New Zealand Employment Relations Authority Decisions

Hoyte v AIA International Limited (Auckland) [2018] NZERA 72; [2018] NZERA Auckland 72 (28 February 2018)

Last Updated: 18 March 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND		
		[2018] NZERA Auckland 72
		3018553
	BETWEEN	EDWINA HOYTE Applicant
	AND	AIA INTERNATIONAL LIMITED Respondent
Member of Authority:	Nicola Craig	
Representatives:	Emma Moss for Applicant	
Graeme Tanner for Respondent		
Investigation Meeting:	14 and 15 November 2017	
Submissions Received:	23 November 2017 from Applicant 30 November 2017 from Respondent	
Determination:	28 February 2018	
DETERMINATION OF THE AUTHORITY		

A. Edwina Hoyte's claims for unjustified actions to her disadvantage were either not raised within the required time or have been considered under her dismissal grievance.

B. Ms Hoyte was unjustifiably dismissed by AIA International Ltd.

C. Within 28 days of the date of this determination AIA International Ltd is to pay the following sums to Ms Hoyte:

(i) $10,125.00 for lost wages; and
(ii) $6,000.00 for compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

D. Costs are reserved and a timetable is set, in the event that agreement cannot be reached.

What is the employment relationship problem?

[1] Edwina Hoyte began working as a Risk Claims Assessor for AIA International Limited (AIA or the company) in Auckland in April 2016. AIA is a large multi- national provider of life insurance services. Ms Hoyte was appointed on a five month fixed-term agreement, covering the assessment of lump sum claims and initial assessment of monthly claims. Her group of three was part of a team of the six person Risk Claim Team (the team).

[2] After a few months several significant events occurred for Ms Hoyte and the Risk Claim Team. In June 2016 Richard Brown started as the new Head of Claims and Rehabilitation. He became Ms Hoyte's manager. He told Ms Hoyte that he saw her biggest asset as her experience working in a number of insurance companies in different countries.

[3] In early July 2016 the team was advised that the current structure was to be reviewed.

[4] On 18 July 2016 Ms Hoyte broke her foot in several places and tore a major ligament and tendon. Although she kept working initially, in August 2016 she needed surgery and had to request a change in her work hours to accommodate her rehabilitation.

[5] The restructuring led to all roles in the team being disestablished and several roles being established which staff could apply for. Ms Hoyte applied for three roles and was appointed to one, a Case Manager role.

[6] Ms Hoyte developed concerns about the equity of the work spread between herself and the other case manager. She spoke to Mr Brown about that and about her concern that there may also not be sufficient staffing with two case managers.

[7] In October 2016 Ms Hoyte was advised that she required further surgery on her foot. She continued to work, but did some work from home due to mobility problems.

[8] Just before Christmas 2016 Ms Hoyte was asked to attend a meeting with Mr Brown and the Head of Human Resources, Brynlea Hunter-Morpeth. This resulted in her being put on a performance improvement plan (the first PIP). The first PIP highlighted service to clients and advisers, adhering to priorities and quality standards, and respectful interactions with clients, team mates, management and others. The latter included reference to developing collaborative relationships, explaining her views professionally and respectfully, actively listening and being open to feedback.

[9] On 4 January 2017 a discussion between Mr Brown and Ms Hoyte, in front of the team, degenerated with Ms Hoyte becoming argumentative. An investigation led to a disciplinary process and a first written warning.

[10] Ms Hoyte was struggling with the work volumes. AIA made reference to complaints being made about her. She was then told she would require further foot surgery.

[11] On 16 March 2017 Ms Hoyte was involved in an incident with another staff member (employee A). He became very angry at her after she had recalculated a payment which he had previously calculated. Ms Hoyte complained to an AIA HR partner. Employee A apologised to Ms Hoyte.

[12] On return from her third foot surgery Ms Hoyte was invited to a disciplinary meeting regarding alleged failures in dealings with clients and failure to follow a direction from Mr Brown. Ms Hoyte went off on paid leave. At that point she engaged an advocate to assist her.

[13] A meeting on 19 April 2017 resulted in AIA deciding to take no further action. However, a second or revised PIP (the second PIP) was put in place with AIA acknowledging that aspects of the first PIP had not thoroughly been followed through on. Ms Hoyte accepted a second PIP as she wanted to work on her relationship with AIA. At her advocate's request the respectful interactions item, which was described as behavioural, was removed on the basis that any difficulties in that regard could be dealt with through the disciplinary process. The HR business partner acknowledged at that point that there had been improvements in Ms Hoyte's behaviour

[14] Ms Hoyte began to be in frequent contact with the HR business partner, who saw signs of Ms Hoyte being very stressed.

[15] In mid-May 2017 Ms Hoyte was involved in an incident with another staff member (employee B). Ms Hoyte contacted the HR partner. At a meeting with the partner and Mr Brown, Ms Hoyte was advised that the matter would be looked into but no outcome was received by her.

[16] A couple of weeks later two HR representatives approached Ms Hoyte about the possibility of a negotiated exit but nothing was agreed.

[17] On 15 June 2017 Mr Brown emailed the HR business partner with concerns about Ms Hoyte, concluding that it is "critical we see action on this. I'll be going on leave soon and I don't want to have to consider leaving should this issue not be rectified soon".

[18] Ms Hoyte and her advocate attended meetings on 23 June 2017 to respond to concerns and then on 26 June 2017 to respond to the preliminary decision to dismiss.

[19] AIA dismissed Ms Hoyte for irretrievable breakdown of her relationship with Mr Brown and other team members and creating an inharmonious and unsustainable work environment.

[20] Ms Hoyte claims that she was disadvantaged by AIA's unjustified actions during her employment and was unjustifiably dismissed. AIA argues that disadvantage grievances were not raised in time, that in any event there was no disadvantage or unjustified action and that it was justified in dismissing Ms Hoyte.

[21] Ms Hoyte initially filed in the Authority at the end of August 2017 claiming interim reinstatement. It was agreed to proceed to an early substantive hearing, although the first dates which could be agreed were in mid-November 2017.

[22] An investigation meeting was held on 14 and 15 November 2017. Ms Hoyte's reinstatement claim was withdrawn at the start of the first day. I heard evidence from Ms Hoyte, Mr Brown, Brynlea Hunter-Morpeth (Head of Human Resources), the HR business partner, and four colleagues from Ms Hoyte's team (including employee B). After the investigation meeting submissions were filed on behalf of the Applicant and

then the Respondent. The opportunity to file submissions in rely for the Applicant was not taken up.

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

What are the issues?

[24] Ms Hoyte's Statement of Problem clearly identified that she challenged her dismissal as being unjustified. There was also a general reference to Ms Hoyte being unjustifiably disadvantaged during the course of her employment. In relation to aspects of the test from *Walker v Procare Health Ltd 1* regarding incompatibility, reference was made to earlier events during Ms Hoyte's employment.

[25] AIA identified in its Statement in Reply that Ms Hoyte had not sufficiently particularised a claim for unjustifiable disadvantage. No further particulars were filed.

[26] In the closing submissions on Ms Hoyte's behalf several discrete events were identified as being the subject of disadvantage claims, such as the imposition of the PIPs. In some instances links were made with the dismissal, which may tie the alleged disadvantage events into the dismissal grievance.

[27] AIA submits that no grievance claims were raised by Ms Hoyte during her employment with it and thus she is unable to pursue any disadvantage claims as they are out of time, in relation to s 114 of the Act. It also notes that there has been no application for leave to file grievances out of time.

[28] Although the Authority is a body which makes determinations according to the substantial merits of the case without regard to technicalities2, there is a requirement to submit grievances within the time period, or else obtain leave to raise them late.3 If neither of those things occur, the Authority is unable to uphold the grievance claims.

1 *Walker v Procare Health Ltd* [2012] NZEmpC 90

2 S 157(1) of the Act

3 S 114 of the Act

[29] I therefore go on to consider whether disadvantage grievances were raised in time.

What disadvantage grievances were claimed?

The first PIP

[30] This grievance is described as the first PIP being run in a manner that was neither procedurally nor substantively fair. AIA commenced Ms Hoyte's first PIP in December 2016. I am not satisfied that Ms Hoyte raised a grievance within the 90 day period about either the imposition of a PIP or its operation.

The issue with employee A

[31] Ms Hoyte claims a grievance regarding how AIA dealt with and used the incident with employee A on 16 March 2017. I am not satisfied that any grievance regarding disparate treatment between employee A and Ms Hoyte was raised within the 90 day period. However, substantial aspects of what is being argued actually relate to the assessment of incompatibility and process in relation to the dismissal and so can be dealt with in relation to that grievance.

Suspension

[32] Ms Hoyte claims that what she describes as her suspension from 4 April to 1 May 2017 was an unjustifiable action by AIA to her disadvantage.

[33] Ms Hoyte's advocate attended a meeting on 19 April 2017 between the parties but there is no reference in the notes from the meeting regarding the period off work as being at issue. On 27 June 2017 her advocate emailed a lengthy letter to AIA's in- house legal counsel raising the dismissal grievance and claiming that AIA was engaged in sustained workplace bullying of Ms Hoyte. There was no reference in that letter to any concerns about the time Ms Hoyte had off work in April 2017.

[34] I am not satisfied that the paid time off work in April 2017 was raised as a grievance in time.

The second PIP

[35] Ms Hoyte voluntarily entered into the second PIP process on about 2 May 2017. Her grievance relates to AIA's failure to use the process to identify and address any behavioural concerns with the wider team, meaning she was denied the opportunity to change.

[36] However, the item in first PIP about respectful interactions was left out of the second at the advocate's request. An understanding was reached to deal with this behaviour issue, should any incidents arise, by way of disciplinary action. I take the arguments to be that the absence of disciplinary action in May and early June 2017 indicates that no problematic behaviour from Ms Hoyte occurred and that less serious disciplinary action should have been taken about anything which arose. I consider that these matters can be considered in relation to the dismissal grievance.

The issue with employee B

[37] The grievance claimed is that AIA decided to deal with this matter informally but then suggested that the on-off incident was representative of a wider relationship issue between Ms Hoyte and employee B. This was said not to be supported by evidence and not passed on to Ms Hoyte. Similarly to the issue regarding employee A I consider that this can be dealt with in relation to the dismissal grievance.

Discussion about possible exit

[38] Ms Hoyte claims that the discussion on 23 May 2017 where AIA's two HR representatives raised the possibility of an agreed exit, without Ms Hoyte's representative present, amounted to a disadvantage. I have been unable to establish from the communications which followed any raising of concerns about this meeting which could amount to the raising of a grievance. In the event that I am wrong about that, I also am not satisfied that any disadvantage to Ms Hoyte was established. Had she, for example, resigned as a result of the meeting, the situation could be different. Rather she expressed a concern about proceeding without her advocate present, and the meeting was adjourned.

Failure to investigate

[39] On Ms Hoyte's behalf it is alleged that Ms Hunter-Morpeth, as the instigator and decision-maker of the meetings regarding incompatibility issues, failed to investigate and merely relied on what was given to her. This matter relates to the dismissal and I will deal it under the heading.

What is required with incompatibility dismissals?

[40] I am encouraged by *Walker v Procare Health Ltd 4*, rather than looking at individual incidents and areas of conflict between Ms Hoyte, Mr Brown and other staff to take a more holistic approach to the whole employment relationship in looking at whether the employer has established the necessary elements justifying the dismissal in

terms of the statutory test in s 103A of the Act.

[41] In accordance with *Walker v Procare Health Ltd* I look at whether it has been established that:

(a) irreconcilable incompatibility existed;
(b) the irreconcilable breakdown in the employment relationship was attributably wholly or substantially to the employee; and
(c) the employer handled the dismissal in a procedurally fair way.

Was there irreconcilable incompatibility?

[42] Unlike in *Walker*, I took Ms Hoyte as not accepting that there was serious incompatibility or disharmony, while acknowledging that there were some issues in the workplace.

Other staff

[43] I heard from most of the staff in Ms Hoyte's team. Not surprisingly there was some difference between people regarding whether there was incompatibility in their relationship with Ms Hoyte, although it is fair to say that most expressed difficulties in their relationship with her.

[44] Most positive about her relationship with Ms Hoyte was the person who had the same job as Ms Hoyte. She describes herself as someone who tries to get along with everyone. She says that she had a very good working relationship with Ms Hoyte. She was aware of some disagreements between Ms Hoyte and others in the team, for example, about how things were done. From her perspective the main difficulty was that in the later period Ms Hoyte would go off to HR when there were issues, and would not be available to do her work, leaving her co-worker to cover.

4 *Walker v Procare Health Ltd* [2012] ERNZ 303 at [82]

[45] The other team members all expressed difficulties with working with Ms Hoyte and a preference not to have to do so. However, on closer examination most or all of these people could refer to only one incident with her, some of which were many months earlier. It certainly did not seem like there were frequently recurring incidents. One of the team members had moved to another work area that she had an interest in, and so had not been involved since April 2017.

[46] Ms Hunter-Morpeth referred in her statement to there being constant arguments, in the latter period of Ms Hoyte's employment. I did not find evidence of Ms Hoyte having constant or even frequent arguments with team members in the last few months of her employment. There was a sense of tension in the atmosphere though. This appeared to be possibly more linked to Mr Brown than to all team members personally.

Mr Brown

[47] My impression is that whilst some members of the team were dissatisfied in their dealings with Ms Hoyte, it was Mr Brown's email of 15 June 2017 which spurred AIA into more significant action.

[48] I accept that there were difficulties between Mr Brown and Ms Hoyte. He found her difficult to manage and reluctant to accept feedback readily. As one team member said, Ms Hoyte did not know when to stop.

[49] Obviously it was a serious concern to AIA that Mr Brown had expressed a question about remaining if the situation with Ms Hoyte was not resolved. However, in the months before her dismissal, due to the processes being undertaken by AIA and her own responses to them, Ms Hoyte withdrew and tried to minimise her interactions with Mr Brown. Their main interaction was in the weekly priority (case management type) meetings, when the HR business partner was present.

[50] I was unable to gain a strong sense of what it was about Ms Hoyte's behaviour which caused Mr Brown to write the email in mid-June 2017, particularly given their limited and formalised interactions. In his witness statement he refers mainly to tension being caused by Ms Hoyte's advocate who he considers inflamed the situation, going further than Ms Hoyte herself wanted to go in one instance.

[51] Mr Brown found it stressful to be challenged by the advocate and it was not an easy basis for a working relationship with Ms Hoyte. In his statement Mr Brown attempted to characterise some of Ms Hoyte's behaviour at this time as dishonest, meaning he had no trust and confidence in her. However, I did not find that evidence persuasive.

Conclusion on irreconcilable incompatibility

[52] In conclusion I accept that there were tensions between some staff and Ms Hoyte and between Ms Hoyte and Mr Brown. However, I am not satisfied that that had got to the point of an irreconcilable breakdown.

Was any breakdown attributable to Ms Hoyte?

[53] As I have found that the relationship had not yet got to the point of irreconcilable breakdown, I do not need to go on to consider whether the conflict was generated substantially by Ms Hoyte, to make my finding regarding whether her dismissal was unjustified. However, I will make some comment as it will be of significance to the issue of contribution.

[54] Ms Hoyte had substantial experience in insurance claims, both in New Zealand and overseas. She is someone who has strong views and is not afraid to speak her own mind and continue to argue her point. Her manner of dealing with issues and people had the potential to cause conflicts. She was not someone who backed down easily or readily accepted failings on her own part.

[55] Mr Brown was well-liked as a manager by other team members. One of the team members said during an interview for the January 2017 disciplinary process that Mr Brown would give people “the look” when they were overstepping the mark. My impression is that Ms Hoyte could not pick up on the “look” and ploughed on with setting out her position.

[56] Without meaning to impose blame on Mr Brown, my impression is that he seemed disinclined, whether due to Ms Hoyte’s personality or his general management style, to put specifics of concerns and complaints to her, particularly in the earlier days of their working relationship. This did change later.

[57] More broadly I accept that AIA put a considerable amount of human resources and managerial time into Ms Hoyte. The HR business partner spent a considerable

amount of time with Ms Hoyte, although my impression was that mush of this was more in a support role, rather than a formal coaching role.

[58] I also consider it likely that Ms Hoyte’s foot injury, surgeries, resulting time off work and mobility issues played a part in difficulties in keeping up with the workload. She was appreciative of AIA’s support, particularly as a relatively new employee.

Dismissal effected in a procedurally fair manner?

[59] In the event that I am wrong about the incompatibility issue I also make some comment on AIA’s process.

[60] The process was run by Ms Hunter-Morpeth. This was appropriate as Mr Brown, although Ms Hoyte’s manager, was not in a positon to objectively consider the matter.

[61] Ms Hunter-Morpeth wrote to Ms Hoyte outlining the concerns and enclosing a copy of Mr Brown’s email. Of particular concern was noted to be the apparent breakdown of Ms Hoyte’s relationship with Mr Brown, to the extent that he was considering resigning from AIA if action was not taken.

[62] Ms Hoyte was invited to a meeting on 23 June 2017. Both parties had external representatives present. She was advised that a possible outcome was the termination of her employment. After an adjournment, AIA advised of its preliminary finding that the relationship with Mr Brown and other team members had irreparably broken down.

[63] A further meeting was held on 26 June 2017 to enable Ms Hoyte and her representative to provide feedback. After an adjournment Ms Hoyte was informed of her termination

[64] Much of the process was undertaken fairly. However, I have concerns about the lack of investigation or exploration undertaken. Mr Brown’s email seems to have been completely accepted without further discussion with him or exploration about what else could be done or offered. The issues with other staff were not fully investigated. A written statement from employee B was sought a month after the

incident between him and Ms Hoyte. An assumption appears to have been made as regards employees A and B, that the incidents involving them indicated a wider relationship problem.

[65] This is in contrast to the interview notes from investigative meetings with other staff in relation to the January 2017 incident with Mr Brown which led to the first written warning. I accept that Ms Hunter-Morpeth had some knowledge from her own previous involvement, but the HR business partner had been dealing with events since the start of 2017. The two had had some informal discussion over that period about Ms Hoyte.

[66] I was interested in whether there had been consideration of Ms Hoyte moving to another area of AIA's business, namely one outside Mr Brown's area. The other main area is underwriting. Mr Brown spoke of an informal discussion he had had with the person in charge of that area after that person considered that her expertise had been questioned by Ms Hoyte. I was not satisfied that there were redeployment options.

Was Ms Hoyte unjustifiably dismissed?

[67] In *Walker* v *Procare Health Ltd* 5 it was noted to be a rare and unusual case where incompatibility will justify dismissal. As outlined above I am not satisfied that the relationship between Ms Hoyte and Mr Brown and other team members had got to the point of having broken down irretrievably and that a dismissal was justified at that point.

[68] Ms Hoyte had been given a first written warning about the incident with Mr Brown in January 2017. No incidents between January and May had been seen as warranting a warning. It had then been agreed in May 2017 that behavioural issues would be dealt with by way of disciplinary action. At that point AIA had not indicated that dismissal was the next step if the behaviour did not improve. Ms Hoyte was entitled to expect another warning if there was a repetition. Other than the issue with employee B which was not specifically mentioned in the letter inviting her to the 23 June 2017 meeting and had occurred some weeks before, there were no recent events referred to as the subject of the final process.

5 Ibid

[69] I consider that more could have been done by this fairly large employer to support Ms Hoyte to attempt to resolve the difficulties that existed. There was no external training suggested or required of Ms Hoyte, nor any team building work undertaken.

[70] I find that Ms Hoyte was unjustifiably dismissed by AIA.

What remedies should Ms Hoyte receive?

Lost wages

[71] Ms Hoyte claims reimbursement for lost earnings for a period of 12 months, which extended past the date of the Authority's investigation meeting. Ms Hoyte had not obtained other employment by the time of the investigation meeting.

[72] There is a discretion under s 128(3) of the Act to order a sum of compensation for lost remuneration greater than the three month period. I was urged to do so on the basis of the likely difficulties of Ms Hoyte finding other work in the small world of insurance companies. Ms Hoyte notes that AIA bought Sovereign insurance (in around September 2017) thus reducing her options for employment in the insurance market. I accept that finding other employment may be difficult. However, given the difficulties in the AIA workplace I am not sufficiently confident that, had she not been dismissed in June 2017, Ms Hoyte's employment would likely have continued for a long period. I therefore do not award more than three months' lost wages.

[73] AIA argued that Ms Hoyte had not sufficiently mitigated her loss, pointing to the evidence of mitigation as all dating from 5 October 2017 onwards, over three months after her dismissal

[74] Ms Hoyte says that she had found the situation at AIA quite traumatic and needed to get herself in a good head space to apply for jobs. Evidence of her mental state towards the end of her time at AIA was supplied by the HR business partner. She described Ms Hoyte as very stressed, confused, upset and sometimes angry. Also, in August 2017 Ms Hoyte attended mediation and was involved in filing her application for interim reinstatement.

[75] Ms Hoyte, given her childcare responsibilities, was looking at part time work which she described as rare.

[76] In *Xtreme Dining Ltd (t/a Think Steel) v Dewar* 6 the Full Court stated that ultimately it is for the employer to persuade the Authority that the employee has acted unreasonably in failing to mitigate the asserted loss.

[77] Although by a fine margin, I accept as reasonable Ms Hoyte's explanation for not applying for jobs earlier. She was not in a fit state to start looking at other work immediately after her dismissal and would have found it difficult to find alternative employment, particularly part time at a similar pay level. I have calculated three months' lost wages as $16,875.00 gross7 subject to a consideration of contribution.

Compensation under s 123(1)(i)(i) of the Act

[78] Ms Hoyte claims $15,000 compensation under this head. There was little evidence given specifically in relation to this claim. However, as referred to above, I gained an impression from Ms Hoyte and the HR business partner about the effects on Ms Hoyte of what was occurring at AIA and this assists as regards the effects of dismissal. Ms Hoyte also said that she found the situation very traumatic. She questioned who was going to have her, in relation to getting other work, which I take as indicating a severe dent in Ms Hoyte's self-confidence.

[79] Ms Hoyte also spoke of the financial difficulties which the dismissal caused her. Considering all the circumstance an award of $10,000 would be appropriate, before Ms Hoyte's contribution is considered.

Coaching services

[80] The statement of problem sought a contribution of $3000 plus GST to coaching or outplacement services for Ms Hoyte. AIA questions the Authority's jurisdiction to award such a sum. In any event there was no evidence of Ms Hoyte having incurred such an expense and I make no award in that regard.

6 *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court at [104]

7 Total salary divided by 12 (months), multiplied by three (months), and reduced by 25% to reflect part time hours

Contribution

[81] AIA says that if I find that Ms Hoyte is entitled to remedies then these should be substantially reduced due to her contribution to the situation which gave rise to her dismissal.

[82] In order to make a reduction, Ms Hoyte's actions must be culpable or blameworthy or wrongful actions which have, when assessed in a commonsense way, contributed to the situation that gave rise to the personal grievance. 8

[83] I accept that Ms Hoyte's actions, although not intentionally designed to cause disturbance in the workplace, did have that effect and that this was to an extent which can be regarded as blameworthy.

[84] I have considered the possibility that no remedies should be awarded due to Ms Hoyte's role in her dismissal, but do not consider that to be warranted in this case.

[85] In the X*treme Dining* case the Court repeated the description of a contribution of 50% being a significant one.9 I order a reduction for contribution of 40%. I therefore order AIA to pay Ms Hoyte the sums of $10,125.00 for lost wages and

$6,000.00 for compensation under s 123(1)(c)(i) of the Act, after reduction for contribution, within 28 days of the date of this determination.

Costs

[86] Costs are reserved and the parties are invited to resolve the matter. If they are unable to do so, Ms Hoyte shall have 28 days from the date of this determination to file and serve a memorandum on the matter. AIA shall have a further 14 days to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig

Member of the Employment Relations Authority

8 *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 at [175]

9 N 8 at [222]