

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 545
3095892

BETWEEN HENDRIKA KILLGOUR
 Applicant

AND WAIKATO DISTRICT HEALTH
 BOARD
 Respondent

Member of Authority: Michael Loftus

Representatives: Allan Halse, advocate for the Applicant
 Anthony Russell, counsel for the Respondent

Investigation Meeting: 12 May 2021 at Hamilton

Submissions Received: 21 May and 16 June 2021 from the Applicant
 27 May 2021 from the Respondent

Date of Determination: 7 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Hendrika Killgour, claims she was unjustifiably dismissed, albeit constructively as a result of the respondent's *failure to follow process and justly and correctly investigate allegations of bullying*, on or about 30 November 2018.

[2] The respondent, Waikato District Health Board (WDHB), denies the claim and asserts Ms Killgour resigned of her own volition.

Background

[3] Ms Killgour worked for WDHB's Mental Health and Addiction Service (CADS) as a Drug and Alcohol Clinician between April 2017 and her cessation.

[4] In July 2017 a new charge nurse manager, Velda Raybone-Jones, was appointed and quickly identified some issues with Ms Killgour's clinical record keeping. She raised this with Ms Killgour who advised she had dyslexia. This led Ms Raybone-Jones to ask what assistance was being provided to which the answer was "nothing".

[5] The answer surprised Ms Raybone-Jones. She raised it with the health and safety team to be told the reason was the condition had not been previously declared. Ms Killgour disputes that saying it was mentioned in her interview though if that was the case it was not recorded anywhere. There were further discussions between Ms Raybone-Jones and Ms Killgour about assistance and the fact the latter did not want her condition widely known though her clinical lead, Kate Ridder, was involved in providing assistance. Here it should be noted Ms Ridder subsequently left WDHB and appeared as a witness for Ms Killgour.

[6] In March 2018 there was what the DHB calls a sentinel (extremely serious) event which when reviewed again exposed potential concerns about Ms Killgour's record keeping. Further enquiries evidenced that others also had concerns. That led to a meeting between Ms Raybone-Jones, Ms Ridder and CADS operations manager, Nicola Livingston, at which it was decided it might be worth getting an external person to assess Ms Killgour's work.

[7] These issues were then raised in a meeting Ms Raybone-Jones had with Ms Killgour on 1 May. It was followed by a detailed e-mail and advice Ms Killgour's clinical notes would be audited by someone outside of CADS; that Ms Raybone-Jones and Ms Killgour would work together to explore options that would assist the latter and Health and Safety would be involved.

[8] Here it should be noted there was one comment during the meeting that might potentially be construed as alleging bullying. It was that Ms Killgour got flustered when working with a certain named clinician. However, and when asked if she wished the issue raised with that Doctor, Ms Killgour said no though that did not stop Ms Raybone-Jones choosing to observe the two together on a couple of occasions though she saw nothing of concern.

[9] A further meeting followed on 17 May at which Ms Killgour agreed to attend an external assessment. The same day Ms Raybone-Jones sent a general e-mail reminding people of pink shirt day and making a stand against bullying.

[10] The assessment occurred on 27 June. A report was provided on 1 August and it would be fair to say it raised some issues about Ms Killgour's ability to perform her role. They included impaired written expression, reading skills, difficulty processing both visual and auditory information and poor working memory. WDHB's view of the report was conveyed to Ms Killgour by letter dated 29 August. As Ms Raybone-Jones put it:

In the letter I outlined the various issues that had been raised by the report. The number and significance of these issues meant that there were serious concerns about the ability of Ms Kilgour to do the job she was employed for, being Alcohol and Drug Clinician. We requested that Ms Kilgour attend a meeting to discuss these issues. The meeting date proposed was 6 September.

[11] As events transpired Ms Killgour then enlisted Mr Halse's assistance and as a result the meeting actually occurred on 18 September.

[12] In the interim and during July and August Ms Raybone-Jones continued to monitor Ms Killgour's notes. This evidenced on-going issues, with one being of particular concern, and further correspondence ensued.

[13] On 11 September Ms Killgour saw her Doctor who certified her unfit for work till the 17th. Ms Killgour says the reason was that she was displaying symptoms of stress which, in her opinion, *confirmed that the toxic culture at CADS was undermining my physical health and mental wellbeing.*¹ That said none of this was apparent from the medical certificate which said no more than Ms Killgour was medically unfit for work and she said nothing.

[14] The meeting of 18 September proceeded and, as Ms Raybone-Jones put it, resulted in a plan to:

- (a) Look at further support for Ms Killgour, including technological support;
- (b) Give Ms Killgour a three week period to catch up with her files and patient notes, as well as other issues and find her a place to do this free of distractions;

¹ Written brief of evidence at [6]

- (c) After the three week period, Ms Killgour would return to her role and support a normal caseload of between 30 to 40 clients;
- (d) Her progress would then be reviewed after a further six weeks;
- (e) If, after six weeks, there had been no progress in her ability to manage a full caseload and perform her work safely and effectively, they would then have to meet to review the ongoing employment and how it would proceed; and
- (f) There was an offer of EAP (Employee Assistance Program) support in the meantime.

[15] It was then arranged that Ms Killgour work from another building while she addressed the “catch up” and there was a further meeting with IT staff to arrange support with additional software being installed for Ms Killgour in early October.

[16] On 1 October there was a further meeting at which Ms Killgour reported she had completed the updating of her work. WDHB disagreed and gave further time for this to occur with these events being summarised in a letter dated 10 October. That letter did acknowledge Ms Killgour had by then caught up and confirmed the further, agreed, six week review would occur on 12 November.

[17] That said there was another meeting on 24 October after further errors were discovered. The six week review was rescheduled for 26 November and, in the interim, regular meetings were to occur with Ms Ridder in order to provide further support.

[18] That process was, however, truncated as Ms Killgour left a letter of resignation on Ms Raybone-Jones’ desk on 5 November. It was headed “constructive dismissal” and alleged discrimination as a result of dyslexia. The letter also claimed Ms Killgour had been harassed and bullied out of the organisation and treated condescendingly. Other complaints were raised, including one that Ms Killgour had received minimal support from Ms Raybone-Jones and that she had been set up to fail by being given the ten most challenging clients the service had.

[19] The letter was acknowledged on 7 November along with advice the concerns were being taken seriously and a further response would follow. That occurred on 13 November with the letter being written by Ms Livingston. Having expressed disappointment at the resignation the letter sought more information about Ms Killgour’s allegations. It also reviewed what Ms

Livingston saw as significant attempts at assisting Ms Killgour before advising *If at any time you wish to reconsider your resignation, please contact me immediately.*

[20] There was no response to the suggestion Ms Killgour might reconsider her resignation. Her, I must say, rather confused evidence was that was because she never saw the letter as it might have been sent directly to her advocate. She also added it would have made no difference as she already had a new job to go to.

[21] As a result of the lack of response the resignation was formally accepted on 26 November with Ms Killgour's last day of employment being 30 November.

[22] The grievance was then formally raised on 28 February 2019.

Discussion

[23] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[24] As already said Ms Killgour claims she was constructively dismissed as a result of WDHB's failure to address the bullying to which she was subjected.

[25] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*² the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.

[26] In *Wellington etc Clerical Workers etc IUOW v Greenwich*³ the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

² (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

³ (1983) ERNZ Sel Cas 95; [1983] ACJ 965

[27] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. It is for the applicant to convince me that is the case. There must also be a causal link between the employer's conduct and the tendering of the resignation⁴ and the possibility of resignation should be foreseeable.⁵

[28] Here the alleged breach is bullying and a failure to address it but almost immediately the claim faces obstacles as it is for Ms Killgour to establish a prima facie case that requires an answer from WDHB. In other words she must establish conditions were such that by that bullying WDHB had breached her employment agreement to such an extent resignation was both a warranted reaction and foreseeable.

[29] When answering questions about who wrote the resignation letter Ms Killgour provided two answers. The first was that she had been assisted with its preparation but parts were her words. The second was more detailed. It started with a concession she had not written the letter of resignation and said that was because she could not formulate the words as she was too stressed. She then went so far as to say she hadn't actually checked the letter's content and similar concessions were made regarding her written brief. This leads to a scenario where her oral evidence becomes important and the problem is it did not support the accusations written on her behalf – indeed I have to conclude it failed to come close.

[30] When asked why she felt compelled to resign she initially said the stress was unsustainable as it appeared Ms Raybone-Jones would not stop raising issues which were, in turn, undermining Ms Killgour's professionalism. She also criticised the assessment as being stressful. By way of what proved a summation she said she resigned due to the unsafe environment but, at least orally, provided little or no detail other than that already referred to in this paragraph. Interestingly Ms Killgour never mentioned, let alone spoke to most of the written assertions such as the allegation she was given the most challenging clients and provided no detail of any alleged bullying.

[31] Another problem is Ms Killgour's evidence ignored the fact there were clearly performance issues. The evidence in this regard is overwhelming and not only was WDHB entitled to raise the issues, it was probably beholden to do so given patient safety was at issue.

⁴ *Z v A* [1993] 2 ERNZ 469

⁵ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[32] Despite this Ms Killgour only referred to this when asked and then her answers were that her issue was not the fact WDHB was trying to address its concerns but that she was trying to “sort it” and continuing pressure made it hard to cope. That is difficult to accept given evidence problems continued to emerge and it was apparent Ms Killgour was failing to remedy clear and continuing deficiencies.

[33] Ms Killgour also undermined her claim by accepting WDHB undoubtedly thought it was trying to help her and the evidence overwhelmingly shows that was so. WDHB clearly sought to assist in a genuine effort to try and improve Ms Killgour’s performance and she concedes this was so with respect to the “intellectual stuff” but claims WDHB was failing with respect to her emotional needs. To provide such help is not the act of an employer trying to “get rid” of an employee or force them out.

[34] It is here Ms Killgour’s second fundamental problem arises and that is the question of foreseeability of resignation and WDHB’s knowledge of its contended failure. The evidence leads to only one conclusion - there was no knowledge or foreseeability. As already said it is conceded WDHB was trying to help and the evidence is clear it was never made aware it was failing to address Ms Killgour’s emotional needs.

[35] Ms Killgour accepts she never raised any of the emotional issues with her managers other than to suggest she might have made some passing comments to Ms Ridder. She concedes the first management would have been aware there was a possible problem in that regard was when she tendered her resignation. She puts her failure to raise these concerns to a belief WDHB *wouldn’t want to know* and also accepts she did not respond when WDHB tried to find out more once the issues were raised. That is far from adequate given the foreseeability requirement.

[36] Nor did Ms Ridder raise any concerns. Indeed she denied Ms Killgour raised concerns with her though she says she perceived Ms Killgour was having difficulties especially toward the end when Ms Ridder felt Ms Killgour was completely overwhelmed and the letters were making it worse. That said Ms Ridder also said her role was to assist with “training and support” and she made no attempt to raise any perceived concerns on Ms Killgour’s behalf as to do so was “beyond my brief”.

[37] I also note Ms Killgour’s admission she obtained replacement employment before resigning. As submitted on behalf of WDHB *This is hardly commensurate with a breach of*

duty forcing the applicant to resign; instead it shows a voluntary action to take up another position.

[38] Ms Killgour's evidence relies on a contention the pressure of WDHB's attempts to address her clearly inadequate performance was so overwhelming she had to resign. It is undermined by the fact this went on for some time and she could remain until she found another job.

[39] Finally there is the allegation of discrimination due to dyslexia though I have to note that while it was mentioned it was not pleaded as a cause of action in the Statement of Problem. There is no evidence to support the claim and I again refer to the fact Ms Killgour conceded WDHB was trying to assist her cope and thought it was helping. I also note her supporting witness, Ms Ridder, accepted dyslexia was not a barrier to Ms Killgour continuing employ at WDHB and not, in itself, an issue.

Conclusion

[40] For these reasons Ms Killgour has failed to establish there was a breach, let alone one upon which she could found a claim of constructive dismissal. Her claim is dismissed.

[41] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority