IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 435
3243479

	BETWEEN	OLIVIA VAN EEKELEN Applicant
	AND	MAXWELL JACKSON LIMITED Respondent
Member of Authority:	Antoinette Baker	
Representatives:	Ramses Hunt, counsel for the Applicant Robert Thompson, and Graeme Nelson, advocates for the Respondent	
Investigation Meeting:	3 April 2024 at Christchurch	
Submissions Received:	On the day from the Applicant On the day from the Respondent	
Final information received:	30 April 2024	
Date of Determination:	19 July 2024	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms van Eekelen was variously employed in front of house roles by the respondent (MJ) in some of its five 'Lonestar' restaurants. The two directors of MJ are Mr Trevor Casey and Ms Anna McNeill.

[2] Ms van Eekelen was most recently employed from June 2022 to April 2023 by MJ as restaurant manager (RM) in (or in preparation for the opening of) a new 'Lonestar' restaurant that opened a couple of months after her employment started. She resigned from the RM role on 6 March 2023.

[3] From commencement in the RM role Ms van Eekelen worked hours across at least five days per week for about five months. In January 2022 she wanted to work the same approximate weekly hours (40 to 45) but across four days per week continuing a prior agreement that she could alternate with the '2IC' and have a weekend day off each week. She first proposed this verbally. Ms van Eekelen wanted the change to her days of work for about six months to get her through an expected busy full time third year of tertiary study. Within the proposed six months Ms van Eekelen said she would be available for a fifth day in the semester breaks which would have been a total of 8 weeks of time across those six months.

[4] MJ says Ms van Eekelen's RM role required presence in the restaurant across five days and initially proposed a 'trial' of four days but with Ms van Eekelen having to work every weekend day. MJ expressed concern as to whether the arrangement would work given the RM role required five days. It did not accept that the same hours (40-45 hours) could be worked across four days due to the risk of 'burn out'. Its 'proposal' was conditional on reverting back to the five days if it did not work out.

[5] Ms van Eekelen rejected MJ's proposal and reiterated the change she wanted. She relied on what she believed was her ability to change her availability by just informing MJ in writing of her availability. Ms van Eekelen considered her individual employment agreement (IEA) allowed for this and that MJ was contractually bound to accommodate her proposed change without negotiation.

[6] MJ then responded that five days was a requirement of the role and did not repeat the four day proposal that Ms van Eekelen had rejected. It did not agree with Ms van Eekelen's interpretation of her IEA that the change was not a variation that required negotiation. MJ proposed that a renegotiation of Ms van Eekelen's employment may be necessary if she could not manage to do the role across five days.

[7] Ms van Eekelen says that the way the directors dealt with her when she required a change to four days per week, including the behaviour towards her in a meeting on the day of her resignation all led her to 'have no option but to resign.' This includes saying that the proposal to accommodate the four days was not genuine, and then that MJ unreasonably suggested she get employment elsewhere or negotiate what Ms van Eekelen took to be a demotion, a different role and renumeration. She claims she was being pressured to accept MJ's position that the role required five days which she also

says it did not. Overall, however Ms van Eekelen remains of the view that MJ breached the IEA by not accepting her advice of availability for the change that she wanted.

[8] Ms van Eekelen claims she was constructively unjustifiably dismissed and disadvantaged in her employment based on the above actions of the employer. She claims compensation and lost earnings for the grievances, a penalty to be partly paid to her for breach of her IEA (breach of the 'advice of availability provision'), and costs.

[9] MJ denies the claims. It says Ms van Eekelen did not have the contractual entitlement to unilaterally change her days of the week as she proposed. While the IEA contained an 'advice of availability' process, MJ says this did not apply to the RM role held by Ms van Eekelen and it was appropriate to deal with the request to work across four days as something to be negotiated as a variation. It says that it tried to negotiate with Ms van Eekelen about her proposal to work across four days and it refutes that any actions of the directors unjustifiably disadvantaged her or led to her resignation.

The Authority's investigation

[10] Parties lodged and exchanged written briefs of evidence with attached documents. I held an investigation meeting. I heard sworn and affirmed evidence from Ms Eekelen, her father Mr Neill, and a former colleague, Mr Singh; for MJ, from the two directors, Mr Casey and Ms McNeill. Parties were given the opportunity to ask questions of the other and I heard the representatives' oral submissions based on written submissions provided on the day. After the investigation meeting I requested further information about the final pay due to my lack of clarity about whether the notice period had been paid. This information was provided without disagreement as to its accuracy. I further asked and received from Ms van Eekelen, comment on the 'Preferred Availability Form' that MJ produced at the investigation meeting (at my request) and gave MJ the opportunity to respond which it did.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions. I have set out my findings and come to conclusions on issues to make any necessary orders to dispose of this matter.

Issues

[12] The issues[1] for me to now determine are:

a. What did the parties agree to in relation to Schedule A clause 5 –'Hours of Work' of the Applicant's individual employment agreement (considering this against contractual interpretation principles)?
b. Depending on the above did the Respondent breach the IEA and if so, is a penalty to be awarded?
c. Was the Applicant constructively dismissed based on a breach of good faith relating to the way her employer allegedly dealt with her requests to be available for work culminating in the conduct of the directors at the 6 March 2023 meeting?
d. Was the Applicant disadvantaged in her employment due to the actions of the employer in relation to the above?
e. Depending on the outcome of the grievance(s) above, is any compensation to be awarded or lost wages due under ss123(1)(c)(ii) and 123(1)(b) respectively of the Act?
f. Are there any employee contributory factors under s 24 of the Act that mean remedies for grievance(s) should be reduced?
g. What, if any costs are to be awarded from one party to the other including the filing fee for the Applicant?

What did the parties agree to in relation to Schedule A clause 5 -"Hours of Work" of the Applicant's individual employment agreement (considering this against contractual interpretation principles)?

[13] The Supreme Court has set out the objective approach to be used in contractual interpretation which involves as the 'ultimate objective' the establishment of what the parties intended their words to bear. Background material can be helpful as a 'cross check', even if the words used appear to be unambiguous.[2]

[14] If a contract is silent about a certain term or condition, then to imply the term later includes asking amongst other things whether a term is so obvious that the parties

[1] Directions of the Authority dated 18 October 2023 at paragraph [3] included these issues.
[2] *Vector Gas v Bay of Plenty Energy Limited* [2010] 2 NZLR 444 (SC) at [4] and [19].

might be heard to say, "we didn't bother to say that; it is too clear." [3] An implied term is not a term that is added to a contract, but the implying is simply to recognise it should be there as a matter of construction.[4]

What does the IEA say?

[15] Ms van Eekelen relies on the following clauses in her IEA and in particular that which I emphasise below in italics to say that she could simply put forward her availability and her employer needed to change to this:

- Clause 5.1 The Employee's normal hours of work are set out in Schedule A. …
- **SCHEDULE A** … **5. HOURS OF WORK**
  The hours of work for this position will be as required to complete all duties and responsibilities. The Employer will endeavour to provide you with at least **30 hours per week**. Your work hours will fall within the Employer's operating hours which are as follows:
  Monday to Friday 7am to 2am (all Back of House staff only); 7am – 2am (a; front of House staff only);
- *Your rostered hours will be governed by your Advice of Availability you have provided at the commencement of your employment. If you wish to vary your Advice of Availability you must do so in writing to the Employer.*
- The hours of work for each week will be allocated by way of roster at least 7 days in advance. You are required to be available to work your rostered shifts(s). If you are offered shifts over and above your rostered shifts, you may accept or decline these shifts.

[16] As I understand the submission for Ms van Eekelen her view is that the above 'Advice of Availability' clearly meant that Ms van Eekelen had to provide what change she wanted in writing to her 'hours' to her employer and that nothing more impeded this being accepted. For MJ it is submitted that the reference to 'hours of work' precludes days but I find nothing really turns on this. MJ further submits that providing 'Advice of Availability' in Ms Eekelen's IEA (set out above in my emphasised italics)

[3] *Relgate v Union Manufacturing Co (Ramsbottom)* (1918)1 KB 592 (PC), Scrutton LJ at 605.
[4] *Dysart Timbers Limited v Nielsen* [2009] NZSC 43, Tipping and Wilson JJ.

does not apply to the RM role. When asked by me why the wording was included if it did not apply to the RM role, Ms McNeill explained it was there because the IEA was a 'Lonestar' template.

[17] I find that the plain and ordinary words (in italics above) in Clause 5 can be read as meaning that if the employee wants to 'vary' the advice they previously gave to their availability for hours of work at the commencement of their employment they must do so in writing to the employer. Beyond this there is nothing specified about what the employer will do with the advice, but the word 'vary' in a plain and ordinary interpretation means something has to have come before. It could also mean that what was being sought was a variation to the previously agreed hours of work and impliedly this means a negotiation.

[18] Based on the plain reading of the words I find it is not clear that the words obviously mean that the advice once proffered in writing by the employee must simply be accepted by the employer. I will therefore consider context below.

Advice of Availability Form

[19] The 'Advice of Availability' form that I find Clause 5 likely refers to was provided by MJ at the investigation meeting when I asked for it. Ms van Eekelen was given time to comment after the investigation meeting. The form includes:

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
7am-4.30pm							
4.30pm-11pm							

(Put a tick in each box that you are available to work EVERY week)

****NOTE:** Must be available for at least 2 weekend days/Nights
****NOTE:** Shift availability is not a guaranteed day off – it is a preference. We try our best but have to be able to still fill a roster. You must discuss this form with your manager when handing it in. Must be an acceptable reason for U/A [I read: 'unavailability'] i.e. not everyone can be U/A to work Saturdays.

On what date will your availability above change again due to commitments etc?_____
Upcoming leave dates discussed and agreed to with the Employer:_____

[20] At the bottom of the above form is the same table as the above but with blue stars against shifts that fall on Friday, Saturday, and Sunday. That chart is prefaced with 'Employer required availability discussed position offered.' I take this to be a record of the 'Advice of Availability' that an employee under Schedule A, Clause 5 is expected to have 'provided at the commencement of your employment.'

[21] Ms van Eekelen replied to my questions about the form by stating that she recognised this as the form that applied ‘throughout the years’ and the one she ‘used for staff when I was a restaurant manager.’ In her oral evidence she referred to staff using such a form when they wanted to change their hours. Ms van Eekelen further commented that she could not ‘say with confidence’ that the exact wording in the paragraph that includes ‘shift availability is not a guaranteed day off – it is a preference’ was there. She does ‘not recall reading that wording in much detail’ noting that she does ‘recall that there was some text written down.’ Ms van Eekelen further comments that she did not recall seeing the bottom section that is headed up, ‘Employer required availability discussed before the position offered’ followed by another weekly table to fill in.

[22] Even considering the possibility that the inclusion of the bottom part of the form may have postdated Ms van Eekelen’s employment, the form does not seem to support that any change to the initial ‘advice of availability’ is a foregone conclusion as is submitted for Ms van Eekelen. The wording after the ** refers to this not being guaranteed. Even if I consider Ms van Eekelen’s comment that she could not recall the exact wording next to **, the wording appears to me consistent with business sense in running a busy restaurant operation where it is unlikely to be always reasonable to accommodate all employee requests for changed hours.

Ms van Eekelen’s past employment with MJ

[23] Ms van Eekelen says she was able to just change hours in the past without problems. It is further submitted for her that ‘during bargaining’ MJ did not tell Ms van Eekelen that the RM role would be any different to that past situation with her roster flexibility. I do not accept that Ms van Eekelen could have reasonably expected that the RM role would have the same conditions or terms of employment unless MJ advised her otherwise. Ms van Eekelen accepted the RM role some years after last working for MJ at a different ‘Lonestar’ restaurant. I further do not accept, for the same reasons the submission for Ms van Eekelen that ‘a reasonable and properly informed third-party reader of Clause 5 and Schedule A’ understanding this past context would not interpret the parties would have ‘intended a level of consistency’ with Ms van Eekelen’s past employment practices.

Ms van Eekelen's practice as RM in relation to the 'Advice of Availability' form

[24] It is submitted for Ms van Eekelen that I should consider her evidence that she did not refer to the directors of MJ when her staff wanted to amend their availability to their hours. She says she just accepted the change they proposed to their advice of availability when managing the rosters for the restaurant. However, those staff reported to Ms van Eekelen and not the directors. Ms van Eekelen was responsible for the rosters. None of those staff were the RM. I do not find this assists me as context.

Prior negotiations regarding a change to working alternate weekend days

[25] It is submitted for MJ that Ms van Eekelen negotiated with the directors a change to working every weekend prior to approaching the directors about working four days rather than five. Her oral evidence is that she and the '2IC' 'sat down with' the directors to discuss this. The outcome was that the directors agreed to Ms van Eekelen's '2IC' alternating weekend shifts so that Ms van Eekelen would have one weekend day off each fortnight. This was so she could spend time with her husband amidst what she explained was her full-time study commitments. I do not understand that this change came about with the initiation of Ms van Eekelen filling in an Advice of Availability and it being automatically accepted by MJ. I accept the submission for MJ that this supports a form of negotiation as would be expected for variation of a contract for the hours or days worked in the RM role.

Did the 'Advice of Availability' apply to the RM role?

[26] It is not disputed that Ms van Eekelen's position was RM. Schedule A of the IEA refers to '3 KEY DUTIES: As per Job Description attached'[5]. I asked for the Job description because this was not provided in the evidence of either party. While Ms van Eekelen told me she did not recall the Job Description she also acknowledged that if she was sent it with the IEA she is unlikely to have read it. MJ then provided an email dated 17 June 2022, from Ms McNeill to Ms van Eekelen which attached:

(a) the offer of employment
(b) job description for restaurant manager
(c) the IEA.

[5] These words: 'As per Job Description' are highlighted in red font.

[27] The above email invited questions and said that once the paperwork was signed and returned the rest of the paperwork would be sent. I find it likely Ms van Eekelen did receive the attached Job Description.

[28] The Job Description I have been provided with is headed 'Lone Star New Zealand' in logo form and 'Job Description Restaurant Manager'. It then includes the following:

> **Position Title:** Lone Star Restaurant Manager …
> **Hours:** Full-time working all key shifts in café with extra Administration time allocated …
> **Reports to:** Managing Director/s, Owner/s
> **Supervises:** All Lone Star Staff.
> **Purpose of Job**
>
> 1. To maintain smooth, efficient and cost effective running of the restaurant in all areas, including; service, staff rosters, training and induction, cleaning and strategic planning.
> 2. To ensure that customers are given a flawless dining experience and are satisfied at all times.
> 3. To read and remain familiar with the Operations Manual and to follow, and ensure staff follow, all operations as specified in the Operations Manual.
>
> …

[29] The Job Description includes 'Job Roles and Tasks Involved' which include the following headings:

> Leading Delegating and Managing Staff; Performing Floor Work; Rosters Organisation and Administration; Stock and Ordering; Selecting, Inducting and Training Staff; Strategic Planning and Financial Responsibility; Customer Service; Presentation and Personal Hygiene; Self Development; Self Responsibility.

[30] The Job Description ends with a list of 'key competencies' and 'skills' and a final statement about the 'Lone Star Values'.

[31] The Job Description further includes 'Hours: Full-time working all key shifts in café with extra Administration time allocated.' There is no reference in the IEA to specifically working 5 days per week but according to what both parties explained to

me, those key shifts were at least Friday, Saturday and Sunday nights. Mr Casey explained it could be Thursday night as well which I find plausible.

[32] The RM role is clearly a senior role according to the Job Description. It requires performance on the restaurant floor and 'Full-Time working all key Shifts'. Ms van Eekelen's response to the 19 January 2023 letter includes that she can 'understand' that MJ wanted the 'RM to be on the floor for five nights'. While there is no definition in the IEA as to what 'full time' means, and while it is disputed whether this was specified in the first interview for the job, it appears the parties agree there was a discussion about the full time commitment required. Ms van Eekelen in her oral evidence explained she was committed at that point and wanted to work 40-45 hours. Ms McNeill says that this discussion included her saying in the interview that the RM role was 'full on and required a commitment'. The evidence of the directors is that the role required the RM to be the 'face of Lonestar' at the restaurant which is not inconsistent with the Job Description. I find it likely that Ms van Eekelen knew this at the time she was agreeing to do the RM role. It is also not inconsistent with Ms van Eekelen actually working five days per week since she started the role subject to some leave taken. I find within this that Ms van Eekelen by performance and the nature of the RM role had committed to working five days per week.

[33] Standing back from the above and considering both the IEA words and the context I do not find that the parties intended the 'Advice of Availability' was to apply to Ms van Eekelen's role as RM and if it did, I find it unlikely that what was meant was that it was simply a notification of change to the employer without negotiation.

Depending on the above did the Respondent breach the IEA and if so, is a penalty to be awarded?

[34] Given my finding above, I do not find that MJ breached Ms van Eekelen's IEA by not applying the 'Advice of Availability' referred to in clause 5, Schedule A of the IEA by accepting her proposal to change to four days without question. I also find that five days working was also likely part of what the parties agreed to if not in writing in the IEA specifically, by way of a reading of the RM role. It should be evident that a penalty for breach of the IEA will not be considered.

Was Ms van Eekelen constructively dismissed based on a breach of good faith relating to the way her employer allegedly dealt with her requests to be available for work and the conduct at the 6 March 2023 meeting?

[35] Where an employee gives the appearance of resigning, but the resignation was in fact the result of some adverse action on by the employer's initiative (not a third party's initiative) a court may treat the resignation as a constructive dismissal because it is considered a termination of the employment at the initiative of the employer.

[36] The Court of Appeal[6] has listed three non-exhaustive situations where constructive dismissal might occur:

- Where the employee is given a choice of resignation or dismissal
- Where the employer has followed a course of conduct with the deliberate and dominant purpose or coercing an employee to resign
- Where a breach of duty by the employer leads a worker to resign

[37] The Court of Appeal[7] has held that the correct approach in determining a constructive dismissal where there is an apparent resignation is two steps. Firstly, to determine whether the resignation was caused by the breach of duty on the part of the employer considering all the circumstances of the resignation. Secondly, to ask whether the breach of duty is of sufficient seriousness that a substantial risk of resignation was *reasonably foreseeable.*

[38] The Employment Court[8] has considered the situation where an employer may be saying it does not intend to terminate the relationship but has breached a fundamental aspect of it:

> Because of the nature of a constructive dismissal, it may be that the employer does not intend the employment relationship to end and may, as here, so advise the employee. But if the employer in doing so acts in continued fundamental breach of the contract or evinces an intention not to be bound by the fundamental aspects of it, that may nevertheless give the employee grounds to treat the position as a

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[6] Cooke J in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited* (1985) 2 NZLR372 (CA) at 374 following an approach previously taken in the former Arbitration Court in NZ.
[7] *Auckland Electric Power Board v Auckland Provincial District Local Authority Officers IUOW Inc* (1994) 2 NZLR 415 (CA) at 419 later endorsed in *Business Distributors Ltd v Patel* (2001) I ERNZ 124 (CA).
[8] *Hwang v Boyne Co Ltd (t/a Goodday Newspaper)* (2004) 2 ERNZ 412 (EmpC) at (23)

> constructive dismissal even though it may appear to be the antithesis of an actual dismissal.

[39] It is submitted for Ms van Eekelen that there were events that led up to the meeting on 6 March 2023 (the day she resigned) that meant what occurred at the meeting was the 'last straw'. It is submitted that it was this cumulation that was a breach of serious good faith that was so serious it should have been foreseeable to MJ that Ms van Eekelen would resign as a result. I will consider these events now.

18 January 2023

[40] It is common ground that Ms van Eekelen first raised her desire to work across four days on 18 January 2023 although the recall of the parties is vague as to how she initiated that discussion. I find it likely it was verbal and discussed briefly and informally with Mr Casey and Ms McNeill. It is Ms van Eekelen's evidence that the directors were 'dismissive' of her request with Mr Casey saying that the RM role was to be worked across 'five days' in her role. She says this conversation made her doubt what she had concluded would be straightforward given her own reading of her IEA and past experience about providing a change of availability. In other words, I take Ms van Eekelen to be saying that she thought it would be straight forward to make the change.

[41] Ms McNeill says that the response to the request on 18 January 2023 was not 'dismissive' and that this is evidenced by her 19 January 2023 letter to Ms van Eekelen. The letter refers to the prior verbal discussion on 18 January only in that it records the directors said they would go away and consider the request and reply. I am satisfied MJ was responding to the same proposal put in writing as a reiteration by Ms van Eekelen on 30 January 2023.

[42] The 19 January letter sets out MJ's concerns about the request given that the RM role requires five days per week, a full time commitment and that condensing the same hours (40-45 hour per week) worked (as was requested) to four days would be a pressured workload. It recognised it had previously gone through a pay review with Ms van Eekelen including recognition of the seniority of the RM role and that MJ had previously recognised work life balance for Ms van Eekelen by agreeing to her alternating weekend days of work with the '2IC' in the restaurant. MJ then proposed a trial for six months for four days (the time frame requested), but not on the same hours

and working across every weekend (cutting across, as was later challenged by Ms van Eekelen, her alternate one weekend day off each week). That proposal was conditional on it all working and that there would be a reversion back to five days if it did not. The letter left open for Ms van Eekelen to consider the proposal and discuss with the directors further, emphasising it was a proposal only.

[43] The 19 January 2023 letter is consistent with Ms McNeill's evidence that the response to Ms van Eekelen was not 'dismissive'. I find the tone in the letter to be professional and thoughtful. It leaves things open for discussion. It also sets out a good explanation of MJ's concerns linked to its business and the role they had employed Ms van Eekelen do to and what she was being paid for. I am not satisfied there were actions here outside of what a fair and reasonable employer could have done in the circumstances.

[44] Ms van Eekelen used, in her evidence the words that Ms McNeill 'weaponised' MJ's response (the 19 January letter) because the directors knew she needed weekend time off to be with her husband who travelled during the week for work, and in her evidence in reply, that she attended church on Sundays.[9] Ms van Eekelen did not resile from this strong view about the directors personalising their response. When I asked her to explain the language used of 'weaponising' I conclude from this that Ms van Eekelen took MJ's proposal personally and as a personal attack on her. I found Ms McNeill's response to me about this reasonable and straightforward. I find it plausible that Ms McNeill did not have this personalised intention when sending the 19 January 2023 letter proposing a trial to four days back to Ms van Eekelen. I accept the letter was written after her discussions with Mr Casey. I do not accept the letter in proposing work every weekend to accommodate the four day trial to have the type of intentional malice that Ms van Eekelen seems to have believed that it did. She also had the opportunity to further discuss, and I would have thought that if this was the sticking point for her she had the opportunity here to consider entering into that discussion.

[45] Considering the above I find that while after the 19 January 2023 letter there was a positioning of the parties in terms of a dispute about what I have already concluded above, I find a likelihood that Ms van Eekelen had convinced herself she was right about not needing to negotiate a variation to her IEA and that there should

[9] Witness Statement, Olivia van Eekelen dated 11 March 2024 at 1.9 to 1.13.

have been no reason why MJ should not have simply accepted the change she wanted. Her response to the 19 January 2023 letter supports this. This is different to saying that the directors behaved towards her poorly.

[46] I note further that it was clarified to me at the investigation meeting that this was not a claim following the statutory procedure under the Act for flexible working.[10] However, had it been, the tenor of the 19 January 2023 response would not have been out of step as an initial response.

Period from 19 January to 6 March 2023

[47] In *Harrod v DMG World Media (NZ) Ltd* [2002] 2 ERNZ 410 at [41] the Employment Court referred to a constructive dismissal being one that is 'deemed' to be a termination at the initiative of the employer and that this could include the employer creating an atmosphere in which the employee could have been unlikely to have continued in the employment for very long. While acknowledging this could be subtle behaviour, the Court reminded that it still needed to be proven. I note that proof in this jurisdiction is based on likelihood.

[48] I am not satisfied that Mr Casey or Ms McNeill created a 'hostile' atmosphere in the period before the 6 March 2023 meeting. While strong words were used by Ms van Eekelen in her evidence to describe how she felt about the way she felt the employers were treating her at this time, when pressed by me she explained that the behaviour during this time had become 'cold' and 'professional'. She describes Ms McNeill no longer chatting with her about things she had always felt were part of her relationship with her. She gave me no real specifics other than her perception that the directors stopped talking when she entered the area they were in. Alongside, at this time, the dispute about availability had arisen and Ms van Eekelen had engaged legal representation, as had MJ. It is not surprising that the parties may humanly then put their relationship on a more formal level. I accept the submission for MJ that this falls short of saying the directors created an atmosphere that was 'hostile' or that MJ had shut down further discussion. If anything, Ms van Eekelen's 30 January 2023 letter shows she was strongly of the view that her hours and days should simply be changed and sets out the change in specific bullet points that she required. I note further that

[10] Employment Relations Act 2000, Part 6AA.

the written communications to Ms van Eekelen from MJ during this time were generally detailed, professional, and included proposals with options to discuss.

[49] I accept that the tone in Mr Casey's text after Ms van Eekelen went on leave, after having put herself on the roster for four days, could reasonably be regarded as blunt. However, that was in the context of Ms van Eekelen instructing her representative to communicate to MJ's representative that she would do this subject to MJ being unhappy and rectifying it. That email included that Ms van Eekelen was still unclear about the position whether she could be rostered for four days instead of five. I find it ought to have been clear to Ms van Eekelen at the time of going on leave that the matter of working four or five days was not resolved. It could not therefore have been a great surprise to Ms van Eekelen that she received a response from her employer that it did not accept she could just revert to four days without negotiating a resolution, something that had not at that time yet occurred. Perhaps a better tone could have been used by Mr Casey, but I do not accept this text convinces me that it was part of a 'hostile' atmosphere prior to the 6 Match 2024 meeting.

[50] Accordingly, I do not accept that before 6 March 2023 actions were somehow cumulating that would support the 'last straw' submission made for Ms van Eekelen to support her constructive dismissal claim based on her resignation after the 6 March 2023 meeting. I accept the submission for MJ that this means that this is not in the category of a course of action designed to get an employee to resign[11]. That requires a level of intent. I do not find Ms Eekelen has shown me this occurred during this period after she raised the request to work four days.

6 March 2023 meeting

[51] The parties recall the 6 March 2023 meeting differently. The reason for the meeting is described by both as including a managerial catch up which was initially brief and cordial. Ms van Eekelen had just returned from leave. To the extent that Ms van Eekelen may say she did not know the four or five day issue would be discussed I find inconsistent with her resignation letter which starts by saying she had looked forward to the meeting to discuss the issue. I find that the parties both knew full well

[11] The second limb referred to above at [36] when referring to Cooke J in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited* (1985) 2 NZLR372 (CA) at 374 following an approach previously taken in the former Arbitration Court in NZ.

by then that there was a live dispute. The directors likely knew that Ms van Eekelen's representative had proposed mediation.

[52] Ms van Eekelen's evidence is that in the meeting on 6 March 2023, after the initial 'catch up' from Ms McNeill, Mr Casey started to talk about the four to five days issue and that he became aggressive, yelled and pointed his finger at her. MJ submits that this evidence is not supported and was only raised later in Ms van Eekelen's evidence. Mr Casey denies 'pointing'. I do not accept the submission that this part of what Ms van Eekelen says about Mr Casey's gestures discredits her account which she recorded soon after the meeting occurred.

[53] Ms van Eekelen's record of the meeting was that Ms Casey spoke to her in an aggressive way that left her distressed. She says Mr Casey 'yelled' at her and that he said he was not happy about her lawyer's letter that morning and he would not mediate as was proposed in that letter. Mr Casey refutes that he yelled but accepts that he 'raised his voice'. He denies this was 'aggressive' behaviour as does Ms McNeill. Both directors say they were 'frustrated' that matters were not getting resolved which is why they wanted to meet with Ms van Eekelen. They were annoyed she had changed the roster to four days before she went on leave. They were annoyed that they tried to meet her the day before and Ms van Eekelen had changed her shift. Mr Casey's later explanation to Ms van Eekelen about her claims regarding his behaviour in this meeting (included in her resignation letter that night) were that he was just trying to get his point across. That 'point' I take to be that Ms van Eekelen needed to work five days in the RM role or find another job or look at a different role in the restaurant. As to the latter, while Ms van Eekelen concedes the word 'demotion' was not mentioned, this would have been a fair assumption of the effect of negotiating a different position because hers was the most senior role.

[54] Ms van Eekelen says that Ms McNeill tried to stop Mr Casey 'several times' from continuing to talk saying 'we don't have to talk about this now.' Ms McNeill's evidence is that she only said this once when Ms van Eekelen said she wanted her lawyer to deal with things and that this brought an end to the meeting. I find Ms van Eekelen's account likely more accurate because it is based on notes I accept she made soon after.

[55] Ms van Eekelen's later evidence is that she relied on her notes and that this is reflected in her evidence about what was said and how Mr Casey behaved in the meeting. MJ submits that Ms van Eekelen may have been influenced in making these notes because she had spoken to her legal advisor before making the notes. I find little to convince me in this submission that this dints the weight of notes take soon after an event occurred to help me consider what may have happened as opposed to a differing version being recalled sometime later.

[56] While Ms McNeill says she noticed nothing of Ms van Eekelen's distress after the meeting, I accept this was after, as Ms van Eekelen explains, she pulled herself together for the purpose of leaving the premises, went and arranged her sister to cover her shift, and then went to Ms McNeill and said briefly that she would be leaving for the day. This is consistent with Ms McNeill's evidence in that her response to Ms van Eekelen was to say something like 'ok'. The interaction was brief. Ms McNeill did nothing to confirm if Ms van Eekelen was alright or find out why she was leaving suddenly. Nor did anyone from MJ contact Ms van Eekelen until after she then resigned later that evening. Ms McNeill's explanation to me for this lack of response at the time was either she did not know Ms van Eekelen was upset or because things were busy then with setting up for the lunch service. She had no plausible reason for why contact was not made later in the day before Ms van Eekelen resigned that night.

[57] Standing back from the above, I find a likelihood that Mr Casey did behave aggressively towards Ms van Eekelen in the 6 March 2023 meeting. This is supported by Ms van Eekelen's reasonably contemporaneous notes and further supported by two straightforward witnesses who witnessed the level of Ms van Eekelen's distress after the event. Mr Singh, a kitchen colleague who was on the premises, and Mr Neill, Ms van Eekelen's father, both said it was unusual to see Ms van Eekelen so upset. Mr Neill said it was very unusual for Ms van Eekelen to call him away from his work and he was upset himself about her level of distress.

[58] It is submitted for MJ that the cause of this distress was because Ms van Eekelen was being told she could not get what she wanted in relation to her days of work. While that may have been part of her distress I find it was likely a minor part. That is because of the context here. There was a live dispute and Mr Casey confirms he simply wanted to get his point across with what I find likely had the aim of trying to convince Ms van Eekelen to simply accept that point or effectively not do the RM role.

[59] It is submitted for MJ that after the resignation, MJ continued to offer to negotiate including agreeing to go to mediation. The response from the directors (Mr Casey) to Ms van Eekelen's resignation included a proposal that she work across five days, and she needed to respond to this within three days. The letter included that the directors were approachable to discuss. I find given the circumstances of the 6 March meeting and that the letter simply reiterated a proposal to work five days (albeit double shifts included and no clarity about whether it included weekend days) this did not in my view fix the damage caused to Ms van Eekelen's loss of trust at the 6 March 2023 meeting that a further discussion would be more constructive given the way Mr Casey behaved.

[60] I find that the behaviour of the directors for MJ in the 6 March 2023 meeting,particularly through Mr Casey, understandingly resulted in what Ms van Eekelen described in her resignation email as:

> I had hoped that we could have found a more constructive and respectful way to discuss my concerns about my hours. Instead, I was shaken and upset by how Trevor [Mr Casey] started raising his voice at me throughout the meeting.

Accordingly, I find a breach of good faith occurred at the 6 March 2023 in that the conduct was far from MJ's obligation to communicate actively and constructively in establishing and maintaining a productive relationship in which the parties are, among other things, responsive and communicative.[12]

[61] For Ms van Eekelen it is submitted that the combination of a number of things meant that there was a serious breach of good faith. Those things (excluding those that relate to the breach of the IEA that I have already not determined in Ms van Eekelen's favour) include the following that I will now explain why I do not find they constituted breaches of good faith or collectively made MJ's breach of good faith more serious as is submitted for Ms van Eekelen:

a. That MJ misled Ms van Eekelen by stating that she could not work her 40-45 hours per week across four day because of 'burn' out. This relates to the response to her initial request as contained in her letter dated 19 January. I have already found that letter was reasonable. The submission rests on Ms van Eekelen saying that other staff were made to work long

[12] Employment Relations Act 2000, s4(1A)

hours. I have no evidence to support this, and no other staff were witnesses. In any event the 19 January letter was a proposal, and this aspect was open for Ms van Eekelen to discuss at the time.

b. That MJ created a hostile environment unsafe for Ms van Eekelen to work in. I have found above based on what is before me that I do not find there was likely a 'hostile environment' before the 6 March 2023 meeting. It is submitted that the behaviour of the directors before the 6 March 2023 meeting was 'bullying' and 'gaslighting'. I have no plausible evidence of this.

Was the breach of good faith in the 6 March meeting so serious that it caused Ms van Eekelen to resign and was this foreseeable to MJ?

[62] I find that after behaving towards Ms van Eekelen in the 6 March 2023 meeting in that way I find likely it ought to have been clear to Mr Casey and Ms McNeill that Ms van Eekelen would have been upset. I have already referred above to no one from MJ questioning what she suddenly left the workplace and that Ms McNeill's explanation was not plausible as to why this did not happen.

[63] While Mr Casey's response to the resignation referred to being 'sorry if I upset you', he then explained that his intention was just to 'get his point across' for what was required for the RM position 'as we have already outlined.' Ms van Eekelen had explained in her resignation letter that she felt berated and made to feel she had done something wrong. While Mr Casey's letter responding to the resignation was to say MJ was 'shocked' by the resignation I find in the circumstances that it is difficult to see how the directors may be 'shocked'.

Was the resignation caused by the serious breach of good faith?

[64] It is submitted for MJ that the evidence does not support that the decision made by Ms van Eekelen was caused by the events of the 6 March 2023 meeting alone because Ms van Eekelen's evidence changed from initially saying she had not applied for another job until after she resigned, to then amending this to say that she must have applied for jobs before this because of communications by then obtained between what became her new employer after she left MJ's employment. When questioned, Ms van

Eekelen's oral evidence included that it is possible she applied for another job before she went on leave.

[65] Despite my findings above about a serious breach of good faith I need to now consider whether in fact it is likely that even though the events of the 6 March 2023 meeting were distressing for her, Ms van Eekelen's mind was already made up about leaving.

[66] The day after (7 March 2023) the night Ms van Eekelen resigned and had a response from MJ, she provided to MJ a medical certificate stating she was unfit for work for 14 days. This accorded then with the notice period she had said she would work out in her resignation letter.

[67] On 7 March 2023 Ms van Eekelen went to an interview for a new position and this interview had already been arranged prior to the 6 March 2023. Ms van Eekelen explains this must have been because she was searching for another job because she was unhappy with the way things were going in the workplace. I have not found here that the events leading up to the 6 March 2023 meeting as was claimed, were all part of the same serious breach of good faith. Given this I accept the submission for MJ that Ms van Eekelen had in fact made her decision to leave before the distressing meeting on 6 March 2023. I find this causation point means that I do not find that her resignation can be caused by the events at that meeting. It is submitted for MJ that the 6 March 2023 meeting was a 'one off event' rather than the chain of events that is submitted occurred for Ms van Eekelen. Based on what is before me, I agree. I accept this means that the grievance for constructive dismissal does not succeed.

Was the Applicant disadvantaged in her employment due to the actions of the employer in relation to the above?

[68] Section 103A of the Act includes as a personal grievance that an employee can bring a claim '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 was (during the employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; …'

[69] The duty of good faith exists as something both parties to the employment relationship are obliged to follow. I do not intend to repeat my findings above about the

6 March 2023 meeting but find that the serious breach of good faith I found above had a disadvantageous effect on Ms van Eekelen for the period following the 6 March 2023 meeting, to when her employment concluded.

[70] I find this because under 103A of the Act, which applies to considering this type of grievance, the actions of Mr Casey at the 6 March 2023 meeting and to a lesser extent Ms McNeill were far from how a fair and reasonable employer could have acted in the circumstances at the time. In particular as I have already referred to above, the parties were represented and there was a live dispute to which Ms van Eekelen through her representative had twice by the time of the 6 March 2023 meeting proposed the intervention of a resolution service. At the very least I find Mr Casey was aware of this proposal made on 6 March 2023 because he told Ms van Eekelen in that meeting, in raised voice, that he was unhappy with her lawyer's communication and would not mediate. His response to the resignation did not resile from this but rather put up a further proposal of five days which was known to be in dispute at the time. He also said that the directors were approachable to discuss this, something that must have felt uncertain to Ms van Eekelen given the way they meeting earlier in the day went.

[71] I find that Ms van Eekelen's condition of employment to have her employer communicate with her constrictively to maintain the employment relationship disadvantaged her to the extent that she was likely so distressed she had to take sick leave rather than working out her notice. While it could be considered that her attendance at the pre organised employment interview on 7 March 2023 was inconsistent with this leave, I accept that Ms van Eekelen could not face working at the restaurant after the events of 6 March 2023, not being able to face the directors and in particular Mr Casey who had treated her verbally aggressively in the 6 March 2023 meeting to get his point across.

[72] Even if I step back and consider that my findings above are that the five days was something that formed part of what Ms van Eekelen had agreed to work, and even if I consider as I have found above that Ms van Eekelen's interpretation of her IEA did not support her view that she could just change her availability to four days and this may have even been an unreasonable assumption to make, at the time of the 6 March 2023 meeting this all remained a live issue to be resolved. Things were in place to attempt to address this constructively, mainly as a result of Ms van Eekelen getting representation for herself. To that extent, due to the breach of good faith, MJ did not

give Ms van Eekelen an opportunity to continue to constructively address matters. I find this disadvantaged Ms van Eekelen in her employment. Whether a more constructive meeting on 6 March 2023 would have resulted in Ms van Eekelen still resigning is speculative. I have already found she had set her sights on another job before the 6 March 2023 meeting. However, I accept that at the very least Ms van Eekelen was confronted with actions at the 6 March 2023 meeting that were not those that a fair and reasonable employer could have taken in the all circumstances at the time.

Depending on the outcome of the grievance(s) above, is any compensation to be awarded?

[73] I have not found Ms van Eekelen had made out her claim that she was constructively dismissed, but she is entitled to a remedy for the disadvantage grievance in the manner of compensation.

[74] Compensation under s 123(1)(c)(i) of the Act is for 'Humiliation, loss of dignity, and injury to the feelings of the employee' as a result of the grievance.

[75] I am persuaded that Ms van Eekelen had enjoyed a long association with MJ having started with them in their restaurants when still a teenager. Her evidence refers to being grateful for the start in employment she got and how well that employment worked for her during her high school years juggling study and work and other commitments at the time. It is apparent to me from her evidence that she had a fondness for the business and considered she had worked hard and was loyal to it. I further accept as likely, having heard from her, that she felt significantly hurt by the actions of Mr Casey at the 6 March 2023 meeting. The level of her distress has been suggested as relating simply to her not getting what she wanted. I find there is a human factor here. An employer ought not to behave in a way that makes an employee feel they are belittled and being pushed into a corner to accept their employers point of view.

[76] Given the history for Ms van Eekelen with MJ's businesses I accept she suffered a significant hurt to feelings and loss of dignitary which was not much fixed by Mr Casey's response to her resignation where he said sorry but that he was just trying to get his point across.

[77] I find a likely element of humiliation for Ms van Eekelen was not being able to properly leave the workplace that she had held a senior role in, a role I accept she enjoyed and was dedicated to.

[78] I found Mr Neill's evidence, as Ms van Eekelen's father, straightforward. However, it focused largely on the effect on Ms van Eekelen from the alleged constructive dismissal. He did however refer to the 'week after the end of the employment' being 'hard for her' and that her family tried to support her but that she is 'fiercely independent.' His oral evidence was that she was distressed after the 6 March meeting and said she could not go back on the work premises because of the way the meeting went. He noted a change in the way Ms van Eekelen interacts with people still today. He believes this is her first experience of being treated in such an adverse way and this has changed her. When challenged under cross examination whether he was biased towards his daughters' position, Mr Neill accepted his views were as her father. I do not find Mr Neill's evidence anything other than straightforward as to the emotional effect he observed after the 6 March 2023 meeting.

[79] Ms van Eekelen obtained replacement employment almost straight away on a higher rate of pay. Her evidence when questioned was that initially she was required to work across five days abut then there was agreement this would revert to less days later. I accept this evidence.

[80] I am satisfied based on the above that an appropriate level of compensation is $10,000.00.

Are there any employee contributory factors under s 24 of the Act that mean remedies for grievance(s) should be reduced?

[81] MJ invites me to consider that if I award remedies, Ms van Eekelen should have these reduced as a result of her contribution to the situation that gave rise to the grievance.

[82] The grievance I have found relates specifically to the manner in which Mr Casey and to a lesser extent Ms McNeill for MJ treated Ms van Eekelen at the 6 March 2023 meeting. This is while Ms van Eekelen may have formed an incorrect view about how her request for a change to her days should be accepted without negotiation and while this may have frustrated the directors of MJ, they made choices to conduct a meeting where Ms van Eekelen was treated poorly when other ways of more constructively

discussing the live dispute were available and already proposed by Ms van Eekelen. I do not find that it is appropriate to consider a reduction to the compensation awarded.

Notice period

[83] I asked for confirmation from the representatives that there was no issue about incorrect payment of a notice period at the end of the employment. Counsel for the applicant provided submissions about this which included mainly an amendment relating to the lost earnings claim for the constructive dismissal grievance. To the extent these submissions (unopposed by the respondent through its representative) refers to the notice period, my reading is that there is no issue that this was not paid albeit the material before me explains that it was partly paid as sick leave, understandable given Ms van Eekelen's notice to that affect on 8 March 2023. [13]

Summary of Orders

[84] Maxwell Jackson Limited is to pay Olivia van Eekelen $10,000.00 in compensation under s 123(1)(c)(i) of the Act.

Costs

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

[86] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms van Eekelen may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum MJ will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[13] 'Submissions of Counsel for the Applicant Regarding Wages' dated 19 April 2024 and response in email from the respondent's representative on 30 April 2024 saying it had no further submissions to make.

[87] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[14]

Antoinette Baker
Member of the Employment Relations Authority

[14] www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1