

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 172
3052912

BETWEEN KAYLA MILLER
Applicant

A N D HARBOUR VIEW REST HOME (2005)
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Louise Laming, counsel for the Applicant
Philip de Wattignar, advocate for the Respondent

Investigation Meeting: 29 January 2020

Submissions Received: 29 January 2020 from the Applicant
29 January 2020 and 17 February 2020 from the Respondent

Date of Determination: 29 April 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kayla Miller worked as a care assistant at Harbour View Rest Home. She was employed by Harbour View Rest Home (2005) Limited in this role from 24 July 2017 until 17 October 2018 when she resigned.

[2] Ms Miller says that during her employment she was bullied and this was not addressed by Harbour View despite being raised with it. In the end the continued failure of Harbour View to address Ms Miller's bullying complaints led her to resign and Ms Miller claims this is an unjustified dismissal.

[3] Harbour View says, in response, that it did respond to Ms Miller's complaints of bullying and was continuing to do so when she resigned. It denies any wrong doing on its part and denies that it unjustifiably dismissed Ms Miller, as a result.

[4] It is Ms Miller's claim for constructive dismissal that I have investigated and this determination resolves.

Issues for unjustified dismissal

[5] The issues for the unjustified dismissal grievance are:

- (a) Was Ms Miller dismissed; and
- (a) If so, was the dismissal justified?

Dismissal

[6] Ms Miller alleges that her resignation is a constructive dismissal because she resigned in response to a breach of duty by Harbour View.

[7] The relevant case law¹ shows that in order to determine if Ms Miller was constructively dismissed I must consider

- (a) Was there a breach of duty by Harbour View;
- (b) Was that breach of duty sufficiently serious such that it was reasonably foreseeable that there was a substantial risk that Ms Miller might resign in response to that; and
- (c) Did Ms Miller resign in response to that breach of duty?

Justification

[8] If I determine that Harbour View did constructively dismiss Ms Miller, I must then consider the second issue for unjustified dismissal: was the dismissal justified, with the onus

¹ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

falling to Harbour View to show its actions were justified in line with the test for justification and the duty of good faith set out in the Employment Relations Act 2000 (the Act).

Dismissal

Was there a breach of duty by Harbour View?

[9] Ms Miller says Harbour View breached the duty it owed to her to not, without proper cause, act in a manner calculated to, or likely to, destroy or seriously damage the relationship of trust and confidence. The Court of Appeal and the Employment Court recognise this duty as being implied into the employment relationship.²

[10] Ms Miller says the actions that give rise to this breach include various failures to address her complaints of bullying at work and her need for support at work.

[11] Harbour View says it did not breach the duty it owed to Ms Miller. It says the actions which support this include:

- (a) It did respond to complaints made by Ms Miller culminating in an all employee meeting on 12 June 2018 to discuss bullying behaviour in the workplace and this resolved all of Ms Miller's concerns up to that point;
- (b) After 12 June 2018, it did not receive sufficient information in relation to any other alleged incidences of bullying for it to investigate and/or respond to;
- (c) In any event, in a meeting on 23 August 2018, Harbour View discussed Ms Miller's ongoing concerns with her and her lawyer and agreed a process for dealing with any remaining issues including Ms Miller providing details of any outstanding complaints, and again, Ms Miller did not provide that information.

[12] So, in order to determine if Harbour View has breached the duty it owed to Ms Miller to not, without proper cause, act in a manner calculated to, or likely to, destroy or seriously damage the relationship of trust and confidence, I must consider what complaints Ms Miller

² *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA); *Rodkiss v Carter Holt Harvey Limited* [2015] NZEmpC 34.

did make to Harbour View about bullying and lack of support at work and to the extent complaints were made, what Harbour View did about them.

Events giving rise to the alleged breach of duty

[13] Ms Miller commenced work at Harbour View on 24 July 2017.

[14] It was around October 2017 that Ms Miller said she began being bullied by her colleagues. Ms Miller said the behaviour was ongoing and she believed, amongst other things, that it reflected the fact that some of her colleagues had taken a dislike to her and the way she worked. She described the bullying as being constant ranging from minor and subtle incidences through to significant issues. Some examples of the behaviour included:

- (a) Being confronted by colleagues about entries in her time sheets, accusing her of not properly recording breaks.
- (b) A supervisor raising a complaint with her in front of colleagues, residents and some family members.
- (c) A colleague failing to help her in a situation where she was forcibly being restrained by a resident.
- (d) A colleague not responding to, or even acknowledging her, when she approached that colleague to ask a question about work.
- (e) A colleague yelling at her about supposedly “dobbing her in” when Ms Miller had raised a concern over treatment of a resident.
- (f) Overhearing three colleagues talking about her and then being rude to her when she entered the room.
- (g) A colleague continually obstructing her and preventing her from being able to complete her breakfast duties.

[15] Having considered the evidence I heard from Ms Miller and Denise Jeffares, the Manager of Harbour View, I am satisfied that Ms Miller raised concerns about this behaviour,

both specific complaints about some of the incidents and more generally about what she perceived to be a pattern of behaviour towards her by her colleagues.

[16] During this time Ms Miller also experienced a decline in her mental health. In March 2018 she spoke to Ms Jeffares about this. Ms Jeffares' notes of a meeting on 26 March 2018 record that Ms Miller told Ms Jeffares that she was having mental health issues of unknown origin and she had had a break down. The notes also record that Ms Miller said that her health issues had nothing to do with her work. Ms Miller says this is not a correct account of what was discussed on 26 March, she says she referred to her health issues as stemming from underlying mental health issues – issues she had discussed with Ms Jeffares before - but this was exacerbated by the anxiety she was suffering from because of what was happening at work.

[17] From the evidence I heard, I conclude that in the 26 March meeting Ms Miller did signal to Ms Jeffares that her underlying mental health issues were being impacted by events at work but I also conclude that because the conversation focussed on Ms Miller's underlying mental health issues and an attempted suicide that had occurred outside of work, Ms Jeffares did not recognise the signal and consequently did not act on it.

[18] However, this was not the only time Ms Miller raised concerns over her mental health and the impact that her work environment was having on it. In April 2018 Ms Miller and Ms Jeffares had an email exchange about an incident at a training session where it was thought Ms Miller had inappropriately discussed issues she had at work. In that email exchange Ms Jeffares stated "... some of the comments made are not entirely appropriate and are not keeping the business of Harbour View confidential." Ms Miller responded stating "(t)his email is a real shame, I had a lot of stress caused by staff but felt to (sic) ashamed to talk to you" She went on to state further "(t)ruth is, I opened up in that class because I was feeling very alone and was struggling to the point that it affected my job."

[19] Ms Jeffares did not respond to Ms Miller's email and nothing further was done about the issues raised until Ms Miller met with Ms Jeffares on 6 June 2018. The notes from this meeting record that Ms Miller raised specific complaints about how some colleagues had treated her and she reminded Ms Jeffares that she had previously raised written complaints

about incidences but had not heard back; she said people are just getting away with it and some staff get treated poorly. Ms Miller named three colleagues whom she said were bullies and told Ms Jeffares that she knew this. Ms Miller also said she had tried to kill herself and ended up in ED and work does not help.

[20] The 6 June 2018 meeting did not resolve any of the issues but Ms Jeffares agreed to address Ms Miller's concerns through staff training. In her evidence Ms Miller said she had felt underwhelmed by how Ms Jeffares had dealt with the issues she had raised prior to 6 June 2018 but felt reassured that things would change after the meeting, with the proposed training.

[21] The training took place in an all employee meeting on 12 June 2018. However, the training did not appear to change much for Ms Miller and shortly after it further incidences arose between her and her colleagues. Ms Miller also felt that Ms Jeffares' attitude to her changed, with her becoming hostile to her and not making any attempt to resolve the issues she had raised and continued to raise. This appears to be the case as Ms Jeffares did not investigate any of the complaints Ms Miller had made either before the 6 June 2018 meeting or in that meeting. In fact, in one complaint, made on 16 July 2018 by a colleague that involved Ms Miller, Ms Jeffares has recorded in the notes to the complaint "I will have to follow up on every silly little complaint as [Ms Miller] sees that as being part of my job".

[22] So despite the prospect of progress being made for Ms Miller it appears that this did not happen and she continued to have issues with her colleagues through the end of June 2018 and July 2018.

[23] In an effort to get some structure into her working life and some support from Ms Jeffares, Ms Miller sent an email to Ms Jeffares on 14 August 2018 which stated:

As I am pregnant and very stressed due to the lack of support from you, my manager. I need a structured fortnightly roster. I came to you months ago asking for a structured roster after I ended up in hospital from attempting to take my life due to bullying (sic) at Harbour View.

[24] Ms Jeffares did not respond to this email and did not take any action in respect of it. Rather one week later on 21 August 2018 she sent a disciplinary letter to Ms Miller which recorded:

We are very concerned about your recent behaviour and wish to meet with you. ...

We now have to address the problem of the way you are behaving at work.
....

[25] The letter records a common area of concern being Ms Miller's interpersonal relationships at work, including how she spoke to staff. The letter then set out that Ms Miller appeared to have damaged her working relationship with staff, alienating herself from other staff. The letter concluded with the following statement:

That matter is now urgent. We now request you meet with us to discuss these issues with us. We wish to make it clear that should your explanations for your behaviour be unacceptable then we may have to take disciplinary action which might include termination of employment.

[26] Following on from the 21 August 2018 letter Ms Miller met Ms Jeffares on 23 August 2018. Both had legal advisers present at the meeting. Ms Miller took the opportunity to respond to the concerns raised by Harbour View and reiterated her concerns about bullying, her complaints not being investigated and that she was not supported in the workplace. Ms Jeffares responded to Ms Miller by telling her that her colleagues had complained about her; when asked about these complaints Ms Jeffares told Ms Miller about one but did not provide other details.

[27] The meeting concluded with an agreed plan for how Ms Miller and Harbour View (mostly through Ms Jeffares) would move forward. This was then confirmed in an email from Ms Miller's lawyer on 24 August 2018. The plan included:

- (a) Ms Miller and Ms Jeffares would work on how they communicated in order to improve their working relationship.
- (b) Ms Jeffares would raise any complaints about Ms Miller with her so she could respond and work through them as required.

(c) Ms Jeffares would deal with Ms Miller's outstanding bullying complaints.

(d) Providing structure and support for Ms Miller at work including a structured roster and some training/study goals.

(e) Ms Miller to remain on paid leave pending resolution of the issues and implementation of the plan.

[28] Harbour View responded to the 24 August 2018 email in an email reply of 31 August 2018 by addressing the roster, issuing Ms Miller with a written warning and advising her that she had no sick leave remaining and therefore if she wished to remain on leave she would need to use annual leave.

[29] Ms Miller's lawyer responded to Harbour View's 31 August 2018 email in a comprehensive letter dated 7 September 2018 addressing a number of concerns Ms Miller had with Harbour View's response. In this letter Ms Miller's lawyer stated, in conclusion:

We wish to reiterate that it is not [Ms Miller's] physical or mental health which is the cause of the breakdown in the employment relationship. [Ms Miller] has made it clear that she feels she is being bullied in the workplace and that those concerns, having been raised with you directly, are subsequently being ignored. [Ms Miller] would like an acknowledgement by you that action will be taken to address these concerns to ensure a safe, healthy and productive work environment.

[30] In response to this in a letter dated 11 September 2018, Harbour View recorded that it took allegations of bullying seriously but it needed a written account of the behaviour complained of including when and where it occurred in order for it to investigate.

[31] Ms Miller was shocked by this response as she had already provided complaints with specific details in writing and more generally had raised concerns in discussions with Ms Jeffares, particularly on the 6 June 2018 meeting. Ms Miller's lawyer responded on her behalf encouraging Harbour View to investigate the bullying complaints she had already made and address the various issues Ms Miller had with her employment relationship, but nothing eventuated from this and Harbour View took no further steps to address Ms Miller's employment issues.

[32] On 17 October 2018 Ms Miller resigned from Harbour View stating that it was untenable for her to continue working in an environment where her concerns over bullying had not been addressed and where she felt compromised.

Conclusion on breach of duty

[33] So, Ms Miller consistently complained of bullying by colleagues with both specific examples being given and general complaints being made about staff behaviour toward her. Ms Miller also asked for help, support and some structure at work, she discussed her mental health issues and told her employer work was impacting on it, and she even subsequently advised her employer that work issues were part of an attempted suicide. Despite all of this there is no evidence that Harbour View investigated any complaints other than those complaints which were made about Ms Miller after the 12 June 2018 training, nor did it consider how it could support Ms Miller at work.

[34] Turning to the 12 June 2018 training, this did nothing to resolve Ms Miller's issues and it did not excuse Harbour View; simply telling staff how to act without investigating complaints, monitoring behaviour and responding to the complainant achieves very little. In fact what it does show is that at least at one point Harbour View realised there was an issue and it needed to respond, it just did not do enough with that response.

[35] Then one week after another plea for help from Ms Miller, Harbour View concluded that any issues were in fact from Ms Miller's behaviour, advising her it required a satisfactory explanation in order for her to keep her job. This indicates that Harbour View had predetermined that Ms Miller had done the things complained of about her, without giving her a chance to respond to the allegations; and it had decided that the behaviour was so serious that absent a satisfactory explanation Ms Miller could be dismissed.

[36] Harbour View came to this conclusion and took disciplinary action without any investigation or proper intervention into Ms Miller's ongoing complaints about bullying at work and with a complete lack of support for her, which had an impact on her mental health. It had not even considered whether the things Ms Miller had complained of had informed her behaviour, if that behaviour did occur.

[37] The disciplinary meeting was, however, productive in that Ms Miller was able to set out again her concerns and the parties agreed a way forward to deal with concerns arising out of the employment relationship, which they recognised as having broken down.

[38] Harbour View then failed to properly action the agreed plan by not investigating and taking steps to understand Ms Miller's bullying complaints and concerns. It also thought it appropriate to work on improving the broken employment relationship and providing support to Ms Miller by issuing a written warning to her.

[39] In conclusion, there were a number of clear signals that Ms Miller had concerns about how she was treated at work and needed help and support, and she made a number of direct complaints and requests for help all of which were ignored except for the 12 June 2018 meeting which was ineffectual; and then Harbour View embarked on disciplinary action against Ms Miller resulting in a written warning being issued to her. Harbour View also agreed a way forward to address various issues raised by Ms Miller in the disciplinary meeting but it did not take steps to action that plan.

[40] I find that these failings amount to a breach of the duty to not, without proper cause, act in a manner calculated to or likely to, destroy or seriously damage the relationship of trust and confidence.

Was it reasonably foreseeable that Ms Miller might resign in response to the breach of duty?

[41] The issue of whether it is reasonably foreseeable that an employee might resign in response to a breach of the duty to not, without proper cause, act in a manner calculated to or likely to, destroy or seriously damage the relationship of trust and confidence is straight forward. It is reasonably foreseeable.

[42] To put it in the context of the specific failure by Harbour View - if an employer fails to deal with allegations of bullying and requests for help at work because of deteriorating mental health, it is reasonably foreseeable that the employee subject to those failings might resign.

Did Ms Miller resign in response to the breach?

[43] Ms Miller did resign because of Harbour View's failure to address her concerns raised with it over bullying and her need for support at work; this is clear from her resignation letter and from her evidence in my investigation.

Conclusion on dismissal

[44] In all of the circumstances I am satisfied that Ms Miller's resignation amounts to a constructive dismissal.

Justification

[45] Having decided that Ms Miller was constructively dismissed I must now consider if that dismissal was justified, with the onus on Harbour View to prove that the dismissal was justified.

[46] The test of justification is set out in s 103A of the Act.

[47] Based on my findings in terms of the breach of duty, I conclude that Harbour View did not meet the requirements of the Act and therefore it did not act in a justified manner toward Ms Miller.

[48] Ms Miller's dismissal was both procedurally and substantively unjustified.

Remedies

[49] As Ms Miller was constructively dismissed I may award any of the remedies provided for under s 123 of the Act; Ms Miller seeks compensation and reimbursement.

Compensation

[50] Turning to compensation, this is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and is made pursuant to s 123(1)(c)(i) of the Act. Ms Miller seeks \$15,000.00 in compensation.

[51] My task is to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of this dismissal and recent decisions of the Employment Court provide guidance on this exercise of quantification.³

[52] What these decisions show is that I must consider the effects of the dismissal and the unjustified behaviour on Ms Miller; identifying the harm caused to her and the loss she suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed. Then I must consider where that corresponds to the spectrum of quantum awarded as compensation.⁴

[53] Ms Miller described the events at Harbour View as taking a huge toll on her physically and mentally. Ms Miller became stressed and distressed and she developed extreme anxiety creating problems for her day to day including a fear of leaving the house. Ms Miller lost self-esteem both in terms of her work ability and in herself; as Ms Miller described it, the events broke her spirit.

[54] I assess the level of harm and loss described to be around the middle of the spectrum, and consider that the compensation also sits around the middle of the spectrum. Therefore I have no difficulty in concluding that Ms Miller is entitled to the \$15,000.00 compensation she seeks.

Reimbursement

[55] Ms Miller also seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal pursuant to s 123(1)(b) of the Act.

[56] As I am satisfied that Ms Miller has a personal grievance and she has lost remuneration as a result, then pursuant to s 128 of the Act I must award Ms Miller at least the lesser of her lost remuneration or three months ordinary time remuneration.

³ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁴ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[57] Ms Miller was able to start new employment on a casual basis after she resigned from Harbour View. However she worked reduced hours initially and as a result lost income of \$3,091.00.

[58] This lost income is less than three months ordinary time remuneration and this lost remuneration flows from her unjustified dismissal so I award her this sum pursuant to s 123(1)(b) of the Act.

Contribution

[59] As I have awarded remedies to Ms Miller, I must now consider whether she contributed to the situation that gave rise to her dismissal.⁵

[60] This assessment requires me to determine if Ms Miller behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievance.⁶

[61] I have reflected on what occurred to Ms Miller and how her employment relationship with Harbour View deteriorated over quite a long period of time; I have also considered how she acted throughout this, in particular how she responded to events. I am satisfied that Ms Miller did not act in a blameworthy or culpable manner.

[62] So, in conclusion there was no contributory behaviour from Ms Miller that warrants a reduction in remedies.

Conclusion

[63] Harbour View unjustifiably dismissed Ms Miller. In settlement of this grievance Harbour View must pay Ms Miller:

- (a) \$15,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) \$3,091.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000.

⁵ Section 124 of the Act.

⁶ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

Costs

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

[65] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority