

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 411
3023304

BETWEEN

JULIE BRISTOWE

Applicant

AND

RAKEIWHENUA TRUST

T/A TUHOE HAUORA

Respondent

Member of Authority: Robin Arthur

Representatives: Stan Austin, Advocate for the Applicant
Peter Marshall, Counsel for the Respondent

Investigation Meeting: 8 October 2018 in Whakatane

Determination: 21 December 2018

DETERMINATION OF THE AUTHORITY

- A. Julie Bristowe was not constructively dismissed but was unjustifiably disadvantaged before her employment ended.**
- B. In settlement of her personal grievance for unjustified disadvantage, and by no later than 1 February 2019, Rakeiwhenua Trust must pay Ms Bristowe \$5000 as compensation for humiliation, loss of dignity and injury to her feelings.**
- C. The Trust's application for an order requiring Ms Bristowe to reimburse it for the monetary value of 21 days of study leave is declined.**
- D. Costs are reserved. A timetable for memorandum to be lodged has been set if an Authority determination of costs is needed.**

Employment Relationship Problem

[1] Julie Bristowe was employed from 4 April 2016 to 8 September 2017 as a mental health clinician for Tuhoe Hauora, a mental health services agency operated by the Rakeiwhenua Trust. Ms Bristowe worked from the Trust's offices in Taneatua, commuting daily from her home near Opotiki, about an hour's drive away. She resigned from that position on 10 August 2017, giving one month's notice.

[2] Ms Bristowe raised a personal grievance soon after her employment ended. She said her resignation was caused by the Trust's general manager Pania Hetet treating her unfairly over a health-related request. Ms Bristowe suffered from the painful auto-immune disease commonly called Lupus.¹ On 21 July 2017 she returned to work after a two-week period of sick leave taken due to Lupus-related symptoms. That morning Ms Bristowe asked Ms Hetet to consider a doctor's suggestion she be permitted to work reduced hours or from home one day a week to help manage particularly severe symptoms she was suffering at the time.

[3] The discussion that followed eventually led to Ms Bristowe's resignation on 10 August which she said was a constructive dismissal. She also said the Trust's chairperson Finney Davis had treated her unfairly, during the notice period, by not considering a request from her to withdraw her resignation.

[4] The Trust denied Ms Bristowe was treated unfairly. It said Ms Bristowe had been granted sick leave both before and after her request to Ms Hetet about working reduced hours or from home. Rather than rejecting the suggestions of Ms Bristowe's doctor, the Trust said Ms Hetet had arranged to meet with Ms Bristowe to discuss what further support she could be offered. It said Ms Bristowe resigned before the intended meeting could take place. It also denied Mr Davis was asked to allow Ms Bristowe to withdraw her resignation, so the Trust did not accept it had acted unfairly in not considering that possibility.

[5] In a counterclaim the Trust asked the Authority to order Ms Bristowe to reimburse it for \$4,368 for 21 days' study leave she was paid to attend a Maori Health diploma course. The Trust had approved leave for Ms Bristowe for the diploma course in February 2017. The terms of the approval, accepted in writing by Ms

¹ Systemic lupus erythematosus.

Bristowe, included an “organisation bond” that stated she would be “bonded and committed” to the Trust for one year on completion of her study. Ms Bristowe opposed any such order being made because she did not accept she had agreed to repay the cost of her study leave if she left before her course was completed.

The Authority’s investigation

[6] Ms Bristowe, her husband Geoff Bristowe, Ms Hetet, Mr Davis, and Ms Hetet’s personal assistant Mary-Jane Araroa each provided written witness statements for the Authority’s investigation of the parties’ claims. Ms Araroa did not attend the Authority investigation meeting and her witness statement was put aside. The other witnesses did attend. Under oath or affirmation, they each confirmed their own written statements and answered questions from me and the parties’ representatives. The representatives also provided oral closing submissions.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues for determination were:

- (i) Did the Trust, through its representatives, act unjustifiably towards Ms Bristowe in:
 - (a) how it dealt with her request for reduced hours or a work-from-home arrangement; and/or
 - (b) how it dealt with concerns she expressed in her resignation letter; and/or
 - (c) (if one were made) her request for reconsideration of her resignation (including whether she was treated differently from another person who had made a similar request)?
- (ii) Did the Trust’s actions in respect of those matters amount to a breach of its duty of good faith to Ms Bristowe?
- (iii) If the Trust did breach duties owed to Ms Bristowe, did this then cause her to resign so that the end of her employment amounted to a constructive dismissal?

- (iv) If actions of the Trust were found to be unjustified, what remedies should be awarded, considering:
 - (a) Lost wages; and
 - (b) Compensation under s123(1)(c)(i) of the Act?
- (v) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Bristowe that contributed to the situation giving rise to her grievance?
- (vi) Does Ms Bristowe owe the Trust any money for leave given for study in 2017 study?
- (vii) Should either party contribute to the costs of representation of the other party.

Responding to Ms Bristowe's request: an unjustified action?

[9] When she returned to work on 21 July Ms Bristowe went to Ms Hetet's office. Ms Hetet was busy working on a funding application but waved for Ms Bristowe to come in. Ms Bristowe gave her a medical certificate, based on an examination conducted the day before, setting out the following opinion of her doctor:

... [I]n my opinion she is currently medically unfit for full-time employment as a ... [c]linician due to her medical conditions, including Lupus and migraine headaches.

She suffers exacerbations of her condition by exposure to long work days and prolonged driving. She will benefit from reduced work hours and from possibly working from home one day per week.

She will be re-evaluated as to her fitness to resume full-time duties in 3 months.

[10] According to Ms Bristowe Ms Hetet then told her to "go away and think about what changes I could make". She said Ms Hetet stated the Trust did not have clients in Opotiki (near where Ms Bristowe lived) and if she was given part-time hours other staff would want that arrangement too.

[11] Ms Bristowe returned to her desk. Soon after she felt ill and "threw up". She then decided she was too upset to work and needed a further break. She filled out an application for sick leave and took it to Ms Hetet. She said Ms Hetet looked at the form and said: "I have worked with someone with Lupus and they were not as

dramatic as you are”. After signing the form Ms Hetet said to her: “When you come back to work, you need to decide if you are going to work or resign”.

[12] Ms Hetet’s account of those interactions differed in some key aspects. She said she was busy working on a funding application when Ms Bristowe came to her office on 21 July and was surprised by her request for shorter hours. She accepted it was “obvious” she was not enthusiastic about the idea. She thought Ms Bristowe wanted an immediate answer but Ms Hetet was not prepared to give her one. She suggested meeting the next week to talk about it. She said it was Ms Bristowe who first mentioned thinking about other options because of her health, including resigning. Ms Hetet’s evidence was that she responded by saying “that will be up to her and she should think about her options as well and we can discuss it all at the meeting next week”.

[13] When Ms Bristowe had returned about 30 minutes later with a leave application Ms Hetet said she had signed it “without hesitation”. In her oral evidence Ms Hetet accepted she had made a comment about Ms Bristowe’s Lupus condition being, comparatively, “dramatic” but denied she referred then to Ms Hetet having to decide to work or resign. Rather, as already noted, it was Ms Bristowe who first mentioned resigning in their brief conversation earlier that day. Ms Hetet accepted she had acknowledged resignation was one of the options but had “left it at that”. She also suggested Ms Bristowe think about what lifestyle changes she could make and had told her “I’ll see what I can do”.

[14] Ms Bristowe then began the further two weeks of sick leave. Ms Hetet followed up their brief discussion on 21 July with a letter dated 25 July and posted to Ms Bristowe’s home address:

I appreciate you are on leave at present, however as this leave was approved in haste, and at your request, it is important that I follow up with this letter to confirm our original discussion regarding your on-going health issues which need to be addressed on your return to work.

Therefore, as per our conversation please consider what lifestyle changes you can make to support your continuation in your role, as your employer I will also consider what further support we can offer.

I note that you are expected back to work on the 7th August 2017, according to your calendar you are on study leave. Please be advised that I have scheduled a meeting for us to discuss the above on the 7th August 2017 at

9.30am-10.30, please advise [tutor's name] that you be late to lectures on this day.

[15] The reference to study leave was for a course toward a Diploma of Applied Maori Health. Ms Bristowe had been granted leave in February to attend the course. As well as practicum work (completed as part of ordinary working days), the course required attendance at ten sessions of three-day wananga held in Rotorua throughout 2017. By the time Ms Bristowe resigned she had completed seven sessions. The topic of the cost of the study leave days she had taken became another issue to be resolved in this determination.

[16] However, in respect of the immediate question, there was no unjustified disadvantage to Ms Bristowe in how Ms Hetet responded to her request for further leave. It was granted, as Ms Hetet said, without hesitation.

[17] Neither, on balance, did the evidence establish as more likely than not that Ms Hetet had raised the topic of resignation or indicated only a binary choice of work or resignation was available. Rather, it was, more likely than not, an option Ms Bristowe raised and Ms Hetet had acknowledged as one option to think about. Ms Hetet's subsequent letter, written close to the time, asked for reflection from Ms Bristowe and undertook to consider what further support the Trust could offer her.

[18] Ms Bristowe could not recall plans for a meeting on her return being mentioned in her brief discussions with Ms Hetet on 21 July. The 25 July letter makes the prospect that, more likely than not, it was mentioned.

[19] There was also nothing in the note from Ms Bristowe's doctor that indicated some further or different response should be triggered under the Trust's policy for work-induced stress. It identified Ms Bristowe's health issues as arising from her medical conditions which could be made worse by long work days and driving but were not said to be caused by her job. The doctor's opinion was that Ms Bristowe would benefit from reduced hours. Similarly there was nothing to indicate a breach of the Trust's sick leave policy. Rather Ms Bristowe had been granted what she sought and been given an indication that her employer was open to the prospect of further support for her.

Responding to Ms Bristowe's resignation letter: an unjustified action?

[20] On Monday 7 August Ms Bristowe arrived at the Trust's offices in time for her scheduled 9am meeting with Ms Hetet. Ms Hetet's evidence described herself as being away from the office that week on "other business" for the Trust. She had arranged on Friday 4 August for her personal assistant to let Ms Bristowe their planned meeting for Monday would be delayed. There was some evidence of missed phone calls and messages to call back being left but, again on the balance of probabilities, it appeared Ms Bristowe was not actually advised of any postponement of the scheduled meeting.

[21] As a result Ms Bristowe had turned up on the morning of 7 August not knowing Ms Hetet would not be there to meet with her. She then learned from her team leader that this was because some staff had made a complaint of bullying against Ms Hetet and Ms Hetet would not be at the office that day.

[22] In his oral evidence to the Authority investigation meeting the Trust chair Mr Davis confirmed the Trust had received an anonymous complaint alleging bullying of some staff by two senior managers. On Employer's Association advice he had arranged for Ms Hetet to stay away from work for one week and staff were given time to come forward or contact him confidentially by email so the complaint could be considered further. After a week no one had come forward and he emailed all staff advising that work would continue as normal. He advised Ms Hetet of that and she returned to work.

[23] Meanwhile Ms Bristowe had gone ahead with attending her three-day study session that started on 7 August. On her return to work on 10 August she wrote the following letter of resignation:

I am informing you of my decision to resign as the Rangatahi Alcohol and Drug clinician; this is partly due to becoming unwell due to the travelling causing continued migraines, resulting in a Lupus Flare.

Also contributing to my decision to resign was the treatment I received by my manager when I became unwell at work. I produced a letter from my Doctor around my health, which the manager choose (sic) not to read. This also included a statement about my health from my manager "I have worked with someone with Lupus before and they were never this traumatic (sic)". I left that meeting and become (sic) further unwell due to the stress and was physically sick. I knew at that stage I needed to take some time off, I took a

leave app to my manager who used bullying tactics and showed no care, concern or compassion for my health. She signed the leave app and threw it at me.

Thank you for the opportunity to be a part of the Tuhoe Hauora team.

My last day of work will be on the 8th September.

[24] Her letter was not addressed to anyone. As Ms Hetet was still away from the office Ms Bristowe emailed her letter to Mr Davis with just this covering note: "Attached is my resignation". The following morning Mr Davis sent the following reply by email: "Your resignation has been received and accepted. On behalf of Tuhoe Hauora we acknowledge the mahi you have accomplished and wish you well in the future". He did so after having contacted Ms Hetet to advise her he had received a resignation letter from Ms Bristowe. Ms Hetet's oral evidence was that she told Mr Davis that Ms Bristowe had obviously had time to think about it, so he should accept the resignation. Neither Mr Davis nor Ms Hetet considered, at the time, whether this was a matter that could be left until Ms Hetet returned to work.

[25] On her return to work Ms Hetet sent the following email to Ms Bristowe under the subject heading of Resignation:

I understand our Chairman has on behalf of the (sic) myself accepted your resignation, in terms of the allegation of bullying that you refer to in this letter I must state is not a shared experience, the sequence of events from my perspective is that I was ambushed into signing further unplanned leave for you again, knowing that from Jan 2017 up to that point you have already been absent from this work place for 40.5 day inclusive of all types of leave and study, as of today now stands at 51.5 days. Clearly we both have differing views of the events of that afternoon so I therefore suggest we leave this matter as it stands.

Study leave agreement

As per our agreement when you were initially supported to undertake the [diploma course] we had an agreement that should you leave prior to the end of study or before the end of your bond (one year) there was an expectation that you would re-pay the cost of your attendance to attend study. Therefore I have had [an administrator] calculate the total re-payment for this to date, this calculation covers actual attendance at the course to date which equates to the following:

21 days study leave @ 168 hours = \$208 per day total amount owing: \$4,368 should you require to discuss further please send an invitation to meet, otherwise discuss with [the administrator] repayment options thank you.

[26] Ms Hetet's letter, in the context it was written, was not what a fair and reasonable employer could have done in all the circumstances. In short it failed to meet the statutory test of justification. Ms Bristowe had made an express allegation of unfair treatment and bullying by Ms Hetet. Only the week before the Trust, through the efforts of Mr Davis, had gone to considerable efforts to check an anonymous allegation and allow employees to come forward so it could be properly investigated. Instead of arranging some suitably fair and independent investigation of Ms Bristowe's openly-made allegation, whether it was ultimately right or wrong or fairly made, Ms Hetet simply dismissed Ms Bristowe's accusation about her as being different from her recollection so the matter was to be left "as it stands". What 'stood' was that Ms Bristowe had resigned but given the reason for having done so as, in part, unfair treatment. The Trust acted unfairly, through Ms Hetet, in not arranging some investigation or other fair process to make some reasonable assessment of Ms Bristowe's complaint. As Ms Bristowe remained an employee at that point, serving out her notice to 8 September, it was an unjustified disadvantage to her. Other anonymous employees had been given the courtesy the week before of an opportunity to come forward and have their concerns addressed in some formal process. Ms Bristowe's complaint was not treated with the same degree of fairness.

[27] This conclusion is strengthened by the accompanying reference in Ms Hetet's 14 April email to a requirement to repay the value of days taken for the study leave Ms Bristowe had been granted in February. Even if there were a sound contractual basis for making that requirement, the context in which it was made meant there was an unfortunate retaliatory air to the demand made. The context was the anonymous bullying complaint that resulted in Ms Hetet staying away from the office the previous week, Ms Bristowe's allegations in her resignation letter and the fact that Ms Hetet's email was sent so soon after her return to work in the Trust offices on 14 August.

Response to request to withdraw resignation: an unjustified action?

[28] Attached to Ms Hetet's 14 August email to Ms Bristowe was a copy of her application for the diploma course. It had been signed on 27 January 2017 by Ms Bristowe's team leader. Below the team leader's signature was a handwritten note in Ms Hetet's handwriting, with her signature and the date of 30 January 2017:

As per our discussion Julie will be bonded for one year on completion of course. Should she leave before that time the organisation will expect to be paid back for study time away.

[29] Ms Bristowe emailed the district health board course co-ordinator and asked for a copy of her original application. What she was sent in reply was the same as the one sent to her by Ms Hetet, but without Ms Hetet's handwritten note. The course co-ordinator told Ms Bristowe that Ms Hetet had herself asked for the same document in the previous week.

[30] An important part of the background at that point was that Ms Hetet provided Ms Bristowe with a formal letter of approval for her 2017 study application. The letter dated 14 February 2017 set out the basis on which the study was approved under various headings. Only two terms needed be set out in full for the purposes of this determination:

...

b) PAID LEAVE

You will receive paid leave from your core role whilst you carry out your study commitment.

...

f) ORGANISATION BOND

Upon completion of your full study, you will be bonded and committed to this organisation for 1 year.

[31] The letter included a declaration section for Ms Bristowe to confirm she understood and accepted the study terms and conditions outlined in the letter. She did so. Her signature was dated 15 February 2018.

[32] Comparing the two copies of the application form she had obtained by 21 August Ms Bristowe formed the view that the handwritten note from Ms Hetet was not written in January 2017, as dated. Instead she believed Ms Hetet had added it only recently "to try and strengthen her demand for payment".

[33] Ms Bristowe, after talking the matter through with her husband, decided to try and arrange a meeting with Mr Davis. She had two purposes in mind. One was to show him the file note which she described as being "a false document". The other was to talk to him about her resignation. She knew of an earlier occasion when another employee of the Trust, who was a relative of Mr Davis, had put in a notice of resignation but after some discussion was permitted to withdraw it and remain in her

employment. Ms Bristowe hoped a discussion with Mr Davis would lead to a similar outcome. As she put it in her oral evidence at the Authority investigation she thought she would thereby get “some resolution about my health and continue”.

[34] She then requested a meeting with Mr Davis but did not disclose her full reasons for the request, as shown by the following email trail:

22 August 2017

1.51pm	Bristowe	Kia ora. Could I please meet with you tomorrow.
1.53pm	Davis	Kia ora Julie. Please state the purpose of this meeting.
2.00pm	Bristowe	I would like to discuss some information relating to my study.
2.11pm	Davis	Kia ora ano Julie. This is an operational matter. Please communicate this with your GM.
2.18pm	Bristowe	This is a matter that needs to be addressed with you due to the nature of the issue. I have consulted a lawyer and this is a serious matter.
2.23pm	Davis	Ki ora Julie. What is the nature of the issue for it to be a serious matter?
2.29pm	Bristowe	False document.
3.37pm	Davis	We can meet tomorrow morning after karakia.
3.44pm	Bristowe	Ok great thank you, will that be about 9.30am.

[35] Ms Bristowe and her husband attended the meeting with Mr Davis the following morning. Her evidence was that Mr Davis was adamant he would not discuss her resignation or related events with her. He was firm that he would only discuss the file note issue and was “very interested in understanding what had happened with the file note”.

[36] Mr Bristowe’s evidence was to the same effect. He said that when Ms Bristowe tried to raise the issue of her resignation Mr David “quite abruptly said the meeting was not about that and he was not going to discuss that matter”.

[37] Mr Davis' evidence was that he was interested in the allegation that Ms Hetet's handwritten note on the application form was in some way dishonest but was satisfied, in the end, that it was file note for herself and nothing dishonest was involved. He told Ms Bristowe the reimbursement of study leave was an operational matter for Ms Hetet to deal with, not him as chairperson in a governance role. He also told her that the allegations raised in her resignation letter were an operational matter for Ms Hetet.

[38] He said that "at no time in this meeting" did Ms Bristowe suggest she wanted to withdraw her resignation. The evidence of Mr and Ms Bristowe was to the same effect. The discussion had not canvassed that point because Mr Davis made it clear her resignation was not a topic he would talk about at all.

[39] As a result it was clear Ms Bristowe had made no express request to be allowed to withdraw her resignation. Neither was her evidence sufficient to uphold her allegation that she was treated differently and unfairly from another employee. No real similarity of circumstances was established.

[40] The following emails from and to Mr Davis show how he concluded his direct involvement in Ms Bristowe's concerns:

24 August 2017

5.43pm Davis to Bristowe After viewing the document and also in consultation with the General Manager, Pania Hetet around the accusation I have concluded this is still an administrative matter. Please progress this further with your GM.

6.37pm Bristowe to Davis Thank you for your txt. I will not be talking with pania it's too unsafe for me and unethical. I will be seeking legal advice tomorrow and you will be hearing from my lawyer.

7.41pm Davis to Hetet As per our conversation relating to the matter of the document please see below.

25 August 2017

8.54am Hetet to Davis No problem, let the process take due course.

Did the Trust's breach its good faith duty to Ms Bristowe?

[41] Against that background there was one clear failure by the Trust to meet its statutory good faith duty to Ms Bristowe as its employee. As already identified, it should have done more to consider the complaint she made in her letter of resignation. The employment relationship remained on foot for the following month. The Trust, acting in good faith, should have been active and constructive, responsive and communicative in addressing her allegations about how Ms Hetet treated her request for adjustments to her working arrangements. Even if such a process reached the same conclusion as Ms Hetet's personal opinion of what happened, it was something that a fair employer acting reasonably should have done.

[42] Good faith obligations in an employment relationship are, of course, mutual. Ms Bristowe failed to observe the duty of good faith herself. She misled Mr Davis about the purpose of the meeting she sought on 22 August, saying it was for one purpose when she intended to pursue another. She opted not to seek any further meetings with Ms Hetet. Her declaration that it was "unsafe and unethical" for her to talk to Ms Hetet did not absolve Ms Bristowe from her own responsibility to be active and communicative. If she had truly wanted to withdraw her resignation and discuss further what accommodation of her health needs might be arranged, she could and should have openly asked for that to be considered. She did not, in part, because as disclosed in an email to the district health board course co-ordinator, Ms Bristowe had already taken steps by 21 August to get another job with a local health trust much closer to her home. It was a job she had done previously. She started the job with that local trust on 15 September 2017, one week after her notice period at the Trust expired. Some six weeks later she then secured a new position elsewhere in the Eastern Bay of Plenty on better pay than she received with the Trust.

Was the resignation really a constructive dismissal?

[43] Ms Bristowe submitted the resignation she tendered on 10 August was a constructive dismissal because it was really caused by the Trust breaching duties owed to her.

[44] Longstanding guidance from the Court of Appeal in the *Electric Power Board* case suggests the following approach to evaluating such a claim:²

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[45] Evaluating the existence and seriousness of a breach of duty is an assessment of fact and degree. As explained in the *Greenwich* case:³

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship ... In identifying cases of constructive dismissal, and in separating them from cases of employee resignation, we suggest there is useful insight to gained from a consideration of the real or true source of the initiative for termination. If the real source of the initiative for termination is the employer, or the basic causation comes from the employer, then the case is one of constructive dismissal.

[46] What comprises a breach may include a failure to keep an express term of the employment agreement or a breach of the term implied in every employment agreement that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Breach of that implied term need not be deliberately intended by the employer. Rather, if the effect of an employer's conduct as a whole is determined to be such that, assessed reasonably and sensibly, the employee cannot be expected to put up with it, that will amount to breach of that implied term of trust and confidence.⁴

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 1 ERNZ 168 (CA) at 172.

³ *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cases 95 at 104.

⁴ See *Auckland Electric Power Board*, above n 2, at 172.

[47] Ms Bristowe's claim of constructive dismissal fell at the first hurdle of the finding of facts, made earlier in this determination, about the breaches said to have caused her resignation.

[48] Her description of those causes was encapsulated in this passage from her written witness statement:

I was very clear in my resignation that a major influence on my decision to resign was the way I had been treated and because I was frustrated over my inability to have my situation considered. At the time I was very distressed and [Ms Hetet] was clear that this was an option she wanted me to consider. I just had to get relief from the situation and [Ms Hetet] had been quite unsympathetic.

[49] Even if Ms Hetet's brusque manner on 21 July appeared inconsiderate and caused Ms Bristowe some unhappiness or resentment, an objective assessment did not show she clearly crossed the *Greenwich* border line to amount to conduct dismissive of the employment relationship. Ms Bristowe's evidence did not compellingly establish Ms Hetet had clearly indicated she would not consider Ms Bristowe's situation or was unsympathetic to her. It was Ms Bristowe who first mentioned resignation as one of her options and Ms Hetet had encouraged her to consider all her options. Ms Hetet appropriately arranged for a meeting to discuss what could and should happen. She also granted the further leave Ms Bristowe sought and quite reasonably asked her, during that time, to reflect on what lifestyle changes might assist her. None of those actions established a lack of sympathy to the level that would amount to a breach of duties to reasonably provide leave when sought for good reasons, to act in good faith or not to act in a manner likely to seriously damage the relationship of confidence and trust with the employee.

[50] The real or true source of Ms Bristowe's initiative to end the employment relationship was her difficult and draining medical condition at the time, not actions or omissions of her employer.

[51] The other situations in which she said she was unjustifiably disadvantaged, which would be breaches of duty, occurred after she had resigned. This was the failure of the Trust to inquire appropriately into her allegations about how Ms Hetet spoke to her and whether, at the 23 August meeting, Mr Davis was asked and refused to consider allowing Ms Bristowe to withdraw her resignation. Even on Ms

Bristowe's account of events, those situations could not have caused her to resign because they happened after she sent her letter of 10 August.

[52] Ms Bristowe has failed to establish her claim of constructive dismissal.

Remedies for the personal grievance

[53] Ms Bristowe has established one grievance she pursued in the Authority – the unjustified disadvantage to her of the Trust not doing more to fairly inquire into her allegation that Ms Hetet had “used bullying tactics and showed no care, concern or compassion” when she applied for further sick leave on 21 July. As already noted this was not a matter of whether some proper inquiry would or would not have substantiated Ms Bristowe's view. Rather it concerned the lack of fairness in not even properly considering the prospect of making an inquiry.

[54] A remedy for that grievance did not lie in lost wages. What could be awarded was compensation for humiliation, loss of dignity and injury to Ms Bristowe's feelings caused by that failure. Such an award cannot include compensation for other distress she undoubtedly suffered because of the severity of her medical conditions at the time as that has not been found to be due to the Trust's actions. Filtering those other factors out, an award of \$5000 was warranted to compensate Ms Bristowe for the upset that she experienced from no further inquiry being fairly made into the concerns she raised.

[55] Ms Bristowe did not contribute to the situation giving rise to that particular grievance, rather it was the result of decisions that Mr Davis and Ms Hetet made. Accordingly, although considered, no reduction of the remedy awarded to her was required under s 124 of the Act.

Any order for reimbursement of paid study leave?

[56] The Trust, ultimately, did not contend Ms Bristowe was bound by an express term to reimburse it for the cost of 21 study days she was granted and took for the diploma course before her employment ended. Rather it submitted there was an implied term that Ms Bristowe would pay for those days of leave if she ended her employment with the Trust before the course was completed. The following findings and analysis explain why its claim for order for such a payment has been declined.

[57] Firstly, the words of the written study leave approval letter Ms Bristowe signed made no reference to the prospect she could be called upon to repay any amount. It stated she “will receive paid leave”. The reference to a bond referred to that operating “upon completion of your full study”. It made no provision for what would happen if she did not complete the study, which might occur for a range of reasons, including illness, accident, disillusion with the course or leaving the employment. All those circumstances were readily foreseeable. Given the apparent formality of the letter, it could be taken to comprise all the terms that the employer, who drafted it, considered necessary. Her employment agreement included a term on study leave that said “time off shall be allowed” to attend lectures and to prepare for and attend exams. It made no reference to payment for such leave or any repayment. It also included a variation term that allowed for any variation to be by agreement in writing. The 14 February letter was such a variation and did not go as far as the Trust maintained.

[58] Secondly, Ms Hetet’s note dated 30 January was not sufficient evidence of any mutual intention or agreement that repayment was expected and would be made if Ms Bristowe left the Trust before completing the diploma. On the balance of probabilities, Ms Hetet’s note was made at the time of that date and not added later as Ms Bristowe had alleged. Ms Hetet said she made those notes as a file note following a discussion with Ms Bristowe and her team leader about the study leave application. However if there was an agreement about such a specific point in late January, it was difficult to understand why it was not then expressly included in the formal approval letter Ms Hetet had drafted and Ms Bristowe had signed in February.

[59] Thirdly, even if Ms Hetet’s note did set out an at least orally agreed term, a closer reading of it did not support the Trust’s claim. Her words refer to Ms Bristowe being bonded for one year on completion of the course. They then refer to her leaving “before that time” and an expectation the Trust would be paid back for the study leave. Those words clearly refer to what might happen in the one year following completion of the course, not anything before then.

[60] As a result the Trust’s claim did not meet well-known factors that would support an implied term for repayment by Ms Bristowe.⁵ Reimbursing the Trust for the wage cost of 21 days study was not necessary to give business efficacy to the

⁵ *BP Refinery (Western Port) Pty Ltd v Shire of Hastings* [1977] 16 ALR 363 at 376.

terms of the study leave approval letter. The requirements of the letter were effective without such an implied term. Neither was it so obvious that such an implied term would go without saying.

Costs

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

[62] If they are not able to do so and an Authority determination on costs is needed, Ms Bristowe as the party who appears to have achieved the greater degree of success may lodge, and then should serve, a memorandum on costs by no later than 1 February 2019. From the date of service of that memorandum the Trust 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.

[63] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶ As a preliminary indication, in the absence of any information about relevant factors such as whether there was an operative *Calderbank* offer, an award of costs at the daily tariff would be the most likely outcome.

Robin Arthur
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].