Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2020] NZERA 440
3069233

	BETWEEN	JULIETTE DARNLEY Applicant
	AND	THE CHIEF OF THE NEW ZEALAND DEFENCE FORCE Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Peter McKenzie-Bridle, counsel for the Applicant Jordan Boyle, counsel for the Respondent
Investigation Meeting:	10 and 11 December 2019
Submissions [and further Information] Received:	11 December 2019 orally and in writing from the Applicant 11 December 2019 orally and in writing from the Respondent
Date of Determination:	23 October 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Juliette Darnley was employed by the Chief of the New Zealand Defence Force (NZDF) as a Human Resources Site Lead (HRSL) from 31 July 2017 until 24 June 2019. Ms Darnley claims she was constructively dismissed by NZDF and seeks compensation and costs.

[2] NZDF denies Ms Darnley's claims and says it acted fairly and reasonably towards her at all times. NZDF claims Ms Darnley breached her duty to deal with it in good faith and breached her individual employment agreement (IEA) by not giving notice of her resignation. It says Ms Darnley's failure to notify her resignation resulted in her being paid after the date on which she had commenced new employment.

[3] NZDF seeks the imposition of a penalty against Ms Darnley for breaches of good faith and her IEA. It also seeks an order for the repayment of any wages it is found to have overpaid Ms Darnley.

The Authority's investigation

[4] In the course of the investigation meeting, confidential matters were referred to involving four named former employees. I granted a non-publication order sought by NZDF, and unopposed by Ms Darnley, in relation to those former employees. The order covers their names and the confidential matters in question.

[5] I heard evidence from Ms Darnley on her own behalf, and from two witnesses for NZDF: Jackie Ward, who was then the Acting Group Captain Assistant Chief Defence Human Resources (GPCAPT Ward); and Myregal Carambas, a solicitor employed by NZDF.

[6] I am not required to set out a record of all evidence heard or received, as specified in s 174E of the Employment Relations Act 2000 (the Act), and will not do so. In determining this matter, however, I have carefully considered all the material placed before the Authority, including all evidence from the parties and submissions made by their representatives.

[7] This determination has been issued outside the timeframe set out at s 174C (3) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

Issues

[8] The issues for determination are:

(a) Whether Ms Darnley was constructively dismissed;

(b) Whether Ms Darnley breached her obligations of good faith to NZDF;

(c) Whether Ms Darnley breached her employment agreement in not formally resigning from her employment with NZDF;

(d) Whether a penalty should be imposed on Ms Darnley if she is found to have breached her IEA and/or her obligations of good faith; and

(e) Whether Ms Darnley should repay three days' salary NZDF says it mistakenly paid her.

[9] If Ms Darnley has been constructively dismissed, remedies and any contribution will require consideration.

Relevant background

[10] Ms Darnley's role as HRSL included representing NZDF in employment relationship problems involving its personnel. The resolution of such problems at times entailed the exit of personnel from the organisation on terms agreed and recorded in a settlement agreement.

[11] In October 2018 the Chief People Officer of NZDF introduced a directive regarding "*ex gratia and compensation settlement payments*" (the CPO directive). The purpose of the directive, as stated in the document, was to provide policy guidance for the control and management of such payments. It was applicable to "*all members of the CPO Portfolio who have role requirements in relation to ex gratia and compensation settlement payments for members of the Civil Staff*". Ms Darnley received a copy of the CPO directive by email from her manager on 12 December 2018.

[12] In January 2019 Ms Darnley facilitated, on behalf of NZDF, a settlement agreement between NZDF and one of its employees. The terms of settlement, which were signed by a mediator under s 149 of the Act, included the employee resigning from a specified imminent date and being paid salary in lieu of notice for a period in excess of that required by the employee's employment agreement.

[13] NZDF's payroll personnel queried the payment when Ms Darnley emailed them the signed record of settlement for processing of the financial component. She responded that the manager who had signed the settlement agreement on behalf of NZDF had the delegation to approve the payment. Ms Darnley also stated in her email that there was no *ex gratia* payment involved which was why the settlement agreement did not require oversight from the NZDF's Manager of Employment Relations.

[14] In February 2019 Ms Darnley received written notification of a formal investigation into allegations she had breached the CPO directive in relation to the January 2019 settlement. The allegations were that:

(a) Ms Darnley had settled an employment dispute between NZDF and the named employee.

(b) the terms of settlement included a (specified) period of salary in lieu of notice.

(c) it was a requirement of the CPO directive to obtain approval before agreeing to that specified length of pay in lieu of notice.

(d) she had circumvented the approval process knowing that approvals were required under the CPO directive and had told staff actioning the payment that approvals were not required.

(e) the settlement sum agreed to was in excess of NZDF's financial delegations.

[15] The letter was signed by GPCAPT Ward who put Ms Darnley on notice that, if proven, the allegations may constitute misconduct or serious misconduct and be in breach of her employment agreement. GPCAPT Ward advised she was to be the decision maker in the matter.

[16] The investigation was carried out by an NZDF manager, supported by an NZDF HR Business Partner. It was completed in March 2019 and the finalised investigation report was dated 1 April 2019. It found the allegations were proven and constituted conduct capable of amounting to a breach of Ms Darnley's obligations to NZDF as set out in the employer's Code of Conduct.

[17] The investigation report identified a number of mitigating factors for the decision maker to consider but made no recommendations as to whether Ms Darnley's actions amounted to misconduct or serious misconduct.

[18] GPCAPT Ward wrote to Ms Darnley on 8 April 2019 advising she had concluded the allegations against her were proven and that serious misconduct had occurred. GPCAPT Ward's letter noted her view that disciplinary action was necessary and disciplinary outcomes could include a warning or dismissal. She asked Ms Darnley to attend a disciplinary meeting, which took place on 15 April 2019.

[19] On 14 May 2019 Ms Darnley met with, and received a letter from, GPCAPT Ward who confirmed her view that Ms Darnley's actions amounted to serious misconduct. Her preliminary decision was that disciplinary action was necessary and the appropriate outcome

was dismissal with notice. The letter noted the decision maker's view that the employment relationship was beyond repair. GPCAPT Ward invited Ms Darnley to attend a further meeting with her on 16 May 2019 to provide any reasons or submissions as to why she should not confirm her preliminary decision to dismiss Ms Darnley on notice.

[20] After leaving the workplace on 14 May 2019, Ms Darnley did not return to NZDF. She did not meet with GPCAPT Ward on 16 May and her subsequent interactions with her employer were conducted on her behalf by her legal representative, Mr McKenzie-Bridle.

[21] Ms Darnley was initially granted a period of paid special leave but, after submitting a medical certificate, was placed on sick leave. When this expired, her annual leave was debited.

[22] GPCAPT Ward's preliminary decision to dismiss Ms Darnley on notice was not finalised as the process was curtailed by Ms Darnley's departure from NZDF.

Constructive Dismissal

[23] An employee may be constructively dismissed in situations where no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* identified the following three situations constituting constructive dismissal, while making clear it was not an exclusive list:

> (a) An employer gives an employee a choice of resigning or being dismissed.
>
> (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
>
> (c) A breach of duty by the employer causes an employee to resign. [1]

[24] Ms Darnley has the onus of establishing that her resignation was as a result of her employer's actions. If she establishes that, the employer's actions are then considered through the lens of the test of justification set out in s 103A of the Act. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[25] With respect to the third category at paragraph [23 above, Ms Darnley says NZDF breached its obligations to her so significantly she was left with no option other than to resign.

[1] [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

However, she also says there are elements of all three of the categories of constructive dismissal in the way she was treated by NZDF between February and May 2019. She says NZDF repudiated her employment by acting unfairly and unreasonably in that timeframe.

The CPO directive

[26] Ms Darnley said she was devastated to discover from the investigation report that the CPO directive had been issued specifically to address concerns NZDF had over her approach to settling employment disputes. No one had raised performance issues with her about her practice in these matters.

[27] In a section of the investigation report headed "*Where was DHR[2] management in this situation?*", the investigator posed the following question:

> Was DHR management aware of how Ms Darnley resolved this and other issues, was supervision in place and what checks and balances ensure that all HR personnel acted in accordance with NZDF expectations?

[28] The investigator answered the question by stating that, while DHR management was not specifically aware of Ms Darnley's intention regarding the situation in question, it was aware of previous issues regarding her approach to settling disputes. The report then noted:

> In mid-2018 questions were raised and discussions held as to whether an audit was required and whether an investigation needed to occur. None of these issues were pursued other than the CPO directive being drafted and issued. There is no evidence to suggest that the issues around Ms Darnley were ever raised with her directly as you would expect. Neither was there any evidence once the directive was issued, around any support, direction, reinforcement or monitoring of Ms Darnley's ER[3] activity (including that of her direct reports).
>
> ….
>
> Whilst Ms Darnley, in the view of the investigation, displayed poor judgement, the lack of adequate controls and supervision of ER in this instance was unacceptable.

[29] The "*Mitigation*" section of the investigation report reiterated this and the investigator set out "*some factors the decision maker may wish to consider*". The first of these was that the concern DHR management had over Ms Darnley's practice when resolving employment disputes:

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[2] Defence Human Resources.
[3] Employment Relations.

> …was never addressed with Ms Darnley specifically and the CPO directive was created to address the issues related to Ms Darnley's practice.

[30] Other mitigating factors identified by the investigation report included management failure, and the lack of risk management or follow up to ensure Ms Darnley was complying with the directive, and deficiencies in the promulgation of the directive.

[31] Ms Darnley was unaware until she read the investigation report that her employer had concerns dating back several months about her performance in that particular aspect of her HRSL role. She therefore had no opportunity to address those concerns and, if necessary, modify her actions to meet her employer's requirements. She was not aware the purpose of the CPO directive was to effect a change to her practice in managing employment settlements. The investigation report of 1 April 2019 identified there had been no follow up with Ms Darnley to ensure she fully understood the directive that, unbeknownst to her, had been formulated as a tool to manage her performance.

[32] I find NZDF breached its obligation to treat Ms Darnley fairly and reasonably by addressing a performance issue it had identified by the indirect means of promulgating a CPO directive rather than directly addressing the issue with her. It was also a breach of the employer's obligation to be active and constructive in establishing and maintaining a productive employment relationship, and the requirement for parties to such relationships to be, among other things, responsive and communicative.[4]

[33] GPCAPT Ward's evidence was that she relied on the investigation report findings in concluding serious misconduct had occurred. In her letter of 8 April 2019 to Ms Darnley, she said she had carefully considered the report, including the mitigation factors, before concluding that serious misconduct had occurred.

[34] In the course of cross examination in the Authority's investigation, however, GPCAPT Ward questioned whether the CPO directive had been promulgated to address concerns over Ms Darnley's performance. Having relied on the investigator's report to reach a decision that Ms Darnley's actions constituted serious misconduct, she dismissed as "*only his view*" the investigator's statements about the rationale behind the directive, which he clearly identified

[4] Section 4(1A)(b) Employment Relations Act 2000.

as a mitigating factor. I am concerned that selecting aspects of the report in this way calls into question the fairness of the preliminary decision reached by the decision maker.

[35] Ms Darnley's evidence was that she lost trust that her employer would treat her fairly and had no doubt, following the delivery of the preliminary decision to dismiss her for serious misconduct, that nothing she could do or say would change the employer's view. I accept her evidence. NZDF breached its obligation to treat Ms Darnley fairly in relation to the performance concerns it had about her. That breach was so fundamental that her resulting resignation was foreseeable. In short, I find Ms Darnley has established her case for constructive dismissal.

Breach of good faith

[36] NZDF claims Ms Darnley breached her duty to deal with it in good faith in several ways from 15 May 2019. The allegation relates to how and when Ms Darnley engaged with her employer following GPCAPT Ward's conveying, on 14 May 2019, her preliminary decision to dismiss her. It also encompasses concerns about Ms Darnley's medical certificate and the timing of her acceptance, and commencement, of new employment. I will consider the separate elements of the allegation and whether they amount, either individually or in the aggregate, to a breach of good faith by Ms Darnley.

[37] The first element is that Ms Darnley failed to respond to an email NZDF sent her on 15 May, despite NZDF sending a follow up email on 22 May. This relates to GPCAPT Ward's request that Ms Darnley respond by 16 May to the preliminary decision she had reached to dismiss her for serious misconduct. Ms Darnley notified her employer on 15 May that she had engaged legal counsel to help her and would not be able to meet that deadline.

[38] The GPCAPT advised Ms Darnley she was approving special paid leave effective immediately until she received her response to the preliminary decision, at which time she would review it. She asked if there were any urgent work matters Ms Darnley would like to be reallocated; and if Ms Darnley wished anything to be communicated to her team about her absence from the workplace and, if so, what form that should take and how Ms Darnley would like it to be communicated. The GPCAPT also asked for the name of Ms Darnley's legal representative.

[39] Mr McKenzie-Bridle wrote to GPCAPT Ward on 17 May 2019, which effectively answered her question about representation. His letter informed the GPCAPT of his intention to provide Ms Darnley's response once he had fully reviewed his client's matter. Mr McKenzie-Bridle requested a number of documents from NZDF under the Good Faith provisions of the Act[5] and the Official Information Act 1982, noting these were necessary for him to advise Ms Darnley on her response to her employer.

[40] There were two matters raised by GPCAPT Ward's 15 May email that Mr McKenzie-Bridle did not address in his 17 May letter: those relating to work allocation and communication to Ms Darnley's colleagues about her absence from the workplace. Ms Darnley was unwell at the time. She saw her general practitioner (GP) on 23 May and provided her employer with a medical certificate. NZDF placed her on sick leave on receipt of the certificate. In the circumstances, I do not view Ms Darnley's failure to address the two outstanding questions from GPCAPT Ward's email of 15 May 2019 as a breach of good faith.

[41] The next element to the allegation is that Ms Darnley had continued to engage in the disciplinary process, in particular by seeking information in Mr McKenzie-Bridle's letter of 17 May and by Mr McKenzie-Bridle providing comment on NZDF's actions in his letter of 29 May 2019.

[42] There is no merit to this allegation. Ms Darnley was facing dismissal and had engaged a lawyer to assist her. Mr McKenzie-Bridle identified documentation relevant to Ms Darnley's situation that he wished to review before responding to the employer's preliminary decision. His request was reasonable and in accordance with the rights of employees to access relevant information when an employer is proposing to make a decision that will, or is likely to, adversely affect the continuation of their employment.[6]

[43] NZDF delivered the requested documents on 29 May 2019. Mr McKenzie-Bridle wrote to the employer that day acknowledging receipt of the documents. His letter presented Ms Darnley's concerns with NZDF's actions to date. It identified the deficiencies and disparities Mr McKenzie-Bridle perceived in the employer's actions towards his client. In an email exchange between Mr McKenzie-Bridle and Ms Carambas in the days preceding that letter, NZDF had made clear it did not welcome comments on the allegations against Ms Darnley,

[5] Mistakenly cited as a non-existent s4A (1A)(c)(i).
[6] Section 4(1A)(c).

but only comments on the appropriate penalty, specifically on the proposal to dismiss her with notice.

[44] Mr McKenzie-Bridle's 29 May letter raised issues that were relevant to NZDF's preliminary decision to dismiss Ms Darnley. These included issues arising from the definitions of general misconduct and serious misconduct in Ms Darnley's IEA; whether the January 2019 settlement payment came within the scope of the CPO directive; apparent inconsistency in the employer's treatment of Ms Darnley in relation to that of a named colleague; and apparent lack of awareness of the CPO directive in NZDF's Legal department.

