IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 52
5639198

	BETWEEN	T Applicant
	A N D	K Respondent

Member of Authority:	Rachel Larmer
Representatives:	Allan Halse, Advocate for Applicant Shima Grice, Counsel for Respondent
Investigation Meeting:	23 January 2017
Date of Determination:	28 February 2017

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] In 2011, after more than 20 years as a primary school teacher, Mrs T retrained as an early education teacher. As part of that training she completed a practicum at K.

[2] That experience resulted in the K offering Mrs T full time employment as an early education teacher at one of its North Island kindergartens ("the kindergarten").

[3] After accepting the offer of employment Mrs T discovered that she had been employed to replace a former teacher ("the previous employee") who had had her bullying complaint against the kindergarten Head Teacher, who I shall refer to as Ms X, upheld by K. That had resulted in Ms X being disciplined and the previous employee being moved to a different kindergarten operated by K.

[4] I have decided not to name Ms X or the kindergarten where Mrs T worked because Ms X was not a witness in or even an observer at the Authority's

investigation meeting. That meant that Ms X has (presumably) not had an opportunity to view the evidence presented to the Authority about her. She also did not hear the evidence about her given by witnesses during the investigation meeting.

[5] That means Ms X has not had an opportunity to comment on or respond to the evidence the Authority heard, which forms the basis of the findings in this determination. I am also mindful that the Authority has not put to Ms X some of the matters that have been the subject of adverse comment and/or findings in this determination which would have occurred had she been a witness.

[6] I did not consider that Ms X needed to give evidence to the Authority because K's position was that it had conducted two separate bullying investigations and subsequent disciplinary proceedings into Ms X's treatment of two of her subordinate employees and had concluded in each case that Ms X had bullied each of the employees who had initiated the bullying complaints about her.

[7] Ms X was disciplined in both cases and disciplinary action short of dismissal was imposed on her. K took the position that it wanted to support Ms X to address and correct her behaviour.

[8] Mrs T was working under Ms X while the latter was undergoing corrective training which was part of the disciplinary sanction arising out of the first bullying complaint by the previous employee. Mrs T's evidence was that Ms X did not seem to be taking the corrective action seriously because she had belittled the training and appeared to be merely 'going through the motions'.

[9] I consider that Ms X's subsequent bullying of Mrs T which occurred after Ms X had completed her corrective training, which had aimed to ensure such behaviour did not occur, supports Mrs T's evidence about Ms X's offhand attitude towards the first bullying complaint and subsequent disciplinary sanction.

[10] After the previous employee's first bullying complaint was upheld that employee was transferred by K to a different kindergarten while Ms X remained in her management role at the same kindergarten.

[11] It is worth pointing out that Ms X was the most senior K employee on the kindergarten premises. Ms X's manager Ms A was the Senior Teacher employed by the K to oversee the provision of teaching and learning at its various kindergartens.

[12] Ms A's role involved coaching and mentoring staff including Ms X. Ms A had not picked up Ms X's continued bullying and the issue only came to light as a result of Mrs T's complaint.

[13] Mrs T initially raised her concerns about being bullied by Ms X with Mr B who advised Mrs T to file a formal complaint so it could be properly investigated. In March 2015 Mrs T made a written bullying complaint against Ms X. By agreement she was placed on paid special leave while her concerns were investigated.

[14] On 12 June 2015 Mrs T's bullying complaint against Ms X was upheld. Ms X was disciplined but not dismissed.

[15] Mrs T understood she needed to return to work under Ms X, but Mrs T was concerned about how that would work in practice because she had observed Ms X belittling the first disciplinary outcome. Mrs T believed that Ms X had demonstrated through her words, actions and attitude in response to the first disciplinary sanction for bullying that she did not believe she had done anything wrong.

[16] The Authority was told by K that Ms X denied she had bullied Mrs T so she did not acknowledge any wrongdoing and was not prepared to apologise for her actions. From the evidence I heard, Ms X does not appear to have ever expressed or demonstrated any insight or understanding of her behaviour in terms of the adverse effects her bullying had on the two complainants.

[17] Ms X's manager, Ms A, was situated about 90km away and only visited the kindergarten occasionally. Ms A accepted that meant she did not have the same level of management or oversight of Ms X that would have occurred had they been located in the same workplace.

[18] The Principal of the K, Mr B said that a decision was made to focus on continuing to support Ms X to change her bullying behaviour because her behaviour was not considered sufficiently serious to warrant dismissing her.

[19] Mr B and Ms A met with Mrs T on 13 July 2015 to discuss a proposed return to work plan for her. This involved giving Ms X training about appropriate behaviour towards staff, reviewing the kindergarten's philosophy and conduct towards each other, Ms A having monthly meetings with Ms X for a period of six months to review her conduct of staff relations, all the kindergarten staff being required to attend a

guided mediation which aimed to facilitate Mrs T's reintegration back into the workplace and Ms A attending fortnightly staff meetings for an unspecified period of time.

[20] This initial return to work proposal was emailed to Mrs T on 14 July 2015. She took advice on it from her then representative a NZEI Union representative, Mr C.

[21] Mr C suggested some amendments to the work plan which Mrs T then emailed to Mr B on 16 July 2015 in addition to her own views on the proposal. Mrs T also asked if she could go in to the kindergarten the following day to read the staff minutes so she was aware of what had been happening in her absence.[1]

[22] Mr B told the Authority that he believes he fully responded to Mrs T's feedback on the initial return to work proposal but no documentation has been produced to show he did so. The undated amended return to work proposal document which Mr B says was the final updated version did not address items 5-8 of Mr C's email or any of the matters referred to in Mrs T's email.

[23] During the Authority's investigation meeting Mr B was unable to satisfactorily explain what response he had given to each of these matters which leads me to prefer Mrs T's evidence that her specific concerns were never fully responded to over Mr B's belief that he did so.

[24] I therefore consider it more likely than not that K failed to fully respond to all of Mrs T's specific concerns or suggestions and that it also failed to provide her with a final updated work plan which had incorporated some of her feedback.

[25] While the final work plan document may have been prepared by K before Mrs T's employment ended I am not satisfied to the required standard of proof that it was ever actually provided to Mrs T.

[26] Nevertheless it is common ground that in late July/early August 2015 the parties had agreed in principle that Mrs T would be returning to work, under Ms X even if all of the elements of the return to work had not yet been finally ironed out.

[1] That did not occur.

[27] As part of facilitating Mrs T's return to work K arranged for all staff to attend what it described as "*guided mediation*"[2] session on 11 August 2015. It is also common ground that this meeting did not go well because by the end of it all staff felt deeply aggrieved as a result of information that was shared during the meeting.

[28] Mrs T was very upset during the 11 August meeting because she says she felt "*ganged up on*" at the meeting. Mrs T says she got the impression that K just wanted her to "*get over it*" and get back to work. Mrs T says she was doing her best to *"get over it"* because she did want to return to work.

[29] Mrs T's main complaint was that she did not feel she has been heard and understood in terms of the adverse effects the bullying has had on her and she was not satisfied that Ms X had accepted any responsibility for her actions. Mrs T was concerned that she had not received an apology from Ms X. Mrs T says she felt *"panic stricken"* at returning to the same environment in which the bullying had occurred which created safety issues from her perspective.

[30] Mrs T worried that under these circumstances (denial of wrongdoing, adverse body language, lack of remorse or understanding of impact her bullying had, refusal to apologise) Ms X would simply go through the motions of complying with the corrective action but would not actually change her bullying behaviour which is what Mrs T says she had observed subsequent to the first disciplinary outcome being imposed on Ms X.

[31] K says that some of the unpleasantness at the 11 August meeting arose because Mrs T sought to explain her point of view in a way that offended other staff.

[32] Because of the tensions that were inflamed at the "*guided mediation*" Ms A and Mr B decided that the level of ill feeling that had arisen made it inappropriate for Mrs T to return to work as initially scheduled. They communicated that to Mrs T who agreed to continue to remain away from work on paid special leave.

[33] On 18 September 2015 the parties attended mediation with a mediator from the Ministry of Business Innovation and Employment (MBIE) which was unsuccessful.

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[2] This was not run by an MBIE mediator

[34] After the unsuccessful MBIE mediation K (via its solicitor) wrote to Mrs T's representative, Allan Halse,[3] later that day advising that Mrs T had to decide whether she intended to return to work or not.

[35] K stated that if Mrs T did intend to return to work, then it would uphold the commitments as per the return to work plan which had been discussed by the parties in July. It did not specify whether it was referring to the initial work plan or the amended work plan.

[36] I find that Mrs T likely would have thought it was referring to the initial work plan because that was the only work plan she had received a written copy of.

[37] K's lawyer in the 18 September letter acknowledged that a finalised copy of the work plan document was not available at the time the letter was sent to Mrs T but indicated it would be provided by 21 September 2015.[4] That did not occur.

[38] K's letter of 18 September stated that if Mrs T wanted to return to work then *"she must also commit to the return to work plan. This will be recorded in an agreement made pursuant to section 149 of the Employment Relations Act 2000, which will record that the agreement is a full and final settlement of all issues arising out of* [Mrs's T] *complaint about* [Ms X]. *If* [Mrs T] *does not wish to return to work on this basis,* [K] *will treat that as a resignation."*

[39] K effectively said to Mrs T that if you want to return to work you must compromise all potential legal claims against us and you must accept our work plan, without providing a copy of what she was required to agree to.

[40] K's letter of 18 September further stated that if Mrs T did not wish to return to work on that basis (i.e. by committing to the (unspecified) return to work plan and by compromising her right to pursue legal action) then *"*[K] *will treat that as a resignation"*.

[41] K said that if Mrs T had not accepted its settlement offer by 12pm on 08 October 2015 (which required her to agree to the unspecified work plan and to enter into a s.149 Record of Settlement) they would treat the offer as having been declined.

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[3] Mrs T changed representatives which K believes caused difficulties with her return to work process.
[4] That does not appear to have occurred.

[42] Mr Halse responded by letter dated 04 October 2015 to Ms Grice, which referred back to his letter of 02 September 2015 which said Mrs T was reluctant *"to be forced back into exactly the same work environment under the same bully"* and he reiterated the exact same concern again.

[43] Mr Halse referred to the aggressive tone of the letter and further said "*it seems that* [K] *intends to bully* [Mrs T] *into resigning"* in breach of health and safety obligations and good faith requirements. Mr Halse also raised health and safety concerns about the workplace and requested health and safety documentation to be provided by 06 October 2015.

[44] Ms Grice responded on 06 October 2015 stating that K had met its health and safety obligations to Mrs T by providing her with the proposed return to work plan so its position remained unchanged from its letter of 18 September.

[45] On 08 October 2015 Mr B wrote to Mrs T stating:

> *I note that you have not responded to Shima Grice's letter of 18 September 2015 to your agent, Allan Halse, containing our proposal of a return to work. Accordingly, that* ***failure to respond amounts to a resignation*** *as of 7 October.* (my emphasis added)

[46] There is no dispute that this letter ended Mrs T's employment without notice and that the notice provisions in the Collective Agreement which governed the employment relationship were not adhered to.

[47] Although the letter of 08 October refers to a "*return to work*" proposal it is important to acknowledge that the letter of 18 September was actually a settlement proposal because it required Mrs T to compromise all legal claims she may have had.

[48] It was not simply a matter of Mrs T agreeing to return to work because the 18 September letter says that *"[i]f* [Mrs T] *does not wish to return to work on this basis* (i.e. by accepting the settlement proposal in that letter), that would be *"treated as a resignation".*

[49] Mrs T claims she was unjustifiably summarily dismissed. K denies dismissing Mrs T. It says that her employment ended because she resigned. K further says that even if Mrs T was dismissed (which it denies) any such dismissal was carried out in a procedurally fair manner and was substantively justified.

[50] Alternatively K argues that if the Authority does not agree that Mrs T resigned, then her failure to respond to its full and final settlement proposal resulted in her abandoning her employment and/or repudiating it and/or frustrating the employment relationship.

The issues

[51] The following issues are to be determined:

(a) Was Mrs T dismissed?

(b) If so, was her dismissal justified?

(c) If not, what if any remedies should be awarded?

(d) What, if any, costs should be awarded?

Was Mrs T dismissed?

[52] Mrs T bears the onus of establishing on the balance of probabilities that her employment ended because she was dismissed by K.

[53] A dismissal occurs where the initiative for ending the employee's employment comes from the employer and not from the employee. A free or voluntary resignation is not a dismissal.

[54] I find that K's claims that Mrs T freely and voluntarily resigned are inconsistent with the agreed facts and the documentary records.

[55] K's positon is that Mrs T must have resigned because she was on notice that failing to comply with its return to work plan which was to be incorporated into a s.149 Record of Settlement would be treated as a resignation.

[56] I do not accept K's submissions that created a situation where Mrs T freely, genuinely or voluntarily resigned. K effectively told Mrs T she had to compromise her legal claims if she wanted to return to work, and that her failure to do so would be treated as a resignation. It then acted consistently with that position, which it had initiated and outlined to her.

[57] K's letter to Mrs T dated 08 October alleged that Mrs T had failed to respond to the 18 September letter and further says *"Accordingly, that the failure to respond* [to the settlement proposal] *amounts to a resignation as of 7 October."*

[58] Mrs T had actually responded on 04 October. She reiterated her view that she did not want to be forced back into the same work environment to work under Ms X. Mrs T also stated her view that despite there being unresolved safety issues she felt that K was attempting to bully her into resigning. What Mrs T had failed to expressly do was to accept K's settlement proposal, but notwithstanding that she had replied to the letter containing the proposal.

[59] There is no dispute that it was K that brought up resignation, not Mrs T.

[60] Mr B accepted in his evidence that the initiative for ending Mrs T's employment came from K, not from her. I consider that was a proper concession for him to make.

[61] K wrote to Mrs T on 08 October advising her that her employment had ended effective the previous day. Mr B accepted during questioning that Mrs T had not at any point raised resignation or expressed a wish to resign. Quite the contrary.

[62] I find that Mrs T had expressed her wish to return to work and understood and accepted that Ms X, as Head Teacher, would remain Mrs T's manager. Mrs T's concern was on managing her return to work so that she felt safe and supported when returning to work under a bully who was the most senior manager on site, so was effectively completely unsupervised on a day to day basis.

[63] I consider that Mrs T had co-operated with K regarding that by having meetings with Mr B and Ms A, by providing feedback on the initial work plan, by attending the "*guided mediation*", by not returning to work as scheduled when requested not to by Ms A, by applying for and attending Ministry of Business Innovation and Employment MBIE mediation.

[64] The employment relationship was governed by a Collective Agreement dated 12 December 2013. Clause 2.12 of the Collective Agreement dealt with termination of employment and required a minimum of one month's notice of termination. Neither party gave any notice of termination in this case.

[65] There was no contractual or common law right for K to unilaterally decide that if Mrs T did not accept its settlement proposal then she would be deemed to have resigned.

[66] I do not accept K's submission that Mrs T led it to believe she wanted to resign because she failed to respond to its 18 September letter.

[67] I find that Mrs T did not engage in any ambiguous or equivocal communication with K which could have fairly or reasonably have led it to conclude that she intended to terminate her employment by way of resignation.

[68] When I asked Mr B why K had decided to treat Mrs T as if she had resigned he said that it needed certainty regarding its staffing arrangements and was very concerned about the ongoing costs it had incurred because it had been paying Mrs T but she had not been working.

[69] However instead of addressing these concerns by initiating a fair and reasonable formal process to address its desire for Mrs T to either return to work or for the employment relationship to end I find that K elected to give her an ultimatum – accept this settlement offer on the terms we have proposed or we will treat you as if you have resigned, thereby ending your employment.

[70] Despite having been bullied, and despite K informing Mrs T that Ms X, who had bullied two subordinates, would remain the most senior employee on site, I am satisfied that Mrs T had demonstrated by her ongoing engagement with K, her feedback, and by her attendance at the 11 August 2015 meeting with all staff, that she did wish to return to work so was cooperating with K in that regard.

[71] I do not accept that K could have been under any reasonable misapprehension that Mrs T was in fact seeking to terminate her employment.

[72] Mr Halse had put K clearly on notice that he considered it was improperly pressuring Mrs T to resign. I agree with that assessment.

[73] I have no difficulty in finding that it was K's sole actions that ended the employment, not any acts or omissions by Mrs T. Because I am satisfied that the employment relationship ended at K's initiative, that in law amounts to a dismissal.

[74] Accordingly, I find that K dismissed Mrs T on 08 October 2015 when it wrote to her advising that her employment had ended as of 07 October on the grounds of resignation, when I find as a matter of fact that she had never resigned.

[75] It is clear that prior to 04 October 2015 K was improperly, inappropriately and unfairly pressuring Mrs T to accept a work plan that it did not appear to have even copied to her and which did not address all of the specific concerns she had raised. It is hardly surprising that she was not agreeable to compromising all of her potential legal claims on that basis.

[76] I also consider it significant that K had not responded in full to Mrs T's specific concerns and/or addressed the adverse impact that the bullying behaviour had had on her and/or addressed the ill will amongst all staff that arose out of the unsatisfactory meeting on 11 August.

[77] Although I acknowledge that the parties attended MBIE assisted mediation on 18 September, that was unsuccessful in resolving the issues between the parties. Unsuccessful mediation did not entitle K to abdicate its legal responsibilities to Mrs T by failing to facilitate her return to work in a fair and reasonable manner which involved addressing her specific safety concerns.

[78] Whether or not Mrs T was dismissed is to be assessed at the time her employment ended. I do not accept Ms Grice's submission that the facts can retrospectively bear an alternative analysis. What I am determining is the position as the parties believed it to be as at 08 October when the letter ending the employment relationship was sent by K to Mrs T.

[79] Mrs T was not treated as if she had abandoned her employment. There was no abandonment clause in the Collective Agreement so there is no legal basis to support this submission that she abandoned her employment. Even if there had been, it is fundamentally undermined because Mrs T was readily contactable by K either directly or through her representative.

[80] Mrs T was not at work because she had been asked by K on 11 August not to return to work. No subsequent direction or instruction had been issued for her to return to work that was not also linked to a requirement to compromise all of her legal claims. While Mr B's evidence was that Mrs T was 'invited' to return to work, acceptance of that invitation still required Mrs T to compromise her legal rights.

[81] There is simply no evidence from K's witnesses to support the submission that Mrs T repudiated her employment contract. Mrs T was not cross examined on that point. The issue of repudiation was raised for the first time in closing submissions.

[82] Likewise the issue of frustration of contract was not the subject of evidence by K's witnesses and Mrs T was not cross examined on it. It cannot be said that Mrs T legally frustrated her employment contract by asking her employer to engage with her by responding to her specific safety concerns before she returned to work under a bullying manager.

[83] That claim which also arose for the first time in closing submission is without merit.

[84] I am satisfied that Mrs T has discharged her onus to establish she was dismissed. The onus now passes to K to justify her dismissal.

Was dismissal justified?

Justification test

[85] Justification is to be assessed in accordance with the justification tests set out in s.103A of the Act. This requires the Authority to objectively assess whether K's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Mrs T was dismissed.[5]

[86] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith requirements in s.4(1A) of the Act and each of the four procedural fairness tests in s.103A(3) of the Act.

[87] Failure by an employer to do so is likely to fundamentally undermine its ability to justify its actions and/or how it acted.

[88] I find that K is unable to discharge its onus of establishing on the balance of probabilities that it complied with its good faith requirements and/or any of the four procedural fairness tests in s.103A(3) of the Act.

[5] Section 103A(2) of the Act.

Good faith

[89] It is clear that K was acting on the basis that Mrs T has resigned. It did not provide her with information relevant to its proposed decision which could adversely affect her ongoing employment.

[90] Mr B told me K acted the way it did because it was concerned about costs and staffing issues and wanted to address that. That information was never shared with Mrs T so it follows she was deprived of an opportunity to comment on it.

[91] I find that the failure of K to provide Mrs T with all relevant information and an opportunity to comment on it before she was dismissed breached its obligations under s.4(1A) of the Act. This failure undermines its ability to justify its dismissal of Mrs T.

Procedural fairness tests

[92] Section 103A(3) of the Act sets out four procedural fairness tests to ensure that a dismissal is carried out in a procedurally fair manner. This involves the requirement on K before it took action against Mrs T to sufficiently investigate its concerns[6], to raise the concerns with Mrs T,[7] to give her a reasonable opportunity to respond to its concerns,[8] and to genuinely consider her explanation.[9]

[93] I find that K failed to comply with any of these four procedural fairness tests in s.103A(3) of the Act. Instead of engaging with Mrs T about its concerns and then allowing her to respond to them K gave her an ultimatum – accept the proposed terms or be treated as if she had resigned.

[94] I consider there was a complete absence of any fair or proper process. K had not even provided Mrs T with a final version of the proposed work plan which she was being required to accept. Nor had she been given a response to the specific concerns she had raised.

[95] Mrs T was also unaware of the reasons behind why K was pushing for her return to work before her safety concerns had been addressed to her satisfaction.

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[6] Section 103A(3)(a) of the Act.
[7] Section 103A(3)(b) of the Act.
[8] Section 103A(3)(c) of the Act.
[9] Section 103A(3)(d) of the Act.

[96] I find that K did not sufficiently investigate its concerns regarding Mrs T's return to work, it did not raise those specific concerns with her (regarding a need to finalise staff arrangements and the ongoing cost of having her drawing a salary but not working), it did not give her a reasonable opportunity to respond to its concern (because it told her she had to compromise her claims against it in order to return to work), so it was unable to genuinely consider Mrs T's feedback or explanations to its concerns.

[97] I consider that these omissions fundamentally undermine K's ability to establish justification in accordance with the procedural fairness requirements of the s.103A(3) justification test in the Act. I therefore find that Mrs T's dismissal was procedurally unjustified.

Section 103A(4)

[98] I further find that the procedural fairness defects were so serious, and resulted in such unfairness to Mrs T that s.103A(4) of the Act does not preclude me from finding that her dismissal was unjustified.

Substantive justification

[99] I find that K is unable to discharge the onus of establishing on the balance of probabilities that Mrs T's dismissal was substantively justified.

[100] Mrs T had been bullied by her manager who had a track record of having bullied the previous employee who had formerly held Mrs T's positon. Clearly the first sanction and corrective action had failed to adequately rectify Ms X's bullying behaviour.

[101] Added to that was Mrs T's personal observations that Ms X had not seriously engaged in the corrective training that was imposed after the first bullying complaint was upheld because she had made light of it and appeared to be going through the motions.

[102] Another aggravating feature was Mrs T's perception of Ms X's adverse attitude, and body language at the 11 August meeting. K admits this meeting went so badly that it decided to put Mrs T's return to work on hold.

[103] In response to Mrs T's request for an apology from Ms X or some acknowledgement of wrongdoing or at least recognition of the adverse effect Ms X's actions had had, K told Mrs T – that was never going to happen.

[104] It was unfair and unreasonable for K to require Mrs T to accept its settlement proposal if she wanted to return to work or be treated as if she had resigned. It was not open to K to address its staffing and costs concerns in such a manner.

[105] While K could have elected to engage in a formal process regarding Mrs T's return to work, if it had formed the view that it was necessary to cry halt to the existing situation it did not do that.

[106] Instead K tried to compel Mrs T to accept its terms and compromise her claims when she had the right to return to a safe work environment regardless of whether or not she wanted to compromise her potential legal claims.

[107] I consider it was a serious omission for K to fail to take any constructive action to repair the problems that had arisen between staff at the 11 August meeting. I consider attendance at the MBIE mediation was insufficient to address this because it involved only Mrs T when the August meeting had involved all of the other staff who worked at the kindergarten.

[108] Some remedial steps needed to be taken so that all staff were on board with Mrs T's return to work to ensure she was not going to have to return to a hostile work environment where other staff were harbouring unresolved issues against her.

[109] All of these issues could, and should, have been addressed within the context of a formal process, but that did not occur. Rather K acted on the basis that Mrs T had an either/or option; either return to work and compromise her claim by way of a s.149 record of settlement, or be treated as if she had resigned.

[110] I do not accept that K had any good or genuine reason for ending Mrs T's employment in all the circumstances. Her dismissal was substantively unjustified.

Outcome

[111] Accordingly, I find that Mrs T's dismissal was procedurally and substantively unjustified.

What, if any, remedies should be awarded?

Mitigation

[112] The law relating to mitigation of loss in a personal grievance case was set out by the Full Employment Court in *Xtreme Dining Ltd t/a Think Steel v Dewar*.[10]

[113] In accordance with *Xtreme Dining*[11] K bears the onus of persuading the Authority that Mrs T acted unreasonably in failing to mitigate her loss. It is then up to Mrs T to provide satisfactory evidence about the steps she took to mitigate her loss bearing in mind she was *"the victim of a wrong"*. [12]

[114] The Full Court in *Xtreme Dining* reminded the employment institutions to not be too stringent in their expectations of a dismissed employee because *"what has to be provided - by the employer - is that the employee acted unreasonably; the employee does not have to show that what he did was reasonable."* Reasonableness is to be objectively assessed by the Authority in light of all of the applicable circumstances.

Did Mrs T act unreasonably?

[115] K says that Mrs T unreasonably declined its offers on 12 and 19 November 2015 to reinstate her to her former position. I do not accept that.

[116] First, K did not simply offer Mrs T her job back as it claims. Rather the offer K made to Mrs T was to settle all claims she may have against it by way of a s.149 Record of Settlement under the Act, by agreeing to return to work as per K's desired work plan.

[117] Second, the settlement offer had still not addressed Mrs T's specific concerns regarding her return to work. K merely made the same offer to her that she had not accepted while employed. There was no evidence that K had engaged with Mrs T about her specific concerns or that it had taken any steps to address these.

[118] Mrs T's representative responded to this settlement offer by putting forward further suggestions that in their view would ensure Mrs T's "*safety*" upon her return to work, but these suggestions were not acceptable to K.

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[10] [2016] NZEnpC 136.
[11] Supra.
[12] Ibid 1.

[119] This meant that had Mrs T accepted the settlement offer she would be returning to work under a bully manager who was the most senior person on the work site. Ms X also did not acknowledge that she was a bully, had not done anything to address the considerable stress and distress her actions had caused Mrs T and who had also refused to apologise to Mrs T.

[120] Third, K did not offer an apology or acknowledgement of wrongdoing for unjustifiably dismissing Mrs T. Nor did the offer address the issue of her legal costs.

[121] I consider that in the circumstances it was understandable and entirely reasonable for Mrs T to decline the settlement offers that were made. I therefore find that she did not act unreasonably in doing so.

[122] Mrs T has provided unchallenged evidence of the steps she took to mitigate her loss. Mrs T proactively obtained relief work where possible. She also sold the family home and moved her family to be closer to potential work opportunities.

[123] I find that Mrs T has mitigated her loss.

Lost remuneration

[124] Section 128(3) of the Act gives the Authority the discretion to award lost remuneration when an employee's loss exceeds three months' lost remuneration.

[125] There is no question that Mrs T's actual remuneration loss exceeded three months' loss. When exercising the discretion in s.128(3) the Authority is required to assess as a matter of probability what Mrs T's employment situation would have been had she not been unjustifiably dismissed.

[126] Mrs T had worked for K for approximately four years. She told the Authority that she loved her job and loved working with the children. Mrs T had a clean disciplinary record and had not been subject to any performance concerns or processes. Her family was also reliant on her income and I am told there are limited opportunities in this area for the work she was employed to do.

[127] I consider that had Mrs T not been bullied at work, the situation that gave rise to her unjustified dismissal would not have arisen. I therefore conclude as a matter of probability that Mrs T's employment would likely have continued at the very least to now.

[128] I am not persuaded that Mrs T would not have continued working for K up to the present time. There is no good reason to deny Mrs T the ability to recover her actual loss.

[129] I therefore consider she is entitled to recover her actual loss remuneration from the date of her unjustified dismissal on 08 October 2015 to the date of this determination under s.128(3) of the Act.

[130] The calculation of Mrs T's actual loss needs to account for any pay increases that applied under the Collective Agreement during the material period and must deduct any income she earned over the material period.

[131] I decline to award ongoing future lost remuneration as I am not satisfied that evidence was lead which would support the exercise of the Authority's discretion in that regard.

[132] The parties have 7 days from the date of this determination to agree if possible on the amount of actual lost remuneration awarded. If agreement is not reached then either party has 14 days from the date of this determination to apply to the Authority to fix the amount.

Distress compensation

[133] Mrs T gave evidence to the Authority about the considerable distress and humiliation she had suffered as a result of her unjustified dismissal. Mrs T's husband also corroborated her evidence and explained that he had noticed dramatic changes in her post her dismissal.

[134] Mrs T presented at the Authority's investigation meeting as still very distressed and highly emotional about these events. It was clear that her unjustified dismissal has had a significantly detrimental effect on her.

[135] Mrs T had to make the difficult decision to move her and her family out of the area in an attempt to find work. This resulted in her incurring the stress, uncertainty and cost of selling her family home and moving out of the region in an attempt to mitigate her loss by moving closer to potential employment opportunities.

[136] In her Statement of Problem Mrs T sought to recover the costs of her house sale and relocation together with costs associated with the sale and purchase of property relating to relocation to Katikati.

[137] I decline to separately award her these amounts because I consider that these costs are a relevant factor to put in the overall mix when assessing an appropriate level of distress compensation. I find that these additional unplanned expenses created stress and distress for Mrs T.

[138] Mrs T was also distressed that K had a suitable vacancy at another kindergarten shortly after it dismissed her which it did not offer to her.

[139] Mr B says she was not offered this vacant role because K had lost trust and confidence in Mrs T which he attributed to the manner in which Mr Halse had conducted his representation of her.

[140] That position seems to lose sight of the fact that Mrs T was bullied then unjustifiably dismissed when all she wanted her employer to do was to address her specific safety concerns about returning to work under her bullying manager.

[141] Mrs T gave evidence of being acutely embarrassed because others in the community were asking her why she was no longer working at the kindergarten. She also felt that she was in some way to blame for losing her job by having been bullied by her manager.

[142] Mrs T's husband described how his wife's dismissal had destroyed her self-esteem and confidence and the dramatic changes he had observed in her as a result of that.

[143] I am satisfied that this is an appropriate case where there needs to be a significant level of distress compensation awarded to Mrs T to reflect the significant humiliation, loss of dignity and injury to feelings she has suffered.

[144] K is ordered to pay Mrs T $15,000 under s.123(1)(c)(i) of the Act.

Contribution

[145] Having concluded that Mrs T has a personal grievance claim, s.124 of the Act requires me to assess the extent to which she contributed to the situation that gave rise

to her personal grievance and to reduce remedies accordingly. Contribution denotes blameworthy conduct which is to be proven on the balance of probabilities.

[146] I do not accept K's submission that Mrs T engaged in a high level of contributory conduct. I am not satisfied that any of the matters that K have submitted establish contributory conduct to the required standard.

[147] I do not consider Mrs T engaged in any blameworthy conduct that should result in a reduction in her remedies.

What, if any costs should be awarded?

[148] Mrs T as the successful party is entitled to a contribution towards her actual legal costs.

[149] The parties are encouraged to resolve costs by agreement within 14 days of the date of this determination. If that does not occur, Mrs T has 21 days from the date of this determination to file a costs application which must be supported by proof of actual costs incurred.

[150] K then has 28 days from the date of this determination to file its costs memorandum in response to any costs application. Mrs T has three working days from service of K's costs memo within which to respond.

[151] If costs are not agreed the Authority will adopt its usual notional daily tariff based approach to assessing costs so the parties are invited to identify any factors they say warrant the notional daily tariff being adjusted.

[152] The notional daily tariff is $4,500 for this matter, which is to be pro-rated to reflect the two hour investigation meeting, so the notional starting point for assessing costs is $1,500.

Rachel Larmer
Member Employment Relations Authority