

**Attention is drawn to an order
prohibiting publication of
parties' identification details**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 536
3150704

BETWEEN GWH
 Applicant

AND ZOG LIMITED
 Respondent

Member of Authority: David G Beck

Representatives: Virginia Nicholls, advocate for the Applicant
 Daniel Erickson, counsel for the Respondent

Investigation Meeting: 8 - 9 August 2022

Submissions Received: 26 August 2022 from the Applicant
 26 August 2022 from the Respondent

Date of Determination: 17 October 2022

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] Pursuant to a discretion available in s 10 (1) Schedule 2 of the Employment Relations Act 2000 ("the Act") the Authority on an interim basis, resolved to not publish the parties'

names, location of the employment and certain features of this dispute due to the potential for long term reputational harm that may occur to the applicant in what was a ‘no fault’ ending of an employment relationship involving no performance or disciplinary issues.

[2] In seeking a permanent non-publication order the applicant’s advocate in submissions has stressed the matters in this dispute do not warrant any public interest and that allusions to the applicant’s health issues may have an unfair and discriminatory impact upon her in future employment applications. In addition, the applicant’s advocate drew attention to both general mainstream media reporting and an emerging trend on social media reporting of Authority decisions and subsequent negative comment.

[3] In addition, a recent Employment Court decision was cited considering how the interest in open justice should be assessed - the court observed that:

The reality is that the routine online publication of decisions of the Employment Relations Authority and the Employment Court creates a search mechanism for those who wish to use it, for example, to screen applicants for employment. It has become increasingly well recognised that the spectre of publication puts many employees off pursuing their claims, which in turn raises important access to justice issues.¹

[4] The respondent party’s counsel submission expressed a neutral view on the continuing non-publication order issue. However, the Authority has resolved that identifying the respondent employer would likely lead to the identification of the applicant, so the non-publication order is extended to both parties.

[5] In considering all the factors, including the circumstances of the employment relationship ending, I make the non-publication order ongoing despite having regard to the Employment Court also emphasising the importance of open justice. I have balanced this against the applicant’s objectively legitimate concerns around negative publicity, as I must be satisfied of specific adverse consequences or other compelling reasons to order non-

¹ *Chief of Defence Force v Darnley* [2021] NZEmpC 40 at [3] see also similar observations made in *JGD v MBC Ltd* [2020] ERNZ 447.

publication - it is a reasonably high standard to meet but it has been achieved here where I consider the applicant to be in a vulnerable situation. ²

[6] I use the following random identifiers for the respondent and those who gave evidence during the investigation meeting and I have redacted parts of evidence and quoted correspondence where specific detail is unnecessary:

- GWH - the applicant.
- ZOG Ltd - is the respondent company.
- JXE – GWH’s partner.
- ROK – general manager of ZOG Ltd at time of dispute.
- VBK – deputy general manager of ZOG Ltd at time of dispute.
- EVN – national retail manager of ZOG Ltd at time of dispute.

Employment relationship problem

[7] GWH was employed by ZOG Ltd a nationwide retailer, from 10 September 2018 as a Store Manager, until her employment ended on 2 July 2021 by way of a resignation in disputed circumstances.

[8] GWH has claimed that she was unjustifiably dismissed in a constructive manner. GWH’s advocate in submissions, has placed reliance upon the third limb of categories of potential constructive dismissal identified by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* (a breach of duty by the employer leads an employee to resign). ³

[9] GWH also claimed she was the subject of employer actions and omissions that caused her disadvantage during the period of employment. These are said to include:

² See *Erceg v Erceg*[2016] NZSC 135 and *Crimson Consulting Ltd v Berry*[2017] NZEmpC 94, [2017] NZEmpC 511 and *FVB v XEY* [2020] NZEmpC 182

³ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

- A failure of ZOG Ltd to provide a safe workplace.
- Unlawful deductions from wages during the 2020 Covid lockdown.
- Non-compliance with the Holidays Act 2003 (HA).
- A failure to pay notice as set out in GWH's individual employment agreement.

[10] ZOG Ltd says that GWH's resignation did not amount to a constructive dismissal and if any breach of duty is found, such was not sufficiently creative of a foreseeable resignation. ZOG Ltd asserts that no statutory or employment agreement entitlements are at issue.

The Authority's investigation

[11] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. likewise, I have carefully considered the helpful submissions received from both parties and refer to them where appropriate and relevant.

[12] GWH, JXE, ROK, VBK and EVN gave evidence at the investigation meeting and their representatives made timetabled written submissions afterwards.

Issues

[13] The Authority will determine the following issues:

- (a) Did ZOG Ltd breach terms of employment or duties owed to GWH in a sufficiently serious manner and if so, was it reasonably foreseeable that GWH would resign and the ending of the employment be categorised as a constructive dismissal rather than a resignation?
- (b) Did ZOG Ltd engage in any actions or omissions that caused GWH to be disadvantaged in an unjustified manner (including an allegation of an unjustified withdrawal of a job offer on 14 May 2021)?

- (c) Did ZOG Ltd adhere to the provisions of GWH's employment agreement during the 2020 Covid lockdown and upon the ending of the employment relationship?
- (d) If any of GWH's claims are established - what remedies should follow?
- (e) If GWH is successful in all or any element of her claims should the Authority reduce any remedies granted because of contributory conduct?
- (f) How costs are to be dealt with.

What caused the employment relationship problem?

[14] GWH who had previous retail management experience, commenced employment with ZOG Ltd in September 2018 and led the establishment of one of ZOG Ltd's new outlet stores. GWH initially reported to three different managers. ZOG Ltd witnesses confirmed that GWH was a well-regarded, committed, energetic and capable manager with no performance issues and GWH expressed a passion for her role and the industry. The work whilst managerial and administrative in nature, also involved a degree of shopfloor duties including assisting shopfloor staff with physical tasks. GWH described being on her feet most of the working day and having to lift and bend to move stock.

[15] Unfortunately, GWH had an accident at home on 29 October 2019 that initially seemed inconsequential. After returning to work shortly thereafter (4 November), the injury became aggravated when lifting stock in the workplace. The incident was reported in ZOG Ltd's online Health and Safety system (Pioneer) but despite being viewed by twelve other managers, ZOG Limited conceded that no follow up action was initiated. GWH reported in Pioneer that she had attended her GP and was receiving physio and pain management.

[16] At this point in time, GWH was reporting to VBK, the then deputy general manager. There was some dispute about VBK's awareness of the initial cause of GWH's injury but as her treatment progressed, she provided her employer with regular updates. Throughout 2019 – 2020 GWH carried on attending work and managing her pain through various strategies but this also involved using her sick leave entitlement and annual leave for respite.

[17] On 10 August 2020, ROK then general manager, located in another city, visited GWH ostensibly to discuss some supply chain issues but during the informal conversation over lunch, ROK acknowledged GWH's health issues and suggested she consider temporarily relinquishing her managerial role. GWH was concerned about the tenor of the conversation and approached VBK after ROK had called her after the lunch asking her if she had given the proposal any further thought.

[18] This led to ROK emailing GWH on 11 August suggesting she may have misinterpreted the conversation, that was from her perspective, aimed at being supportive of GWH's health issues and it acknowledged that GWH was a "valued member of our team" who ZOG Ltd did not wish to lose. ROK's email however, ended with an ambiguous suggestion that GWH "think on what would work best for you, any ideas or solutions" and suggested a further Zoom call also involving VBK. The email also offered ongoing assistance to address both GWH's health issues and frustrations over supply chain issues. The matter did not progress any further and at a further meeting on 17 September 2020 when ROK raised the 10 August conversation, GWH declined to discuss the matter further.

Ongoing absence

[19] Due to a flare up of the original injury, GWH was absent from work from 13 December 2020 onwards and did not return to work. During this period, GWH kept ZOG Ltd fully apprised of her medical treatment and provided ongoing medical certificates to support her absence. The Authority observes that GWH's access to prompt treatment provided via ACC was delayed due to factors outside her control including an initial decision, later overturned, not to fund the surgery. ZOG Ltd made no suggestion other than, that GWH was making every effort to return to work.

[20] From mid November 2020, EVN, an external appointee, took over as ZOG Ltd's national retail manager and became GWH's direct manager. EVN telephoned GWH during the early stage of her absence in late December 2020 and was made aware she had a specialist appointment on 25 January 2021. Further, on 26 January EVN and VBK had a telephone conversation with GWH in which she confirmed surgery was required. At this point in time,

GWH had furnished a medical certificate covering her absence up to 29 January 2021. EVN recalled GWH had indicated a good prognosis following surgery and up to six weeks recovery time. EVN suggested the impression they had was an absence of up to 12 weeks was possible. As no surgery date was indicated, EVN emailed GWH on 28 January asking for a confirmation of a likely surgery date including capacity to undertake the physical requirements of her role. GWH replied the next day, saying she had no date for her surgery and asked for her job description to show to her surgeon.

[21] A further medical certificate was provided by GWH on 2 February up to 28 April 2021. EVN responded further on 5 February asking whether GWH would be expecting to return on 28 April on full or light duties. On 18 February 2021 GWH emailed EVN saying once ACC approved her surgery it would take place “within four to six weeks”. GWH indicated in this email that she had sent EVN’s questions to her surgeon and received the following reply:

Once we get approval for surgery your date will be 4-6 weeks after that.

You will be off work until you come in for a post-surgery check-up (usually at 6 weeks) and then you will go back to work on a graduated basis over the next 4-6 weeks depending on how well you are recovering and the type of work you do.

You will be able to get back to full duties usually around the three-month mark and you should be able go back to heavy type work at this stage.

[22] GWH ended the email outlining how distressed she was, referring to the August 2020 conversation with ROK and EVN’s last email; and she indicated:

I would like to sit down with you to discuss this, and any opportunities to work from home. I really enjoy my job and believe [the surgeon’s] comments provides a reasonable time frame for my absence and return to work. Knowing my job is safe and the company supports me will go a long way to speeding my recovery. I look forward to discussing this further with you and putting in place a plan that will meet our expectations.

[23] The dilemma for ZOG Ltd was anticipating a return date depended upon the surgery date. At worst, the absence indication at this point, was a further 18 weeks (up to mid-June 2021) and that was wholly dependent on the surgery date going ahead as envisaged.

[24] EVN responded in an email of 25 February, that after confirming the detail of information provided from GWH, she addressed the request to explore GWH working from home. Initially EVN expressed an understanding that GWH's current physical restrictions, pain level and impact of medication would be problematic and then she indicated that the "store manager role is an instore function we didn't believe that there is anything you could do until your recovery". However, EVN offered to engage in a conference call involving VBK the next day.

[25] In any event, the parties could not agree to a short notice meeting until 10 March. This was presaged by an email from EVN to GWH bemoaning the parties' inability to meet promptly and suggesting GWH was being evasive in the provision of information. Whilst the meeting had ostensibly been at GWH's request to explore working from home, the email stated an urgency to 'discuss the current situation' and:

As we have been unable to meet with you, we need to advise you in writing that your absence is having a significant impact on the business and team.

[26] The significant impact was said to include a 30% sales reduction due to the lack of a full-time store manager (at this point the manager's function was split between two city's stores). The email then sought early confirmation of a Zoom meeting time in the next two days or: "If we are unable to meet with you by 5pm this Wednesday, we have no other option than to request a formal health meeting". EVN then indicated if the 'formal' meeting was necessary, ROK and VBK would also attend and GWH should obtain representation and ZOG Ltd would consider contributing to any fees incurred. Whilst assuring GWH that no decision had been made, EVN stressed "...there are potential consequences for your on-going employment as Store Manager to be considered".

[27] GWH responded by email the next day in a conciliatory tone offering to meet the following day. GWH acknowledged the difficult situation ZOG Ltd's store had been placed in but noted the sales reduction may have also been impacted by Covid restrictions. EVN did not in response clarify the status of the meeting.

10 March 2021 Zoom meeting

[28] The parties subsequently convened a discussion by zoom early evening 10 March. In attendance were GWH her partner JXE as support, EVN and VBK. Notes of the meeting prepared by VBK were disclosed during the investigation proceeding but not shared with GWH at the time, although no specific concern was raised about the accuracy of such and GWH did not refer to this meeting in her brief of evidence.

[29] The minutes show that GWH, after outlining the impact of her injury, disclosed that ACC had declined her surgery funding (and income support) but she was reviewing this and, was in the interim on the public waiting list for surgery, but “with no clarity on timelines”. GWH also indicated the source of her medical condition had been conclusively linked to her non-work-related accident of 29 October 2019. GWH assured ZOG Ltd that she had her pain medication under control and although she could not return to the store, she was willing to work from home to help with staff rosters, administration tasks and contacting customers.

[30] EVN is recorded as generally stating ZOG Ltd would have to consider the length of GWH likely absence and that ZOG Ltd was assuming with the ACC complications, that a full return to work would not occur until early September 2021. I observe that given the information disclosed, this was not an unreasonable assessment. The cover for the store was then discussed as being problematic for a store manager from another city covering two stores. GWH confirmed she was in regular contact with her team at the store during her absence.

[31] Following the meeting by email to GWH of 19 March, EVN communicated a summary of the meeting and then indicated:

..... we now need to move to a formal health meeting to discuss your medical condition and our concerns around your ability to return to your role as Store Manager in the near future.

[32] The email concluded with a suggested formal Zoom meeting on 23 March, a request for all ACC correspondence and medical information and EVN warned that the ongoing

employment relationship was now in jeopardy. It is apparent that the move to a formal approach was triggered by the uncertainty of the length of absence, as no surgery date had been fixed.

[33] However, a 23 March email exchange between GWH and EVN details that GWH signalled her surgery date would soon be confirmed and EVN reiterated “we are struggling to hold the position open for much longer without specific timelines.” The next day GWH confirmed her surgery would proceed on 21 April 2021.

[34] It is reasonable to conclude at this point (24 March), circumstances did change and ZOG Ltd’s uncertainty was somewhat ameliorated. I observe that GWH was adequately communicating with her employer and disclosing relevant health information and the need for a “formal health meeting” was arguably premature.

[35] No formal meeting proceeded. EVN in an email of 29 March, then pressed GWH to confirm an understanding that she would return to work full time on 6 June 2021. EVN reiterated ZOG Ltd would struggle for another 10 weeks without a store manager but they were willing to do this “and our expectation is from your return date of 6 June you will be back at work as normal.” In evidence EVN suggested 6 June’ was chosen through an interpretation of GWH’s surgeon’s advice communicated in GWH’s 18 February 2021 email – i.e., seven weeks after the surgery. I observe whilst GWH’s surgeon’s advice was not presented clearly, he did appear to indicate it would be around the three-month mark by the time GWH could return to full duties, so seven weeks seemed an overly optimistic estimate.

[36] GWH responded by email of 30 March indicating the timing (6 June) was incorrect and GWH reiterated her surgeon’s advice implying that 12 weeks post-surgery recovery time was the case (i.e., around mid-July). GWH also (in hindsight, she accepts rather optimistically) indicated in this email: “I am able to work from home now to assist the store where needed”.

Alternative proposal

[37] Regardless, VBK then took over communication with GWH and in a 2 April email that first emphasised how much ZOG Ltd valued GWH and acknowledged that a return to full duties was to be around 21 July, VBK suggested: "I am pleased to say that we are able to put forward a proposal which we believe is a solution ...". The email did not specify what the solution was but VBK suggested a Zoom meeting on 7 or 8 April.

[38] Evidence emerged that in tandem, ZOG Ltd had persuaded another employee, of another city where he was an assistant store manager and was set to move anyway, to fill an online sales position, to take up the store manager role on a temporary basis to cover GWH's absence.

Temporary online sales and service associate job offer

[39] A Zoom meeting was initially agreed for 8 April but cancelled as GWH was unwell. VBK by email of 8 April stressed the urgency of providing a response by 11 April, to a proposal that GWH undertake a fixed term role as an online sales and service associate for working from home until she was able to return to the store post-surgery. A job description was attached and a salary of \$8,000 per annum less than the store manager salary was specified.

[40] An objectively unrealistic expectation was detailed that GWH would commence the temporary role on 14 April 2011 (seven days short of her surgery date) and it would run until 10 October 2021.

[41] GWH responded on 11 April accepting the proposed temporary role but indicated she was not well enough to start prior to her surgery. GWH then suggested a potential graduated starting date of six weeks after her surgery as per her surgeon's previous advice. GWH in evidence says she saw her response as being acceptance of the temporary offer.

[42] In a response of 13 April, VBK effectively withdrew the offer after explaining it had only been made on the expectation that GWH could take it up immediately and ZOG Ltd would have to reassess the situation, including how they could resource the online operation

(webstore) and crucially whether they could “hold open” GWH’s position and: “We will be in touch with more information later in the week”.

[43] VBK proceeded to advise in the same email that it had been announced to the team that the assistant manager from another store was going to commence as acting store manager in GWH’s role for six months. Then, in a contradictory statement, after saying that they may not be able to hold GWH’s position open, VBK indicated GBH would not be required to assume any store manager responsibilities during the next six months and that: “This is to ensure you have time to recover”.

[44] GWH during the investigation disclosed an appointment confirmation letter of 13 April 2021 to the person who took up the acting store manager role for a term 14 April 2021 to 10 October 2021.

[45] Further emails between 29 April and 7 May between GWH and VBK disputed the validity of the temporary job offer.

[46] The next significant communication was a 12 May email from VBK suggesting GBH had not acknowledged “the first paragraph of my email sent to you on 8 April” (the email was reproduced in full with the first paragraph highlighted – i.e., the message that ZOG Ltd was considering if they could continue to preserve GWH’s ongoing employment).

[47] GWH responded by email of 14 May 2021 expressing distress at the withdrawal of the online role that she considered accepted. GWH indicated: “It is clear to me that we have a serious employment relationship problem” and that she disagreed with the highlighted first paragraph. GWH concluded by indicating she was seeing her surgeon on 8 June and would consider her options and be in touch thereafter.

[48] The Authority accepts that in terms of s 114 of the Act that this email identified a personal grievance that at the time is capable of being described as a potential unjustified disadvantage and centred upon the disputed job offer. This assessment is reinforced by the fact that ZOG Ltd by VBK’s email of 14 May, responded to the grievance identified claiming:

- The offer had been countered by GWH not accepting the start date and proposing an uncertain, alternative start time.
- ZOG Ltd had not concluded agreement and signalled they now wanted to review GWH's ongoing employment.
- A general rejection of the notion of an employment relationship problem and an expressed belief that they had always acted in an empathetic and respectful manner.

[49] The email ended by VBK accepting that GWH could not engage further until after her surgeon's appointment on 8 June and wished her well in her recovery.

[50] VBK then emailed GWH on 9 June 2021, proposing a formal meeting with her and EVN on 15 June to provide an update on GWH's recovery and to 'continue the discussion about our proposal that we presented to you via email in May 2021'.

The ending of the employment relationship

[51] The parties met by Zoom on 16 June and VBK by way of a further 18 June email, thanked GWH for an update on her recovery, then summarised events in bullet points from 18 December 2020 to 16 June 2021 and confirmed advice received that GWH would be medically unfit up to 8 July 2021. It recorded a view that GWH had signalled that she would hopefully be returning to work on a gradual basis by 9 July 2021 and full time six weeks later (13 August) but "this timeline remains uncertain". Whilst the meeting had ostensibly been to continue the discussion on the proposed temporary role dispute, VBK only obliquely referred to the webstore being under pressure after its recent launch and being a person short.

[52] VBK then outlined that ZOG Ltd had reached a preliminary view that they could no longer 'hold your role open any longer' and that termination on the grounds of medical incapacity was being proposed, as there was no certainty of a return date. VBK proposed a further formal Zoom meeting of 22 June to discuss "this preliminary decision".

[53] In response, by email of 21 June GWH resigned claiming that she had been the subject of ZOG Ltd constructing a case against her and that she had been provided

insufficient time to recover from her surgery and her dismissal was being effected in a procedurally unfair manner. GWH identified a personal grievance of disadvantage and constructive dismissal. When pressed during the investigation meeting, GWH says she resigned to avoid the shame of being dismissed.

[54] VBK responded on 23 June denying any intention on ZOG Ltd's part to induce GWH's resignation and offered to meet to discuss the proposal to dismiss her for medical incapacity. VBK then emailed GWH on 29 June in an attempt to categorise GWH's resignation as being unconfirmed and she reiterated the reasons for the preliminary view that a medical incapacity situation existed warranting a legitimate termination of GWH's employment. A deadline of 1 July was set for a further discussion. GWH did not respond and in an emailed letter of 2 July headed 'Incapacity due to injury', VBK purported to confirm GWH's dismissal on the basis that ZOG Ltd could not "continue to hold your job open for you". The letter traversed the offer of the web-store position that GWH could not undertake at the time offered and suggested that it had been a critical factor to have someone fill the role in a timely fashion.

[55] The dismissal letter acknowledged the contractual notice period was three weeks and ZOG Ltd openly offered to pay this in lieu and forgo seeking recovery of annual leave and sick leave payment that had been advanced to assist GWH when ACC were not compensating her (a situation that ACC reversed on review). The latter payments were offered "as full and final settlement", although the letter did not directly link such to GWH resignation and personal grievance.

[56] I incidentally find there was no obligation to pay GWH for her notice period, as she was not available for work and had in any case resigned without giving notice.

[57] GWH rejected the offer the same day and the parties then attended mediation but were unable to resolve their differences.

Issue one – was GWH constructively dismissed?

[58] A constructive dismissal can be found if an employer's conduct compels an employee to resign in circumstances where, although on the surface the employee appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this doctrine, as asserted by GWH, is where the resignation is caused by a breach of a duty owed to the employee and the employer could reasonably foresee that rather than put up with the breach, the employee resigns - effectively signalling a belief that their employment agreement has been repudiated by the employer. The Court of Appeal has stated the legal test as:

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 the 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.⁴

[59] The overarching and well recognised duty that is now statutorily recognised as a component of 'good faith'⁵ is that an employer should not without proper cause, act in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the parties to the employment relationship.⁶

[60] In assessing the context of a claimed constructive dismissal, the Authority must be satisfied there is a causal link between the employer's conduct and the tendering of the resignation.⁷ Further, the Authority must assess whether the employer could have

⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

⁵ Section 4 (1A)(a) and s 4(1A)(b).

⁶ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372

⁷ *Z v A* [1993] 2ERNZ 469.

reasonably foreseen that resignation was a likely response to any identified breach committed by the employer.⁸ GWH has the burden of establishing her resignation was a dismissal.

Assessment

[61] I objectively conclude from the evidence at the investigation meeting and the extensive documentation provided that no breach of duty has been established that could be possibly causative of GWH resignation sufficient to categorise the ending of the relationship as a constructive dismissal. In the unfortunate circumstances, GWH chose to resign during a legitimate and fair process of dismissal for medical incapacity after a significant absence, that at the time of the proposal to dismiss was ongoing and of uncertain duration.

[62] GWH did not engage when dismissal was later proposed and did not explore alternative options – she chose to affirm her earlier decision to resign. This left ZOG Ltd with no further input from GWH after they had come to a preliminary decision based upon available disclosed medical information. I find ZOG Ltd was, given the length of absence at the time (seven months) and a best- case scenario of a further three months absence, entitled in law, to contemplate calling a halt to the employment relationship.

[63] Contemplated dismissal for medical incapacity is a fraught area involving several balancing factors, with an employer still having to meet the test as set out in s 103A of the Act and good faith factors. In the Employment Court decision *Lyttelton Port Company v Arthurs*, Judge Holden drawing on case law, identified seven useful principles that an employer should consider before proposing dismissal for medical incapacity.⁹

[64] Whilst I have found no breach of duty by ZOG Ltd is apparent or made out, to allow GWH to understand how I could have approached the issue if she had been dismissed, I will outline the seven applicable principles from *Lyttelton* and my brief assessment of ZOG's compliance or otherwise. In doing so, I stress each case must be assessed in context and no 'hard and fast' rules are in place. The principles and my summarised assessments are:

⁸ *Weston v Advkit Para Legal Services Limited* [2010] NZEmpC at [140].

⁹ *Lyttelton Port Company v Arthurs* [2018] NZEmpC 9 and see article *Terminating employment for medical incapacity-adding insult to injury*, E Peterson and R Carter, [2019] Employment Law Bulletin (NZ) 117.

- 1) **An employer should afford an injured employee a reasonable time to recover (in the circumstances)** – here ZOG Ltd were faced with an employee who had utilised her sick leave entitlement during a period when working, then been absent incapacitated for seven months before any prospect of recovery commenced. Whilst medical information was freely shared, the unfortunate nature of the injury did not lend itself to an exact prognosis. The absence in a key role GWH occupied was disruptive and difficult to cover. On balance, I find ZOG Ltd kept GWH's position open for an objectively reasonable period and extending such was an exercise of discretion that they were entitled in all the circumstances not to extend further.
- 2) **An employer is obliged to conduct a fair and reasonable investigation of the employee's circumstances before contemplating dismissal and this involves balancing fairness to the employee against the employer's practical business needs** – here I find ZOG Ltd carefully considered GWH's medical information and sought regular updates during the early stages of GWH's absence and concluded fairly that the absence would be prolonged and of an uncertain duration. I accept that ZOG Ltd balanced fairness factors with their business requirements and at all times sought GWH's input including offers to assist in funding GWH's representation.
- 3) **Fair process includes: prior notice of an intention to dismiss, exposition of the reasoning for such and, input from the employee prior to finalisation of any dismissal decision** –I find all these requirements were met by ZOG Ltd –the decision-making was not rushed and good faith obligations were met.
- 4) **The terms of employment including any relevant policies, the nature of the role and length of time in the role are relevant factors that inform what is reasonable in the circumstances** – here GWH had been in the role just over twelve months when the non-work-related accident occurred. The role of store manager was a key one and more so for a newly established store struggling during the period of Covid. I am satisfied that ZOG Ltd appropriately took these factors into account and cl 15.4 of the individual employment agreement provided dismissal applied where: "... as a result of

sickness or injury, the employee is rendered incapable of the proper and full performance of his/her duties”.

- 5) **Where the injury is work-related and the employer has in any way caused such there may be a heightening of the employer responsibility to assist in rehabilitation** – This was not a significant factor as ZOG Ltd did not cause GWH’s injury and although it was aggravated at work, GWH took active steps to make ZOG Ltd aware of her situation and accessed treatment and managed her injury in a supportive environment. I also find ZOG Ltd’s early offer to deploy GWH on alternative duties when noticing her sick leave usage was explored but GWH misinterpreted this approach and did not properly consider it.
- 6) **Even a large employer is not obliged to keep a job open indefinitely** – ZOG Ltd is a relatively large employer but employment is spread nationwide and, in the circumstances, I have found they did wait a reasonably long period of time given GWH’s length of service and role occupied before they initiated a medical incapacity process. They could have waited until GWH had her surgery but were not obliged to given the uncertainty they faced.
- 7) **The employee is also obliged to openly communicate** – I attribute no fault to GWH in this regard.

[65] The Authority observes in this case, that GWH was a committed and passionate employee who made significant effort to retain her employment in objectively difficult circumstances but the reason for her being unable to maintain the relationship lay in factors outside of GWH’s control and I have not found ZOG Ltd acted in a manner that breached any of their employer obligations.

Finding on issue one

[66] I have not found that GWH has established that she was unjustifiably dismissed in a constructive or other manner and no remedies are available for this claim.

Issue two - Did ZOG Ltd engage in any actions or omissions that caused GWH to be disadvantaged

[67] In submissions GWH's advocate sought to suggest that ZOG Ltd had failed to provide GWH with a safe workplace and that such could found a disadvantage claim. Ms Nicholls attempted to draw a comparison with the circumstances outlined in the Employment Court case of *FGH v RST* where Judge Corkill found an employer took inadequate regard of FGH's known mental health issues when conducting a performance plan. The problem is apart from highlighting a failure of ZOG Ltd to formally acknowledge GWH's incident report when she aggravated her pre-existing injury on 4 November 2019, no evidence was advanced that this caused any further problems for GWH. On the contrary, the evidence suggests ZOG Ltd was fully aware of GWH's limitations whilst at work and supportive of her managing such. I find no threshold has been met to establish that GWH was disadvantaged on this ground.

[68] What was traversed during the investigation meeting but not alluded to in submissions as a specific disadvantage claim (instead being used to highlight a potential unfairness element of the alleged constructive dismissal) was a suggestion that ZOG Ltd acted unreasonably in not providing GWH with alternative duties during her absence. The first part to the claim was an asserted duty to provide GWH with work from home whilst she was incapacitated from her normal role. I find that no such duty existed and despite initially agreeing to explore such, ZOG Ltd sensibly did not offer such, as they fairly assessed that GWH was in some pain and was likely unable to cope with working from home. A further compelling factor ruling this out was GWH had been declared medically unfit and an employer pursuing an employee to take on duties in such circumstances is problematic. VBK in evidence acknowledged that in hindsight' the offer of an online role should have been assessed after GWH had had surgery.

[69] The next issue was the offer of an alternative online role of online sales and service associate made on 8 April 2021 and then confirmed on 13 April and, allegedly accepted by GWH but then withdrawn. The problem with this scenario was the mutual communication around the offer started with ZOG Ltd wrongly assuming GWH had signalled she was

immediately available to accept it. I find this assumption was unreasonable in the circumstances, as GWH was days away from major surgery and in need of recuperation time afterwards. A problem was easily foreseeable and the offer, although well intentioned, was not capable of acceptance by GWH. A further factor was by the time GWH would have been fit to gradually return to work it would have logically been to the store manager role.

[70] In any event, if the employment relationship had persisted, ZOG Ltd had not properly thought through the implications of the offer and once they resiled from it, they evidently caused GWH unnecessary distress, particularly as a temporary appointment was made to the store manager role. This created an impression that ZOG Ltd could persist longer in keeping the role open for GWH returning later and a temporary feeling of security was offered to GWH. The resiling from this position was messily handled by ZOG Ltd and although the reasoning of needing someone in an online role from 14 April was justified, it was not realistic to expect GWH to take it up. VBK's email of 13 April 2021 sent a 'mixed message' – it on the one hand left open a possibility that the online work would continue once GWH gradually returned to work but then signalled a significant change of approach of “we now have to reconsider whether or not we can continue to hold open your position”. It is also apparent that placing an acting manager in GWH's role up to October 2021 created an understandable expectation that GWH had an extension of her period of absence.

[71] In such circumstances, whilst I have found that ZOG Ltd was justified in moving towards ending the relationship on medical incapacity grounds, ZOG Ltd's actions did cause GWH unnecessary distress at an importune time and such actions were not ones of a reasonable employer. I do not favour the view taken by VBK that GWH “misread/or misinterpreted” the offer made – it was simply unrealistic.

Finding

[72] No loss of income was incurred by GWH, as she was in receipt of ACC earnings related compensation but I do find that GWH is entitled to be compensated for the distress and humiliation ZOG Ltd caused in the poor handling of the online sales role offer.

Issue 3 – wage payments made during Covid period

[73] By a memorandum of 26 March 2020 entitled “COVID-19 UPDATE, ROK outlined that ZOG Ltd had obtained a government wage subsidy and that ZOG Ltd would be topping up wages to “80% of your normal pay” for 12 weeks. ROK suggested those with outstanding time in lieu or accrued annual leave owing could “top up” there pay by utilising such. There was no attempt to reach individual agreement with GWH on the reduction in pay.

[74] Further at a team meeting held on 2 June 2020, ZOG Ltd management in response to declining sales and difficult operating conditions during imposed Covid restrictions, resolved that an 11% salary reduction would prevail for a period of 12 weeks commencing 6 July 2020. This reduction was confirmed to GWH by ROK in a memorandum of 21 June 2020 that she signed (the memo referenced an individual meeting but none occurred for GWH). No evidence was provided that ZOG Ltd sought to individually negotiate the decrease and whilst GWH signed the memorandum, she says she did so under pressure and without recourse to legal advice. I find it was evident the reduction was imposed and no formal variation was properly entered – the reductions continued for 17 weeks.

[75] It is noted GWH’s employment agreement contained no variation clause and she was a salaried employee with the basis of the remuneration obligation being expressed at cl 4 as: “Your salary covers all time worked”.

[76] The legal position on the reduction to 80% of agreed salary was a breach not remedied by the suggestion that GWH use her annual leave to top up the shortfall even though ZOG Ltd consulted on the timing of the leave. Generally, a unilateral variation to an employment is permitted by s 63(2) of the Act by mutual agreement - here none was clearly evidenced for the first Covid period (27 March 2020 – 9 June 2020) or thereafter for an additional 17 weeks from 6 July 2020 and the process followed shows the reductions were imposed rather than properly negotiated. In addition, s 4 Wages Protection Act 1983 (WPA) provides that where wages become payable the entire amount must be paid to the worker without deduction. Section 5 of the WPA provides deductions are permitted only by mutual consent.

Finding

[77] I find the temporary reductions of GWH's salary by 20% from 27 March – 9 June and eleven percent for 17 weeks thereafter were breaches of both GWH's employment agreement and the WPA. GWH is entitled to recover the deductions of her salary as a remedy for the breaches. The amounts are respectively \$2,907.72 and \$2,281.92c.

[78] GWH sought penalties for the identified breaches but in the circumstances prevailing, the Authority considers such to be inappropriate.

Compensation for hurt and humiliation

[79] GWH and her partner gave compelling evidence of the impact the withdrawal of the offer of the temporary online sales role entailed, coming at a time that GWH was struggling to cope with an ongoing painful injury this made her feel more anxious and vulnerable and ZOG Ltd must have been fully aware of this.

[80] Against the above, I found GWH to present as a reasonably robust character and she seems to be coping with a very difficult long-term injury together with ACC income support. The injury was not caused by the employer who I have found kept GWH's position open for a reasonably generous timeframe.

[81] I however, have found that the distress around the job offer was reasonably significant but not directly causative of GWH losing her job and temporary in impact.

Finding

[82] Considering the evidence proffered and awards made by the Authority and Court in similar situations and surveying cases brought to my attention in submissions, I consider that GWH's evidence warrants modest compensation of \$5,000 under s 123(1)(c)(i) of the Act.¹⁰

Contribution

[83] Section 124 of the Act states that I must assess the extent to what, if any, GWH's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*¹¹.

[84] In the circumstances I do not find GWH contributed to the circumstances giving rise to her personal grievance.

Summary

[85] I have found that:

- (a) GWH was not constructively dismissed but was the subject of an unjustified action causing her to suffer a disadvantage by the manner ZOG Limited offered and then withdrew a temporary online sales role.
- (b) I also find that ZOG Limited unilaterally, without proper consent or any legal justification, reduced GWH's salary for 17 weeks and arrears are due.
- (c) In the circumstances, ZOG Limited must pay GWH the sum of \$5,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000 for the unjustified action; and:

¹⁰ See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

¹¹ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

(d) \$5,189.64 gross arrears of salary for two identified breaches of GWH's employment agreement pursuant to s 123(1)(c)(ii) Employment Relations Act

Costs

[86] Costs are reserved. The parties are invited to resolve the matter between themselves. If they are unable to do so, GWH has 14 days from the date of this determination in which to file and serve a memorandum on costs. ZOG Limited has a further 14 days in which to file and serve a memorandum in reply.

[87] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless circumstances or factors, require an adjustment upwards or downwards.¹²

David G Beck
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1