[45] The issues Mr McKenzie-Bridle raised were genuine and serious matters deserving consideration by the employer. Bringing those matters to NZDF's attention was not a breach of good faith, regardless of the employer's wish to restrict Ms Darnley's comments to the narrow issue of punishment.

[46] Another issue raised in Mr McKenzie-Bridle's letter of 29 May 2019 was that Ms Darnley been singled out for disciplinary action in respect of the CPO directive which was not well understood or followed. Mr McKenzie-Bridle provided sufficient information for NZDF to make further inquiries. Oral evidence from GPCAPT Ward was that she had done nothing to follow up on the information Mr McKenzie-Bridle provided.

[47] Evidence from Ms Carambas was that she had not followed up on the information that indicated at least one person in NZDF's Legal department was unaware of the requirements introduced by the CPO directive. In her letter of 11 June 2019 to Mr McKenzie-Bridle Ms Carambas said NZDF had not entered into any settlement agreements since the issuing of the CPO directive, apart from that which Ms Darnley had facilitated. She also said there was "*no evidence of similar cases where NZDF has acted differently*" but made no direct response to the situation detailed in Mr McKenzie-Bridle's letter.

[48] I regard NZDF's inaction over issues raised by Ms Darnley's representative that were potentially relevant to any decisions made about her employment, and its subsequent allegation of bad faith against Ms Darnley for raising those issues, to be problematic. I do not accept the employer's claim that Ms Darnley breached her duty of good faith in raising those matters.

[49] The next four elements relate to Ms Darnley's acceptance and commencement of new employment and allege she:

(a) accepted new employment on 5 June 2019; provided NZDF with a medical certificate on 6 June 2019 certifying her to be unable to work until 6 July 2019; and commenced new employment on 24 June 2019;

(b) represented to her employer, by way of a letter dated 24 June 2019, that she was engaging in the disciplinary process with it, when she had commenced new employment that day;

(c) failed to respond to NZDF's email to her of 1 July 2019 asking for confirmation of if, and when, she had commenced new employment;

(d) emailed former colleagues on 7 July 2019 notifying them she had started new employment but not specifying the commencement date.

[50] Ms Darnley did not dispute the timeframe of the events in paragraph [49(a)] above. Her evidence was that, as the sole income earner for her family, and with a mortgage to pay, she could not countenance being without a salary. Ms Darnley had previously visited her GP on 23 May 2019. At that time she had obtained a medical certificate that linked her ailment to workplace stressors. I accept those stressors were specific to NZDF and did not necessarily impact on her ability to work elsewhere.

[51] With regard to paragraph [49(b)] above, the letter in question was from Mr McKenzie-Bridle as part of a correspondence trail with NZDF starting with his letter of 29 May 2019. In that letter he raised issues over the process NZDF was following in relation to Ms Darnley; inconsistencies with the treatment others had received; and the lack of knowledge or clarity other HR and Legal staff appeared to have over the CPO directive. I do not agree Ms Darnley's engagement with her employer, through Mr McKenzie-Bridle, was a pretence of engagement with her employer as NZDF implies, or a breach of good faith. I have no doubt Ms Darnley, as a person facing dismissal, and the adverse consequences that would have on her career, was genuinely engaged with her employer at that time.

[52] Nor do I find Ms Darnley's failure to respond to NZDF's email of 1 July 2019 (paragraph [49(c)] above) to have been a breach of good faith, given that the parties had scheduled mediation to take place three days later. Her email to colleagues on 7 July 2019 (paragraph [49(d)] above) was an informal communication to former colleagues, not an official communication to her employer, and any omission of information should be seen in that context.

[53] I do, however, find Ms Darnley's failure to disclose to her employer that she intended to start, and indeed had already started, new employment on 24 June 2019 to be a breach of her duty of good faith. She was still employed by NZDF when she commenced the new employment although, unbeknownst to her at the time, she was being paid by way of her remaining annual leave entitlement.

[54] I accept Ms Darnley was genuinely concerned over the finding of serious misconduct GPCAPT Ward had made, and over her employer's preliminary decision to dismiss her. If confirmed, that would almost certainly impact negatively on her ability to obtain employment in her chosen field. Nonetheless, it was her duty to be responsive, and communicative, attributes she did not display in failing to alert NZDF that she was no longer its employee.

Penalty

[55] In the circumstances in which the breach occurred, I do not find it appropriate to impose a penalty on Ms Darnley for not informing NZDF she had accepted new employment.

Breach of IEA

[56] NZDF claims Ms Darnley breached the terms of her IEA by failing to provide one month's notice of her resignation. Having found Ms Darnley to have been constructively dismissed, I dismiss this claim.

Salary overpayment

[57] Ms Carambas stated under questioning that NZDF was seeking repayment of three days' salary it had paid Ms Darnley on 10 July 2019. The payslip for that period shows payment of 24 hours' base salary and records 56 hours of sick leave that was unpaid. Ms Carambas said she assumed the payroll team had not been notified Ms Darnley was no longer an employee and acknowledged the payment was made in error.

[58] Ms Darnley acknowledged in the course of the Authority's investigation she was willing to set off the three days' pay against any remedies she received. I accept that is an appropriate means of disposing of the overpayment matter.

Remedies and contribution

[59] Ms Darnley did not lose wages as a result of her personal grievance but is seeking compensation for hurt and humiliation; loss of reputation and mana, and injury to feelings; and for the loss of opportunity for promotion and advancement in her career with NZDF.

[60] I am obliged to consider the extent to which Ms Darnley contributed to the situation that gave rise to the personal grievance. NZDF submits Ms Darnley's acknowledgement during the investigation that she failed to follow the CPO directive must be taken into account if the issue of remedies is considered. In its submission, contribution should be assessed at fifty percent and any remedies reduced accordingly.

[61] I disagree. Ms Darnley's acknowledgement during the NZDF investigation was that she had interpreted the directive differently from her employer but that she would in future apply the NZDF interpretation to any future settlements in which she was involved. Simply put, the directive applied to compensation and *ex gratia* payments: Ms Darnley's understanding was that, because the January settlement concerned an enhanced period of notice, it was neither compensation, which she associated with a s 123 payment under the Act, nor an *ex gratia* payment.

[62] I have already noted my view of the employer's flawed approach to performance managing Ms Darnley by means of the CPO directive. I am unwilling to find she contributed to the situation that led to her personal grievance in light of the employer's failure to raise with her its concerns over her approach to settlements. I find Ms Darnley did not contribute to the situation that led to her personal grievance.

[63] I accept Ms Darnley's evidence of the effect on her of discovering, through the investigation report, the purpose of the directive and of her growing consternation that nothing she said would change her employer's perception of her actions. Ms Darnley's evidence was persuasive and the hurt and humiliation she suffered was unmistakable. I find an award of $25,000 to be appropriate in the circumstances.

[64] I do not, however, accept Ms Darnley's claims for compensation for loss of opportunity for promotion and advancement of her career with NZDF. As a well-qualified and experienced professional in her field, Ms Darnley had no difficulty in obtaining alternative employment and there is no reason to believe her career will not prosper with her new employer.

Summary and orders

[65] Ms Darnley was constructively dismissed from her employment. She did not contribute to the situation that led to her personal grievance.

[66] For the most part, the employer's counterclaims are dismissed. While I have found Ms Darnley did breach her duty of good faith in one regard, in the circumstances I have found it inappropriate to impose a penalty.

[67] NZDF is ordered to pay Ms Darnley compensation of $25,000 under s 123(1)(c)(i) of the Act.

[68] Ms Darnley is to repay NZDF three days' nett salary, being monies it mistakenly paid her on 10 July 2019.

Costs

[69] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority