

BETWEEN LORRAINE EDMONDS
 Applicant

AND BOSSANOVA ENTERPRISES
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Mark Beech and Jeremy Sparrow, Counsel for Applicant

 Peter Crombie and Kelly Hymers, Counsel for Respondent

Investigation Meeting: 4 & 5 March 2014 at Tauranga

Submissions received: 5 March 2014 from Applicant and from Respondent

Determination: 21 March 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Lorraine Edmonds, claims that she was unjustifiably constructively dismissed by the Respondent, Bossanova Enterprises Limited (Bossanova) either as a result of Bossanova engaging in a course of conduct undertaken with the deliberate and dominant purpose of coercing her to resign, or alternatively by a breach of the duty Bossanova owed to her in relation to trust and confidence and fair dealing.

[2] Bossanova denies that it constructively dismissed Ms Edmonds, and claims that she voluntarily terminated her employment following her resignation on 25 January 2013.

Issues

[3] The issues for determination are whether Bossanova unjustifiably constructively dismissed Ms Edmonds by:

- undertaking a course of conduct with the deliberate and dominant purpose of coercing her to resign; or

- breaching the duty it owed her in respect of trust and confidence and fair dealing.

Background Facts

[4] Bossanova is a small business which imports and sells Havianas footwear from Brazil into New Zealand, and which employs approximately 6 employees.

[5] Ms Edmonds commenced employment with Bossanova in August 2011 as Customer Service/Marketing Assistant. In that position Ms Edmonds reported to Ms Monique Fairlane, Marketing Manager at that time.

[6] In January 2012 Ms Fairlane resigned from Bossanova. Ms Claudine Paiva, sole Director of Bossanova, said that she had decided not to replace Ms Fairlane at that point because the business of Bossanova was seasonally influenced and the busy summer season was coming to an end, and also because Ms Fairlane had completed the 2012/13 marketing plan and budget at the time of her employment ending.

[7] Ms Pavia said that the marketing aspect of Bossanova's business was operated according to guidelines set by the Brazilian supplier, with the supplier approving all marketing activities.

[8] Following the departure of Ms Fairlane in January 2012, Ms Edmonds reported directly to Ms Paiva. Ms Edmonds said she had also been promoted to Customer Service/Marketing Coordinator, given additional responsibilities and a salary increase. However she had not received a new job description until September 2012.

[9] Ms Paiva said that the Marketing Manager had been responsible for complying with all the activities and guidelines set by the supplier in Brazil, and that it had been Ms Edmond's role to assist her in this. Ms Paiva said that following Ms Fairlane's departure, she had supervised marketing deadlines, and given final approval on marketing matters and associated expenditure.

[10] Ms Paiva said that the supplier in Brazil developed most of the advertising material which meant that Bossanova did not have to devise its own marketing campaigns and designs. In addition, contractors AMG and an external PR agent carried out some marketing, and PR work. Shortly after Ms Fairlane had left, Ms Paiva asked Ms Edmonds to co-ordinate these three marketing sources thus giving her some additional responsibilities.

[11] On or about the beginning of October 2012 Ms Paiva had been on holiday overseas during which time she had checked the Bossanova website daily, and had realised that it was out of date. This had concerned her as the website was an important sales and marketing tool for Bossanova's sales effort and not having details of the up-to-date availability of Havianas footwear would adversely impact sales.

[12] Ms Paiva said that maintenance of the website was part of Ms Edmond's responsibilities and in order to do so, she needed to work closely with the warehouse employees, Mr Rodrigo Martins and Mr Renato Nicoletti, who were responsible for the processing of orders and updating her on current stock levels.

[13] Ms Pavia said that prior to going on holiday, she had discussed the website issues with Ms Edmonds, Mr Martins and Mr Nicoletti and she had been frustrated when she saw that the issues discussed had not been actioned. Accordingly on her return she had decided to hold a meeting with the three employees involved in the website maintenance collectively rather than individually.

Meeting on 26 October 2012

[14] Ms Edmonds said that she had not been advised of the purpose of the meeting held on 26 October 2012 which she had attended together with Mr Martins and Mr Renato, however she had understood it was to be an operational meeting.

[15] Ms Edmonds said that in fact the meeting had transpired to be a disciplinary meeting during which Ms Paiva had been very angry about the way the website had been presented and had shouted at her, Mr Martins and Mr Renato. Ms Edmonds said she had been very upset at what had occurred at the meeting.

[16] During the meeting Ms Edmonds said she had taken responsibility for what had occurred relating to the maintenance of the website, and following the meeting had sent an email to Ms Pavia who had requested the three employees to provide their feedback by email following the meeting. In the email dated 26 October 2012 Ms Edmonds had written:

Dear Claudine,

I am really sorry the state of the Internet Store has gotten to the point where you can no longer have me looking after this part of the business. ...

I know I have let you (and myself) down with this stock and mystery grab ordeal. Your comments at the meeting were totally justified in that I should know how these things work and be able to organise promo's etc. without you having to do it/constantly looking over my shoulder. ...

I am also really sorry that I could not teach and train Rodrigo to be able to look after the physical stock adequately. ...

I am aware, take responsibility and apologise for the areas where I have let you down. ... I enjoy working at Bossanova and I don't want this to change so all I can do is give you my word that you will not have to have another conversation like today's with me again.

[17] Ms Paiva agreed that she had been angry and frustrated at the meeting held on 26 October 2012 and that she had spoken in a raised voice, however she said that she had not shouted at Ms Edmonds, or the two other attendees, directly.

[18] Ms Paiva said that she had been pleased that Ms Edmonds had taken responsibility for what had occurred, both during the meeting, and subsequently in the email she had written following the meeting.

[19] Ms Edmonds said that she had been upset and crying after the meeting had ended and that Ms Paiva had been aware of this. Ms Paiva confirmed that she had noticed that Ms Edmonds was upset following the meeting and had apologised and told Ms Edmonds that she could leave work.

[20] Ms Edmonds said that on 9 November 2012 she had been handed a letter by Ms Paiva. The letter was dated 30 October 2012 and headed: "*Re: Poor Performance Warning*". The letter referred to the verbal warning issued on 25 November (sic) 2012 and stated that Ms Edmonds needed to: "*demonstrate that you are able to deliver a satisfactory and sustained service by 30th November 2012*".

[21] Ms Pavia confirmed at the Investigation Meeting that she had made a mistake regarding the dates in the letter which referred in fact to the meeting held on 26 October 2012. Ms Pavia said that although she had intended sending similar letters to Mr Martins and Mr Renato, she had not done so since Mr Martins had resigned and Mr Renato was a new employee.

[22] Ms Edmonds said that Ms Paiva had wanted her to sign the letter, however she had asked if she could have time to consider it before she did so, to which Ms Paiva agreed. Ms Edmonds signed and returned the letter on 12 November 2012.

[23] Ms Edmonds said that the letter had not indicated what specific tasks were linked to her improvement and that Ms Paiva gave her no guidance on the areas in which she needed to improve.

[24] Ms Paiva said that she had provided guidance and feedback to Ms Edmonds, although she conceded that she could have provided more, moreover Ms Edmonds agreed that some

guidance had been provided, as supported by the emails dated 28 November 2012, and some positive feedback in the email dated 29 November 2012 with the subject heading: “*Specials r looking nice*” which stated: “*Thank you*”. Ms Edmonds also confirmed when questioned at the Investigation Meeting that Ms Paiva had been available if she wanted to discuss anything with her.

[25] Ms Edmonds said that she had not been advised on 30 November 2012 whether or not her performance had reached the expected service level and her performance issues were not discussed with her after that date.

[26] Ms Paiva agreed that she had not formally advised Ms Edmonds that she had reached the required performance level but said her performance had significantly improved and she had made Ms Edmonds informally aware of this.

[27] Ms Paiva said that Ms Edmonds had not raised with her any concerns relating to the fact that she had not received any formal feedback about her having reached the required performance standard.

Following the 26 October 2012 Meeting

[28] Ms Edmonds said that following the 26 October 2012 meeting she found it difficult to work at Bossanova due to the manner in which she was treated by Ms Paiva, and that she felt she was not performing to Ms Paiva’s expectations.

(i) *Computer and paperwork issue*

[29] Ms Edmonds said that she was concerned Ms Paiva did not appear to trust her as she became aware that Ms Paiva had been looking at her work emails and desk paperwork after she had left work for the day. Ms Edmonds initially claimed that Ms Paiva had also been looking at her personal emails but confirmed at the Investigation Meeting that she had not kept personal emails on the Bossanova computers.

[30] Ms Paiva explained that she had frequently worked after normal work hours and had accessed Ms Edmonds work emails to check details in connection with various issues. She had also noticed notes Ms Edmonds had made which were on her desk, and had offered Ms Edmonds guidance in connection with these where appropriate.

[31] Ms Paiva said that she had never concealed her activity or carried it out with the specific intention of checking on Ms Edmonds’s work. Further that she had not had the opportunity to address Ms Edmonds’s concerns about the issue with her as Ms Edmonds had never raised the issue with her.

[32] On 3 December 2012 Ms Edmonds had emailed Ms Paiva the November Internet Sales. Ms Paiva responded that same day in an email which stated:

Ops, 10k less than last year is a bit of a worry ...

I guess we have to make it up in Dec, could you please make sure that site's looking primo and that we have enough 39/40 and 43/44 on special to keep us going?!

Also let's get on to goggle adds and facebook with heaps of cool stuff, please?!

(ii) *Surf Life Saving New Zealand*

[33] Ms Paiva said that in December 2012 she had learned that Ms Edmonds had failed to reply to Surf Life Saving New Zealand regarding sponsorship within the required time frame. This meant that Bossanova lost the opportunity to sponsor the national 'jandal day' promotion which it had sponsored for a number of years previously, and which had meant a significant loss of exposure for Havianas over the summer 2012/13.

[34] Ms Edmonds said that Ms Paiva had spoken to her about the loss of Bossanova being able to sponsor the event and had addressed her in a manner similar to that used in the meeting held on 26 October 2013.

[35] Ms Paiva denied that she had been angry with Ms Edmonds, although she conceded she had probably been direct in addressing the issue as she had advised Ms Edmonds on several occasions to organise her diary and to note key dates. Ms Paiva said she had asked Ms Edmonds to write an email advising the sales representatives and the PR agent of what had occurred.

[36] Ms Edmonds had sent the requested email on 5 December 2012. In the email she had written:

Hi Everyone

I am writing to inform you that Bossanova no longer has a sponsorship relationship with Surf Life Saving NZ. ...

I want to apologise to everyone for this happening as this partnership was 2 years strong, as well as a vital tool for launching the Dupe brand to NZ. SLSNZ has found another sponsor and I was not on the ball enough this year to maintain this association...

... I realise this does make everyone's job that little bit harder.

[37] Ms Paiva said she had been very disappointed at the loss of the sponsorship opportunity but as Ms Edmonds had acknowledged her mistake in the email, and had been performing well in other aspects of her job, she had not taken any further action.

(iii) *Christmas Event*

[38] During December 2012 Bossanova organised a “*Make Your Own Havanias*” event in Auckland, and Ms Edmonds had been an attendee at this event with 4 other Bossanova employees.

[39] Ms Paiva explained that the event had been organised to encompass a Christmas celebration for the employees, in addition to one evening being a clients’ Christmas party at the Britomart Country Club, and she had booked the employees into the penthouse suite of the Quay West hotel in Auckland.

[40] Ms Edmonds said she had enjoyed being part of the event but felt the event had been adversely affected by there being only 4 beds for 5 employees in the hotel penthouse suite, so that an extra bed had to be brought into the suite.

[41] Ms Paiva said that she had booked the penthouse suite as it had panoramic views over the Auckland harbour and she had wanted to thank the employees for their contribution to Bossanova during the year. Ms Pavia agreed that there had only been four beds, however as Ms Edmonds had been the only female employee, the male employees had given her the master bedroom with ensuite bathroom.

[42] Ms Edmonds said that Ms Paiva had given her a bottle of perfume at the event, however she had made an adverse comment which she considered had detracted from the gift. Ms Paiva said she did not understand what comment Ms Edmonds referred to, but she commented that she had thought she was just giving Ms Edmonds a nice Christmas gift.

[43] Ms Edmonds said that Ms Paiva had also given a gift of Havanias to her family and friends, approximately 12 pairs of sandals, and she had emailed Ms Pavia on 4 January 2013 to thank her for her generosity stating that: “.. *it is very much appreciated!*”

Lilo Challenge

[44] Ms Edmonds said that on or about December 2012 she had told Ms Paiva in response to a query that she was feeling overwhelmed by her workload, especially coping with an event called “*The Lilo Challenge*”.

[45] Ms Paiva responded by appointing Ms Annalise Williams as a temporary member of staff to assist Ms Edmonds over the busy season of summer 2012/13, and by engaging an

acquaintance, Ms Patricia Ramires, a freelancer graphic contractor who was familiar with the work of Bossanova to assist Ms Edmonds with the artwork required for the *Lilo* catalogue.

(iv) Brazilian speaker employee issue

[46] Ms Edmonds said that she had been the only non-Brazilian employee and that Portuguese was the main language used by the employees unless a remark was specifically addressed to her. Consequently on or about November or December 2012 she had discussed with Ms Paiva her concern that she felt ‘out of the team’ and that she would like to have a female English-only speaker appointed who had made a commitment to her that this would occur.

[47] Ms Paiva said that she had listened to Ms Edmonds’s concerns, however the fact that Bossanova’s supplier was based in Brazil meant that there was a need for some of the employees to speak Portuguese, and as not many New Zealanders were able to speak Portuguese fluently, employees were often hired who originally came from Brazil.

[48] Ms Paiva pointed out however that Ms Emma Bidois and Mr Dane Winter, Sales Representatives for Bossanova, were New Zealanders, as was Ms Annalise Williams who was appointed to assist Ms Edmonds over the busy season of summer 2012/13.

Events January 2013

[49] Ms Edmonds said that on 3 January 2013 she had sent the December Internet Sales information to Ms Paiva and she had been pleased to receive an email in response which read: “*Nice one Lolo!*”, however later that day there had been an incident which had upset her.

Stapler Incident

[50] Ms Edmonds said that Ms Paiva had instructed her to replace a stapler some time earlier but she had not done so by 3 January 2013 when Ms Paiva came to use it again. Ms Edmonds said that she had been very upset because Ms Paiva had yelled at her in front of the Sales Representative, Mr Winter, who had been visiting from Auckland.

[51] Ms Paiva said that she recalled being frustrated with a stapler which did not work, however she did not recall shouting at Ms Edmonds.

[52] Mr Winter said he did not recall the stapler or any other incident in which Ms Paiva yelled or shouted at Ms Edmonds.

[53] Ms Bidois said she had visited Bossanova’s premises on a weekly basis, sometimes more frequently in the busy periods; however she did not recall Ms Paiva yelling or shouting at Ms Edmonds, or showing her any lack of respect on any of those visits.

First job interview

[54] Ms Edmonds said that she had started to apply for alternative employment following this incident, and had had a telephone interview for a position based in Auckland on or about mid-January 2013.

Sick/stress leave

[55] Ms Edmonds said that she had taken sick leave on 14 January 2013 as a result of the stress she was feeling at that time. She had informed the warehouse manager that she would not be attending work that day as she was taking a 'mental health' day, however she had not spoken to Ms Paiva and informed her of the reason for her absence.

[56] Ms Paiva said that because she had given those employees who had attended the "Make Your Own Havianas" event in Auckland a day off in lieu, she had assumed on 14 January 2013 that Ms Edmonds had taken her day in lieu.

[57] Ms Edmonds said that when she returned to work after 14 January 2013 she had spoken to Ms Paiva and informed her that she had spoken to the warehouse manager rather than to her as she was suffering from stress and did not feel comfortable talking to her and that Ms Paiva had responded: "I am how I am, if you don't like it you know where the door is."

[58] Ms Paiva said she did not recall the conversation following Ms Edmonds's absence on 14 January 2013 and denied that she had made the comment as alleged to Ms Edmonds. Ms Paiva said that she had no reason to believe that Ms Edmonds was unhappy in her job.

Supplier Incident

[59] On 3 December 2012 Ms Edmonds had emailed a file containing the New Zealand marketing plan to the supplier in Brazil, a file which Ms Paiva had approved.

[60] Ms Edmonds said that on 16 January 2013 she had realised as a result of an email received from the supplier that the wrong file had been sent.

[61] Ms Paiva said that the fact that the wrong file had been sent was her responsibility but because she had been busy she had not opened the file attached to the email for approval from Ms Edmonds as she had assumed that the attached file was the updated one she and Ms Edmonds had previously worked on together.

Second job interview

[62] Ms Edmonds said that following the earlier telephone interview, on the weekend of 19 and 20 January 2013 she had attended an interview for the job she had applied for which was based in Auckland.

Further sickness/stress leave

[63] Ms Edmonds said that on Monday 21 January 2013 she had been suffering from stress and had not attended for work that day. Ms Paiva said Ms Edmonds had contacted the warehouse manager and informed him that she was absent as the result of a “*tummy bug*”.

[64] The following day, 22 January 2013, Ms Paiva said Ms Edmonds had telephoned her and explained that she had been vomiting and unable to attend for work that day, but had not mentioned anything about suffering from stress during that conversation.

[65] Ms Paiva said she had requested that Ms Edmonds obtain a medical certificate as her absence was placing a strain on the business.

[66] Ms Edmonds said that as Ms Paiva had asked her to obtain a medical certificate; she had attended a medical centre that day and obtained a medical certificate which stated that she was: “*unable to attend for work for 3 days and will be fit to attend work on Thursday 24th Jan*”.

[67] On 23 January 2013 Ms Edmonds returned to work and read an email which Ms Paiva had sent to the supplier in Brazil. The email was dated 22 January 2013 and stated:

I would like to apologise as I've just found out that Lorraine sent you the wrong file with our budget and actions for 2013.

We have a new Marketing Manager starting on 04/02/2013 and Pedro will be here on 09/02/2013 so I would like to go over the plan with them and send you a revised version with the correct costs and activities.

[68] On 23 January 2013 Ms Edmonds had emailed Ms Paiva once she had read the email stating: “*My apologies for sending the budget you approved to Brazil.*” Ms Paiva responded by email that same day stating: “*No worries. We'll update it and present it to Pedro next month*”.

Appointment of Marketing Manager

[69] Ms Paiva said that she had decided during December 2012 to appoint someone to the still vacant Marketing Manager position as she could no longer afford the time to assist and supervise Ms Edmonds.

[70] Ms Paiva said that she had considered Ms Edmonds for the role, to whom she had provided role development in the form of funding training courses in management skills and design with a view to her further advancement in marketing.

[71] However she had realised during the busy 2012/13 summer season that Ms Edmonds was not sufficiently experienced to take on the Marketing Manager role and she was feeling pressurised in her current role, so she did not want to put additional pressure on her. Consequently she had decided to offer the position to Ms Ramires.

[72] Ms Edmonds said that as a result of Ms Paiva's email to the supplier dated 22 January 2013 she considered that she was being blamed for the wrong file being sent despite the fact that she had asked Ms Paiva to approve her emailed file prior to it being sent, and she had also been upset that to find out that a Marketing Manager had been appointed without her having been consulted or advised prior to reading the email.

[73] Ms Edmonds said she saw the appointment of a Marketing Manager as a demotion and devaluation of her role.

[74] Ms Paiva said she had viewed the appointment of a Marketing Manager as relieving the pressure on Ms Edmonds and giving her a more appropriate person to report to rather than herself. Further that she felt Ms Edmonds could benefit from the experience which Ms Ramires would bring to that role.

[75] Ms Paiva said that she did not accept that the appointment of a Marketing Manager would represent a demotion for Ms Edmonds who would retain all the duties she had been allocated.

[76] On 24 January 2013 Ms Edmonds had been offered the job in Auckland for which she had been interviewed.

[77] On 25 January 2013 Ms Edmonds had resigned from her employment with Bossanova. In the resignation letter Ms Edmonds stated:

Dear Claudine,

I am writing to advise that I am resigning from my position as Customer Service/Marketing Coordinator at Bossanova. My last day of work will be Friday 1 February.

I sincerely thank you for my employment and the opportunities provided to me in this time.

[78] Ms Edmonds's last day of employment with Bossanova was 1 February 2013, and she commenced employment in Auckland a few days later.

[79] On 23 April 2013 Ms Edmonds raised a personal grievance with Bossanova. Ms Edmonds attributed the delay in raising proceedings to her moving to Auckland and settling in to her new job.

Determination

Constructive Dismissal

[80] An employee is usually entitled to resign from their employment on a unilateral basis. In this case, the Employment Agreement made provision for this situation at clause 32.1 which required either party to provide two weeks' notice (subsequently amended to one weeks' notice) of termination.

[81] 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*:¹

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.

[82] 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.

[83] 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.

[84] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.²

¹ 5/12/00 AC 94/100, AEC 106/00 at para 21

² *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

[85] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*³ there are three fundamental situations in which a constructive dismissal claim may arise:

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

[86] Ms Edmonds is claiming her resignation was caused either by Ms Paiva adopting a course of conduct with the deliberate and dominant purpose of coercing her to resign, or alternatively that there was a breach of duty on the part of Bossanova.

Did Bossanova unjustifiably constructively dismiss Ms Edmonds by embarking upon a course of conduct with the deliberate and dominant purpose of coercing her to resign?

[87] In the case of a ‘course of conduct’ type of constructive dismissal it will be necessary to examine the course of dealings between the parties to determine if it were sufficient to coerce Ms Edmonds into resigning from her employment. Ms Edmonds in claiming that there was such a course of conduct highlighted a number of incidents which had caused her to feel that she had no option but to resign.

[88] Significantly I note that prior to October 2012 there is no evidence before the Authority to indicate that there were any problems in that relationship between Ms Edmonds and Ms Paiva. This is despite the fact that Ms Edmonds had begun reporting directly to Ms Paiva in January 2012, some 9 months prior to the meeting held on 26 October 2012, the first incident cited by Ms Edmonds.

Incidents

1. *26 October 2012 Meeting and Warning Letter*

[89] I accept that Ms Paiva had been angry during the meeting held on 26 October 2012 and that she had raised her voice and that Ms Edmonds had been upset by the meeting.

³ (1985) ERNZ Sel Cas 136; [19785] 2 NZLR 372

[90] However it is clear both from Ms Paiva's evidence and that of Ms Edmonds herself that Ms Edmonds had accepted responsibility for what had occurred during the meeting, and had confirmed this in an email written immediately following the meeting.

[91] I find it significant for consideration of this incident that Ms Edmonds states in the email written immediately after the meeting that: "*I enjoy working at Bossanova ..*". I therefore do not find that what had occurred at this meeting was destructive of the employment relationship at that point.

[92] I find that the issuing of the verbal warning letter given to Ms Edmonds on 9 November 2012 was not procedurally acceptable, either in reference to what had occurred at the meeting, or in setting a date for a performance review which was not subsequently followed.

[93] However I accept that Ms Paiva believed that she had addressed this matter informally and there is no evidence that Ms Edmonds pursued this matter, or that she voiced any concern about it to Ms Paiva.

[94] Indeed emails written to Ms Edmonds by Ms Paiva on or about the performance review date are positive, and in particular the email written by Ms Paiva and dated 3 December 2012, post-review date, which discusses the fall in the internet sales is indicative of a supportive relationship towards Ms Edmonds on the part of Ms Paiva. I find no indication in that email that Ms Paiva no longer wished to have an ongoing employment relationship with Ms Edmonds.

2. *Computer and paperwork issue*

[95] Although Ms Edmonds initially stated that her personal emails were being accessed by Ms Paiva, it is accepted that there were no personal emails on the Bossanova computer which Ms Paiva was alleged to be accessing.

[96] Bossanova's supplier was based in Brazil; therefore there was a significant time difference between the supplier and Bossanova. Ms Paiva said that she had accessed Ms Edmonds's work emails and the work notes on her desk top during the late evening when she had been working late to check details on matters with which she was dealing at that time.

[97] There is no dispute that Ms Paiva made no attempt to conceal her activity from Ms Edmonds, nor is there any evidence that she criticised Ms Edmonds about the emails or paperwork. There is no evidence before the Authority that Ms Edmonds raised any concern about this issue with Ms Paiva.

[98] I do not find that the fact that Ms Paiva accessed Ms Edmonds work emails or paperwork to indicate a lack of trust and confidence in her work by Ms Paiva.

3. *Surf Life Saving New Zealand*

[99] Ms Edmonds claims that Ms Paiva had spoken to her about the Surf Life Saving New Zealand matter in a manner similar to that used during the meeting held on 26 October 2012 and accused her of being the reason others associated with Bossanova were going to have to work harder.

[100] I accept that Ms Paiva was direct in the manner of addressing this loss of the sponsorship opportunity with Ms Edmonds, but note that she stated she had not been angry. Although the email Ms Edmonds wrote to the sales representatives and PR agent dated 5 December 2012 was written at Ms Paiva's request to inform them of what had occurred, Ms Paiva denies, and there is no evidence to support, Ms Edmond's statement that Ms Paiva dictated the email, although Ms Paiva accepted that she may have observed that loss of the sponsorship would impact on the work needing to be undertaken by the sales representatives.

[101] In the email Ms Edmonds takes responsibility for the issue, and Ms Paiva said she had been pleased by that. There is no evidence of any disciplinary action in connection with this matter, or that Ms Edmonds raised this matter as a concern with Ms Paiva, and significantly in fact it was followed by the events in December 2012.

4. *Christmas events*

[102] Ms Edmonds claimed that Ms Paiva's conduct towards her during the Christmas period had been repudiatory of the employment relationship, specifically the alleged lack of accommodation in the penthouse suite in the hotel booked by Ms Paiva for the employees to attend the 'Make Your Own Havianas' event, and the comments in relation to her Christmas perfume gift.

[103] I note that Ms Edmonds had resided in the master bedroom in the penthouse suite. Further that Ms Edmonds's evidence regarding the alleged comments made by Ms Paiva at the presentation of the perfume gift, which are denied by Ms Paiva, is cast into some doubt by the gift from Ms Paiva of Havianas footwear to Ms Edmonds's family and friends which was acknowledged as generous by Ms Edmonds.

[104] I do not find these actions to be repudiatory of the employment relationship but rather the actions of an employer who valued the employee.

5. *Brazilian/English speaking employee recruitment*

[105] Bossanova imported Havianas footwear from Brazil; I accept that in this situation it was preferable for the company to engage employees who had a fluency in Portuguese as well as English, although I also accept that such fluency was not an essential for some roles.

[106] Ms Paiva said that she had taken into consideration Ms Edmonds's preference for having an English speaker recruited, and indeed Ms Williams, a New Zealander, had been appointed to assist Ms Edmonds over the summer season 2012/13.

[107] I do not find that Ms Paiva disregarded Ms Edmonds wishes in this matter, or that she recruited Ms Ramires who was a Portuguese speaker with the deliberate and dominant purpose of coercing Ms Edmonds to resign.

6. *Stapler Incident*

[108] Ms Edmonds's evidence as to what occurred regarding the stapler is at direct variance with that given by Ms Paiva, Mr Winter and Ms Bidois.

[109] Even were I to accept Ms Edmonds's evidence on this matter in preference to that of the three other witnesses, which I am not persuaded to do, I do not find that this incident amounts to conduct with a deliberate and dominant purpose of coercing an employee to resign.

[110] Moreover I am not persuaded that this event was sufficiently serious to have triggered Ms Edmonds's 'mental health' sick leave on 14 January 2013 as claimed by Ms Edmonds, given the delay between this incident and the sick leave.

7. *Supplier Incident*

[111] Ms Edmonds said that the realisation that the wrong file had been sent to the supplier had resulted in her taking a day of 'mental health' sick leave on 14 January 2013, and the realisation that Ms Paiva was blaming her for the error had triggered the second period of sickness absence.

[112] I find that this evidence does not correlate with the actual chronology of the events. The first day of Ms Edmonds's sickness absence was on 14 January 2014, however Ms Edmonds did not know about the file error until the supplier's email received on 16 January 2013. In the case of the second period of sickness absence on 21 and 22 January 2013, Ms Edmonds did not read the email written by Ms Paiva to the supplier until she returned to work on 23 January 2013.

[113] However leaving that issue to one side, Ms Paiva said that she had not intended to blame Ms Edmonds for the error in the wrong file being sent to Brazil. Whilst I accept that the wording of the email dated 22 January 2013 may have been more tactfully worded, there was no evidence that Ms Paiva reprimanded Ms Edmonds for this matter, on the contrary Ms Paiva's response to Ms Edmonds email dated 23 January 2013 had been: "*No worries*".

[114] I further find that there is also no evidence that Ms Edmonds raised her concern about this aspect of the email wording with Ms Paiva at that time.

[115] I do not find that Ms Paiva blamed Ms Edmonds for the error in the wrong file being sent to the supplier or that the email wording was written with a deliberate and dominant purpose of coercing Ms Edmonds to resign.

7. *Marketing Manager Appointment*

[116] Ms Edmonds claimed that the recruitment of the Marketing Manager was done without consultation with her, and that it resulted in the loss of most of her marketing duties.

[117] Ms Paiva's evidence was that since Ms Fairland had resigned in January 2012 she had been providing Ms Edmonds with assistance and guidance on marketing matters. Ms Edmonds acknowledged that this was the case in her email dated 26 October 2012 in which she refers to her being able to organise the stock and organisation of promotions without Ms Paiva: "*having to do it/constantly be looking over my shoulder*".

[118] In December 2012 Ms Edmonds's evidence was that she had been feeling overwhelmed by her workload. As a result Ms Paiva had recruited Ms Williams and engaged Ms Ramires to assist Ms Edmonds with her workload.

[119] It was in this situation that Ms Paiva decided to recruit a replacement for the vacant Marketing Manager position. Ms Paiva's evidence was that the decision would have the effect of relieving her of the need to provide the assistance and guidance that she had been providing to Ms Edmonds since Ms Fairlane's departure. The decision would also relieve the pressure on Ms Edmonds.

[120] Ms Paiva denied that there would be any adverse impact on Ms Edmonds's responsibilities, that change would be in her reporting line to Ms Ramires rather than Ms Paiva, and her marketing duties would continue as previously

[121] I do not find that the Marketing Manager appointment was undertaken with a deliberate and dominant purpose of coercing Ms Edmonds to resign.

[122] I determine that Ms Edmonds was not unjustifiably dismissed by Bossanova embarking on a course of conduct with a deliberate and dominant purpose of coercing Ms Edmonds to resign.

Did Bossanova unjustifiably constructively dismiss Ms Edmonds by breaching the duty it owed her in respect of trust and confidence and fair dealing?

[123] The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*⁴. The Court of Appeal in examining the question of constructive dismissal observed:

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.

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

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

[125] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*⁵ observed in describing this type of constructive dismissal:⁶

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

⁴ [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

⁵ [1983] ACJ 965

⁶ at [975]

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.

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

[127] In the case of *Harrod v DMG World Media (NZ) Ltd*⁷ (*Harrod*) the then Chief Judge observed that the unsuccessful plaintiff failed in her claim of constructive dismissal in circumstances in which: "... she knew or ought to have known that it could have been discussed further if it was troubling her."⁸

[128] Further in the case of a claim of repudiatory breach of an employment agreement, an employee may either accept the repudiation of the agreement and resign, or refuse to accept the repudiation and continue to work. In *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd*⁹ it was held that a delay in making such an election may be fatal to the employee's claim of constructive dismissal¹⁰

Breach of Duty

[129] I accept that Ms Edmonds claimed she felt unhappy by the various incidents outlined above, however what is necessary to amount to unjustifiable dismissal on the basis of this type of constructive dismissal claim is: *dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship*".

[130] As set out in the preceding paragraphs, whilst I have found that Ms Paiva's conduct may have caused Ms Edmonds some unhappiness by the manner in which issues were raised with her, notably on 26 October 2012 and in relation to the Surf Life Saving New Zealand issue, I do not find that these amounted to dismissive or repudiatory conduct such as to constitute a breach of the duty Bossanova owed to Ms Edmonds in relation to trust and confidence and fair dealing.

Reasonably foreseeable

[131] As a result of the alleged actions by Bossanova, the risk of Ms Edmonds resigning must have been reasonably foreseeable to Bossanova. Apart from Ms Edmonds having raised her concern about the number of Portuguese speakers employed by Bossanova, there is no

⁷ [2002] 2 ERNZ 410

⁸ *Harrod* at [54]

⁹ (1990) ERNZ Sel Cas 791 (LC)

¹⁰

evidence that she raised any of her concerns about the incidents between 26 October 2012 and her resignation on 25 January 2013 with Ms Paiva.

[132] Section 4 (1A) of the Act requires both parties to an employment relationship to be responsive and communicative in their dealings with each other. Ms Edmonds failed to be responsive and communicative in the good faith duty she owed to Bossanova by failing to bring her concerns to the attention of Ms Paiva and providing her with an opportunity for corrective action.

[133] Ms Edmonds had taken a 'mental health' day on 14 January 2013, but had not advised Ms Paiva directly of the reason for her absence. On the two further days of alleged stress leave on 21 and 22 January 2013, Ms Edmonds had informed Ms Paiva that she had been suffering from a stomach upset.

[134] In this situation I find that Ms Edmonds had failed to notify Ms Paiva of the impact her work concerns were having on her health thus that Ms Paiva had no opportunity to take corrective action.

[135] Ms Edmonds resigned on 25 January 2013. I find that there is no indication in the letter of resignation that she was forced to resign by a breach of duty on the part of Bossanova, nor was it reasonable to expect Ms Paiva to infer that such was the case in the absence of any other indicia to the contrary,

[136] I determine that Bossanova did not unjustifiably constructively dismiss Ms Edmonds by breaching the duty it owed her in respect of trust and confidence and fair dealing.

[137] I am unable to assist Ms Edmonds further.

Costs

[138] 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