

**NOTE: This determination contains orders prohibiting publication of certain information at paragraphs [92] and [93]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 251  
3297180

BETWEEN

SHAUNA DWYER  
Applicant

AND

OAKVUE BLOODSTOCK  
LIMITED  
Respondent

Member of Authority: Shane Kinley

Representatives: Hayley Johnson, advocate for the applicant  
Tom Jarman, counsel for the respondent

Investigation Meeting: 18 December 2024 in Hamilton and by AVL

Submissions and further information: Up to 18 February 2025

Determination: 07 May 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Shauna Dwyer was employed by Oakvue Bloodstock Limited (OBL) as a stablehand in June 2021 until her employment ended by way of resignation on 23 August 2022. Ms Dwyer raises claims of sexual harassment in relation to communications including text messages during her employment, unjustified disadvantage, unjustified constructive dismissal and breaches of OBL's duty of good faith. Ms Dwyer also seeks a non-publication order.

[2] OBL denies Ms Dwyer's claims and says a number of comments made or alleged were not of a sexual nature or denies having made the alleged comments and

says some comments may not have been raised in the applicable notification period. OBL also says it was not clear how Ms Dwyer was disadvantaged in her employment, Ms Dwyer resigned in circumstances which do not amount to a constructive dismissal and it did not breach its duty of good faith to her. OBL opposes the application for non-publication orders.

### **The Authority's investigation**

[3] A case management conference was held in relation to this matter on 13 August 2024 with a representative for Shauna Dwyer present. Robert (Ralph) Manning, sole Director and shareholder of OBL, was contacted at the scheduled time for the conference however declined to participate. As I was satisfied Mr Manning had been advised of the time of the conference, it proceeded in his absence, as he had been advised it would.

[4] At the time of the conference OBL were not represented and had not lodged a statement in reply, and the parties had not attended mediation. I timetabled for OBL to lodge a statement in reply, with leave required to do so, as well as directing the parties to attend mediation. The parties subsequently attended mediation, which did not resolve this matter, a copy of an undated statement in reply was provided by Shauna Dwyer's advocate and OBL obtained representation.

[5] For the Authority's investigation written witness statements were lodged by Ms Dwyer, her sister Brianna Dwyer, who had also previously worked for OBL, and HTG, another former employee of OBL whose evidence is covered by non-publication orders, as discussed at paragraphs [89] and [93] below. Written witness statements were provided for OBL by Mr Manning, Sarah Harris, Stable Foreman of OBL and Mr Manning's partner, and Rayna Johansen, a former employee of OBL. Ms Dwyer, Brianna Dwyer, HTG (by AVL), Mr Manning, Ms Harris and Ms Johansen answered questions under affirmation from me and from the representatives.

[6] At the conclusion of the investigation meeting I timetabled for evidence discussed during the investigation meeting to be provided and identified a number of points I considered it would be helpful for submissions to address. Following the investigation meeting the representatives provided written submissions and further information in accordance with timetable directions made at the conclusion of the investigation meeting.

[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 requiring investigation and determination are:

- (a) Was Ms Dwyer unjustifiably constructively dismissed by OBL, sexually harassed in her employment with OBL or unjustifiably disadvantaged by OBL?
- (b) Did OBL breach its duty of good faith (under s 4 of the Act) to Ms Dwyer?
- (c) If OBL's actions were not justified (in relation to constructively dismissing or disadvantaging Ms Dwyer), Ms Dwyer was sexually harassed in her employment with OBL or OBL breached its duty of good faith to Ms Dwyer, what remedies should be awarded, considering:
  - (i) Lost wages under ss 123(1)(b) and 128 of the Act; and
  - (ii) Compensation for hurt and humiliation under s 123(1)(c)(i) of the Act.
- (d) Has OBL failed to pay Ms Dwyer her final holiday pay entitlements under the Holidays Act 2003?
- (e) Should a non-publication order be made under cl 10 of sch 2 of the Act?
- (f) Should either party contribute to the costs of representation of the other party?

[9] At the investigation meeting Ms Dwyer's claim in relation to final holiday pay entitlements was withdrawn, meaning this claim is not addressed further in this determination.

[10] In addition, clarification was provided of the basis for Ms Dwyer's claims to have been unjustifiably constructively dismissed by OBL, sexually harassed in her employment with OBL or unjustifiably disadvantaged by OBL. As Ms Dwyer's dismissal claim was based on a course of conduct which included actions said to amount to disadvantage or sexual harassment, I have considered those claims first.

[11] I also directed submissions identify the findings of fact relied upon to support Ms Dwyer's claim OBL had breached its duty of good faith to her. Submissions for

both Ms Dwyer and OBL addressed this issue as part of consideration of remedies, rather than as a stand-alone issue. I have adopted the same approach and do not separately address the claim OBL breached its duty of good faith to Ms Dwyer.

**Was Ms Dwyer unjustifiably disadvantaged by OBL or sexually harassed in her employment with OBL?**

*Relevant law*

[12] For Ms Dwyer's unjustified disadvantage claims under s 103(1)(b) of the Act to be successful requires:

- a. her employment, or one or more conditions of her employment, to have been affected to her disadvantage; and
- b. this was due to some unjustifiable action by OBL.

[13] In assessing this, I must apply the test of justification under s 103A of the Act, being whether OBL's actions, and how OBL acted, were objectively what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[14] In reaching my conclusions about Ms Dwyer's unjustified disadvantage claims, s 103A(3) requires I consider:

- a. having regard to the resources available to it, did OBL sufficiently investigate before taking action?
- b. did OBL raise concerns it had with Ms Dwyer before taking action?
- c. did Ms Dwyer have a reasonable opportunity to respond?; and
- d. did OBL genuinely consider Ms Dwyer's explanation or comments?

[15] I may also take into account any other factors I think are appropriate under s 103A(4). I must not determine an action to be unjustifiable where defects in OBL's process were minor and did not result in Ms Dwyer being treated unfairly under s 103A(5).

[16] Ms Dwyer's claim to have been sexually harassed in her employment is advanced with reference to s 108(1)(b) of the Act, which states:

**108 Sexual harassment**

- (1) For the purposes of sections 103(1)(d) and 123(d), an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer—
  - (b) by—

- (i) the use of language (whether written or spoken) of a sexual nature; or ...

directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance, or job satisfaction.

*Basis for Ms Dwyer's claims and submissions of the parties*

[17] The bases for Ms Dwyer's claim she was sexually harassed in her employment were:

- (a) a text message where Mr Manning replied to Ms Dwyer's request for a day off for a tattoo appointment by saying "I thought only prostitutes had tatoos!!" [sic];
- (b) an alleged comment on an unspecified race day by Mr Manning that it would be a shame if the wind blew Ms Dwyer's dress up; and
- (c) alleged questions on unspecified dates by Mr Manning about Ms Dwyer's personal life, including whether she had a boyfriend.

[18] Ms Dwyer said Mr Manning's actions subjected her to unwanted behaviour of a sexual nature which she found offensive and which negatively impacted on her job satisfaction. Brianna Dwyer also said Mr Manning asked if she and Ms Dwyer had "dressed up for all the old men at the races".

[19] The bases for Ms Dwyer's claim she was unjustifiably disadvantaged in her employment were:

- (a) being "constantly yelled at by Mr Manning if she made a mistake or was injured by a horse", which she claims deeply embarrassed her; and
- (b) OBL's alleged failures to meet its statutory duty to take all reasonably practicable steps to provide a workplace that met health and safety requirements, which led to Ms Dwyer feeling unsafe, targeted and extremely vulnerable.

[20] Evidence from Brianna Dwyer and HTG was said corroborate Ms Dwyer's claims.

[21] OBL says the text message was not said in a sexual manner or with innuendo, denied Mr Manning made other comments alleged and submitted Mr Manning asking whether Ms Dwyer had a boyfriend did not objectively amount to questions of a sexual

nature, rather said those questions were “a sincere inquiry about her life”. OBL said if the comments were found to be sexual in nature, they did not have a detrimental effect on Ms Dwyer’s employment, as her evidence only said the comments “contributed to an uneasy feeling”. OBL also says Ms Dwyer may not have raised a grievance in relation to all of these comments within the required timeframes, for example, due to the date of the race meeting not being specified.

[22] OBL also says Ms Dwyer had not clearly established her conditions of employment were affected to her disadvantage, with allegations Mr Manning reprimanded Ms Dwyer lacking specificity and being denied. While OBL accepted Mr Manning’s comments when raising horse welfare issues with immediate risk may not always have been gentle or considered, OBL said his communication was consistent and appropriate for its workplace. HTG’s evidence, while denied, was said to not demonstrate disadvantage to Ms Dwyer.

*Was Ms Dwyer sexually harassed in her employment?*

[23] In relation to Ms Dwyer’s claims she was sexually harassed in her employment s 108(1)(b) requires three elements be established, being:

- (a) Language of a sexual nature was used by Mr Manning (assessed on an objective basis of what would be apparent to a reasonable person); and
- (b) Such language was unwelcome or offensive to Ms Dwyer (assessed on the subjective basis of how she saw or experienced that herself); and
- (c) Such language had a detrimental effect on Ms Dwyer’s employment, job performance and job satisfaction (assessed on a combination of both objective factors of what others could identify and subjective factors of her own reported experience).

[24] The Court in *Kumar v Icehouse (NZ) Limited* included this description of relevant principles in making the assessment of whether actions were sexual in nature:<sup>1</sup>

The present case is one where the alleged actions of the plaintiff ... were not unequivocally sexual in nature. In such borderline cases, where the sexual nature is not immediately manifested by the manner of the physical behaviour or the nature of any accompanying words used, it may be helpful to take into account the context of the behaviour. ... Where there has been an element of repetition this can lead to a conclusion that words or acts, which individually were equivocal as to the sexuality of their nature, were indeed sexual. Where

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<sup>1</sup> *Kumar v Icehouse (NZ) Ltd* [2006] ERNZ 381 at [53].

equivocal behaviour is not repeated it is not likely to be objectively viewed as sexual in nature.

[25] I have also taken into account the Court of Appeal's comments in *Craig v Slater*:<sup>2</sup>

... where a complaint of sexual harassment involves an allegation of intentional sexualised conduct or language, and there is a power imbalance favouring the perpetrator over the recipient, it is reasonable to draw a rebuttable inference that the sexual conduct or language was unwelcome, whether the complainant objected at the time of the alleged harassment or not.

[26] Submissions for both Ms Dwyer and OBL referred to an Authority determination *Balani v TCS Old Co Ltd*<sup>3</sup> in relation to an assessment of whether a sexual harassment claim had been established.

[27] I consider Mr Manning's text in response to Ms Dwyer's intention to obtain a tattoo has an element of a sexual reference and was inappropriate, however, there was no evidence this type of comment was repeated. Following the approach of the Court in *Kumar v Icehouse (NZ) Limited* I am not satisfied this text in and of itself can be categorised as sexual in nature.

[28] Both Ms Dwyer and Brianna Dwyer were unable to answer at the investigation meeting on what date or even month the alleged comments about the dress and dressing up were made, although they said it was when Ms Dwyer was in full-time employment, which Ms Dwyer said commenced in April 2021 with a written employment agreement signed in June 2021. Brianna Dwyer said the comment about the dress was made before the races in summertime. The initial raising of Ms Dwyer's grievance, her statement of problem and her witness statement were equally non-specific about the date of these alleged comments.

[29] The lack of specificity raises a reasonable possibility these alleged comments were made outside the notification period required for raising a sexual harassment grievance under s 114(7)(a) of the Act, being 12 months beginning with the date on which the action alleged to amount to the personal grievance occurred. The reference to comments being made during summertime would however suggest the comments were made within the notification period.

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<sup>2</sup> *Craig v Slater* [2020] NZCA 305 at [89].

<sup>3</sup> *Balani v TCS Old Co Ltd* [2016] NZERA Auckland 46.

[30] Brianna Dwyer said at the investigation meeting the comment about dressing up was made on a different day to the comment about Ms Dwyer's dress, however, this was not consistent with the inference in her witness statement that the two comments were linked. In addition, Ms Dwyer said she was offended by the comment about her dress, so did not wear a dress again. On the balance of probabilities, I consider it more likely than not the two comments were, if made, made on the same day.

[31] On the basis these comments were connected, while there again is an element of a sexual reference, there was no evidence this type of comment was repeated on other occasions. Again, following the approach of the Court in *Kumar v Icehouse (NZ) Limited* I am not satisfied these comments in and of themselves can be categorised as sexual in nature.

[32] In relation to the questions about Ms Dwyer's personal life, including whether she had a boyfriend, Ms Dwyer said at the investigation meeting these were repeated on multiple occasions but could not say when. Brianna Dwyer said these types of questions were asked of her more when she was younger. These questions were not raised as part of the sexual harassment allegation in the initial raising of Ms Dwyer's grievance, her statement of problem and her witness statement. While OBL said these comments were not objectively of a sexual nature, I consider the repeated nature of these questions from a significantly older man to teenage girls is inappropriate even if not complained about at the time and arguably carries a sufficient enough element of a sexual reference to be potentially categorised as sexual in nature given the repetition of the questions.

[33] I consider however these comments were not clearly raised as part of Ms Dwyer's sexual harassment claim within the notification period required for raising a sexual harassment grievance under s 114(7)(a) of the Act, being 12 months beginning with the date on which the action alleged to amount to the personal grievance occurred. The first reference to these comments was in Brianna Dwyer's witness statement lodged on 7 November 2024, more than two years after Ms Dwyer's employment with OBL ended. Leave was not sought to raise these comments as the basis for a sexual harassment claim outside of the notification period. On this basis, I decline to make a finding of sexual harassment based on these comments.

[34] As a consequence, Ms Dwyer's claims of sexual harassment are not established.

*Was Ms Dwyer unjustifiably disadvantaged in her employment?*

[35] At the investigation meeting Ms Dwyer's advocate said her unjustified disadvantage claim was based on her not being allowed to take leave to attend to her partner's situation and due to impacts on her mental health. This was elaborated on in submissions to refer to Ms Dwyer's claims she was constantly abused by Mr Manning and OBL failed to meet its statutory duty to take all reasonably practicable steps to provide a workplace that met health and safety requirements. Instances referred to included allegations Mr Manning told Ms Dwyer to "toughen up" when injured by a horse on an unspecified date, she was denied access to medical treatment, and Mr Manning screamed at Ms Dwyer on 8 August 2022 after what she described as a bad ride, when she said he called her a "useless piece of crap". Brianna Dwyer and HTG described generally abusive language, including Mr Manning calling employees useless, stupid, slow, lazy and with heavy amounts of swearing.

[36] OBL accepted where there were immediate welfare risks Mr Manning's communications with employees "is not always in a gentle or considered manner [but his] manner of communication remained consistent and appropriate for this particular workplace". Mr Manning accepted he yelled at Ms Dwyer on one occasion to "let go of the reins" which he said related to safety concerns. He denied otherwise abusing her or making the statements she alleged he had made. OBL also said Ms Dwyer had not established which conditions of her employment were affected to her disadvantage. Ms Harris and Ms Johansen said they had no concerns with Mr Manning's communications with employees.

Ms Dwyer's disadvantage claim is not established in relation to her not being allowed to take leave to attend to her partner's situation

[37] Submissions for Ms Dwyer presented this element of Ms Dwyer's disadvantage claim as part of her unjustified constructive dismissal claim, in relation to Ms Dwyer's request on 2 August 2022 to have the next day off work to support her partner, who was at the time in hospital in a coma. Text messages provided show a brief exchange between Ms Dwyer and Mr Manning, which culminated in Mr Manning approving the day off. Only the first text message was timestamped and Ms Dwyer was unable to provide evidence confirming the time between leave first being requested and leave being approved.

[38] Submissions for Ms Dwyer also said:

Under s65(1)(b) of the Holidays Act 2003, [Ms Dwyer] had a right to access sick leave in relation to her injured partner. [She] had a right to request time off and the employer ought not to have pushed back on [her] request for an entirely legitimate entitlement.

[39] I do not consider Ms Dwyer has established she was disadvantaged by Mr Manning's hesitation in granting her time off work, with her own evidence being he granted her leave both on 3 August 2022 and when she asked for further leave in the following weeks. Any delay in granting leave would have been relatively minor and I am not satisfied was sufficient to amount to a disadvantage. The nature of Mr Manning's communication style in how he initially responded to these requests is however covered separately below.

Credibility assessment in relation to Mr Manning's communication style with employees

[40] There is a material difference between the evidence of Ms Dwyer's witnesses and OBL's witnesses about Mr Manning's communications with employees. Given this conflict in evidence, I must decide which evidence I prefer based on an assessment of credibility. To do so I rely on the guidance provided by Judge Harding in the District Court in *R v Biddle* that was cited with approval on appeal to the High Court<sup>4</sup> and guidance from the Employment Court in *Lawson v New Zealand Transport Agency* and *Cornish Truck & Van Limited v Gildenhuys*.<sup>5</sup>

[41] The key aspects relevant to this case are consistency of the witnesses' evidence, how plausible the evidence of each witness is and whether there are elements of confirmation bias evident.

[42] Both sets of witnesses were broadly consistent in their evidence, with any elaborations at the investigation meeting in response to questions expanding points in witness statements in a consistent manner, with the exception of Ms Harris' evidence as discussed below. For example, Ms Dwyer said at the investigation meeting she had raised concerns verbally with Ms Harris about how she was generally treated and feeling she was brushed off, and alleged Ms Harris' response included comments such as "this is how he is", "everyone deals with it" and "this is how our workplace runs". Ms Harris denied making comments of this nature and said she could not recall Ms

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<sup>4</sup> *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21].

<sup>5</sup> *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165; and *Cornish Truck & Van Limited v Gildenhuys* [2019] NZEmpC 6.

Dwyer raising issues, claiming the conversations she had with Ms Dwyer and Brianna Dwyer were about the issues she had as the Stable Foreman with Mr Manning.

[43] Ms Harris said all the staff knew they could come to her with issues but no serious issues had ever been raised with her. She also said she had talked with staff about the disagreements she had with some of Mr Manning's decisions, as any foreman would have with their boss. I was not fully convinced by her evidence, given Ms Harris said on the one hand people brought her "little issues", but on the other hand said she had not had anyone raise an issue with her. When asked what the differentiation between little issues and major or serious issues she said issues worrying staff would be major ones, then again said she had never had anyone raise an issue with her. Ms Harris also was deferential to Mr Manning, saying where she had a disagreement with him "at the end of the day, he is the boss".

[44] Ms Harris was also clearly disappointed at what she saw as a lack of communication when Ms Dwyer resigned, sending her a text message which said:

I'm really disappointed you've treated me like shit when I've been nothing but kind an supportive 2 u, its really rude and horrible, all I ever did was stand up 4 u and check in on u

[45] This text message suggests issues had been raised with Ms Harris, despite her claims they had not. I have placed limited weight on Ms Harris' comments in support of OBL about there being no issues with Mr Manning's communication style for these reasons, as I consider her evidence was not entirely consistent.

[46] I do not otherwise consider consistency assists me to determine whether Ms Dwyer's witnesses' or OBL's other witnesses' accounts of Mr Manning's communication style was more likely to be credible.

[47] In terms of plausibility, I consider Mr Manning's text exchanges with Ms Dwyer and his comments about the texts are more supportive of Ms Dwyer's witnesses' accounts of his communication style than OBL's witnesses' accounts. While the texts provided were an incomplete record and reflected the time when Ms Dwyer's partner was in hospital, leading up to her resignation, one text from Mr Manning which I was told responded to a request for time off said "At 10pm at night!!! How fucken stupid do you think we are?". Ms Dwyer said this was inappropriate communication because of the aggressive language. Mr Manning accepted this was inappropriate, but said he

would have been woken by the message late at night and would have had limited staff the next day so this would have been disruptive.

[48] I consider this exchange supports it being more likely than not Mr Manning may have used objectively inappropriate language when communicating with OBL's employees in person. This supports the evidence of Ms Dwyer's witnesses' accounts of Mr Manning's communication style over OBL's witnesses' accounts.

[49] OBL also said HTG's evidence from her notebook reflecting her own experiences at OBL did not evidence Ms Dwyer being unjustifiably disadvantaged. While I accept this, I consider HTG's evidence provides some indirect support for the plausibility of Ms Dwyer's witnesses' accounts of Mr Manning's communication style over OBL's witnesses' accounts.

[50] I also consider Mr Manning's evidence demonstrated some risks of confirmation bias. Mr Manning emphasised he had been an employer for 43 years, with no previous personal grievances, although did accept in response to questions at the investigation meeting some aspects of his text communications had been inappropriate. The lack of prior personal grievances does not however mean Mr Manning's communications and communication style was incapable of giving rise to a personal grievance in this matter.

#### Conclusion on credibility assessment

[51] For the above reasons, I prefer Ms Dwyer's witnesses' accounts of Mr Manning's communication style over OBL's witnesses' accounts. I find it more likely than not on some occasions Mr Manning yelled at Ms Dwyer in addition to the occasions on which he acknowledged yelling at her and other staff where there were immediate safety concerns, including critiquing her when he was not satisfied with her performance at work. The specific example Ms Dwyer provided was on 8 August 2022 after what she described as a bad ride, when she then said Mr Manning called her a "useless piece of crap". I find this more likely than not occurred.

#### Ms Dwyer was unjustifiably disadvantaged as a result of Mr Manning's communications with her

[52] The Court has recently found in *Wiles v Vice-Chancellor of the University of Auckland* [2024] NZEmpC 123 that failures to keep employees safe and to provide adequate protection and support, in the context of breaches of health and safety

obligations, can amount to an unjustified disadvantage.<sup>6</sup> Ms Dwyer referred to comments in an earlier Court judgment in *Emmerson v Northland District Health Board*<sup>7</sup> [2019] NZEmpC 34 referring to “the statutory obligation on employers to take reasonable steps to maintain a safe workplace [with] these obligations ... recognised as a term implied by common law into all employment agreements”. *Emmerson* applied principles from *Gilbert* however found Dr Emmerson had not made out her disadvantage claims based on bullying or breach of health and safety obligations.

[53] Ms Dwyer’s employment agreement included a clear contractual commitment on behalf of OBL that “The employer shall take all practicable steps to ensure the safety of the employee while at work”.

[54] I consider Ms Dwyer has established OBL, through Mr Manning’s actions, disadvantaged her in relation to inappropriate communications such as those referenced at paragraphs [17](a), [47] and [51] above. While I accept it may have been reasonable for Mr Manning to yell at Ms Dwyer to “let go of the reins” where there were safety concerns, this does not apply more broadly to justify his communication style.

[55] In the context of the power imbalance between Mr Manning and Ms Dwyer, and the age difference between them, I find Mr Manning’s inappropriate communication style amounted to bullying of Ms Dwyer and a breach of OBL’s health and safety obligations to Ms Dwyer. Ms Dwyer’s unjustified disadvantage claim is made out in respect of these actions, and I return to consideration of remedies at paragraphs [78] to [84] below.

[56] For completeness, I have not placed any weight on the evidence of HTG in reaching this conclusion, as her evidence did not relate directly to Ms Dwyer’s claims. Nor have I taken into account Ms Harris’ evidence medical appointments should not be arranged during work hours, as I do not consider Ms Dwyer has clearly established any specific instances where medical treatment was denied for workplace injuries.

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<sup>6</sup> *Wiles v Vice-Chancellor of the University of Auckland* [2024] NZEmpC 123 at [163] and [164].

<sup>7</sup> *Emmerson v Northland District Health Board* [2019] NZEmpC 34 at [159], referring to the Court of Appeal’s judgment in *Attorney-General v Gilbert* [2002] 2 NZLR 342 at [92].

## Was Ms Dwyer unjustifiably constructively dismissed by OBL?

### *The legal approach to a constructive dismissal*

[57] A constructive dismissal occurs where an employee appears to have resigned but the situation is such the resignation has been forced or initiated by an action of the employer. The Court of Appeal in *Wellington Clerical Union v Greenwich* stated:<sup>8</sup>

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. ...

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.

[58] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:<sup>9</sup>

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

[59] At the investigation meeting Ms Dwyer's constructive dismissal claim was advised to be based on a course of conduct which included actions said to amount to disadvantage or sexual harassment. Submissions for Ms Dwyer also referred to breaches of duty by OBL which were said to have led her to resign, meaning I consider it appropriate to examine also whether any breaches of duty by OBL were sufficient for Ms Dwyer's resignation to be reasonably foreseeable.

[60] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* set out the correct approach in constructive dismissal cases where breaches are alleged, which is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.<sup>10</sup> In determining that, all the circumstances of the resignation must be

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<sup>8</sup> *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

<sup>9</sup> *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

<sup>10</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

examined not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.

[61] Ms Dwyer has the burden of establishing her resignation was a dismissal.

### *Submissions*

[62] Ms Dwyer referred to Mr Manning's response to her partner's accident and Mr Manning's reluctant approval of sick leave<sup>11</sup>, alleged bullying behaviour on her return to work<sup>12</sup> and subsequent alleged unsupportive behaviours<sup>13</sup> as amounting to a course of conduct which culminated in her resignation on 23 August 2022. Part of the alleged unsupportive behaviour involved Mr Manning's response when Ms Dwyer asked for further time off and indicated she may resign, with Mr Manning responding "don't make this about you. I think we have been more than reasonable. You are not the only person having a hard time". After an exchange of text messages Ms Dwyer resigned by text message alleging "I have been bullied by you, sent inappropriate messages by you, had zero empathy towards my partner and my situation. I cannot return and continue to be treated like this".

[63] Submissions for Ms Dwyer said OBL's course of conduct directly led to her resigning, with reference to Mr Manning's inappropriate sexual language, breaches of OBL's obligations related to bullying and inability to access medical treatment in a timely manner, as well as lack of support generally and when attempting to access entitlements for partner's leave and sick leave. These factors were said to make it reasonably foreseeable Ms Dwyer would find the situation intolerable and resign, amounting to a constructive dismissal.

[64] OBL said it acted as a fair and reasonable employer throughout Ms Dwyer's employment, she was not forced to resign and could have raised issues with OBL prior to resigning, which she did not do. OBL also said it did not follow a course of conduct with the deliberate and dominant purpose of seeking Ms Dwyer's resignation, rather it said she was a good employee who it wanted to retain.

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<sup>11</sup> Discussed at paragraphs [37] to [39].

<sup>12</sup> Discussed at paragraph [51].

<sup>13</sup> Including as discussed at paragraph [47].

[65] OBL referred to the text message exchanges, as well as accepted attempts by Ms Harris to offer support, as evidence of it acting as a fair and reasonable employer, with Ms Dwyer not being responsive to OBL's attempts to support her. OBL accepted some of Mr Manning's messages could be viewed as insensitive and also suggested swear language was not unusual in communications at OBL. OBL said Mr Manning's "conduct did not cross the line between inconsiderate conduct causing some unhappiness and dismissive and repudiatory conduct".

[66] OBL said while Mr Manning's messages may have caused unhappiness, they were not sufficient to amount to a breach of duty or any breach was not sufficiently serious for resignation to be foreseeable. OBL also said it supported Ms Dwyer following her partner's accident, granted leave requests and attempted to contact her to understand how it could support her. OBL said Ms Dwyer's "resignation was not due to a breach of duty by [it], but due to the stress and anxiety she was experiencing due to [her partner's accident]".

#### *Analysis*

[67] Ms Dwyer referred to a range of matters in relation to the alleged course of conduct by OBL, which led to her resignation. One of the complexities of her claim is the events occurred over a period of time and involved quite different conduct. I have found Mr Manning's inappropriate communication style amounted to bullying of Ms Dwyer and a breach of OBL's health and safety obligations to Ms Dwyer<sup>14</sup>, however, I have also found her claims of sexual harassment were not established. These findings are relevant to both whether there was a course of conduct by OBL or a breach of duty by OBL which led to Ms Dwyer's resignation.

[68] The Court has recently observed in *Sharma v Rodney Farm 'N' Machinery Ltd* "While there can be a course of conduct that leads to a constructive dismissal, one would expect proximity between the final event pointed to and the resignation".<sup>15</sup>

[69] Ms Dwyer's text message where the possibility of resignation was raised, which she said was sent on or about 19 August 2022, initially focussed on whether she was being granted leave, with her saying:

Im having a really tough time which is why ive asked for leave. Im sorry im not at work but im even more sorry that my partner is going through this. I

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<sup>14</sup> Discussed at paragraph [55].

<sup>15</sup> *Sharma v Rodney Farm 'N' Machinery Ltd* [2025] NZEmpC 64 at [43].

thought I would be more supported. Are you approving/supporting my leave or do I have no other option but to resign? [sic]

[70] Ms Dwyer's eventual resignation text message, which she said was sent on or about 23 August 2022 and which is quoted at paragraph [62] above, expanded the reasons for her resignation. I am not satisfied however the earlier messages with elements of sexual references or other inappropriate communications from Mr Manning amount to a course of conduct which led to Ms Dwyer's resignation. I am also not satisfied, given the different nature of the actions of Mr Manning, these actions amount to a course of conduct.

[71] This is analogous to the Court's observation in *Sharma*:<sup>16</sup>

while I accept that there were instances during the course of his employment that Mr Sharma was not happy with, most of those occurred many months prior to his decision to resign and would not have, either individually or collectively, amounted to the sort of repudiatory conduct that meant a resignation amounted to a constructive dismissal.

[72] I consider Ms Dwyer's resignation was precipitated by the situation related to her partner's accident and the stress this was placing her under. Mr Manning's responses to her requests for leave at this time were not always sensitive, even when granting leave, although there were some unsuccessful attempts by both Mr Manning and Ms Harris to identify what further support Ms Dwyer was seeking.

[73] Ms Dwyer, in a Facebook message to Mr Manning responding to a query about whether she was returning to work, said "I don't feel like it is the right place for me to be at the moment". Both of these messages were sent on 22 August 2022. I consider this exchange supports the reason for Ms Dwyer's resignation being more related to the situation following her partner's accident and the stress this was placing her under, than broader concerns about Mr Manning's prior conduct.

[74] At the investigation meeting, when Ms Dwyer was asked what further support Mr Manning could have provided, she said he should have said "from the get go ... more than welcome to visit [her partner and] take as long as needs, let me know when you'll be back at work". While I appreciate Ms Dwyer's priority was supporting her partner including spending significant amounts of time with him at hospital and she felt Mr Manning's conduct was unsupportive, I accept OBL's submissions that Mr Manning's actions did not cross the line to become dismissive and repudiatory conduct.

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<sup>16</sup> Ibid at [45].

[75] I am also not convinced Ms Dwyer's resignation was due to a breach of duty by OBL or that her resignation was reasonably foreseeable as a result of any alleged breach, notwithstanding messages which referred to her potentially resigning. While Mr Manning had been reluctant to grant Ms Dwyer leave in early August 2022, he granted that leave. Payslips show Ms Dwyer being granted further sick leave in the following weeks, although there appears to be some breakdown in communications about whether sick leave was being granted, with Ms Dwyer asking if her leave would be granted or she should resign on or about 19 August 2022. Notwithstanding that, Ms Dwyer had indicated she would be returning to work on 22 August 2022 and when asked that day by Mr Manning if she was returning to work, she restated her intention to resign without seeking consideration of further leave being granted.

[76] Ms Dwyer then expanded her reasons for resigning in her message sent on or about 23 August 2022 in an unequivocal manner, requesting it be "effective immediately". I do not consider this a situation where it was reasonably foreseeable Ms Dwyer would resign for the reasons she cited. In these circumstances, I consider Ms Dwyer acted precipitously in resigning.

*Ms Dwyer has not established her resignation was a constructive dismissal*

[77] In those circumstances, I do not accept Ms Dwyer's resignation amounted to a constructive dismissal. Accordingly, Ms Dwyer's claim of unjustified dismissal does not succeed.

**What remedies should be awarded to Ms Dwyer in relation to being unjustifiably disadvantaged as a result of Mr Manning's communications with her?**

[78] Having determined Ms Dwyer was unjustifiably disadvantaged as a result of Mr Manning's communications with her (at paragraph [55] above), I need to consider what remedies should follow. Ms Dwyer sought a global award of compensation of \$25,000 to \$30,000 for hurt and humiliation under s 123(1)(c)(i) of the Act, in relation to her claims of sexual harassment, unjustified disadvantage and unjustified constructive dismissal.

[79] The majority of Ms Dwyer's evidence and submissions related to the impact of leaving her employment, rather than her successful unjustified disadvantage claim. The majority of OBL's submissions were also focussed on Ms Dwyer's leaving her employment, which OBL said supported a finding of low impacts only.

[80] Ms Dwyer also said Mr Manning's repeated conduct demonstrated an absolute lack of good faith contrary to s 4 of the Act. OBL said while communications were relatively informal, there was a productive employment relationship which was responsive and communicative.

[81] I consider Ms Dwyer's evidence of the impacts of what she described as Mr Manning's "aggressive", "inappropriate" and "rude" communications with her is sufficient to demonstrate comparatively low levels of impact on her. She said his communications made her feel uncomfortable and unsafe in having conversations about how she was being engaged with and brushed off her feelings.

[82] I have considered other Authority determinations where similar levels of impact were referenced. I consider in this case \$10,000 compensation under s 123(1)(c)(i) of the Act is appropriate.

[83] I am not satisfied Ms Dwyer has established breaches of the duty of good faith by OBL and in any event consider the impact of any such breaches would have been mixed with the impacts of the established unjustified disadvantage claim, so separate remedies would not have been appropriate.

*Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Ms Dwyer that contributed to the situation giving rise to her grievance?*

[84] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Ms Dwyer that contributed to the situation giving rise to her grievance. I can see no reason to do so. Ms Dwyer was not responsible for Mr Manning's communication style, which is the foundation of her successful grievance.

**Should non-publication orders be made under cl 10 of sch 2 of the Act?**

[85] Ms Dwyer sought non-publication orders over her name and those of her supporting witnesses, as well as any details which may identify them. The grounds for the requested orders were the alleged sexual nature of the personal grievances, the ages of the witnesses, potential for identification of Brianna Dwyer to lead to the identification of Ms Dwyer, the potential impacts on future employment and the contents of evidence provided by HTG.

[86] OBL opposed the non-publication orders sought and says the orders sought were not justified based on the Court's approach in *MW v Spiga Ltd*,<sup>17</sup> particularly whether specific adverse consequences could reasonably be expected to occur and to justify a departure from open justice in the circumstances of the case.<sup>18</sup> In the event I considered non-publication orders were appropriate, OBL said the details of HTG's evidence could be redacted.

[87] I do not consider the sexual nature of the communications which underpinned Ms Dwyer's sexual harassment claims is sufficient to warrant a non-publication order. This claim was based on comments and communications by Mr Manning which I have found had elements of sexual reference and were inappropriate, however, there was no evidence the comments were repeated. I have also found Ms Dwyer's sexual harassment claims were not established. In these circumstances, I do not consider a departure from open justice is warranted.

[88] I also do not consider the ages of witnesses or the potential for the identification of Brianna Dwyer to lead to the identification of Ms Dwyer warrants non-publication orders. Neither do I consider the asserted potential for prejudice to the applicant's witnesses on future employment opportunities is sufficient to demonstrate specific adverse consequences justifying a departure from open justice. The risks of impacts on future employment opportunities were general only, albeit relating to a relatively small industry and employment in a specific location.

[89] I am satisfied permanent non-publication orders are appropriate taking into account the Court's judgments in *MW v Spiga Ltd* in relation to the contents of evidence provided by HTG, due to the nature of that evidence. I do not consider a non-publication order is necessary in relation to HTG's name, although I consider it appropriate to anonymise her name, an option which was endorsed by the Court in *MW v Spiga Ltd*.<sup>19</sup> I consider this strikes an appropriate balance in relation to open justice and providing protections to HTG in light of the non-publication order I have made.

[90] I decline to make broader non-publication orders requested on behalf of Ms Dwyer and her witnesses. I do, however, make an interim order prohibiting the

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<sup>17</sup> *MW v Spiga Ltd* [2024] NZEmpC 147.

<sup>18</sup> *Ibid* at [88] and [89].

<sup>19</sup> *Ibid* at [96].

publication of the names of Ms Dwyer and her witnesses for a period of 28 days from the date of this determination at paragraph [92] below.

### **Orders**

[91] For the above reasons I order Oakvue Bloodstock Limited to pay Shauna Dwyer \$10,000 in compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) within 28 days of the date of this determination.

[92] Under cl 10 of sch 2 of the Act I make an interim non-publication order over the names of Ms Dwyer and her witnesses for a period of 28 days from the date of this determination. At the end of the 28 days, unless there is a further order of the Authority or Employment Court, this interim order will lapse and there will be no restriction on publication. This determination will not be published until the end of the 28-day period or further order of the Authority or Court.

[93] I also make a permanent non-publication order under cl 10 of sch 2 of the Act in relation to the contents of evidence provided by HTG.

### **Costs**

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

[95] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Dwyer may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum OBL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[96] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.<sup>20</sup>

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<sup>20</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)

[97] The investigation meeting for this matter finished mid-afternoon. My preliminary view is the notional daily rate for one day is the appropriate starting point for a determination of costs.

Shane Kinley  
Member of the Employment Relations Authority