

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 6
5440853

BETWEEN KAREN SWAINE
 Applicant

AND WAITAKI RESOURCE
 RECOVERY TRUST
 Respondent

Member of Authority: Christine Hickey

Representatives: Phillip de Wattignar, Advocate for Applicant
 Rachel Brazil, Counsel for Respondent

Investigation Meeting: 6 November 2014 in Oamaru

Submissions Received: From Applicant on 13 November and 4 December 2014
 From Respondent on 28 November 2014

Determination: 27 January 2015

DETERMINATION OF THE AUTHORITY

A. Karen Swaine was not constructively dismissed.

Employment relationship problem

[1] Karen Swaine was the Shop Manager at the Waitaki Resource Recovery Park run by the Waitaki Resource Recovery Trust (the Trust). She claims that she was constructively dismissed as a result of the actions of the Trust manager, Marian Shore, particularly on 20 and 23 September 2013.

[2] The Waitaki Resource Recovery Trust (the Trust) denies that Ms Swaine was constructively dismissed and says that she resigned during a redundancy process.

[3] By way of remedy Ms Swaine claims lost wages up to the date on which she would have been made redundant and \$10,000 in compensation for humiliation, loss of dignity and injury to her feelings.

Issues

[4] To establish whether Ms Swaine was constructively dismissed the Authority needs to examine:

- (a) Whether the Trust breached a duty or duties to Ms Swaine?
- (b) If so, was that breach of a duty or breach of duties so serious that there was a repudiation of the employment agreement and was it reasonably foreseeable to the Trust that Ms Swaine would be likely to resign as a result?
- (c) Was/were the breach/es the actual cause of Ms Swaine's resignation?
- (d) If Ms Swaine was constructively dismissed what remedies are due to her?

Did the Trust breach a duty or duties to Ms Swaine?

[5] As part of the investigation Ms Swaine raised a number of actions and omissions which she says cumulatively led her to lose trust and confidence in Ms Shore, and thereby in the Trust, leading to her resignation. She also says the main reasons that she resigned was because of Ms Shore's behaviour on 20 and 23 September 2013.

[6] Ms Swaine did not raise a personal grievance of unjustified disadvantage about any of the actions or omissions. I examine each of Ms Swaine's concerns to assess whether they amounted to a breach of her employer's duty to her.

Promise of more hours/greater pay

[7] Ms Swaine says that when she was interviewed for the job she made it clear that the offered salary of \$30,000 was not sufficient for her and she needed to be paid \$40,000. Ms Shore told her that at some point she intended to leave her position as Trust Manager but at that stage she could not offer Ms Swaine any higher level of pay. Ms Swaine says that she told Ms Shore that so long as she raised Ms Swaine's pay to \$40,000 by the end of the 2012 year *that would be OK*.

[8] Ms Shore's evidence was that she explained to Ms Swaine before Ms Swaine became employed that the Trust was unable to pay her more. Ms Shore also attempted unsuccessfully to get initiatives off the ground to engage Ms Swaine for more hours.

[9] Ms Swaine says that in July 2012 and again in September 2012 she asked Ms Shore how her plans for moving on from the Trust Manager position were going. She says that in September 2012 Ms Shore suggested that Ms Swaine's pay could increase if Ms Shore's hours decreased. However, Ms Swaine says that never happened and from later September 2102 she *became wary of Ms Shore*. Her explanation for that wariness is that Ms Shore had not provided her with any more hours of work.

[10] However, in September 2012 Ms Swaine was engaged for 8 further hours a week doing administrative duties and that was reflected in a new IEA. From then on Ms Swaine was employed full-time.

[11] Ms Swaine and Ms Shore's first discussion about Ms Swaine's desire for more pay/hours was in pre-contract negotiations. There was no employment relationship at that time and so there could not have been a breach of contract arising out of that discussion.

[12] I also note that the duty of good faith does not come into existence until there is an employment relationship in existence and is not owed during pre-contract negotiations.¹

[13] There was no term or condition of Ms Swaine's first IEA that bound the Trust to provide her with more work or more pay. I do not consider that there was any breach of a contractual duty by the Trust in not providing any further work, which resulted in more pay, until September 2012.

[14] There is no breach of a duty by the Trust in not providing Ms Swaine with more work until September 2012. Therefore, this concern could not contribute to a constructive dismissal.

¹ *Hayden v Wellington Free Ambulance Service* [2002] 1 ERNZ 399

May 2013 written warning

[15] Ms Shore arranged a meeting with Ms Swaine on 13 May 2013. After discussions about Ms Swaine's work performance that day, and after Ms Swaine made a written response, Ms Shore issued Ms Swaine with a written record of a verbal warning². Ms Shore subsequently agreed to keep that record off Ms Swaine's personal file so that another staff member would not inadvertently see it.

[16] The formal disciplinary step of a warning was unjustified in all the circumstances because Ms Swaine was never made aware prior to the warning being issued that there could be a disciplinary consequence to the discussions she and Ms Shore had on 13 May 2013. That knowledge may well have affected how she responded to the concerns.

[17] Nor was Ms Swaine told that she had the right to be represented or supported at her meeting with Ms Shore.

[18] The warning is not claimed as a personal grievance.

[19] Issuing a warning in the circumstances was a breach of good faith because the Trust was not adequately communicative with Ms Swaine about the seriousness with which it regarded Ms Shore's concerns or about the potential for a disciplinary consequence and therefore Ms Swaine was not adequately equipped to respond to Ms Shore's concerns.

21 June 2013 - meeting

[20] Ms Swaine says that at a meeting Ms Shore organised with her and another employee to attempt to improve the working relationship between the two Ms Shore *bullied* the other employee *to talk until she cried*.

[21] Ms Shore had real and justified concerns about the working relationship between Ms Swaine and the other employee. Holding a meeting with them was a reasonable approach to addressing the situation. Even if the other employee did cry that does not mean any employer duty to Ms Swaine was breached. The meeting and the way it was conducted was not in breach of any duty the Trust owed to Ms Swaine.

² On 20 May 2013

26 August 2013 – forklift incident

[22] Ms Swaine says that on 26 August 2013 Ms Shore was driving the forklift with the forks up which she knew was unsafe and was doing so purposely to threaten or intimidate Ms Swaine. She also says that Ms Shore swore at another employee who *called her on* driving unsafely with the forks up.

[23] Ms Shore agrees that she drove the forklift with the forks up and that was dangerous practice. However, she denies any intention to threaten or intimidate Ms Swaine. Ms Shore says she simply forgot she had to have the forks down when driving without a load. She agrees that she may have sworn at the employee who reminded her to lower the forks but it would have been in a joking way.

[24] Whilst Ms Shore was initially operating the forklift in a less than safe manner when she was reminded that she needed to lower the forks she did so. She may have done so earlier if Ms Swaine had pointed out that she needed to do that. Ms Shore's actions on 26 August 2013 were not in breach of any duty the Trust owed to Ms Swaine.

30 August 2013 – office rearranged and computer work done

[25] On 30 August 2013 Ms Swaine returned to work after her regular two days off to discover that a computer technician had been called in to fix recurring computer and internet problems. The office in which Ms Swaine undertook her administrative duties had also been tidied and rearranged, by which she felt affronted.

[26] Ms Swaine considered that employing a computer technician from outside the Trust was an example of duties being taken off her *without any discussion*.

[27] Ms Shore says that the computer/internet problem occurred again when Ms Swaine was on her days off and so it made sense to call someone in. In addition, although Ms Swaine had known of the recurring problems she had not been able to fix them. Ms Shore agreed that Ms Swaine had a lot of computer knowledge and had often helped with computer issues and helped choose and set up the system that was being used. However, she said that computer trouble-shooting and fixing was not an official part of Ms Swaine's duties or job description. I accept that but also accept

that Ms Swaine had generally been called on to fix problems with the computer system.

[28] The fact that Ms Swaine had not been able to fix the problem is not a criticism of her. The computer technician discovered that rodents had chewed the wires in a wall cavity; something Ms Swaine would not have been expected to find and rectify.

[29] Tidying and rearranging the shared office and engaging an outside computer technician to rectify a problem on Ms Swaine's days off did not remove any of Ms Swaine's duties and were not in breach of any duty the Trust owed to Ms Swaine.

1 September 2013- shop staff meeting

[30] Ms Swaine says she was disadvantaged by Ms Shore's unexpected appearance and participation in the regular shop staff meeting on 1 September 2013. Ms Swaine, as the shop manager, usually led the staff meeting.

[31] Ms Swaine says that on 30 August Ms Shore asked her if there would be a shop meeting the next day but did not say that she would be attending. Ms Shore agrees she did not tell Ms Swaine she would attend the meeting. Ms Shore says she attended the meeting because she and Ms Swaine had concerns about one of the shop staff and she felt by attending the meeting she was supporting Ms Swaine.

[32] Ms Swaine says that at the meeting Ms Shore stated that someone would have to take notes of the meetings from then on and looked pointedly at Ms Swaine. Ms Swaine says that she said she would take notes but:

... felt so humiliated in front of my shop staff. I had no idea what she was going to talk about. In the past she would have consulted me before a meeting. This time she just took over the meeting.

[33] Ms Shore denies that her actions in leading the meeting and asking someone to take notes could have been interpreted as humiliating Ms Swaine in front of her staff. She also denied that she looked pointedly at Ms Swaine and, in so doing, asked her, in particular, to take the notes. She says Ms Swaine volunteered to do so.

[34] Ms Shore announcing that notes needed to be taken and asking for volunteers was not in breach of any duty to Ms Swaine and nor would there have been a breach if Ms Shore had directly asked Ms Swaine to take notes.

[35] Ms Shore did not signal in advance to Ms Swaine that she would attend the meeting. It would have been courteous to do so and had been her practice. However, forgetting or failing to do that in this instance does not amount to a breach of the Trust's duty of good faith to be communicative and is not a breach of any other duty. As Trust manager Ms Shore had a right to attend and to lead shop meetings when she deemed it necessary.

[36] Ms Swaine and Ms Shore agree that Ms Shore ended the meeting by signalling that the Trust Board was concerned about its finances and had given Ms Shore a clear directive to make changes which would be announced the following week.

[37] Ms Swaine asked if that meant there would be restructuring. Ms Shore replied it did not necessarily mean that but she had some tough decisions to make.

[38] Ms Swaine says that a number of her staff were clearly upset after the meeting and asked her a number of questions she was unable to answer as she did not have any more information than Ms Shore had given at the meeting.

[39] Potential restructuring is always unsettling for staff but I find that in raising the Trust's financial concerns Ms Shore's conduct before or at the meeting did not amount to any breach of the Trust's duty to Ms Swaine.

3 September 2013 – managers' meeting

[40] A regularly scheduled manager's meeting was held. Ms Swaine says that at the meeting Ms Shore said:

...she was hoping to put off having to tell us something but since someone had gone around talking about it she would have to tell us the organisation would be restructuring. She glared at me as she said this to make it quite clear I was that someone she was referring to.

[41] Ms Swaine says that during the meeting Ms Shore was:

...hostile and unreasonable in blaming me for her mismanagement of the [shop] meeting.

[42] Ms Shore denies that she was hostile or acted negatively towards Ms Swaine at the meeting. David Clare, the Trust's business manager was at the meeting. His evidence supports that of Ms Shore and is contrary to Ms Swaine's evidence.

[43] I do not accept that Ms Shore acted inappropriately towards Ms Swaine at the meeting. That does not mean I consider Ms Swaine is being untruthful. She believes Ms Shore acted in the way she reports. However, by this stage Ms Swaine's lack of respect for and suspicion of Ms Shore was so entrenched that she interpreted much of Ms Shore's conduct to be against her. I find that the Trust did not breach any of its duties to Ms Swaine in the 3 September 2013 meeting.

Friday 6 September 2013– breach of Ms Swaine's privacy

[44] On this day Ms Swaine rang Ms Shore to tell her she had a terrible headache and was not coming to work. Ms Shore told her she had given Ms Swaine's phone number to an unidentified caller, and apologised for having done so. Ms Swaine was upset at what she considered a breach of her privacy, although she did not tell Ms Shore she was upset.

[45] Ms Shore agrees that she unthinkingly gave Ms Swaine's number to an unidentified caller and accepts that she should not have done so. That may have been a breach of one or more privacy principles of the Privacy Act 1990. However, the Authority does not have jurisdiction in that area. I do not consider Ms Shore acted in breach of the Trust's duty of good faith. Even if she did, it was an inadvertent breach and not sufficient to go to the heart of trust and confidence in the employment relationship.

10 Sept 2013– managers' meeting and the redundancy decision and process.

[46] I have heard the recording of this meeting and read the transcript. Ms Swaine accepts that the recording and transcript are accurate. Ms Shore announced a proposed restructure which would make four job positions redundant with duties being reorganised into three positions. There were three managers affected, including Ms Swaine but not Ms Shore.

[47] There was nothing done or said in the meeting on 10 September 2013 that was in breach of any duty the Trust had to Ms Swaine.

Friday, 20 Sept 2013- request to discuss an alleged breach of confidentiality

[48] This was the day that was the deadline for staff feedback on the restructuring proposal. Ms Swaine says that towards the end of the working day Ms Shore approached her to discuss a shop related issue. Ms Shore then raised a concern about

a breach of confidentiality by Ms Swaine and asked Ms Swaine to come and have a conversation about it in Ms Shore's office.

[49] Ms Swaine asked if the concern was related to the restructuring process and Ms Shore said it was not. Ms Swaine said she would not go to Ms Shore's office to discuss the issue and wanted all communication from Ms Shore about the restructuring in writing.

[50] Ms Shore asked again if they could simply discuss the matter in her office but eventually accepted that Ms Swaine would not talk with her about it. Ms Shore says that she never raised her voice and did not ask more than twice.

[51] Ms Swaine says she was *bullied* by and *confused* that Ms Shore was raising something that was unrelated to the consultation period that was almost due to end.

[52] Ms Shore says that she thought it would have been heavy handed to deal with the issue she was concerned about as a disciplinary one and that originally she had hoped to have a simple discussion privately with Ms Swaine. She agrees that she may have told Ms Swaine that her concern potentially amounted to misconduct on Ms Swaine's behalf. Ms Shore told Ms Swaine she would seek advice and get back to her in writing. Ms Shore intended to put her concern in writing on the Monday but subsequent events overtook that.

[53] I do not accept that Ms Shore acted inappropriately in asking to have a discussion with Ms Swaine about the allegation Ms Swaine had been talking about Ms Shore's salary with other employees. It was in line with the Trust's duty of good faith to Ms Swaine to let her know that Ms Shore had been approached by staff telling her that Ms Swaine had been discussing Ms Shore's salary with them. The timing of that was purely coincidental and the request to discuss an issue with Ms Swaine did not amount to bullying.

Saturday, 21 Sept 2013- discovery of hidden camera

[54] The following day Ms Swaine was in the shared office alone when she found a wireless surveillance camera in a box on top of a high shelf which she considered was directed at her desk. Ms Swaine took the camera down and placed it upside down on her desk facing Ms Shore's desk in the adjoining room

[55] Ms Shore says Ms Swaine deleted the footage from the camera, which Ms Swaine denies. It is not proved that if footage was deleted it was Ms Swaine who deleted it, whether deliberately or inadvertently.

[56] Ms Swaine says due to the discovery of the hidden camera she was:

...very concerned for my privacy and feeling very intimidated that I was being deliberately targeted.

[57] Ms Swaine says she had been previously told the cameras were only props, which is denied by the Trust. However, at least by earlier in the year Ms Swaine was aware that the Trust used surveillance cameras and was aware that historical footage from those was stored on another employee's computer at home. The Trust denies targeting Ms Swaine by using the surveillance camera and says that the reason the camera was in that office was because of apparent unauthorised use of the computer system, by a person or persons unknown.

[58] The office used by Ms Swaine was a shared one and the desk she habitually used was also used by Mr Clare on his days in the office. I find that Ms Swaine was not being personally targeted for investigation and surveillance.

[59] It would have been preferable for the Trust to let employees that used the office know that it was concerned about unauthorised use of the computer system and that the Trust would be monitoring the situation. The covert use of the camera in a new position was a breach of the Trust's duty to be communicative with all users of the office who did not know it was there. However, in all the circumstances I do not consider the installation of the camera to have been a breach of good faith so significant as to go to the root of trust and confidence in the employment relationship.

Sunday, 22 September 2013

[60] Ms Swaine told a number of members of the public that her job would be terminated the following day. She also said that there were only two positions going for three people and she was not going to apply for the positions. Ms Swaine told me that she did that because she wanted to say goodbye to her regular customers.

Monday, 23 Sept 2013- discussion in Ms Shore's office

[61] Ms Swaine says that she woke up that day *panicking about how angry Marian would get when she realised I had found the camera*. She says she went to work feeling very distressed and decided that she had to speak to Ms Shore.

[62] Ms Shore says that morning when she came in to work she discovered the camera had been placed facing towards her desk in her office. She was told by two staff members Ms Swaine had discovered the camera and taken it down. Before Ms Shore could talk to Ms Swaine about it Ms Swaine came in to her office with employees Lesley Maaka and Terry Chappell, who she had asked to be witnesses for her.

[63] Ms Swaine says told Ms Shore she was going to take a sick day and go home. She said she felt bullied by Ms Shore's behaviour on the Friday and was very concerned about finding the camera. Ms Shore told her that it was fine for her to go home but that she wished to briefly discuss the confidentiality concern and the camera. Ms Swaine said that she was taking a sick day and left.

Resignation letter

[64] Ms Swaine returned home and wrote a letter which she sent by email that afternoon to Ms Shore in which she resigned *effective immediately*. Ms Swaine gave as her reasons feeling bullied by Ms Shore's behaviour on 20 September and finding the camera on 21 September, as well as Ms Shore's attempt to *ambush me* in her attempt to talk with her on 20 and 23 September. She also recorded that she had lost all trust in Ms Shore as her manager

Ms Shore's letter of 25 Sept 2013

[65] Ms Shore responded to Ms Swaine's resignation by letter sent on 25 September 2013. She asked her to reconsider her resignation. She acknowledged that the restructuring process would have been stressful for Ms Swaine and asked her if she wished to continue with the process. She asked for an opportunity to discuss why Ms Swaine felt bullied and requested specifics about what she had done to make her feel that way.

[66] Ms Shore also wrote that she considered Ms Swaine's taking down the camera to be unacceptable and told Ms Swaine that the issue she had hoped to discuss confidentially on 20 September was about an *apparent discussion you had with others about my salary*.

[67] Ms Shore also alleged that Ms Swaine removed some files from the computer server and removed the shop manager's email file after she discovered the camera and said the Trust wanted her to return those.

[68] Ms Shore asked Ms Swaine to let her know the following day if she wanted to discuss the restructure any further, and if she wished to discuss her concerns with Ms Shore, and Ms Shore's concerns about her behaviour.

[69] Ms Swaine did not respond to Ms Shore's letter.

[70] Ms Shore says that until she received Ms Swaine's resignation letter she expected that Ms Swaine would apply for the new positions.

Did the Trust need to investigate Ms Swaine's complaint about Ms Shore's behaviour?

[71] Ms Swaine says that because she wrote her resignation letter and complained about Ms Shore's bullying behaviour the Trust should have investigated her complaint and not left it to Ms Shore to continue communicating with her about work issues.

[72] Ms Swaine says that she decided not to respond to Ms Shore's 25 September letter and instead left it to her advocate to communicate with the Trust. He did so by telephoning Mr Langrish and writing to the Board on 25 September 2013.

[73] Mr de Wattignar's letter raised Ms Swaine's personal grievance of unjustified constructive dismissal stating that due to Ms Shore's behaviour she had no option but to resign. He asked for an opportunity to discuss Ms Swaine's complaints and personal grievance with the Board.

[74] The Trust's solicitor replied on 29 October 2013 saying that the Trust had confidence in Ms Shore as its manager and stating it considered she should be dealing with the issue on behalf of the Trust. Ms Brazil asked for further details about

Ms Swaine's personal grievance and noted that Ms Shore's letter had asked for clarification on Ms Swaine's concerns and offered to discuss her resignation but that Ms Swaine had not responded.

[75] Ms Swaine is concerned at the long time it took the Trust to respond to Mr de Wattignar's letter. However, by the time he wrote to the Board Ms Swaine had resigned and so there was no longer an employment relationship between her and the Trust. The Trust had no ongoing duty to her to treat her in good faith or to resolve the concerns she had. The timing and content of the Trust's response were not a breach of any duty the Trust had towards Ms Swaine.

Reasons for redundancy and the process followed

[76] In effect Ms Swaine challenges the redundancy proposal and decision-making process. She considers that the new job descriptions were designed to suit the other two existing managers and:

...I felt the intention was to force me out of the organisation as Marian was already talking with them in meetings about projects that I would have been involved in as if I was no longer present.

[77] The Trust denies that the restructuring and redundancy process were intended to get rid of Ms Swaine.

[78] I have considered all the evidence about the redundancy process and the reason for the redundancy, including that given by Neville Langrish, the then Chairman of the Trust. I accept his evidence Ms Shore was acting under Board instructions to implement a restructuring process to save the equivalent of one salary at middle management level which resulted in the disestablishment of the three positions. The restructuring and the proposal to make one position redundant was a genuine one based on an ongoing difficult financial position.

[79] Having considered Ms Swaine's and Ms Shore's evidence on the issue of whether Ms Swaine was being deliberately excluded from discussions on projects she would usually have been involved I do not find that proved.

[80] The restructuring process allowed for consultation with the affected staff. Ms Swaine asked for and received a small extension to the period of consultation

proposed by the Trust to allow her to gain independent advice; which she did. Ms Swaine asked written questions during the consultation period which Ms Shore answered in writing. Ms Shore also provided copies of information requested by Ms Swaine during the consultation period.

[81] The consultation process for Ms Swaine ended on 20 September 2013, which was the date she had suggested herself. It was not a long period of consultation but in all the circumstances I consider it a reasonable period. Ms Swaine's feedback was:

I have no further input or feedback on the retrenchment proposal except to say that I feel the process is unfair and biased.

[82] I note that Ms Swaine did not offer any reason for considering the process unfair and biased. She did not offer any suggestions to the Trust that it could consider in place of its proposal.

[83] After Ms Swaine's resignation, the resignations of one full-time and one part-time employee followed and the proposed redundancies did not proceed. The vacant positions were not filled which achieved the necessary cost savings.

[84] The need for restructuring was genuine; the redundancy process was a fair process and was not biased against Ms Swaine.

Where the breach or breaches so serious that it was reasonably foreseeable to the Trust that it was likely Ms Swaine would resign as a result?

What was the cause of Ms Swaine's resignation?

[85] Ms Swaine claims that her employer's breach or breaches of its duty caused her to resign.

[86] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*³ observed in describing this type of constructive dismissal:

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from

³ [1983] ACJ 965

*dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.*⁴

[87] Ms Swaine says Ms Shore's actions on 20 September 2013 coupled with the discovery of the camera on 21 September and Ms Shore's attempt to discuss both of those issues with her on 23 September caused her resignation. I have found that Ms Shore's behaviour on 20 and 23 September 2013 were not in breach of the Trust's duty of good faith to Ms Swaine or in any other way a breach of her rights as an employee.

[88] Even if they had been in breach of the employer's duty I do not consider Ms Shore's behaviour on 20 September, coupled with the placement of the camera and her attempt to discuss issues with Ms Swaine on 23 September to be conduct that was dismissive or repudiatory conduct sufficient to justify termination of Ms Swaine's employment. Nor do I consider any one of those three alone amounted to dismissive or repudiatory behaviour.

[89] Any attempted discussion initiated by Ms Shore on 23 September 2013 is unlikely to have contributed to Ms Swaine's decision to resign. That is evidenced by her telling several people that she would not be working for the Trust past the following day and that she was not going to apply for the restructured roles.

[90] That leaves the issuing of the warning in May 2013 as a possible cause of Ms Swaine's resignation. Ms Swaine's evidence makes it clear that the May warning was not alone the cause of her resignation.

[91] It is well established that the repudiatory conduct by the employer leading to a loss of trust and confidence may involve a series of events over a period of time such that no single event may be sufficiently serious to enable the employee to treat the contract as repudiated but the cumulative effect may be.⁵

⁴ Ibid, at [975]

⁵ *Lewis v Motor World Garages Limited* [1986] ICR 157 (CA)

[92] To found a claim for constructive dismissal the breach of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable.⁶

[93] Ms Swaine did not raise with the Trust how unfair and detrimental she considered the process leading to the warning in May 2013 to be until well after she resigned. The duty of good faith set out in s.4(1A) of the Act is a mutual duty to be communicative during the employment relationship. Instead of telling to the Trust how unfair she felt the warning to be Ms Swaine apparently accepted the warning. I do not consider the issuing of a written record of a verbal warning, or the verbal warning itself to be of such a character as to make Ms Swaine's resignation reasonably foreseeable to Ms Shore at the time the warning was given.

[94] While the warning was in breach of good faith Ms Swaine kept working for the Trust for a further four months. It was not foreseeable to the Trust that Ms Swaine would resign as a result of the warning. Nor do I find that the May warning was an actual cause of Ms Swaine's resignation which she says was due to Ms Shore's September conduct.

Conclusion

[95] Ms Swaine was not constructively dismissed but resigned during a redundancy process that was genuine and had not targeted her position or her as an employee.

Costs

[96] Costs are reserved. The parties are invited to agree on the matter. To assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.

⁶ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[97] If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

Christine Hickey
Member of the Employment Relations Authority