

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 268
3134678

BETWEEN	LESLEY MCBRIDE Applicant
AND	THE ULITMATE CARE GROUP LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Amy De-la Cruz, advocate for the Applicant Fiona Dalziel, counsel for the Respondent
Investigation Meeting:	28 January 2022
Submissions Received:	28 January 2022 with further information received up to 10 May 2022 from the Applicant 28 January 2022 with further information received up to 11 May 2022 from the Respondent
Date of Determination:	23 June 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lesley McBride worked as a caregiver in a retirement village owned and operated by the Ultimate Care Group Limited.

[2] Ms McBride says that in the course of her employment she was bullied and had her hours of work unilaterally changed.

[3] These events and a pending hip operation caused Ms McBride to take time off work. After her surgery Ms McBride never returned to work for Ultimate Care, resigning in July 2021.

[4] Ms McBride claims the bullying, the unilateral change to her hours of work and her resignation amount to various breaches of her employment agreement, breaches of the duty of good faith, personal grievances for unjustifiable action causing disadvantage and a personal grievance for unjustifiable dismissal.

[5] Ms McBride raised personal grievances and lodged a claim in the Authority based on these things.

The Authority's investigation

[6] The parties were unable to resolve Ms McBride's claims; Ultimate Care denies the events occurred as alleged or, if they did, that they give rise to the claims made.

[7] It is these disputed claims that I investigated. In my investigation I received written evidence and documents. I then held an investigation meeting in which the witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[8] As permitted by 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Issues

[9] I will deal with Ms McBride's claims in three parts: bullying, change to working hours and constructive dismissal.

Bullying

[10] Firstly, I must determine if, based on the evidence, Ms McBride was bullied during her work at Ultimate Care.

[11] If Ms McBride was bullied, I must then determine if this give rise to any of the following claims:

- (a) A breach of Ms McBride's employment agreement.
- (b) A breach of the duty of good faith.
- (c) A personal grievance for unjustifiable action causing disadvantage.

[12] If Ms McBride has a claim for any of the above, I must then determine what remedies she is entitled to.

Unilateral variation to hours of work

[13] Firstly, I must determine if Ultimate Care unilaterally changed Ms McBride's hours of work.

[14] If Ultimate Care did unilaterally change Ms McBride's hours of work I must then determine if this give rise to any of the following claims:

- (a) A breach of Ms McBride's employment agreement.
- (b) A breach of the duty of good faith.
- (c) A personal grievance for unjustifiable action causing disadvantage.

[15] If Ms McBride has a claim based for any of the above, I must then determine what remedies she is entitled to.

Constructive dismissal

[16] Constructive dismissal is a form of unjustifiable dismissal where a resignation is treated as a dismissal. Therefore, the first issue is to establish if the circumstances giving rise to Ms McBride's resignation amount to a dismissal. In this regard, Ms McBride says that there was a course of conduct by Ultimate Care which was intended to make her resign and that there was a breach of duty by Ultimate Care that was sufficiently serious to cause her resignation.¹

[17] If either of these two categories are established such that there is a dismissal, I must then consider the second issue; was the dismissal justified?

[18] If the dismissal is not justified Ms McBride will have a personal grievance for unjustifiable dismissal and I must consider what remedies Ms McBride may be entitled to.

What happened?

[19] Ultimate Care owns and operates Kensington Court Village, a retirement village in Nelson with various care options including rest home and hospital level care. Ms McBride was employed by Ultimate Care to work at Kensington Court Village as a caregiver from 5 September 2018.

[20] Ms McBride's employment agreement, which was signed and dated 29 August 2018, records that her hours of work would be: "Minimum 20 hours per week. Hours as per the roster".

[21] Ultimate Care says Ms McBride worked an irregular shift pattern, with her rosters being set each week, along with other employees, by Ultimate Care. The wage and time records show

¹ In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374-375.

that Ms McBride always worked more than her minimum 20 hours per week and generally this was between 27 – 30 hours per week.

[22] The rosters for caregivers were a mixture of set hours for some employees (as set out in their employment agreements) and variable for others, providing at least whatever minimum weekly hours they were entitled to.

[23] Over time however, some of the employees without set hours were regularly rostered on to shifts that they preferred to work. Debbie Gada, the Facility Manager at Kensington Court Village, described how this came about as she was responsible for setting the rosters, which she did fortnightly, in advance of the start date. Rather than making significant changes to the rosters each time, she relied on allocating the set shifts to employees who had set hours, then she assigned the preferred shift patterns to those who only had minimum hours and then she would complete the roster by assigning additional shifts amongst employees who were more flexible – it appears this was a combination of assigning additional work to some and allowing staff to pick up extra work if shifts were not filled on the rosters. There needed to be some flexibility in all of the rosters to accommodate necessary changes to staffing levels due to employee absence or demand for care, based on resident numbers or needs.

[24] It is clear to me from this evidence and from Ms McBride's description of the hours she worked, that whilst Ms McBride had preferred days and times for the shifts that she was allocated, there was some variation in shift patterns. So, I accept Ultimate Care's description of Ms McBride's working pattern as being irregular with her being given more than her minimum hours per week but with the total hours worked fluctuating depending on the shifts she was allocated.

[25] In December 2020 Ultimate Care employed a new Clinical Services Manager, Dee Smith, at Kensington Court Village.

[26] Shortly after she started, Ms Smith spoke to Ms McBride questioning her over her name badge, which she was not wearing at the time. Then on two different occasions Ms Smith told Ms McBride to tie back her hair, this being a requirement for caregivers.

[27] In January 2021 when Ms Gada was on leave, Ms Smith was required to complete the staffing rosters for the period commencing 18 January 2021. Ms Smith says she was not aware of how the rosters were completed by Ms Gada but it was clear to her that there were some staffing shortages and many staff were working additional hours.

[28] Ms Smith says she had two concerns arising from this. First, she wanted to understand what the staffing shortage looked like and whether there might be a staff resourcing issue that she needed to discuss with Ms Gada when she returned from holiday. Second, she did not know what additional shifts staff were prepared to undertake so was reluctant to assign shifts to staff in excess of their minimum hours or set shifts.

[29] So, Ms Smith completed the rosters by giving staff with set hours their shifts, assigning shifts to other staff in line with their minimum entitlement (and to the extent she knew in line with their preferred shifts) and leaving the balance of the shifts free, advising staff they could pick up extra shifts by putting their name into the rosters for additional shifts they wished to do.

[30] The effect of this was that Ms McBride was only rostered on for 20 hours for each of the two weeks from 18 January 2021. But there were available shifts for her to select so that she could work additional hours. However, Ms McBride was reluctant to take any additional shifts because there were only evening shifts and/or hospital care shifts and she preferred not to work evenings and preferred to work in rest home care.

[31] Prior to putting the rosters out to the staff Ms Smith held a meeting with them to explain what she was going to do and advising them that they could pick up additional shifts to get their preferred number of hours of work.

[32] When Ms McBride saw the 18 January 2021 rosters, she thought Ms Smith had not given her enough hours and the rosters were incorrect. Ms McBride asked to meet Ms Smith to discuss this; they met on 8 January 2021. In this meeting Ms Smith told Ms McBride that she was being rostered on for her 20-hour minimum and she could pick up extra shifts if she wanted more hours.

[33] There was then a discussion about Ms McBride's ability to work evening shifts and hospital care shifts. Whilst the evidence on this was not entirely clear, it appears that Ms McBride's hip pain - Ms McBride was waiting for hip replacement surgery and was often in pain at work - had an impact on some of the work she was able to do in the evenings and in the hospital care area. Ms Smith says she was concerned when she heard about the extent of the hip pain Ms McBride was working with and asked her if she should be working pending her operation.

[34] Ms McBride was unhappy with the outcome of the meeting – essentially her position was that she believed she should have been rostered on for 30 hours per week consisting of day shifts in rest home care and she thought Ms Smith was not only reducing her hours of work but she was also telling her she was not fit to work if she would not or could not pick up additional evening and/or hospital care shifts.

[35] Ms McBride worked her rostered shifts up until 17 January 2021 and then went on sick leave; she says this was partly due to the stress caused by the reduced hours and because of her hip pain.

[36] Whilst she was off work and pending her operation, which was scheduled for March 2021, Ms McBride raised a personal grievance for unjustified disadvantage primarily relating to the change in her working hours. There was a short exchange between Ms McBride's advocate and Ultimate Care over the grievance but it was essentially left unresolved pending Ms McBride's operation and her return to work; Ultimate Care believing it would discuss and hopefully resolve any issues as part of any plan for Ms McBride's return to work following surgery.

[37] Ms McBride's operation was then postponed until April 2021 and she remained off work. After her operation Ms McBride engaged with Ultimate Care over her personal grievance. Ms McBride was unhappy with the negotiations and on 6 July 2021 she resigned, advising Ultimate Care that she had fully recovered from her hip operation and had found work elsewhere.

Bullying

[38] Ms McBride gave evidence in general terms in which she described the work environment at Kensington Court Village as toxic with bullying and short staffing being problematic. She also described Ms Smith as being a bully with no idea how to manage and someone who did not care at all.

[39] There was no detail as to what the bullying behaviour was and who was responsible for it except the three examples where Ms Smith raised uniform issues with her (name badge and tying her hair back).

[40] Ms McBride described these interactions with Ms Smith as being yelled at by her and feeling as though she had been picked on. Ms Smith describes the interactions as being fairly innocuous, simple statements from her to Ms McBride reminding her to comply with the uniform policy, as she would have done with any staff member – she denied yelling at Ms McBride.

[41] Having observed both witnesses answering questions and after considering all of the evidence about behaviour, work culture and atmosphere at Kensington Court Village, I am satisfied that Ms Smith would have spoken in a loud and matter of fact way to Ms McBride – that is how she expressed many of her answers to my questions. I am not satisfied that Ms Smith yelled at Ms McBride or that she rebuked her, confronted her or was in any way antagonistic or overbearing.

[42] Ms Gada, Susan Carter who works in HR for Ultimate Care, and Anne Thompson who works as a receptionist and administrator at Kensington Court Village, gave evidence denying any bullying behaviour. All three say they never witnessed any bullying behaviour and all three say no employees or residents ever reported bullying behaviour to them. Ms Smith denied bullying anyone.

[43] On the evidence in my investigation I conclude there was no bullying behaviour at Kensington Court Village generally, and specifically Ms Smith did not bully Ms McBride. The three incidents complained of by Ms McBride occurred but these do not amount to bullying nor were they unnecessary or unjustified behaviour on the part of Ms Smith who was managing Ms McBride.

[44] As I have concluded that Ms McBride was not bullied or subject to any unjustified actions there are no claims established for breach of her employment agreement, breach of good faith or a personal grievance for unjustified action causing disadvantage.

Variation to hours of work

[45] On reviewing the evidence in relation to the alleged change to Ms McBride's hours of work I note the following:

- (a) Ms McBride's contractual entitlement was to a minimum of 20 hours work per week. And Ms McBride's employment agreement also reserved the right for Ultimate Care to vary the hours she worked from time to time depending on need.
- (b) There was no pattern of work or representation that caused Ms McBride's written entitlement to be changed to some set shift pattern or a minimum of 30 hours per week. Similarly, there is no basis to imply a term into Ms McBride's

employment agreement that she was entitled to a set shift pattern or a minimum of 30 hours work per week.²

(c) Ms Smith did unilaterally change the way the rosters were drawn up for the two weeks commencing 18 January 2021. However, she did consult over this in so far as she advised staff of the change and she specifically met with Ms McBride to discuss the change.

(d) The way Ms Smith changed how the rosters were set had the effect of unilaterally changing the way Ms McBride might get additional hours of work. That is, from being allocated seven or more additional hours per week through shifts she preferred in terms of hours and work in rest home care, to being given only 20 hours per week and having to choose additional shifts from the available shifts which were less favourable for her in terms of hours and work in hospital care.

[46] So, the action that might inform Ms McBride's claims is a unilateral change to the way rosters were drawn up and in the case of Ms McBride a unilateral change to the way she was able to obtain additional work over her 20-hour contractual minimum.

Breach of Ms McBride's employment agreement

[47] Ultimate Care's unilateral change to the way rosters were drawn up and the consequent unilateral change to the way Ms McBride was able to obtain additional work over her 20-hour contractual minimum does not amount to a breach of Ms McBride's employment agreement:

(a) She had no contractual right to be rostered on for more than 20 hours of work per week.

² *Attorney-General v New Zealand Post Primary Teachers Association* (1992) 1 ERNZ 1163 (CA); *Edminston v Sanford Ltd* [2017] NZEmpC 70; and *Everist v McEvedy* [1996] 3 NZLR 348.

(b) She had no contractual right to be rostered on for recurring shifts or a particular shift pattern.

(c) She had no contractual right to have additional work allocated to her in the way it had been done prior to 18 January 2021.

Breach of the duty of good faith

[48] The duty of good faith is set out in s 4 of the Act. It requires an employer and an employee to not act in a way that would, or would be likely to, mislead or deceive the other. And it requires them to be active and constructive and responsive and communicative with each other.

[49] In terms of consultation or discussion over the change to be implemented I note:

(a) The unilateral change effected by Ultimate Care was not to a contractual right - or term of employment – therefore there was no need to consult and obtain agreement over the change.

(b) A change to policy, benefit or the way something operates – such as in this case how shifts are allocated – does require consultation in the form of advising what is going to change and why. And Ultimate Care met this requirement.

[50] I am satisfied that in effecting the change to the way the rosters were drawn up Ultimate Care did not mislead or deceive its employees and it was active, constructive, communicative and responsive, particularly to Ms McBride.

[51] Ultimate Care's unilateral change to the way rosters were drawn up and the consequent unilateral change to the way Ms McBride was able to obtain additional work over her 20-hour contractual minimum does not amount to a breach of the duty of good faith

Unjustifiable action causing disadvantage

[52] Ultimate Care did unilaterally change the way rosters were drawn up and this changed the way Ms McBride was able to obtain additional work over her 20-hour contractual minimum.

[53] This action did not cause a disadvantage to a condition of Ms McBride's employment.

[54] And, in any event, the action by Ultimate Care was justified in the circumstances – there was a substantive reason for the change and there was sufficient advice given to employees about the change. This was a decision that a fair and reasonable employer could have come to in all of the circumstances.³

[55] There is no basis for Ms McBride's claim arising out of an alleged unjustified action causing disadvantage.

Constructive dismissal

[56] Ms McBride resigned but her resignation can be treated as a dismissal if certain circumstances are met; this is a constructive dismissal.

[57] In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* the Court of Appeal set out three non-exhaustive categories of constructive dismissal, where an employee's resignation is in response to the employer's actions:⁴

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign;
- (c) Where a breach of duty by the employer leads an employee to resign.

³ Section 103A of the Employment Relations Act 2000.

⁴ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] above n1.

[58] Ms McBride relies on the second and third limb in *Woolworths*.

Course of conduct

[59] In order to determine if Ms McBride has been constructively dismissed relying on the second limb of *Woolworths*, I must consider:

(a) Did Ultimate Care carry out a course of conduct with a deliberate and dominant purpose of coercing Ms McBride into resigning?

(b) If so, did Ms McBride resign in response to that course of conduct?

[60] On the evidence I am not satisfied that Ultimate Care carried out a course of conduct with Ms McBride either based on bullying or not providing her with her minimum contractual hours or agreeing to change those minimum contractual hours of work. And, in any event there is no evidence that any of Ultimate Care's actions towards Ms McBride were for the purpose of causing her to resign. In one of the last pieces of correspondence sent to Ms McBride before she resigned, Ultimate Care told Ms McBride she was a valued member of staff and would be welcomed back from her sick leave.

[61] There is no basis for Ms McBride's constructive dismissal claim based on the second limb of *Woolworths*.

Breach of duty

[62] The relevant case law shows that for a constructive dismissal based on a breach of duty I need to be satisfied that:⁵

(a) There was a breach of duty by Ultimate Care.

⁵ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] above n1; *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

- (b) The breach of duty was sufficiently serious, that is repudiatory or dismissive, to warrant Ms McBride's resignation.
- (c) It was reasonably foreseeable that Ms McBride might resign in response to the breach.
- (d) Ms McBride did resign in response to that breach of duty.

[63] In this case rather I am going to focus on the last step first as it is not entirely clear why Ms McBride resigned.

[64] On the face of it, it might appear that Ms McBride resigned because she believed she was entitled to 30 hours per week and by not giving her this minimum amount in the 18 January 2021 rosters, Ultimate Care was breaching her contractual right. But the totality of the evidence shows that the situation is more nuanced than just that. Here are the key facts:

- (a) Initially Ms McBride believed she was entitled to a minimum of 30 hours per week under her employment agreement due to the conduct of Ultimate Care in the course of allocating shifts to her in the fortnightly rosters.
- (b) Ms McBride wanted to keep being given 30 minimum per week and she had asked Ultimate Care to confirm her entitlement at a minimum of 30 hours per week before January 2021. At the time Ultimate Care said it would consider this after her hip surgery as it was currently concerned that she was unable to work 30 hours per week on a regular basis – evidenced by large amounts of sick leave being used by Ms McBride.
- (c) When Ms McBride went off work pending her hip surgery on 18 January 2021 the issue of her minimum entitlement being increased to 30 hours had not been resolved by Ultimate Care but it had made it clear to Ms McBride it did not consider she had a minimum entitlement of 30 hours.

- (d) I conclude that Ms McBride knew she did not have a contractual entitlement to a minimum of 30 hours per week and she believed Ultimate Care would not increase her minimum entitlement to 30 hours when she returned after her hip surgery.
- (e) After Ms McBride's hip surgery and her rehabilitation, around the start of June 2021 Ms McBride began looking for alternative work and was successful in gaining employment elsewhere; she commenced work in this new job on 7 July 2021.
- (f) Whilst looking for alternative work Ms McBride also engaged with Ultimate Care, through her advocate, seeking to settle her personal grievance.
- (g) As part of the discussions around these matters Ultimate Care offered to Ms McBride that it would increase her minimum hours to a contractual entitlement of 30 hours per week, noting that Ms McBride was a valued member of staff and would be welcomed back.
- (h) Ms McBride did not accept this offer from Ultimate Care and resigned from her employment in an email of 6 July 2021. In this email she stated:

I wish to terminate my work as support worker effective from 7 July 2021, I have fully recovered from my hip operation and have found work elsewhere

- (i) On 12 July 2021 Ms Carter (Head of People and Performance at Ultimate Care) had not seen Ms McBride's resignation and she sent an email to Ms McBride advising:

I have been advised that you were happy to accept our offer of a variation to your Contract increasing your weekly hours from minimum 20 to Minimum 30.

I have a variation letter prepared for you Would you like this emailed or put on a courier?

(j) Ms McBride did not accept the offer of 30 hours per week.

(k) In the investigation meeting Ms McBride's evidence was that she resigned because Ultimate Care would not give her 30 hours per week minimum. And she said she had been looking for work elsewhere previous to the January 2021 events as she was not happy at Ultimate Care – in fact she described it as an awful place to work.

[65] Putting all of this together my conclusion is that prior to January 2021 (sometime in 2020) Ms McBride had decided to leave Ultimate Care after her hip surgery because she had not been offered 30 hours minimum entitlement when she asked for it and because she was unhappy with the work environment.

[66] There are two key conclusions that inform this decision - the events of January 2021 did not cause Ms McBride to resign and the offer of an increase to 30 hours minimum in June 2021 did not change her decision to resign.

[67] So, working back from this reason for resigning I need to determine if:

(a) Ultimate Care did not agree to increasing Ms McBride's minimum hourly entitlement to 30 hours when she requested an increase to her hours.

(b) There was some issue with the work environment at Kensington Court Village.

[68] Then if either of these occurred then I need to determine if they amount to a breach of duty by Ultimate Care which is sufficiently serious to warrant Ms McBride's resignation and it was foreseeable that she would resign in response.

[69] I can deal with these steps relatively easily:

(a) Ultimate Care did not agree to increasing Ms McBride's minimum hourly entitlement to 30 hours when she requested this, but this was not a breach of any duty and cannot inform a constructive dismissal claim.

(b) There is no evidence of a poor work environment at Kensington Court Village and no basis to find Ultimate Care had breached any duty it owed to Ms McBride in terms of her work, such as providing a safe workplace. Ms McBride's view that informed her decision to resign was subjective and there is no basis to find Ultimate Care responsible in some way for that.

[70] So, in conclusion, Ms McBride resigned because she was unhappy at work and because she believed she was not going to be given a minimum of 30 hours work per week as a contractual right as she had requested. These factors do not arise from breaches of duty by Ultimate Care so there is no basis for Ms McBride's constructive dismissal claim.

Conclusion

[71] Ms McBride's claims are dismissed.

Costs

[72] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ultimate Care may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Ms McBride would 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.

[73] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁶

Peter van Keulen
Member of the Employment Relations Authority

⁶ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.