

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 95
3216459

BETWEEN HGO
Applicant

AND LARSON-JUHL NEW
ZEALAND LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Chrissy Gordon, advocate for the Applicant
Paul Mathews, advocate for the Respondent

Investigation Meeting: 13 December 2023 in Christchurch and by AVL

Submissions Received: On the day

Determination: 21 February 2024

DETERMINATION OF THE AUTHORITY

Prohibition of Publication

[1] HGO applies to prohibit from publication her name under clause 10 of the second schedule of the Employment Relations Act 2000 (the Act). The ground relied on is that she is struggling to find permanent full-time work and regardless of the outcome of this matter there is a risk of detriment to her career prospects.

[2] There is a fundamental principle that justice should be administered openly. A party seeking to depart from that principle is required to provide evidence identifying specific adverse consequences.¹

[3] The Authority has considered the principle of open justice with the grounds relied on. The application relies on the potential for difficulty in obtaining work if HGO's name is published.

[4] There is a growing awareness of the impact of publication on future employment prospects of individuals named in employment litigation. This has been commented on by the Employment Court in *Elisara v Allianz New Zealand Limited* in terms of the potential for perverse results for access to justice and reputational ruin.² The Employment Court in that judgment was asked to prohibit from publication two employees who were not parties to the litigation and who were not witnesses.

[5] The Authority has not been provided with specific adverse consequences that HGO would suffer if her name is published beyond the potential of impact on her employment prospects. That is a risk that could apply to any employee. More is required to support a non-publication order being made and the principle of open justice displaced. It is not a step that should be taken lightly.

[6] In the circumstances I decline the application for non-publication of the employee's name.

[7] I will make an interim order prohibiting from publication the name of the applicant for a period of 28 days from the date of this determination to enable a challenge to the Employment Court. At the end of the 28-day period, unless there is a further order of the Authority or Employment Court, this interim order will lapse and there will be no restriction on publication. I shall refer to the applicant for the purposes of this interim order as HGO. These three letters were obtained from a random online letter selection tool and bear no relation to the employee's real name.

¹ *Erceg v Erceg* [2016] NZSC 135.

² *Elisara v Allianz New Zealand Limited* [2019] NZEmpC 123 at [63].

Employment Relationship Problems

[8] Larson-Juhl NZ Limited (Larson-Juhl or the company) is a duly incorporated company having its registered office in Auckland and carrying on business as one of three wholesalers in New Zealand supplying the retail market with custom picture framing materials.

[9] HGO commenced employment with Larson-Juhl NZ Limited on 7 July 2011. Her role was a warehouse person with reasonably varied duties. These included running the warehouse, meeting deadlines for dispatch, invoicing, courier, and freight ticketing for dispatch, stocktake and procedures. Shortly after HGO commenced her employment Craig Duncan was appointed as Branch Controller and then Operations Manager at Larson-Juhl Christchurch.

[10] On 19 June 2017 HGO was presented with an employment agreement which had a new title for her role of Warehouse Team Leader and a pay increase. HGO said any changes in the day-to-day tasks were minimal.

[11] HGO says that there was a breach of her employment agreement by a decision to remove her from the customer services role in February 2023 that she had been performing and then by the unilateral variation of her hours of work. Reliance is placed on these matters as serious breaches leading to a resignation that HGO says was in the nature of a constructive dismissal. HGO seeks a penalty for a breach of good faith, compensation, reimbursement of the wages lost when her hours were reduced and lost wages after she resigned together with costs.

[12] Larson-Juhl do not accept that HGO was disadvantaged or unjustifiably constructively dismissed from her employment or that there was a breach of good faith. Larson-Juhl maintains that the resignation was voluntary.

The Authority's investigation

[13] For the Authority's investigation written witness statements were lodged from HGO, Craig Duncan and two current employees of Larson-Juhl who I shall refer to as Nick and Wendy-Anne.

[14] All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[15] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The legal framework to assess the claim of constructive dismissal

[16] In some circumstances a resignation may amount to a dismissal. The Court of Appeal in *Wellington Clerical Union v Greenwich* stated:

There is no substantial difference between the case of an employer who, intending to terminate the employment, dismisses the employee, and the case of the employer who, by conduct, compels the employee to leave the employment.

[17] There are three situations referred to by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur although these are not exhaustive.³ HGO relies on the third of these situations where a breach of duty by the employer leads the employee to resign. It was stated by the Court of Appeal that the conduct complained of must amount to a repudiation of the contract rather than just be unreasonable. Conduct can be a breach of an express or an implied term not to act in a manner calculated to destroy or damage the relationship of trust and confidence between an employer and employee.⁴

[18] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* held that the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.⁵ In determining that matter, all of the circumstances of the resignation have to be examined,

³ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

⁴ Above n 4.

⁵ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found, by the employer was of sufficient seriousness to make resignation.

[19] HGO has the burden of establishing that the resignation was actually a dismissal.

The issues

[20] The issues requiring determination are:

- (a) What are the material clauses in the employment agreement?
- (b) What are the reasons HGO resigned?
- (c) Was the resignation caused by breaches of duty to HGO?
- (d) This will require consideration of the following:
 - (i) Did HGO change roles on a temporary or permanent basis to undertake a customer service role in October 2022?
 - (ii) What resulted in HGO returning to her warehouse role in February 2023?
 - (iii) What happened to the customer service role?
 - (iv) What led to a reduction in HGO's hours in the warehouse role?
 - (v) Was the process in reducing the hours fair?
 - (vi) Did HGO agree to the reduction in hours?
- (e) If there were breaches of duty by Larson-Juhl were they of a serious nature that would mean it was reasonably foreseeable that HGO would not be prepared to continue to work?
- (f) Did HGO affirm the contract?
- (g) If there was a constructive dismissal was it justified?
- (h) Alternatively, was HGO disadvantaged in her employment by unjustified actions of Larson -Juhl.

- (i) If actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded and are there issues of contribution and mitigation.
- (j) If there was a breach of good faith then should a penalty be awarded and if so who should it be paid to?
- (k) Should either party contribute to the costs of representation of the other party?

What are the material clauses in the employment agreement?

Hours of work

[21] Clause 3 of the employment agreement deals with hours of work and provides the normal hours of work are from 7.30am to 4pm Monday to Friday. The normal working week is recorded as consisting of any consecutive five days a week of eight hours per day.

Personal grievances

[22] Clause 31 deals with personal grievances.

[23] Clause 31.1 provides that in the event of a problem or disagreement arising out of the agreement or rule or policies the company and employee will endeavour to resolve these through honest and open discussion. There is an obligation on the employee in this clause to bring matters to the attention of the company as soon as possible so they can be resolved promptly and fairly.

[24] Clause 31.3 provides that in the event that any dispute is not able to be resolved by direct discussion then any of the procedures in Schedule 3 can apply. Mediation is a specific option in Schedule 3.

Variations of the agreement

[25] Clause 32 provides that any variations to the agreement must be agreed to by both parties in writing.

What are the reasons HGO resigned?

[26] HGO resigned on 19 April 2023 following mediation. Ms Gordon in a letter to Larson-Juhl dated 19 April 2023 advised that HGO was giving notice of resignation. Ms Gordon provided the reasons for resignation arose due to issues in February 2023.

[27] The first issue was that HGO had been moved into a customer service role due to the collapse of the customer service team in Auckland and was promised a pay rise. In early 2023 a decision was made to formally relocate customer service to Christchurch. HGO thought having been working in the role since October 2022 she would be offered the position. HGO told Larson-Juhl that she wanted to stay in the customer service role on a full-time basis but she was told that she was “too old and unqualified to do the role.” The position was advertised, and a new employee then hired.

[28] The second issue was HGO was told that her hours [in the warehouse role] needed to be reduced. She advised she did not want her hours reduced but was told that the decision had been made. Her full time hours were reduced by six from 17 February 2023.

[29] After that time HGO applied to the Ministry of Business Innovation and Employment (MBIE) for mediation assistance but Larson-Juhl was not willing to attend.

[30] HGO then lodged an application with the Authority and the parties were directed to attend mediation. Mediation took place on 19 April 2023 after which HGO resigned saying that she had lost trust and confidence in Larson-Juhl and had no choice but to resign.

[31] I accept that the reasons set out in the letter are the reasons for resignation.

Was the resignation caused by breaches of duty to HGO?

Did HGO change roles and undertake a customer service role in October 2022?

[32] In or about October 2022 staffing issues in Auckland resulted in another staff member, Wendy-Anne, expanding her role into customer services in Christchurch from the warehouse. Once Wendy -Anne went into customer services, there was only one other person working in the warehouse with HGO. A previous staff member had resigned and

was not replaced. HGO would go on occasions between customer services and the warehouse to help out and the person in customer services would do the same occasionally but not often.

[33] HGO said Mr Duncan asked her at a Toolbox meeting in October 2022 in front of two other employees if she would be interested in working in a customer services role and she was told that it would come with a pay rise. HGO understood she was being offered the role on a permanent basis and accepted the role on that basis and shook hands with Mr Duncan. The pay rise never eventuated and there was nothing put in writing about a change to her role although HGO understood that was to happen. HGO said that she was told she would no longer need her Hi-Viz and could “toss that in the bin.” Mr Duncan recalled a discussion about that although said it was focussed on whether HGO would need to wear a uniform out front. He recalled advising HGO that she could use his Hi-Viz when required. The evidence supported one was required to be worn in the warehouse.

[34] HGO says that from the discussion in October 2022 she worked in customer services through until 10 February 2023.

[35] Mr Duncan’s evidence was that HGO had expressed an interest in a full-time customer service role with a pay rise when he had put to staff his proposal to move customer services to Christchurch. He asked HGO if she would work in customer service during her downtime in the warehouse. Mr Duncan’s view was that the customer services role was always temporary and agreement needed to be obtained from those more senior than him to bring down the role permanently from Auckland and for a pay rise. Mr Duncan’s evidence was that HGO only worked in customer services when required and during her downtime and continued her work in the warehouse.

[36] The Authority also heard evidence from two current employees who were present at the time of the meeting in October 2022. One employee was Wendy-Anne who worked in the customer service area. Her evidence was that HGO worked reasonably fluidly between her previous role and the customer service role and that it was in the nature of a “split role.”

[37] The other employee who had worked in the warehouse with HGO at the material time was Nick. The Christchurch warehouse closed in or about August 2023 and Nick now works for Larson-Juhl as a store person in Auckland. Whilst his recollection of the date of the meeting at which the customer service role was discussed was unclear he recalled that Mr Duncan did ask HGO if she wanted to work doing customer service and that she responded “yes.” His evidence was that for a time after that HGO did spend “most of her time at the front doing customer service.” He also referred to HGO coming back to the warehouse role at a later time.

[38] I found Nick to be a straightforward witness. He no longer worked in the Christchurch office and was somewhat removed from the situation at the time he gave his evidence. Nick recalled a specific question from Mr Duncan about whether HGO agreed to undertake that work and her responding in the affirmative to that request. Such a request is consistent with the increase in work at that time in the customer service area and Nick’s recollection that most of HGO’s time was spent at the front doing customer service work. As he had previously worked with HGO in the warehouse the change with HGO spending most of her time at the front doing customer service would have been apparent.

[39] Having considered the above I conclude it more likely that there was a change in the work that HGO undertook from October 2022. She had from time to time worked in customer service whilst working in the warehouse role but the evidence supported the customer service role she undertook for a period of time between October 2022 and February 2023 was different and her main role was in customer services. Mr Duncan in his oral evidence described the period HGO performed the duties in the role as a more permanent period in customer service from October 2022. If it had not been different to what had occurred before October 2022 there would have been no need to have discussed the matter at all.

[40] I conclude HGO spent the majority of her time undertaking customer service role duties between October 2022 and February 2023. That was a change to the role that she had been performing in which customer service duties were only performed from time to time.

Permanent or temporary

[41] It was not until January 2023 a decision was made to relocate customer services formally to Christchurch from Auckland. The result of the decision in January 2023 was there would be continuation of the customer service role in Christchurch.

[42] HGO said she expected to continue in the role because she understood that it was her new role from the October 2022 discussion. Mr Duncan on the other hand said it was always clear it was a temporary role and decisions about pay rises and changes in role would be made at a higher level. Mr Duncan had asked Nick and Wendy-Anne to sign a statement in the statement in reply that they agreed with the following statement which they both did.

---No promises were made regarding increasing pay or moving [HGO] permanently into a customer services role.

This was something Craig supported but as stated the other managers would need to support and agree to this proposal before this happened.

[43] The decision to advertise the customer services role externally was made by others in the company. That decision was likely a surprise to Mr Duncan. Existing employees had been moved around roles previously. Wendy-Anne for example was an existing employee when she was moved into customer services. The evidence supported a degree of informality with changes not always reduced to writing. I cannot discount the likelihood that Mr Duncan's evidence that he clearly advised HGO that the role was temporary in October 2022 and subject to higher level approval is flavoured by the later events. There was nothing in writing that the change was temporary. There was no evidence that issues had been raised with HGO about her performance in the customer service role and she had concluded that all had been going very well.

[44] I do not find from the discussion in October 2022 that HGO understood the change in role to be temporary in nature. When the need for a second employee in customer services remained after the decision to formally remove customer services to Christchurch in January 2023 it was not unreasonable for HGO to believe she would simply remain in the role.

What happened with the customer services role?

[45] On Friday 10 February 2023 HGO said that she was told in front of others at a Toolbox meeting that she would be returning to her previous role in the warehouse. HGO said that she became aware that day for the first time that there was an external advertisement for a new customer service person that anyone could apply for and interviews were to take place the following week. Mr Duncan said that HGO was only asked to go back to the warehouse if she was not going to apply.

[46] HGO spoke to Mr Duncan to ask him what she had done wrong when everything had gone so well. HGO said that he responded that they were looking for someone younger and with the skills needed for the new technology they were installing and that this had been decided on.

[47] Mr Duncan said that he felt HGO knew that the position was going to be advertised and that had been raised earlier. I conclude that less likely. The evidence from both HGO and Mr Duncan was that HGO was very upset during the discussion on 10 February 2023. HGO said that she had burst into tears. Mr Duncan after the initial discussion went to the warehouse and suggested that she could leave the warehouse floor and have a coffee or go home. This evidence supports that the advertising of the customer service position and the return to the warehouse role came as a surprise and a shock to HGO.

[48] Mr Duncan said that comments made about age and skills were taken out of context and it was an intense and emotional time. He said in his evidence that he was trying to explain what would happen if HGO did not apply and that she would not be considered for the role. He said that each person took away something different from the discussion and there was a misunderstanding.

[49] There was no specific mention of these comments about age and skills in a letter HGO wrote to Mr Duncan on 20 February 2023. The content of that letter will be set out shortly in full. There was reference to the age and skills comments in the statement of problem HGO lodged on 10 March 2023 whilst still employed. The specific comments

were not responded to by the company in an otherwise reasonably detailed statement in reply lodged on 15 March 2023.

[50] The failure to refer to the explanations Mr Duncan gave to HGO about why others in the organisation had made the decision to advertise the position does not mean they were not said. The letter of 20 February 2023 does not refer to any detail about any explanations but simply to Mr Duncan's apology and explanation the next day doing little to alleviate HGO's concerns. There is then a request that Larson-Juhl reconsider the matter and reappoint her to the position that she held when the changes were made and a suggestion of mediation.

[51] Mr Duncan said that HGO was encouraged to apply for the full-time customer services role. HGO accepted in her evidence that Mr Duncan did say she could apply for the role. She did not do so as she considered it was her role. Mr Duncan said HGO was considered anyway but was unsuccessful.

[52] It is more likely than not that there were statements made to HGO about age and skills and that HGO concluded, not unreasonably, that these matters resulted in the advertisement of the role and were preferred qualities for a new candidate. HGO said that she was told it was a company decision to replace her. When Mr Duncan came to check on HGO's well-being in the warehouse she said she asked him why "as the job was hers" and why he did not "back her". HGO said that Mr Duncan responded that he did not know how to tell her what they were doing. It is more probable than not that Mr Duncan was relaying to HGO what those above him had decided.

[53] In answer to questions from the Authority about what additional skills if any were required that HGO did not have Mr Duncan referred in a general way to accounts payable and receivable and new systems. Wendy-Anne was questioned about whether she was aware of any new tasks for the customer service role when it was advertised. Wendy-Anne answered that "maybe they were looking at accounts payable." The advertisement described the position as a full-time entry-level customer service person with an hourly rate between \$20-\$22 per hour. HGO was receiving \$21.50 per hour and Mr Duncan said that she was one of the highest paid employees in Christchurch.

[54] Mr Duncan said that he had not discussed the additional skills required with HGO before the position was advertised.

[55] HGO returned to the warehouse role on 13 February 2023 and was asked to clear out her desk at the front as another person would be starting in that role the following week. HGO said that a younger person was appointed to the role a few days later.

What led to a reduction in HGO's hours in the warehouse role and was the process in reducing the hours fair?

[56] Mr Duncan said that Larson-Juhl was looking to restructure its Christchurch operation at the start of 2023 and he was hopeful that some costs could be reduced over the short-term.

[57] On 13 and 14 February 2023 Mr Duncan said that he met with all staff to discuss a proposal that there be a reduction in the number of hours worked with the alternative being to reduce positions.

[58] The hours discussed to be reduced for HGO were the six hours she worked on a Friday. Although she worked fewer hours on a Friday the normal hours of work for the week were still 40 hours. Mr Duncan said that initially HGO was vocal and positive about the reduction. Later in the day Mr Duncan said that HGO mentioned her partner did not want her to reduce her hours but that ultimately it was her decision.

[59] On 15 February 2023 HGO met with Mr Duncan. There are some differences in the evidence about what was said. Mr Duncan said that HGO asked for a closed-door meeting to discuss options and said if the company were willing to increase her pay rate she'd sign a variation and work four days per week immediately. These terms were not agreed to. HGO said she advised Mr Duncan she didn't want to reduce her hours and would work for five days a week but Mr Duncan said that there was no choice in the situation and that her hours were to reduce. HGO said that she asked if she could talk to her partner but Mr Duncan said he had nothing to do with this matter. Mr Duncan said that he wanted to hear from HGO not her partner.

[60] The following workdays Thursday and Friday HGO was away unwell.

[61] On Monday 20 February 2023 HGO attended work and left a letter on Mr Duncan's desk that provided as follows:

Over the last few days I have taken some time to consider the work changes that were forced upon me and the manner in which this was done.

On the 13 February 2023 discussions took place between us that were confusing at best.

Your apology and explanation the next day did little to alleviate my concerns and then to add insult to injury, on day three you informed me that my hours of work will be reduced to a four day week. Starting this Friday 17 February 2023.

I am requesting that you and the firm you represent, (Larson-Juhl) reconsider this whole episode and reappoint me to the position that I held when these changes were made. If you would like the assistance of an appointed mediator to help with this matter, I can arrange this following your reply if required. Please reply in writing by 5.00pm Tuesday 21-02-23 and forward to my email address in the first instance.

[62] Mr Duncan responded by email dated 20 February 2023 as follows:

To [HGO]

In response to your request to reinstate your hours, unfortunately this is something that we are unable to pursue.

Reference our discussions over the 13th and 14th February 2023 we discussed too (sic) separate topics.

First your request to transfer full-time into a customer services role was unsuccessful. We did acknowledge your contribution over the Christmas period in this temporary role and were keen for you to continue in a part-time capacity in the future.

Overall, your focus would remain working in the warehouse and assisting the team with its daily operations.

Second, we discussed options available to you and asked your level in interest in reducing your hours worked.

This is a topic we talked about before and something you express interest in.

The offer was made to work Monday to Thursday and reduce your working week by six hours and 30 minutes, which covers the period you would normally work on a Friday. You accepted this proposal.

We also discussed the economic climate and the requirement to consider its impact on our business and the team.

This is something that affects us all and is not an easy path to take.

In summary,

After careful consideration of other alternatives, reducing hours worked is a better alternative than redundancy.

[63] HGO responded to that by letter dated 21 February 2023. In that letter she said that she wanted to make it quite clear that she did not accept the proposal at any stage of discussions and advised Mr Duncan of that on 15 February 2023. She wrote that she was then advised that she had no choice in the matter. HGO advised she would be seeking the assistance of a mediator to hear the matter.

[64] Larson-Juhl was unwilling to attend mediation at that time.

[65] Larson-Juhl said that HGO did not attend work on Fridays. Her pay slips were marked as “leave without pay.” HGO said that she did not consent to that and it was done without her knowledge.

[66] It was clear that HGO did not agree to a reduction of the hours but this was imposed on the basis that there was no choice.

Conclusion about whether the resignation was caused by breaches of duty on the part of Larson-Juhl

[67] Good faith obligations exist in an employment relationship and require parties to be responsive and communicative with each other. Parties should be active and constructive in maintaining a productive employment relationship and not without good reason behave in a manner calculated or likely to destroy or seriously damage the employment relationship.

[68] Objectively assessed Larson-Juhl behaved in a manner likely to destroy or seriously damage the employment relation in breach of its obligations. There were also breaches of the employment agreement.

[69] HGO was told without warning on 10 February 2023 that a position she had been working in for about three months, enjoyed and regarded as her role, would be advertised. The decision to advertise must have been made before that date but there was no earlier discussion with HGO.

[70] The damage to the employment relationship was exacerbated by the reasons advanced as to why HGO could not continue in the role. The explanation given to her I have found was that the company was looking for someone younger and with new skills

or different experiences. Age is a prohibited ground of discrimination and reference to that as a reason for advertising a role that HGO was performing was damaging to the employment relationship. There had never been any discussion with HGO about what the new skills were and whether she had the skills or could be trained to perform them, before the role was advertised or after, other than in a very general way. HGO had worked in the business for twelve years and had trained Wendy-Anne in her role. She had been able to work in the customer service role from October 2022 without additional training and had not been told that there were any issues with her performance or skills. Suggesting that HGO apply for the advertised role in those circumstances does not reduce the seriousness of the breach or the damage to the relationship.

[71] At the time of the decision to advertise the customer service role Larson-Juhl knew that they were going to propose that employees including HGO reduce their hours. I accept Ms Gordon's submission that it would have been known that moving HGO back to the warehouse made her role less secure and that she would suffer disadvantage accordingly if her hours were reduced. It is difficult to reconcile cost saving with a decision to employ a new full-time customer service person who worked 40 hours per week with a reduction to HGO's hours. There was no information supplied in support of the request to reduce hours.

[72] There may have been some initial confusion as to whether HGO agreed to reduce her hours. This confusion did not extend beyond a few days and it was confirmed by HGO on 21 February 2023 that she did not agree to the reduction. Even when this was clear Larson-Juhl still appeared to maintain that there was agreement. The unilateral reduction in hours from 17 February 2023 without any process or information to support the need to reduce hours breached the employment agreement. The employment agreement provided for forty hours per week and did not have any provision to vary those hours without agreement. There was no written variation entered into.

[73] Larson-Juhl then refused to engage in the mediation process in the employment agreement until after HGO had lodged a statement of problem in the Authority and mediation was directed.

[74] These breaches were causative of the resignation.

Were the breaches of a serious nature that would mean it was reasonably foreseeable that HGO would not be prepared to continue to work for Larson -Juhl?

[75] HGO undertook mediation with Larson-Juhl in April 2019 to ascertain if her complaints could be addressed adequately. She had tried to meet earlier but Larson-Juhl declined to attend mediation. Some weight was placed on HGO removing personal items before the mediation from the workplace. Importantly however HGO did try to resolve matters before resigning and gave Larson-Juhl that opportunity. I conclude that her resignation, given the serious breaches and consequential damage to trust and confidence, was reasonably foreseeable.

Did the delay in resigning until after directed mediation affirm the employment agreement?

[76] Neither party raised the issue of affirmation of the employment agreement. The Authority advised it was a matter that it would need to consider.

[77] Whether HGO affirmed the employment agreement is a question of fact as to whether inferences can be drawn that the employment agreement was affirmed.⁶

[78] HGO relied on her employment agreement in the event of a dispute between the parties to use mediation as the first step to resolution. Attempting to resolve matters is appropriate and to be encouraged. It also reflects the object of the Act in s 3.

[79] On 26 February 2023 HGO made a request of the MBIE for mediation after indicating her intention to do this earlier. On 27 February 2023 MBIE advised HGO that Larson-Juhl were unwilling to attend mediation. On 10 March 2023 HGO lodged a statement of problem with the Authority. On 15 March 2023 Larson-Juhl lodged a statement in reply and from the Authority administrative record the parties were directed

⁶ *Premier Events Group Limited v Malcolm James Beattie* [2014] NZEmpC 231 at [653].

to mediation very soon after. A date was agreed on for mediation of 19 April 2023. HGO resigned after mediation and was then on sick leave for the notice period.

[80] HGO continued to raise concerns about how she had been treated and the reduction in her hours whilst she waited for agreement to and in the absence of that a directed mediation date. The evidence supported that it was apparent to those she worked with that she was unhappy although she carried out her work in a professional manner. Nick said in his evidence that HGO was upset that she did not get to stay in a full-time customer service role. Mr Duncan referred to a couple of outbursts by HGO but nothing “over the top.” He also referred to comments made by HGO that “I’m going to make Larson Juhl pay.” Wendy-Anne noticed a change in HGO’s attitude after the meeting at which hours were suggested to be cut and said that she was “not happy.”

[81] I do not find that HGO affirmed the employment agreement.

If there was a constructive dismissal was it justified?

[82] I do not conclude in accordance with the s 103A test of justification that the conduct of Larson Juhl was how a fair and reasonable employer could have acted in all the circumstances.

[83] The constructive dismissal was unjustified.

[84] HGO has established a personal grievance that she was unjustifiably constructively dismissed and is entitled to consideration of remedies. The finding of unjustified constructive dismissal absorbs the unjustified disadvantage claims because they are inextricably linked.

Remedies

Reimbursement for the reduction of hours

[85] From 17 February 2023 HGO’s hours were unilaterally reduced by six each week for eleven weeks until the date of her resignation.

[86] HGO is entitled to reimbursement for the reduction in hours from the hours set out in her employment agreement which are forty hours per week as there was no agreement to the reduction and an absence of a proper process.

[87] HGO's hourly rate was \$21.50 per hour for seven of the weeks and \$22.70 for the remaining four weeks.

[88] Ms Gordon has calculated that the sum of \$1,447.80 gross is owing for reimbursement. I accept that calculation.

Interest

[89] Interest is claimed. The Authority is minded to award interest on the sum of \$1,447.80 gross. The Authority has the power to award interest under clause 11 of the second schedule of the Act calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

[90] I will calculate interest from 3 May 2023 to the date of this determination. That is the sum of \$64.51.

Lost wages

[91] HGO said that she had made many applications for employment in warehouse work and other work including with recruitment companies but felt that her age had countered against her. She has been able to obtain some part time work hours from in or about June 2023. I am satisfied that HGO attempted to mitigate her loss.

[92] HGO claims three months lost wages from 3 May 2023 to 2 August 2023.

[93] Section 123 (b) of the Act provides for the reimbursement of a sum equal to the whole or any part of the wages lost because of the grievance found established. This section needs to be considered with s 128 of the Act which deals with lost remuneration.

[94] Section 128 (2) of the Act provides that the Authority must order the payment of three months ordinary time remuneration, or the actual amount lost whichever is the lesser.

[95] The Inland Revenue summary of earnings provided shows earnings to 2 August 2023 of \$1,449. Given that part-time employment continued after that date I am satisfied actual earnings would be a greater amount than three months ordinary time remuneration.

[96] HGO is entitled subject to any issues of contribution to reimbursement of a sum equal to three months lost wages which is \$11,804 gross (\$22.70 per hour multiplied by 40 hours multiplied by 13 weeks).

Compensation

[97] HGO gave extensive evidence about the effect on her under each of the heads in s 123(1)(c)(i) of the Act.⁷ HGO described doing everything she was asked to do whilst she had been working at Larson-Juhl but this was not reciprocated with the events in February 2023. HGO said that she was “gob smacked” when she was told the customer service role was being advertised and that they were looking for someone younger with more experience. She was “so upset” because she felt strongly that the role was hers and that Mr Duncan had not been straightforward about what had been agreed. She felt betrayed. HGO described a lack of confidence flowing from the reasons for the advertising of the position.

[98] HGO said that she simply could not accept the reduction in her hours when a new person was starting on full time hours in the role she had been performing and she was reduced to part time hours as the longest serving employee. She had not been aware previously of any redundancy proposal. She said that she would not have wished on anyone what she was subjected to.

[99] When she asked for mediation, the company initially refused and that made HGO feel unsupported and unvalued. She felt that the company insisted that she had agreed to a change of her hours when she made it clear that she had not. This necessitated the lodging of a statement of problem with the Authority when that could have been avoided

⁷ *Richora Group Ltd v Cheng* [2018] ERNZ 113

with earlier agreement to attend mediation. HGO described the injury to feelings and humiliation continuing after her resignation and to the date of the investigation meeting.

[100] Ms Gordon submits that the compensatory award should be above \$25,000 in the mid to high region.⁸

[101] I have considered compensatory awards in comparable cases. The evidence of humiliation, loss of dignity and injury to feelings in this matter is compelling. I conclude an award of \$30,000 is appropriate in this matter subject to issues of contribution.

Contribution

[102] I am not satisfied that HGO contributed to the circumstances of her personal grievance and the above awards are not to be reduced as a result.

Penalty for a breach of good faith

[103] I have found there were breaches of good faith by the company. The duty of good faith in s 4 of the Act is wider than the obligations both parties have of trust and confidence. Parties are required to be active and responsive in establishing and maintaining a productive employment relationship.

[104] There was a failure by Larson-Juhl to be responsive and communicative about the customer services role. HGO was not advised before decisions were made about advertising the customer services role that she had been undertaking. She was then told the role was only temporary when that was not clear to her. HGO's work in the customer services role was referred to by Mr Duncan as work she carried out in her "downtime" in the warehouse when it was the main aspect of her work between 22 October 2022 and 10 February 2023. This minimised her work in the role and was an unfair portrayal of what actually occurred. Whilst HGO was encouraged to apply for the advertised role she was almost inevitably going to be unsuccessful given the reason for its advertisement.

⁸ *GF v Comptroller of the New Zealand Custom Service* [2023] NZEmpC 101 at [162].

[105] There was a failure to provide information about the need for reduction of hours. Larson-Juhl maintained that it was an alternative to redundancy that HGO was unaware was a possibility before this time. Larson-Juhl maintained that HGO had agreed to the reduction in hours because she had initially responded in a manner that was positive. Within days she had made it very clear that she did not agree to the reduction but when HGO asked the company to go to mediation in accordance with her employment agreement provisions the company did not agree. The explanation for that was the HGO appeared to be getting on with her work and there was a continuation of the good relationship. HGO was entitled to have her issues that she had promptly raised addressed fairly and promptly in accordance with her employment agreement.

[106] The failures were deliberate, serious, and sustained under s 4A(a) of the Act. Consideration of the imposition of a penalty is appropriate to deter similar conduct.

[107] The maximum penalty is \$20,000 in s 135(2)(b) of the Act.

[108] I have considered the factors in s 133A of the Act. I have considered the objects of the Act which include addressing the inherent imbalance of power in the employment relationship, the promotion of mediation as the primary problem-solving mechanism and the reducing of the need for judicial intervention. I have concluded the breaches were intentional and negatively impacted HGO.

[109] A penalty of \$5000 is appropriate and is to be paid to the Crown. This is on the basis that HGO has already received compensation.

Summary of findings and orders made

[110] HGO was unjustifiably constructively dismissed from her employment.

[111] Larson-Juhl is to make the following payments:

- (i) The sum of \$1,447.80 gross being reimbursement of six hours reduced each week for eleven weeks.
- (ii) Interest on the sum of \$1,447.80 gross being \$64.51.

- (iii) The sum of \$11,804 gross being reimbursement of lost wages under s 123(1)(b) of the Act.
- (iv) The sum of \$30,000 without deduction being payment of compensation under s 123(1)(c)(i) of the Act.
- (v) A penalty in the sum of \$5000 payable to the Crown within 28 days.

Costs

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

[113] If they are not able to do so and an Authority determination on costs is needed Ms Gordon may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Mathews will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[114] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹

Helen Doyle
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.