

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2025] NZERA 45  
3288100

	BETWEEN	LYNN LEAUPEPE Applicant
	AND	TAMAKI HEALTH SERVICES LIMITED Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Ronald Jones, advocate for the Applicant Penny Swarbrick, counsel for the Respondent	
Investigation Meeting:	17 and 18 December 2024 and 16 January 2025 in Auckland	
Submissions and/or further evidence	07 January 2025 from the Applicant 16 January 2025 from the Respondent	
Determination:	29 January 2025	

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Lynn Leaupepe, claims that she was constructively dismissed by the Respondent, Tamaki Health Services Limited, (THS)

**The Authority's investigation**

[2] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Lynn Leaupepe, and from Joanna Holahia, a former employee.

[3] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Pauline Lauaki and Pushap Vashista.

[4] Oral and written submissions were received from Mr Jones for the Applicant and from Ms Swarbrick for the Respondent. Whilst I have not referred to all the submissions made by the parties, I have fully considered them.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to

dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Issues**

[6] The issue requiring investigation is whether or not Ms Leaupepe was constructively dismissed by THS.

### **Background**

[7] THS provides primary health care services in locations throughout New Zealand, with eight clinics in the greater Auckland area. It operates clinics under the names Local Doctors and White Cross. Many of the clinics provide urgent care and operate 24 hours a day, seven days a week.. Each clinic has either a Clinic Coordinator or a Practice Manager.

[8] Ms Leaupepe commenced employment at THS as a part-time Medical Receptionist at its clinic in Henderson (the Henderson Clinic) on or about 14 June 2022, working two nights shifts (overnight) per week. She was provided with a written employment agreement and a role description. Ms Leaupepe reported to the Clinic Coordinator, Pauline Lauaki.

[9] Ms Leaupepe's role as a Medical Receptionist meant she was the first point of contact for patients entering the clinic. Medical Receptionists make appointments, deal with patient enrolment, are responsible for the keeping of patient records, and for administrative matters.

[10] Ms Lauaki is the Clinic Coordinator at the Henderson Clinic in which capacity she was responsible for the management of the medical receptionists. She reported to Ms Vashisti, the Operations Manager for the White Cross clinics.

[11] Ms Lauaki said she and Ms Leaupepe had a very good working relationship. At one time they had both been Medical Receptionists at the Henderson Clinic and their shifts had overlapped on occasion. Ms Lauaki said they worked together well and became friends at work although they did not see each other outside of the workplace. Although both Ms Leaupepe and Ms Lauaki were Samoan, Ms Lauaki said they communicated in English.

[12] Ms Leaupepe's contracted shifts were Thursday and Friday nights, working the night shift from 11 p.m. to 7 a.m.. Sometimes Ms Leaupepe worked additional shifts either at the Henderson Clinic or at another THS clinic.

#### *Pay issue April 2023*

[13] During April 2023 Ms Leaupepe raised a query in relation to the wages she had received. She said she contacted and informed Ms Lauaki of the error but Ms Lauaki had taken

no action to rectify the error. Ms Leaupepe said she also emailed the Payroll department and was told that Ms Lauaki had not contacted them.

[14] Ms Lauaki said she had looked into the issue and, upon investigation, it was discovered that Ms Leaupepe had not entered all the hours she had worked on her completed timesheet which went to her (Ms Lauaki) for approval. As a result both she and the Payroll department had been unaware that Ms Leaupepe was entitled to be paid for additional hours she had worked.

[15] Once it had been raised and investigated, it had been quickly resolved with an adjustment in the following pay cycle in which Ms Leaupepe was paid the shortfall.

[16] Ms Leaupepe emailed the Payroll department on 28 April 2023. In the Subject line of the email it read “Payroll is crap”, and in the body of the email read:

This is not fair this happened before and it was fixed the same week I’m going to make sure that I make a complaint about this. You guys stuffed my pay and did not pay me right, I have 4 kids I need to feed bills need to be paid on time. I don’t need this bull crap.

[17] Ms Leaupepe did not raise a complaint about the payment issue after April 2023 until it was raised in the personal grievance letter dated 15 January 2024. This referred to “repeated issues with payroll” which occurred in April 2023.

[18] Ms Lauaki said she was not aware of “repeated” payroll issues being raised by Ms Leaupepe after the issue in April 2023 which had been quickly resolved.

#### *Complaint about a doctor April 2023*

[19] On or about April 2023 Ms Leaupepe said she made a complaint to Ms Lauaki about the conduct of a doctor at the Henderson Clinic. Ms Leaupepe said it was a verbal complaint and she had expected Ms Lauaki to speak to Ms Vashisti about it.

[20] Ms Lauaki said she did not recall Ms Leaupepe making a complaint, although it was possible there may have been a comment made by Ms Leaupepe during a conversation between them.

[21] Ms Leaupepe confirmed when questioned during the Investigation Meeting that she had known Ms Lauaki was not responsible for the doctors who worked at the Henderson Clinic, this was Ms Vashisti’s management area. Ms Leaupepe confirmed she had known that complaints were to be emailed to the person responsible and able to address them, she had also known how to log a complaint in the THS reporting system.

[22] Despite Ms Vashisti being based in the Henderson Clinic, Ms Leaupepe she said had neither spoken to her to raise the complaint, nor had she emailed her. She had also not logged a complaint in the THS system.

[23] There was no evidence that Ms Leaupepe raised any complaint about a doctor after April 2023.

#### *Performance issues June 2023*

[24] During June 2023 Ms Lauaki and Ms Vashisti met with Ms Leaupepe to discuss concerns about Ms Leaupepe's performance, These concerns were an issue about ACC leave and a medical certificate, using disrespectful language in emails, and sleeping during her shifts.

[25] Ms Vashisti said the meeting on 15 June 2023 had discussed THS's concerns and its expectations with Ms Leaupepe. Following the meeting, Ms Vashisti wrote to Ms Leaupepe setting out THS' expectations about ongoing leave under ACC. In regard to the email language issue she stated:

I have explained the disrespectful language in emails or otherwise towards your colleagues is not something we take lightly. It is part of our Code of Conduct ... and breach will not be taken lightly.

[26] In regard to the complaints which had been made about Ms Leaupepe sleeping whilst working her shifts, it was stated that this was a serious matter because it put patients and THS's business at risk. The letter concluded:

My expectations are very clear.  
I want to see you alert and present while you job (sic).  
You are respectful and professional in all interactions with colleagues and patients.

#### *Sleeping at work incident October 2023*

[27] In October 2023 THL became aware that Ms Leaupepe had been asleep at work on two occasions when she was working. Ms Lauaki said one of the night nurses had noticed Ms Leaupepe asleep during the night shift on 5 October 2023 shift, and reported it to a doctor, who had raised it with Ms Vashisti.

[28] Ms Vashisti said she asked Ms Lauaki to view the CCTV footage to check the veracity of the complaint. Ms Lauaki said the CCTV footage showed that Ms Leaupepe had been asleep during the 5 October shift, and again on the shift which straddled 11 and 12 October 2023.

#### *Discussion 12 October 2023*

[29] On 12 October 2023 Ms Vashisti and Ms Lauaki met with Ms Leaupepe at the start of her shift that evening and explained that there was CCTV footage of her asleep when she should have been working. explained that the concern was serious because of the potential

consequences for patient safety, and that due to the earlier occurrence there would have to be a meeting.

[30] During their conversation Ms Lauaki said Ms Leaupepe said she wanted to leave and study nursing. This did not surprise her since Ms Leaupepe had often spoken about not being happy at work, and wanted a day job to allow her to spend more time with her family.

[31] Ms Leaupepe confirmed at the Investigation Meeting that she and Ms Lauaki would often discuss the fact that she (Ms Leaupepe) did not like working nights and wanted more time with her family.

[32] Ms Leaupepe also confirmed that during the meeting on 12 October 2023 she had told Ms Lauaki and Ms Vashisti that she wanted to leave and study Nursing. However she said she had done so because Ms Lauaki and Ms Vashisti had told her she had to resign or THS would black-list her and ensure she did not work in any other clinic.

#### *Communications 16 October 2023*

[33] At 10.00 o'clock on the morning of 16 October 2023, Ms Leaupepe sent a text message asking Ms Lauaki to help her write her CV:

Just to let you know I've updated my CV, and applied for a role back at Whakarongorau I've added you as my reference, just waiting on my certificate from public service commission on the work I done with Covid advisor cause I think it'll look good on my cv. Just making the most of it working with you guys while I'm looking for something else..

[34] At 2.29 p.m. Ms Vashisti emailed Ms Leaupepe attaching the invitation to a formal disciplinary meeting to be held at 2 p.m. on 18 October 2023. The invitation letter confirmed that the meeting was: "in relation to concerns sleeping on duty on the 5 October & 12 October 2023".

[35] The letter informed Ms Leaupepe that the purpose of the meeting was to hear her explanation to the concern that she had been sleeping on duty, and that she was entitled to have a support person or representative present. She was informed that if the concerns were upheld, it might be considered a breach of the THS Disciplinary and Performance Management Policy, and if considered to be Serious Misconduct, might result in the termination of her employment.

[36] At 4.00 p.m. Ms Leaupepe text messaged Ms Lauaki asking:

Do you know if there gonna let me go or not, cause I need to know so that I can resign. I don't have [want] go ahead with this meeting."

[37] Ms Lauaki texted back that she was unable to discuss it because she was covering the reception shift and asked if Ms Leaupepe would be available to discuss her CV the next day.

[38] Ms Lauaki said she called Ms Vashisti for advice and Ms Vashisti told her that she could not discuss the outcome of the meeting with Ms Leaupepe because that would not be known until the meeting had taken place.

*17 October 2023*

[39] On 17 October 2023 Ms Lauaki text messaged Ms Leaupepe telling her that she was working in the specialist part of the Henderson Clinic if Ms Leaupepe wanted to see her. Ms Leaupepe confirmed that she did want to see her, and text messaged asking Ms Lauaki to edit her CV because she wanted to send it off to another company. Ms Lauaki responded that she was editing it.

[40] Ms Lauaki confirmed that she had typed out the resignation letter after Ms Leaupepe asked her to prepare it. She had found a template letter on the internet, Ms Leaupepe informed her of the wording she wanted and she had typed it as instructed. The letter was printed out, after which Ms Leaupepe signed it. The letter which was dated 17 October 2023 stated:

Dear Pauline,

Please accept this as my formal notice of my resignation from my position as Medical Reception at White Cross Henderson. My last day of employment will be Tuesday 31<sup>st</sup> October 2023.

Thank you for giving me the opportunity to work in this position for the last year. I have thoroughly enjoyed my journey here but I have decided to put my family first and resign from the overnight shift. ...

Thank you again for the opportunity and I wish you and White Cross Henderson all the best for the future.

[41] Ms Lauaki said that after the resignation letter was finished they went to see Ms Vashisti who was working in Henderson Clinic.

[42] Ms Vashisti said Ms Lauaki and Ms Leaupepe came into her office and gave her the resignation letter. She said she told Ms Leaupepe that she was not going to answer it that day, and that Ms Leaupepe should not rush her decision, but consider it further.

*Meeting 18 October 2023*

[43] Prior to the meeting held on 18 October 2023, Ms Vashisti said she had spoken to the THS People and Capability Business Partner (the P&C Partner) for advice on how to conduct the meeting. She had told the P&C Partner that Ms Leaupepe had handed her a resignation, and she was advised by the P&C Partner not to discuss it during the disciplinary meeting.

[44] Ms Leaupepe text messaged Ms Lauaki at 7.41 a.m. on the morning of 18 October 2023 asking her (Ms Lauaki) to call her and ask her to go into work when the meeting was due to start because her husband was working at home and she did not want him to know about the meeting, and also asking if Ms Lauaki could finish her CV so she could send it out that day.

[45] At 11.42 Ms Leaupepe texted Ms Lauaki: “Sis, have you edit mu cv please.” Ms Lauaki responded that she had been busy but would have it ready for Ms Leaupepe when she came into Henderson Clinic.

[46] At 2.00 p.m. on 18 October 2023 Ms Leaupepe text messaged Ms Lauaki asking “Should I come in now?” and Ms Lauaki replied: “Come in”.

[47] Ms Vashisti said she ran the disciplinary meeting which started at 2.00 p.m. on 18 October 2023. Ms Lauaki was present. Ms Leaupepe did not have a support person or representative with her, and when reminded that she could have someone with her, said she did not want anyone.

[48] Ms Leaupepe confirmed that she had been sleeping during her night shifts and apologised.

[49] Ms Vashisti said that Ms Leaupepe explained that she was looking for alternative work with shorter hours and that she was considering studying to become a nurse.

[50] Ms Leaupepe said that before the meeting on 18 October 2023 she was in Henderson Clinic editing her CV with Ms Lauaki. Ms Lauaki reminded her that they had almost forgotten to prepare the resignation letter. She said that Ms Lauaki typed the resignation letter and she signed it. During the middle of the meeting on 18 October 2023, Ms Leaupepe said Ms Lauaki handed her resignation letter to Ms Vashisti.

[51] Ms Vashisti who said she had received the resignation letter the preceding day, said Ms Leaupepe’s resignation was not discussed during the meeting.

[52] I have considered the evidence about when the resignation was given to Ms Vashisti. I find it significant that the text message from Ms Lauaki telling Ms Leaupepe to come into Henderson Clinic was sent at 2.00 p.m., just before the meeting was due to start. There is no evidence that the meeting start was delayed. There would therefore have been no time to type and print the resignation letter before the meeting.

[53] Given that timing I accept Ms Lauaki and Ms Vashisti's evidence that the resignation, dated 17 October 2023, was given to Ms Vashisti that day, a day before the meeting on 18 October 2023.

[54] There was a short adjournment in the meeting on 18 October 2023 during which Ms Vashisti said she had considered the situation, including the fact that Ms Leaupepe had expressed remorse for her actions, and she telephoned the P&C Partner for advice.

[55] After the meeting resumed, she informed Ms Leaupepe that the outcome was a written warning.

[56] Ms Leaupepe confirmed she had been told that the outcome was a written warning not dismissal, but said that she had not thought to retract her resignation at that point.

*Events following the disciplinary meeting*

[57] A letter dated 26 October 2023 confirming the outcome of the meeting was emailed to Ms Leaupepe on the morning of 27 October 2023. The letter stated:

We consider these breaches as serious misconduct and as such your actions risk undermining the required trust and confidence in the employment relationship .... Given the circumstances and your response to these allegations, including the remorse you have shown, we believe that the necessary trust and confidence in the employment relationship can still be restored. As a result, we are confirming our decision to issue you with a Final Written Warning.

[58] Ms Leaupepe responded by email on 27 November 2023 to confirm that she had received the outcome letter. She also sent an email to Ms Vashisti that same day about cover having been found for her shift and referred to her resignation letter:

And about the date that I've put in my resignation letter it should be four weeks, not two weeks. I have sent a screen shot of my contract to Pauline.

Can you also help proof read my CV push [Ms Vashisti] Pauline has not got back to me since then.

[59] Ms Vashisti responded on 30 October 2023 confirming that she thought Ms Leaupepe's CV looked good. Ms Leaupepe responded by email: "Is there a chance I can go on casual for now, until I find something else where?".

[60] Ms Vashista responded that becoming casual would require a new contract, and that there was a standdown period.

[61] The following day, 31 October 2023, Ms Leaupepe emailed Ms Vashisti seeking to retract her resignation: She stated:

I am desperately need to cancel my resignation I have made the biggest mistake of my life to resign, my husband is not happy when I should've talk to him first about it, when I should've have something back up, as it's put a lot of stress now of myself. Can I please still continue with my shift, but I won't be working on Thursday anymore with ..., can only do 1 night shift which is Wednesday, and the rest evening shift, is there a way for me to pick up extra shift elsewhere for now until I find somewhere permanent, right now I needed all the support I can. I am looking for something day time now as my son will be in kindy full time. Or I am open to changing my contract to casual so I can pick up extra shift from other clinic.

[62] Ms Vashisti said she spoke to Ms Leaupepe about her request on 1 November 2023 and explained how casual employment operated in THS, including that there was normally a standdown period after someone left before a casual contract commenced, and that casual contracts were performed in individual clinics but were operated by the THS Workforce Team. She also emailed Ms Leaupepe confirming what had been discussed:

Hi Lynn,  
As per our conversation on the phone.  
Don't stress, there is a right role for you somewhere and you will find it. Try [link to ADHB website] ...

Your last date with us was yesterday that is 31<sup>st</sup> Oct 23. Once you finish there is usually a stand down period of 4 to 6 weeks before you can sign new casual contract with us.

It also depends on if workforce is taking in new casuals or not. Casual role sits with workforce team and does not sit in any one particular clinic.

#### *Emails 6 November 2023*

[63] On 6 November 2023 Ms Vashisti received an email from Ms Leaupepe dated 5 November 2023 and in which she stated that she believed she would be eligible for redundancy.

[64] Ms Vashisti responded, explaining that Ms Leaupepe had resigned and her situation was not eligible for redundancy.

[65] Ms Vashisti said she was alarmed by Ms Leaupepe's subsequent response in which she stated that Ms Lauaki had pressurised her into resigning and created a resignation letter before she was ready to do so:

I wanted to resign but I Knew I needed to find the right job.

But because Pauline pressurised me into resigning and created my resignation letter but I wasn't ready she could've just respected my decision.

She called me to come in before the meeting I only needed her help with CV that's all, but she brought up the resignation just a few minutes before we started the meeting,

So when you mention that you were gonna give me a warning it was too late.

[66] Ms Vashisti said she asked Ms Leaupepe to call her or send a number on which she could call her. It was the following day, 7 November 2023, when they spoke.

[67] Ms Vashisti said she asked Ms Leaupepe if Ms Lauaki has asked her to resign, to which Ms Leaupepe replied: “on no Pushap she didn’t ask me, I was asking her if I could resign.”. Ms Vashisti said she was relieved by the response, and they proceeded to discuss Ms Leaupepe’s request for a casual contract.

[68] Ms Vashisti said she was aware that Ms Leaupepe was experiencing financial pressure so she offered to arrange a shortened stand-down period. After the telephone call she discussed the casual agreement with the P&C Partner who agreed to the reduction of the stand-down period for Ms Leaupepe.

[69] Ms Leaupepe was sent a casual employment agreement by Ms Vashisti on 8 November which she signed and returned on 10 November 2023. The process for casual employees was that they would be offered work by Workforce if this was available. Ms Leaupepe was offered and accepted casual hours at a THS clinic. This was followed by other periods of work at various THS clinics.

#### *Events 2024*

[70] On 3 January 2024 Ms Leaupepe emailed Ms Vashisti, copying the letter to the P&C Partner, requesting the reinstatement of her permanent employment status. and stating that she believed her resignation was ‘orchestrated’ by Ms Lauaki because she had reported issues about a doctor at Henderson Clinic. Ms Vashisti said this was the first time she had been informed of any concerns about a doctor at the Henderson Clinic.

[71] The P&C Partner responded to Ms Leaupepe on 10 January 2024 acknowledging that she had received the email, and would be in touch the following week.

[72] Ms Leaupepe responded that she was taking legal advice, and on 15 January 2024 wrote to THS raising a personal grievance. In the letter Ms Leaupepe stated:

I am writing to formally lodge a personal grievance against White Cross Healthcare Limited concerning issues of constructive dismissal, unfair treatment, and wage arrears ...

On 17 October 2023, under significant pressure and feeling as though I had no other choice, I agreed to a resignation letter prepared by Pauline Lauaki. Pushpa Vashisti had insisted on resignation as the best course, threatening to blacklist me within the healthcare industry, ...

In April 2023, I faced repeated issues with payroll, including delayed and underpaid wages. Despite bringing these issues to the attention of Pushap Vashisti and Pauline Lauaki, the resulting stress and difficulty in resolving these matters were unfairly used against me in further communications ...

I was advised by Pauline Lauaki to not lodge complaints against an overnight doctor. ... This was unfairly used against me in further communications when I was reported to be sleeping – I had reported this common practice to both managers prior and was asked not to record this.

Pauline Lauaki has told me my only option is to resign writing the resignation letter for me ...

[73] The Statement of Problem was lodged with the Authority on 29 March 2024. The parties attended mediation, but this did not resolve the issues.

### **Was Ms Leaupepe constructively dismissed by THS?**

[74] An employee who has resigned has not been dismissed. A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[75] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether or not there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.<sup>1</sup>

[76] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* there are three fundamental situations in which a constructive dismissal claim may arise:

- i. An employee is given a choice between resigning and being dismissed;
- ii. There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;
- iii. There had been a breach of duty by the employer which causes an employee to resign.<sup>2</sup>

[77] It is difficult to precisely identify into which category the claim of constructive dismissal by Ms Leaupepe falls. In the letter dated 15 January 2024 raising a personal grievance, Ms Leaupepe states that she was told to resign or be blacklisted; but in the Statement of Problem a breach of the duty of good faith and a breach of the employment agreement by THS is claimed.

[78] I therefore consider Ms Leaupepe's claim of constructive dismissal under each of the three categories.

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<sup>1</sup> *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

<sup>2</sup> *Auckland Shop Employees etc IUOW etc v Woolworths (NZ) Ltd* [1994] 1 ERNZ 168

[79] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where he or she had no other option.

**Was Ms Leaupepe given a choice to resign or be dismissed?**

[80] Ms Leaupepe is claiming that her resignation was made because Ms Lauaki and Ms Vashisti told her that she should resign rather than be dismissed.

[81] Ms Lauaki and Ms Vashisti deny that they told Ms Leaupepe to resign. In examining the evidence I note as significant the following matters.

[82] In June 2023 there had been a meeting held to discuss a number of issues, these included disrespectful language used by Ms Leaupepe in internal emails, a breach of the THS Code of Conduct, and an instance of her sleeping during her shift. However, although both these were serious matters, especially the sleeping on duty, there was no disciplinary outcome of that meeting in June 2023, instead Ms Vashisti's evidence was that it was a reset of expectations.

[83] I find this indicates that there was a good employment relationship between Ms Leaupepe, Ms Lauaki and Ms Vashisti.

[84] It is not disputed by Ms Leaupepe that she had frequently spoken of her wish to stop working at night and to have day-time work in order to spend more time with her family. I find more credible the evidence that she spoke of her intention to leave at the meeting on 12 October 2024 than that Ms Lauaki and Ms Vashisti advised her to resign.

[85] In coming to that view I note the evidence that: (i) there was a friendly relationship between the parties; (ii) despite the serious nature of the issues discussed at the June meeting, there had been no disciplinary action taken and (iii) Ms Leaupepe had frequently discussed with Ms Lauaki her wish to stop working at night in favour of day time employment in order to spend more time with her young family.

[86] Having provided her resignation, I note as significant the fact that Ms Leaupepe did not seek to retract it:

- (i) on 18 October 2023 when advised at the conclusion of the meeting that the outcome was a written warning, not dismissal;

- (ii) on 26 October 2023 when she received the formal warning letter which confirmed the outcome was a written warning and that THS held the view that trust and confidence between the parties could be restored;
- (iii) in the email dated 27 October 2023 in which Ms Leaupepe advised Ms Vashisti of an error about the leaving notice in the resignation letter;
- (iv) in the email dated 30 October 2023 which Ms Leaupepe sent to Ms Vashisti asking if she could become a casual employee; nor
- (v) in the email dated 5 November 2023 which Ms Leaupepe sent to Ms Vashisti in which she claims she should be eligible for redundancy compensation on the basis that she had wanted to return to work but there are no day shifts available for her.

[87] It is not until the final day of her permanent employment on 31 October 2023, that Ms Leaupepe emailed Ms Vashisti stating that she needed to cancel her resignation.

[88] Significantly in the email dated 31 October 2023 sent to Ms Vashisti, Ms Leaupepe states: "... I have made the biggest mistake of my life to resign", she does not claim that she was coerced to resign.

[89] Rather the basis for her wish to cancel her resignation is that her husband is not happy about her decision. I also find it significant that in the email Ms Leaupepe does not want to resume her previous two night contract but to change the employment by reducing to one night shift and to substitute an evening shift for the second contracted night shift.

[90] It is not until 6 November 2023 that Ms Leaupepe claims that Ms Lauaki pressurised her into resigning. In that email Ms Leaupepe does not dispute that she intended to resign: "I wanted to resign ...".

[91] Having considered the evidence I find that Ms Leaupepe had frequently expressed her intention to seek alternative daytime employment prior to October 2023. That was understandable given her personal circumstances.

[92] She had a positive working relationship with both Ms Lauaki and Ms Vashisti, evidenced by the messages between them in which Ms Leaupepe seeks help editing her CV which is willingly provided by them both.

[93] Ms Lauaki did not dispute typing Ms Leaupepe's resignation, but denied pressurising Ms Leaupepe to resign.

[94] The evidence I find to support the conclusion that Ms Lauaki did not pressurise Ms Leaupepe to resign, nor that Ms Lauaki and/or Ms Vashisti gave Ms Leaupepe a choice to resign or be dismissed or black-listed for clinic work elsewhere. Rather I find it was Ms Leaupepe's

voluntary decision to resign: the evidence is that Ms Leaupepe was unhappy at working night shifts, she wanted to spend more time with her family, and had expressed this view frequently to Ms Lauaki who agreed to help her prepare a resignation letter.

[95] There is no evidence of THS seeking to end Ms Leaupepe's employment, on the contrary there is no disciplinary outcome to the serious issues raised with her at the meeting held in June 2023.

[96] The outcome of the 18 October 2023 disciplinary meeting was a warning, not dismissal and THS expressed its view in the letter dated 26 October 2023 that trust and confidence could be restored.

[97] I also observe that Ms Vashisti actively sought to assist Ms Leaupepe obtain casual employment earlier than THS normally permitted by having the stand-down period reduced when she realised Ms Leaupepe was facing financial difficulties.

[98] THS offered Ms Leaupepe casual employment after shortening the stand-down period at Ms Vashisti's request, and Ms Leaupepe received more hours as a casual than she had worked as a permanent employee.

[99] I find these actions indicate a positive and supportive employment relationship which THS was willing to continue despite the serious concerns which had been raised with Ms Leaupepe

[100] I determine having considered the evidence that it is more likely that Ms Leaupepe resigned of her own volition than was given a choice to resign or be dismissed by Ms Lauaki and/or Ms Vashisti.

**Did THS follow a course of conduct with the intention of coercing Ms Leaupepe to resign?**

[101] In the Statement of Problem Ms Leaupepe claims a breach of the duty of good faith and a breach of the employment agreement by THS, based upon her claim that Ms Lauaki wrote her resignation although she did not want to resign.

[102] Ms Leaupepe also claims that THS had followed a course of conduct with the aim of coercing her to resign, and breached the duty of good faith it owed to her; specifically by not addressing her issues with payroll and her complaints about a doctor.

[103] Accordingly Ms Leaupepe's claims would fall into either the second or third situation set out in *Auckland etc Shop Employees*.<sup>3</sup>

[104] . The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*<sup>4</sup>. The Court of Appeal in examining the question of constructive dismissal observed that in examining whether a constructive dismissal under this heading has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation?

*A breach of duty?*

[105] The evidence establishes that Ms Leaupepe's payroll issue in April 2023 arose as a result of her own failure to complete the timesheet correctly, and when the problem was identified, it was corrected in a timely manner.

[106] I find that THS acted promptly to resolve Ms Leaupepe's payroll issue, and there is no evidence to support her claim that it was an ongoing issue after April 2023.

[107] Ms Leaupepe did not report a complaint about a doctor to Ms Vashisti either in person when Ms Vashisti was in the Henderson Clinic, or by email. She did not enter a complaint into the THS system. Nor did Ms Leaupepe contact the P&C Partner to raise a complaint despite being aware of her email address as evidenced by the fact that she copied her into the acknowledgement of the warning she sent to Ms Vashisti on 27 October 2023.

[108] I observe that despite Ms Leaupepe's evidence that she repeatedly raised her concern about a doctor, she did not pursue any of the avenues known to her for raising complaints. Nor is there any evidence to support the claim that she raised this issue after April 2023.

[109] An employer cannot be expected to take action in regard to a complaint which has not been properly brought to its attention.

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<sup>3</sup> Above n 2 at pg 172.

<sup>4</sup>*Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW* [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA).

[110] I find that no evidence that THS failed to investigate a complaint about a doctor by Ms Leaupepe since it was unaware that she had raised one.

[111] It is not disputed that Ms Lauaki wrote Ms Leaupepe's resignation. However I have found that this was within the context of a friendly and supportive relationship and at the request of Ms Leaupepe.

[112] Ms Leaupepe, having provided her resignation to Ms Vashisti was told to reconsider it. There were a number of occasions when Ms Leaupepe could have withdrawn the resignation but instead she reconfirmed the decision.

[113] Once the permanent employment ended, Ms Leaupepe was provided by THS with casual hours in excess of the permanent hours she had worked.

[114] In the circumstances I find no breach of duty on the part of THS towards Ms Leaupepe.

[115] I find no breach of the duty of good faith; on the contrary I find Ms Lauaki and Ms Vashisti were supportive of Ms Leaupepe's expressed intention to seek alternative employment, assisting her by editing her CV as requested.

*Reasonably foreseeable?*

[116] I find that it was reasonably foreseeable that Ms Leaupepe would resign given her frequently expressed intention to find a job with day-time hours. However I have found no breach of duty by THS that caused the resignation.

[117] I determine that THS did not follow a course of conduct with the intention of coercing Ms Leaupepe to resign.

[118] I determine that Ms Leaupepe was not constructively dismissed by THS,

**Was Ms Leaupepe unjustifiably disadvantaged by THS?**

[119] To qualify as a disadvantage grievance, Ms Leaupepe must establish that there was some unjustifiable action by THS which affected her terms and conditions of employment to her disadvantage.

[120] In the email raising a personal grievance dated 15 January 2024 Ms Leaupepe refers to the following issues: (i) repeated issues with payroll"; (ii) being told not to lodge complaints about an overnight doctor; and (iii) being told to resign by Ms Lauaki.

[121] In the Statement of Problem dated 29 March 2024 Ms Leaupepe sets out that she was disadvantaged in her employment by:

- i. The fact that English is her second language and this lead to: “a clear lack of access to aspects of natural justice”;
- ii. Unresolved pay issues;
- iii. Harassment and ongoing bullying by her supervisors for making legitimate concerns; and
- iv. Being advised to resign.

[122] THS submits that there is no evidence that Ms Leaupepe raised any of these personal grievances with it within the statutory 90 day time limit in s 114 of the Act. It does not consent to these issues being raise outside of the statutory time limit, and submits that the Authority has no jurisdiction to consider them.

*Were the unjustifiable disadvantage claims raised outside of the statutory 90 day time limit?*

[123] The disadvantage claims raised in Ms Leaupepe’s email dated 15 January 2024 were made on day 89, a day within the statutory time limit for raising a personal grievance. However any issues arising prior to 18 October 2023 would be outside of the statutory time limit.

[124] I have found that there is no evidence of the payroll issue being raised as an ongoing issue after April 2023, nor is there any evidence of a complaint about a doctor being raised after April 2023, and I note that there is no evidence that it was raised as a complaint at that time.

[125] I have found no evidence supporting the claim that Ms Leaupepe worked under duress or that her resignation was forced by such duress on the part of Ms Lauaki or Ms Vashisti.

[126] There is no evidence provided that Ms Leaupepe was disadvantaged by the use of English in her employment. I observe that English appears to have been Ms Leaupepe’s preferred language as evidenced by the text messages with Ms Lauaki, despite Ms Lauaki also being Samoan. The meetings held with Ms Leaupepe are with Ms Lauaki and Ms Vashisti for whom English is also a second language.

[127] There is no evidence to support a disadvantage grievance due to the use of English in her employment having been raised with THS prior to the Statement of Problem.

*Should leave be granted to raise the disadvantage grievances outside of the statutory time limit?*

[128] THS does not consent to the personal grievances being raised out of time. There has been no application to raise the issues outside of the statutory time limit.

[129] As set out in s 114(3) of the Act, where an employer does not consent to a personal grievance being raised after the 90-day statutory time frame an employee may apply to the Authority for leave to raise it outside of that frame pursuant to s 114(3) and (4) of the Act. The relevant subsections of s 114 state;

- (3) Where an employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
- (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –

[130] There has been no application made to the Authority for leave to raise the unjustifiable disadvantage personal grievances out of time.

[131] I determine that in those circumstances the Authority is unable to grant leave to Ms Leaupepe to raise the unjustifiable disadvantage personal grievance claims out of time.

### **Costs**

[132] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[133] If they are not able to do so and an Authority determination on costs is needed THS may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, Ms Leaupepe would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[134] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[135] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

Eleanor Robinson  
Member of the Employment Relations Authority

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<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].