

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Marcel Leo Nico van Leeuwen
AND Canterbury District Health Board
REPRESENTATIVES David Beck Counsel for Applicant
Penny Shaw Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING Christchurch, Thursday 14 September 2006
DATE OF DETERMINATION 22 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr van Leeuwen) alleges that he has been constructively dismissed from his employment by the respondent, the Canterbury District Health Board (the District Health Board), that he has been the subject of a series of unjustifiable actions of the District Health Board causing him disadvantage, and that there had been various breaches of implied and express terms of his employment agreement.

[2] The District Health Board resists each and every one of those claims contending that the District Health Board at all times treated Mr van Leeuwen fairly and appropriately and that he resigned of his own volition on 29 November 2005.

[3] Mr van Leeuwen was employed as an occupational therapy instructor working in the Work Assessment and Rehabilitation Service of the District Health Board. His initial engagement was as part of a small catering unit providing a rehabilitation environment for clients of the Service who were, or had been, severely mentally unwell or intellectually disabled.

[4] The primary purpose of Mr van Leeuwen's position was to instruct those clients in a range of food preparation skills for a retail environment. The food that was prepared as part of this educative process was subsequently sold to the public, with the assistance of the District Health Board staff.

[5] When Mr van Leeuwen was initially employed on 2 July 2003, he worked approximately 16 hours a week and typically this involved him working on Wednesday, Thursday and Friday but not on the other days of the week. The other days of the week were covered by another part time employee.

[6] Working alongside these part time employees, was a full time employee Ms Dianne McFarlane. It is the relationship between Ms McFarlane and Mr van Leeuwen which forms the centrepiece of Mr van Leeuwen's claim against the District Health Board. In essence, Mr van Leeuwen complains that Ms McFarlane bullied and harassed him during his employment

and the District Health Board, although they were aware of the problem, failed to take the appropriate action.

[7] Mr van Leeuwen worked in his permanent part time role for a bit over twelve months and during that period, he says that he raised with the District Health Board management on a number of occasions the difficulties that he had in working with Ms McFarlane.

[8] While the evidence of Mr van Leeuwen's immediate manager Ms Hodge confirmed that she had heard from Mr van Leeuwen on a number of occasions during that initial period of his employment, Ms Hodge's evidence is also that she thought the problem had to some extent been ameliorated either by the passage of time or by her intervention which she describes in her evidence. What is common ground is that Mr van Leeuwen never formally complained about Ms McFarlane; all that he ever did was raise general issues about his relationship with her.

[9] In her responses to those general concerns, Ms Hodge not unnaturally chose to draw the issues to the attention of Ms McFarlane and she was confronted by Ms McFarlane expressing reservations about Mr van Leeuwen. When, as part of her management process, she then reverted to Mr van Leeuwen with Ms McFarlane's observations about him, Ms Hodge's evidence is that Mr van Leeuwen readily accepted the criticisms that Ms McFarlane had made about him.

[10] In August of 2004 (about a year into Mr van Leeuwen's service at the District Health Board), Mr van Leeuwen's performance appraisal came up. In the course of that appraisal there was discussion about Mr van Leeuwen translating to a full time position which had become available. The appraisal document refers positively to that prospect in Mr van Leeuwen's own hand and the only comment about the alleged bullying and harassment appears to be the following two lines:

F Give details of any difficulties that you have encountered that have impacted on your performance.

- *Co-worker's influence! (Has been improved; however, still stressful at times)*

[11] In fact that full time position did not become available until November of 2004. In early October 2004, Ms Hodge says that she received four emails from Mr van Leeuwen advising that he was suffering from anxiety which was particularly related to driving and that he was taking medication for that anxiety. Ms Hodge said that he was always open about his situation and *never suggested that his anxiety was only linked to his work. In particular I understood that he had financial difficulties.*

[12] When Mr van Leeuwen was interviewed for the permanent position, Ms Hodge not unnaturally carefully assessed the anxiety issue as part of her consideration of Mr van Leeuwen's application and in particular she says that she *questioned him quite carefully* in relation to how he might cope with the full time position.

[13] In answer to her question *What might you find stressful in this position?*, Mr van Leeuwen at no point mentioned Ms McFarlane. However, it is possible that Mr van Leeuwen did not mention Ms McFarlane because it seems she was a member of the interview panel. Despite that, it would still have been available to him to raise the issue which he now says in his application to the Authority caused him such serious concern.

[14] In any event, Ms Hodge was satisfied with Mr van Leeuwen's responses to her inquiries and he was appointed to the full time position.

[15] There were difficulties almost immediately however and Mr van Leeuwen went home saying he was *feeling anxious and shaky* after a disagreement with Ms McFarlane on 4 February 2005. When confronted by Ms Hodge, Ms McFarlane said that she did not feel supported.

[16] Ms Hodge then spoke both to Mr Wayne Evans the Human Resources Adviser, and Mr George Schwass the Service Manager about these issues.

[17] Mr Evans then engaged with both Mr van Leeuwen and Ms McFarlane. When Mr Evans met initially with Ms McFarlane, he says that amongst other things she told him that she *felt harassed by her colleagues*. In particular, Ms McFarlane expressed her frustration with Mr van Leeuwen who she apparently wanted to be *more organised and structured*.

[18] When Mr Evans spoke with Mr van Leeuwen, he indicated that he felt he could not communicate with Ms McFarlane and Mr Evans recalls him describing his employment as *hellish*. Mr Evans says that it was Mr van Leeuwen's suggestion that there be mediation between the protagonists.

[19] An initial mediation meeting took place on 18 February 2005 and Mr Evans said that it went *very well*. He thought that the major issue between Mr van Leeuwen and Ms McFarlane was communication (or perhaps more accurately the lack of it) and he worked on some strategies with the pair of them to improve that.

[20] There was a follow-up meeting on 17 March 2005 at which Mr Evans records that things seemed *much improved*, and Mr Evans records that both of the protagonists *thought the other was putting in an effort*.

[21] Mr Evans met with Mr van Leeuwen alone on 29 April 2005 at which point Mr van Leeuwen indicated that matters had deteriorated again. Mr van Leeuwen told Mr Evans at this meeting that he had a lot of external pressures as well as this workplace difficulty, and Mr Evans encouraged Mr van Leeuwen to take some time off. Mr van Leeuwen went on sick leave on 4 May 2005 and although he returned to work briefly later in May, was effectively away from the workplace from then on.

[22] When Mr Evans spoke with Ms McFarlane after his discussion with Mr van Leeuwen on 29 April, Ms McFarlane indicated that she was afraid of communicating with Mr van Leeuwen because she was never sure how he would react and that she *found it difficult to cope with his moods and problems*.

[23] Mr Evans formed the view, after meeting with the two protagonists on a regular basis over this quite short period, that the difference between them amounted to a personality conflict. He described the two of them as being *real opposites* in their personalities and in their work philosophies. He noted that both had at various times complained about the other, but he also noted that each of them had also made positive comments about the other on these occasions.

[24] Mr Evans was very clear that Mr van Leeuwen did not wish to make a formal complaint against Ms McFarlane despite being asked by Mr Evans if he wished to take that step. Mr Evans was adamant that he at no stage had discouraged Mr van Leeuwen from making a complaint as was alleged in Mr van Leeuwen's statement of problem filed in the Authority.

[25] Mr Evans' evidence was that, had the employment relationship not been disturbed by Mr van Leeuwen needing to go off on sick leave, he would have continued to work with the protagonists and believed that that process would continue to bear fruit. In particular, Mr Evans indicated that he never had an intention of moving either Mr van Leeuwen or Ms McFarlane as both of them were good at what they did and both made a contribution to the Unit in their existing roles.

[26] Mr Evans also was very clear that he always saw the conflict as a personality clash and that it very definitely was not bullying. Mr Evans said in the clearest terms that he did not agree that Mr van Leeuwen was describing bullying. Mr Evans said, in answer to a question from me, that *... he called it bullying but he had few examples to support the allegation ...* and that he (Mr Evans) *... still considered this a personality clash and not an example of bullying*.

[27] It is clear that the District Health Board at no stage accepted the bullying categorisation. For instance, Mr Evans said in answer to a question from me that *We as an organisation had not concluded there was bullying happening*. Later in his evidence Mr Evans said *It is difficult to come to the conclusion that bullying has taken place without any evidence of it*.

[28] When Mr Schwass gave his evidence, Mr Schwass said *zero tolerance of bullying meant just that*, but that in order for there to be a finding that bullying existed, to protect all parties there needed to be *a formal process and a formal complaint to establish that bullying was in fact present*.

[29] During his extended sick leave, Mr van Leeuwen had, by agreement with the District Health Board, taken some overseas leave, to the Netherlands. Upon his return there was a meeting between Mr van Leeuwen and officers of the District Health Board on 25 August 2005. Mr van Leeuwen seemed better in himself to the District Health Board witnesses who were present at that meeting. Within seven days of that meeting the District Health Board had identified an orderly position which Mr van Leeuwen might be interested in and certainly could aspire to. The email traffic at the time indicates that Mr van Leeuwen was given the opportunity of considering this position but that his health had deteriorated again and he did not feel well enough to think about that opportunity.

[30] Then on 11 October 2005, Mr van Leeuwen sent Mr Evans an email in which he sought information about how to make a formal complaint and how to lodge a personal grievance. Mr Evans suggested that the parties meet and that meeting took place on 26 October 2005. This meeting seems to have covered three distinct aspects. The first was the imparting of the information Mr van Leeuwen sought in relation to the possible complaint and personal grievance. The second was discussion around a suggestion from Mr van Leeuwen that the District Health Board pay Mr van Leeuwen \$5000 by way of a golden handshake which Mr Evans undertook to consider and third was a suggestion from Mr Evans that Mr van Leeuwen commit himself to a return to work medical assessment.

[31] Mr van Leeuwen subsequently confirmed his readiness to accept the medical assessment and on 28 October, Mr Evans, for his part, confirmed that the District Health Board was not interested in a golden handshake to conclude the employment relationship. In that same email traffic, Mr Evans offered Mr van Leeuwen further possible employment opportunities both within the District Health Board and within District Health Board contractor's employment.

[32] The medical report on Mr van Leeuwen's return to work prognosis became available on 24 November 2005 and while indicating that there would need to be continuing input from Human Resources into the relationship between Mr van Leeuwen and Ms McFarlane to ensure that as positive a work environment as possible, the thrust of the report is that Mr van Leeuwen could return to work but with conditions. I quote in full the relevant passage from Dr Anne Young's assessment:

At present, therefore, Marcel (Mr van Leeuwen) has no psychiatric diagnosis and from a psychiatric perspective is ready to resume work.

My only hesitation in recommending a return to work is that if the experience with Dianne (Ms McFarlane) is repeated it is highly likely that Marcel's symptoms will recur and the return to work process will fail. It would be necessary for Human Resources to have some ongoing input into the relationship between Marcel and Dianne, to ensure as positive a work environment for Marcel as possible. I would have no hesitation about Marcel's capacity to work with the patients in his role as occupation therapy instructor.

[33] On reading Dr Anne Young's report, Mr van Leeuwen says that he telephoned Mr Evans the report findings and that Mr Evans suggested that Mr van Leeuwen resign. Mr Evans categorically denies that allegation, and I believe him. What he agrees that he said was that the District Health Board might be able to make a form of severance payment to assist Mr van Leeuwen if he was intent upon resigning. I am absolutely satisfied that Mr Evans at no

time took any inappropriate steps to try to force Mr van Leeuwen out of his position. I accept Mr Evans' evidence that he *liked the guy and wanted to help*.

[34] There is unchallenged evidence that, after receiving Mr van Leeuwen's emailed resignation on 29 November, Mr Evans continued to try to engage with Mr van Leeuwen, endeavoured to help him to aspire to other positions in the organisation and tried to get him to reconsider his resignation. None of those steps are consistent with Mr van Leeuwen's claim that Mr Evans sought his resignation.

[35] One final matter needs to be dealt with. After his resignation, Mr van Leeuwen became aware that Ms McFarlane had resigned her position. His evidence was that he was ... *immediately interested in getting my old job back*, and although the parties attended mediation, the matter remained unresolved.

[36] I questioned Mr Schwass about this matter particularly, as he was the Service Manager. Like the other District Health Board witnesses, Mr Schwass impressed me as an honest and straightforward witness. He told me the reason Mr van Leeuwen was not able to be considered for what he regarded as *his old position* was that the position had changed in the period since Mr van Leeuwen had been working for the organisation.

[37] Mr Schwass said that had Mr van Leeuwen come back to the job, he would have needed retraining and when the position was publicly advertised, the District Health Board decided that they wanted someone with a mental health background rather than the occupational background which Mr van Leeuwen had.

[38] Mr Schwass pointed out that he had written to Mr van Leeuwen by letter dated 8 December 2005 in which he had carefully set out the District Health Board's desire for Mr van Leeuwen to reconsider his resignation and return to work, and sought to set up a meeting to facilitate that, a meeting which Mr van Leeuwen declined to attend and instead reiterated his wish to resign.

[39] Mr Schwass indicated in his evidence that had Mr van Leeuwen responded positively to his letter of 8 December 2005, the District Health Board would have been able to reintroduce Mr van Leeuwen to the workplace and would have worked with him to either resolve the issues with his co-worker (as they had been doing), or they would work with Mr van Leeuwen to find an alternative position for him elsewhere in the organisation.

Issues

[40] Mr van Leeuwen claims that he has been constructively dismissed, that he has suffered a series of unjustified actions to his disadvantage, and that the District Health Board breached a number of terms either of his employment agreement or of policy or legislation.

[41] However, the basis of each claim is the contention that Mr van Leeuwen suffered bullying at the hands of a co-worker and that the District Health Board's response to that was in some way inadequate or unsatisfactory. It follows that the first issue that the Authority needs to consider is the bullying allegation and the response to it.

[42] Next, I need to look at the constructive dismissal allegation in particular and consider whether, on the facts, there is sufficient evidence to disclose a constructive dismissal under one of the commonly found heads.

The bullying allegation

[43] I have already referred in some detail to the factual position as I discern it from the evidence before me. I have reached the conclusion that the evidence does not support

Mr van Leeuwen's categorisation of what he encountered as bullying. I reach this conclusion for a number of reasons and I refer to those reasons now.

[44] The first and most important is that I do not think that the evidence as presented at the investigation meeting discloses that bullying behaviour actually took place. In Mr van Leeuwen's evidence, there is an absence of particularity about actual incidents which make it very difficult to reach a finding that bullying has actually occurred. Certainly there is ample evidence of an unsatisfactory personal relationship between two co-workers, but that, of itself, in my judgement cannot constitute bullying in a legal sense.

[45] Next, Mr van Leeuwen's refusal throughout his employment to lodge a formal complaint against the alleged bully seems to me to militate against his wish to categorise the problem as one of bullying. On the District Health Board's evidence (which I accept) there were a number of occasions when Mr van Leeuwen was advised that he could make a formal complaint, but he always demurred. Indeed, on more than one occasion, the evidence discloses that Mr van Leeuwen indicated to one or other of the District Health Board senior managers that he regarded the alleged bully highly, or that he thought that her work was good or valuable. Equally, when confronted by the senior managers of the District Health Board in respect to the concerns that Mr van Leeuwen had passed on to them, Ms McFarlane, the alleged bully, spoke positively about Mr van Leeuwen. In the circumstances, it is difficult to find some of the central elements of bullying behaviour.

[46] The Canterbury District Health Board put into evidence its policy on bullying in the following terms:

Bullying is defined as any situation involving staff and their relationship with management, other staff or users of our services as follows:

- *Use of force or threats to pressure or coerce a person to do something they would otherwise feel comfortable to debate and/or dispute.*
- *Examples of bullying/personal harassment may include but are not limited to: intimidation (eg shouting, obscene language), emotional abuse (eg patronising humiliation, name calling), isolation (eg stopping access to other managers/staff, withholding information), coercion and threats, economic abuse (eg withholding training or other benefits), positional abuse (eg unjustifiable and/or inconsistent disciplinary action being set up to fail with an overload of work).*

[47] The policy then goes on to spell out any conduct of the type just discussed *will not be tolerated*, then concludes with this paragraph:

Breach of this policy will be considered as serious misconduct within the terms of the Code of Conduct and upon investigation, may result in disciplinary action and/or dismissal.

[48] In my opinion the evidence advanced by Mr van Leeuwen as directed at him by a co-worker falls well short of the definition in the District Health Board's policy of coercion and threats *to pressure or coerce a person to do something they would otherwise feel comfortable to debate and/or dispute*. The evidence does disclose that Mr van Leeuwen and Ms McFarlane had a difficult relationship but that they continued to speak well of each other, if not continuously then at least from time to time, despite those personal difficulties.

[49] The evidence suggests that Mr van Leeuwen made a conscious decision not to make a formal complaint about the alleged bullying. It seems that the District Health Board's officers told him on more than one occasion how to complain, but he elected to continue with the informal complaints to management which characterise the factual matrix in this case.

[50] Despite Mr van Leeuwen's failure to formally complain about the matters of concern to him and indeed from time to time to speak warmly of Ms McFarlane the alleged bully, the District Health Board officers took Mr van Leeuwen's concerns seriously and actively engaged in a process of endeavouring to improve the inter-personal dynamic between the two members of staff. Ms Hodge and Mr Evans invested significant resource in endeavouring to improve that fundamental relationship between Mr van Leeuwen and Ms McFarlane despite the absence of a formal complaint. The evidence from the District Health Board (which I accept) was that Ms McFarlane was given strategies to help her relate to Mr van Leeuwen in such a way as to not cause him distress.

[51] The evidence also suggests that Ms McFarlane was made aware of boundaries in terms of her personal behaviour and inter-relationships with Mr van Leeuwen such that it seems to me on reflection that the District Health Board's officers did everything they reasonably could, without conducting a formal investigation, so as to make it clear of what the Board's expectations were.

[52] The District Health Board's evidence was that without a formal complaint it was impossible for them to conduct a formal investigation and make findings on particular episodes of alleged bullying. All the District Health Board could do was work with both protagonists to try to help them to understand the effect that their behaviour might well be having on the other. One of the ironies of the difficult relationship between Ms McFarlane and Mr van Leeuwen was that the District Health Board indicated that Ms McFarlane regarded herself as being a victim of bullying as well, but as a consequence of having to confront regular complaints from Mr van Leeuwen which of course were quite properly referred to her via the medium of the District Health Board's officers.

[53] I am satisfied then that, within the framework of the informal complaint process which Mr van Leeuwen seems to have chosen, the District Health Board did all that it reasonably could to address his concerns and that on each and every occasion when he raised an issue or had a particular concern, the District Health Board responded promptly and appropriately within the confines of the process that Mr van Leeuwen had chosen to go down. My only concern is that perhaps the District Health Board did not make as abundantly clear to Mr van Leeuwen as might have been appropriate, that a consequence of him apparently considering but then declining to make a formal complaint was that it would be impossible for the District Health Board to conduct an investigation of the behaviours complained about and thus to make findings of fact on which disciplinary action could potentially be taken.

[54] The reason that an investigation could not take place in the absence of a formal written complaint would seem abundantly clear; natural justice requires that a person accused of misbehaviour in the workplace has the right to confront their accuser and respond directly to allegations made against them. Given that no allegation was ever made formally by Mr van Leeuwen, the Board was precluded from formally constructing an investigation into the allegations and was left only with the opportunity to try to work collaboratively with the protagonists to improve their working relationship.

[55] In fact, all the evidence (including the evidence of Mr van Leeuwen) is that the Board's activities were beneficial and did in fact improve the working relationship. I accept Mr Evans' judgement that had the Board been enabled to continue that exchange (which was precluded by Mr van Leeuwen's sick leave) the relationship might well have continued to improve to the benefit of both parties.

Was there a constructive dismissal?

[56] In my opinion, the facts as disclosed in the evidence before the Authority do not support any of the versions of a constructive dismissal which are known to New Zealand employment law. It was never suggested by any of the evidence that Mr van Leeuwen was told to resign or he would face dismissal and there is no evidence before me that the District Health Board had the *deliberate and dominant purpose* of forcing a resignation of Mr van Leeuwen. Indeed, all

the evidence is quite the reverse. The evidence suggests that the District Health Board did everything it reasonably could, within the limitations imposed by Mr van Leeuwen's reluctance to formally complain, to work with the protagonists to improve their relationship and that that collaborative process was actually making some headway.

[57] Further, when Mr van Leeuwen became ill the District Health Board's officers insisted that he take sick leave and that he not return to work until he was well. While he was on sick leave the District Health Board readily agreed to Mr van Leeuwen taking some overseas leave in his home country and towards the end of the relationship, when it was clear to the District Health Board that Mr van Leeuwen could not return to his original position, the District Health Board came up with a number of possible alternative positions within its wider ambit, none of which Mr van Leeuwen accepted.

[58] Mr van Leeuwen originally contended in his statement of problem that the District Health Board officers had tried to get him to resign, but even his own oral evidence in the investigation meeting did not suggest that; all that he himself suggested, and which the District Health Board's officers readily accepted, was that they had explored with him a suggestion that perhaps a golden handshake might be offered, but both parties accepted that the initiative of suggesting a golden handshake in fact had come from Mr van Leeuwen and not from the District Health Board.

[59] When Mr van Leeuwen sought information about how to formally complain and how to raise a personal grievance in the month before he issued his first resignation letter, the District Health Board provided that information. And even after Mr van Leeuwen's resignation was received, a resignation which even on Mr van Leeuwen's evidence seems to have been propelled by his reading Dr Anne Young's report that he was fit and able to return to work with conditions, the District Health Board's officers continued to try to persuade Mr van Leeuwen not to resign and worked to identify positions within the organisation that would be of interest to him, different from the one that he was presently occupying.

[60] It follows that I do not think the evidence supports a conclusion that the District Health Board had any intention of trying to force Mr van Leeuwen to resign.

[61] The final kind of constructive dismissal are the cases where a breach of duty by the employer leads the worker to resign in consequence. In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW* [1994] 1 ERNZ 168 the Court of Appeal indicated that the first question that has to be asked in analysing this issue is ... *whether the resignation has been caused by a breach of duty on the part of the employer*. If the answer to that question is in the affirmative then there are other questions to follow.

[62] In the particular facts of this case I do not think that there can be any charge against the employer that is in any way causative of Mr van Leeuwen's resignation. I think even his evidence strongly suggests that the reason that he resigned was because he had read Dr Anne Young's report which indicated that he was fit to return to work on conditions. In my opinion, Mr van Leeuwen resigned prematurely without giving the employer the opportunity to work collaboratively with him to resolve the issues that were of concern to him.

[63] In refusing to meet again with the employer, I think Mr van Leeuwen effectively confirmed that the decision that he had taken was a decision that he was comfortable with and would not move from.

Determination

[64] I am not persuaded on the evidence before me that Mr van Leeuwen has made out his claim that he suffered bullying in the workplace within the terms of the District Health Board's policy on that matter. In the absence of any evidence of bullying or any evidence of any improper action to Mr van Leeuwen's disadvantage from the District Health Board, his claim of an unjustifiable action by the District Health Board to his disadvantage must, of necessity, fail.

I emphasise for the sake of completeness that I am satisfied that, within the constraints of the information provided to it and the process determined by Mr van Leeuwen, the District Health Board did all it reasonably could to respond appropriately to Mr van Leeuwen's complaints.

[65] In relation to the claim of an unjustified constructive dismissal, I have found that there is no evidence to support Mr van Leeuwen's contention that he was in fact constructively dismissed; I think the evidence supports the conclusion that Mr van Leeuwen resigned of his own volition having decided prematurely that, having been certified as fit to return to work, he did not wish to continue to be employed with the District Health Board and was not prepared to continue working collaboratively with the Board to find him an appropriate role.

[66] As the very basis of Mr van Leeuwen's claim, based as it is on an allegation that he was bullied in the workplace, has been completely unsuccessful, it follows that all of Mr van Leeuwen's claims against the District Health Board fail. I have not found any personal grievance and in consequence I am not able to order any of the remedies Mr van Leeuwen seeks.

Costs

[67] Costs are reserved.

James Crichton
Member of Employment Relations Authority