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TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 48
5345136

BETWEEN

ANGELA SHAW
Applicant

AND

SCHERING-PLOUGH
ANIMAL HEALTH NEW
ZEALAND LIMITED
Respondent

Member of Authority: Paul Stapp

Representatives: Paul McBride, Counsel for the Applicant
Andrew Scott-Howman and Jamie Eng, Counsel for the
Respondent

Investigation Meeting: 17 November 2011 at Wellington

Determination: 26 April 2012

DETERMINATION OF THE AUTHORITY

Prohibition on the publication

[1] There is a prohibition on the publication of the applicant's background medical details, financial circumstances, information relating to Mr Shaw's personal and private matters and the name of a person the applicant complained about that has been referred to as "A" in the Authority's determination. Other names have been withheld as the people did not appear at the Authority's investigation meeting. Privacy interests outweigh the public interest, and I am satisfied that shielding the identity of these people has not prejudiced the public's right to the access of justice.

Employment relationship problem

[2] This is an employment relationship problem about how Mrs Shaw's employment ended with her employer, Schering-Plough Animal Health New Zealand Limited (Schering-Plough) on 3 December 2010.

[3] Prior to 3 December 2010 Mrs Shaw had made a complaint about a co-worker's behaviour, who she shared an office with. She believed that her immediate manager had done nothing significant about her complaint, and this led to her resignation.

[4] Mrs Shaw and Schering-Plough are in dispute over whether or not any discussion she had with Mr Dennis Boyle, supervisor, about what she says was going on in her employment, and his subsequent action was enough to provide her with a safe place of work. Furthermore, did Mrs Shaw have good grounds to resign based on an alleged serious breach by her employer?

[5] Mrs Shaw has claimed lost wages, compensation and costs in her statement of problem filed in the Authority. On 15 November 2011 (a couple of day before the Authority's investigation meeting, an amended claim was made that Schering-Plough breached Mrs Shaw's rights in regard to health and safety and made a claim for special damages of \$20,000 for losses.

[6] All the claims have been denied by Schering-Plough.

The issues

[7] The issues are:

[8] Did Schering-Plough expose Mrs Shaw to improper behaviour of another employee?

[9] Did Schering-Plough take any steps to prevent and address the reoccurrence of the conduct Mrs Shaw complained about?

[10] Was Mrs Shaw treated properly when she advised that she would be leaving?

[11] Has Mrs Shaw established that Schering-Plough breached the obligation to provide a safe place of work and that there has been a sufficiently serious breach that caused her to resign?

[12] In essence the primary issue relates to Mrs Shaw's reasons and decision to resign from her employment.

[13] Finally there are two other disputes that relate to the timing of a meeting on 25 November 2010 and/or 2 December 2010, and the working relationship between Mrs Shaw and A.

The facts

[14] Mrs Shaw worked as a logistics coordinator at Schering-Plough's premises in Upper Hutt. She was employed subject to the terms of an individual employment agreement. She worked alongside a number of colleagues, one whom was A in a shared office, and other people who were located in adjoining offices. She reported to Mr Boyle. Mr Boyle's office was adjacent to Mrs Shaw's office.

[15] Following Mrs Shaw's return to work from a period of parental leave in 2009, she applied for two different jobs at Schering-Plough without providing any indication as to the reasons why she was doing so. She was unsuccessful in obtaining these roles. This is relevant because Schering-Plough claimed that Mrs Shaw never provided details of her complaints about her co-worker at that time.

[16] On 2 September 2010, Mrs Shaw sent an email to Mr Boyle. This email complained about aspects of the behaviour of the employee with whom she shared an office. The email reads as follows:

Dear Dennis

I wish to complain about [A's] behaviour within our office environment. This has been an ongoing problem for quite some time, and I know you are aware of most issues, however to date I have not been aware of any actions to address his behaviour.

I find his constant loud bad language, disruptive attitude, rude behaviour and increasingly violent outbursts towards myself and my office furniture and other items including my desk very distressing and I am worried about my health and safety.

Recently I had to vacate our shared office very quickly as I was afraid of his actions after he threw documents around the room and also after one very heavy kick to my desk, and only yesterday he punched a

pile of documents on my desk extremely hard. All these actions have left me distressed and shaken.

I would like these actions addressed to eliminate the risk to myself and my colleagues.

I also wish for my complaint to be dealt with confidentially as this would place me in an extremely difficult working environment if [A] became aware of my personal complaint.

Thank you and I am sure you understand why I have had to express this concern.

[17] Mr Boyle discussed this matter with Mrs Shaw on 3 September 2010. She emphasised that she wanted her concerns to be treated “*confidentially*” and that it was important to her that A not be made aware of the fact that she had raised any concerns about him.

[18] On 9 September 2010, Mr Boyle discussed Mrs Shaw’s concerns with Schering-Plough’s human resources manager, Linda Bognuda. Mrs Bognuda made some suggestions to Mr Boyle on handling the situation. She suggested that an appropriate course of action would be for him to have a general chat to A about his behaviours in the office and to monitor his behaviour over the following months. Mrs Bognuda followed this up with an email. Her email (10 September 2010) reads as follows:

Further to our discussion yesterday about behaviours within the Planning team, I’m sending you in the internal mail a set of the Global Behavioural Competency – which defines “under skilled”, “skilled” and “overused”.

Of course we are aiming for “skilled”.

For [A] I recommend that you take a good look at Composure.

For [A] I recommend that you look at Interpersonal Savvy, and maybe some of Standing Alone.

In both cases it would be good for them to be able to self-assess and see their opportunities.

I’d also ask [A] to look at the policy “harassment – BPHR02” which is on our HR site. This directs the colleague to look at self help options in the first instance. But also goes on to next steps if this is not possible.

Please let me know if you need any further assistance.

[19] Mr Boyle says that over the next three months he had several conversations with A about his behaviour. He also says that he observed both A’s behaviour and the

interactions between that person and Mrs Shaw. He says he did not observe anything that he felt would give Mrs Shaw anything to be concerned about.

[20] Mr Boyle says also that he had discussions with Mrs Shaw on a number of separate occasions for the purpose of asking her, and checking, on how things were going. He says that she told him that nothing had occurred that was either unacceptable or caused her to feel unsafe in the office. Mrs Shaw disputed this. They dispute the date of at least one of the occasions when they had a discussion, which was on either 25 November and/or 2-3 December 2010.

[21] Unknown to Schering-Plough, Mrs Shaw booked major surgery on 15 November 2010, to occur on 20 January 2011. This would involve a six week recovery period. Schering-Plough only became aware of this matter as a result of documentation exchanged as part of this investigation.

[22] Mr Boyle says that on 2 December 2010, which Mrs Shaw disputes, he checked with Mrs Shaw as to how things were going. Whether or not the meeting occurred on 25 November and/or 2-3 December, there is common ground that Mrs Shaw did indicate to Mr Boyle that she thought things had become worse. She provided no details according to Mr Boyle. Nor did she give any indication that she thought it was so serious that she would resign from her employment.

[23] Mr Boyle says that he indicated that he would advise the human resources department on the following Monday, 6 December, to see what suggestions they had for addressing Mrs Shaw's increased concerns.

[24] On 3 December 2010, Mrs Shaw resigned by providing her letter to the company's HR associate, Jane Vennell. The letter read as follows:

To HR,

Due to the Office Environment and Stress of my Logistics Coordinator position here at ...Schering-Plough, I wish to tender my resignation, effective end of business 04 January 2011.

[25] Mrs Vennell rang Mrs Shaw on the same date expressing concerns about her resignation and the letter. On the same day, Mrs Shaw attended Schering-Plough's Christmas barbecue lunch. Present were the other staff and A.

[26] On 6 December 2010, Mrs Vennell, Mr Boyle and Mrs Bodnuda met to discuss Mrs Shaw's resignation. It was concluded that Mrs Vennell would meet with

Mrs Shaw to discuss the reasons for the resignation. This meeting occurred on 7 December 2010 and Mrs Shaw informed Mrs Vennell that the reasons for her resignation were that the things that she raised as long ago as September 2010 had not been dealt with and that Mr Boyle had done nothing to address her claims.

[27] In its defence to this matter, Schering-Plough has raised that Mrs Shaw's concerns were mitigated by her request for confidentiality and her socialising amicably with everyone at the Christmas lunch, which included walking home with the person she has complained about and that she stated to them that she "*liked*" A. However Mrs Shaw says that while she had previously only found this person hard to work with occasionally, he was opinionated and rude yelled and swore and threw things to the extent that she did not feel safe working in the same area. Schering-Plough's witnesses said that Mrs Shaw said that she felt A's behaviour was not directed at her, but more generally to the office environment. Mrs Shaw denied this.

[28] Schering-Plough also claimed that Mrs Shaw said that there were a number of other things that had contributed to her decision to resign. These included:

- (a) Her job had become more stressful; and
- (b) She felt that she had not been adequately "*challenged*" in her role.

[29] Following the meeting between Mrs Vennell and Mrs Shaw, Mrs Vennell said that she would meet with Mr Boyle to discuss the reasons behind the resignation and she offered Mrs Shaw the opportunity of attending that meeting. Mrs Shaw declined the invitation to attend the meeting. She continued to pursue her resignation and leave the company. At this point, Mrs Vennell decided, with input from Mrs Bognuda and Mr Boyle, to escalate the matter to the attention of Mr Ian Pawson, the general manager. Mr Pawson, once he become appraised of the situation, took the view that it would be appropriate for the company to investigate (on a formal basis) the matters that Mrs Shaw had raised in regard to her reasons for resigning. This would need to involve A, and that he would need to be made aware of the concerns raised about him. Mrs Shaw was informed of this. Mrs Vennell offered Mrs Shaw a range of options which would allow her to remain at work but in a different site away from her office with A. It is alleged by Mrs Shaw that she said that she would prefer to remain away from the workplace on leave. This has been denied by Schering-Plough.

Mrs Vennell, Mrs Bognuda and Mr Boyle dispute that this was ever a matter raised by them to put Mrs Shaw off work.

[30] On 10 December 2010 Mrs Vennell and Mr Pawson met the other staff separately, including A, two other employees in adjoining offices, Mr Boyle and Mrs Bognuda. The findings of those interviews were that:

- (a) Certain behaviours identified by Mrs Shaw had occurred, but they were not of the seriousness or frequency alleged by Mrs Shaw;
- (b) Other employees confirmed the above; and they worked alongside Mrs Shaw and the person she shared the office with;
- (c) The concerns were not such that resignation was justified or inevitable;
- (d) A apparently was shocked at the seriousness about Mrs Shaw's concerns, he had been unaware of them and had indicated he was prepared to alter his behaviour;
- (e) Mrs Shaw had acted in ways which were the subject of her own concern (including lewd language and swearing);
- (f) Finally, the situation, if taken as a whole, was capable of being managed and the resignation unnecessary.

[31] Mrs Shaw was informed of these conclusions, and interim arrangements were discussed (including alternative seating arrangements which could be put in place to enable Mrs Shaw's concerns to be worked through and to avoid the need for her resignation).

[32] On Friday, 10 December 2010, Mrs Shaw was asked to reconsider her resignation and Mrs Shaw indicated she would think about it, but never responded directly.

[33] Instead what happened was that on Monday, 13 December 2010, Mrs Shaw circulated an email to all staff stating that she would be on leave until 4 January 2011 (which happened to be her last working day). A medical certificate was presented that had been obtained on 10 December 2010 and this certificate certified Mrs Shaw as unfit for work until 24 December 2010 (the date on which her leave commenced

taking her through to her last day of work on 4 January 2011). Mrs Shaw went on leave and did not return to work.

[34] On 23 December 2010, Mrs Shaw was informed of the findings of the investigation process. The findings were:

- That Mrs Shaw's complaint had shocked everyone.
- That A acknowledged that he had sworn in the office from time to time.
- That other people had acknowledged that A had lewd conversations.
- That Mr Boyle had acted appropriately to preserve confidentiality and deal with the problem when it was raised.

[35] In addition, the supporting information available to Schering-Plough was that A's swearing was occasional and directed at his work and computer and not at Mrs Shaw personally. Also other people were not offended by A's lewd conversation. Mr Pawson and Mrs Vennell say that they heard Mrs Shaw swear from time to time and also engage in A's conversations.

[36] Two conclusions were reached: first the workplace was not unsafe, and the behaviours could be addressed; and second there was no need for Mrs Shaw to resign.

[37] Mrs Shaw did not return to work. Mrs Shaw was provided with information with regard to her pay slips and was given a reference. Mrs Shaw raised an employment relationship problem on 14 February 2011. The parties attended mediation. The Authority is required to make a determination on the unresolved issues.

Findings and determination

[38] Mrs Shaw complained about unwelcome and inappropriate behaviour she says she experienced from A. I accept that Mrs Shaw found A's behaviour unwarranted and she did not like it. She asked that her complaint be treated confidentially to protect her at that time. Mr Boyle honoured that request. The evidence supports that any swearing was not at Mrs Shaw personally. Lewd conversations seemed to be part of the workplace culture that no one had complained about until Mrs Shaw took exception to it.

[39] Mr Boyle acted in good faith by getting advice and taking the matter up with HR, and he protected the privacy Mrs Shaw had asked for and within that context set about to observe check and speak to A. There can be no breach of duty given the constraint for confidentiality that Mrs Shaw asked for and that Mr Boyle did act on the matter, even although Mrs Shaw now complains that his action was not enough, I hold. Also, Mr Boyle clearly followed the matter up with A and he made observations of the situation and checked back with Mrs Shaw.

[40] When Mrs Shaw complained again and resigned she did not give Mr Boyle the opportunity to follow up her complaint that things had not improved. Also, she had not provided any details of the reasons for her decision to leave. In becoming aware of the resignation, action was taken by Mr Pawson and Mrs Vennell immediately, to speak to her and to escalate an investigation while Mrs Shaw was on leave. Indeed the matter was properly escalated to Mr Pawson for an investigation. He correctly decided to involve A, and advised A of the nature of the complainant. Despite the investigation Mrs Shaw did not provide the employer with a reasonable opportunity to consider options to resolve the problem, as she had made her mind up to leave anyway. If Mrs Shaw genuinely believed that Mr Boyle and A were acting to minimize the complaint because of any friendship and association they had then Mrs Vennell's and Mr Pawson's involvement dispels the notion that the company were not acting fairly and reasonably. They reached genuine findings based on reasonable grounds including that what Mrs Shaw had complained about did not amount to serious enough behaviour to warrant Mrs Shaw resigning. It was also considered that Mrs Shaw had at least for some time condoned the workplace conversations and A's swearing. Another consideration was that A's swearing was in relation to the work and his computer and that behaviour was due to frustration.

[41] Also, there were two reasons associated with why Mrs Shaw may have resigned. The company has relied on these two reasons which would not support a constructive dismissal claim. These reasons were for Mrs Shaw to have time off for major surgery and she had made her mind up to leave without considering any alternatives. Also, the decision appeared to relate to her job becoming more stressful and not being challenged in the role when she had made applications in March 2010 and May 2010 for alternative positions in the company.

[42] Finally, Schering-Plough has tried to defend its actions with the claim that Mrs Shaw liked A at work. This has not helped the defence I hold, because I accept that

Mrs Shaw had to politely and amicably interact with her colleagues, including A, but that does not mean that she had to like A. There is absolutely no suggestion that there was anything more than a working relationship.

[43] Mrs Shaw has not established the grounds for a constructive dismissal, I hold. Her claims relating to A's behaviour are part of the background and do not establish a separate personal grievance for unjustified disadvantage on each and every complaint and Mr Boyle's way of dealing with the matter because the claims were not raised as such in time. However, in considering the nature of the claim and whether or not it is different to the constructive dismissal as raised, I hold that none of the employer's actions amount to an unjustified disadvantage. Given that Mrs Shaw resigned when she was about to take leave enabled the employer to escalate the investigation in that time. As a fair and reasonable employer, Schering-Plough reacted to manage the situation and to investigate. This was supported by Mr Pawson's involvement and decisions. The conclusions in the investigation were genuinely reached, and Mrs Shaw was given an opportunity for input and an opportunity to discuss options as an alternative to resigning. She may not have liked the options, but that was not a sufficient reason to resign over I hold. Also I hold in light of my findings above that Mrs Shaw's claim that the company breached its obligations on health and safety for special damages has not been proved.

[44] Mrs Shaw's claims are dismissed.

[45] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority