

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 167
3100653

BETWEEN KATHRYN DOUDS
 Applicant

AND OASIS NETWORK
 INCORPORATED
 Respondent

Member of Authority: Michael Loftus

Representatives: Ashleigh Fechney, advocate for the Applicant
 Recardo Bosch, for the Respondent

Investigation Meeting: 27 January 2021 at Wellington

Submissions Received: At the Investigation Meeting

Date of Determination: 27 April 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Kathryn Douds, claims she was unjustifiably dismissed, albeit constructively, on 27 February 2020. Ms Douds also claims was unjustifiably disadvantaged in that she was issued a final written warning in circumstances that were neither fair nor reasonable on 5 February 2020 and the respondent failed to properly investigate concerns Ms Douds raised in early February 2020.

[2] The respondent, Oasis Network Incorporated (Oasis), is of the view Ms Douds resigned of her own volition. It denies the warning was unjustified and refutes the claim in respect to the alleged failure to investigate Ms Douds' concerns.

Background

[3] Oasis is a not for profit organisation providing support to eligible clients in the Hutt Valley. Ms Douds was employed as a Housing Advocate in January 2019.

[4] Later in the year the position of Housing Coordinator became vacant. Ms Douds was interested but not appointed. Oasis is of the view Ms Douds' disappointment is the root cause of difficulties that subsequently emerged and which centre around Oasis' concern she was providing services which were the responsibility of the Coordinator contrary to the requirements of her job and instructions she desist.

[5] The person appointed to the Coordinator's role was Bevan Shaw. He says Ms Douds repeatedly advised she was more qualified and better educated than he and, as a result, resented his appointment.

[6] Ms Douds has a contrary view. She says difficulties with Mr Shaw arose not as a result of jealousy but because he started questioning everything she did. She says she initially tried to explain what she was doing and why but a growing belief she was being micromanaged and disrespected as a result of repeatedly explaining the same things led her to cease trying.

[7] To that Mr Shaw says he had concerns with the way Ms Douds was completing various reports and administrative documents but when he tried to raise these concerns she became defensive. More importantly there were issues with the duties Ms Douds was performing with Oasis being of the view she was acting beyond her jurisdiction with respect to clients. This was of concern to Oasis as it had to comply with very strict rules and protocols to satisfy its obligations to those who funded its activities such as the Ministry of Social Development and this led to various meetings with Ms Douds.

[8] Those meetings culminated in a letter to Ms Douds from Recardo Bosch, the CEO, on 12 December 2019. The letter went on to advise residents in a transitional house in Naenae were Mr Shaw's responsibility and Ms Douds was only to engage with them on matters concerning their search for long term accommodation. Examples of her having strayed outside her territory were given, before Ms Douds was told:

I made it clear that your job role is a Housing Advocate to assist Oasis Transitional Housing Residents into long term housing and to visit the placed residents for 12 weeks after placement and to seek support for them, but not to provide support yourself.

[9] The letter also referred to an incident where it was alleged Ms Douds had failed to obey a direct instruction not to provide further assistance to a specific client and reaffirmed her operational work was to be supervised by Mr Shaw. There is then reference to Ms Douds' hours being limited to those in her employment agreement which was a reference to an earlier temporary increase and discussions about time in lieu granted for what Oasis saw as the performance of duties Ms Douds was not required to perform. The removal of the hours was advised in a meeting on 3 December but rescinded six days later on the proviso Ms Douds demonstrated she was capable of working to her job description and Oasis guidelines.

[10] The letter then goes on to advise

I am confident that you will be able to meet the requirements as stated above as any further breaches of your job description, overstepping the boundaries (coordinator's role), or not following guidelines as above will lead to a formal performance meeting and/or reduction in your hours.

I also notice that you continually request to be promoted to a senior/managerial position. As advised, I do not see you as having the necessary skills as yet and would like you to concentrate on your current role as Housing Advocate and to ensure you meet the requirements of this role rather than focusing on other roles.

[11] Ms Douds says that on or about 23 January, Mr Shaw came into the office and started abusing her in front of a client. She says he was swearing and called her an idiot with the essence of his "rant" being that something was on a car seat after she had taken it out. Mr Shaw denies he behaved as alleged and attributes the issue to his having properly raised the fact the car contained evidence Ms Douds was still allowing Oasis' protocols and rules to be breached.

[12] It was that alleged breach and a couple of other matters that resulted in a written request, dated 31 January 2020, that Ms Douds attend a formal performance/disciplinary meeting. The meeting was to discuss Oasis' view Ms Douds had exceeded her responsibilities in respect to three clients, though one at Hutt Hospital caused particular aggravation. The outcome of the subsequent meeting, which occurred on 5 February, was a final written warning dated 10 February. The rationale was that:

It became apparent from the discussion that you have not adhered to your job description; not followed Oasis Policies and Procedures and disobeyed a direct instruction from your manager.

[13] This letter also notes Ms Douds was again claiming she was not clear about her role and sought clarification. The letter records that as a result she had two weeks to put her questions and identify any clarification she needed. That was to be in writing and Mr Bosch would respond in writing. The letter then reiterated that residents in the transitional house were the responsibility of the Coordinator and Ms Douds was only to engage with them on matters concerning their search for long term accommodation. She was told her job related to permanent housing and she was not to provide other support or advocacy with such requests to be directed to Mr Shaw. Ms Douds was also told she was not to refer any people to support agencies and she was specifically told not to engage further with the client at Hutt Hospital.

[14] The Authority has no evidence of any subsequent written exchanges but the parties did meet to discuss the parameters of Ms Douds role on 29 February. That said, and on an unknown date during the first half of February, Ms Douds sent a three page letter to Mr Bosch raising what she considered unprofessional conduct in the office. In essence it is a compilation of complaints about Mr Shaw and it is this that is the basis of the allegation Oasis failed to investigate.

[15] In the interim there were, however, further incidents. A particular one occurred at a meeting on 26 February which degenerated when Mr Shaw suggested Ms Douds had been “*pulling the wool over his eyes*” regarding time in lieu. Here it should be remembered time in lieu was already an issue. Essentially the argument was Ms Douds was claiming time in lieu when she could not have been eligible as her claims related to duties she should not have been performing. In doing so she was also breaching Oasis’ health and safety rules.

[16] The following day, 27 February, Ms Douds went to work about 7.30am. She says she found Mr Bosch and Mr Shaw in the office. It is Ms Douds evidence Mr Shaw accused her of leaving work early and attending meetings she shouldn’t have. She says *he was nasty*. She says she looked at Mr Bosch for support and he told Mr Shaw to go as he needed to talk.

[17] Ms Douds says Mr Bosch then said that if she had taken time in lieu she was stealing from Oasis. Ms Douds says she denied she was taking time inappropriately but accepted she had recently taken time in lieu and was entitled to do so.

[18] It is Ms Douds evidence Mr Bosch then said, “that is stealing” and he would have no option but to terminate her employment. Ms Douds says she again denied she was taking time improperly but Mr Bosch replied “*Basically, I am letting you go*”.

[19] Ms Douds says she replied then said she didn't want to be fired and was told her only option was to resign.

[20] Ms Douds says Mr Shaw then returned. She says she asked Mr Shaw why he wanted to get rid of her and he replied he didn't. She says she then asked *why are you making this stuff up*, to which he replied he saw it (evidence of her claiming hours worked when she hadn't) on the cameras. She says she asked show me but he was unable to do so as the recordings did not go back far enough. She says she then alleged he hadn't *seen it* and he agreed.

[21] Ms Douds says at that point Mr Bosch said she could ring Richard Morete (Oasis' Chairperson). She says she did so and was told Mr Bosch had told Mr Morete that he (Mr Bosch) was letting her go. She says Mr Morete said she could contest that decision.

[22] Mr Morete denies he made any comment about Mr Bosch having said he was letting Ms Douds go. He says Ms Douds advised Mr Bosch had delivered *an ultimatum*. Mr Morete says he told Ms Douds to get some evidence about her alleged improper absences. He says she responded Mr Bosch wanted her resignation by 3.00pm otherwise he would make the decision for her. It is Mr Morete's evidence the call occurred about 10.00am.

[23] It is there the evidence gets a little convoluted. Ms Douds says that at 2.00pm she got an email from Mr Bosch telling her she had until 3.00pm to resign or be let go. It is this allegation she relies on to support her claim she was constructively dismissed. It is Oasis' view that no such email exists and the evidence would suggest that is correct.

[24] At 1.50pm on 27 February, Ms Douds emailed Mr Bosch. The email is short, it reads

Good afternoon. As discussed I resign from Oasis.

[25] At 1.58pm Mr Bosch replied

Good afternoon Kathy

I accept your resignation. As discuss you do not have to work out your notice period. Oasis will pay you fortnightly as normal on 9 and 23 March 2020 until the last day of your notice period – Friday 27 March 2020. Your final pay and holiday pay will be paid to you on that day.

On behalf of Oasis, I would like to thank you for your contribution and wish you all the best in your future endeavours.

Please hand in the 2 phones, keys, swipe tag and any other Oasis belongings you may have to Bevan Shaw.

Thank you.

Kind regards Recardo Bosch

[26] At exactly the same time (1.58pm) Ms Douds sent another email to Mr Bosch. She says she did so at Mr Morete's suggestion and attached evidence she had been in the office when it was alleged she hadn't (and was therefore eligible for time in lieu).

[27] That was in response to Mr Bosch having replied to Ms Douds' emails of 1.58pm. He did so at 2.06pm and said

That is after the fact, you have resigned, so let us leave it at that.

[28] At 2.07pm Ms Douds sent another email reading

I don't want to leave it and I do not want to leave my job.

This is all so wrong. I beg you to reconsider.

[29] Ms Douds then left and was paid, as agreed, to the end of the March.

Discussion

[30] As already said Ms Douds has three claims. She says she has been unjustifiably disadvantaged via the final written warning of 5 February 2020; unjustifiably disadvantaged by Oasis' failure to investigate her concerns about the office environment and unjustifiably dismissed.

[31] I shall deal with the two unjustified disadvantage claims first, if only because neither will succeed. Ultimately, though, that means little as I will conclude Ms Douds was unjustifiably dismissed and the remedies sought were global – they did not differentiate between causes of action.

[32] The reason Ms Douds says the warning was unjustified is that (a) its subject matter was performance related and should not have been considered disciplinary¹ and (b) there had been no previous warning.²

¹ Closing submission at [18]

² Above n 1 at [19]

[33] These are not, I conclude, assertions the evidence supports. The issues discussed in the warning were Ms Douds failure to comply with the requirements and expectations of the employer which had been expressed in the form of a clear instruction. Failure to adhere to instructions can easily be considered a disciplinary matter. The argument this was unheralded also fails with the issues having been well canvassed in the meetings leading to the letter of 12 December 2019. Furthermore it has to be noted that letter forewarns Ms Douds she faced consequences should she fail to comply. Finally I add the fact the evidence shows the procedural requirements of s 103A of the Employment Relations Act 2000 (the Act) were complied with. For these reasons the claim fails.

[34] Turning now to the allegation Oasis failed to address the concerns Ms Douds raised in her letter of early February. The first issue is when were these raised and that is unclear. Ms Douds submission suggests sometime between 3 and 10 February 2020. That said the content suggest it could well have been later as it appears to refer to Mr Bosch's letter of 10 February having been received and when giving oral evidence no-one could put a date on this event. In other words it is debatable whether enough time had passed between its delivery and Ms Douds departure to suggest Oasis had failed to address it but in any event the evidence suggests a start had been made. In particular it is clear the meeting of 26 February did canvass some of the relationship issues between Ms Douds and Mr Shaw though it also has to be accepted it was far from successful. It is also clear from Mr Bosch's uncontested evidence that he continued to work on the issue with Mr Shaw the following morning. The fact there were attempts to at least commence a process means the claim nothing was done must fail.

[35] Turning now to the claim Ms Douds was constructively dismissed.

[36] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. It is for the applicant to convince me that is the case. There must also be a causal link between the employer's conduct and the tendering of the resignation³ and the possibility of resignation should be foreseeable.⁴

³ *Z v A* [1993] 2 ERNZ 469

⁴ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[37] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*⁵ the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice between 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.

[38] It is the first of these Ms Douds alleges; namely that she was asked to choose between resignation and dismissal. Mr Bosch denies this but accepts he did give Ms Douds an ultimatum. He says that when he went to the office to discuss the relationship issue with Mr Shaw, Ms Douds asked for a meeting. He says Ms Douds again raised the issue of her relationship with Mr Shaw to which he (Mr Bosch) replied it just wasn't working and he was going to move her to another office in the interim. When Ms Douds objected and said she thought Mr Shaw should be moved Mr Bosch says he told her she had till 3pm to sort it out or he would make a decision. He did not say what about and accepts the two also discussed possible dismissal during the same conversation. Mr Bosch says this arose as the conversation also canvassed the issue of time in lieu and the allegation of time theft and he accepts he told Ms Douds that if that were to be established he advised it *will or may* lead to dismissal.

[39] It is fair to say this evidence leads to a conclusion mixed messages were sent. It is equally clear Ms Douds interpreted the comments as an ultimatum she choose between resignation or dismissal. That conclusion is confirmed by the fact she almost immediately told her husband of the choice.

[40] More importantly she also telephoned Mr Morete who, as already said, accepts she told him Mr Bosch had given her an ultimatum. His evidence is the possibility of dismissal was in the mix. Indeed he said, when answering questions, *Ms Douds told him Recardo wants my resignation letter by 3pm otherwise he will make the decision for me.* Mr Morete also accepts Ms Douds telephoned a second time to advise she had tried to rescind her resignation but unsuccessfully.

⁵ *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

[41] Mr Morete says he thinks he might have called Mr Bosch after one of these calls but is not sure. Mr Bosch says no but the key issue is at last one senior member of Oasis' management/governance knew there was a serious issue. Oasis then had a duty to follow up and remove any possible confusion. It didn't and that makes this a constructive dismissal.

[42] That it is unjustified follows. The very nature of a constructive dismissal means there can be no compliance with the requirements of s 103A of the Act, and particularly s 103A(3). The dismissal is unjustified.

[43] Even if that were not the case Mr Bosch accepts the discussion was terse. That would then mean it unwise to accept a resignation tendered as result and he should have reconsidered once that issue was raised.⁶ He didn't.

[44] The conclusion the dismissal was unjustified raises the question of remedies. Ms Douds seeks lost wages and \$15,000 compensation.

[45] Section 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser.

[46] Ms Douds was paid until 27 March 2020. She obtained a new job with effect 18 May 2020. The intervening period is 7 weeks during which she would have earned \$7,840. That is payable.

[47] Turning now to compensation. Ms Douds supported her claim with evidence of the hurt she felt and feelings of exhaustion and depression. She say she wandered about aimlessly for weeks while it sunk in that *this was real*. She also spoke of damage to her confidence as she was forced to take a lessor role and her evidence was supported by that of her husband. Having considered the evidence and current trends I consider \$12,000 to be appropriate.

[48] Finally the conclusion Ms Douds has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.⁷ While Oasis clearly had some problems with Ms Douds and I have no doubt it was these that led to Mr Bosch accepting her resignation, I conclude the answer is no. That is because those concerns were already being addressed. That process was incomplete and should

⁶ *Kostic v Dodd* NZEmpC Christchurch CC14/07, 11 July 2007, Judge Couch

⁷ Section 124 of the Employment Relations Act 2000

have been allowed to run its course. Secondly, and while there was the time in lieu issue and question about whether or not Ms Douds was making improper claims, these were never investigated. The claims were not corroborated and cannot, therefore, be taken into account.

Conclusion and Orders

[49] For the above reasons I conclude Ms Douds has a personal grievance in that she was unjustifiably dismissed. As a result I order the respondent, Oasis Network Incorporated, pay Ms Douds:

- (a) \$7,840.00 (seven thousand, eight hundred and forty dollars) gross as recompense for wages lost as a result of the dismissal; and
- (b) A further \$12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[50] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority