

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 236
3049452

BETWEEN HEAVEN YOO
Applicant

AND JESSE & ASSOCIATES,
BARRISTERS AND
SOLICITORS
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Simon Greening, counsel for the Applicant
Kaden Nguy, representative for the Respondent

Investigation Meeting: 14 March 2019

Submissions [and further 15 March 2019 from the Applicant
Information] Received: 15 March 2019 from the Respondent

Date of Determination: 18 April 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jesse & Associates is a firm of barristers and solicitors operating in Auckland. Heaven Yoo was employed by Jesse & Associates as a law clerk from February 2018 to November 2018.

[2] Miss Yoo claims she was unjustifiably constructively dismissed by Jesse & Associates. She further claims she suffered an unjustified disadvantage to her employment and Jesse & Associates breached its duty of good faith. Miss Yoo's claims are denied by Jesse & Associates.

[3] As permitted by 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 but has not recorded all evidence and submissions received.

The issues

[4] The issues requiring investigation and determination are:

- (a) Has Miss Yoo suffered an unjustified disadvantage to one or more of the conditions of her employment arising from:
 - (i) Workplace bullying
 - (ii) A verbal warning
- (b) Was Miss Yoo dismissed?
- (c) If so, was her dismissal justified?
- (d) Did Jesse & Associates breach its duty of good faith? If so, should the Authority order it to pay a penalty?

Relevant background facts

[5] Jesse & Associates is a one partner law firm operating in Auckland. The principal of the firm is Jesse Nguy. Mr Nguy, at material times, employed two law clerks and several support staff.

[6] At the time Miss Yoo was employed she had just completed her law degree and was due to commence her legal professional's course. For this reason the parties agreed that she would be employed as a law clerk and, once admitted to the bar, would then be employed as a junior solicitor. Other than her law degree, Miss Yoo had no legal experience.

[7] The parties' relationship started out well. Mr Nguy provided Miss Yoo with a high level of support and responded to her multiple questions and requests for assistance during the working day. Mr Nguy told Miss Yoo that he had an open door policy and encouraged her to come and see him any time she needed help.

[8] After around two months in the role, Mr Nguy began easing off on the high level of support he had been providing to Miss Yoo by, for example, asking Miss Yoo to first attempt to find the answer to her questions herself before interrupting him.

[9] It was around this time that Miss Yoo began to feel concerned about the way in which Mr Nguy was treating her and felt she was being picked on. She provided several examples:

- (a) She found it difficult to ask Mr Nguy questions as, when she interrupted him, he would often act annoyed and ask her to come back later. She explained how on one occasion, when Mr Nguy was walking through the corridor, he told her that he could not talk with her, which she considered to be unfair. Later in the day Mr Nguy called everyone into his office and told them not to talk to him when he first arrived at the office. Mr Nguy explained that he required staff to provide him with 10 to 15 minutes of uninterrupted time when he first arrived in the office in the morning before interrupting him or asking questions.
- (b) When she wrote letters Mr Nguy would correct these, such as the gap between each paragraph or the font size. She didn't consider this fair as he did not make the same changes to the other law clerk's work. Mr Nguy explained that, as a junior law clerk, Miss Yoo's work was not up to the standard expected of a qualified solicitor and therefore changes to her work were necessary. He contrasted this with the other law clerk. He said this law clerk had more legal experience, and performed at a high standard, such that he did not need to supervise him to the same extent as Miss Yoo.
- (c) Mr Nguy would made changes to the documents that she drafted and made her redraft them multiple times.

[10] From 23 May 2018 onwards Miss Yoo made diary entries of all negative experiences that she had with Mr Nguy. As she relies on these to establish her claim of bullying, I will address each event.

23 May 2018

[11] On 23 May 2018 Mr Nguy provided a debt collection file to Miss Yoo. He asked her to prepare a letter of demand based on the correspondence exchanged between their client and the responding party. Mr Nguy advised Miss Yoo to ensure that she recorded the date when the invoice was issued.

[12] Miss Yoo reviewed the file. This included a number of English documents as well as Chinese documents that had been translated into English by the Office Manager, Ivy Ching-Wei Chiang. After reading all of the documents Miss Yoo said she could not ascertain the date of the invoice. This was because it was not written on the invoice itself or referred to in the correspondence. She asked Ms Chiang for assistance in finding out the date.

[13] Later that day Mr Nguy called Miss Yoo into the office. She said he told her “You can’t dump your file on someone else”. He continued to say “You have to take action for yourself. You can’t always say I can’t do this and I don’t understand”. Miss Yoo said Mr Nguy spoke to her in a lecturing and irritated tone. She said when he had finished, he told her that he was a “reasonable man” and would give her a chance to speak. She said when she tried to explain her reasoning; Mr Nguy told her that it was “wise to take a senior person’s advice and not to talk back”.

[14] Mr Nguy said he could not recall this incident but did recall, on a number of occasions, advising Miss Yoo that she needed to resolve tasks herself or she would always be relying on people. He said Miss Yoo would resort to asking assistance from other staff instead of trying to resolve the problem herself. He explained that the issue was not with the difficulty of the task, but developing the habit and skill to troubleshoot a problem. In the present case, he said she could have phoned the client herself and asked the date.

25 June 2018

[15] On 25 June 2018 Miss Yoo said she was instructed by Mr Nguy to write to a client to advise him how he could get divorced and what the firm’s fees were in relation to the divorce application. Miss Yoo drafted the letter. What happened next is in dispute.

[16] Miss Yoo says that upon Mr Nguy reading the email he stormed angrily into her office and yelled that she was a “shit writer”. She said he then angrily lectured her. Mr Nguy denies the allegations made by Miss Yoo. He said that what he tried to explain to Miss Yoo was that she needed to adopt a writing style depending on the type of file she was working on.

[17] Miss Yoo said after she removed a paragraph at issue Mr Nguy returned to her office and told her that the email was much better and that she should continue writing like this. She said the following day Mr Nguy reviewed a statement of claim that she had drafted for a different case and praised her writing ability.

27 July 2018

[18] On 27 July 2018 Mr Nguy instructed Miss Yoo to draft a letter to a surveyor outlining the documents required for a subdivision. Mr Nguy was not happy with the way the letter was drafted. He instructed Miss Yoo to revise it and told her the words to use. Miss Yoo said that she did not think the words that Mr Nguy had told her to write in the letter were suitable and therefore she spent some time thinking of different wording. Later, Mr Nguy came into her office and asked her if the letter was ready. When she replied no, she said he yelled at her loudly saying “Heaven, it’s just one paragraph! Just get it done!”. Miss Yoo said that she felt the changes made by Mr Nguy were unnecessary and she thought he was criticising her letter for the sake of picking on her and demonstrating his authority.

[19] Mr Nguy could not recall this incident specifically. However, he did recall advising Miss Yoo on numerous occasions that as they were a small law firm, with a heavy workload, they needed to be efficient and concentrate on getting work out as quickly as possible.

2 August 2018

[20] On 2 August 2018 Mr Nguy asked Miss Yoo to complete a transfer of a property from an individual to a family trust. The property was subject to a mortgage and therefore the parties needed to obtain the bank’s consent to the transfer. Mr Nguy told Miss Yoo the date required for settlement. Miss Yoo questioned the date that Mr Nguy had told her. She said Mr Nguy shut her down and said “Don’t ask questions. I know what I am doing” in an irritated tone. Miss Yoo said that she felt

his response to her was contradictory to what he told her, which was she could ask him questions if she had any.

23 August 2018

[21] On 23 August 2018 Miss Yoo said that Mr Nguy yelled at her, telling her “Use your brain. You have a brain that God gave you, use it”. She said this was said while he was pointing his finger at his head. She could not recall the context in which this comment was made but can recall feeling extremely offended.

[22] After thinking about what had happened she decided to confront Mr Nguy. She went into his office and told him that he was being unfair by treating her differently than the other law clerk. She said before she could provide any other examples Mr Nguy became extremely angry, his face became red, and he started screaming at her while throwing his arms in the air. She said he called her a whinging child and told her that he wasn’t her boyfriend or her father who needed to care about her feelings. It is noteworthy that, unlike the other records she made, she did not make a note of these events at the time.

[23] Mr Nguy denies getting angry at Miss Yoo or saying the words alleged. He said he could recall one occasion where Miss Yoo told him that he showed favouritism to the other law clerk. His response was that he treated everyone the same. He told her if “you are doing your job then you will get a pat on the shoulder and if you are not then you get more supervision”.

24 August 2018

[24] On 24 August 2018 Mr Nguy asked Miss Yoo to have lunch with him to discuss the issue that she had raised the previous day.

[25] Miss Yoo says that whilst they were at lunch, Mr Nguy made comments to her that she interpreted as flirting. Mr Nguy denies making any comments of this nature.

[26] The remainder of the parties’ conversation is not in dispute. During the conversation that followed Mr Nguy explained to Miss Yoo that he didn’t want their relationship to break down. He prompted her to share what was troubling her and she told him that she felt like he was putting her down. He responded that that was not his intention. Ms Yoo told him that, because of the way he communicated with her, she

felt stressed at work and less confident about her work. Mr Nguy said he would address this issue and assured her he would speak to her more carefully moving forward. He also expressed to her that she should try not to be too sensitive. Mr Nguy continued that he wanted to train her to be a good lawyer and have her stay at the firm permanently. He told her that eventually he wanted to make her a partner at the firm and that he needed her to be stronger for this reason.

[27] Miss Yoo said Mr Nguy then touched her face in a caressing manner that made her feel extremely uncomfortable. He denies this.

4 September 2018

[28] On 4 September 2018 Mr Nguy called Miss Yoo into his office and told her he was disappointed. He showed her a conveyancing file and told her that the conditions were to be completed the day before. Miss Yoo responded by telling him that the conditions had been deferred to another day. He then told her “Okay, I take it back”. Miss Yoo felt there was no justification for his allegation and felt that he was picking on her.

11 September 2018

[29] On 11 September 2018 Mr Nguy assigned a file to Miss Yoo that concerned an application for dissolution of marriage. Before their client could file the application with the Court they needed to confirm the addresses of their client and his former wife.

[30] Miss Yoo said Mr Nguy told her to ask Ms Chiang to confirm the addresses with their client as they did not speak English. Mr Nguy cannot recall doing this.

[31] The following day, at 2pm, Mr Nguy asked Miss Yoo whether she was able to confirm the addresses. When she said no, Mr Nguy asked her to get it done within the hour. Miss Yoo tried obtaining the information from Ms Chiang without success. At 5pm Mr Nguy asked Ms Yoo again whether she had obtained the addresses. When she replied no, she said Mr Nguy became red-faced and started yelling at her, saying “How hard is it to confirm an address?”. He then told her to call the client. Miss Yoo said she felt extremely stressed because she couldn’t phone the client because she was told by Ms Chiang that they couldn’t understand English. Mr Nguy denies this. He

said the clients did have a level of understanding of English to the extent that they could have provided their address.

12 September 2018

[32] On 12 September 2018 Mr Nguy came into Miss Yoo's office and took a subdivision file that she was working on. He later came back into her office in what she described as an angry mood. She said he told her that there was a problem with her writing ability and pointed to an email that she had written to a surveyor. He then explained why the email was unsatisfactory. In particular that, while there was nothing wrong with the language that she used, what she said was factually incorrect. When Miss Yoo challenged what he was saying, he told her that she was making excuses and that she needed to appreciate what he was teaching her. Miss Yoo said that she was shaking with anger after Mr Nguy left the office and thought what he was saying was absurd. She felt that he was picking on her just so that he could start yelling at her.

21 September 2018

[33] On 21 September 2018 Mr Nguy invited Miss Yoo to attend a client function with him. Mr Nguy asked her to attend the function with him in his vehicle and she declined. She says he asked her multiple times but she went to the function in her own vehicle.

[34] The function was held on 27 September 2018 and was conducted in Chinese, a language that Ms Yoo could not understand. Miss Yoo sat next to Mr Nguy throughout the function and talked with him. She said that when people were talking to him they would occasionally look at her and she felt he was telling people that she was his girlfriend. This was denied by Mr Nguy who said he was simply introducing her to his clients.

[35] After the function Miss Yoo expressed her appreciation to Mr Nguy for trying to speak nicer to her. She said she didn't think he had improved in the way he spoke to her at all but hoped that saying he had would encourage him to be nicer to her.

17 October 2018

[36] Upon her arrival to work on 17 October 2018, Miss Yoo noticed a note on her desk from Mr Nguy that asked her to see him. She went to see Mr Nguy as soon as he came into the office. He asked her if the matter she was handling had been settled. She began explaining that they were awaiting the bank's approval of the transfer. Mr Nguy then stopped her and said he would come back to her. Miss Yoo found this to be rude and couldn't understand why he had asked her to come into the office and then cut her off.

[37] Mr Nguy explained that having just arrived in the office it was not a suitable time to talk with him. He was only after a yes or no answer and when he realised that it hadn't settled, he told her he would talk to her later that day.

[38] Later that day Mr Nguy called Miss Yoo into his office again. Miss Yoo explained the reason why they could not settle. Mr Nguy then asked her to stop and show him the email from the bank that set out the conditions. She showed him the email and he asked her whether she had emailed them back about the first paragraph of the bank's email. She said she couldn't remember the exact contents of the letter and wanted to be certain about her answer so leaned across to read the letter. She said Mr Nguy became upset and yelled at her "I have so much work piled up. You don't have that many files. You don't have much work so you should know your file off by heart. You make everything difficult!". He then asked whether she had emailed the bank back or not. Miss Yoo responded positively and showed him the email to the bank. He agreed that they couldn't do anything until they heard back from their client.

23 October 2018

[39] On 23 October 2018 Mr Nguy received a phone call from a client regarding an urgent matter. To protect confidentiality, I shall refer to this client as client C. Mr Nguy had given client C's file to Miss Yoo to handle. He rushed into Miss Yoo's office and asked her what was happening on the file. Miss Yoo responded that it was not her file. She said she did this because she didn't recognise the name as Mr Nguy had pronounced the Chinese client's surname differently than she thought it was pronounced. Mr Nguy then spelt out the client's surname and she told him she recalled having dealt with it and asked him to wait while she looked at her computer.

[40] Mr Nguy then went away and located the file that she had placed in his office. He came back to her office and asked her to fix the application form and get the client to sign it. She said she hated how he left everything until the last moment and felt very stressed.

The verbal warning

[41] Around lunch time that day Mr Nguy called Miss Yoo into his office. Ms Chiang was already sitting at the table. Mr Nguy informed Miss Yoo that he was giving her a formal verbal warning. He then addressed three reasons why he was providing her with this warning. Namely, that she was undertaking unnecessary work, as opposed to doing work that was relevant to files. She was taking documents from the facsimile machine without authorisation. Work was getting delayed due to miscommunications and incorrect and inefficient procedures being utilised between her and Mr Nguy.

[42] Miss Yoo was provided with an opportunity to respond which she did. The parties then discussed ways her performance could be improved. Miss Yoo was visibly upset during the meeting. Mr Nguy explained that he felt she could become a good lawyer with a bit more guidance from him and effort on her part. He discussed his plans for her progression with the firm including her eventually managing a team of Korean Solicitors.

24 October 2018

[43] On 24 October 2018 Ms Chiang called Ms Yoo into her office. She offered her help to Ms Yoo with any problems that she might be having. She also told her she was willing to be the bridge between Mr Nguy and her if there was a miscommunication between them.

[44] Later that day, Jesse & Associates received a number of scam calls. Miss Yoo said that following these calls Mr Nguy rushed into her office and started lecturing her about scam calls. She said he singled her out and didn't lecture the other staff members. This evidence was contested by the witnesses who gave evidence to the Authority. All attested that they had been spoken to by Mr Nguy about the scam calls.

Sick leave and job interview

[45] On 25 October 2018 Miss Yoo notified Jesse & Associates that she was taking sick leave and stopped going to work.

[46] The following day she attended an interview with her present employer and, following a conversation with that employer later that afternoon, understood that she was going to be offered a job.

The personal grievance

[47] On 29 October 2018 Miss Yoo's lawyers drafted a personal grievance letter. The sending of the letter was delayed until 31 October 2018 to enable receipt of a formal offer from Miss Yoo's new employer and her acceptance of this offer. The letter raised a personal grievance for unjustified disadvantage in relation to the alleged bullying, providing details of the events as previously outlined, and also the verbal warning. Miss Yoo sought compensation and legal costs.

[48] On 1 November 2018, before Jesse & Associates had a chance to respond, Miss Yoo's solicitors sent a without prejudice email to Jesse & Associates. This letter was produced by Jesse & Associates in its statement in reply and no objection was raised by Miss Yoo or her solicitors to its production. On that basis, and in accordance with s 157 of the Act, I have reviewed this correspondence, and other surrounding correspondence.

[49] The letter advised "as a consequence of the bullying behaviour, Heaven does not wish to return to work". It went on to offer that she "resigns from employment close of business today" and that she "is not required to work out her notice period". It sought compensation, lost wages and a contribution towards legal costs. The email concluded by Mr Green advising that he was going to discuss with Miss Yoo "her position regarding a possible complaint to the New Zealand Law Society."

[50] Mr Nguy responded shortly thereafter advising that he was shocked and disappointed by the allegations and stating the allegations were far from the fact. He denied the claims and expressed concern about the level of Miss Yoo's claim and the threat to complain to the Law Society which he considered could be viewed as extortion. He indicated he would reply to the allegations in due course.

[51] Mr Nguy then spoke with his staff about the allegations made in Miss Yoo's personal grievance letter. The outcome of these discussions were that none of his employees had witnessed the events in question, nor viewed any intimidating or bullying behaviour from Mr Nguy. Jesse & Associates then wrote to Mr Greening denying the allegations made. In terms of the offer made it advised:

... Miss Yoo may resign today and is not required to work out her notice period. However, we would like to provide Miss Yoo with further options as follows:

1. Miss Yoo may reconsider her resignation, and return to work any time she feels she is ready, or
2. Miss Yoo may take more time off if she needs it, and return to work at a later date that is reasonable.

Should Miss Yoo decide to return to work, our office will make arrangements to provide Miss Yoo with any support she requires.

Our offer is open for discussion and/or mediation, and we look forward to your response.

[52] On 2 November 2018 Mr Greening responded:

Thank you for your correspondence – which is noted. For the record, our client does not wish to resign – but wishes to proceed to mediation on an urgent basis.

Please confirm by 5pm today that the employer agrees to attend mediation. If the employer does not agree to attend mediation, then we will file a statement of problem in the Employment Relations Authority.

[53] On 5 November 2018 Jesse & Associates responded, advising:

Referring to your email on the 2nd November 2018 we are somewhat confused of its contents for the following reasons:

3. Your email on the 1st November 2018 had clearly advised Miss Yoo wishes to resign and does not wish to work out her notice period. For that reason we have provided Miss Yoo with several options, one of which is that she may resign if she so chooses. Your current email now states: "For the record, our client does not wish to resign".
4. You have clearly advised in our letter to you on the 1st November 2018 that we are open for mediation. Therefore we are again somewhat confused why you are under any impression we would not attend mediation.
5. Your threats to file this matter to the Employment Relations Authority are therefore unwarranted and unnecessary. As we are both aware, mediation is a key component in resolving any employment dispute, especially if it is to be heard at the Employment Relations Authority.

As Miss Yoo will be aware, Jesse runs a very busy law practice and there are many matters he must attend to, especially at year end. The timeframes you have provided to respond to your emails is bordering unreasonable.

To answer your question once again, we would welcome the opportunity to attend mediation provided it also suits our timetable.

It is our hope that this matter can be settled amicably and professionally.

[54] Miss Yoo's solicitors immediately responded, advising that they would make urgent arrangements with Mediation Services that day.

[55] On 8 November 2018 Mr Greening wrote to Jesse & Associates again, advising:

We note the impact of the employer's actions on our client – Heaven Yoo. In fact, the impact has been so significant – that our client is unsure whether she wishes to continue practice as a lawyer.

Her experience at the firm – being her first law firm experience post law school, has caused significant emotional distress and harm.

You will be aware that the New Zealand Law Society, in recent months, has made it very clear to law firms that this kind of alleged behaviour is not acceptable and will not be tolerated.

The NZ Law Society has even gone as far as setting up an 0800 number, to address these very issues.

On that footing, I suggest your client needs to appreciate the seriousness of the issues – and therefore suggest that you make every effort to persuade your client to attend mediation tomorrow.

[56] On 9 November 2018 Jesse & Associates responded, advising:

I was away on leave yesterday and have only received your email today.

I wish to also advise that I am away on study leave and will not be available in the office on Wednesdays and Fridays until 11th December 2018.

Responding to your emails I wish to make the following observations:

1. The purpose of any mediation is for both parties to resolve the issue, without Jesse attending I cannot see how any resolution can be achieved, it is therefore pointless for me to attend unless your client has any other agenda in mind.
2. Although Jesse is happy to attend the mediation, we are still not aware of your agenda? Please provide us with a list of things you would like to discuss and resolve so that we can better prepare for the mediation and ensure it runs more smoothly.
3. We wish to remind you that at this early stage, your client's allegations have not been proven and we have denied all allegations.

4. We hope you can keep this in mind and conduct your own objective investigation, as your numerous threats are not welcomed.
5. Neither do we believe your professional conduct is up to the standard set out under the Conduct and Client Care Rules, and for that reason we will contemplate whether to equally file a complaint to the NZ Law Society of your professional conduct.
6. You have mentioned on numerous occasions that your client has suffered a great deal of mental stress. However you must also understand that as your client has suddenly left the firm, Jesse and the rest of our staff have had to attend to her files. As we are a small law firm and extremely busy at year end, this has also added a lot of stress for our firm as well.
7. Having explained our firm's position, we find your request for us to attend mediation "immediately" to be overly demanding. We hope that you can also be more considerate.

As Jesse is away in Queenstown today, I am unable to advise of his availability.

[57] On 9 November 2018 Miss Yoo wrote to Jesse & Associates attaching her letter of resignation. This advised:

I am writing this letter to notify you that due to the harassment and bullying that I have been subjected to for the duration of my employment, I am resigning from my position at Jesse & Associates.

The way that I was communicated to was inappropriate, often involving unreasonable yelling, being lashed out at, and given warnings. You excuse this behaviour by claiming that this was for my benefit. I found your behaviour extremely offensive, intimidating and humiliating, and this has not only damaged my mental wellbeing but my physical wellbeing as well. When I raised this issue with you back in August 2018, you assured me that you would change the way you communicated with me which is why I decided to continue my employment. However, after a few days, you resumed the abovementioned inappropriate behaviour. It has come to the point where I can no longer bear the stress and anxiety I am suffering in the workplace and therefore, for the sake of my wellbeing, I have decided to resign and will not be returning to the office. My last day will therefore be the date of this letter so please accept this letter as my official notice of resignation.

It is my hope that by bringing this incident to your attention, such behaviour will not be exhibited to future employees.

[58] On 15 November 2018 Gaze Burt raised a personal grievance on behalf of Miss Yoo, alleging she was constructively dismissed by Jesse & Associates on 9 November 2018.

Issue One: Unjustified disadvantage

The legal position

[59] Under s 103(1)(b) an employee may commence a personal grievance claim if one or more of the conditions of the employee's employment have been affected to the employee's disadvantage by an unjustifiable action by the employer.

[60] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

The Allegation of Bullying

[61] An employer's failure to address bullying in the workplace may give rise to an unjustified disadvantage claim. This can be seen as an aspect of the implied and statutory duty to provide a safe workplace.¹

[62] The Court of Appeal in *AG v Gilbert*² discussed the nature of the duty to provide a safe work place as follows:

The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of "all practicable steps". What is "reasonably practicable" requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances.

¹ *FGH v RST* [2018] NZEmpC 60 at [201].

² [2002] 1 ERNZ 1 at [83].

The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[63] The requirement to take all practicable steps to ensure an employee's safety only arises where an employer knows, or ought reasonably to know, about the circumstances giving rise to the risk of harm.

While an employer cannot absolve itself of responsibility to take all practicable steps simply because its employees have not raised an issue, the alternative threshold of reasonable foreseeability must nevertheless be negotiated if a claim is to be successfully made out.³

[64] In *FST v RGH* the Court referred to the definition of bullying in the Worksafe Guidelines. I accept that definition, namely:

Workplace bullying is repeated and unreasonable behaviour directed towards a worker that creates a risk to health and safety.

Analysis

[65] Following a careful analysis of the evidence I am satisfied that the behaviour that Ms Yoo has described cannot be described as bullying.

Setting high performance standards and requiring instructions to be carried out

[66] When lawyers graduate from University they generally have very little practical experience. Miss Yoo was no exception. As such, Mr Nguy had to have a high level of control over her work. I accept it was vitally important that any documentation leaving Jesse & Associates was accurate, especially as it was going out in Mr Nguy's name. This applied not only to the content of that documentation but also to the formatting.

[67] There was nothing unreasonable or inappropriate about Mr Nguy's level of monitoring or his requests for changes to documentation. The examples provided show reasonable instructions being made. Miss Yoo failing to follow those instructions, at times, led to tension between the parties and Mr Nguy becoming frustrated. However, there is no evidence that Mr Nguy undervalued Miss Yoo's contribution or belittled her ability as alleged. It was simply a case where he knew better based on his many years of experience.

³ *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC 99.

No evidence of unachievable tasks – impossible deadlines – unmanageable workloads

[68] I accept it was reasonable for Mr Nguy to expect, after a settling in period, that Miss Yoo would try to find the answer to her problem before going to him or others to ask questions. When she failed to do so, it is reasonable that he would remind her that she needed to do this. For example:

- (a) 23 May 2018 – Mr Nguy had set a clear expectation that Miss Yoo was to try and find answers to questions herself before asking others. It was reasonable for Mr Nguy to expect Miss Yoo to phone the client herself to find the answer to her question rather than asking Miss Chiang to do this for her.
- (b) 11 September 2018 – I doubt that Mr Nguy asked Miss Yoo to have Ms Chiang confirm the addresses. Had he wanted Miss Chiang to do this then it is more likely than not that he would have asked Miss Chiang directly to do this. Miss Yoo was provided with ample time to obtain the information sought by Mr Nguy. There appears to be no reason why she could not have phoned the client herself to find out this information.
- (c) 17 October 2018, - Miss Yoo was aware that Mr Nguy did not like people to bother him when he first arrived at work as his mornings were busy addressing files and urgent matters. Notwithstanding this knowledge, she interrupted him. Mr Nguy asked the question that he needed to know and then told her he was going to speak with her later in the day to discuss the reasons why the file had not settled. When they met later in the day Mr Nguy's expectation that Miss Yoo would have read the one email of relevance to his question before attending his office that afternoon was a reasonable one. Miss Yoo only handled 10-12 files.

Allegation that Mr Nguy yelled at Miss Yoo

[69] I acknowledge from the evidence presented that Mr Nguy speaks loudly, is a very assertive person, and takes a very direct approach towards the management of his staff and providing feedback. However, I am not persuaded that this extends to yelling at his staff or belittling them or Miss Yoo.

[70] None of the staff members that provided evidence heard Mr Nguy yell at Miss Yoo or bully her. Mr Tran, a law clerk at Jesse & Associates, said he sat three metres from Miss Yoo's office and two metres from Mr Yoo's office. He said he could hear the conversations between the two and never heard Mr Nguy criticize, yell or bully Miss Yoo. He said up until the time she raised her personal grievance, he thought Miss Yoo had a good relationship with Mr Nguy. He said her viewed her laughing and joking with Mr Nguy on many occasions.

[71] Miss Chiang said she was unaware of any issues between Miss Yoo and Mr Nguy until 23 October 2018. Prior to then she had not viewed any signs that Miss Yoo was unhappy. She said most of the time Miss Yoo appeared happy and was viewed laughing with Mr Nguy and other colleagues.

[72] In terms of the particular examples provided by Miss Yoo:

- (a) 25 June 2018 –Mr Nguy was unhappy about the way in which the letter was written. However, I am not persuaded that he called Miss Yoo a “shit writer”. The use of these words is inconsistent with the actions that followed. Miss Yoo said after she removed the paragraph at issue Mr Nguy returned to her office and told her that the email was much better and that she should continue writing like this. She said the following day Mr Nguy reviewed a statement of claim that she had drafted for a different case and praised her writing ability.
- (b) 23 August 2018 – I am doubtful that the events that Miss Yoo described on this day occurred in the way in which she described. The allegations that Miss Yoo alleges occurred on this day are serious. She said that she kept a record of any major events on the day they occurred or the day after. No record of the events of this day was made until several weeks after the alleged incident. This is despite several other records being made in the interim including a note of the events on 24 August 2018. Had the events occurred it is more likely than not that Miss Yoo would have recorded them at the time or shortly afterwards.
- (c) 24 October 2018 – I accept the evidence of the witnesses that Mr Nguy approached all staff regarding the scam calls. There was nothing inappropriate about him also speaking to Miss Yoo about these calls.

Miss Yoo's expectations

[73] Lastly, I make comment about Miss Yoo's expectations. From the evidence I heard and viewed it appeared that Miss Yoo expected Mr Nguy to be available at any time that she had questions. Initially Mr Nguy tried his best to answer Miss Yoo's questions despite what she described as constant interruptions during the day. Miss Yoo described him as friendly and welcoming. However, as time went on, I accept constant interruptions at this level were not sustainable.

[74] As a sole practitioner Mr Nguy had many commitments that had to be met. I do not consider a frown, a hand up asking Miss Yoo to wait, or a request to come back later to be bullying behaviour. It is clear that when Mr Nguy was not in the middle of something he was happy to assist Miss Yoo.

The verbal warning

[75] The issue of the verbal warning had an adverse effect on Miss Yoo's employment such that she was disadvantaged.

[76] The process followed when issuing the warning was seriously flawed. None of the mandatory requirements set out at s 103A were met. Mr Nguy acknowledged that he made the decision to issue Miss Yoo with a verbal warning without affording her with an opportunity to be heard or otherwise undertaking any investigation. These defects were not minor and did cause unfairness.

[77] In the foregoing circumstances I find Jesse & Associates decision to issue Miss Yoo with a verbal warning was unjustified. Miss Yoo suffered an unjustified disadvantage to her employment. I consider an appropriate remedy in the circumstances to be compensation under s 123(1)(c)(i) of the Act in the sum of \$2,000. This sum is consistent with other awards made by the Authority in similar situations.⁴

[78] Jesse & Associates is ordered to pay Miss Yoo the sum of \$2,000 within 14 days of the date of this determination.

⁴ *Newman v Solid Roofing Limited* [2018] NZERA Auckland 214.

Issue Two: Was the Applicant dismissed?

[79] The legal principles relating to constructive dismissal are well established and are not in dispute. Constructive dismissal includes, but is not limited to, cases where:⁵

- (a) An employer gives the employee the choice of resignation or dismissal;
- (b) An employer follows a course of conduct with the ‘deliberate and dominant purpose’ of coercing an employee to resign;
- (c) A breach of duty by the employer leads an employee to resign.

[80] The present case concerns the third of these categories.

[81] In reference to the third category of case, the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* stated:⁶

In such a case as this we consider that the first relevant question is whether the resignation has been caused by breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the 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.

[82] If, after applying the above principles, the Authority concludes that there has been a constructive dismissal, it must then determine objectively whether it was justifiable in terms of the statutory test of justification under s 103A of the Act. To this end, Jesse & Associates must satisfy the Authority that its actions were what a fair and reasonable employer could have done in all the circumstances at the time.

Step One: Was there a breach of duty on the part of the Respondent? If so, was Miss Yoo’s resignation caused by this breach?

[83] For the reasons already outlined I am satisfied that Jesse & Associates did not breach any duty owed to Miss Yoo. Even if I am wrong, it is clear that Miss Yoo did

⁵ *Auckland Etc Shop Employees Etc IUOW v Woolworths (NZ) Limited (NZ) Ltd* [1985] 2 NZLR 372.

⁶ [1994] 1 ERNZ 168 (CA).

not resign due to any breach on the part of Jesse & Associates but rather due to obtaining a new job. She applied for this job prior to going on sick leave, attended an interview whilst on sick leave and, at the time she raised her personal grievance, had already been offered and accepted a new position with her current employer.

Issue Five: Breach of Good Faith?

[84] The Act requires parties to an employment relationship to act in good faith. This includes a requirement that parties to an employment relationship must be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.⁷

[85] The Statement of Problem pleads that Jesse & Associates breached its duty of good faith by failing to investigate the bullying complaints that Miss Yoo reported on 23 August 2018 and on 31 October 2018.

[86] I am satisfied there is no evidence to establish any breach of good faith by Jesse & Associates. Miss Yoo first raised concerns about her employment on 23 August 2018. On this day she told Mr Nguy that he was being unfair by treating her differently than the other law clerk. The next day Mr Nguy met with Miss Yoo to discuss her concern. During this conversation she told him that she felt like he was putting her down and, because of the way he communicated with her, she felt stressed at work and less confident about her work. The outcome of that meeting was that Mr Nguy said he would speak more carefully to her moving forward.

[87] On 27 September 2018 Miss Yoo expressed her appreciation to Mr Nguy for trying to speak nicer to her. In hindsight Miss Yoo may not have meant what she said but Mr Nguy was not to know that. The obligation to be open and communicative is a two-way street.

[88] The first time an allegation of bullying was raised was in Miss Yoo's personal grievance letter of 31 October 2018. The uncontested evidence was at this time Jesse & Associates reviewed the Worksafe guidelines in relation to bullying, Mr Nguy spoke with its staff about the complaints made by Miss Yoo, and Jesse and Associates

⁷ Section 4 of the Employment Relations Act 2000.

wrote to Miss Yoo advising it would make arrangements to provide Miss Yoo with any support she required. Miss Yoo resigned before it had an opportunity to do this.

[89] In the circumstances I find that Jesse & Associates did not breach the duty of good faith contained in s 4 of the Act.

Finding on Issue Three

[90] Miss Yoo's claim for breach of good faith is dismissed.

Costs

[91] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[92] If they are not able to do so and an Authority determination on costs is needed Jesse & Associates may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Miss Yoo will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[93] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Outcome

[94] The overall outcome is:

- (a) Heaven Yoo was not bullied by Jesse Nguy.
- (b) Heaven Yoo suffered an unjustified disadvantage to her employment by the issue of a verbal warning by Jesse & Associates.
- (c) Jesse & Associates is ordered to pay Heaven Yoo the sum of \$2,000 under s 123(1)(c)(i) within 14 days of today's date.
- (d) Jesse & Associates did not breach its duty of good faith.

⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

(e) Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority