

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 6  
5399804

BETWEEN                      JACQUELINE CRUMLISH  
   Applicant  
  
AND                                STREEDAGH LIMITED trading  
   as THE GREEN MAN PUB  
   Respondent

Member of Authority:        Michele Ryan  
  
Representatives:              Guido Ballara, Counsel for the Applicant  
   Peter Churchman QC, Counsel for the Respondent  
   Alyn Higgins, Counsel for the Respondent  
  
Submissions received        Oral and written from both parties on 19 November  
   2013  
  
Investigation Meeting:        13, 14 and 19 November 2013  
  
Determination:                21 January 2014

---

**DETERMINATION OF THE AUTHORITY**

---

**Brief summary of facts and events leading to the applicant's claims**

[1] The Green Man Pub (the Green Man), is an Irish themed pub located in Wellington's central business district. It employs approximately 30 staff, many of whom are from the UK and Ireland on working holidays. Irish expatriate, Mr Cieran O'Kelly, and Mr Steve Drummond are joint directors of Streedagh Ltd, the company that owns the Green Man.

[2] Ms Jacqueline Crumlish (Jax) was first employed by the Green Man in June 2009.

[3] In March 2010 Ms Crumlish resigned from her position and returned to Ireland with her partner. In early 2011 she travelled back to New Zealand and resumed

employment at the Green Man. Within 6 months she was promoted to the Functions Manager position.

[4] In late January 2012 the parties agreed that Ms Crumlish would perform the role of General Manager and they commenced negotiations of terms and conditions of employment for that position.

[5] In May 2012 Ms Crumlish became aware that she was pregnant. The parties do not agree as to when exactly Ms Crumlish advised the directors of her pregnancy, but it is accepted that they both were initially happy for Ms Crumlish.

[6] It is common ground that Ms Crumlish is a hard worker and that she and the directors were friends. Ms Crumlish says however that relatively soon after her announcement, the behaviour of the directors of the Green Man changed towards her in a number of ways.

[7] Firstly, Ms Crumlish says that in July and again on 7 August 2012 there were discussions between herself and the directors concerning the management of her maternity leave. She says during these meetings she was pressured to consider relinquishing her position as General Manager and instead perform the duties of the Functions Manager.

[8] Between 10 August and 10 September 2012 Ms Crumlish holidayed in Ireland. When she returned to work on or about 13 September she told the directors that she was not interested in taking up the Functions Manager role.

[9] Ms Crumlish points next to a 'work in progress' and review meeting held on 25 September 2012 as evidence of the change in attitude towards her by the directors. The content of that meeting is disputed between the parties. Ms Crumlish says during the meeting Mr Drummond emphasised the need for the Green Man to focus its commitments on long term staff and she perceived those comments were said to let her know that she would not be working at the Green Man in the long term.

[10] Ms Crumlish says for the following month, until 29 October 2012, the directors' behaviour towards her continued to deteriorate. She says she felt threatened by comments made by one or both directors during subsequent 'work in progress' meetings and that she was generally either ignored or shouted at by each of them.

[11] Ms Crumlish's view of the directors also negatively changed and there is evidence that she discussed their management style with some senior staff who reported to her<sup>1</sup>. The directors of the Green Man say they were unaware of Ms Crumlish's concerns.

[12] On 16 October 2012 Ms Crumlish was admitted to hospital with kidney and bladder infections and high blood pressure. Various individual staff raised concerns with the directors about Ms Crumlish's health status, and in particular the hours of work that the directors required Ms Crumlish to perform. The directors say that at this point they became aware that there was a disparity between the content of the discussions held with Ms Crumlish about hours of work, and the information Ms Crumlish had conveyed to staff.

[13] Although Ms Crumlish was not able to attend, her health status was discussed during a scheduled leadership meeting the same day. Ms Crumlish says the directors canvassed staff as to whether the atmosphere at the Green Man would improve if she was no longer there.

[14] In the early evening of 16 October 2012 Ms Crumlish's partner, Mr Cody Reddie, emailed the directors of the Green Man. Amongst other things he advised:

*During the last few weeks you have been directly responsible for putting Jax under what I can only describe as suffocating and all consuming pressure and stress. I am in no doubt that this has led to her current emotional and physical state.*

[15] Mr Drummond responded to Mr Reddie's email the following day. He thanked Mr Reddie for his willingness to share his concerns and stated that Ms Crumlish should take as much time off as needed to recover. He also advised that if there were concerns that the Green Man had put Ms Crumlish's health or that of her baby at risk, then further particulars were needed so that these matters could be resolved.

[16] Ms Crumlish returned to work on 18 October 2012. Later that day she met briefly with the directors of the Green Man. She was given a letter which advised that the external business opportunities which had previously involved the directors had not come to fruition and they would be refocusing their resources on the Green Man. The letter stated there had been a decline in sales between January and August 2012<sup>2</sup>

---

Evidence (including text messages) of Ms Susan Clancy, Mr Jason Varley, Ms Jamie Winter, Ms Rosie Proops, and Ms Lauren McCabe

<sup>2</sup> As compared to the previous year

by approximately 10% and the Green Man needed to trim costs. The letter further advised that the Green Man was considering making the General Manager position redundant but no final decision had been made.

[17] The parties met on 25 October 2012 to discuss the restructuring. Ms Crumlish says it was clear to her from the outset that her position was redundant and no role existed for her at the Green Man.

[18] On 26 October 2012 Ms Crumlish sent the directors an email. She agreed to meet with the directors to further discuss the restructuring and stated the following:

*On a different side topic, I feel if you both continue to ignore me or disrespect me doing my role, I am still GM, by your lack of communication then you should put me off on my four weeks holidays that I have outstanding, stress leave or maternity leave early. At the minute your attitudes towards me is extremely stressful, it is humiliating that you both refuse to communicate or engage with me. I think your attitude towards me is uncomfortable for not only me but staff. I believe you have been asking staff if the atmosphere in here will get better once I leave or if I left, that is unacceptable. It is not me making the atmosphere in here awful. Talk to you both on Monday.*

[19] Mr O'Kelly replied the following day stating that that he did not think the directors were doing anything differently and was not sure why she thought she was being ignored but that Mr Drummond had been busy. He further stated:

*You are the general manager and that has not changed. If there are staff creating a negative attitude you need to address them...As discussed at several meetings over the last few months you need to manage performance. If you need help in this I am more than happy to help you.*

*We have never asked staff if the atmosphere would be better if you weren't there. I would like to know who has given you this feedback...*

...

*I am more than happy to have a chat about this on Monday.*

[20] A meeting was scheduled for 31 October 2012 however Ms Crumlish sought legal advice and obtained a medical certificate which recorded she was unwell and she did not return to work.

[21] The parties' respective legal representatives exchanged correspondence. They attended mediation on 31 October 2012 but the issues between them were not settled.

[22] In November 2012 Ms Crumlish went on annual leave until the birth of her son on 4 January 2013 at which time she commenced maternity leave.

[23] On 2 May 2013 the Green Man via its representative wrote to Ms Crumlish's solicitor. The letter stated that the Green Man had engaged temporary cover until the

anticipated conclusion of Ms Crumlish's leave on 13 September 2013. It requested Ms Crumlish confirm her intentions at least three weeks before her leave ended.

[24] Ms Crumlish's solicitor responded and advised it was misleading of the Green Man to suggest Ms Crumlish could return to work in circumstances where outstanding issues remained were unresolved. Further mediation was requested.

[25] On 13 May 2013 the Green Man wrote again and advised that it had not made any decision to make Ms Crumlish redundant and considered Ms Crumlish could return to work. The letter concluded with the following statements:

*[The Green Man] would like to move on from the events of last year and considers that your client can achieve a meaningful return to work...*

*[The Green Man] welcomes further discussion on how this can be achieved and will of course agree to attend further mediation...*

[26] The parties did attend additional mediation on 14 June 2013 but again were unable to settle their differences. On 18 June 2013 Ms Crumlish advised the Green Man of her termination of her employment with immediate effect.

### **Ms Crumlish's claims**

[27] The essence of Ms Crumlish's claim before the Authority is that the Green Man's attitude towards her changed following her announcement that she was pregnant. She alleges that the Green Man initially sought to persuade her to relinquish her position but when she resisted this approach her performance was unjustly criticised and she was either ignored or abused within the workplace.

[28] Ms Crumlish says the Green Man then initiated a disingenuous process to disestablish her position and claims she was unjustifiably disadvantaged by this action. She does not accept the Green Man's assertion that she was able to return to the work place. She says the Green Man has breached its implied duty to act as a fair and reasonable employer and as a consequence she has been constructively dismissed. She further claims that she has been discriminated against based on her family status and that the Green Man is in breach of its obligations pursuant to the Parental Leave and Employment Protection Act 1987 when it dismissed her and she has been replaced. She also claims the Green Man has not acted in good faith.

[29] Ms Crumlish seeks reimbursement of lost wages to the date of the Authority's investigation and compensation for distress associated with the unjustifiable

dismissal, and unjustifiable actions relating to the redundancy process. She asks the Authority to order a penalty against the Green Man and have this amount awarded to her.

[30] Finally, Ms Crumlech says she is owed wage arrears associated with an agreement that she would be paid back pay for the period between February and April 2013 when the parties were negotiating terms and conditions of employment, and reimbursement of \$225 for phone expenses.<sup>3</sup>

[31] The Green Man refutes that it discriminated against Ms Crumlish or that she was constructively dismissed. All claims are denied in their in their entirety.

### **The Authority's investigation**

[32] The Authority's investigation lasted three full days. Fifteen witnesses provided evidence including 5 individuals who worked at the Green Man at the relevant time and were summonsed by Ms Crumlish to the investigation meeting. There was a suggestion that those witnesses received benefits from the Green Man on the agreement that they provide evidence in favour of it or that they were fearful of reprisal if they did not. There is no evidence to support that proposition or that witnesses were coached on their testimony. I am satisfied that each of those individuals under oath or affirmation answered questions asked by me or the parties' representatives honestly and directly on matters they were able to.

[33] A significant volume of documents was provided. A large portion of these do not provide direct evidence on the issues the Authority is required to determine but were proffered to give background context and/or to discredit the parties' respective positions or credibility. In this respect it was apparent that the parties were unable to agree on almost all aspects of evidence before the Authority.

[34] Many of the events which form the basis of Ms Crumlish's claims, including (a) the content of the meetings about the management and length of Ms Crumlish's maternity leave and work in progress meetings; (b) the directors' communications towards Ms Crumlish subsequent to the meeting of 25 September and (c) what was discussed between the directors of Green Man and senior staff during a leadership meeting on 16 October 2012, were not recorded in writing. In circumstances where

---

<sup>3</sup> Calculated as \$25 per month for each month she performed the role of General Manager

there is little written material to support oral testimony about what transpired between the parties and where there is a sharp conflict on the meaning that should be ascribed to material events, the Authority is required to determine what happened on the balance of probabilities, i.e. what is more likely than not to have occurred.

[35] The Authority's role is to state relevant findings of fact and law on matters requiring determination. Given the quantity of information furnished to the Authority I have not recorded all the evidence or submissions received but I have closely examined and considered the material provided to the Authority.

[36] Finally, evidence was provided by both parties as to the Green Man's decision to bar Ms Crumlish's partner from the Green Man in December 2012. It is not the Authority's role to determine matters outside the confines of an employment relationship and I am unable to determine the reasonableness or otherwise of the Green Man's action in this regard.

**Was the resignation of Ms Crumlish caused by a breach of duty on the part of the employer?**

[37] Ms Crumlish has the burden of satisfying the Authority that her resignation was in reality a constructive dismissal.

[38] The legal principles applying to constructive dismissals are well established and derived from a number of leading cases including the judgement of the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*<sup>4</sup>. The Court stated that although not exhaustive, there are three main circumstances where a constructive dismissal may arise:

- (a) Where an employer gives an employee an option of resigning or being dismissed;
- (b) Where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;
- (c) Where a breach of duty by the employer leads an employee to resign.

[39] As noted, Ms Crumlish claims that it is the third of these categories that applies to her circumstances. Where an employee relies on a breach of an implied or express duty by the employer as cause for the resignation, the breach must be of such a

---

<sup>4</sup> [1985] ACJ 963

character as to make the employee's resignation foreseeable.<sup>5</sup> However it is not necessary to establish that the employer intended to repudiate the contract.<sup>6</sup>

[40] In *Auckland Electric Power Board v Auckland Local Authorities Officers IUOW*<sup>7</sup> the Court of Appeal held the following:

*In such a case as this we consider that the first relevant question is whether the resignation was caused by a breach of duty on the part of the employer. To determine that question, all of the circumstances of the resignation have to be examined not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is 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.*

### ***Discussions about the Functions Manager role***

[41] The parties do not agree as to the exact dates in which they discussed Ms Crumlish's maternity leave, nor do they agree on the content of their discussions.

[42] Ms Crumlish says during both meetings she was told by the directors to re-think if the General Manager role was right for her given her progressing pregnancy and impeding motherhood and that she should instead take up the then vacant role of Functions Manager. She says the directors indicated that they considered she would find it difficult to perform the role of the General Manager and cope with the demands of being a first time mother. She says she was shocked by these comments, had no opportunity to defend herself and left the meeting on 7 August stressed and worried.

[43] The Green Man agrees that the possibility of having Ms Crumlish perform the Functions Manager role was offered but say the suggestion was precipitated by Ms Crumlish's assertions (which she denies) that her mother in law would care for the child and she would return to work immediately following the birth of her child. The Green Man says the proposal was made so as to allow Ms Crumlish to continue to work during her maternity leave, albeit from home. They strongly refute Ms Crumlish's perception that they were seeking to demote her and say that at the time of their discussions Ms Crumlish was pleased to be allowed the flexibility of an alternative role to consider.

---

<sup>5</sup> *Weston v Advkit Para Legal Services* [2010] EmpC 140

<sup>6</sup> *Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407

<sup>7</sup> [1994] I ERNZ at 172

[44] On balance I am unable to conclude that Ms Crumlish was pressured to the degree she has described or that the discussions, in and of themselves, were in breach of the Green Man's obligations to act as a fair and reasonable employer. The evidence is that when she returned from Ireland in mid September 2012 Ms Crumlish advised the directors that she was not interested in taking up the Functions Manager role. This evidence is consistent with testimony from both directors that the transfer back to the Functions Manager role was only ever a proposal for Ms Crumlish's consideration. My view is reinforced by evidence that whilst some initial recruitment activity was undertaken to place someone into the Functions Manager position during Ms Crumlish's leave and while she considered the offer, the position was not filled until she returned to New Zealand and informed the directors of her decision.

[45] I note also that Ms Crumlish's employment agreement provides at clause 15.2 the following:

*The parties to the agreement acknowledge that any discrimination as defined by s.105 of the Employment Relations Act 2000 is totally unacceptable and undertake that, where discrimination occurs, that they will take whatever steps practicable to prevent such behaviour.*

[46] Clause 15.3 further states:

*If you believe that you have been subject to behaviour amounting to harassment or discrimination of any kind then you should as soon as possible report the behaviour to your supervisor or the employer who will listen to our complaint, investigate and if necessary take appropriate action. You may also invoke the Dispute Resolution procedure in Schedule B of this agreement.*

[47] Although it was apparent that Ms Crumlish found the Authority's investigation uncomfortable, she presented as a capable and assertive woman who is able to articulate concerns when and if they arise. I am confident that had she perceived that she was being pressured by the directors of the Green Man to resign from her role and/or that she being discriminated against on the basis of her pregnancy then she would have voiced her distress directly to the directors about that action. Ms Crumlish says that she questioned whether she was being demoted during the meeting of 7 August 2012 but there is no evidence of Ms Crumlish raising concerns with the Green Man about the content of the two meetings or the proposal to perform the Functions Manager role in the three months she subsequently worked and until she sought legal advice in late October 2012.

*The work in progress meetings*

[48] There is considerable conflict between the parties about what was communicated during ‘work in progress’ meetings held on 25 September and 2 and 9 October 2012.

[49] It is apparent that a great many work related issues were discussed during the meeting of 25 September. Relevant to Ms Crumlish’s claims, she says the directors unfairly criticized many aspects of her performance whereas previously her performance had been consistently good. She says she was talked down to or talked over. She says she was “blindsided” by the content of the meeting and had no idea that her performance would be discussed. She says also that Mr Drummond advised that the Green Man needed to focus on its long term staff and that he referred to some staff attending the meeting as not being there in three months. Ms Crumlish says that it was clear that Mr Drummond was referring to her and that it was made apparent that she was “a problem for the Green Man”.

[50] The directors of the Green Man have a different view of the meeting on 25 September. Mr Drummond says it was always anticipated that there would be a review of the functioning of the General Manager role as evidenced by an email sent to Ms Crumlish on 30 July 2012 as follows:

*Jax, I am keen to catch up to discuss how you’re finding things are going with the General Management of The Green Man before you head away on holiday. Look at goal setting and targets, what is working well and what the challenges/distractions are that need to be considered in the second half of the year and how we as owners should support you. I’ll schedule a time to meet this week after our meeting tomorrow.*

[51] Mr Drummond sent an electronic meeting request on 8 August 2012. It was unclear in evidence why this request was declined by Ms Crumlish.

[52] Ms Crumlish accepts that prior to her trip there had been an increase in customer complaints about the standard of service received at the Green Man and that Mr Drummond had requested these matters be attended<sup>8</sup>. Mr Drummond says concerns about customer service and management of staff were raised during the meeting of 25 September 2012 as ongoing issues and I accept that the Green Man was entitled to address these types of operational concerns with its General Manager.

---

<sup>8</sup> For example emails of 28 June 2012 and 26 July 2012

[53] Mr Drummond agrees that Ms Crumlish's hours of work were discussed during the meeting but says this was in the context of wanting Ms Crumlish to ensure that senior staff (including herself) were rostered at key selling points of the day. The directors deny that Ms Crumlish was instructed to work longer hours or that she told she was not able to swap shifts. I accept also that the Green Man was entitled to discuss appropriate rostering of staff.

[54] Head chef, Mr Jason Varley, provided evidence as to what was discussed during the meeting of 25 September. Although he did not stay for the duration of the meeting he does not agree that Ms Crumlish was talked down to or talked over in his presence. Mr Varley accepts that Mr Drummond did make a general comment that some staff may not be at the Green Man in three months but says he simply considered this to be a reference to Ms Crumlish anticipated maternity leave and not a euphemism used to convey the Green Man's intention to get rid of Ms Crumlish.

[55] Ms Crumlish says further that at both of the following 'work in progress' meetings (2 and 9 October 2012) that one or both directors stated "*they had ways of getting rid of dead weight and unwanted staff*". She says it was clear on both occasions that the comment was directed at her personally. In her evidence however Ms Crumlish accepts that the statements by the directors were made in the context of improving customer service generally and in particular the performance of a small number of bar staff employees who were considered to be under performing.

[56] I consider the Green Man could have better forewarned Ms Crumlish of the exact nature of the discourse it wished to have on September 2012 but I am unable to find that the Green Man engaged in conduct sufficient to conclude it was in breach of its obligation to act as a fair employer. I am satisfied that the meeting was not disciplinary in nature nor a precursor to formal disciplinary action against Ms Crumlish. It is plain that the Green Man had growing concerns about customer service and wished the General Manager to address and improve the delivery of that service through its staff. These are matters that an employer should be able to fairly discuss with a General Manager. I am unable to find that the Green Man acted unreasonably during the work in progress meeting and review meeting of 25 September and the subsequent meetings referred to.

*Is there other evidence of discrimination against Ms Crumlish?*

[57] Ms Crumlish states that her maltreatment by the directors intensified following the meeting of 25 September 2012. She referred to a range of instances where she says she was either ignored or shouted at, or where the directors told other staff they had concerns about her performance. I have not detailed every event alleged, many of which are based on hearsay and were unable to be tested. Ms Crumlish agrees that she did not raise concerns about the way the directors interacted with her until she sent the email of 26 October 2012. An important aspect of her evidence was that other senior staff were able to confirm that soon after the announcement of her pregnancy the directors discriminated against her and had witnessed their behaviour towards her.

[58] By way of example Ms Crumlish points to approaches made by individual senior staff members to the directors on or about the day she was admitted to hospital (16 October) each of whom expressed concern at the way she was being treated by them. She refers also to a scheduled fortnightly leadership meeting on the same day and says that Mr Drummond advised staff that Ms Crumlish's baby was "*not the Green Man's baby*" and canvassed amongst staff whether the atmosphere at the Green Man would improve once she left.

[59] The directors say that on the day of Ms Crumlish's hospitalisation they became aware that there was a view held by some senior staff that that they had instructed Ms Crumlish to work long hours and was prohibited from swapping shifts and that these actions resulted in her ill health. The directors agree that during the leadership meeting that tension amongst staff was discussed as well as Ms Crumlish's pregnancy. They say the focus was to discuss what staff could do to improve morale including what could be done to assist Ms Crumlish in her work.

[60] There was some disparity in the evidence given by the individuals who attended the leadership meeting on 16 October 2012. Given the passage of time I accept that details about the content of the meeting have dimmed. There was no corroborating evidence to support Ms Crumlish's view that staff were asked whether the atmosphere at the Green Man would improve in her absence.

[61] Six colleagues of Ms Crumlish provided evidence to the Authority. Without exception each of these witnesses agreed that they had not personally witnessed the

directors treat Ms Crumlish differently or had directly seen instances of discrimination. They each conceded that their concerns about the way the directors engaged with Ms Crumlish had been based on information Ms Crumlish had reported to them.

[62] I find there is little tangible evidence to support Ms Crumlish's allegations that the behaviour of the directors had changed towards her.

***The proposal to make Ms Crumlish's position redundant***

[63] Ms Crumlish returned to work on 18 October 2012. Later that day she was advised that the directors were considering disestablishing the General Manager position and given a letter (mistakenly dated 13 September 2012) which set out the directors reasons for restructuring and inviting her to a meeting to discuss the matter.

[64] Ms Crumlish attended a meeting with an HR consultant on 25 October 2012 to discuss the proposal. Each of the parties provided notes taken during the meeting. Between becoming aware of the Green Man's proposal and the meeting held on 25 October 2012 there is a suggestion that Ms Crumlish had encouraged senior staff members to resign in protest of the Green Man's actions. There is insufficient evidence to support this proposition and I do not accept it.

[65] Ms Crumlish considers that the proposal to disestablish her position was predetermined and a sham.

[66] Ms Crumlish referred to the circumstances of Ms Sarah Jane Duncan who had held the position of General Manager from February 2010 until May 2011 when the position was disestablished. A significant amount of documentation and oral evidence was furnished by both parties, including Ms Duncan, as to whether the decision in May 2011 was made for genuine reasons and was justifiable. I understand this information was furnished to establish a pattern whereby the Green Man dismissed staff ostensibly on the grounds of redundancy. I consider it more appropriate to examine the circumstances in which the Green Man proposed to disestablish the General Manager position in October 2012.

[67] The Green Man accepts that the timing of its proposal to disestablish Ms Crumlish's position was poor in the circumstances, but states there is no good time to introduce a restructuring proposal. It produced cogent evidence, which was not

challenged, of a significant financial downturn between January to August 2012 and that this information was conveyed to Ms Crumlish in the letter given to her on 18 October 2012 and discussed in the meeting of 25 October 2012.

[68] I am satisfied on balance that there likely were genuine financial grounds on which the Green Man contemplated a restructure. However I do not need to conclusively determine this matter as Ms Crumlish was not made redundant.

[69] Ms Crumlish did not attend the meeting scheduled for 31 October 2012 to discuss her response to the Green Man's proposal. She sought legal advice as she was entitled to do and the parties then engaged in without prejudice discussions.

[70] The evidence is that the Green Man did not progress the restructuring and the General Manager position was not disestablished. I am unable to conclude that a proposal to restructure and disestablish a position is evidence of a fundamental breach of an employment agreement or that the Green Man acted without good faith and Ms Crumlish was unjustifiably disadvantaged in this regard.

***Events that occurred whilst Ms Crumlish was on maternity leave***

[71] In written evidence Ms Crumlish reported two conversations held in February and/or March 2013 where she alleges Mr O'Kelly directly or indirectly advised others that Ms Crumlish would not be returning to work at the Green Man. As regards the first instance both individuals deny the content of the conversation occurred as alleged. The second instance was unable to be properly tested. I am not satisfied that there is sufficient evidence to conclude that the Green Man had determined by March 2013 that Ms Crumlish was dismissed.

[72] Considerable correspondence was exchanged between the parties on a without prejudice basis from 29 October 2012 onwards. Appropriately this documentation has not provided to the Authority. There is an inference that the Green Man would not have engaged in the level of correspondence if it was not seeking to terminate Ms Crumlish's employment. However, in the absence of evidence I am unable to make any conclusions about the content of the parties' correspondence other than it is apparent the parties were unable to resolve the employment relationship problem.

[73] Whilst I accept as at June 2013 the parties had not settled their differences, without additional evidence I am unable to conclude that Ms Crumlish's resignation was inevitable.

### **Summary**

[74] I find that is clear from the evidence that a turning point occurred in the employment relationship during the meeting of 25 September 2012. Ms Crumlish regarded the directors' concerns as to staff performance and service and as an attack against her personally, particularly so in circumstances where she had a friendship with Mr O'Kelly. I consider it likely that following on from that meeting Ms Crumlish's sensitivity was heightened to any perceived criticism and that this view permeated her subsequent dealings with the Green Man.

[75] It is clear that Ms Crumlish regarded the proposal to disestablish the role of the General Manager as yet another example of the directors' *"trying to get rid of me"*. However I have been unable to identify evidence of conduct by the Green Man that was discriminatory, unreasonable or in breach of its implied or express obligations pursuant to the employment agreement. In this regard while I find Ms Crumlish had concerns that were real for her these do not appear to be based on reasonable grounds and there is insufficient direct evidence to support her claims.

[76] Having considered all the information provided to the Authority I am unable to conclude that Ms Crumlish was discriminated against due to her pregnancy or that the Green Man's actions, both specific and cumulatively, were of such a serious nature that Ms Crumlish could reasonably conclude that the Green Man did not intend to be bound by the terms and conditions of Ms Crumlish's employment. I find that the resignation of Ms Crumlish was not caused by a breach of duty on the part of her employer that would have the foreseeable consequence that Ms Crumlish would resign. It follows that I find that Ms Crumlish was not constructively dismissed and that her resignation was a voluntary action on her part.

[77] Given that I have found Ms Crumlish was not discriminated against, or constructively dismissed, I am unable to conclude that the Green Man was in breach of its obligations under the Parental Leave and Employment and Protection Act.

**Is Ms Crumlish owed arrears of wages including a fixed reimbursement for phone costs?**

[78] Ms Crumlish claims she is owed the difference between wages received between 1 February and 2 April 2012, when the parties were engaged in negotiations as to terms and conditions of employment associated with the General Manager role. She also claims reimbursement of phone expenses which she says the parties had agreed were \$25 per month. She seeks interest on both these sums.

[79] Ms Crumlish's evidence is that she commenced working in the General Manager's role on 1 February 2012 and that there was an agreement she would be paid back-pay once she and the directors reached agreement on remuneration. Mr Crumlish's evidence suggests that the Green Man delayed reaching an agreement as to remuneration and therefore unreasonably denied her the balance between the Functions Manager and the General Manager salary for this period.

[80] It is plain from the evidence that negotiations as to terms and conditions associated with the General Managers role were protracted. Ms Crumlish's correspondence to an independent recruitment consultant in mid February 2012 reveals that the Green Man was seeking to conclude negotiations but that Ms Crumlish considered the salary offer too low and she was unwilling to sign an employment agreement until she had sufficient time to review the document.<sup>9</sup> In mid-March Ms Crumlish further reported to the consultant that the Green Man had asked her to write up her own contract and that the parties would take it from there<sup>10</sup>. While it is not necessary for the Authority to determine which party caused delay in concluding an employment agreement I am unwilling to find in these circumstances that fault can be solely attributed to the Green Man.

[81] The evidence is that the parties verbally agreed to terms and conditions of employment on 2 April 2013 and payroll information establishes that from this date onwards Ms Crumlish was paid according to the terms and conditions of that agreement. An employment agreement was subsequently signed by the parties on 21 May 2012. No reference is made to back pay in that document. I note also that whilst the Green Man's original offer stated that the Green Man would pay for approved work related calls made by Ms Crumlish's cell phone, this term was crossed out by

---

<sup>9</sup> Email dated 16 February 2012 from Ms Crumlish to a recruitment consultant.

<sup>10</sup> Email dated 13 March 2012 from Ms Crumlish to a recruitment consultant

Ms Crumlish and in handwriting she inserted “*Did we decide on a figure to be paid months (sic)*”. No further information was contained in the employment agreement about how reimbursement for phone calls would be made. There is no written evidence of an agreement in the way Ms Crumlish contends.

[82] On balance I consider it unlikely that the Green Man would commit itself to payment of back pay during negotiations for an employment agreement when the parties had not resolved the quantification of Ms Crumlish’s salary.

[83] Finally, I note that the arrears of wages and phone reimbursement claims were not pursued by Ms Crumlish until 19 months after terms and conditions of employment had been agreed and almost 4 months after her resignation. I accept that a delay in bringing a claim does not automatically make it invalid but Ms Crumlish was unable to explain why she had not raised these matters with the Green Man sooner. In these circumstances and in the absence of better evidence, this is a factor which strengthens the Green Man’s position.

[84] On the evidence provided I am not satisfied that Ms Crumlish has established her claim for back pay or that there was an agreement that she would receive fixed reimbursement of phone expenses.

### **Costs**

[85] Costs are reserved.

**Michele Ryan**  
**Member of the Employment Relations Authority**