

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 143
5391581**

BETWEEN REBECCA EAGLE
Applicant
AND HILL PARK DENTAL LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Jennifer Puah, Counsel for Applicant
Aaron Kashyap, Counsel for Respondent
Investigation Meeting: 7 March 2013 at Auckland
Submissions received: 7 and 21 March 2013 from Applicant
7 and 16 March 2013 from Respondent
Determination: 24 April 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Rebecca Eagle, claims that she has been unjustifiably constructively dismissed and unjustifiably disadvantaged by the Respondent, Hill Park Dental Limited (HPDL).

[2] Specifically Ms Eagle claims that her terms and conditions of employment were unilaterally altered to her disadvantage and this had resulted in her feeling unsafe in the workplace, and in her being constructively dismissed.

[3] HPDL denies that it constructively dismissed Ms Eagle, and claims that she resigned. HPDL also denies that Ms Eagle was unjustifiably disadvantaged in her employment.

Issues

[4] The issues for determination are whether Ms Eagle was

- Unjustifiably constructively dismissed from her employment with HPDL

- Unjustifiably disadvantaged in her employment with HPDL

Background Facts

[5] Mr Ravin Chandar, Dentist and Director of HPDL explained that in mid 2011 after his wife, Ms Yolande Hansji, had become pregnant, HPDL recruited Ms Eagle who commenced employment with HPDL on 11 July 2011 as a Dental Receptionist.

[6] Ms Eagle signed an individual employment agreement (the Employment Agreement) on 11 July 2011. The Employment Agreement provided in regard to Ms Eagle's place of work and working hours at clause 8 that:

8. Place of work and working hours

*Your place of work shall be Clendon Dental Ltd t/a Hill Park Dental
32a Dennis Ave, Manurewa, Auckland.*

*Your normal hours of work are from 10.30 to 5.30 pm Monday to
Friday initially for a 4-6 week period after the start of your
employment and from 9 am to 1.30 on Saturdays. Weekday hours will
increase to 8.30 am to 5.30 pm once it is noted that you are fully
capable to work without supervision. This is to be negotiated with the
clinic Practice Manager or your Employers.*

[7] Mr Chandar said that following the birth of their child, his wife had been unable to return to work at HPDL due to personal circumstances, and as they had found Ms Eagle to be very capable in the job, she had been asked to take on more responsibility.

[8] In particular Mr Chandar said that Ms Eagle had been instrumental in helping him to open three further dental surgeries and to train other receptionists. Ms Eagle had also had responsibility for dealing with the payroll

[9] Ms Eagle said that she had found the work at HPDL to be interesting and challenging and she had enjoyed it. Ms Eagle confirmed that she had taken on additional responsibilities and as a result had received a corresponding increase in her hourly rate of pay.

[10] Ms Eagle said she had had responsibility for dealing with the payroll until a fingerprint time keeping machine had been acquired on or about April 2012 and Ms Hansji had taken over the payroll from that time

[11] Mr Chandar said that Ms Eagle had begun to plan her wedding on or about April 2012 and he had become aware that the financial pressures of this were causing her stress, and he had therefore made her a financial gift of \$1,500.00

Bereavement Leave

[12] Ms Eagle said that on or about 8 June 2012 her grandfather died and she had informed Mr Chandar that she needed to take some time off as bereavement leave.

[13] Ms Eagle said Mr Chandar had arranged for another employee to provide cover for her duties on 8 June 2012, but explained that as that employee would be working at one of the other dental surgeries on Saturday 9 June 2012, she could only take that day as bereavement leave provided she obtain cover for her duties.

[14] Ms Eagle said she had made arrangements for Ms Marry-Anne Aukino to cover her duties on Saturday 9 June 2012; however Mr Chandar had telephoned her on the evening of 8 June 2012 and explained that Ms Aukino could not cover her position the following day, and that she was required to work.

[15] Mr Chandar explained that he and his wife usually invited all the employees for a barbeque held at their home on Friday evenings.

[16] Mr Chandar said he had been unaware that Ms Eagle was entitled to three days bereavement leave on the basis that a grandparent was classified as a close relative, and at the barbeque on Friday 8 June 2012 he had discussed this with Mr Mustafa Mustafa whom he regarded as being in the capacity of his supervisor, and with whom he discussed many issues concerning the dental surgeries.

[17] Ms Eagle said she had attended work on Saturday 9 June 2012 and also on Monday 11 June 2012 when she had informed Ms Chandar that she would be taking the following two days, 12 and 13 June 2012, as bereavement leave.

[18] Ms Eagle said Mr Mustafa had spoken to her on 11 June 2012 and told her that Mr Chandar's view was that she had not been entitled to take bereavement leave due to her grandfather not being "*immediate*" family. Ms Eagle said that although the fact of her grandfather's passing was common knowledge among the employees, she had been upset at what she regarded as a breach of confidentiality in regards to whether or not she was entitled to take bereavement leave.

[19] Ms Eagle confirmed that she had been paid for the three days she had taken as bereavement leave.

Change in location

[20] On 13 June 2012 when she was on bereavement leave, Ms Eagle said she had received a text message from Mr Chandar stating that with effect from the following day she was to be based at the dental surgery in East Tamaki. Ms Eagle said Mr Chandar had briefly explained that there was to be a rotation of staff and another employee, Ms Aleesha Myers, would be working with her.

[21] Mr Chandar said that there had been “*chaos*” at the Manurewa dental surgery when Ms Eagle had taken bereavement leave, and in light of the fact that Ms Eagle was shortly intending to be absent on two weeks’ leave, he had therefore decided to ensure that other employees were trained to handle Ms Eagle’s duties during her impending absence. Additionally Mr Chandar explained that the East Tamaki dental surgery had been performing poorly and he believed Ms Eagle’s attendance there could bring an improvement.

[22] Ms Eagle said she had been unhappy at the change of location which meant she had additional travelling time and incurred extra petrol expenditure. Ms Eagle, a mother of two children, said the change in location has caused her stress, and she had tried to discuss this with Mr Chandar by telephone; however he had not returned her calls.

[23] Ms Eagle said she had consequently called in to the Manurewa dental surgery to see Mr Chandar, but had been told that he had been busy with a patient. Ms Eagle said she had then contacted Ms Hansji who had told her to discuss the issue with Mr Chandar.

Shortfall in weekly wages

[24] On or about 14 June 2012 Ms Eagle had noticed a shortfall of approximately \$97.00 in her weekly wages. Ms Eagle said she had spoken to Mr Chandar who had said he would call her back, but when he did not do so, Ms Eagle said she had spoken to Ms Hansji at the Manurewa dental surgery.

[25] Later that same day, Ms Eagle said Ms Hansji called to see her at the East Tamaki dental surgery and had paid her the shortfall of \$97.00 in cash.

[26] Ms Eagle said that the following week there had again been a discrepancy in her weekly pay. When she had raised this issue with Mr Chandar, Ms Eagle said he had confirmed that there had been a mistake and that she would receive an adjustment in the following week's payment. Ms Eagle confirmed the adjustment had been made the following week.

[27] Ms Eagle said that shortly after this date, she had examined her payslips and realised that she had been underpaid a few times. At the Investigation Meeting Mr Chandar attributed the discrepancy to a cent shortfall, and Ms Eagle agreed that the amount involved had been insignificant.

Reduction in hours

[28] On 21 June 2012 Ms Eagle said she had been informed that she would not be required to work on either Friday or Saturday for the following two weeks, this meant that she would be working full time for only four days instead of the five and a half days a week set out at clause 8 of the Employment Agreement.

[29] Ms Eagle said she had contacted Mr Chandar to express her concern to him at the reduction in her working hours and the resultant financial impact it would have on her family income, however she said Mr Chandar's response had been unsympathetic.

[30] Ms Eagle said that she had become very unhappy at the changes in her working conditions and the lack of response when she tried to raise these issues with Mr Chandar. Ms Eagle said she had visited her doctor on 2 July 2012, who had prescribed medication and issued her with a medical certificate saying that she was unfit for work for a period of three days.

New employment agreement

[31] On 28 June 2012 Ms Eagle said Mr Chandar had informed her that she was to be issued with on a new employment agreement on the basis that her old contract had expired. Ms Eagle said she could not understand why this would be necessary as she had examined the Employment Agreement and realised that it was not of a fixed term nature.

[32] Mr Chandar said he had arranged to have new employment agreements drawn up to reflect the changes in the business, which included the increase in the number of locations and the need to have employees become familiar with the processes in the other surgeries.. Mr Chandar said he had explained the reasons for the proposed change to Ms Eagle, and that her new employment agreement would not contain any less favourable terms and conditions.

[33] Mr Chandar said he had informed Ms Eagle that if her preference was to work at the Manurewa location, this would be made her main location, and he had also offered her the option of working full-time at the dental surgery shortly to be opened in Papakura and which would be the closest dental surgery to her home.

[34] Ms Eagle said she had discussed the situation with her brother-in-law, Mr Craig Scrimgeour, and he had suggested that she arrange a meeting with Mr Chandar with himself accompanying her as a support person. Ms Eagle said she had contacted Mr Chandar and a meeting had been arranged to take place on 13 July 2012.

Meeting 13 July 2012

[35] Ms Eagle said that during the meeting held on 13 July 2012 Mr Scrimgeour had spoken on her behalf with Mr Chandar. Ms Eagle said that as she had felt intimidated, she had asked Mr Scrimgeour to speak on her behalf.

[36] Mr Scrimgeour said that he had tried to discuss Ms Eagle's concerns with Mr Chandar but had felt that Mr Chandar had been disinterested, however there had been a lengthy discussion about the proposed new employment agreement, and he had suggested that Mr Chandar take some legal advice on this proposal.

[37] Ms Eagle said at the Investigation Meeting that she had a poor recollection of the meeting on 13 July 2012; however she did recall Kiwisaver being discussed.

[38] Mr Chandar said various issues had been discussed during the meeting. These included:

- **Kiwisaver:** Mr Chandar explained that Ms Eagle had opted out of Kiwisaver when she had commenced employment but a complaint had been raised that she had not been issued with an 'opt-out' form. Mr Chandar said he had explained that Ms Eagle could download the form from the HPDL intranet.
- **Confidentiality in regards to discussion of Ms Eagle's bereavement leave:** Mr Chandar said he had explained that he did not consider that he had breached confidentiality, but thought he had apologised in the meeting.
- **Location:** Mr Chandar said he had told Ms Eagle that he wanted her to remain at the East Tamaki location to train the other receptionists.

- Hours: Mr Chandar said it had been discussed that Ms Eagle was feeling stressed due to the reduction in hours and financial issues; and he had agreed that Ms Eagle's hours would be restored to what they had been prior to the reduction from week commencing 21 June 2012.

[39] Mr Scrimgeour said that because he had believed that the discussion was not resolving the issues and as Ms Eagle felt that she was unable to return to work, he had tried to negotiate an exit payment on her behalf.

[40] Ms Eagle said she had felt her trust in Mr Chandar had been eroded, and on that basis an exit payment had been sought.

[41] Mr Chandar said he had tried to discuss the issues raised, but following his agreement to restore Ms Eagle's hours, he had felt that Ms Eagle and Mr Scrimgeour were still unhappy, and that that was when an exit payment was requested, which he had refused.

[42] Mr Chandar said he had felt pressurised by the request to agree to an exit payment because he believed that Ms Eagle no longer enjoyed her job and wanted to leave. This had prompted him to remark that if she wanted to leave, she could do so.

Events 13 July 2012 following the meeting

[43] Following the meeting with Ms Eagle and Mr Scrimgeour, Mr Chandar said he had spoken to Ms Hansji about the discussion and she had decided that it would be best to keep Ms Eagle at the East Tamaki location. Ms Hansji had confirmed this in an email sent to Ms Eagle at 2.32 p.m. that same day, 13 July 2012.

[44] In the email Ms Hansji had written:

Ravin has told me what has happened in today's meeting and we have discussed a few things.

The first one being your opinion that your trust has been eroded, we have decided that for this reason, we will not shift you back to Manurewa under the staff rotation and you will continue your employment in East Tamaki until further notice. The staff rotation was put in place to ensure that ALL the receptionists would know how to run each surgery ...

You also mentioned to Ravin that the change from Manurewa to East Tamaki has resulted in you suffering depression which is another

reason we are maintaining your employment at East Tamaki. As you remember Manurewa has a far larger and more stressful workload and we do not want to exacerbate your current condition.

Also as your initial employment started on the 04/07/11, your contract is currently under review and we will have a new one along to you shortly, although I would appreciate it if you could let us know if you no longer wish to continue your employment with us as this is what you mentioned at today's meeting with Ravin.

[45] Ms Eagle had replied to this email at 4.26 p.m. and mentioned the explanation of staff rotation in Ms Hansji's email which she said had contradicted Mr Chandar's explanation in the meeting earlier that day that she had been moved to 'fix things' at East Tamaki.

[46] Ms Eagle also stated that it had not been working at the different site, but: "*both the cut in hours and extra cost of getting to East Tamaki that had caused undue stress and pressure ...*"

[47] Ms Eagle had concluded her reply by stating:

There was no mention about not wanting to continue employment, there was a mention that I felt I could no longer work in an environment where I did not feel safe and secure in my role. It was also mentioned that I will continue to do my job to the best of my ability until further notice.

[48] Mr Chandar said that after the meeting he had felt confused and upset at the exit payment suggestion made by Ms Eagle and Mr Scrimgeour, and he had contacted his lawyer, Mr Kashyap, who had advised him that since there was no provision in the Employment Agreement that Ms Eagle work at other locations, she should be moved back to the Manurewa location.

[49] Ms Eagle said that later that same day, 13 July 2012, she had received a telephone call from Mr Chandar in which he had told her that he had taken legal advice and she was to return to the Manurewa location. Ms Eagle said Mr Chandar had also told her that unless she agreed to a new employment agreement agreeing to work at multiple locations, she would be made redundant.

[50] Mr Chandar confirmed that he had told Ms Eagle that there would be policy changes, but denied that he had told her she would be made redundant.

[51] Mr Chandar also confirmed that he had telephoned Ms Eagle and informed her that if she wished to do so, she could return to her normal hours at Manurewa, to which she had replied that she needed to talk to Mr Scrimgeour about that. Mr Chandar said that Ms Eagle had subsequently refused to return to the Manurewa branch and had sought legal advice.

Subsequent Events

[52] Ms Eagle raised a personal grievance by letter dated 26 July 2012 which she had personally delivered on 27 July 2012. In the letter Ms Eagle cited the reasons for the personal grievance as being:

- The breach of confidentiality in regards to the discussion with Mr Mustafa;
- The change in location of her place of work;
- Underpayment of wages, sick leave entitlement and bereavement leave;
- Reduction in hours; and
- Non-provision of the Kiwisaver opt-out form.

[53] Ms Eagle said that the following day, 28 July 2012, when she had been present at the East Tamaki office she had received a telephone call from Mr Chandar who had started shouting and told her that all contact was to be made via his lawyer.

[54] Ms Eagle said that Mr Chandar had proceeded to request not only a return of the payment of \$1,500.00 which she believed had been a gift from him, but also the cost of dental treatment which she had received to the value of approximately \$900.00 and the cost of dental purchases she had made, to all of which she had felt she had been entitled at the relevant time.

[55] Mr Chandar said he had been hurt and upset by what he regarded as Ms Eagle's refusal to consider the proposals he had made for resolving her concerns, and because he felt that she had so little regard for her employment relationship with him, he would revoke the 'perks' she had received from HPDL and him personally.

[56] Ms Eagle said she had been upset by the telephone discussion, and she had asked Mr Chandar if she could have the rest of the day off, however he had told her that there was no one to cover the reception at the East Tamaki dental surgery.

[57] Ms Eagle said she had subsequently been informed by Dr Pradeep, who had been with her at the East Tamaki dental surgery and who had telephoned Mr Chandar on her behalf, that she could leave the dental surgery

[58] Ms Eagle said she had visited her doctor, who had certified her as unfit to attend work for a period of 10 days from 27 July 2012.

[59] On 30 July 2012 Ms Eagle said she had received a response to the personal grievance letter she had delivered. In the letter, which had been signed by Mr Chandar and Ms Hansji, it had been stated that :

- any breach of confidentiality was denied;
- Ms Eagle had known of the requirement that receptionists work at other locations to familiarise themselves with operations, however once she had raised an objection to working in a different location, it had been agreed that she could work just at Manurewa, but she had chosen not to return;
- Ms Eagle was entitled to bereavement leave;
- Ms Eagle's hours were only reduced when the business was not busy;
- Ms Eagle would have to deal with the IRD in order to opt out of Kiwisaver as HPDL had no forms online. HPDL had opted Ms Eagle in to Kiwisaver and she would need to fill in a form to opt out;
- It was accepted that HPDL could not unilaterally alter an employment agreement;
- Ms Eagle had used all her sick leave entitlement; and she needed to use her annual leave entitlement for the purposes of the annual leave booked from 1 August to 12 August 2012.

[60] The letter from Mr Chandar and Ms Hansji also stated:

You will agree that you have yet to clear our bill for dental works since July 2011 to a total of \$950. We have provided you free lunch and also cash advances and purchases on the company account for your children which to date have not been repaid. It was against this friendly environment between you as employee and we as employer

that we did not think it would matter for you to also familiarise yourself with the other business.

Also we would like to be paid back for the \$1500 given to you as payment for your wedding reception venue.

[61] Following receipt of this letter, Ms Eagle said she had considered that her relationship with HPDL had completely broken down. Ms Eagle said she had visited her doctor who had issued her with further medical certificates saying she was unfit to attend work.

[62] By letter dated 4 September 2012, Ms Eagle had resigned from her employment with HPDL stating that she was resigning with immediate effect on the basis that: “ *circumstances have left me no choice.*”

Determination

Was Ms Eagle unjustifiably constructively dismissed from her employment with HPDL?

The Law

[63] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[64] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*¹ observed in describing this type of constructive dismissal:²

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.

[65] In the Court of Appeal case *Auckland Shop Employees Union v Woolworths (NZ) Ltd*³ Cooke J listed three situations in which a constructive dismissal might occur, although noted that these were not exhaustive. The three situations were:

1. Where the employees is given a choice of resignation or dismissal;

¹ [1983] ACJ 965

² at [975]

³ [1985] 2 NZLR 372

2. Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
3. Where a breach of duty leads a worker to resign.

[66] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*⁴ the Court of Appeal said regarding the correct approach to constructive dismissal:⁵

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 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.

[67] Therefore in examining whether a constructive dismissal has occurred the two relevant questions are:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation. To determine that question all the circumstances of the resignation have to be examined, not merely the terms of the notice or other communication whereby the employee has tendered the resignation.
- ii. and secondly if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[68] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*⁶ observed in describing this type of constructive dismissal:⁷

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

⁴ [1994] 1 ERNZ 168

⁵ Ibid At p 172

⁶ [1983] ACJ 965

⁷ at [975]

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.

[69] The relationship between Ms Eagle and HPDL was initially an extremely good relationship as evinced by Mr Chandar making a personal gift to Ms Eagle of \$1,500.00 upon his perception that she had been stressed concerning the financial implications of her impending wedding.

[70] I accept that the motivation for the move of Ms Eagle to the East Tamaki location had not been made with the intention of repudiating this otherwise good employment relationship; however it had adverse consequences for Ms Eagle, particularly financially.

[71] The reduction in Ms Eagle's hours of work similarly had an adverse effect on her financially, and I find that Mr Chandar should have been aware of the implications of his actions given Ms Eagle's circumstances as a young mother of two children.

[72] I find that until the meeting held on 13 July 2012 Mr Chandar had been tardy in addressing the issues raised by Ms Eagle which had the effect of reducing her trust and confidence in HPDL as an employer. However during the meeting on 13 July 2012 I consider that Mr Chandar had been open to discussing the issues most concerning Ms Eagle, and observe that he had offered to restore her hours to the level they had been prior to the reduction week commencing 21 June 2012.

[73] The email on 13 June 2012 from Ms Hansji which had been sent shortly after the meeting indicates (1) that Mr Chandar had misunderstood the cause of Ms Eagle's stress, and (ii) had the effect of confusing Ms Eagle.

[74] However I find that the telephone call from Mr Chandar later that same day addressed the issue of the location by confirming that Ms Eagle could return to work at the Manurewa location, and therefore represented an attempt to maintain the employment relationship.

[75] I note in this context that Mr Chandar had previously discussed with Ms Eagle on 28 June 2012 that if she wished Manurewa to be her main location, this would be agreed, and had also offered her the option of working full-time at the proposed Papakura dental surgery.

[76] Until the events on 28 July 2012 I consider that there had been inconsiderate behaviour on Mr Chandar's part which had caused Ms Eagle some unhappiness and concern, though I do not find evidence of repudiatory conduct prior to that date.

[77] However it is clear that, following the receipt of Ms Eagle's personal grievance notification, the conduct of Mr Chandar crossed the threshold of inconsiderate behaviour into repudiatory conduct by the demand of payments, not only in respect of items which Ms Eagle said she and other employees regarded as 'perks' of the job, but of an amount of money which Mr Chandar agreed at the Investigation Meeting had been a gift.

[78] I have considered whether this particular conduct was made in the 'heat of the moment' since Mr Chandar and Ms Hansji had clearly felt hurt and upset at the receipt of the personal grievance letter from Ms Eagle. However the demand for repayment was confirmed in the response letter of 30 July 2012 when Mr Chandar had had time to calm down, and take legal advice. Accordingly, I consider that the risk of Ms Eagle's leaving was reasonably foreseeable from that point in time.

[79] I find that the conduct of Mr Chandar following 27 July 2012 to have had the effect of undermining the trust and confidence between employer and employee which is essential in an employment relationship.

[80] I determine that Ms Eagle had been unjustifiably constructively dismissed by HDPL

Was Ms Eagle unjustifiably disadvantaged in her employment with HPDL?

[81] Ms Eagle is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[82] The elements of s103 (1) (b) are:

- An action
- The action was unjustifiable
- The action affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[83] Ms Eagle claims that she has been disadvantaged by:

- The breach of confidentiality, being the discussion as to whether or not Ms Eagle was entitled to 3 days bereavement leave with another employee
- The unilateral relocation to another location.
- The unilateral reduction of hours
- An underpayment of wages and associated issues

Breach of confidentiality

[84] Ms Eagle claims that personal information about her was disclosed to another person without her authorisation in breach of Principle 11 of the Privacy Act 1993.

[85] The personal information in issue is the discussion of whether or not Ms Eagle was entitled to 3 days bereavement leave in the circumstances of her grandfather's demise. There is no dispute that the death of Ms Eagle's grandfather had been a well-known fact to all the employees, including Mr Mustafa with whom the discussion regarding entitlement had taken place.

[86] A discussion concerning entitlement to bereavement leave in general would not be a breach of the Privacy Act Principles since such information is freely available. However I find that discussion about whether or not Ms Eagle would be paid bereavement leave in her personal circumstances to have been a breach, albeit accepting that Mr Chandar regarded Mr Mustafa as being employed in a quasi- managerial position.

[87] I find that the breach affected the implied term of respect and therefore affected Ms Eagle's terms and conditions of employment to her disadvantage.

Unilateral relocation to the East Tamaki dental surgery.

[88] Ms Eagle had been relocated unilaterally to the East Tamaki location.

[89] This had an adverse effect on her financially and therefore affected Ms Eagle's terms and conditions of employment to her disadvantage.

Unilateral reduction of hours

[90] Ms Eagle's hours had been unilaterally reduced which also had the effect of adversely affecting her financially.

[91] I find that Ms Eagle's terms and conditions of employment had been affected by the unilateral reduction of hours to her disadvantage.

Underpayment of wages and associated issues

[92] There were two significant shortfalls in the payment of Ms Eagle's wages, the first occurring on or about 14 June 2012, the second the following week.

[93] The first shortfall had been rectified by Ms Hansji the same day she had been informed of the error, the second shortfall had been rectified by an adjustment made the following week.

[94] I find there to have been a genuine error made by the employer which had been rectified within a reasonable time period after being brought to its attention. In these circumstances I do not find that Ms Eagle's terms and conditions of employment had been affected by the underpayment of wages to her disadvantage.

[95] In regards to the cent shortfall, Ms Eagle accepted at the Investigation Meeting that the amount involved was insignificant and on this basis I do not consider that Ms Eagle's terms and conditions of employment had been significantly affected by the underpayment of wages to her disadvantage.

Remedies

[96] Ms Eagle has been unjustifiably constructively dismissed and unjustifiably disadvantaged and is entitled to remedies.

Lost Wages

[97] Ms Eagle said she had applied for many jobs following the termination of her employment, but as these were primarily via the internet websites Trade-me and Seek, there had not been tangible evidence of these efforts presented to the Authority.

[98] In *Allen v Transpacific Industries Group Ltd (t/a "Medismart Ltd")*⁸ Chief Judge Colgan commented that the obligations of a dismissed employee making a loss of earnings claim are as follows:

...dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require,

⁸ (2009) 6 NZELR 530

in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.

[99] In *Radius Residential Care Limited v McLeay*⁹ the Employment Court observed in relation to the employee's obligation to mitigate loss that: "*The Court should not be left to speculate or guess.*"

[100] Despite the paucity of evidence available to the Authority, I am prepared to accept that Ms Eagle made the efforts as described in circumstances in which she had a dependent family, and the fact that initially her husband had been unemployed.

[101] I order HPDL to pay Ms Eagle the sum of \$6,835.68 net based on her contractual hours payment of \$569.64 net, less any payment received through WINZ, pursuant to s 128(2) of the Act.

Underpayment of wages due to unilateral reduction of hours

[102] Prior to the unilateral reduction in her hours of employment, Ms Eagle had been employed to work a 47 hour week in accordance with the Employment Agreement. Based on Ms Eagle's hourly rate of \$15.00, this equated to \$705.00 gross per week and to \$4,230.00 gross for a 6 week period.

[103] Following the unilateral reduction of hours, Ms Eagle had been paid a total sum of \$3002.66 gross based on the pay records provided by HPDL. This equates to a shortfall of \$1,227.34.

[104] I order HPDL to pay Ms Eagle the sum of \$1,227.34 gross in respect of the unilateral reduction in hours.

Underpayment of statutory holiday entitlement, bereavement leave and sick leave entitlement.

[105] Both parties have made detailed submissions about the amounts due in respect of underpayments of Ms Eagle's entitlements in respect of statutory holiday entitlement, bereavement leave and sick leave entitlement.

[106] Having considered these, I order HPDL to pay Ms Eagle the sum of:

- **\$15.00 net in respect of unpaid statutory holiday entitlement**
- **\$45.00 net in respect of unpaid bereavement leave**
- **\$30.00 in respect of unpaid sick leave entitlement**

⁹ Unreported [2010] NZEMPC 149

Other monies lost (i) Travelling costs

[107] As a result of being relocated to the East Tamaki surgery, Ms Eagle had incurred additional travelling costs.

[108] I order that HPDL pay Ms Eagle the sum of \$456.22 in respect of additional travelling costs pursuant to s 123(1)(b) of the Act.

Other monies lost (ii) Medical expenses

[109] Ms Eagle provided evidence of medical visits and claims that she incurred medical expenses totalling \$120.00.

[110] Ms Eagle had suffered some stress as a result of her work environment and issues, however I am aware that there was some evidence of other stresses present in Ms Eagle's life at the time of her employment with HPDL.

[111] On this basis I consider that there should be a reasonable contribution to medical expenses made by HPDL.

[112] I order that HPDL pay Ms Eagle the sum of \$60.00 in respect of medical expenses pursuant to s 123(1)(b) of the Act.

Compensation pursuant to s 123(1) (c) (i) of the Act

[113] As the disadvantage grievances contributed to the constructive dismissal grievance, I consider that the hurt, humiliation and injury to feelings experienced by Ms Eagle to arise from the same causes.

[114] I accept that Ms Eagle suffered hurt, humiliation, and injury to feelings, and that she experienced a loss of confidence following the termination of her employment..

[115] I order HPDL pay Ms Eagle the sum of \$6,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[116] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[117] Ms Eagle had requested a meeting with Mr Chandar in order to resolve her employment relationship issues. An employee in such a situation is required to abide by the

good faith requirements as set out in s 4 4 of the Act. In particular, s 4(1A) (b) states that good faith:

Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[118] Ms Eagle had not participated in the discussion at the meeting on 13 July 2012, having Mr Scrimgeour speak for her, which notwithstanding her right to have a support person present, I consider falls short of the requirement to be ‘*responsive and communicative*’.¹⁰ I have considered whether this can be accounted for by Ms Eagle’s assertion that she had felt intimidated by Mr Chandar, but do not find this to accord with the nature of their relationship as described to that point.

[119] There is further the requirement to be ‘*active and constructive in establishing and maintaining a productive employment relationship*’. During the meeting I find that Mr Chandar had been addressing the issues, and whilst this may not have been to the level required by Ms Eagle, this could be regarded as an attempt by Mr Chandra to maintain a productive employment relationship. However the unanticipated request for an exit package by Mr Scrimgeour made with the acquiescence of Ms Eagle at a point in time when the termination of her employment had not been proposed or discussed by either party, I find fell far short of the good faith requirement of s 4 (1A)(b) of the Act in respect of being constructive in maintaining an employment relationship.

[120] Following the meeting on 13 July 2012, Mr Chandar had informed Ms Eagle that she could return to work solely at the Manurewa location on her contractual hours; however she had refused to do so.

[121] I appreciate that Ms Eagle may have been confused by the communication from Ms Hansji on 13 July 2012, however the telephone call by Mr Chandar later that day was unequivocal. I find that Ms Eagle failed to be active and constructive in Mr Chandar’s attempt to maintain a productive employment relationship.

[122] I find contributory fault on the part of Ms Eagle and reduce the remedies awarded for compensation pursuant to s 123(1) (c) (i) of the Act by 50 %.

¹⁰ *Radius Residential Care Limited v McLeay* [2010] ERNZ 371

Costs

[123] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave to continue

Eleanor Robinson
Member of the Employment Relations Authority