

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 74
5614856

BETWEEN NICOLA FRANCIS
 Applicant

AND RUAWAI REST HOME 2014
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Jenny Murphy, Advocate for Applicant
 Alastair Hall and Joelle Avery, Counsel for Respondent

Investigation Meeting: 26 September 2016 at Palmerston North

Submissions Received: 10 October and 26 October 2016 from the Applicant
 25 October and 28 October 2016 from the Respondent

Determination: 10 August 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Nicola Francis, claims she was unjustifiably dismissed (albeit constructively) on 1 September 2016. She also claims to have been unjustifiably disadvantaged by virtue of being presented with an employment agreement that did not reflect her permanent status. Finally Ms Francis claims she has not been paid public holidays when she should.

[2] The respondent, Ruawai Rest Home 2014 Limited (Ruawai), denies Ms Francis was either disadvantaged or constructively dismissed. It says Ms Francis sought changes to her conditions of employment, including a pay rise, and while it negotiated in good faith settlement could not be reached. Ruawai denies the wage claim.

Background

[3] Ruawai is a care facility for the elderly in Feilding. On 22 January 2013, Ms Francis commenced employment as a caregiver. The manager at the time was Andrea Thompson.

[4] On 15 December 2014, Ms Thompson registered Ruawai Rest Home 2014 Limited and on 1 April 2015 her company acquired Ruawai as a going concern.

[5] Existing staff continued to work although they were presented with a new individual employment agreement in which some conditions differed from those that had previously applied. In particular there were changes to the hours of work with the introduction of a four-day-on/four-day-off roster.

[6] The new agreements were also of fixed duration with Ms Francis' being for a term of six months. While she now takes issue with this as others were offered 12 month agreements she chose to sign without taking advice. In fact Ms Francis says she saw the new arrangement as advantageous as it gave her regular hours whereas her previous arrangement had been somewhat ad hoc.

[7] Despite initially welcoming the changed hours Ms Francis found the new arrangement difficult. On a couple of occasions she asked Ms Thompson if her hours could change. Ms Francis says advice there would be no change was accompanied by reminders it might be difficult for her to get work elsewhere. This was a reference to the fact Ms Francis had a criminal conviction for which she had been jailed. Indeed she says it was the conviction's stigma and the reaction of residents in her previous locale that had led her to shift to Feilding.

[8] In November 2015 Ms Francis and her husband separated. Unsurprisingly Ms Francis found this stressful with the situation exacerbated by the fact her social circle was small and essentially limited to family.

[9] In December, and while away from Feilding on a rostered day off, Ms Francis received a phone call from Ms Thompson. Upon saying she would be working, as rostered, the following day, Ms Francis says she was told she and Ms Thompson had to meet. She was also told it was to have a talk about *the drama going on in your life* and a concern Ms Francis had allegedly told both staff and residents she had been in prison. Ms Francis says she advised Ms Thompson she had only told two colleagues

and then in confidence. The conversation turned to Ms Francis' marital difficulties before Ms Thompson is alleged to have said *well you need to think about what has to happen because it can't go on like this* and then saying other staff had had *a gut's full and it was affecting the residents*.

[10] Ms Francis says she was upset by the exchange and immediately returned to Feilding. She telephoned Ruawai and asked if she could come in to meet immediately. The response was no. She and Ms Thompson would meet as arranged the next day.

[11] The following day, Ms Francis went to work and met with Ms Thompson as arranged. The meeting was also attended by a staff nurse.

[12] About the meeting, Ms Francis says she was told that as a result of widespread knowledge of her imprisonment her fixed term employment agreement, the renewal of which was yet to be addressed despite its earlier expiry, would only be renewed for a further six months backdated to the previous expiry. Ms Francis says she was then asked why she had not raised the expiry and replied she had been waiting to receive confirmation of various applicable qualifications at which time she would have raised the agreement and asked for a wage rise. Ms Francis goes on to say:

She then printed a copy of the agreement off the computer, signed it and backdated it. She gave it to me to sign, but I said I would need to take some advice. I was very upset. Andrea said that she had already arranged for a reliever to come and do my shift, so I could go home. This had never planned to be a 'chat' or a quiet discussion, this had been a dismissal meeting.

[13] Ms Francis sought advice and was told the fixed term arrangement was invalid. She says her main concern was keeping her job and obtaining an employment agreement that confirmed permanent full time status. She says she also wanted her pay increased.

[14] At the same time, things were not improving in Ms Francis' personal life and she was of the view Ms Thompson was interfering unduly therein.

[15] During January and February there was correspondence between Ms Murphy and Ms Thompson which culminated the raising of a personal grievance by letter dated 3 March 2016 alleging unjustified disadvantages.

[16] The alleged disadvantages related to the fixed term agreement and its expiry on 31 March 2016; with the way the meeting of 22 December 2015 was conducted and a failure to respond positively to Ms Francis' request for a pay rise which is alleged to constitute a failure to be responsive and communicative.

[17] On 8 March Ruawai replied via its solicitor. It confirmed Mr Francis was now considered a full time permanent employee but rejected the assertion she should receive a pay rise.

[18] Ms Francis goes on to say that following the lodging of the personal grievance, the environment became even tenser. That said, she accepts Ms Thompson was civil and an issue concerning payment of meal breaks was resolved. She says she was also given extra shifts but felt there was some negativity. Ms Francis complains that when an external adviser came in to run sessions about improving the working environment she was horrified that person said a personal grievance had been raised though the applicant as not identified. Ms Francis says that, along with other comments, made her feel other staff were against her and she was being held to blame for empty beds which meant she was responsible for staff having reduced hours and their jobs potentially jeopardised.

[19] Ms Francis complains that when another colleague resigned Ms Thompson planned and paid for a farewell dinner to which she (Ms Francis) was not invited. The evidence, however, shows the concerned staff member and not Ms Thompson was responsible for the list and not all attended.

[20] Ms Francis also says she was qualified to fill the role of the departing employee (diversional therapist) and wanted to do so as it constituted a promotion. She says she was hurt by the fact she was not offered the job and it was advertised with a new employee filling it. Ms Francis says she concluded these events confirmed Ruawai was intent on repudiating the employment agreement and that, in turn, led to her claim of constructive dismissal.

[21] The letter advising the resignation was dated 1 September 2016 and was written by Ms Murphy. It advised the reasons Ms Francis was resigning were:

- (a) A view that by proffering the fixed term agreement on 22 December 2015 Ruawai had in fact dismissed Ms Francis;

- (b) Ruawai had failed to conclude an employment agreement that fairly reflected Ms Francis' status as a full time permanent employee;
- (c) Ruawai had failed to pay Mr Francis fairly;
- (d) That application of the four-day-on/four-day-off roster meant Ms Francis did not work 40 hours a week and was incapable of addressing the situation by finding other employment due to the nature of the roster. It is also alleged other employees were not required to work to such a roster which was unfair and showed disparity of treatment;
- (e) That Ms Thompson showed a lack of good faith in dealing with the initial grievance and had continued to discuss Ms Francis' personal circumstances despite requests she not do so;
- (f) Ruawai's failure to offer Ms Francis the diversional therapist job when it could have;
- (g) That:

Ruawai was made aware that Ms Francis had vacated her home due to her marriage ending and that with the hours of work and rate of pay that she was supplying her with she was unable to find any affordable accommodation and has had to rely on family. She has been sleeping on a mattress on the floor for the past couple of months – but this has become untenable.

- (h) That Ms Francis' wage would not be paid the minimum required under the Minimum Wage Act were she a full time employee.

Determination

[22] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[23] Ms Francis' claims she was unjustifiably disadvantaged and constructively dismissed with the disadvantages, when considered as a totality, being the issues which led to her resignation and the claim of constructive dismissal.

[24] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ the Court of Appeal held constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[25] In *Wellington etc Clerical Workers etc IUOW v Greenwich*² the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[26] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus is on Ms Francis to establish, prima facie, there was such a breach.

[27] There must also be a causal link between the employer's conduct and the tendering of the resignation³ and the possibility of resignation in response to that conduct should be foreseeable.⁴

[28] When answering questions from both myself and Mr Hall Ms Francis' emphasised two key concerns as those which led to the conclusion her continued employment was no longer viable. The first and most important was a view she was being underpaid and that is reflected in six of the eight issues raised in her representatives letter of representatives letter of 1 September 2016 ([21] above).

[29] The first of the six points to which I refer are Ruawai's alleged failure to conclude an employment agreement which, in Ms Francis' view, fairly reflected her status as a full time worker. The effect of this claim is the same as two others - that

¹ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

² (1983) ERNZ Sel Cas 95; [1983] ACJ 965

³ *Z v A* [1993] 2 ERNZ 469

⁴ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

the four day on/four-day-off roster meant Ms Francis did not work 40 hours each week and her weekly wage did not equal forty hours at the minimum wage.⁵

[30] The others are the refusal to increase the hourly rate, the failure to offer the diversionary therapist job which would have meant a pay rise and the alleged failure to recognise Ms Francis' domestic situation and her inability to source affordable accommodation.

[31] As already said Ms Francis' answers made it obvious her main priority was the attainment of a wage rise and that was a key driver behind her subsequent decision to leave. Unfortunately for Ms Francis there is, providing statutory minima are being observed, absolutely no right to a pay rise and a lawful rate, even if inadequate in the eyes of the recipient, is not grounds upon which a claim of constructive dismissal can be based.

[32] The hourly rate paid to Ms Francis was lawful.

[33] There is then an argument that when converted to a weekly rate Ms Francis' earnings fell short as she was not receiving full time hours. The problem that faces is that while forty hours is widely applied working week there is no statutory definition confirming it as a rule. For example the public service used 37 hours and 55 minutes for many years while 37.5 was also widely adopted.

[34] Here the agreed hours, which must as a result be considered full time, were determined by the four on/four off roster. Not only did Ms Francis agree, she initially welcomed the arrangement. She was then paid appropriately. While she subsequently made attempts to alter the arrangement and increase her hours the obligation on the employer is to enter into the discussion. It is not obliged to agree a change. The evidence confirms that is what occurred and Ruawai cannot be criticised for its approach, especially given Ms Francis' concession when answering questions that a key reason a new agreement was not signed is she was not offered one that met her needs.

[35] Again there was no obligation on Ruawai to offer an increase to the hourly rate and there is no right to a promotion which would have been the effect of being

⁵ Minimum Wage Act 1983

appointed to the diversional therapist's position.⁶ Finally I must say Ruawai simply cannot be held responsible for the consequences of Ms Francis' marital difficulties.

[36] The arguments regarding Ms Francis' view her weekly pay rate was inadequate, a contention she repeatedly referred to as central to her decision to resign, fail to convince. This is not a ground upon which a claim for constructive dismissal can be based.

[37] The second point referred to as strongly influencing the resignation was Ms Francis' belief the offering of the fixed term agreement in December constituted an actual dismissal. This is simply incorrect and I remain a little bemused as to why this argument is being enunciated.

[38] While the fixed term agreement Ruawai offered was undoubtedly unenforceable as the evidence shows it did not comply with the requirements of s 66 of the Act it is difficult to conclude it constituted a dismissal given subsequent events. It is equally difficult to conclude it even constitutes a disadvantage.

[39] While the threat of termination temporarily existed, it never occurred. Ms Francis was not dismissed as a result of December's events. Indeed she did the right thing and sought professional assistance. Her advisor then raised the matter with Ruawai who responded to the employment relationship problem by resiling. That was made quite clear in the letter of 8 March which conceded Ms Francis was now deemed a permanent employee and no longer faced the prospect of termination upon expiry of a fixed term. The employment then continued for some months and until Ms Francis resigned having found new employment.

[40] Where an employer makes a mistake or is guilty of an improper act and having been put on notice of that fact then desists, there is no breach of duty.⁷ That also means the pleaded breach of section 66 has been addressed and rectified.

[41] Similarly I dismiss the argument, now being offered, that the fixed term agreement was indicative of Ruawai's intent and confirmed to Ms Francis there was no security of employment. I do so for the reasons above and also note this claim has only been recently raised. It could not, given it was rectified, have been something Ruawai could foreseeably see as leading to a resignation.

⁶ *Southern Local Government Officers Union v Timaru District Council* [1991] 2 ERNZ 932

⁷ *Oats v Hovenden* [1997] ERNZ 614 (EmpC)

[42] Finally there are the issues concerning Ms Francis' view she was being ostracised and the allegation Ms Thomson was unduly interfering in Ms Francis' personal life. The evidence regarding the first issue and the way it came out leads to a conclusion this was nothing more than a source of unhappiness. It fell far short of repudiatory. The evidence regarding the second issue was confused, contradictory and reliant to a large extent on supposition as opposed to fact.

[43] Finally I note that underpinning the concept of constructive dismissal is that the situation is one in which the employment agreement has been repudiated and its continuation is no longer possible. The events upon which Ms Francis primarily relies when saying why she concluded the employment's continuation was no longer viable occurred sometime before her departure. She ultimately chose to remain while she sought, and ultimately sourced, alternate employment. In other words the employment relationship was not totally untenable and the event which ultimately triggered the resignation was the attainment of new employment which also addressed Ms Francis' goal of improving her remuneration.

[44] The claim for unpaid public holidays was withdrawn.⁸

Costs

[45] For the above reasons I conclude Ms Francis has failed to discharge the duty she has of establishing she was constructively dismissed. Accordingly her claim is dismissed.

[46] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority

⁸ Closing submissions of 10 October 2016 at [96]