her at the Super Clinic, but she could not recall when Ms Mackenzie had told her. However, she believed it was when the relationship between Ms Mackenzie and Ms Dysart was no longer positive, and said that Ms Mackenzie could have been told her about it towards the middle part of 2018.

Telephone Tracking by Ms Dysart

[46] Ms Mackenzie said that during May 2017 when Ms Dysart was in Rome attending the Papal visit, she and her husband had been having a domestic incident at their home and it had become such of a nature that she had called 111 on her landline.

[47] When the police had arrived at her door Ms Mackenzie said her mobile telephone had rung and it had been Ms Dysart asking if she had any concerns. She said she had been shocked that Ms Dysart knew what was going on and believed Ms Dysart must have had some tracking device connected to her landline.

[48] There was a further incident when she had had a car accident and called 111 and Ms Dysart had then called her and asked her why she had called 111. This again confirmed her suspicion that there had been a tracking device put on her landline.

[49] Ms Dysart said she had no knowledge of calling Ms Mackenzie in respect of her having a domestic incident with her husband and had not telephoned her in May 2017, although she had been aware that there was serious domestic violence in Ms Mackenzie's home, as a result of Ms Mackenzie having told her and asking her to photograph her showing bruises that she had received from a domestic incident at home.

[50] In relation to the car accident, Ms Dysart said Ms Mackenzie had telephoned her to report the accident and she had asked to speak to the ambulance drivers as she understood Ms Mackenzie had been transporting a patient at the time of the accident. Her inquiry had been to ensure that Ms Mackenzie was not hurt or injured and to inform the ambulance driver about the client's needs.

[51] Ms Dysart denied that there was a tracking device connected to Ms Mackenzie's landline. Ms Hobbs also denied that that was the case, pointing out that HDA did not have the funding to be able to afford such a thing.

Conference 4 and 5 May 2018

[52] HDA had held a conference in May 2018. Ms Mackenzie said that there had been a brain day prior to the conference but she had not been informed about it and did not attend. As a result, she felt excluded and ignored.

[53] Ms Dysart said the brain tour was held on Wednesday 2 May 2018 the day prior to the conference. The brain tour had limited spaces and was a tour organised for family members who following their deaths had given HDA a gift of donating their brains to research, and it was an opportunity for them to attend the university and to hear a little more about how their gift would be used. It was not a brain tour at which employees would be in attendance.

[54] Ms Dysart said she did not know why Ms Mackenzie did not know about the brain tour as it was on the HDA website, Facebook page and in the programmes.

[55] Ms Dysart said she had organised a conference for HDA which included guests from all over New Zealand. On the first evening, 4 May 2018, the conference had opened with a powhiri and dinner to which important guests were invited and Ms Mackenzie was delegated to bring one of the guests to the conference who was an elderly lady and an important Māori supporter of HAD.

[56] Ms Mackenzie had not arrived to collect the guest as arranged and the guest's daughter had telephoned Ms Dysart informing her that her mother was in some distress because that she had not been picked up. Ms Dysart said she made immediate arrangements for someone to collect the guest and bring her to the dinner.

[57] Ms Dysart said she tried, but was unable to contact Ms Mackenzie who had telephoned her a little earlier and told her that she was almost at the guest's home. She had become concerned as to whether Ms Mackenzie had been involved in an accident and had made some telephone calls to try and ascertain what had occurred.

[58] She had called Ms Mackenzie's husband more than once, but he had no knowledge of Ms Mackenzie's whereabouts. She had also called hospitals and the police, but no accidents had been reported. Ms Mackenzie had subsequently called her at 9:30 p.m. and told her that she had become lost and returned home.

[59] Mr McKenzie confirmed that Ms Dysart had telephoned him several times during the evening. Ms Mackenzie agreed during the Investigation Meeting that it had been kind of Ms Dysart to be so concerned about her.

[60] During the following day, 5 May 2018, Ms Mackenzie said that Ms Dysart had reprimanded her publically about a shortage of lanyards which she had been delegated to arrange at the conference.

[61] Ms Dysart confirmed that there had been a few lanyards short at the conference, but denied she had been angry or reprimanded Ms Mackenzie stating that she had just asked Ms Mackenzie to go and buy some more.

[62] Ms Mackenzie said there had been a dinner on the Saturday evening of the conference and when she had arrived there had been no seat available for her in the dining room and she had to sit in the foyer to eat her meal.

[63] Mr Hobbs said he had noticed Ms Mackenzie sitting having her meal at the conference in the foyer and had suggested that she come and sit in the conference dining room because there were seats available. However, Ms Mackenzie had declined to do so.

[64] Ms Dysart confirmed that there was seating available in the dining room and said that she did not know why Ms Mackenzie had sat in the foyer.

Incident 9 May 2018

[65] Ms Mackenzie had not attended for work on Monday 7 or Tuesday 8 May 2018 as she said she was stressed after the conference. On Wednesday, 9 May 2018, she had received a text message from Ms Dysart asking her to meet at the Hollywood Café. Ms Dysart had not said what the meeting was concerning. She tried calling Ms Dysart but was not able to reach her. When she arrived at the Hollywood Café Ms Beverley Rakich was sitting with Ms Dysart.

[66] Ms Rakich, who is now retired, said she had been working for the Parkinson's Association in May 2018. The Parkinson's Association shared the office premises with HDA and therefore she had known both Ms Dysart and Ms Mackenzie reasonably well and they had a good working relationship.

[67] During the meeting at the Hollywood Café on 9 May 2018 Ms Mackenzie said that Ms Dysart told her that she should hand in her notice otherwise she would: 'take her down the disciplinary route'. Ms Dysart told her that if she handed in her notice she would be given a good reference, but if she took her down the disciplinary route she would be unemployable because this would be known to other employees. She had asked Ms Dysart what she meant by the disciplinary route and Ms Dysart had told her Ms Rakich would explain it to her. Ms Dysart had then left the café.

[68] Ms Mackenzie said a few minutes later Ms Rakich received a call from Ms Dysart who told her to help her (Ms Mackenzie) with her resignation letter and that she wanted a copy of it on her desk before 2pm that same day.

[69] Ms Mackenzie said she went back to the office with Ms Rakich and felt pressured to write a resignation letter. She had then received a text message from Ms Dysart saying that she wanted to meet her at 3:30pm. She had shown Ms Rakich the resignation letter she had written and Ms Rakich said: "Aren't you going to leave it on Jo's desk?" She had replied that she was not going to do so because she had been asked to meet with Ms Dysart at 3:30pm.

[70] Ms Rakich said that when Ms Dysart came into the café she had joined her, and explained that she was waiting for Ms Mackenzie to come for coffee with her. Ms Dysart had explained to her that she was concerned about her well-being and wanted to ensure Ms Mackenzie was safe. Ms Dysart explained that she had been concerned about Ms Mackenzie's behaviour over the weekend.

[71] Ms Rakich said she also was concerned as Ms Mackenzie had shared information about her domestic situation with her and she also wanted to know what had happened to Ms Mackenzie when she had been delegated to collect the guest and bring her to the evening meal at the commencement of their conference but did not arrive. She said Ms Dysart had expressed her concerns that she was worried for Ms Mackenzie's well-being and wanted to make sure that she was well.

[72] Ms Dysart said that she has asked Ms Mackenzie to attend the meeting at the Hollywood Café on 9 May 2018 because she had been concerned and wanted to ensure Ms Mackenzie's well-being. She said during the meeting there was no discussion regarding work in terms of disciplinary actions. However, Ms Mackenzie had been very upset and had said that she had let Ms Dysart down and wasn't able to manage the job.

[73] Ms Mackenzie had confirmed that her safety had nothing to do with domestic violence or the home and it was when those matters were established that she (Ms Dysart) suggested they meet at 3:30pm in the afternoon. Ms Dysart said there had been no discussion regarding Ms Mackenzie's employment or continued employment and there had been no discussion about Ms Mackenzie resigning.

[74] Ms Rakich confirmed that when Ms Mackenzie arrived at the Hollywood Café she burst into tears and told Ms Dysart she was sorry and felt she had let her down. She had also added that the job was too much for her. Ms Dysart had been sympathetic and enquired whether or not Ms Mackenzie was alright.

[75] Ms Rakich said she also had made an enquiry as to Ms Mackenzie's well-being on the Thursday evening as she thought it could be a medical issue. However, it had appeared that Ms Mackenzie had not been ill and had simply become lost on that evening. She also confirmed that she was well and had not had an argument with her husband.

[76] Ms Rakich said that she did not recall Ms Dysart talking to her about Ms Mackenzie's employment or continued employment during the meeting. Ms Dysart had not telephoned her after she had left the café.

[77] Ms Dysart left the café to keep an appointment and Ms Rakich and Ms Mackenzie returned to the office. Upon their return Ms Mackenzie had asked her advice on how to write a resignation letter and she had printed out a few examples from the internet for her information. Ms Mackenzie had returned to the HDA office and she had gone to her own office.

[78] Later, Ms Mackenzie arrived in her office to show her the resignation letter she had handwritten. Ms Rakich said she had offered to type it up for Ms Mackenzie as there was some errors in her letter but Ms Mackenzie had decided to rewrite the letter by hand.

[79] Ms Mackenzie had left the office and she had no further contact after that.

[80] Ms Mackenzie had said that she had been upset by what had happened at the meeting with Ms Dysart and Ms Rakich and she had gone home for lunch and told her husband about the meeting and he had suggested that she send Ms Dysart a text message saying she would not come in that afternoon.

[81] In the afternoon Ms Dysart said she had received a text from Ms Mackenzie's work phone informing her that she wasn't well enough to return to work.

[82] Ms Mackenzie said she then called Ms Lyn Dyson and explained what had happened at the meeting between herself and Ms Dysart, and Ms Dyson advised that she would speak to Mr Malcom and they would come back to her.

[83] Ms Dyson said that Ms Mackenzie had told her about the meeting between herself and Ms Dysart who had told her to resign. Ms Dyson said that Ms Mackenzie was upset and appeared to be confused during the telephone call. She had telephoned Mr Malcolm following the call with Ms Mackenzie and had understood he would be handling the matter.

[84] When Ms Mackenzie arrived at work the following day, Thursday 10 May 2018, she had noticed that Ms Dysart was on leave and she called Mr Malcom to follow up on her

discussion with Ms Dyson and he had told her to carry on working. Ms Dysart said that she had not seen Ms Mackenzie at work on either Thursday 10 or Friday 11 May 2018.

[85] Mr Hobbs said he had heard from Mr Malcolm who told him about Ms Mackenzie's version of what had happened at the meeting between her and Ms Dysart on 9 May 2018. They had discussed that they needed to talk to Ms Dysart and Mr Malcolm was to speak to Ms Mackenzie, confirm her statement and check on her well-being.

[86] If the allegation had a basis, they had discussed that it was a potential human resources matter and Mr Malcolm had consulted an HR Consultant known to him personally to advise on procedure. They had agreed that Ms Mackenzie should have two weeks sickness absence.

[87] Mr Hobbs said Mr Malcolm had spoken to Ms Dysart about the allegations made by Ms Mackenzie regarding the meeting at the Hollywood café on 9 May 2018 and Ms Dysart had denied what had occurred.

[88] Ms Rakich had not been interviewed and because the advice from the HR Consultant had been that HDA should not contact Ms Mackenzie whilst she was on sick leave as this might exacerbate her stress and the situation, no further steps had been taken pending Ms Mackenzie's return to work.

[89] Ms Mackenzie said she went to see her doctor on Monday, 14 May 2018 and she had been medically certified as unfit for work until 28 May 2018. On Wednesday 16 May 2018, Mr Malcolm had called her and told her that they would discuss the situation when she returned to work.

[90] Ms Dysart said that Ms Mackenzie had not returned to work after the meeting on Wednesday, 9 May 2018. There had been two medical certificates provided in respect of Ms Mackenzie's absence. One was dated 4 May, which covered her until 9 May 2018, and the second was issued on 14 May 2018 and covered Ms Mackenzie's absence until 28 May 2018. Although a third certificate had been produced, covering the period 28 May until 5 June 2018, that had not been provided at the time and she had not been aware of it until Ms Mackenzie had filed a Statement of Problem with the Authority.

[91] Mr Malcolm had spoken to Ms Dysart who had provided her version of what had occurred during the meeting in the Hollywood café and who denied the version of the conversation as relayed by Ms Mackenzie.

[92] The advice received from the HR Consultant had been that it would not be reasonable to speak to Ms Mackenzie while she was away on sick leave as this might increase her stress.

It was advised to speak to Ms Mackenzie when her sick leave was over and otherwise not to engage with her.

[93] In the interim, Ms Dysart had informed them that Ms Mackenzie had some items that needed to be retrieved in order that matters concerning clients could be progressed whilst Ms Mackenzie was on sick leave.

[94] Mr Malcolm wrote to Ms Mackenzie by letter dated 25 May 2018, confirming the points they had discussed on the telephone regarding Ms Mackenzie's leave due to absence. The letter stated:

As we discussed, you have already used all your sick leave and all your annual leave to date. Unfortunately the Association does not have the funds to allow us to continue to pay staff who are unable to work for extended periods of time.

However, we have agreed to allow you to have a limited number of annual leave dates in advance, and so we have agreed to pay the amount you would normally receive on Thursday 24th May. This means that you will accrue further negative annual leave.

Please note that from May 28th any further time that is taken off, either sick leave or annual leave will be considered leave without pay and will not be paid until the negative annual leave and negative sick leave balances that you have accrued have been returned to positive balances.

[95] The letter included a place for Ms Mackenzie to sign the letter to say that she agreed with the conversation. However, the HDA did not receive a copy of the signed letter back from Ms Mackenzie.

Attempted contact with Ms Mackenzie after 28 May 2018

[96] Following the expiry on 28 May 2018 of the last medical certificate of which HDA was aware, and in Ms Mackenzie's continued absence from work, both Ms Dysart and Mr Hobbs had attempted to contact Ms Mackenzie by telephone.

[97] In a letter dated 2 June 2018 written by Mr Hobbs and signed by Ms Dysart it was stated that Ms Dysart had tried to call Ms Mackenzie unsuccessfully several times and that: "However I have managed to contact your husband Ian, who informed me that you have gone up to stay in Northland".

[98] The letter asked Ms Mackenzie to make contact with Ms Dysart as soon as possible to discuss her employment with HDA. The letter ended with the statement: "If I do not have any communication from you by Friday 8th June, I will have no choice other than to terminate your employment on the basis of abandonment of employment". That letter had been sent by courier to Ms Mackenzie's home.

[99] There had been no response received to the letter. Mr Hobbs said accordingly HDA considered that Ms Mackenzie had abandoned her employment and she had been written to on 27 June 2018, advising that her that her employment had terminated her on the basis of abandonment. The letter stated:

You have now been absent from work since 27 May 2018 without explanation. I have not heard from you either by phone or in writing despite several efforts made to call you by myself on 28th May 2018, 31st May 2018 and by Matt Hobbs on 11th June 2018 and also a letter sent to your home address via courier on 6th June 2018.

As indicated in this letter the fact that I have not heard from you since 27th May 2018 and you've not supplied a medical certificate to explain your continued absence from work, I regretfully have to inform you that your employment with the Huntington's Disease Association has been terminated due to an abandonment of employment effective immediately from 27th June 2018.

Although this circumstance deeply saddens me, I hope everything is well with you and I wish you all the best for the future.

[100] Mr Hobbs said on 25 September 2018 he responded to the request for wage and details relating to Ms Mackenzie's employment. With the letter he had sent a copy of Ms Mackenzie's annual paid leave as well as her sick leave from the time that she commenced employment until the time she finished employment.

[101] The information provided by HDA confirmed that that during Ms Mackenzie's employment until 11 May 2018 when she stopped working, she had received 45.42 days of annual leave. She had had 11.92 days holiday pay outstanding at that time. She was paid a further 12 days while on leave until 27 May 2018.

Was Ms Mackenzie constructively dismissed by HDA or did she voluntarily abandon her employment?

[102] HDA terminated Ms Mackenzie's employment on the basis of abandonment. Although a medical certificate existed certifying Ms Mackenzie as absent due to sickness until 5 June 2018, this had not been provided to HDA until the investigation process. Following the expiry of the last medical certificate provided to it which expired on 28 May 2018, and Ms Mackenzie's failure to return to work after that date, HDA had tried to contact her by telephone and letter but received no response.

[103] HDA wrote to Ms Mackenzie on 2 June 2018 following the expiry of the last medical certificate which it had received. The letter advised Ms Mackenzie that unless she contacted HDA by 8 June 2018, her employment would be terminated on the basis of abandonment.

[104] Ms Mackenzie made no attempt to contact HDA before or by 8 June 2018, and as a consequence, HDA terminated her employment on the basis of abandonment.

[105] I find that HDA in terminating Ms Mackenzie's employment on the basis of abandonment acted in accordance with clause 14 of the Employment Agreement headed 'Abandonment' which stated:

Where the employee is absent from work for a continuous period of three days without the consent of or notification to the employer, the employee shall be deemed to have terminated his employment.

[106] Ms Mackenzie claims that she did not abandon her employment but that she was constructively dismissed by HDA as a result of unjustified actions by HDA.

[107] 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. In this case Ms Mackenzie did not resign but ceased to attend for work after the last date of sickness absence notified to HDA on 28 May 2018.

[108] 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

Second, if there was such a breach,

ii. 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

Williamson J in *Wellington Clerical Workers IUOW v Greenwich*¹ observed in describing this type of constructive dismissal:²

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.

Breach of Duty

[109] The issue concerning Ms Mackenzie as notified to Ms Dyson on 9 May 2018 was the claim that Ms Dysart had advised her to resign or to face disciplinary consequences if she failed to do so.

¹ [1983] ACJ 965

² at [975]

[110] It is unclear whether or not Ms Mackenzie had made allegations concerning Ms Dysart having undertaken inappropriate financial transactions with HDA accounts during their conversation; however Ms Dyson when questioned during the Investigation Meeting thought it possible that Ms Mackenzie may have mentioned it to her sometime during May 2018.

[111] There is no reference to financial impropriety in regard to Ms Dysart in the report of the meeting between Ms Dyson and Ms Mackenzie in February 2018, and there is no record of any other conversation between Ms Dyson or Ms Mackenzie until May 2018 so it is reasonable to conclude that the conversation between them on 9 May 2018 was when the allegations had been made.

[112] Mr Hobbs was aware of the allegations of inappropriate financial dealings against Ms Dysart by Ms Mackenzie so it is possible that he may have been made aware of these allegations by Mr Malcolm when they spoke concerning Ms Mackenzie's conversation with Mr Malcolm following the 9 May 2018 café meeting.

[113] In examining the financial allegations made against Ms Dysart I note that Ms Mackenzie had no evidence to support her allegations, some of which dated back to mid-2017. Others are not identified by date.

[114] Although Ms Mackenzie's evidence was that she had not raised her concerns in a timely manner because she had no ability to contact members of the Committee, Ms Dyson confirmed in cross-examination that Ms Mackenzie had her telephone number in June 2017.

[115] I find that Ms Mackenzie had the opportunity to make her concerns known to the Committee at the time they arose, but that she failed to do so. The earliest she mentions them is May 2018.

[116] In that context I find it significant that there is no mention in Ms Dyson's report of the meeting with Ms Mackenzie on 27 February 2018 of any financial irregularity on Ms Dysart's part which I would have expected had there been concern about this on the part of Ms Mackenzie from mid-2017.

[117] There is also no reference in Ms Dyson's report of the meeting with Ms Mackenzie on 27 February 2018 to an incident involving inappropriate comments being made by Ms Dysart to Ms Mackenzie at a Super Clinic or to allegations of telephone tracking on Ms Mackenzie's home landline and/or her HDA mobile telephone, or to these having been made to Ms Dyson on 9 May 2018.

[118] HDA had been aware of allegations of financial inappropriateness by Ms Dysart on a previous occasion; these had been investigated fully at the time and found to have been wholly without foundation.

[119] Mr Hobbs evidence was that HDA accounts were subject to scrutiny by an accountant and regularly audited. HDA had therefore concluded that the allegations made by Ms Mackenzie in regard to Ms Dysart's financial impropriety were without foundation.

[120] I find no breach of duty in HDA not pursuing these allegations because of its conclusion that they were without foundation.

[121] There is no evidence that Ms Mackenzie made HDA aware of Ms Dysart allegedly making inappropriate comments to her at a Super Clinic and therefore no breach of duty in it not investigating it.

[122] There is no evidence of telephone tapping of Ms Mackenzie's telephones by HDA. I accept Mr Hobbs evidence that this did not occur and moreover would have been a costly undertaking for HDA which is a charity dependent on funding. I find no breach of duty in respect of the telephone tapping allegation.

[123] No complaint had been received by HDA prior to the evidence prepared after Ms Mackenzie raised a personal grievance in December 2018 of bullying by Ms Dysart in regard to the lanyard shortage at the conference in May 2018. This is also the case regarding the complaint about a lack of seating for Ms Mackenzie to eat her meal at the conference. I find there is therefore no breach of duty in HDA not investigating these allegations.

[124] The breach of duty remaining to be considered is the complaint by Ms Mackenzie that Ms Dysart instructed her to resign during the meeting at the Hollywood café on 9 May 2018 and HDA failing to investigate that complaint adequately.

[125] Ms Mackenzie had made HDA aware of her concern about the meeting on 9 May 2018. HDA acknowledged the complaint and interviewed Ms Dysart, but did not take any further action on the basis of HR advice that it would not be appropriate to do so due to Ms Mackenzie being on sick leave.

[126] Employers are in a difficult position when employees are absent due to sick leave and not available to be interviewed in relation to their allegations. I find that HDA acted reasonably in accepting the HR advice received and deciding not to pursue the investigation whilst Ms Mackenzie was absent on sick leave. HDA's evidence was that the investigation process was 'on hold' and not finalised.

[127] However I observe that HDA could have interviewed Ms Rakich who had been at the café meeting and could therefore have provided insight into what had occurred.

[128] Following the receipt of the medical certificates I accept that HDA attempted to contact Ms Mackenzie on several occasions to ascertain her intentions regarding a return to work. Termination took place only when HDA was unable to obtain any response or communication from Ms Mackenzie, and this did not take place until 27 June 2018.

[129] However I note that a number of these contacts were made by Ms Dysart including the letters dated 2 and 27 June 2018. I accept that HDA believed this to be the correct approach because Ms Dysart was Ms Mackenzie's Manager, I find this was not appropriate in light of the allegations against Ms Dysart by Ms Mackenzie and the possible perception by Ms Mackenzie that the Committee had made a decision in regard to her allegations that supported Ms Dysart prior to any investigation.

[130] I find that there was a breach of duty by HDA in regard to the investigation and communications with Ms Mackenzie following 9 May 2018.

Was the breach sufficiently serious so as to make it reasonably foreseeable that Ms Mackenzie would be unable to continue working at HDA?

[131] Prior to the complaint on 9 May 2018 there was no evidence that the relationship between Ms Mackenzie and Ms Dysart was other than a strongly supportive one.

[132] Ms Mackenzie's evidence was that Ms Dysart had visited her in hospital during her illness in 2017, and that Ms Dysart had provided advice, support and shelter during her domestic violence experiences.

[133] There is no reference in the report by Ms Dyson dated 27 February 2018 to any issues between Ms Mackenzie and Ms Dysart but there is a comment that Ms Mackenzie 'mainly enjoyed her job'.

[134] There is no evidence that Ms Mackenzie raised any issue with Ms Dysart with HDA prior to her telephone call to Ms Dyson on 9 May 2018.

[135] On that basis there was no reason for HDA to make any investigation prior to the raising of the complaint on 9 May 2018.

[136] Once apprised of the complaint HDA spoke to Ms Dysart but I find that its enquiry was then frustrated by Ms Mackenzie's sick absence and her failure to contact HDA following the expiry of the medical certificate on 28 May 2018. Although there was a further

medical certificate for the period 28 May to 5 June 2018 this was not provided to HDA which therefore had no knowledge of it.

[137] Further Ms Mackenzie also failed to contact HDA following the letter dated 2 June 2018 in the period following that letter until the letter dated 27 June 2018 advising that her employment had been terminated for abandonment. I find that this was a breach of good faith on the part of Ms Mackenzie.

[138] I find that HDA had acted reasonably in not progressing the investigation as a result of Ms Mackenzie's sickness absence and acted reasonably in trying to contact her to find out her intentions regarding a return to work upon expiry of the last medical certificate received by it.

[139] Although it was inappropriate for Ms Dysart to be the point of contact I find that this was: "inconsiderate conduct causing some unhappiness or resentment to the employee" rather than dismissive or repudiatory conduct. I do not find that it was foreseeable that Ms Mackenzie would resign from her employment with HDA prior to the 9 May 2018 incident.

[140] I determine that Ms Mackenzie was not constructively dismissed by HDA but voluntarily abandoned her employment.

Was Ms Mackenzie unjustifiably disadvantaged by HDA failing to investigate her complaint?

[141] I accept that HDA did not progress the investigation into Ms Mackenzie's complaint that Ms Dysart had told her to resign or disciplinary action would be taken on 9 May 2018 because it did not want to affect Ms Mackenzie's well-being whilst she was on sick leave.

[142] However I have found that HDA could have made some progress in the investigation by interviewing Ms Rakich, but it did not do so.

[143] On the basis that Ms Rakich's evidence at the Investigation Meeting supported the version of events given to HDA by Ms Dysart, I find that the failure to take a statement from Ms Rakich did not disadvantage Ms Mackenzie.

[144] I have also noted in the preceding paragraph that Ms Dysart had contacted Ms Mackenzie on behalf of the HDA during her absence, and this may have given Ms Mackenzie the impression that HDA had rejected her complaint against Ms Dysart.

[145] I find that this may have prevented Ms Mackenzie contacting HDA during absence in May and June 2018 and as such I find it to have unjustifiably disadvantaged Ms Mackenzie in her employment.

Remedies

[146] I have found that HDA unjustifiably disadvantaged Ms Mackenzie in her employment.

[147] I order HDA to pay Ms Mackenzie the sum of \$1,500.00 in respect of the disadvantage claim pursuant to s 123(1)(c)(i) of the Act.

Contribution

[148] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[149] Ms Mackenzie did not engage or communicate with HDA following the complaint on 9 May 2018 but was medically certified as unfit to attend work until 28 May 2018. During that period until 2 June 2018 HDA made several attempts to contact her but she failed to respond. Whilst some of these attempts were by Ms Dysart, at least one was made by Mr Hobbs.

[150] Employees are expected to be ‘responsive and communicative’ with their employees during the employment relationship.³ However Ms Mackenzie did not communicate with HDA to advise that she was concerned about Ms Dysart’s involvement in the communications to her and provided the opportunity for HDA to address that concern.

[151] I find that Ms Mackenzie’s failure to be responsive to attempts by HDA to contact her during her employment contributed to the disadvantage grievance and reduce the remedy awarded by 25%.

Costs

[152] On the basis that both parties have had some degree of success in the matter, I make no order for costs.

³ Section 4(1A)(b) of the Employment Relations Act 2000.

[153] However, in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, they may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged with 14 days of receipt. I will not consider any application outside that timeframe.

[154] 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