

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 150/10
5286932

BETWEEN

KOLETI SAMU
Applicant

AND

CATHOLIC BISHOPS
CONFERENCE SECURITIES
LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Julia Sanders for the Applicant
David Burton for the Respondent

Investigation Meeting: 20 July 2010 at Wellington

Submissions Received: By 3 September 2010

Determination: 23 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Samu claims that she was unjustifiably constructively dismissed by the respondent, which is part of the Catholic Church. She seeks reinstatement, together with a partial redundancy payment for reduced duties, following a restructuring that was afoot at the time of her resignation. The Catholic Church maintains that Ms Samu resigned of her own accord during an investigation into alleged serious misconduct by her.

[2] The issues for determination are:

- whether the Catholic Church identified and properly investigated concerns of Ms Samu's supervisor early enough;

- whether the investigator properly and impartially carried out her role;
- whether the investigator's report into misconduct allegations against Ms Samu was accepted by the Church as a *fait accompli*;
- whether the Church failed in its duties to Ms Samu in concluding she had committed serious misconduct;
- whether any or all of above actions (or inaction) by the Church, viewed objectively, constituted breaches of its duties sufficient to constitute a constructive dismissal of Ms Samu; and
- if so, what remedies should be awarded.

Credibility

[3] There can be no certainty about events that occurred a year or more ago, but the Authority is required to determine the facts of disputed matters nevertheless. It does so on the basis of the balance of probabilities – i.e. what is more likely than not to have occurred in any given situation. Fortunately, such differences are rare in this case.

[4] In determining credibility I have relied on documentary evidence created at the time and also through my preference of the evidence of the witnesses on behalf of the respondent over that of Ms Samu herself. In particular I do so, in the limited areas of conflict, on the basis of the respondent's witnesses notes taken at or near the time, and because the evidence of a witness called by Ms Samu, who advised her on many issues during the course of employment, was more consistent with that of the respondent's witnesses than Ms Samu.

[5] I draw these conclusions despite the absence of a key witness to events, Ms Samu's former supervisor Ms Christine Bright, who was not compelled to attend the Authority's investigation meeting because a summons was unable to be served on her by Ms Samu. Ms Bright's evidence may have allowed the Authority to get a fuller picture of the evidence, but I am satisfied, for reasons given below, that it would not have changed the result of the case in any event.

[6] Furthermore Ms Samu's evidence is seldom, if at all, in conflict with the evidence of the respondent except in terms of genuine perception. I have no doubt

that her evidence was given to the best of her recollection, but that does not mean that I have to prefer it where it is in conflict with that of the respondent.

The Facts

[7] Ms Samu was employed by the Catholic Church as a case instructor for many years in Wellington in its National Tribunal, dealing with Church issues with legal ramifications. Prior to that she had served the Church as a nun.

[8] Ms Samu reported to Ms Christine Bright, the administrator responsible for the six regional Tribunal offices. Ms Bright and Ms Samu also worked closely with Father Michael O'Day, Associate Judicial Vicar for the Wellington Region. Archbishop John Dew had overall responsibility for the work of the Wellington Tribunal, as Archbishop for the region.

[9] Ms Samu and Ms Bright, who had started work as Father O'Day's secretary, appeared to have a close working relationship, albeit with its ups and downs, over the many years they worked together. There were also some issues about the sufficiency of work to keep everybody in the office fully employed. As an indirect result of Ms Bright giving notice of her intention to resign on 3 August 2009, these work load issues came to the notice of, and were addressed by, Archbishop Dew. I accept that he was then unaware of the high degree of workplace tensions apprehended by Ms Bright at that point, and that their existence was not reasonably foreseeable by him then.

[10] Following consultation, Archbishop Dew determined that it was necessary to restructure operations, including a number of (partial) redundancies, in order to deal with the lack of work, by requiring a number of positions to be given lesser hours. These proposals were announced on 3 September 2009.

[11] Ms Samu accepts the genuineness of this restructuring, which could have resulted in a number of staff positions such as her own being made redundant. However Archbishop Dew indicated his intention to offer all affected staff lesser hours and a partial redundancy payment, commensurate with the loss of hours for each staff member.

[12] On 7 September 2009 there was an incident that took place over several minutes involving Ms Bright and Ms Samu, which was in part observed by others.

Ms Bright made a formal complaint on 9 September, alleging bullying by Ms Samu to the extent that she had become over-stressed, and that she felt intimidated by the closeness of the working relationship between Ms Samu and Father O'Day. Various other claims of alleged misbehaviour by Ms Samu were also raised, including her being too tired to work because of her night job. Ms Bright gave a detailed account of her version of the 7 September incident, and concluded by stating that she did not feel safe in the office. Even although Ms Bright accepted that she had previously acted unprofessionally herself, she believed that this was a result of the pressured working environment caused primarily by Ms Samu.

[13] The Archbishop decided that, given the seriousness of the allegations, and Ms Bright's claim of feeling unsafe at work, he had no option but to investigate the complaint. On 11 September the Archbishop instructed a member of the archdiocese, who was also an experienced human resources practitioner, to investigate the alleged behaviour of Ms Samu, pursuant to written terms of reference.

[14] The same day as he wrote to the investigator, the Archbishop met with Ms Samu and a support person, and informed her of the investigation and also of his intention to suspend her. Ms Samu was told in the letter that was handed over during the meeting that if she disagreed with the suspension she was to let him have her views immediately. Ms Samu subsequently wrote agreeing to the investigation process.

[15] The investigator arranged to meet all relevant people over the next week or so and presented her report on 21 September. She made a number of conclusions, essentially upholding Ms Bright's complaint over the incident on 7 September, in part as a result of admissions by Ms Samu about her behaviour that day. She concluded that Ms Samu's actions that day amounted to serious misconduct. She also noted other concerns about Ms Samu exhibiting behaviours that were inappropriate in the work environment.

[16] Ms Samu was given a copy of the report on 23 September by the Archbishop, who advised that it would be discussed at a disciplinary meeting the next day. When giving Ms Samu an accompanying letter, it was pointed out to her that serious misconduct had been found by the investigator and that this could lead to her dismissal, and that further she would be given an opportunity to respond at a meeting

the next day. I accept the Archbishop's evidence that he had come to no preconceived outcome at this time.

[17] In the letter of 23 September the Archbishop made it clear that his main concern was that Ms Samu's behaviour on 7 September appeared to be sufficiently serious to warrant her dismissal and had breached the trust and confidence that is needed to justify continued employment. She was told to note that if there was not an adequate explanation such conduct would be considered unacceptable.

[18] The letter concluded by stating:

You should be aware that because of the serious nature of the matter raised, that disciplinary action may be taken against you. This may include a possible outcome that your employment may be terminated.

[19] Ms Samu had been considering her options, in consultation with her adviser, since her suspension. She decided that, given that serious misconduct could lead to dismissal, then if serious misconduct was to be the Archbishop's finding, she would resign. This was in the context of full discussions with her adviser over many options, such as whether Ms Samu would keep her job, whether she would resign, whether she would be dismissed and even whether she would take action in the Employment Relations Authority.

[20] At the disciplinary meeting the next day Ms Samu admitted that the findings of the investigator's report in respect of her behaviour were basically correct and did not question any particular part of it. She did, however, speak at length about Ms Bright's involvement and how she was a considerable contributor to the issues in question. The Archbishop noted that the focus of this meeting was Ms Samu's behaviour.

[21] Ms Samu asked if the matter could be dealt with the Samoan way, which I take to mean like a *hui*, with all those directly involved attending. The Archbishop said that the matter had got beyond that and that lawyers were now involved.

[22] Archbishop Dew then referred back to the letter of 23 September and re-read the sections on serious misconduct and potential dismissal. He also stated that dismissal was a possibility. Archbishop Dew asked Ms Samu if she had any further explanation and she appeared to state that she would *carry on*.

[23] Ms Samu's support person asked for a break. During the break she and Ms Samu decided that the best option was to resign, which was consistent with what they had decided previously.

[24] On the Archbishop's return to the meeting Ms Samu said that she would resign. The Archbishop agreed that Ms Samu could have more time to organise her affairs, but accepted Ms Samu's resignation at that point. Again I accept the Archbishop's evidence that although he had concluded serious misconduct had occurred he had come to no conclusion on penalty.

[25] Ms Samu had a letter of resignation delivered on her behalf to the Archbishop that day, resigning with effect from 2 October. The Archbishop accepted Ms Samu's resignation in writing the same day as well.

[26] Ms Samu took no action to retrieve the situation before she left on 2 October. In fact it was not until after she left that she reconsidered her position. Then on 10 November she sought to accept the new part-time position together with her partial redundancy, on the basis of constructive dismissal. Mr Burton responded on behalf of the Archbishop, stating that she had resigned and that the offer of part-time employment was not available.

[27] Ms Samu has maintained her claim for reinstatement, in the face of continued opposition from the respondent, and therefore the matter falls to the Authority to make a determination.

The Law

[28] Constructive dismissal can occur when an employee resigns as a result of a breach of duty by an employer. Such breach of duty must be causative of the resignation and be 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 is reasonably foreseeable, having regard to the seriousness of the breach - *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Offices (IOUW)* [1994] 1 ERNZ 168 (CA) at p.172. In many cases the test is said to involve determining whether the initiative for the employee's departure in effect came from the employer or the employee.

[29] In *Auckland & Gisborne Shop Employees Industrial Union of Workers v. Woolworths (New Zealand) Ltd* [1985] ACJ 479, the Arbitration Court held that employers in conducting disciplinary inquiries are required in all the circumstances to act in a correct and reasonable manner, but wherever serious allegations are made the employer is able, if not required, to make such inquiries as it deems appropriate.

[30] Where an employee resigns in the course of a disciplinary meeting, following discussions with an employee's representative, that does not necessarily constitute constructive dismissal (see for example, by way of analogy, *Fredricksen v. Bay of Plenty Area Health Board* [1992] 1 ERNZ 8). Furthermore, in *Business Distributors Ltd v. Patel* [2001] ERNZ 124 (CA) it was held that an employee was not entitled to treat himself as constructively dismissed in anticipation of something in the future that may well have never come to pass.

[31] Finally, I note that when an employer concludes that an employee has committed serious misconduct, it still has the discretion as to whether or not it chooses to dismiss an employee. That decision can later be assessed in light of s.103A by the Authority or Court (see for example *Air New Zealand Ltd v. V* [2009] ERNZ 185).

Determination

[32] The Archbishop was required to investigate serious allegations made against Ms Samu. Ms Samu accepted the procedure to be followed. The Catholic Church was not obliged to appoint an investigator who had no association with it – it was more than sufficient that the investigator did not personally know any of the individuals directly involved.

[33] Ms Samu did not raise any issues about the findings of the investigator at the time – indeed she made some admissions to the investigator and never complained about the findings of the investigator about her own actions to the Archbishop. Given that the investigator interviewed all relevant people, and relied in part on admissions from Ms Samu herself about her own conduct, I have no reason to conclude that the report was so inadequate that Ms Samu could rely on its purported failings to resign, particularly as the one key purpose of the 24 September meeting was to allow Ms Samu an opportunity to convince the Archbishop why he should not accept the investigator's findings.

[34] I accept that the Archbishop did not simply just accept the findings of the report. While Ms Samu wished to (and did, at length) complain about the actions of Ms Bright as being the precipitating factor, the Archbishop reminded her towards the end of the meeting that he was focusing on Ms Samu's behaviour at that time. The Archbishop thus did not fail to listen to Ms Samu, but did (appropriately, I find, in the context of a disciplinary meeting into serious allegations against her) remind her of the focus of the meeting, being her actions. Thus while he did hear Ms Samu's explanation blaming Ms Bright, he was entitled to remind her that her own actions were those being investigated at the time, and such behaviour was not a breach of the Church's duty to her.

[35] The Archbishop never came to determine whether or not the clear findings of misconduct would warrant dismissal, because Ms Samu chose instead to resign. I find that the Archbishop had appropriately investigated matters and accept his evidence that he kept an open mind throughout, even up until the time Ms Samu resigned.

[36] Ms Samu was aware that if there was a finding of serious misconduct she could be dismissed. Dismissal in these circumstances, however, was not inevitable. She had decided, however, in consultation over many days with her adviser, to resign rather than face dismissal if a finding of serious misconduct was made.

[37] I do not accept that the Archbishop was required to give more time to Ms Samu to consider her resignation, because she did not ask for that and because Ms Samu had over a week until her employment actually terminated (while she worked out her notice) to reconsider her position, which she did not. In those circumstances this was not the type of situation where an employer takes advantage of an employee's emotionally upset state to accept a resignation that had been given in the heat of the moment. In fact the evidence shows that Ms Samu had been actively considering this position for over a week.

[38] Furthermore, as noted above, Ms Samu did not change her position for several weeks thereafter. By that point it was too late to withdraw her resignation as she had already left. The Church was under no legal obligation to reinstate Ms Samu by that time.

[39] I therefore do not accept therefore that has been any breach of duty on the part of the Catholic Church that caused Ms Samu to resign. She resigned of her own free

will, in preference to taking the risk of being dismissed for serious misconduct over actions she herself had basically admitted to taking, albeit in her view following serious provocation. As Ms Samu has not satisfied the Authority that, in law, the initiative for her ending her employment came from the respondent, I dismiss her claims.

[40] No doubt it is extremely difficult for Ms Samu, a dedicated lifelong member of the Church, as well as its faithful servant as a nun and/or employee for most of her life, to accept that her employment with the Church has in fact ended. From a legal perspective, however, the initiative for that came from her own election to resign, rather than face the possibility of dismissal for serious misconduct, which may never have occurred. She does, however, have the benefit of maintaining her good record and standing as a former employee and member of the Church accordingly.

Costs

[41] Costs are reserved.

G J Wood
Member of the Employment Relations Authority