

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**ATTENTION IS DRAWN TO THE
ORDER PROHIBITING
PUBLICATION AT PARAGRAPH
[4] OF THIS DETERMINATION**

[2011] NZERA Auckland 189
5298891

BETWEEN DENISE BUTLER
Applicant

AND PROFESSIONAL PUBLIC
RELATIONS NZ LTD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Kerry Single, Advocate for Applicant
Elizabeth Coates, Counsel for Respondent

Investigation Meeting: 21 March 2011 at Auckland

Submissions received: 1 April 2011 from Applicant & Respondent

Determination: 09 May 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Denise Butler, claims she was employed by the Respondent, Professional Public Relations NZ Ltd (“PPRNZ”) from 15 February 2003 until she resigned by letter dated 4 December 2009. Ms Butler claims that her resignation was a constructive dismissal as a result of the unjustifiable actions of PPRNZ.

[2] Specifically Ms Butler claims that her job description had been changed without consultation, and that her honesty and integrity were impugned by the newly appointed Chief Operating Officer (“COO”), resulting in her being left with no alternative but to resign.

[3] PPRNZ deny that Ms Butler was dismissed by PPRNZ, either constructively or otherwise, and claim that Ms Butler resigned from her employment with PPRNZ for her own personal reasons.

Non-publication Order

[4] Upon the application of the Respondent, and with the agreement of the Applicant, I prohibit from publication the name of the Chief Operating Officer (“COO”) of PPRNZ pursuant to clause 10(1) of Schedule 2 of the employment Relations Act 2000. The COO will be referred to by title only in this determination.

Issues

[5] The issues for determination are:

- a. Whether Ms Butler was unjustifiably constructively dismissed by PPRNZ as a result of her job description having been changed without consultation and her honesty and integrity being impugned by the COO;
- b. Whether PPRNZ acted unreasonably in not allowing Ms Butler to retract her resignation following the resignation of the COO.

Background Facts

[6] PPRNZ is a subsidiary company of Professional Public Relations (“PPR”). PPRNZ was launched by Mr Richard Lazar, Managing Director of PPR in 1998. There is a senior management team based in the Auckland office which is responsible for the day-to-day management of PPRNZ, and which team reports to the executive leadership team based in Australia. The executive management team of PPR currently includes Mr Lazar, Mr Grant Imhoff, Finance Director, and Ms Sally Haysom, Chief Operating Officer, East.

[7] Ms Butler, a Chartered Accountant, commenced employment as Finance Manager with PPRNZ in December 2003. Ms Butler had dual reporting responsibilities, these being to Ms Haysom, at that time the Managing Director of PPRNZ, on operational matters, and to Mr Imhoff in Australia, on financial matters.

[8] In February 2008 Ms Haysom relocated to PPR in Australia and Ms Angela Spain was promoted to the position of General Manager. Ms Butler said that Ms Spain had little understanding, or experience of financial matters and consequently she had felt it incumbent on her to take on more responsibility in relation to financial matters.

[9] In March 2008 Ms Spain said that there was a performance review and salary discussion between herself and Ms Butler. As a result of this discussion Ms Spain and Mr Robert Wallace, the National Director of PPRNZ, made a recommendation to PPR that Ms Butler's salary be increased and her job title changed to 'Finance Director NZ'. The recommendation was submitted on a spreadsheet with other pay-rise requests to the finance team in Australia for approval.

[10] Ms Haysom and Mr Lazar gave evidence that the proposed job title change and salary increase were not approved by the senior management team in Australia. However by letter dated 10 April 2008, Ms Spain advised Ms Butler that her salary was not to be increased, but that she had been promoted to the position of Finance Director with effect from 24 March 2008. Attached to the letter was a job description.

[11] Ms Haysom stated that she was unaware of the letter from Ms Spain to Ms Butler, and that she would have expected such a change to have been discussed with her prior to any confirmation of it, or indeed to it being implemented. Mr Imhoff also agreed that he was unaware of the proposal that Ms Butler's title be changed to Finance Director. Mr Imhoff further stated that the job description as provided to Ms Butler reflected the duties she had always performed and did not reflect any promotion, a view with which Ms Haysom concurred.

[12] Ms Spain went on maternity leave during February to May 2009, leaving Mr Wallace with overall responsibility for PPRNZ in her absence. During Ms Spain's parental leave absence, Ms Butler took on a number of additional tasks, including responsibility for HR matters, and began presenting financial information reports at the senior management team ("SMT") meetings.

[13] In July 2009 Ms Spain asked Ms Butler to consider a reduction in her hours due to the difficult economic climate which was prevailing in 2009. Ms Butler was unhappy at the reduction but did agree to it.

[14] Mr Lazar said that neither Ms Spain nor Mr Wallace were identified as the national leader of PPRNZ, nor were they intended to be a replacement for Ms Haysom. Accordingly, in August 2009 PPR appointed a COO to lead the operation in New Zealand. Mr Lazar said that on appointment the brief which the COO was given was to bring growth to PPRNZ; as such he was expected to show leadership and decisiveness in the role as he was to be held accountable for PPRNZ's performance.

[15] As a result of the COO's appointment Ms Butler was told by the SMT that she would no longer report to Ms Spain on operational matters but to the COO, although she would continue to report to Mr Imhoff on financial matters.

[16] Ms Spain said that the COO made a number of changes in the operation of PPRNZ which impacted upon the finance area, and Ms Butler said that on 29 September 2009 the COO told her that she would no longer be consulted as to the financial viability of future company decisions.

[17] On 30 September 2009 the COO made a presentation to all the PPRNZ staff in respect of his vision for the future operation of the business. At the presentation the COO made a statement that every employee would be given a laptop, however Ms Butler said that the capital expenditure budget allowed for the purchase of only two laptops in 2010.

[18] The next day, 1 October 2009 Ms Butler said the COO had met with her and accused her of making negative comments at the meeting the previous day. Ms Butler said that she had been shocked by this but had assured him that she supported his appointment as COO. Ms Butler said that she had been further upset to learn that the COO had met with senior members of PPRNZ staff and made negative comments about her actions.

[19] During October 2009 Ms Haysom said that the COO was given discretionary leave by PPR for health and family reasons. Ms Butler said that she, realising that the COO did not have statutory sick leave entitlement, asked Ms Haysom if she should continue making salary payments to the COO. Ms Butler said that she had been told by Ms Haysom not to interfere.

[20] Ms Haysom confirmed that she had told Ms Butler not to interfere. Ms Haysom said that Ms Butler had kept probing and asking questions and that she had been aware that Ms Butler wanted to know why the COO was continuing to be paid. Ms Haysom said that it had been a confidential matter and that the payment of discretionary leave was a decision for senior management to make, it was not for Ms Butler to be made privy to the details motivating the decision.

[21] On 21 October 2009 the COO announced that Ms Butler would no longer be required to table weekly forecasts at the SMT meetings.

[22] On 2 December 2009 two urgent payments required authorising through the banking system. There was an error on the second of these payments and Ms Butler informed the

COO that it had been corrected and put through again. Ms Butler said that she asked the COO to countersign and authorise the payment, and that he had agreed to do so immediately.

[23] However the next day Ms Butler said she was asked by the COO to check that the first urgent payment had been paid by the bank. Ms Butler confirmed that it had but advised the COO that the second payment had not been paid and reminded him of the conversation they had had the previous day. Ms Butler stated that the COO twice denied knowledge of the conversation which had taken place on 2 December 2009.

[24] Mr Wallace, whose office was next to the COO's office in which the discussion between Ms Butler and the COO had taken place, said that he recalled hearing Ms Butler making a comment to the effect that either the COO was calling her a liar, or Ms Butler saying that the COO was saying that she was lying to him. However he did not recall hearing the COO saying to Ms Butler that she was a liar or that she was lying to him.

[25] Ms Butler stated that she had become very loud during this discussion with the COO, but confirmed that the COO had not responded by becoming loud in return.

[26] Ms Butler said that she had been very upset by this incident and that after overnight consideration, wrote submitting her resignation dated 4 December 2009 to the COO with copies to Mr Lazar, Ms Haysom, Mr Imhoff, Ms Spain and Mr Wallace. The letter stated:

Dear [COO name],

I hereby give you one month's notice of my intention to resign from PPR. I have 15 days leave outstanding, so effectively my last day should be Tuesday 8th December 2009. However, in order for the client invoices to be mailed before Christmas, I am prepared to remain until 23rd December 2009. This will also mean I am able to run the payroll on 9th and 23rd December, thus ensuring staff receive their salaries in time for Christmas.

You have made my position untenable and yesterday effectively questioned my integrity and honesty both as a person and a Chartered Accountant.

I have sufficient grounds to pursue a Personal Grievance for a case of Constructive Dismissal.

Yours sincerely,

*Denise Butler FCCA, CA
Finance Director, PPR*

[27] Mr Imhoff said he had been surprised to receive Ms Butler's resignation on 4 December 2009, and had called her that same day to discuss it with her. Mr Imhoff said he had been surprised at Ms Butler's resignation for two reasons. The first being that he was concerned Ms Butler may have overreacted, this being the first and only time he had heard of any serious personal issues between her and the COO; the second being that he was aware that the financial year end was approaching and he wanted to understand how PPR would manage the year end reporting timetable without her input.

[28] During his conversation with Ms Butler, Mr Imhoff, being aware that Ms Butler was upset, advised her against making a decision in an emotional state. Mr Imhoff said that he had asked Ms Butler to retract her resignation and take time to reconsider her decision, recommending that she had a break over the Christmas period. Mr Imhoff stated he had suggested to Ms Butler that if she still wanted to resign after this, they could have a further discussion at that time. However Ms Butler refused to retract her resignation and confirmed her intention of leaving at the end of the year.

[29] Although Ms Butler said that she told Mr Imhoff she would retract her resignation if the COO left, Mr Imhoff was quite clear in his evidence that Ms Butler did not ask that her position be kept open in the event that the COO resigned. Mr Imhoff stated that although he was aware at this time that the COO had personal problems, and that it was possible the COO might be leaving the company, he had felt that it was not appropriate for him to discuss the COO's personal situation with Ms Butler. Mr Imhoff also said that at this time he had no definite prescience that the COO would resign.

[30] Mr Lazar and Ms Haysom said that they had not contacted Ms Butler immediately following her resignation as they were aware that Mr Imhoff, to whom Ms Butler reported, had spoken to her and asked her to reconsider her decision over the Christmas break.

[31] Ms Butler stated that Mr Imhoff had contacted her again on 9 December 2009. Mr Imhoff had asked if she had 'cooled off' and changed her mind. Ms Butler said that if the COO remained, she would not rescind her notice, although Mr Imhoff said Ms Butler had not at any time asked him to hold her position open in case the COO resigned in the following weeks.

[32] During the days following this conversation with Ms Butler, Mr Imhoff said he had become aware that Ms Butler was discussing her resignation with other PPRNZ employees, and he had asked Ms Butler if she considered Ms Deanne Pan to be capable of undertaking

her role when she left. Mr Imhoff said that Ms Butler had responded that she believed Ms Pan could take on the role, but would need assistance to do so.

[33] Mr Imhoff said that as a result of this conversation, he had spoken to Ms Pan about taking on the role and advised that the details of the precise position description would be confirmed in January 2010 when he would be in Auckland.

[34] Ms Haysom stated that Mr Imhoff had asked her opinion of Ms Pan's suitability for taking over Ms Butler's responsibilities and, following his discussion with Ms Pan, he had told her (Ms Haysom) that Ms Pan was "*very excited*" about the promotion and opportunity.

[35] During the week following 11 December 2009, the COO resigned. Ms Haysom felt that the appropriate manner of announcing this news to the PPRNZ employees would be to do so in person and accordingly advised the PPRNZ employees that she would be in New Zealand on 21 December 2009.

[36] Ms Haysom said that on or around 21 December 2009 she had spoken to Ms Butler. Ms Butler asked Ms Haysom why she had not spoken to her about her resignation and Ms Haysom had told her she had been "*cross*" with her.

[37] Ms Haysom agreed that she had said she had been cross, but that this had not been said in an angry tone, rather she had been very disappointed when she learnt Ms Butler had resigned as she felt Ms Butler would have come to her if she had had a problem in her relationship with the COO, given their previous long and harmonious working relationship.

[38] After Ms Haysom had announced to the PPRNZ employees that the COO had resigned, Ms Butler approached her and said that as the COO was leaving, she would withdraw her resignation. Ms Haysom said that she told Ms Butler that PPRNZ had accepted her resignation and arrangements were in an advanced stage to replace her position.

[39] Ms Butler reiterated that she wanted to withdraw her resignation. Ms Haysom said she had told Ms Butler that this was not her decision but that it would need to be referred to Mr Imhoff and Mr Lazar.

[40] Mr Lazar stated that as the decision had already been made to appoint Ms Pan to the position held by Ms Butler, he did not believe that it was possible to allow Ms Butler to retain her position. However he did feel that there were opportunities in the business if Ms Butler wanted to continue being involved, although he would need to have a discussion with Mr

Imhoff about his plans for the future financial structure of PPRNZ. Mr Lazar emailed Ms Butler to this effect on 22 December 2010. Ms Butler did not respond to this email.

[41] Ms Haysom said that sometime between 21 and 23 December 2009 she had again spoken with Ms Butler concerning her resignation and questioned Ms Butler on the reason why she had not raised her concerns with her given their previous close personal relationship.

[42] Ms Haysom in particular asked Ms Butler why she had not used the 'Right to Speak' policy process. The 'Right to Speak' policy enabled complaints to be made on a '2 up' basis i.e. the complaint would have bypassed Ms Spain and the COO, being raised directly with the senior management team. Ms Haysom said that Ms Butler had confirmed she was aware of the process but did not explain why she had not used it.

[43] On 14 January 2010 Mr Lazar, Mr Imhoff and Ms Haysom attended a restaurant lunch with Ms Butler to thank her for her service to PPRNZ. At the lunch Mr Lazar confirmed that PPRNZ did want Ms Butler to have some continued involvement if that was what she wanted.

[44] On 18 January 2010 Ms Haysom emailed Ms Butler. In the email Ms Haysom wrote:

Lunch was lovely with you last week!

As you'll appreciate, we would like to finalise Deanne's situation as soon as possible, but are somewhat hamstrung until you come back to us with your thoughts (following our discussions the day before) as it may impact on her Job Description.

Can you let us know where you [are] at with regard to your thinking.

[45] Ms Butler replied to this email the following day. Ms Butler stated that she did not know how she could add value working one day a week as had been suggested to her. Ms Butler reiterated that the COO had been her only reason for leaving PPRNZ and that following his departure, she had offered to withdraw her resignation. In the circumstances Ms Butler stated that she was considering her options: *one of which is taking a personal grievance and asking to be reinstated to my previous role.*"

[46] Ms Haysom responded to Ms Butler on 21 January 2010 explaining that the one day a week was just one possibility and that Ms Butler should consider suggesting other options. Ms Butler did not reply to this email.

Determination

The Law

[47] 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.

[48] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*¹ the Court of Appeal said regarding the correct approach to constructive dismissal:²

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[49] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- First, has there been a breach of duty on the part of the employer which has caused the resignation,
- and secondly 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.

[50] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*³ observed in describing this type of constructive dismissal:⁴

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

¹ [1994] 1 ERNZ 168

² Ibid At p 172

³ [1983] ACJ 965

⁴ at [975]

Was Ms Butler unjustifiably constructively dismissed by PPRNZ as a result of the actions of the COO in respect of her job description having been changed without consultation and her honesty and integrity being impugned?

Breach of duty on the part of the employer causing the resignation

[51] Ms Haysom had been involved in the recruitment of Ms Butler in 2003, and they had worked closely together until Ms Haysom's relocation to Australia in February 2008. Ms Haysom explained that during the time they worked together, she had not required Ms Butler to present PPRNZ's financial reports at the SMT meetings but that Ms Butler had produced the relevant financial information reports which she and Ms Butler discussed, and which Ms Haysom then used as the basis for her presentations.

[52] Ms Haysom stated that she had had to remind Ms Butler on several occasions of the purpose of her role, this being to provide the financial information that enabled the senior management in the PPRNZ office, and the leadership team in Australia, to make decisions.

[53] In March 2008 Ms Butler was provided with a job description together with the letter from Ms Spain altering her job title. Mr Imhoff to whom Ms Butler reported on financial matters, and Ms Haysom, gave evidence that this job description did not materially alter Ms Butler's duties and responsibilities.

[54] During the months in 2009 when Ms Spain was General Manager, and especially during Ms Spain's paternity leave period, it is clear that Ms Butler on her own initiative took on more responsibility and began making presentations of the financial reports at the SMT meetings. Mr Wallace, who with Ms Spain was jointly responsible for the management of PPRNZ during this period and particularly during Ms Spain's absence on parental leave, said that he had not formally varied Ms Butler's role so that she would assume additional responsibilities.

[55] On 21 October 2009 the COO announced that he no longer required Ms Butler to make the financial forecasts at the SMT meetings. Ms Haysom stated that she had been supportive of the COO's decision to remove the presentation of financial forecasts from the weekly New Zealand SMT meeting agenda, noting that Ms Butler had not been required to present the financial forecasts at SMT meetings during the 5 years when she had been the Managing Director of PPRNZ.

[56] Ms Haysom considered that this was a decision for the current head of the New Zealand operation to make, and observed that Ms Butler was still required to prepare the same financial information reports as had always been expected of her, in order that the COO could use that information as the basis on which he could make the relevant decisions.

[57] Ms Butler saw this as a diminution of her role. However Mr Imhoff at the investigation meeting confirmed that the preparation of the financial information reports for the SMT meetings was representative of only a very small proportion of Ms Butler's responsibilities, being in effect only a compilation of the account directors' work and data entry, and had in fact not diminished from the previous level.

[58] I find that Ms Butler's job responsibilities had not been varied and that she was still required to provide and discuss the financial information reports with the COO prior to the SMT meetings. In this respect the financial reporting was a resumption of the situation as it had been when Ms Haysom had been Managing Director.

[59] There is no evidence that Ms Butler's job responsibilities were altered by Ms Spain and Mr Wallace from what they had been during the period when Ms Haysom was Managing Director, although there is evidence that Ms Butler on her own initiative assumed a more proactive role in the presentation of the financial information reports during Ms Spain's parental leave.

[60] Mr Wallace said that he did not regard the decision that Ms Butler no longer present the financial reports as a challenge to Ms Butler's contribution to PPRNZ, but that it was just a part of the COO's vision of how he (the COO) would manage the business and run SMT meetings.

[61] On this basis of the evidence, I do not find that the COO, in not requiring Ms Butler to make the financial reports presentations, was unilaterally altering her job description.

[62] It is clear that in relation to the incident regarding the urgent payments Ms Butler felt that she was being accused of lying and that her honesty had been impugned. Mr Wallace had overheard words from Ms Butler which supported this view. However Mr Wallace was unable to confirm that the COO had actually accused Ms Butler of lying. In addition, Ms Haysom said that in a conversation she had had with the COO, he was adamant that he had not accused Ms Butler of lying, but that they had different views about the invoices situation.

[63] The COO did not give evidence at the Investigation Meeting but there is evidence which addresses the overall question of the relationship between the COO and Ms Butler, which is relevant to Ms Butler's perception of the situation.

[64] There is no evidence that the COO was rude or abusive in his attitude towards Ms Butler. Mr Wallace said that on the occasions when he saw Ms Butler and the COO interacting, there was no reason given for him to believe that the COO was actively undermining Ms Butler. Indeed Ms Butler gave evidence that the COO was never rude to her and that she had not been aware of him having been rude to other employees.

[65] Mr Lazar said that he had no reason to believe that the COO had acted inappropriately towards Ms Butler. In his own interactions with the COO he had found him to be pleasant and well-mannered, and confirmed that he received no formal complaints about the COO's treatment of the PPRNZ employees during his period of employment, nor any criticism by the employees of the decisions the COO had made.

[66] However I do find evidence that Ms Butler had a negative attitude towards the COO. Ms Spain and Mr Wallace gave evidence at the Investigation Meeting that Ms Butler's body language at the presentation on 30 September 2009 had been negative, Ms Spain referring to crossed arms and facial expressions of disapproval, Mr Wallace referring to heavy audible sighs, mutterings, and on at least one occasion, to a roll of the eyes.

[67] Mr Wallace stated that during the period of the COO's employment, he had never heard him complain about Ms Butler. However Mr Wallace stated that Ms Butler often seemed to be exasperated about the changes the COO wanted to implement in the business, and referred to her sighing loudly or grumbling when she did not agree with a decision the COO had made.

[68] I find that it is more likely than not, in the face of the evidence of the COO's attitude towards Ms Butler, and of her demeanour towards the COO, that her perception that he was accusing her of lying had been mistaken.

[69] To qualify as constructive dismissal Ms Butler's resignation must first be established to have occurred as a breach of duty on the part of PPRNZ. Ms Butler points towards the actions of the COO as being such a breach by his unilaterally altering her job description and responsibilities and by accusing her of dishonesty.

[70] I have found no evidence that the COO acted inappropriately in his manner towards Ms Butler, Ms Butler's own evidence being that the COO was rather 'bland' in his attitude towards her and that he was not rude to her.

[71] While Ms Butler perceived that not being required to make the financial information reporting presentations was an alteration in her job description, I have found the evidence to support the position that her job responsibilities as regards financial information reporting were unaltered from what had previously been expected, and to have been in line with her position description.

[72] Further whilst there had been a disagreement over what had been discussed between Ms Butler and the COO regarding what had been agreed over the second of the urgent payments, I have not found sufficient support in the evidence as presented, that Ms Butler's perception that she was being accused of dishonesty was reasonable.

[73] In summary, I do not find evidence of a breach of duty on the part of the employer which would give rise to Ms Butler being unjustifiably constructively dismissed, and I determine that Ms Butler was not unjustifiably constructively dismissed by PPRNZ.

Was a breach reasonably foreseeable?

[74] I have not found that there was such a breach. However for the sake of completeness I shall address the question of whether the breach was sufficiently serious to make it reasonably foreseeable by PPRNZ that Ms Butler would not continue to work under the prevailing conditions.

[75] Ms Butler did not make any formal complaint about the behaviour of the COO. Ms Butler said that she had tried to speak to Ms Spain about her concerns but that Ms Spain, who like Ms Butler reported to the COO, had told her she could not speak on her behalf. Ms Spain agreed that she had told Ms Butler that she could not become involved and had recommended that Ms Butler raise her concerns with the senior management team in Australia, to whom the COO reported.

[76] The senior management team visited the PPRNZ office on a regular basis, Ms Haysom and Mr Lazar were more frequent visitors than Mr Imhoff, although Mr Imhoff was in regular telephone contact on a monthly basis with Ms Butler. Mr Lazar said that he participated in these regular calls.

[77] All three of the members of the Australian executive team who gave evidence described their relationship with Ms Butler as good. Mr Lazar said that he had informal interactions with Ms Butler when he visited the PPRNZ office and that he believed he and Ms Butler had a good friendly relationship, Mr Imhoff also described his relationship with Ms Butler as a good working relationship.

[78] Ms Haysom in particular described a close personal working relationship, a “*long and positive working relationship*”, with Ms Butler over many years, and said that she would have expected Ms Butler to have come to her with any concerns. Ms Haysom stated that Ms Butler’s resignation had come as a surprise to her, and she had felt very disappointed and surprised that Ms Butler had not discussed it with her prior to making the decision to resign.

[79] Mr Imhoff also said that, although he visited the PPRNZ office less frequently than Ms Haysom and Mr Lazar, he would have nonetheless have expected Ms Butler to have raised any concerns with him as head of finance, especially if she had felt these were not in the best interests of the business.

[80] Mr Wallace had been aware that Ms Butler did not like working with the COO, and regarded this as a clash of personalities, but stated that there was no reason for him to think it would not have resolved itself. Moreover Mr Wallace said that, given her knowledge of HR procedures, he would have expected Ms Butler to have made a formal complaint had she felt the situation warranted it.

[81] Ms Haysom described Ms Butler as being forthright in her views. Given what appears to have been good working relationships with the senior management team in Australia, and in the case of Ms Haysom, a close and positive relationship, I find it somewhat surprising that Ms Butler had not raised her concerns with one, if not all, of the senior management team, especially as these were also of a financial nature.

[82] I find it also pertinent that there was a ‘Right to Speak’ policy of which Ms Butler was aware and which she had considered, but had chosen not to utilise on the basis that she was concerned that comments would be traced back to her, even though the policy was aimed at ensuring employees felt enabled to make complaints which would be treated in confidence. As Ms Haysom said Ms Butler was responsible for reminding PPRNZ employees about the policy, I find it even more surprising that Ms Butler chose not to use it.

[83] I find there was no notification from Ms Butler to PPRNZ prior to her resignation that she regarded the COO’s actions to amount to a serious breach of duty towards her, and there

is no evidence to substantiate that there was a breach sufficiently serious, nor to make it reasonably foreseeable by PPRNZ that Ms Butler would not be able to continue to work under the prevailing conditions. I determine that Ms Butler was not constructively dismissed by PPRNZ.

Did PPRNZ act unreasonably in not allowing Ms Butler to retract her resignation following the termination of employment of the COO?

[84] An employee is usually entitled to resign from their employment on a unilateral basis. The agreement of the employer to such unilateral notice is not required, the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. As observed by Goddard CJ in *Stiffe v Wilson & Horton*:⁵

Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.

[85] There is no obligation on the employer to dissuade the employee from leaving, although they may choose to do so in some cases. An employee who has resigned has not been dismissed.

[86] Ms Butler resigned in what was clearly an emotional state. In *Boobyer v Good Health Wanganui Ltd*⁶ the Employment Court said that in this type of case that the employer cannot safely insist on what the employee may have said:

This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once “the heat of the moment” had passed and taken with it any “influence of anger or other passion commonly having the effect of impairing reasoning faculties”.

[87] Ms Butler may have been in an emotional state when she tendered her resignation on 4 December 2009, and when she discussed her resignation with Mr Imhoff that same day. In that situation, the employer acts reasonably in allowing the employee a ‘cooling down’ period

[88] However Ms Butler said that there was a further conversation with Mr Imhoff on 9 December 2009 when he had asked her if she had cooled off. By this stage Ms Butler had had

⁵ 5/12/00 AC 94/100, AEC 106/00 at para 21

⁶ (unreported) WEC 3/94

time to reconsider her actions, but Ms Butler reconfirmed her decision to resign, although she had verbally stated that she would reconsider withdrawing her notice should the COO leave. I note that Ms Butler's written notice to leave dated 4 December 2009 was not conditional on this point.

[89] There was no requirement on PPRNZ to accept the condition Ms Butler placed relating to the possible withdrawal of her resignation, and at the time she made it, the departure of the COO was an unknown future contingency.

[90] Ms Butler upon learning of the COO's departure, attempted to withdraw her resignation. The offer to withdraw the resignation by Ms Butler was made after PPRNZ had been taken the necessary actions to replace her position by the appointment of Ms Pan.

[91] PPRNZ held the view that it would not be appropriate to resile from their commitments to Ms Pan. Whilst Ms Butler said at the investigation meeting that she believed Ms Pan would have been prepared to step aside in order that Ms Butler could retain her position, the evidence from Mr Imhoff and Ms Haysom at the Investigation Meeting was that Ms Pan, although a little apprehensive over fulfilling her new responsibilities, was excited at her promotion. Ms Pan was also to receive a not insignificant salary increase. In these circumstances I believe Ms Butler's view of Ms Pan's reaction may have been a little unrealistic.

[92] In all the circumstances I find that PPRNZ were not obliged to accept Ms Butler's retraction of her resignation. Moreover I find that the senior management team attempted to ameliorate the effects of Ms Butler's actions by trying to accommodate her wish to remain within the business with the offer of ongoing employment, albeit on a reduced working hours basis.

[93] It would have been possible for Ms Butler to have retracted her resignation on 4 December or 9 December 2009 when Mr Imhoff spoke to her. Ms Butler chose not to do so. I find that the opportunity to resile from the consequences of her resignation had passed through no other fault than that of Ms Butler's own.

[94] I determine that PPRNZ did not act unreasonably in accepting Ms Butler's resignation.

Costs

[95] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority