

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 461
3151401

BETWEEN SUSAN BROWN
 Applicant

AND WATCHDOG SECURITY
 GROUP LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Jim Wynyard, counsel for the Applicant
 Ruthi Bommoju, counsel for the Respondent

Investigation Meeting: 24 May 2022 at Rotorua

Submissions Received: 7 June 2022 from the Applicant
 22 June 2022 from the Respondent
 29 June 2022 from the Applicant

Date of Determination: 15 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Susan Brown, was employed by the respondent, Watchdog Security Group Limited (Watchdog) as a Security Officer. She commenced employment around 8 December 2017 and her employment ended with her resignation on 6 February 2021.

[2] Ms Brown claimed that her resignation was a constructive dismissal. She alleged that Watchdog's conduct in connection with a meeting held with her on 6 February 2021 had fundamentally breached the trust and confidence in the employment relationship and had repudiated the contract between the parties. Ms Brown claimed that Watchdog's breaches were sufficiently serious that her resignation was reasonably foreseeable.

[3] Watchdog denied that Ms Brown had been dismissed. It said she resigned in response to complaints that had been raised informally with her during a discussion that was held on 6 February 2021.

[4] Watchdog said the 6 February discussion with Ms Brown was not a disciplinary meeting but was simply an opportunity to inform Ms Brown about the issues that had been brought to Watchdog's attention and to advise her of expected standards of conduct moving forward.

[5] Ms Brown became agitated during the meeting and verbally indicated her intention to resign. Watchdog told her it did not want her to resign, but she reiterated that she intended to do so. Ms Brown was told that if she wanted to resign then she would have to do so in writing. Ms Brown responded to that by writing out her resignation and leaving the meeting.

[6] Watchdog gave Ms Brown 24 hours to reconsider her resignation because it believed she had overreacted and had resigned in the heat of the moment. Although Ms Brown was given an opportunity to withdraw her resignation, she did not do so.

[7] Watchdog denied breaching or repudiating any of the terms or conditions of Ms Brown's employment. Watchdog said it was not reasonably foreseeable that a normal workplace conversation with Ms Brown to let her know about complaints that have been made about her would result in her resignation.

The Authority's investigation

[8] The Authority conducted an in-person investigation meeting in Rotorua.

[9] Ms Brown attended the investigation meeting. She also filed two written statements from witnesses who did not attend the investigation meeting.

[10] The respondent filed six witness statements. Mr Brett Wilson - Watchdog's CEO, Mr Trevayze Wairepo - Watchdog's Central Mall Rotorua

[11] Supervisor, Mr Geoffrey Clark-Bilanovic and Ms Rose Ruki (who were both Security Officers) attended the investigation meeting. Mr Clark-Bilanovic had been employed by Watchdog since 2020 and Ms Ruki worked for Watchdog during the summer of 2021.

[12] Mr Kim Marurai, Watchdog's Operations Manager, was scheduled to attend the investigation meeting in person, but was unable to do so due to health issues. By agreement Mr Marurai converted his witness statement into a sworn affidavit that was filed on 7 June 2022.

[13] At the end of the investigation meeting the Authority provided the parties with a preliminary indication of its findings on the issues to be determined. The purpose of that was to encourage the parties to resolve their employment relationship problem by agreement, after having had the benefit of the Authority's preliminary views on the matters in dispute.

[14] Section 160(3) of the Employment Relations Act (the Act) states that the Authority is not bound to treat a matter as being of the type described by the parties, so when investigating the matter the Authority can concentrate on resolving the employment relationship problem, however it had been described by the parties.

[15] The employment relationship problem in this case was the 6 February 2021 discussion, which had given rise to Ms Brown's constructive dismissal grievance. However, it was open to the Authority to determine that the employment relationship problem that had occurred in fact involved a disadvantage grievance instead of a dismissal grievance.

[16] The disadvantage the Authority identified related to Watchdog's involvement of Ms Ruki in the 6 February 2021 discussion without Ms Brown's consent to that occurring. This is discussed later in the determination.¹

[17] During the investigation meeting, the Authority indicated to the parties that it was thinking of proceeding on that basis, so the parties had an opportunity to specifically address that in their submissions.

Issues

[18] The following issues were to be determined:

- (a) Was Ms Brown's resignation a constructive dismissal?
- (b) If so, was her dismissal justified?
- (c) If not, what if any remedies should she be awarded?

¹ See paragraphs [73] – [84].

- (d) Was Ms Brown unjustified disadvantaged as a result of the 6 February 2021 meeting?
- (e) If so, what if any remedies should Ms Brown be awarded?
- (f) Should any remedies Ms Brown is awarded be reduced under s 124 of the Act on the grounds of contribution?
- (g) What if any costs and disbursements should the successful party be awarded?

Background facts

[19] On 2 February 2021 Mr Wairepo had forwarded Mr Marurai a complaint that Mr Clark-Bilanovic had sent Mr Wairepo that afternoon. Mr Clark-Bilanovic had initially verbally complained to Mr Waipero that Ms Brown spent a good hour on Saturday while she was on duty purchasing a phone from a mobile phone store based in the Mall.

[20] Mr Clark-Bilanovic complained that he had seen Ms Brown purchasing the phone, talking to staff, and that later in the day he reported that she had again returned to the mobile phone store to finish her purchase and talk to the staff again for another hour. Mr Clark-Bilanovic said he had a conversation with Ms Brown about her activities and she had confirmed that she was not on a break while she had been seen in the mobile phone store.

[21] Mr Clark-Bilanovic complained that on the following day (Sunday) Ms Brown started work and then 30 minutes later bought food and sat in the food court eating it while she was on duty, leaving Mr Clark-Bilanovic to watch the floor in the Mall because the next guard was not due to start until 4.30 pm. Mr Clark-Bilanovic complained that Ms Brown's conduct was inappropriate and emailed a complaint to Mr Wairepo on 2 February 2021.

[22] A couple of days later Mr Wairepo received a complaint from the Food Court Supervisor at the Mall that Ms Brown was going into the cleaner's office and helping herself to food that had been left for the cleaning staff by one of the food shops in the Mall and that she had been using cleaning products from the cleaners' cupboard without the cleaners' permission. There were also complaints that Ms Brown would tell the cleaners how to do their job while sitting down eating while they were trying to clean the area.

[23] On 5 September 2021 Mr Wairepo received an email complaint from the Manager of a food shop in the Mall that Ms Brown had requested free or discounted food near the end of

the day. The email said that the cleaners had complained to the food shop staff that Ms Brown would help herself to food that the food shop staff had left out for the cleaners.

[24] Mr Wairepo sent copies of the complaints to Mr Marurai and Mr Wilson. Mr Wairepo also called and spoke to Mr Wilson about how to handle the complaints.

[25] Mr Wilson told him to deal with the matter informally by meeting with Ms Brown to discuss the complaints and to remind her of the standards of conduct that Watchdog expected from her. The standards consisted of not taking free items, including food, from any shop owners, not conducting personal activities (such as personal shopping) during shifts, reminding her to keep her personal activities confined to her break times or outside of work hours.

[26] Mr Wilson also reviewed the security camera footage from the Mall to verify that Ms Brown was in the mobile phone shop for around an hour and a half on the day that related to Mr Clark-Bilanovic's complaint.

[27] At that time of these complaints Mr Wairepo had only been in his position of Mall Supervisor since October 2020, although he had been working for Watchdog since 2018, rotating around different sites undertaking security work for it. Mr Wilson considered that because Mr Wairepo was relatively new in the role Mr Marurai, who at that time had been Watchdog's Operator Manager for about three or four months, should also be involved in the discussion with Ms Brown.

[28] On 6 February 2021 Mr Marurai arrived at the Mall in the hope of speaking to the Manager of the food shop who had made the complaint to Mr Wairepo. The Manager was unable to meet in person, so they spoke on the phone. The Manager of the food shop confirmed the details of her email complaint to Mr Wairepo the previous day. She also confirmed that food her staff had left out for the cleaners was being removed by Ms Brown.

[29] Mr Marurai also spoke to the Food Court Supervisor, Eris Huys about the complaints. Ms Huys confirmed to Mr Marurai that Ms Brown had been removing food that had been left out for the cleaners from the cleaners' office.

[30] Another complaint was made by Ms Huys that Ms Brown would often approach the cleaners and ask for rubbish bags or to use the cleaners' cleaning equipment, which was not

permitted by their company. Ms Huys said in a subsequent written statement that the cleaners had been told they were not to give out cleaning supplies to security staff.

[31] After receiving this information, Mr Marurai decided to have an informal discussion with Ms Brown that day, to see what she said about the ‘food’ complaints. Mr Marurai decided that the discussion with Ms Brown should be held before she started her shift at 1500 hours that day.

[32] Mr Marurai’s intention for this discussion was to put the complaints/concerns to Ms Brown so she knew what had been said. He also wanted to give her an opportunity to respond if she wanted to, to what was being said about her, particularly about the food complaints. Mr Marurai intended to relay Ms Brown’s comments to Mr Wilson who would be the person to decide if any further investigation or steps needed to be taken.

[33] Mr Marurai said that he wanted to ensure that the discussion was firm and professional but also that Ms Brown felt safe and comfortable. Mr Marurai took care to set up the seating in the Watchdog office in a way that would not make Ms Brown feel uncomfortable or trapped in the space. He ensured she had easy access to the doorway and that the door was left approximately five centimetres ajar, so Ms Brown could easily leave the meeting at any time.

[34] Mr Marurai asked Mr Wairepo to be involved in the discussion as Ms Brown’s supervisor. Mr Marurai also arranged for a female Security Officer (Ms Ruki) to join the discussions as a “*wahine support*”. Mr Marurai did that so Ms Brown would feel more comfortable by having another female present and to ensure there could not be any allegations of impropriety or a power imbalance made due to two male managers talking to Ms Brown by herself.

[35] The meeting was conducted in Watchdog’s back security office. It is a private area and only accessible to security staff. The area around where the office is was restricted to food court staff access and security only, who had to use an access code or swipe card to enter. The music that is played by a nearby shop meant that no-one else could have overheard what was being discussed in the office.

[36] The Authority heard a lot of evidence about the office in which the meeting occurred, and notwithstanding Ms Brown’s views to the contrary, the Authority considered it was a private and appropriate place to hold such a meeting.

[37] When Ms Brown came into the staffroom, before her shift started on 6 February 2021, Mr Marurai advised her that he needed to talk to her because he had received some complaints about her. He also told Ms Brown that she was free to leave whenever she wanted and that she did not have to answer any questions that he had for her. She was seated near the door so she could easily leave.

[38] There was no indication from Ms Brown that she did not want to participate in a discussion, so Mr Marurai then set out the complaints from the food store Manager about the requests for free or discounted food and from the cleaners' supervisor about the taking of the cleaners' food from the cleaner's office.

[39] Mr Marurai told the Authority he was only interested in the complaints around the food at that point, so never put any other issues to Ms Brown. He said that if she had told him she did not want to talk about it that would have been the end of the discussion. Mr Marurai's intention at that stage was just to hear Ms Brown's side of the story.

[40] However, in response to this information about the food related complaints, Ms Brown quickly grew agitated, and began shouting that they get free food anyway. She then made complaints about Mr Wairepo, involving why was he not giving her enough hours to work and the need for her to do other work outside of Watchdog.

[41] Mr Marurai said it quickly became obvious to him that the conversation with Ms Brown was not achieving what it needed to, despite his attempts to bring the conversation back to the matter at hand – namely the food complaints – numerous times.

[42] Mr Marurai said he decided to end the conversation because the emotions were high, and Ms Brown was visibly upset. Ms Brown verbally shouted that she was going to resign, and Mr Marurai told her that was not necessary, and the conversation was not about her resigning. However, Ms Brown insisted that she wanted to resign, despite Mr Marurai having reaffirmed a number of times resignation was not necessary.

[43] Mr Marurai told Ms Brown she could not verbally resign because resignations had to be in writing. Ms Brown then proceeded to handwrite a resignation letter. Mr Marurai again told Ms Brown "*I don't want you to resign*", but when she insisted Mr Marurai said he felt he was left with no choice but to take the resignation letter Ms Brown had written during the meeting, in light of her visible agitation.

[44] Mr Marurai said it felt to him as if Ms Brown was looking for any excuse to resign. As she was leaving Ms Brown began another tirade of verbal abuse directed towards him and Mr Wairepo.

[45] Mr Marurai said that he was concerned that Ms Brown was acting in a highly emotional state and would go into the Mall, in uniform, drawing adverse attention to herself. He therefore asked her to cover or remove her Watchdog uniform and when she refused to do that, he walked with her out by the back door and wished her well.

[46] Mr Marurai said that Ms Brown accused him and Mr Wairepo of being racist amongst other issues related to colour. Ms Brown is Māori, Ms Ruki is Māori, Mr Wairepo is part Māori and Mr Marurai said he had darker skin than Ms Brown.

[47] While Ms Brown denied making such allegations, the Authority has accepted the evidence of the three other attendees in that meeting that she did. Ms Ruki told the Authority that she was particularly offended as a Māori woman that Ms Brown would be making racism accusations in the way that she did.

[48] The Authority finds that the discussion that occurred on 6 February 2021 was not racist, the discussion was not racially motivated and Ms Brown was not discriminated against based on her race.

[49] Mr Marurai reported back to Mr Wilson, explaining that Ms Brown had been unreasonable and abusive and that she had provided a handwritten resignation notice. Mr Wilson said he would deal with the matter.

[50] Ms Brown emailed Mr Wilson on 6 February 2021 and said about the discussion that had occurred with her managers that day *“I was not informed in advance about my rights nor about the meeting that will take place. I was recorded without my consent and are (sic) taking legal action”*.

[51] Mr Wilson responded by email to Ms Brown half an hour later. He told her that the meeting was not a formal disciplinary meeting, and she had not been recorded. Watchdog did not need to give her notice of the meeting, because it was just a discussion to alert her to the complaints and to advise her of expected standards of behaviour. That approach was consistent with how concerns had previously been addressed with her.

[52] Mr Wilson pointed out that the company was perfectly entitled to have such discussions with her because it had received complaints from a client about her seeking discounted or free food items. He pointed out that Ms Brown had chosen to resign in response to this discussion. Mr Wilson told Ms Brown, “*You have 24 hours to reconsider your resignation if you wish but we stand by our right to manage staff on the job if their performance is not up to standard.*”

[53] Instead of withdrawing her resignation, Ms Brown raised a personal grievance claim for constructive dismissal.

Was Ms Brown’s resignation a constructive dismissal?

[54] It was very clear to the Authority that the meeting on 6 February 2021 was not a disciplinary meeting. It was an informal discussion. Watchdog had good reasons for wanting to talk to Ms Brown about the complaints that had been made. It was a voluntary meeting, that she could have left at any time, and which she did in fact elect to leave before all relevant matters could be discussed.

[55] There was no legal obligation on Watchdog Security to have advised Ms Brown of the meeting in advance. The decision to meet with Ms Brown was made on the same day as they had the discussion with her, after Mr Marurai had spoken to others at the Mall.

[56] The meeting was not recorded. There was a video camera over the safe, which did not have sound, and which would not have captured Ms Brown during the meeting that was held on 6 February 2022.

[57] Ms Brown admitted to the Authority that she knew that disciplinary action had to be undertaken by Mr Wilson only. Mr Wilson was not at the meeting and he had not made any disciplinary allegations against Ms Brown. There was nothing to suggest the discussion was a disciplinary meeting. Ms Brown’s subjective view about that it was a disciplinary meeting was incorrect.

[58] When the meeting occurred, Mr Marurai’s focus was on the food related allegations and in particular on obtaining Ms Brown’s response to the concerns that had been raised with him about her asking for free or discounted food and removing food from the cleaners’ office.

[59] Ms Brown accepted that she became “*extremely emotional*”, because she was embarrassed, during the meeting. She said she felt she was being “*accused of matters that were false*” and without substantive evidence being provided.

[60] The Authority considered this misrepresented the discussion that occurred. The food related concerns that had been raised with Watchdog were being disclosed to Ms Brown, so she had an opportunity to put forward her views about them. While the intention had been to also raise the other issues that had been complained about with Ms Brown, that did not actually occur because she flared up, resigned and left the meeting before the other (non-food related) issues could be raised).

[61] The Authority did not accept Ms Brown’s evidence that she was “*escorted*” off the premises or that there was a suggestion that she “*could not work at the Mall but could work somewhere else*”. That evidence was contradicted by the others who were at the meeting. Ms Brown’s version of events was also questionable.

[62] An example of Ms Brown misinterpreting a communication can be seen in the email exchange she had with Mr Wilson. She claimed in her personal grievance letter that Mr Wilson’s return email to her said that “*She is guilty of the allegations as outlined by [Mr Marurai] without evidence supporting the allegations.*” A review of the email indicates that is incorrect.

[63] Other complaints that Ms Brown made about the meeting not being conducted in a private place, or others being able to see or hear what was happening were also not substantiated after such evidence was thoroughly tested by the Authority.

[64] The Authority did not agree with Ms Brown’s claim that there were “*unfounded allegations*” regarding her work practices. There were legitimate complaints that Watchdog was entitled to speak to her about.

[65] Ms Brown was not disadvantaged by being asked to attend a voluntary meeting to discuss the complaints, with the focus being on the food related complaints. She had no legal right to have a support person present at the meeting with her because it was not a disciplinary meeting.

[66] However, to redress the perception of the power dynamics during the meeting Mr Marurai arranged for Ms Ruki to be present with Ms Brown as a “*wahine support*” person. The Authority was satisfied that no one else (such as other colleagues, members of the public, or other workers or shopkeepers in the area) could have heard the discussion that was conducted within the privacy of the Watchdog office.

[67] The initiative for Ms Brown’s resignation came from her. Ms Brown was repeatedly told during the discussion that Watchdog did not want her to resign. However, despite that Ms Brown insisted that she was going to resign. In the face of her repeated comments that she was going to resign, Ms Brown was told that she had to do so in writing. She then wrote out a resignation letter and handed it over during the meeting.

[68] These were deliberate and voluntary actions that Ms Brown engaged in. There was no pressure or suggestion from Watchdog that Ms Brown resign. Quite the contrary, as Watchdog made repeated attempts to talk Ms Brown out of resignation. This included stating directly, more than once, that Watchdog did not want her to resign.

[69] Ms Brown was also then given another 24 hours by Mr Wilson to reconsider her resignation, because Watchdog believed she had resigned in the heat of the moment. It wanted to give her an opportunity to cool down and reconsider her hasty, spur of the moment resignation. Despite that opportunity Ms Brown did not withdraw her resignation.

[70] The Authority finds that Ms Brown’s resignation was a free and voluntary resignation. She had an overreaction to the discussion that was being held with her. There was nothing inappropriate about the manner in which the meeting was conducted, or the issues that were discussed, or the way that occurred.

[71] In particular, the Authority was satisfied that Watchdog did not breach any express or implied terms of Ms Brown’s employment agreement regarding its discussion with her about the various complaints it had received. The discussion on 6 February 2022 occurred in a way that was consistent with Watchdog’s contractual and good statutory obligations.

[72] Accordingly, Ms Brown’s constructive dismissal claim did not succeed.

Was Ms Brown unjustifiably disadvantaged on 6 February 2021?

[73] The Authority was concerned that Ms Ruki's attendance at the meeting unjustifiably disadvantaged Ms Brown because she had not selected Ms Ruki as a support person. Watchdog had arranged for Ms Ruki to be present without discussing that with Ms Brown.

[74] Ms Ruki was not briefed on the nature of the meeting in terms of what was going to be discussed or how she could support Ms Brown during the meeting. Ms Brown and Ms Ruki were colleagues, who had not worked together for a long time and did not have an out of work friendship or other relationship.

[75] Ms Brown was therefore faced with the situation where two of her managers were discussing complaints about her in the presence of a colleague. While that would have been alright if Ms Brown had been given the option of having Ms Ruki present, or if Ms Brown had selected Ms Ruki as a support person, it was unfair for her to have complaints about her discussed while one of her colleagues was present, in the absence of her consent to that occurring.

[76] The Authority accepted that Watchdog arranged for Ms Ruki to be present for the best of reasons. There was an intention to ensure that Ms Brown felt appropriately supported and had another female with her during the discussion. While the intentions behind it were good, the way in which it was actually carried out disadvantaged Ms Brown. She had her personal business made known to a co-worker, without her ever having expressly consented to that occurring.

[77] The Authority was satisfied that this disadvantage was not justified, because it would have been easy to have explained to Ms Brown why Ms Ruki had been invited to the meeting and to ask Ms Brown if she consented to Ms Ruki being present or would prefer to select somebody else to sit in on the meeting with her as a support person.

[78] It was also unclear to Ms Brown about why Ms Ruki was there. Ms Ruki told the Authority that she was there just listening but did not stop the meeting or step in or give Ms Brown advice when Ms Brown was becoming agitated or upset or repeatedly insisting that she was going to resign.

[79] While Ms Ruki may have been there to provide support to Ms Brown, the circumstances of Watchdog having involved her meant that Ms Ruki did not actually provide

any support to Ms Brown. Her role was effectively an observer although she did not take any notes of what was discussed.

[80] The Authority considered that there was no justification for Ms Ruki's role to be so unclear. If Ms Ruki was there as a support person, then Ms Brown needed to expressly agree to that and understand what Ms Ruki could and would do to support her.

[81] Ms Ruki also needed to have more information about her role during the meeting. As it stood, Ms Ruki was there listening only but was not expected to participate. However, if Ms Ruki was there to support Ms Brown, then she should have stepped in to help calm Ms Brown when Ms Brown became upset and agitated. That was particularly important in light of Ms Brown's repeated threats to resign and unfounded allegations of racism.

[82] The Authority has therefore exercised its power under s 160(3) of the Act to find that although the unjustified dismissal claim did not succeed, the fact that Ms Ruki was in the meeting without the circumstances of her attendance being made clear to, or being agreed by, Ms Brown unjustifiably disadvantaged Ms Brown.

[83] The Authority therefore finds that the nature of the personal grievance claim while not meeting the evidential standard required for an unjustified dismissal, did meet the standard required to establish an unjustified disadvantage grievance.

[84] Ms Ruki's attendance at the 6 February 2022 discussion unjustifiably disadvantaged Ms Brown.

What if any remedies should be awarded?

[85] The Authority accepted that Ms Brown became agitated and upset during the meeting. Ms Brown disputed the claims against her and felt humiliated that they were being discussed in front of a colleague. It is clear that Ms Brown was upset both during and after the meeting.

[86] The Authority orders Watchdog to pay Ms Brown \$2,000 under s 123(1)(c)(i) of the Act to compensate her for the hurt, humiliation, loss of dignity and injury to feelings she suffered as a result of a work colleague being privy to complaints about her, without her consent.

Should Ms Brown's remedies be reduced under s 124 of the Act on the grounds of contribution?

[87] Having established that a personal grievance has occurred, the Authority is required to assess whether Ms Brown contributed to the situation that gave rise to her personal grievance, and if so to reduce remedies accordingly.

[88] The award of \$2,000 distress compensation to Ms Brown should not be reduced under s 124 of the Act, because she did not contribute to the situation that resulted in Ms Ruki being invited to attend the discussion on 6 February 2022 without Ms Brown's consent.

What if any costs should be awarded?

[89] Ms Brown can be said to be the successful party because she has established one personal grievance claim as a result of the Authority's investigation meeting. However, she was not wholly successful, because she did not succeed on her main claim of unjustified dismissal.

[90] The Authority invites the parties to resolve costs by agreement. However, if that is not possible then the applicant has 14 days within which to file a costs application and the respondent has 14 days within which to file its response. Costs will not be dealt with outside of this timetable, without the Authority's prior authorisation.

[91] The Authority is likely to adopt its usual notional daily tariff-based approach to costs. This matter involved a one-day investigation meeting, so the notional starting tariff will be \$4,500.

[92] The notional starting tariff will need to be adjusted to reflect that Ms Brown did not succeed on her dismissal grievance, which took up most of the investigation meeting time. The parties are also invited to identify any other factors they say are relevant to the Authority's assessment of whether the notional starting tariff needs adjusting to reflect the particular circumstances of this investigation.

Rachel Larmer
Member of the Employment Relations Authority