IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 475
5552015

	BETWEEN	JENNIFER WINSOME RENATA Applicant
	A N D	HARTNELL GROND WALKER Respondent

Member of Authority:	T G Tetitaha
Representatives:	D James, Counsel for the Applicant R Mark, Counsel for the Respondent
Investigation meeting:	27-28 October 2015 at Kaitaia
Submissions received:	28 October 2015 from both parties
Date of Determination:	23 December 2015

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Orders:

A. Jennifer Winsome Renata was not constructively and unjustifiably dismissed by Hartnell Grond Walker.

B. The application for personal grievance is dismissed.

C. The application for a penalty for breach of an implied term of the employment agreement is dismissed.

D. The application for a penalty for breach of an implied or statutory duty of good faith is dismissed.

E. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of

this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Jennifer Winsome Renata alleges she was constructively and unjustifiably dismissed and that her employer breached the duty of good faith in their dealings with her.

Facts leading to dispute

[2] Mrs Renata was employed as a computer operator/receptionist on 4 April 2014 by Hartnell Grond Walker. She signed an employment agreement that provided for the accumulation of sick leave every 12 months.

[3] Hartnell Grond Walker is a three partner accountancy firm located in Kaitaia. The three partners are John Hartnell, Carlita Grond and Tracey Walker (the respondents).

[4] In July/August 2014 Mrs Renata's husband was diagnosed with a terminal illness. During this period she required substantial leave from work.

[5] By September 2014 Mrs Renata had used all her sick leave. She was due to accumulate a further four days sick leave in four weeks. When she exceeded her sick leave entitlement, the respondents applied outstanding annual leave against the additional time off required.

[6] Mrs Renata disagreed with their decision to use her annual leave. In September 2014 she approached the partners of the respondent seeking agreement to advancing her sick leave entitlement. This was refused.

[7] Mrs Renata sought a meeting on 18 September 2014. Following that meeting she sent a letter to the respondent employer expressing her disappointment when told it was not possible to advance her sick leave.

[8] Between July and September 2014 the respondent employer had been holding small group meetings with staff. The purpose of the meetings was to identify the issues contributing to low staff morale. During one of the small group meetings, Mrs Renata raised issues of concern between herself and a co-worker.

[9] One of the respondent partners, John Hartnell, wrote to Mrs Renata on 3 November 2014 about mediation between herself and her co-worker to attempt to resolve the situation.

[10] Mrs Renata wrote back on 8 November 2014 advising her husband had been diagnosed with terminal cancer and seeking a deferment of the mediation for approximately six weeks. Mr Hartnell replied on 14 November 2014 seeking for the proposed mediation to occur within the next two weeks.

[11] Mrs Renata emailed a reply on 18 November 2014. She advised she was prepared to proceed with the mediation process although she had hoped it could be deferred.

[12] On 12 December 2014 Mrs Renata wrote to the respondent partners advising how upsetting it was to her husband when she told him about the mediation proposal and the *"no pay rise due to the situation with [co-worker]"*. This referred to an alleged conversation between Mrs Renata and Mr Hartnell in which she was told she would not receive a pay rise that year.

[13] Due to the unavailability of the mediator and Mrs Renata's support person, the mediation did not take place until 19 December 2014. The mediation was unable to resolve the issues between Mrs Renata and her co-worker.

[14] Mrs Renata continued working at the respondent until 20 January 2015. She handed in a resignation notice, but was only required to work until 23 January 2015.

[15] Following her resignation Mrs Renata's husband died.

The issues

[16] On 22 July 2015 at a teleconference the parties agreed that the following issues were for hearing:

(a) Did the respondent employer follow a course of conduct with a deliberate and dominant purpose of coercing the employee to resign?

(b) Did the employer breach an implied term not to conduct itself in a manner causing the applicant's resignation?

(c) Did the employer breach its duty of good faith by failing to be active and constructive about sick leave and supporting the employee during that period?

(d) Was the failure deliberate, serious and sustained warranting a penalty?

(e) What other remedies, if any, should be awarded?

Did the respondent employer follow a course of conduct with a deliberate and dominant purpose of coercing the employee to resign?

[17] The applicant submits the refusal to advance sick leave in circumstances where her husband was terminally ill lacked compassion. Further, she says the direction for her to attend a mediation, reference to disciplinary consequences for non-attendance, the refusal of a pay rise due to the situation with her co-worker and the failure to replace her after she resigned, indicated a course of conduct with the dominant purpose of causing her resignation.

[18] Constructive dismissal occurs where the employer follows a course of conduct with the deliberate and dominant purpose of coercing an employee to resign or there is a breach of duty by the employer which causes an employee to resign.[1] The essential questions in constructive dismissal cases are[2]:

(a) What were the terms of the contract?

(b) Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

[19] In answering the first question, the Authority must examine *all the circumstances of the resignation* not merely the terms of the notice or other communication whereby an employee has tendered the resignation. If there was a breach, the next question is *whether a substantial risk of resignation is reasonably foreseeable, having regard to the seriousness of the breach.*[3]

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1 *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

2 *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich & Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 112-113.

3 *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA).

[20] The onus is upon the employee to prove the conduct of the employer towards her was of such a repudiatory nature that she was entitled to elect to cancel the employment agreement when she did so.[4]

Sick Leave

[21] There is no provision in the parties' employment agreement for the advancement of sick leave. Therefore Mrs Renata may only take sick leave in advance with the agreement of her employer which is then deducted from the employee's entitlement under the Holidays Act 2003.[5]

[22] Here the respondent employer did not agree to the advancement of sick leave because there was an annual leave entitlement available to be used. It is not unusual or unreasonable for an employer to require annual leave to be exhausted before it considers any advancement of sick leave. Mrs Renata was using her sick leave to support her husband. There was evidence she had been unwell and if she had used all of her sick leave would have had none available if she fell ill. The advancement of sick leave also requires an employer to financially expend money prior to it being legally obliged to do so.

[23] Whilst Mrs Renata may have felt aggrieved that the respondents lacked compassion, it did not make the decision unreasonable or unfair in the circumstances. She was aware the employer was entitled to refuse to advance the leave. Her issue appears to be with their lack of interest shown in her husband's illness.

[24] The respondent partners gave evidence about their actions at the time. John Hartnell says he was initially unaware how sick Mrs Renata's husband was. Carlita Grond referred to having to deal with family ill health around the same time. The misapprehension about Mrs Renata's situation and Ms Grond's personal issues may have given an unintended impression of the respondents' disinterest.

[25] However, this is not conduct which could be seen as having a dominant purpose of causing Mrs Renata's resignation. The respondent may have appeared unsympathetic, but as the respondent's counsel put it, there is no legal entitlement to sympathy.

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4 See above n 1.

5 Section 63(3) Holidays Act 2003.

Mediation

[26] It appears common ground there was low staff morale in July/August 2014. Ms Renata accepted she raised at the respondent's small group meetings issues with her co-worker. This included the fact that the origin of their dispute arose 2 years ago but this co-worker still would not speak or recognise her at work and this was noticeable amongst the staff.

[27] It was following these meetings that the respondent wrote to Mrs Renata on 3 November 2014 about mediation. There is a factual dispute about whether the reference to disciplinary proceedings in the letter indicated Mrs Renata was required to attend the mediation or her job was at risk. Mr Hartnell accepted the letter was not well worded. Although it referred to the possibility of a disciplinary process, there was no such process being considered. Mr Hartnell's evidence was that the letter had been drafted following legal advice. He did not appear to apprehend the significance of referring to a disciplinary process and the effect it may have had upon Mrs Renata as a consequence.

[28] I accept Mr Hartnell's evidence because in my view the letter dated 3 November 2014 offered Mrs Renata mediation as opposed to being directive with a possible disciplinary outcome. The reference to a disciplinary process appears to be an option they have declined to consider in favour of mediation. This is reflected in the wording of the letter which states *"rather than enter into a disciplinary process we would like to offer you the opportunity to have an independent outside professional mediator to facilitate discussions between the two of you in order to find a resolution to the situation"*. It also indicated the mediation *"can only be done if you each indicate to us your willingness to participate in the process"*. These parts of the letter appear to offer mediation as opposed to requiring Mrs Renata attend or face disciplinary action.

[29] Mrs Renata confirmed she had sought legal advice about the letter. At no time did she raise a personal grievance following the taking of that advice nor raise an objection based upon any requirement to attend mediation.

[30] Mrs Renata's written correspondence prior to the mediation makes no complaint about being required to attend mediation. Rather, her concerns are around the timing of the mediation. She sought a six week deferment of the mediation which

was what eventually occurred, despite Mr Hartnell's initial preference for it to occur within two weeks.

[31] At hearing, Mrs Renata sought to introduce material from the mediation. I declined to allow the material to be produced.[6] She raised concerns about the lack of independence of the mediator. He was a local lawyer whom had acted previously for the respondent, although not in this matter. There was no evidence the respondent instructed the mediator or the co-worker prior to mediation to act in any particular way which would have caused Mrs Renata's resignation.

[32] The respondent did not attend the mediation and there was no agreement about the outcome. The respondent took no further steps about the matter. Mrs Renata continued working until her resignation.

[33] In my view the respondent's behaviour is at best equivocal. It does not on the balance of probabilities show conduct with the purpose of causing Mrs Renata's resignation.

Refusal of pay rise

[34] There is a conflict of evidence between Mrs Renata and Mr Hartnell about what was said regarding the refusal of her pay rise.

[35] Mrs Renata alleges on 9 December 2014 she was called into Mr Hartnell's office where he said that due to *"the disruption there would be no pay rise for [her]"*. Mrs Renata alleges this was a reference to the tensions between herself and her co-worker. She sent an email on 12 December 2014 expressing her disappointment about the respondent's lack of concern about her husband. She also referred to him being *really upset about the no pay rise due to the situation with [the co-worker]*.[7]

[36] Mr Hartnell explicitly denies he made any such reference to the co-worker issue and her payrise. He accepts he received the email, but believed the situation had been dealt with at the mediation and did not reply. Carlita Grond was also adamant there was no discussion about a co-worker when determining whether to give Mrs Renata a pay rise. Pay rises were determined by all three partners at their regular

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6 Minute dated 29 October 2015.

7 Page 27 bundle of documents: email J Renata to J Hartnell, T Walker and C Grond dated 12 December 2014

partnership meetings. Pay rises for non-productive or non-fee earning staff like Mrs Renata, are dependent upon how well they are doing the job. She also pointed to the fact three other staff did not receive pay rises. The evidence about what Mr Hartnell told or inferred to Ms Renata about her pay rise appears equivocal.

[37] Despite all of the above matters occurring prior to 12 December 2014, Ms Renata continued to work for the respondent employer until 23 January 2015. No other incidences occurred from 12 December onwards. I have no explanation for the delay in leaving.

[38] Standing back and considering all of the alleged conduct I cannot be sure on the balance of probabilities that this was conduct with the dominant purpose of causing her resignation or that her resignation should have been reasonably foreseeable. The personal grievance application is dismissed.

Did the employer breach an implied term not to conduct itself in a manner causing the applicant's resignation?

[39] The applicant makes similar submissions in respect of this issue as it did for the former. It is accepted by the parties that there is an implied term that an employer should not conduct itself in a manner causing an employee's resignation.

[40] Given my above findings, I am not convinced on the balance of probabilities that there has been a breach of this implied term. Even if there had been a breach, I am not satisfied to the same burden of proof that it was sufficiently serious that an employer would have reasonably foreseen Ms Renata's resignation. This is especially given the delay between the last event and her resignation.

[41] As a consequence the application for penalty for a breach of an implied term of the employment agreement is dismissed.

Did the employer breach its duty of good faith by failing to be active and constructive about sick leave and supporting the employee during that period?

[42] The applicant submits there has been a breach of good faith, but does not vigorously pursue this. During oral submissions the applicant's counsel referred to the fact that any penalty awarded would be paid to the Crown as opposed to his client and therefore saw little point in pursuing this remedy.

[43] A duty of good faith includes that a duty of 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*" s.4(1A)(b) of the Act.

[44] The evidence shows this respondent employer was responsive on some issues such as provision of mediation to resolve staff tension, but not active or constructive on other issues. These included giving detailed reasons for refusing sick leave and replying to the concerns about the refusal of the pay rise.

[45] The tests for awarding a penalty are set out in the Employment Court decision *Tan v. Yang.*[8] The evidence here does meet those tests. The application for penalty for breach of an implied or statutory duty of good faith is dismissed.

[46] There is no need to consider the fourth and fifth issues which deal with remedies. This application is dismissed in its entirety.

[47] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority

8 *Tan v Yang & Zhang* [2014] NZEmpC 65.