

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 519
3063339

BETWEEN LISA MAREE MATTHEWS
Applicant

AND HOWARD MATERIAL
HANDLING LIMITED
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Johanne Greally, counsel for the Applicant
Byron Cummins, for the Respondent

Investigation Meeting: 21 June 2021

Submissions Received: From the parties at the investigation meeting

Date of Determination: 24 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Lisa Maree Matthews was employed by Howard Material Handling Limited (HMH) since 27 July 2015. She resigned from her employment on 29 May 2019. She says she did so because she had no other choice. She says this was because the director of the company Byron Cummins engaged in a deteriorating pattern of behaviour that was abusive, condescending, sarcastic and unfair. She says the workplace had become hostile and unpleasant and for the last two years of her employment she woke up in the morning with her heart pounding and feeling physically sick.

[2] On 19 March 2019, 23 April 2019, and 6 May 2019, Ms Matthews advised her employer of a number of personal grievances and says since then Mr Cummins conducted a

number of retaliatory actions which she felt were designed to punish her for standing up to him. She also asked that a formal warning given to her by Mr Cummins be removed immediately because it was unwarranted and unjustified.

[3] HMH was advised in the 6 May letter that Ms Matthews would not return to work until she could be sure her workplace was safe. Indeed, Ms Matthews did not return to work and resigned in writing on 29 May 2019. Ms Matthews says as the resignation was forced on her, she was in reality constructively dismissed.

[4] Ms Matthews claims the following remedies:

- (a) Reimbursement for time off on stress and annual leave.
- (b) Wages from the date she resigned until 7 June 2019 when she obtained other employment.
- (c) Damages for hurt and humiliation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) of \$15,000.

[5] HMH denies the claims to the personal grievances and says there was no bullying or threats made to Ms Matthews by the company and that she resigned on 29 May 2019 of her own free choice. It says further it took steps to try to allay Ms Matthews' concerns prior to her resignation.

[6] The issues to be determined by the Authority are:

- (a) Was retaliatory action taken against Ms Matthews following the raising of her personal grievances?
- (b) Was the formal warning issued on 24 April 2019 justified?
- (c) Was Ms Matthews constructively dismissed?
- (d) What remedies if any should flow.

The Authority's investigation

[7] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions but I do not record all the evidence in submissions received.

[8] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

[9] The Authority heard from five witnesses, namely Ms Matthews, Jason McLauchlan, Mr Cummins, Luke Hamilton, Kim McGill, and Kimberly Graham. The witnesses gave their evidence on oath or affirmation and had filed written briefs of evidence which they were then questioned about by the Authority and cross-examined by either Mr Cummins or Ms Grealley respectively.

What caused the employment relationship problem?

[10] When Ms Matthews first started with HMM there was a lot of give and take and she had a degree of flexibility in coming and going, and was able to make up time during the day where she came in late.

[11] She says however that over time, those things that made her job flexible and suitable for her family life disappeared. Times became regimented, she couldn't work late during school holidays to accrue extra hours and she was treated differently to co-workers. Ms Matthews says her ability to accrue hours to take as leave later were cut following an incident when she took time off because of a dying family pet. Ms Matthews gave evidence that soon after she started her employment, she kept a diary of issues of concern. She said however that although she wrote these down for her own reasons, she did not raise issues at the time but rather kept the log for her own personal reasons.

[12] On 19 March 2019 Ms Matthews wrote to Mr Byron Cummins the director of HMM. She states the grievances she was raising were for bullying, inappropriate comments and statements together with unjustified threats concerning her employment. She highlighted a number of instances as follows:

- (a) January - Monday 28/1/2019 – inappropriate comments and threatening statement regarding my employment when the school holidays are extended and I requested two days leave as there is no OSCAR approved childcare available. Mr Cummins commented, “All the other grown ups manage to find out when their children are going back to school and arrange childcare so they could go to work, so you better sort it out as well”.

- (b) February – Tuesday 19/2/2019 – I requested 2-3 hours leave to take my daughter to a hospital appointment.

....

This request for leave resulted in you telling me if I wasn't at work by 12 noon then I was not to come in at all. When I said that I couldn't afford to use an entire day of annual leave when I only needed 2-3 hours at the most. You said, "I know, but I'm trying to run a business here so it's not my problem, so that is where I am drawing the line. If you are not here by noon you can take the whole day".

- (c) February – Wednesday 27/4/2019 – I requested that you sign and return my request for annual leave form for [child's hospital appointment] and also requested that you add to it in writing what you had previously said to me about not coming into work if I couldn't get there before 12 noon.
- (d) March – Monday 4/3/2019 – you say, "good morning" to me as you walk through the front walkway in the main office and do not hear me reply as you were already in the showroom by the time I replied, "hey". So you come around back and into the main office and lean into my personal space to snarl at me: "I said good morning to you", to which I promptly replied, "I said hey but I must have not said it loud enough".
- (e) March – Monday 11/3/2019 – you sent an email to the sales and accounts email addresses and asked myself and [another employee] to read it. It states that you have booked us into attend a Kiwi Host training course for one day which will extend beyond my contracted hours and that I needed to arrange for childcare in order to attend and that furthermore I am to cover the associated costs of this and you will reimburse me.
- (f) March – Tuesday 12/3/2019 – I email an official letter of complaint to you in regards to the training course and the way you went about trying to get me to attend and cover additional expenses without speaking to me first. I advised you that I would not be attending and stated that I thought the way you had handled it was unacceptable. You came into the building around 11.45 after being out on site since before I got to work, and as you had done on a recent previous occasion, our first interaction was when you walked through the front

part of the office and very bluntly say, “good morning”. I reply as usual, “hey”, then you walk around through the showroom and come back into the office and once again glare at me and say, “I said good morning to you”. As I did the first time this happened I quickly apologised and told you that I had replied “hey” but I guess I hadn’t spoken loud enough.

...

In regards to this growling at me over the fact that you did not hear me reply to you I have since ensure that I speak at a much louder volume when returning your greeting and now say good morning in return.

...

- (g) March – Wednesday 13/3/2019 – I was following my timetable When you came out to where I was working and began questioning what I was doing and why I was doing that. I said that I was planning to count some stuff but that it was all out of its boxes and all over the place, so I was tidying up and putting stuff where it should be. You told me that you had to do a full stock account in a couple of weeks so I was wasting my time and you wanted me to leave it. Later that day you sent an email addressed to myself and [another employee] and asked us to read it. This email requested that we do the very thing that I had been grilled about doing a few hours before: tidying up the stock in preparation for a stocktake and label it where possible and put things where they should be.

...

- (h) March – Monday 18/3/2019 – around 1.30 pm you called me into your office and tell me to sit down. You then inform me that you have arranged for (another employee) to attend the training course this Thursday instead of me. I said okay. You then went on to inform me that you had booked me into one of the other dates on 23 May.

[13] Ms Matthews’ letter went on to explain the negative effects she felt this behaviour was having on her. The letter concluded by stating that she did not feel comfortable trying to resolve these issues without support and that she was in the process of applying for mediation. She stated she would notify Mr Cummins when that application process had been completed.

[14] On 23 April 2019 a further personal grievance was notified. Ms Matthews had instructed Hutt City Law to represent her. Their letter set out further grievances concerning, namely:

- (a) Safety in the workplace;
- (b) Training; and
- (c) Stress, bullying and abuse in the workplace.

[15] This letter also referenced Ms Matthews' prior letter of 19 March 2019. It also raised historic complaints from 2018. It referred to inadequate remuneration and failure to deliver assured pay rises, and accused HMH of taking retaliatory action against Ms Matthews following the lodging of her personal grievance on 19 March 2019. The alleged retaliatory actions included:

- (a) Deducting annual leave rather than allowing an unpaid one hour lunch break extending the hours of the day to six hours when Ms Matthews had to take her child to hospital.
- (b) The paying back the hour which affected Ms Matthews' WINZ subsidy.
- (c) The next time Ms Matthews applied for leave for one hour, intending to work until 1.00pm and then take her lunch break and then use one hour's leave to pick up her child early from school, she was instructed that from now on annual leave can only be applied to normal working hours with no rationale behind this change.
- (d) The Wi-Fi password was changed so Ms Matthews could not access the internet on her phone during her lunchbreak. When she asked for the new password it was not provided.
- (e) The following remedies were sought:
 - (i) an apology and an assurance she would be treated and spoken to with respect;
 - (ii) that she be reimbursed for five days sick leave and five days annual leave;
 - (iii) Compensation for distress and humiliation of \$25,000;

- (iv) an increase in her pay rate to \$25 per hour;
- (v) to be paid one hour for every lunch hour that she worked while there was no staff cover; and
- (vi) her legal fees to be reimbursed.

[16] The letter concluded by advising HMH that if the remedies were not granted, then the law firm was instructed to file proceedings in the Employment Relations Authority.

[17] At this stage HMH instructed Mike Gould of Gibson Sheat to represent it on the claims.

[18] A further personal grievance was then notified on 6 May 2019 (emailed to Mike Gould at Gibson Sheat). The letter informed that:

- (i) The lunch room has been made safe;
- (ii) Ms Matthews' desk has been altered and the screens are now central and far enough away to not cause the previous problems;
- (iii) The drawers under her desk have been removed to allow adequate leg room;
- (iv) Mr Cummins has amended a sign now stating, "management only" for access up the ladder to the mezzanine floor. We presume this means Ms Matthews no longer has to fetch and carry items from the mezzanine floor for customers.
- (v) He has put a latch on the lockers.
- (vi) He has attempted to provide PPE gear although this was insufficient.

[19] The letter went on to advise that Mr Cummins condescending, aggressive and demeaning behaviour is adversely affecting our client's health to the extent that she can no longer attend work for now. The letter also referenced the parties' attendance at mediation on 18 April 2019 which had failed to resolve the issues before them and raised new grievances under the headings:

- (a) Forced to sign documents without being given time to read them first;
- (b) Setting up changed practice to humiliate Ms Matthews.

[20] The 6 May letter also referred to a written warning purported to have been given to Ms Matthews as unwarranted and unjustified with a demand that it be removed immediately.

Evidence and analysis

[21] Following the first raising of the personal grievance on 19 March 2019, Ms Matthews says HMS, through Mr Cummins, immediately embarked on a series of retaliatory actions. The specifics of the alleged actions included deducting an hour of annual leave instead of allowing Ms Matthews to use her one hour unpaid lunch break to extend her hours then, paying the hour back the following week which affected her WINZ subsidy adversely, and changing the Wi-Fi password.

[22] After the parties attended mediation on 18 April 2019, Ms Matthews says there was further retaliatory behaviour by Mr Cummins with him asking her for the return of office keys, slamming a paper with photographs of safety gear on her desk, asking her to read it and sign it.

[23] Ms Matthews says Mr Cummins told her it was her job to do all the invoices and to stop leaving things for Kim, despite these in the past being handled by Ms McGill, being given new tasks and acting in a demeaning way.

[24] Mr Cummins denied the allegations that he was acting in a retaliatory manner. He said because Ms Matthews was adopting a rather belligerent approach he felt he needed to do things by the book and this was the case in respect of Ms Matthews making up hours.

[25] When Ms Matthews raised issues he says he tried to change things for her and indeed this is evidenced in Ms Matthews' representative's letter of 6 May 2019 in which Ms Greally advises progress in respect of Ms Matthews' complaints had been made, although not enough.

[26] In respect of changing the password, Mr Cummins denied it had been changed. He denied standing over Ms Matthews after giving her a form for PPE. He said there would not have been a need to do so. Ms Matthews had been provided gloves but he says that when she had then denied having received them, he gave her another form. He pointed out that everything Ms Matthews was complaining about, he was trying to fix, as was acknowledged in Ms Greally's letter.

[27] It is noted at this point, that during the periods complained of following the grievance letter of 19 March and then notification of subsequent grievances and attendances at mediation, Ms Matthews was represented by Hutt City Law. In her personal grievance letter of 19 March 2019, Ms Matthews advised she had applied for mediation and would notify HMH when this application process had been completed. This was followed up by the 23 April 2019 letter from Hutt City Law outlining in more detail the list of grievances. This letter advised that Ms Matthews was seeking six remedies namely:

- (a) an apology for the alleged abuse and degradation;
- (b) reimbursement for five days sick leave and five hours annual leave;
- (c) compensation for distress and humiliation of \$25,000;
- (d) an increase in her pay rate to \$25 per hour ...
- (e) [Ms Matthews] is to be paid for one hour for every lunch hour that she worked when there was no staff cover; and
- (f) her legal fees to be reimbursed.

[28] A further personal grievance letter sent on 6 May 2019 acknowledged that steps had been taken by HMH and further advised Ms Matthews would not return to work until she was sure that the workplace was safe. Ms Matthews also challenged the issuing of the warning, asking that it be removed immediately.

[29] Ms Matthews' evidence was that she had prepared a list of complaints she had against the firm since she started. However this list was never furnished to HMH until Ms Matthews filed her claims with the Employment Relations Authority some years down the track.

[30] Further, in respect of her claim that she was constructively dismissed, Ms Matthews' evidence was that she waited until she had obtained new employment before she resigned. She said she would not have resigned until she obtained that employment. Although that is an understandable position to take, the length of time in raising complaints, and the fact that Ms Matthews had not returned to her role since 18 April, makes it difficult to conclude that HMH was guilty of such egregious breaches of the employment agreement that it was foreseeable that Ms Matthews would resign from her employment. It is clear that the relationship between Ms Matthews and Mr Cummins was breaking down.

Written warning

[31] On 24 February 2019 HMH issued a written warning to Ms Matthews (D19 in the BOD). The warning was headed – “Warning tone and attitude when speaking to me”. HMH whilst arguing the warning was justified because of the way Ms Matthews spoke to Mr Cummins, accepted that there was no discussion with Ms Matthews regarding the issuing of the warning, nor was she given an opportunity to have input into whether or not it should issue. Because of the way the warning was issued, i.e. without notice, Ms Matthews had no chance to involve her representative or indeed have any input into the decision to issue the warning. It was simply sent to Ms Matthews.

[32] During the investigation meeting, Mr Cummins freely admitted that the warning was issued out of frustration and that proper process was not followed. Indeed, I find that there was no process surrounding the issuing of the warning. Following an altercation of sorts between Mr Cummins and Ms Matthews, Mr Cummins simply emailed the warning to Ms Matthews. There was no discussion regarding it, nor was Ms Matthews given the opportunity to have a representative present at any disciplinary meeting. No meeting of any kind occurred prior to the issuing of the warning. I am satisfied that the warning was unjustified both substantively and procedurally and impacted on Ms Matthews negatively, causing her humiliation, loss of dignity and injury to feelings.

Resignation or dismissal

[33] In the period between attending mediation, and resigning, Ms Matthews suffered an injury and was away from work. On 1 May, Ms Matthews emailed Mr Cummins advising “Just to let you know that ACC should be contacting you to confirm my rate of pay and tax code”. The email went on to advise that Ms Matthews had an appointment with her doctors and would not be back at work on 7 May. She also asked that if there was an issue with ACC cover, then she would request access to 75 hours of accrued annual leave which she had earned to date.

[34] On 2 May, Ms Matthews emailed Mr Cummins again advising:

ACC have advised that because I am receiving an income top up from WINZ that it would cause my benefit to be placed on hold if I use ACC for wage subsidy. As ACC only start paying from day 8 anyway it is not a good option for me. So if possible it would be beneficial if I could access that accrued annual leave or I will take unpaid leave until I return and get WINZ to increase my benefit payment. ...

[35] On 3 May Mr Cummins responded amongst other things asking regarding her return to work. His email response also stated:

How this affects WINZ is not in HMH control. If in any event ACC declines your case and WINZ do not pay you we could consider the accrued leave until this has gone and then it would have to be paid unpaid leave. We would of course seek clarification before making a commitment.

[36] Later on 3 May, Ms Matthews responded stating:

I'm not sure how I can explain it any clearer. ACC have advised me that they will accept my claim but also that it would not be in my best financial interests to pursue that avenue as I would simply lose my benefit top up and likely be financially worse off. As such I have withdrawn my request for ACC wage subsidy.

As this is already becoming a continued source of stress to me and I have asked you twice if I may be able to access my accrued annual leave, I have already advised Jason to fill in my timesheet as unpaid leave once my available annual leave of 17.5 hours is gone. This is not ideal for me but I do not wish to have this become an ongoing added stress.

If I will not be returning to work on 8/5 then I will of course provide you with another medical certificate.

[37] Mr Cummins responded again on 3 May stating amongst other things: "*If you are receiving weekly compensation from ACC then you are not entitled to paid sick leave*". The email also pointed out that the company would be requiring medical certificates regarding absences from work. Ms Matthews was asked not to involve Jason in the matter but to communicate directly with Mr Cummins.

[38] On 7 May Ms Matthews emailed again advising she could not return to work but would continue to take unpaid leave until she could return.

[39] Accordingly, since midday on 24 April, Ms Matthews had not been at work.

[40] A medical certificate advised that she was unfit for work as a result of an injury to her hip, but she was also suffering work related stress and anxiety. The medical certificate provided that it would be reviewed on 31 May 2019.

[41] As indicated earlier, on 6 May 2019 HMH received the further personal grievance letter (Docs 38-41 in the bundle). It is noted that in that letter (page 41 of the bundle) HMH was advised:

Ms Matthews now has another personal grievance in regard to this treatment and will not be returning to work unless she can be sure that her workplace is safe. Please notify what steps the employer will be taking to ensure that Ms Matthews has a safe workplace.

[42] Without returning to work, Ms Matthews on 28 May forwarded her notice of resignation. In the interim there had been no further discussions with HMH in respect of the health and safety matters Ms Matthews had highlighted in the 6 May letter, which she had said prevented her from returning to work.

[43] The underlying assumption in a claim of constructive dismissal, is that the words or actions of HMH need to amount to a breach of the employment agreement which induced a subsequently proffered resignation. It is for Ms Matthews to convince me that that is the case. There must also be a causal link between HMH's conduct and Ms Matthews' tendering of the resignation. The possibility of resignation should be foreseeable.

[44] In *Auckland etc, shop employees etc, RUOW v Woolworths (NZ) Ltd* the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:¹

- (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 the employee to resign.

[45] It seems that it is the third of these, which Ms Matthews is relying on.

[46] However, I conclude that Ms Matthews resigned for her own reasons in circumstances where there was no constructive dismissal. Ms Matthews made a fully informed decision to resign her employment once she found a position elsewhere. The parties have been to mediation and the complaints raised in the series of personal grievances raised, were to a degree being worked through. Although it is clear that the compensation requested by Ms Matthews was not paid, other remedial steps in relation to the personal grievances raised were being taken. There was of course the expectation in respect of the written warning. Ms Matthews through Hutt Law had asked that the warning be removed and this had not occurred.

¹¹ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

Conclusion

[47] Ms Matthews has not been dismissed; accordingly her claim of constructive dismissal fails. However, the warning issued by HMH was not the actions of a fair and reasonable employer and it was issued in a manner devoid of any process which would have allowed Ms Matthews to contest the warning or indeed have any input into whether or not it should issue. She was given no opportunity for representation despite the fact that HMH at this stage was fully aware Ms Matthews was represented. It would have been a simple matter for the company to put in Ms Matthews own notice that it wished to meet with her and discuss any concerns regarding her reaction and/or behaviour to the altercation with Mr Cummins. She would then have been able to participate in a process with the ability to put forward her position. This opportunity was not given. I find therefore that Ms Matthews has been unjustifiably disadvantaged in her employment by the issuing of the warning.

Contribution

[48] I am required under s 124 of the Act to consider the issue of any contributory conduct that may influence remedies. I am satisfied that there was no blameworthy conduct on Ms Matthews' part which led to the issuing of the warning. Although it is clear that the relationship between Ms Matthews and Mr Cummins was fraught, the absolute lack of any sort of procedure surrounding the issuing of the warning leads me to conclude there was no blameworthy conduct on Ms Matthews' part justifying a reduction in remedies.

Orders

[49] I accept Ms Matthews evidence that the issuing of the warning caused her distress at a time she was feeling embattled. I order Howard Material Handling Limited to pay compensation to Ms Matthews of \$5,000 pursuant to section 123(1)(c)(i) of the Act.

Costs

[50] The Authority generally adopts a tariff approach to costs of \$4,500 for the first day of an investigation. Although Ms Matthews was unsuccessful in her claim for constructive dismissal, she has succeeded in her claim for unjustified disadvantage in respect of the warning and generally costs in her favour would follow. The parties are encouraged to settle the issue of costs between themselves however if they cannot do this, Ms Matthews is to file cost submissions within 21 days of the date of this decision with Howard Material Handling Limited

having a further 14 days within which to file submissions in reply. The Authority will then issue a costs determination.

Geoff O'Sullivan
Member of the Employment Relations Authority