

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 161  
5546635

BETWEEN            MOIRA BAUER  
                                 Applicant  
  
A N D                    TOZZETTI 2014 LIMITED  
                                 Respondent

Member of Authority:     David Appleton  
  
Representatives:            Luke Acland, Counsel for the Applicant  
                                 Anjela Sharma, Counsel for the Respondent  
  
Investigation Meeting:     16 September 2015 at Nelson  
  
Submissions Received:     2 and 23 October 2015 on behalf of the Applicant  
                                 19 October 2015 on behalf of the Respondent  
  
Date of Determination:     29 October 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.     Ms Bauer was unjustifiably constructively dismissed and suffered unjustified disadvantage in her employment.**
- B.     Ms Bauer is awarded remedies as set out in this determination.**
- C.     Costs are reserved.**

**Employment relationship problem**

[1]     Ms Bauer claims unjustified disadvantage in her employment arising out of changes to her duties and unjustified constructive dismissal. The respondent denies that Ms Bauer suffered unjustified disadvantage in her employment or that she was dismissed.

**Brief account of events leading to the termination of employment**

[2] The respondent company owns and operates a bakery shop located in Nelson. Ms Bauer had worked in the shop over two periods of time; the first in 2009 and the second from 26 February 2013, after having returned from university at which she obtained a degree in neurosciences. During the latter period of her employment, Ms Bauer had the role of bakery manager.

[3] Ms Bauer was initially employed during the second period under the terms of an individual employment agreement by a company called Tozzetti Panetteria Limited. In November 2014, the ownership of the business passed to the respondent. Mr Ben Carpenter is a director and majority shareholder of the respondent.

[4] Mr Carpenter has over 30 years' experience of working in the hospitality industry, has previously worked as a trained butcher and chef, and owned and operated a well-known restaurant in Christchurch for around 10 years. When he purchased the bakery, however, he had no experience either as a commercial baker or as the owner of a bakery shop.

[5] Accordingly, according to Mr Carpenter, during his first month of ownership, he *stood back* and observed how the organisation was operating. The previous owner of the shop, Richard Brett, stayed on as the master baker, working nights.

[6] It is common ground between the parties that, during that initial period, Ms Bauer and Mr Carpenter got on reasonably well. Ms Bauer's evidence was that she was enthusiastic about having new ownership.

[7] On 29 November 2014, Ms Bauer entered into an individual employment agreement with the respondent company. This agreement contained, at Appendix 1, a space for the position specification to be inserted. Mr Carpenter had written, next to the word *Position* the following:

*SHOP MANAGER AS PER "STATUS QUO"*

[8] This Appendix 1 also recorded that Ms Bauer's salary was \$21 per hour (not \$21.50 as stated in Mr Acland's submissions). This was the salary that she had been earning as bakery manager under her previous employment agreement.

[9] Mr Carpenter's evidence was that, by writing *status quo*, he was intending to convey that Ms Bauer's duties would be as they had been hitherto. In her employment agreement with Tozzetti Panetteria Limited, at Schedule 1, her duties as bakery manager were spelled out as follows:

- *To build strong customer relationships with both new and existing customers, and maintain a professional, positive approach when dealing with them in person and/or over the telephone. To ensure orders are accurately recorded in daily diary with detailed information to prevent error.*
- *To manage staff accordingly, supervise existing staff and train new staff. To facilitate leave or sick days, and roster appropriately. To build good relationships with staff enabling open communication.*
- *To maintain a high standard of cleaning throughout the bakery, adhering to health and safety, and food hygiene guidelines.*
- *To have a good understanding of cash handling procedures working towards minimal human error.*
- *To monitor stock control, rotating stock and minimising wastage where able.*
- *To prepare food following Tozzetti's recipes and to have a high standard of presentation of food with regular quality control checks. Innovation is encouraged in regards to new recipes or altering existing ones – these need to be checked with Richard first if they are major changes.*
- *To have a high standard of personal hygiene and wear Tozzetti's uniform at all times except for when at the Market. All clothing to be kept clean and tidy at all times when representing our company. Shoes at all times (no sandals or open toe shoes permitted).*

[10] It is Ms Bauer's evidence that the term *status quo* referred not only to her duties but also her hours. In her employment with Tozzetti Panetteria Limited, Schedule 1 stated that her usual hours of work would be at least 30 hours per week. In her employment agreement with the respondent company, the following clauses related to hours:

C. *HOURS OF WORK, SALARY AND BENEFITS*

*Hours of Work*

11. *The employee's normal hours of work will be varied, to be performed as required by the employer.*
12. *The employee's days and hours of work may from time to time be fixed or varied by the employer following consultation with the employee. In order to effectively perform the duties designated, you may be required to work such additional hours as necessary in order to meet the needs of the business. You may be required to work additional hours including hours at the weekend as reasonably required by us.*

13. *When varying hours of work, the employer shall act reasonably, and shall take into account the employee's personal circumstances and commitments. Where the employee refuses to accept a reasonable variation of work, the issue may be dealt with as a disciplinary matter.*
14. *You are entitled to half hour unpaid lunch break each day. Where work commitments permit, you may take 10 minutes each day for a paid morning and afternoon tea break.*

[11] It is the evidence of Ms Bauer that once Mr Carpenter had *stood back* and observed matters for a few weeks, he started to take on a much more hands-on approach to management of the shop. This had the result, she says, of her duties being reduced or undermined. In particular, Ms Bauer complains of the following:

- (a) Mr Carpenter took over the writing of the rosters from Ms Bauer;
- (b) Ms Bauer's working week increased to include Mondays and Saturdays and her start time changed to 5.30am (from 6am);
- (c) Ms Bauer's hours were then reduced;
- (d) Ms Bauer was frequently sent home early from her rostered shift;
- (e) Ms Bauer no longer had responsibility for hiring/interviewing and managing staff; and
- (f) Ms Bauer's responsibilities for stock control were removed without her consent.

[12] For his part, Mr Carpenter's evidence is that, whilst Ms Bauer was accommodating during the initial few weeks of his ownership, once he started to take a more active role, she began to challenge his authority and became argumentative. Mr Carpenter said that he did not want arguments with Ms Bauer and so would shut down the discussions. This does accord with Ms Bauer's evidence, which was that Mr Carpenter would not let her explain herself.

[13] Stepping back, having heard evidence from both Ms Bauer and Mr Carpenter, it appears to me that there was a significant clash of personality between them for which both must hold some accountability. However, the role of the Authority is to investigate whether there have been any breaches of statutory duty or contract upon which Ms Bauer's claims are founded. I will examine this in more detail below.

[14] It is Ms Bauer's evidence that, around two weeks before Christmas, she said to Mr Carpenter that *he may wish to start looking for a new manager*. She says that she agreed, however, that she would stay on to help out over Christmas, which was the busiest time of the year for the business, and to train a new manager. Ms Bauer also said that it was not her intention to leave immediately after Christmas and that she did not want to leave as she enjoyed her job. She says she was hopeful that she and Mr Carpenter could find a way to work together.

[15] Ms Bauer says that, a few days after the Christmas break, Mr Carpenter asked her *when are you going to leave?* She said she was shocked when Mr Carpenter asked her this, and that he said that he needed an answer because he was writing the rosters and needed to understand her intentions. Ms Bauer's evidence is that she told Mr Carpenter that she could not make a decision instantly but she would let him know her decision the next day. It is understood that, the next day, she told him that she did not wish to leave.

[16] Mr Carpenter's evidence is that, around two weeks before Christmas, Ms Bauer had actually said that she was resigning but then almost immediately retracted it. He said that he wished that he had accepted that resignation although later explained that he meant in retrospect that he wished he had done so, rather than at the point the resignation had been given.

[17] Whilst there was a reasonable amount of evidence given by the parties about these conversations pre- and post-Christmas, I do not regard them as particularly material, save that they demonstrate the difficult relationship that Ms Bauer and Mr Carpenter had by that time. For the record, I do not believe it was unreasonable for Mr Carpenter to have wanted to have understood Ms Bauer's intentions after Christmas about whether and, if so, when she was leaving given that, on her own evidence, there had been a discussion about Mr Carpenter possibly wanting to find a new manager with the clear implication that she intended to resign at some point. However, I accept that Ms Bauer did tell Mr Carpenter the day after he had sought clarity on her intentions that she did not want to leave.

[18] A more material conversation between the parties took place on 16 January 2015. It is common ground between the parties that Mr Carpenter first admonished Ms Bauer for having been seen taking food home without permission. Ms Bauer denies that she had taken food home and said that she understood the rule that she was

allowed to eat an item at lunchtime but that she could only take food home if she had permission to do so or had paid for it. It appears to be common ground that Mr Carpenter told her that if she did this again it would be considered as theft. Ms Bauer says that she did not have an opportunity to explain herself as the conversation was shut down by Mr Carpenter. In light of Mr Carpenter's evidence that he would shut down discussions to stop them developing into arguments, I accept Ms Bauer's evidence on that.

[19] Incidentally, it would appear that, if Ms Bauer was seen taking home food, it was because she had been sent home early, at around 11.30am, and that she took an item of baked goods as her lunch. However, I do not believe that a great deal turns on whether or not Ms Bauer had indeed taken an item without permission as this was not treated as a disciplinary matter by Mr Carpenter.

[20] During the same conversation, Ms Bauer says that Mr Carpenter then said that he would be taking over more of her duties like stock rotation and coffee orders and that her hourly pay was excessive and that in future she could only be paid \$16.50 per hour. Ms Bauer says that he told her to go away and think about him reducing her wages.

[21] It is Ms Bauer's evidence that she clearly understood Mr Carpenter to be saying she was either to accept the reduction in her pay and duties or she would be forced to resign. She also says that Mr Carpenter said that she was not being demoted.

[22] Mr Carpenter's evidence with respect to this conversation is somewhat different. He says in his written evidence that he did not believe that Ms Bauer had been carrying out her managerial functions adequately despite regular prompting and input from him, that he had been carrying her in her job and that she was resistant to follow his lead towards an improved and efficient business. He also states that it was at that point that he decided he needed to talk to Ms Bauer about the most effective use of her skills and experience, which he saw as being at the bakery assistant level.

[23] Mr Carpenter states that he contacted his lawyers at that time, Saunders & Co, to get advice on how he could address the situation. He says that he was told to be very careful and to proceed only on the basis of having an initial discussion with Ms Bauer about her role in the business going forward. Mr Carpenter produced a

copy of a letter from Anna Worrill, a lawyer from Saunders & Co, addressed to Ms Sharma which stated that she had had a call from Mr Carpenter seeking advice on how he could introduce changes to Ms Bauer's position to work as a bakery assistant, which was more in line with the duties she was performing. Ms Worrill's letter states that Mr Carpenter told her that he was not trying to get rid of Ms Bauer but that he felt she was being overpaid for the work she was doing as he now found himself fulfilling some of her managerial tasks which she was not undertaking.

[24] Ms Worrill's letter states that she advised Mr Carpenter that, without the employee's consent, he was unable to unilaterally change her role without carrying out a formal restructure process. She says that they discussed that Mr Carpenter could have an informal discussion with Ms Bauer as a starting point only, to gauge the possibility of reaching a consensual agreement with her about making changes to her role. Failing this, he would have to carry out a formal restructure process as a means of implementing change. She says that they discussed in detail what a formal restructure process would entail and Mr Carpenter was aware of his obligations as an employer. She says that, as a starting point, Mr Carpenter was aware of the requirement to keep any initial discussions with Ms Bauer at a very informal level as a means of inquiry only.

[25] Mr Carpenter's evidence is that, in accordance with the advice he received from Ms Worrill, he told Ms Bauer that he would like to have a discussion with her about her role going forward and emphasised that the matter was at discussion point only. He says that he expressed his concern that he did not feel she was delivering in her role as bakery manager and that he found himself increasingly doing her work as a result of her failure to follow through. He then suggested to Ms Bauer that, over the weekend, she might like to think about whether she would be interested in taking on the lesser role at a reduced hourly rate. He denied stating the lowered rate of \$16.50 as being set in concrete but rather that the figure was put forward as a suggested starting point for discussion. He says that he told Ms Bauer that they would continue the discussion in the next week after she had had time to think about it over the weekend. Mr Carpenter says that Ms Bauer reacted angrily, insisting that he provide a job description first and with that, she abruptly got up and left the meeting.

[26] It is common ground that later that same day, a personal grievance was delivered to the registered office of the respondent company from Mr Acland saying

that Ms Bauer would not be returning to work and alleging constructive dismissal and unjustified disadvantage.

[27] In Mr Carpenter's answers to questions from the Authority, however, Mr Carpenter agreed that his rationale for wanting to reduce Ms Bauer's pay to \$16.50 was *a pure economic adjustment*. He said that he could not afford to pay Ms Bauer \$21 per hour. He also says that Ms Bauer was *lying point blank* in her evidence when she gave evidence that she was quite clear that Mr Carpenter had said that her pay was going to be cut.

### **The issues**

[28] The Authority must consider the following issues:

- (a) Whether Ms Bauer was unjustifiably disadvantaged in her employment by actions taken by Mr Carpenter;
- (b) Whether Ms Bauer's employment was terminated by way of an unjustified constructive dismissal.

### **Unjustified disadvantage**

[29] Section 103(1)(a) and (b) of the Act provides as follows:

*(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—*

- (a) that the employee has been unjustifiably dismissed; or*
- (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;*

[30] In considering this matter, it is necessary to examine the specific actions that are alleged to have occurred with respect to Ms Bauer's employment. These are as follows:

- (a) That Mr Carpenter took over Ms Bauer's duty of preparing the rosters;
- (b) That Mr Carpenter unilaterally increased Ms Bauer's days of work;
- (c) That Mr Carpenter unilaterally reduced Ms Bauer's hours of work;

- (d) That Mr Carpenter frequently sent her home before the end of her shifts;
- (e) That Mr Carpenter removed Ms Bauer's direct management of staff;
- (f) That Mr Carpenter removed Ms Bauer's responsibility for stock control.

### ***Rosters***

[31] Having considered the evidence from both Mr Carpenter and Ms Bauer, it is not contested that Mr Carpenter did take over the preparation of the rosters. This is because, he says, he was not satisfied with the way that Ms Bauer was preparing them and that, in particular, he wanted her to prepare them two weeks in advance. It is Ms Bauer's evidence that they did have a discussion about how the rosters should operate but that, ultimately, they did not agree. For example, Ms Bauer was concerned about the effect on staff of the way Mr Carpenter wanted to rearrange the rosters.

[32] First, it is clear that rostering was part of Ms Bauer's role. Not only did she do this prior to Mr Carpenter taking over the business, but it is expressly referred to in the position description of her employment agreement with Tozzetti Panetteria Limited. Furthermore, it is common ground that that position description was incorporated into the terms of the new employment agreement with the respondent company by means of the phrase *shop manager as per status quo*. Therefore, Ms Bauer was contractually obliged to carry out rostering as one of her duties. However, one can also say that she was contractually entitled to do so given that it formed part of her duties as bakery manager, which Ms Bauer said *gave her status*.

[33] The evidence of Mr Carpenter and Ms Bauer seems to accord that Mr Carpenter took over writing the rosters without there being an express agreement by Ms Bauer that she would relinquish that duty. I note that clause 80 of the employment agreement with the respondent company states the following:

*Variation*

80. *This agreement can be varied, so long as the variation is in writing, and signed by each of us.*

[34] There was no variation of the employment agreement in writing, signed by both parties, taking away from Ms Bauer her duty of preparation of the rosters.

Accordingly, Mr Carpenter taking over this duty from her constituted a breach of Ms Bauer's contract.

[35] Does this amount to an unjustified disadvantage in Ms Bauer's employment? Ms Bauer states that, as an effect of losing control of the rosters, she lost control of the staff and, in part, the way the bakery was run. This was partly because Mr Carpenter rostered himself on and she could, obviously, not direct him as he was the owner. However, I do not believe that this is a disadvantage that flows from Mr Carpenter taking over the rosters per se. Unlike Mr Brett, Mr Carpenter decided to be a hands-on owner/operator of the business. He had every right to do so which, I understand, Ms Bauer does not dispute. Therefore, he was entitled to require Ms Bauer to roster the staff on in a different way. Therefore, even if she had retained the actual preparation of the rosters herself, she would still have been required to have carried out the rostering in a way that Mr Carpenter thought best suited the business.

[36] However, I do accept the evidence of Ms Bauer that the preparation of the rosters was one of the duties that she carried out as a bakery manager and that taking them away from her constituted a disadvantage in her employment.

[37] The next question to answer, therefore, is whether such disadvantage was unjustified. Section 103A of the Employment Relations Act 2000 (the Act) provides as follows:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
  - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
  - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

- (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
- (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
  - (a) *minor; and*
  - (b) *did not result in the employee being treated unfairly.*

[38] The reason that Mr Carpenter gave for him taking over the preparation of the rosters himself was that *the rosters were badly written and structured and were bad for the business*. It is clear that Mr Carpenter had concerns about the way Ms Bauer carried out her role. However, he also admitted that he never had any formal discussions with her and that he made no notes of any kind of any of his interactions with her. It appears that his rationale for taking over the rosters was that he was not happy with the way she did them. However, this is not an action that a fair and reasonable employer could have taken in all the circumstances. An appropriate approach would have been to have directed Ms Bauer as to the way he wanted the rosters done, given her a reasonable opportunity to have adopted his approach so as to comply with his requirements and given her fair warning of the consequences if she failed to do so. There is no evidence that he did any of those things.

[39] Ms Sharma submits that Ms Bauer did not raise an objection to Mr Carpenter taking over the rosters, and that he was entitled to do so because the business was underperforming. However, whether Ms Bauer objected or not, Mr Carpenter could not, if he were acting fairly, take over the rosters on the basis that they were *badly written and poorly structured*, without having given Ms Bauer a chance to remedy his concerns.

[40] Therefore, I must find that the removal from Ms Bauer of the preparation of the rosters constituted a disadvantage in her employment (as it impinged upon her duties as bakery manager) and that such disadvantage was unjustified.

***Increase in days worked***

[41] Whilst Ms Bauer's days of work did increase, because she had to work on Mondays, which she had not had to do before, it emerged from Ms Bauer's evidence that this was with her agreement. I do not, therefore, find that this amounted to a disadvantage in her employment.

***Reduction in hours***

[42] The respondent produced a printout of the hours worked by Ms Bauer from 8 November 2014 which is, presumably, the date when Mr Carpenter took over the business. No data was produced showing what hours Ms Bauer worked prior to that date but her oral evidence to the Authority was that she would have worked between 35 and 40 hours a week. However, when one assesses the hours recorded between 8 November 2014 and 18 January 2015, omitting the week in which New Year fell, when presumably the shop was mostly shut, Ms Bauer's hours averaged 38.35 per week. Furthermore, there is no evidence that Ms Bauer's hours fell below a minimum of 30 a week (excluding the week in which New Year fell).

[43] It does not appear that there has been any breach of contract by the respondent in respect of Ms Bauer's rostered hours reducing, as they do not appear to have actually reduced, as compared to the hours she says she worked prior to November 2014. Ms Bauer did not argue that her hours varied from week to week without any consultation.

***Being sent home prior to the end of her rostered shifts***

[44] The respondent company was able to vary Ms Bauer's hours, including on a daily basis, following consultation with her, in accordance with clauses 11 and 12 of her employment agreement. I accept Ms Bauer's evidence that there were occasions when she was sent home early without prior consultation. Therefore, I accept that there were breaches of clause 12 of the employment agreement.

[45] It is also accepted that being sent home early without prior notice would have constituted a disadvantage in Ms Bauer's employment as it would have an unplanned adverse impact on her weekly income. Ms Bauer said that sometimes she was sent home as much as three hours before the end of her rostered shift (at 11am instead of 2pm). This would have meant a reduction of \$63 in her income for that day. Whilst it

is understood that small businesses such as the respondent need to be able to react flexibly in accordance with how busy it is from day-to-day, no employer can simply ignore the obligations it has set for itself in its own employment agreement.

[46] Therefore, I am bound to find that failing to consult with Ms Bauer prior to sending her home early on occasions was not the action that a fair and reasonable employer could have done in all the circumstances.

[47] Accordingly, Ms Bauer did suffer a disadvantage in her employment which was unjustified when she was sent home early without prior consultation.

### ***Removal of management of staff***

[48] The management of staff was clearly one of Ms Bauer's duties as bakery manager. Having considered the evidence of both Mr Carpenter and Ms Bauer, it is clear that the reporting lines between the staff and Ms Bauer became blurred once Mr Carpenter decided to become proactively involved in the running of his business. His evidence was that he was simply in the shop and so staff would come to him to ask him questions. Mr Carpenter also said that he would always talk to Ms Bauer first in respect of any changes he wanted to make with respect to the management of staff. Ms Bauer did not contest that.

[49] On balance, I do not believe that there was any deliberate removal of Ms Bauer's responsibilities in managing staff. Whilst I accept that she no longer had complete control of them, this was an unavoidable consequence of Mr Carpenter deciding to take a hands-on approach to the running of his business, which he was clearly entitled to do, even though it was an approach which was quite different from that of the previous owner, Mr Brett.

### ***Stock control***

[50] Ms Bauer's job description refers to her monitoring stock control, rotating stock and minimising wastage where able. The evidence of the parties is that Mr Carpenter changed what was being made and ordered stock which Ms Bauer believed was unnecessary. There was also evidence given by the parties about how food wastage was treated, although I do not accept that any employment relationship problem arises out of that issue. Standing back however, it would appear that

Mr Carpenter did, in his hands-on approach, take over aspects of the stock control which resulted in disagreements between him and Ms Bauer.

[51] I again acknowledge Mr Carpenter's right to make changes in the running of the business, including changes to the way stock was controlled, but also acknowledge that stock control was part of Ms Bauer's duties as bakery manager. In his changing of the approach taken in such matters as stock control, I find that Mr Carpenter failed to properly instruct Ms Bauer as to his wishes or to raise his concerns about her stock control but, instead, unilaterally took over aspects of that work. Tempting though this may have been to him, he was bound by the terms of the employment agreement that his business had entered into with Ms Bauer and did not have *carte blanche* to pick away at Ms Bauer's duties as it suited him.

[52] If Mr Carpenter was unhappy with Ms Bauer's performance in respect of her stock control, an appropriate approach would have been to have instituted a more formal process of performance management which addressed the specific concerns he had and made clear what the consequences would be of non-compliance. As noted above, he did not do this.

[53] My finding is that the taking away of parts of Ms Bauer's duties in stock control was a disadvantage in her employment as it diminished her duties as bakery manager. Furthermore, the manner in which it was done was not the action any fair and reasonable employer could have taken in all the circumstances. Accordingly, I find that Ms Bauer was unjustifiably disadvantaged in her employment in this respect.

[54] In her submissions Ms Sharma asserts that Mr Carpenter raised his concerns with Ms Bauer. However, in his own words, he would *shut down* any discussion so it would not become an argument. This is not the way a fair and reasonable employer complies with his duties under the Act.

### **Was Ms Bauer unjustifiably constructively dismissed?**

[55] There are two seminal authorities on constructive dismissal in New Zealand. The first is *Auckland Shop Employees Union v Woolworths (NZ) Ltd*<sup>1</sup>. This set out three examples of conduct by an employer which could give rise to a constructive dismissal, as follows:

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<sup>1</sup> [1985] 2 NZLR 372

- a. Where the employer gives the employee the choice of resigning or being dismissed;
- b. Where the employer embarks upon a deliberate course of seeking to make the employee resign; and
- c. Where the employer seriously breaches duties owed to the employee making it reasonably foreseeable that the employee would resign as the result.

[56] All three examples amount to the employer repudiating the employment contract by its actions or omissions.

[57] The second seminal authority is the Court of Appeal case of *Auckland Electric Power Board v. Auckland Provincial District Local Authority Officers IUOW*<sup>2</sup>. In the recent Employment Court case of *Gary McIvor (Ali) v. Samir Saad*<sup>3</sup>, Chief Judge Colgan summarised the finding of *Auckland Electric Power Board* as follows:

*That [finding] required the Authority to consider first whether the resignation was caused by a breach of duty on the part of the employer. If that question was answered in the affirmative, the Court of Appeal's judgment said that the next question was whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words whether a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breach.*

[58] In her evidence to the Authority, Ms Bauer stated that, when she returned to work after Christmas:

*I had no desire to leave employment. I hoped we could work together. I was happy with the conditions of my employment.*

[59] On the whole, I found Ms Bauer's evidence to be credible. For example, she conceded that Mr Carpenter was entitled to ask about her intentions about staying in the business after their conversation before Christmas. Where there appeared to be an inconsistency between her oral evidence and her written evidence (about how close to Christmas her conversation with Mr Carpenter about him possibly wishing to find a new manager had been), she readily conceded that there was a mistake in her written evidence.

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<sup>2</sup> [1994] 1 ERNZ 168 (CA) at 172

<sup>3</sup> [2015] NZEmpC 145

[60] On balance, I believe that Mr Carpenter did say to Ms Bauer on 16 January 2015 that he was going to be taking away some of her managerial duties and would be reducing her pay to \$16.50 per hour. It is not contested that he also said she should go away and think about it. I believe further that Ms Bauer is truthful when she states that, having heard this from Mr Carpenter, she was of the strong opinion that she was being given a choice; to accept the unilateral reduction in her pay and duties or to leave. I do not accept that, as submitted by Ms Sharma, it was Ms Bauer who asked Mr Carpenter what she was worth and that this initiated the conversation on 16 January.

[61] My reasons for preferring Ms Bauer's evidence, apart from her general credibility, are as follows:

- (a) She had stated that, only a few days before, she had wanted to stay in employment and make it work with Mr Carpenter. This suggests that a significant event must have precipitated her decision to resign on 16 January 2015;
- (b) Ms Bauer had no employment lined up when she resigned. Indeed, her evidence is that she was unemployed between 16 January and 18 March 2015. I do not believe, on a balance of probabilities, that Ms Bauer would have walked out of her job had Mr Carpenter said to her that he merely wished to initiate a discussion with her about the possibility of reducing her pay and taking away some of her duties;
- (c) One further piece of evidence that persuades me is the fact that the patisserie chef for the respondent company, James Quintal, also resigned the same day as Ms Bauer. They both gave evidence to the Authority that Ms Bauer did not talk to Mr Quintal about leaving before she walked out, but only did so after her personal grievance letter had been sent by Mr Acland. Mr Quintal's evidence is that he left the same day as Ms Bauer as *he felt his job was next after he was told his hours would be cut right back*. I found Mr Quintal's evidence to be credible. Additionally, Mr Carpenter has not denied that he told Mr Quintal that he was going to cut back his hours.

[62] This latter evidence leads me to conclude that, by 16 January 2015, Mr Carpenter had embarked upon a course of action to reduce his staff costs. I make no finding with respect to whether his actions towards Mr Quintal were lawful or not, as Mr Quintal has not brought proceedings before the Authority. However, having told Mr Quintal that he would cut his hours, it is more likely than not that he also subsequently told Ms Bauer that he was going to reduce her duties and cut her pay.

[63] Having found that Mr Carpenter did indeed advise Ms Bauer that he intended to cut her pay, I must now determine whether or not that action was a breach of duty on the part of the respondent. It does not require a great deal of analysis to conclude that it was. Ms Bauer's pay was contractually set at \$21 per hour. Clause 80 of her employment agreement stated that the agreement could be varied so long as the variation was in writing and signed by each party. The unilateral reduction of Ms Bauer's hourly rate by \$4.50 amounted to a fundamental breach of contract. I find that this breach was so fundamental as to amount to a repudiation of the contract by the respondent.

[64] When faced with such a repudiatory breach, Ms Bauer had the choice of either affirming that breach and carrying on in her employment or accepting the breach (to use that term in its legal sense) and treat the contract as at an end by resigning and later claiming her losses. Her very quick resignation shows that she accepted the repudiation. It is not arguable that she affirmed the contract.

[65] The next question is therefore to consider whether this breach of duty by the respondent was of sufficient seriousness to make it reasonably foreseeable by the respondent that Ms Bauer would not be prepared to work under the conditions prevailing. Again, it does not take a great deal of analysis to conclude that a unilateral significant reduction in her pay is so serious as to make it reasonably foreseeable by the respondent that Ms Bauer would not be prepared to continue to work under those conditions.

[66] Accordingly, I find that Ms Bauer's resignation amounts to a dismissal by the respondent in law.

[67] Finally, I must decide whether such a dismissal was unjustified. It is almost inconceivable that a constructive dismissal can be justified in the terms of s.103A of the Act and it is quite clear that Mr Carpenter's actions in declaring that he was going

to be reducing her pay and duties renders his constructive dismissal of Ms Bauer unjustified.

## **Remedies**

[68] Having concluded that Ms Bauer has been unjustifiably disadvantaged in her employment and unjustifiably dismissed, I must now turn to the question of what remedies she is entitled to.

[69] Section 123(1)(a) to (c) of the Act provides as follows:

### ***123 Remedies***

*(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*

*(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee;*

*(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;*

*(c) the payment to the employee of compensation by the employee's employer, including compensation for—*

*(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*

*(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:*

[70] Section 128 provides as follows:

### **128 Reimbursement**

*(1) This section applies where the Authority or the court determines, in respect of any employee,—*

*(a) that the employee has a personal grievance; and*

*(b) that the employee has lost remuneration as a result of the personal grievance.*

*(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*

*(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

*Loss of wages*

[71] I am unable to average the pay received by Ms Bauer during her employment apart from during the final 11 weeks, as no earnings data prior to that period has been disclosed. As I have stated above, excluding the New Year period, Ms Bauer worked an average of 38.35 hours a week. At \$21 an hour, this amounts to average gross earnings of \$805.35 a week. I adopt this as the likely wages that Ms Bauer would have received had she not been constructively dismissed.

[72] Ms Bauer was unemployed for a total of 60 days or 8 weeks and 4 days. This amounts to a likely total loss of earnings of \$7,114.80 gross. From 18 March 2015, Ms Bauer worked in a restaurant earning \$600 a week gross. This means that she suffered a continuing loss of \$205.35 gross per week. This loss continued until June 2015 when Ms Bauer had an unpaid month off work as the owners of the new employer took a holiday. I consider that this broke the chain of causation. However, Ms Bauer does not disclose at what point that occurred in June and so I believe it is appropriate to award her a further six weeks of continuing loss at \$205.35 per week, which amounts to \$1,232.10 gross. This brings the total amount awarded in respect of loss of earnings to \$8,346.90 gross. In his submissions Mr Acland has deducted from her lost income WINZ payments received by Ms Bauer. However, such benefits are not deductible when calculating loss.<sup>4</sup>

[73] I must now turn to what compensation Ms Bauer is entitled to in respect of humiliation, loss of dignity and injury to her feelings arising out of the constructive dismissal. Ms Bauer's evidence was that she was not psychologically damaged by the way that Mr Carpenter treated her and she has not needed counselling. She says, however, that she was very upset at the callous way Mr Carpenter treated her and that she was very hurt. She said that she loved working at Tozzetti's and that it meant a lot to her to be the bakery manager, responsible for all of the workers and the produce and to be known to all of the regular customers. She says that she really misses the role and that it is difficult for her now to remember her time there with happiness given the way that it ended, which was horrible.

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<sup>4</sup> *James and Co Ltd v Hughes* [1995] 2 ERNZ 432 (EmpC), which held that an *unemployment benefit* should not be treated as mitigation of lost wages to reduce an award. Reimbursement of wages to an unjustifiably dismissed employee should be made without regard to the worker's receipt of a benefit. The successful applicant may, however, have an obligation to repay to the Crown benefit sums received under s.71 of the Social Security Act 1964.

[74] First, I accept that Ms Bauer has suffered humiliation, loss of dignity and injury to her feelings by being told that her managerial duties would be taken away from her and that she would be paid at the rate of \$16.50 per hour. Indeed, the effect on her was so significant that she felt compelled to walk out of her job instantly. I believe that the effects on Ms Bauer were moderately significant and I fix the award of compensation at \$10,000.

### **Unjustified disadvantage**

[75] I must also consider whether any remedies are due in respect to the findings of unjustified disadvantage I have made. First, I am not persuaded that any monetary loss has flowed from those findings and so I can only consider whether any compensation is due pursuant to s.123(1)(c)(i) of the Act.

[76] Ms Bauer gave no evidence specifically of the effect on her of the issues that I have found amounted to an unjustified disadvantage in her employment and I also note the comment that she made that, after Christmas, that she had no desire to leave her employment and that she was happy with the conditions of her employment.

[77] Overall, I do not believe that it is appropriate to award any compensation separate from that already awarded for the unjustified dismissal in respect of these actions of unjustified disadvantage.

### **Holiday Pay**

[78] It is appropriate to award holiday pay on the wages that would have been earned if Ms Bauer had not been constructively dismissed. That amounts to \$668.55.

### **Interest**

[79] In his submissions Mr Acland seeks interest, presumably under clause 11 of schedule 2 of the Act. Ms Bauer did not seek interest in her statement of problem. The power to award interest is discretionary. I believe that, in fixing the award for lost remuneration, I have settled on a figure which does justice between the parties without the additional need for an award of interest. I therefore decline to award interest.

**Contribution**

[80] Having determined that Ms Bauer has a personal grievance, I must consider the extent to which her actions contributed towards the situation that gave rise to the personal grievance and, if those actions so required, reduce the remedies that would otherwise have been awarded accordingly.

[81] Mr Carpenter gave evidence that Ms Bauer's performance was unsatisfactory, that she was argumentative, passive aggressive and, effectively, the most difficult employee he had ever encountered. I have already found, however, that I believe there was a clash of personalities between Mr Carpenter and Ms Bauer. I have also noted that Mr Carpenter took no formal steps to performance manage Ms Bauer in respect of the concerns that he says he had. I have also noted that there is an inconsistency in his evidence between him saying in his brief that Ms Bauer was not carrying out her managerial functions adequately, and his oral evidence to the Authority that he had a discussion with her on 16 January 2015 about reducing her pay solely for economic reasons.

[82] Overall, I am not persuaded that there is any cogent evidence that justifies a reduction in Ms Bauer's remedies given that, if there were genuine concerns about Ms Bauer's performance, she was never given a proper opportunity to address them in accordance with her statutory and contractual rights. The absence of any such process casts doubt on whether there were any such performance shortfalls.

[83] Even if Ms Bauer shares some of the blame for the clash of personality I have identified, I am not satisfied that there is sufficient evidence to enable me to conclude that any of her actions that contributed to such a clash also contributed to Mr Carpenter deciding to reduce her duties and pay.

[84] Accordingly, I decline to reduce the remedies awarded.

**Orders**

[85] I order the respondent to pay to Ms Bauer the following:

- (a) The gross sum of \$8,346.90 in respect of lost wages;
- (b) The sum of \$10,000 pursuant to s.123(1)(c)(i) of the Act;

- (c) Holiday pay in the gross amount of \$668.55.

### **Costs**

[86] Costs are reserved. It is noted that Ms Bauer is legally aided. The parties should seek to agree how costs are to be dealt with between them but, if they are unable to reach agreement within 21 days of the date of this determination, Mr Acland is to serve and lodge a memorandum setting out any costs sought from the respondent and the basis for them within a further 14 days. The respondent will have a further 14 days within which to serve and lodge a memorandum in reply.

[87] In view of Ms Bauer's legally aided status, if Mr Acland requires further time within which to comply with these directions, he may seek leave from the Authority for an extension of time prior to the expiry of the relevant time limit.

David Appleton  
Member of the Employment Relations Authority