

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 184
5592752

BETWEEN SUZANNE JONES
Applicant
AND STEVE'S PLUMBING & GAS
COMPANY LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Warwick Reid, Advocate for Applicant
Danny Jacobson, Counsel for Respondent
Investigation Meeting: 11 and 12 May 2016 at Tauranga
Submissions Received: 2 May 2016 from Applicant
2 May 2016 from Respondent
Date of Determination: 9 June 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

[1] The Applicant, Ms Suzanne Jones, claims that she was unjustifiably constructively dismissed by the Respondent, Steve's Plumbing & Gas Co Limited (SPG) as a result of SPG's breach of the implied term to accord her fair treatment in the workplace.

[2] SPG denies that Ms Jones was unjustifiably constructively dismissed and claims that she resigned voluntarily.

The issues

[3] The issue for determination is whether or not Ms Jones was unjustifiably constructively dismissed by SPG.

Background facts

[4] SPG is a plumbing and gas fitting company owned and operated by Mr Stephen Morgan, sole director and shareholder, for over 20 years.

[5] During 2007 SPG employed approximately 13 employees, but by 2014 when Ms Jones was employed it had only 4 employees: 2 tradesmen, an apprentice and Mr Morgan.

[6] SPG had always operated with one full-time Office Manager working approximately 37.5 to 40 hours per week. The previous incumbent having resigned, Ms Jones responded to the advertisement placed by SPG for a replacement Office Manager. The advertisement stated:

Working closely with 'Steve', your time management and organisation skills will be put to good use as you take responsibility for our small, busy and friendly team in this sole charge role. You will be cool, calm and collected under pressure as you juggle the demands of being the first point of contact to customers, scheduling and following up on jobs, preparing financial records and other accounts, administration tasks such as handling debtors and creditors, banking, GST preparation and invoicing.

...

As you may often be the only one in the office, it is important to be able to work 8am to 4pm Monday to Friday with some flexibility to work outside of these hours if required to meet business needs.

[7] Ms Jones had been the office administrator in another plumbing company for six years prior to applying for the role at SPG. In that position she had the assistance of a part-time administrator and a Foreman/Supervisor.

[8] Ms Jones said she believed the role at SPG to be similar to that she had carried out in the previous position, and that following her interview with Mr Morgan at which the role was discussed, she believed she had the necessary skills and ability to fulfil the role requirements.

[9] Ms Jones had not been provided with a written employment agreement at the commencement of her employment. Mr Morgan said he had requested Ms Jones to find a copy of the previous incumbent's employment agreement filed in the office computer which he could use in order to create an employment agreement with her. However, she had not done so and he had forgotten to follow up on it. It was not until July 2015 that Mr Morgan recalled that no written employment agreement had been provided to Ms Jones and one was drafted at that time by Ms Rachel Trimble, an independent HR Advisor and Mr Morgan's partner.

[10] At the commencement of her employment, Ms Jones was provided with a brief handover and induction by the previous Office Manager, and was also provided with a manual entitled: "*Administration Manual Steve's Plumbing & Gas October 2014*" (the Office Manual) which set out the administration processes to be followed, and which she had found to be helpful.

[11] As was his customary practice, Mr Morgan said he held a daily morning meeting with the Office Manager to discuss issues which had arisen and to discuss his planning of the daily schedules for the tradesmen, and this had continued after Ms Jones commenced employment.

[12] Ms Jones said that it had become obvious to her within a month of her employment commencing that the Office Manager role involved more tasks on a daily basis than she had anticipated and in addition there were far more phone calls than she would have expected. Also because there had been no Supervisor/Foreman position as there had been in her previous employment, she had more necessary interaction with the plumber tradesmen.

[13] In addition, the lead-up to the 2014 Christmas period had been very busy and she said it had been obvious to her that there was too much work for one person in the office to manage. She had as a result informed Mr Morgan that she needed a part-time assistant.

[14] Mr Morgan said he had been surprised at Ms Jones' request for part-time assistance as previous Office Managers had managed the position without assistance and within the SPG normal working hours.

[15] Ms Karin Harnett had held the position of SPG Office Manager from August 2008 until April 2011 leaving employment at that time for personal reasons unrelated to her work at SPG. She confirmed that she had been able to manage the Office Manager workload within a normal working week and very rarely needed to work outside those hours. That situation also applied since her return to the Office Manager position in November 2015.

Events January to July 2015

[16] Mr Morgan said that although initially he had been pleased with Ms Jones performance of her duties, he had started to become concerned in early 2015 when it became apparent to him that she was not coping with the requirements of the role. As a result, he had started to discuss this with her on or about February 2015 and correcting errors together.

[17] In addition he tried to assist her by undertaking some of the Office Manager duties, including debt collection, until she became more confident.

[18] Ms Jones confirmed that she had not carried out debt collection from an early stage in her employment at SPG which relieved her as it took away some of her workload, and also confirmed that Mr Morgan had been carrying out some of the duties which fell within the Office Manager's remit.

[19] Ms Jones said that at the beginning of 2015 Mr Morgan had suggested that they start keeping a note of the time she spent on tasks during the day. Mr Morgan explained that his

intention in asking Ms Jones to keep a time record was to try to identify the areas which were preventing her meeting the position requirements in order to be able to rectify the situation.

[20] Ms Jones said she had continued to hope that a part-time employee would be appointed to assist her. However, this had not eventuated. She said she found it difficult to concentrate on invoicing customers and doing the account tasks which were required due to constant interruption by telephone calls, visitors, taking messages and planning jobs. In addition, Ms Jones said that customers would complain about Mr Morgan and this added to her feeling of stress.

[21] Mr Morgan categorised the alleged customer complaints as primarily the customers' frustration at not obtaining certain information about their jobs, and the issue of rebooking follow-up visits, both issues being the responsibility of Ms Jones in her role as Office Manager.

[22] He explained that Ms Jones would call him for further information and/or to seek advice, or would write a number of messages and leave these on his desk without first attempting to see if she could resolve the query herself or discussing them with him when they had their morning work discussions.

[23] He said it had become increasingly difficult to develop a good working relationship with Ms Jones. When he had mentioned to her that she did not appear to be happy in her role, she had confirmed this and said that she needed extra help; however he believed that the real issues concerned her lack of time management and job organisation as she had initially been able to fulfil the role requirements.

Events May to July 2015

[24] From approximately May 2015 Mr Morgan said that Ms Jones stopped attending the daily morning work scheduling meetings, despite his constantly asking her to attend them. In addition, she stopped processing invoices properly and he found that her work attitude changed in that she would constantly interrupt him when he was talking to her and be rude to him. He noted that her phone manner with customers became abrupt and her attitude to customers was such that it inferred that they were an interruption to her work.

[25] Later in May 2015 Mr Morgan discovered that Ms Jones had completely stopped completing invoices. When he inquired as to why the invoices had not been done, she had informed him that she was waiting for the new employee to start. He had been surprised by this as he had never confirmed that a new employee would be engaged.

[26] He had instructed Ms Jones to send out the invoices due to the serious adverse effect that not doing so would have on SPG's cash flow. However, despite the instructions that Ms Jones process the invoicing, he found it had not been done and in addition he discovered that she had not been typing up the quotations that he had prepared.

[27] As a result of her failure or refusal to do that work, he had taken on even more administration tasks himself including invoicing. He had also sought help from Ms Trimble.

[28] Ms Jones confirmed that Mr Morgan began taking an increasing amount of work home with him, including job cards, timesheets and documentation from the office.

[29] By mid-2015 Ms Jones explained that there were three main sources of conflict for her as SPG Office Manager: (i) an extremely unattainable workload; (ii) customer complaints about Mr Morgan, (iii) Mr Morgan's behaviour towards her which she described as constant: "*fault finding and criticism*".

[30] Whilst Ms Jones denied that concerns about her performance had been raised with her by Mr Morgan, she accepted when questioned at the Investigation Meeting that Mr Morgan had been consistently expressing concern about her attention to detail and agreed that his comments could be described as raising concerns about her performance.

[31] Ms Jones said she had discussed with Mr Morgan having an answer phone on his mobile telephone in order that he could deal with the questions from customers which were being addressed to her. She said Mr Morgan refused to have an answering service.

[32] When she had raised the issue with him about his having timesheets similar to the staff to record the labour time he had spent on jobs in order that she could ensure that the debtors invoicing was accurate and sent out to customers the same month, he had refused to do so. As a result she said she could not invoice Mr Morgan's jobs in the same way she could for other employees because she did not know where he had been or for how long until some time had passed.

[33] Mr Morgan explained that Ms Jones did not need his time records as she was not required to complete the invoices completely as he imputed the data required for the invoices himself, including the hours and job costing, and he formalised the invoices so that she was just required to type and dispatch them.

Resignation May 2015

[34] Ms Jones said that on the morning of 6 May 2015 she had felt that she could not cope with Mr Morgan's behaviour towards her and she had told him that she wished to leave. She had informed him that she would give notice as soon as she had obtained alternative employment, advising that if SPG paid her 3 months' salary, she would leave without working her notice.

[35] Mr Morgan had not agreed to Ms Jones' suggestion that SPG paid her monies in lieu of notice. He said he believed she was capable of performing the Office Manager role as she had demonstrated this in the initial period of her employment, and he could not understand why she claimed that she was experiencing difficulties in the role.

[36] Ms Jones said that from May 2015 onwards she had started to make notes of conversations she had with Mr Morgan so that she had an ongoing record of his behaviour towards her with a view to legal action. In addition Ms Jones had started to look for alternative employment.

[37] She considered that the relationship between herself and Mr Morgan worsened in July 2015 but she continued in her employment at SPG because she had a holiday planned.

Performance Improvement Plan July 2015

[38] Mr Morgan said he had been closely monitoring the financial performance of SPG during the first half of 2015 and it had become apparent to him that SPG was at risk financially as the cash flow was not being managed appropriately. Invoices were being delayed by Ms Jones and not being sent out promptly to customers, outstanding payments were not being followed up in a timely manner and the company's cash reserves were being tapped into to pay supplier invoices.

[39] Mr Morgan said he had discussed his concern about Ms Jones' difficulties in the Office Manager role with Ms Trimble. By early July 2015 he said Ms Jones appeared to be unable to manage her time and achieve the requirements of the role within a 40 hour week, and he did not understand why, given that previous Office Managers had been able to do so with an even greater employee level and workload. He believed that a Performance Improvement Plan (PIP) would assist to identify the reasons and help in enabling Ms Jones to manage the work.

[40] Ms Trimble said that Mr Morgan had discussed his intention to commence formal discussion with Ms Jones about her performance, the expectations moving forward and to have a PIP in place for her return from leave.

[41] Ms Trimble had accordingly drafted a letter of invitation to a meeting proposed to be held on 10 July 2015. She also acted as support for Mr Morgan during the meeting with Ms Jones.

[42] Prior to the meeting Ms Trimble had drafted a PIP for discussion at that meeting. The letter inviting Ms Jones to the meeting was dated 3 July 2015 and stated:

This letter is to advise you of my concerns regarding your performance as Office Manager. I am specifically concerned about the following areas:

- 1. Planning and organisation – job card timesheets are not being entered daily which leads to issues where you have unexpected leave days eg Thursday and Friday June. Job cards are not being entered in a timely manner delaying the invoicing and debt collection process which has recently led to cashflow issues which cannot be afforded, the new job costing process is not up to date which has led to invoicing delays and errors in invoicing; not booking in further visits to jobs that require additional work leads to delays in finishing the customer's jobs; I have asked you to check with me when booking early jobs for me yet you continue to book jobs for me without consideration for my time and work required in the office; the office appears untidy and disorganised and when asked about a job you are having to sort through piles for information.*
- 2. Lack of attention to detail – errors to invoices and creditors entered into quick books; jobs not booked in correctly and times have been incorrect; Kyle's time has not been entered into job costing which increases the potential of jobs being inaccurately invoiced and undercharged.*
- 3. Phone calls not being answered – the number of telephone calls that are currently coming through to my mobile has increased and has gotten to a level that is not acceptable.*
- 4. Start and finish times – you have started to move your start and finish times. Your normal business hours are expected to be 7.30am to 4pm with a half hour lunch breach which is a 40 hour week. In an office environment that is sole responsibility, flexibility is not as possible without advertised notice as it affects normal business operating hours. Any hours required in addition to these normal work hours must have prior approval by me.*

The above issues are impeding you from meeting the expected requirements of your role.

I would like to meet with you to discuss these issues and to get your response as part of a formal performance improvement process. I have set up this meeting for Wednesday the 10th of July 2015 at 11... I have asked Rachael Trimble to accompany me at this meeting.

You are entitled to bring a representative or support person to this meeting as outcomes of the process may lead to further disciplinary action.

[43] Ms Jones said that following her reading of the letter she instructed Ms Rachel Rolston, an employment advocate, to act as her representative.

[44] In advance of the meeting Ms Rolston wrote to Mr Morgan and asked to be given some examples of the mistakes it was alleged Ms Jones had made in her work. Ms Jones said the intention was that she and Ms Rolston would obtain these examples and discuss them before going into the meeting. However, they had not received examples prior to the meeting.

[45] Mr Morgan said he had considered Ms Jones capable of fulfilling the Office Manager role and he had not wanted the proposed meeting to focus on past performance, but rather to work through improvements to Ms Jones' performance by identifying any problems and putting an agreed action plan in place.

[46] He had intended to discuss the PIP which Ms Trimble had drafted with Ms Jones during the meeting so it could be put in place once she returned from her extended overseas holiday. As such, he had not believed that providing examples of Ms Jones' errors would assist that process.

[47] Whilst Ms Jones stated that she had been mortified at receiving the letter dated 3 July 2015, she confirmed when questioned at the Investigation Meeting that she had understood the areas of concern regarding her work which Mr Morgan wished to raise with her in the meeting as set out in the letter and that the purpose was to improve her performance.

[48] Mr Morgan had responded to Ms Rolston's request for an adjournment and for information by email dated 12 July 2015, agreeing to the change in time for the meeting and stating that there was no supporting documentation, explaining that although he and Ms Jones had had many informal conversations that were performance related, he had not pursued anything formally until this particular point in time. He clarified in the email:

This is the start of a formal performance improvement process to help establish clear expectations and a path forward to ensure that she meets the requirements of her role as Office Manager at Steve's Plumbing & Gas.

Meeting 13 July 2015

[49] During the meeting held on 13 July 2015 Ms Jones confirmed that Ms Rolston, whose manner she described as 'assertive' during the meeting, had predominantly spoken on her behalf. She had not taken an active part, allowing Ms Rolston to speak for her

[50] Mr Morgan said he had felt that during the meeting Ms Rolston had dominated it, attacking him personally and inferring he had been untruthful. Instead of addressing the issues of concern to SPG Ms Rolston persistently appeared to direct the focus on to him and away from the issues of Ms Jones' unsatisfactory performance.

[51] Ms Trimble also described Ms Rolston's manner during the meeting as aggressive which appeared to cause Ms Jones to become distressed, and which prevented the PIP becoming a constructive process. As a result she said Mr Morgan had been completely obstructed from reaching a point at which the proposed PIP could be discussed and/or agreed.

[52] Ms Jones said that during the meeting she had become distraught at the accusations by Mr Morgan. She had considered that what he had been saying was not true and that he had made a lot of allegations but not provided any information to prove that they were true. She said the meeting had ended without resolution and that there would be further discussions once Mr Morgan had provided actual examples of the mistakes which he alleged she had been making.

[53] Following the meeting, Ms Jones said Ms Rolston had requested on a number of occasions the information she had requested during the meeting. However, this had not been provided.

[54] Mr Morgan said that as he was busy in the weeks leading up to Ms Jones' leave period he had not had an opportunity to prepare the information requested by Ms Rolston. More importantly, his intention had not been to focus on past errors, but to move forward to improve Ms Jones' performance through the PIP.

[55] The requested information was not provided to Ms Rolston until after Ms Jones had gone on leave but on 28 August 2015 which was prior to her return to work.

[56] Prior to Ms Jones commencing her leave, Ms Trimble commenced employment for a two week handover period as it was intended that she would cover the administration during the period Ms Jones was on leave.

[57] Both prior to and after the commencement of Ms Jones' leave, Ms Trimble attended morning meetings with Mr Morgan to go over any bookings that had been made, booking of inspections and attending to customer messages that required his input before she could answer. She had found the meetings to be very effective and allowed them to deal with things quickly and efficiently. When she had not been aware of how to do things she referred to the Office Manual which she had found helpful.

[58] She said Ms Jones had preferred to do the bank reconciliation work during the two week period rather than attending the meetings.

Personal grievance dated 2 August 2015

[59] Ms Jones commenced her leave on 26 July 2015, having given instructions to Ms Rolston to raise a personal grievance on her behalf in her absence. She explained that she had not wanted to disrupt her holiday with thoughts of work issues.

[60] After Ms Jones had commenced her leave, Ms Trimble had emailed Ms Rolston confirming that upon Ms Jones' return from overseas Mr Morgan would provide an employment agreement, job description and the requested information about Ms Jones' work errors.

[61] The letter from Ms Rolston raising Ms Jones' personal grievance was dated 2 August 2015 and stated:

...My email of 20 July advised that I would be representing Ms Jones in her absence, and it is expected that you will now be communicating with me directly to resolve the matters that have arisen that affect the employment relationship.

...

Ms Jones is not happy to return to the workplace given the hostile environment that was created by you prior to her leaving.

...

Ms Jones feels that you began the performance improvement process with a view to putting her out of her job.

...

Ms Jones has asked me to continue to represent her in her absence to resolve this matter. I would ask you therefore, to indicate a willingness to attend Mediation on an Early Assistance basis with the Ministry of Business Innovation and Employment. If you will not try to resolve the employment relationship problem with me prior to Ms Jones' return, you are reminded that she does not feel like the relationship would remain tenable. While no decision has been made by her as yet, it is possible that she may feel as though the position is so untenable that she has no option but to resign.

[62] Ms Jones said she was contacted by Ms Rolston and informed that Mr Morgan had agreed to attend mediation and it was decided that Ms Rolston would represent Ms Jones at the mediation during her absence.

[63] Mediation did not resolve the issue.

[64] Following the mediation, Mr Morgan as requested provided Ms Rolston with the requested information about the alleged errors which were the issue of the complaint about her poor performance. There were some 54 alleged errors in total.

Ms Jones' return to work September 2015

[65] Ms Jones was due to return from leave on 31 August 2015; however she subsequently provided a medical certificate on 1 September 2015 which covered a period of sick leave from 1 September 2015 to 14 September 2015. She returned to work on 15 September 2015.

[66] Ms Trimble had been unable to provide cover for the whole period of Ms Jones' leave as she had her own work commitments, and her attendance had been supplemented by temporary employees.

[67] Mr Morgan said because he anticipated that Ms Jones would need to address work which would have been built up in her prolonged absence, he had retained the services of a temporary administrative employee to cover Ms Jones' sick leave and to provide assistance during Ms Jones' first week back to work.

[68] He decided to delay the PIP with Ms Jones until she had settled back into her role. The office was relatively quiet during that period as there was only one plumber plus himself against for bookings. He also said that during Ms Jones' first few weeks back at work she appeared to be unwell and he had been mindful of this.

Work Schedule

[69] Ms Jones said she used the two weeks sick leave to process the information provided by Mr Morgan. In addition she and Ms Rolston put together an office schedule to which Ms Jones intended to work when she returned to the SPG office.

[70] The work schedule had been drawn up without consultation with Mr Morgan and sent to him together with a review of the intended employment agreement which had been provided by SPG and the information that had been requested concerning the identified errors in Ms Jones' past performance.

[71] The weekly schedule was provided in a letter from Ms Rolston dated 11 September 2015 which stated:

2. *We have created a schedule and daily diary/planner in order to assist Ms Jones to ensure that work is completed in a regular, timely manner. ...*
2. *Any tasks assigned to Suzie beyond that which is in her planner will be queued in her task list for completion as and when she is able. ...*
- 5 *We have scheduled weekly meetings between yourself and Suzie as suggested and agreed to by you. These meetings have been scheduled for Friday afternoons between 3.10 p.m. and 3.45 pm ...*
6. *You have indicated that you wish Suzie to take over the booking of jobs. In order to do this, she will provide you with a job card, to which you will add your notation at staffing hours and give it back to her.*

[72] Mr Morgan said he had found the work schedule prepared for Ms Jones to be a complete misrepresentation of the tasks required of her. The rigid planner put the customers as the lowest priority of the day despite the importance of customers to SPG's operation.

[73] As such the fact that the work schedule indicating that telephones would not be answered for almost half of each working day was contrary to the role requirement that the Office Manager was the: "*first point of contact to customers*". The 'phone-free' periods were also to take place early in the day, which was when the majority of customer calls were received.

[74] Mr Morgan said he considered from the letter and the presentation of the work schedule that Ms Jones felt she was entitled to follow the work schedule drawn up by her and Ms Rolston rather than adhere to her job responsibilities as SPG Office Manager or his instructions to her as her employer.

[75] On 15 September 2015 Ms Rolston emailed Mr Morgan stating:

I understand that you are instructing Suzie not to keep to her planner and schedules which she has prepared prior to her return to work today. ...

As you are aware, your position has been that Suzie was in sole charge of her office and your instructions were that she must ensure that she fulfils all the key tasks you have made part of her job description recently. ... That schedule therefore includes periods of time that are 'phone free' where calls will be diverted to voice mail until the scheduled time to respond to them, in order to allow Suzie to focus on doing her work.

I am advised that you are now saying that she is not to work to the schedule and that she must allow the constant interruptions and answer the telephone. ...

...
As the 'sole charge' office manager Suzie's planner is hers to implement. However, if you intend to micromanage her work then you will need to understand what the tasks noted in the job description you recently provided may not all get done and Suzie may need additional assistance in the form of part time helper.
...

[76] Mr Morgan said he regarded the email dated 15 September 2015 as Ms Rolston informing him that it was for Ms Jones to tell him how and when she would perform her duties in accordance with the work planner submitted by herself and Ms Rolston.

[77] He had found the work schedule to be impractical and unworkable and he had not responded as it required considerable consideration. He confirmed that he had informed Ms Jones not to follow the work schedule as it had never been discussed with him and was not tenable for SPG's operation.

Proposed Employment Agreement

[78] In regards to the provided individual employment agreement, Ms Rolston had stated:

Suzie does not agree to be obliged to work overtime nor to work greater than 40 hours per week. ... Reasonable expenses are to be reimbursed in the intended agreement upon production of a receipt.
...

Clause 8.1 the intended agreement stipulates three weeks annual leave instead of four. (Refer Holidays Act 2003, section 16.1). Please alter this.
...

In clause 10.4 of the intended agreement there is reference to email and internet policies. If these do indeed exist, please forward a copy to Suzie. She is not aware of anything.
...

Suzie would like to negotiate four weeks' notice for redundancy rather than two (intended agreement, clause 11.6). She does not agree to two weeks notice for redundancy.
...

Suzie does not consent to withdrawals from her wages with the exception of PAYE and KiwiSaver.

[79] Mr Morgan said in response to the comments provided regarding the individual employment agreement which had been presented to Ms Jones for consideration, Ms Trimble redrafted the employment agreement and Mr Morgan's intention had been to discuss his response with Ms Jones directly as follows:

- (a) Obligation to work overtime, this was not completely removed but reworded slightly to minimise the requirement for overtime and that it would be agreed between himself and Ms Jones.
- (b) Weekly allowance. This was not agreed as he had made company vehicles available to Ms Jones when she was required to run errands.
- (c) Four weeks annual leave – this was an error and was remedied.
- (d) Email and internet policies – there were none currently. However, there was an intention to produce at some point so the reference was left in the agreement.
- (e) Four weeks’ notice of redundancy – this remained at two weeks as per all other SPG employees.
- (f) Withdrawals from her wages – I consider that employer overpayment should remain in.

[80] Mr Morgan said he had tried to discuss with Ms Jones the concerns raised in regards to the proposed draft employment agreement, however she had responded in an email dated 18 September 2015 stating: “*The negotiations have to be done via Rachel so I am requesting that you contact her please*”.

Work Issues September 2015

[81] Ms Jones said that shortly after her return to work she had started to experience work issues including complaints from customers, being locked out of the bank account so she could not reconcile the accounts, and Mr Morgan asking her to write a letter to the SPG accountants to explain that there was a delay with the June/July GST return which was due in late August because she had been on sick leave. Ms Jones said she had refused to do this as it was not true. She had not been in the country in August and the GST for this period was Ms Trimble’s responsibility not hers.

[82] She had sent Mr Morgan an email stating that she was currently locked out of the bank account and that before she had commenced leave she had instructed Ms Trimble how to change the password. She said there had been a lot of work that had not been done when she had been on leave and stated:

I would like to request an assistant to help me continue with my priority daily customer service tasks. I could then get into a lot more of the backload of work. I still need to correct the mistakes made in

the wages allocations and check other work required, before I proceed.

[83] Ms Jones had followed this up with a further email dated 24 September 2015 outlining more problems that had arisen since her return to work.

[84] Mr Morgan explained that the bank account password had been changed at Ms Jones' request prior to her going on leave. In regards to the GST issue, Ms Trimble said that prior to Ms Jones leaving on her holiday, she had not informed her that a GST return was due, nor had she shown her the process or where the previous GST returns were filed. The outstanding GST return had been found in a pile of documents while Ms Jones was away on leave.

[85] Mr Morgan said that with effect from 21 September 2015 he had required Ms Jones to book the early morning catch-up meetings which would assist her with the work issues. However, she had failed or refused to book the meetings unless he specifically requested her to see him, and even then she had refused to participate in the meeting discussion.

[86] He attributed the difficulties impeding him and Ms Jones from resolving work issues and working together constructively to Ms Rolston's involvement. He said that following her return from leave, Ms Jones appeared to be guarded and not willing to discuss work requirements with him.

[87] Communications were via Ms Rolston and/or Ms Jones would send emails to him regarding work queries instead of speaking directly with him, which was not how they had operated previously. He had requested that Ms Jones stop sending him emails and resume discussing the issues raised in them with him in the morning meetings as had occurred before she went on leave; however she had not done so.

[88] Mr Morgan had agreed to weekly meetings as discussed with Ms Rolston, and it had been agreed that Ms Jones would nominate a suitable time and ensure it was put into his planner for a weekly between them. However, Ms Jones did not do so and as a result after a few weeks Mr Morgan himself arranged a weekly meeting. However, it was not held as Ms Jones had asked Ms Rolston to submit her resignation to SPG which was contained in an email dated 6 October 2015.

[89] Ms Jones said she had found that she could not cope as she considered the workload was impossible to manage when she returned to the office and that she felt the atmosphere in the office was unbearably tense and hostile. She had telephoned Ms Rolston on 6 October 2015 and asked her to send a resignation letter to SPG giving notice.

[90] The emailed resignation from Ms Rolston dated 6 October 2015 stated:

I am advised this morning that Suzie's workload is once again out of control and unrealistic.

...

You are now given notice that Suzie gives resignation of two weeks' notice and is raising a personal grievance for unjustified constructive dismissal. Given the circumstances, and the notices given to you by me previously, it was a foreseeable resignation.

[91] Mr Morgan said he had not regarded Ms Jones' workload at the time as being unmanageable. At the time two plumbers were still not back at work which reduced the Office Manager workload and Ms Jones had not achieved some of the tasks he had given her since her return, in particular two GST returns and associated work which he had said was her priority when she had returned from leave three weeks previously.

[92] Ms Jones said that on 7 October 2017 she had received an email from Mr Mark Hayes, an employment lawyer engaged by Mr Morgan, stating that her resignation had been accepted, her last day would be 20 October 2015 and advising that Mr Morgan would attend mediation.

[93] Ms Jones said she worked out her notice period. A temporary employee had been engaged a few weeks after her resignation and she had commenced training her with her first responsibilities being the late GST return and the incomplete bank reconciliations.

Determination

Constructive Dismissal

[94] An employee is usually entitled to resign from their employment on a unilateral basis. The agreement of the employer to such unilateral notice is not required, the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. As observed by Goddard CJ in *Stiffe v Wilson & Horton*:¹

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

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

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

[96] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

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

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

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

[99] Ms Jones is claiming a breach of duty on the part of SPG. The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*⁴. The Court of Appeal in examining the question of constructive dismissal observed:

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

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

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

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

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

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

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

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

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

[103] Further in the case of a claim of repudiatory breach of an employment agreement, an employee may either accept the repudiation of the agreement and resign, or refuse to accept the repudiation and continue to work. A delay in making such an election may be fatal to the employee's claim of constructive dismissal⁷.

Was Ms Jones unjustifiably dismissed by SPG as a result of a breach of the implied duty to accord her fair treatment in the workplace?

[104] Ms Jones is claiming that a breach of the duty to accord her fair treatment in the workplace has occurred. The duty of good faith as set out in s 4(1) of the Employment Relations Act 2000 (the Act) which states:

s.4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2) –

⁵ [1983] ACJ 965

⁶ at [975]

⁷ *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd* (1990) ERNZ Sel Cas 791 (LC)

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything-

(i) to mislead or deceive each other, or

(ii) that is likely to mislead or deceive each other

(1A) The duty of good faith in subsection (1)-

*...
(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*

[105] I do not find that SPG misled Ms Jones as regards the requirements of the role of Office Manager. The position at SPG was advertised as a sole charge position, and the requirements of the position were clearly set out in the job advertisement. The requirements were:

- Being the first point of contact with customers
- Scheduling and following up on jobs
- Preparing financial records and other accounts
- Administration tasks such as handling debtors and creditors
- Banking
- Handling GST preparation
- Invoicing

[106] Ms Jones's evidence was that she believed she fulfilled the requirements of the position set out in the advertisement and as discussed with Mr Morgan during the interview. However it is clear that she struggled to cope with the role requirements from an early stage of her employment which resulted in her being unable to fulfil her duties to the standard required by her employer.

[107] Mr Morgan's evidence was that, on the basis that Ms Jones had initially been able to fulfil the role requirements, he believed that real issues concerned her lack of time management and job organisation.

[108] I note that the Office Manager position had previously been held by two successive employees, one of whom has since re-commenced employment. It appeared from the evidence that both incumbents had experienced no difficulty fulfilling the role requirements within a normal full-time working week and I accept on the evidence of Mr Morgan and Ms Harnett that the role requirements could be fulfilled by a competent employee within the designated hours of work.

[109] An employer is entitled to raise issues of concern with an employee and Mr Morgan raised his concerns that Ms Jones was making errors in the work she was performing in the role of Office Manager. It is incumbent upon an employer that he or she deals with an employee in good faith in so doing. This requires, inter alia, raising the performance concerns with the employee in a timely manner in order that they can be addressed as close to the point at which they occur as possible.

[110] Mr Morgan's evidence was that he had raised issues as they arose, discussing them with Ms Jones and working together to rectify issues. Such matters were discussed during the morning meetings which were a feature of the employment.

[111] Ms Jones confirmed that performance issues had been raised with her informally by Mr Morgan throughout the period of her employment.

[112] I find that not only did Mr Morgan make Ms Jones aware in a timely manner of performance concerns with her work, but in addition he undertook duties himself which fell within the ambit of the role of Office Manager with a view to alleviating her workload until she became more able to cope with the role requirements.

[113] As observed, an employer is entitled to raise performance concerns with an employee with a view to resolving them. Mr Morgan and Ms Trimble's evidence was that the intent of the meeting held on 3 July 2015 was to raise the performance concerns formally with Ms Jones, and to obtain her response to the concerns as part of a formal improvement process. A PIP had been drafted by Ms Trimble for discussion at the meeting.

[114] In *New Zealand Institute of Fashion Technology v Aitken*⁸ the Employment Court stated:

[57] It must be possible for employers, in the context of a formal performance appraisal, to hold a frank discussion with employees, including the voicing of dissatisfaction or less than entire satisfaction with the employee's performance. The employee is entitled, in the

⁸ [2004] 2 ERNZ 340

context of the subsequent discussion, to advance facts and considerations that might alter or moderate an employer's adverse views ... But the fact remains that this is the appropriate forum for both parties to express concerns on subjects that fall short of warranting a resignation by the employee or disciplinary action or some performance monitoring exercise by the employer.

[115] The letter dated 3 July 2015 set out the main areas of concern in order for Ms Jones to provide a response and to initiate discussion of a way forward. Ms Jones confirmed that she had understood from that letter what areas of her performance were of concern to her employer.

[116] The penultimate line of the letter which referred to: "*further disciplinary action*" had the effect of making Ms Jones concerned that a disciplinary process had been commenced.

[117] That was an unfortunate choice of words, which had the effect of upsetting Ms Jones. However I note that the email dated 12 July 2015 which Ms Morgan sent to Ms Rolston in advance of the meeting held on 13 July 2015 clarified the intention of the meeting, in particular that it was intended to be the start of the formal improvement process.

[118] I also note that it was not the intention of Mr Morgan to focus on previous errors, and the list of errors was provided by him reluctantly and only at the insistence of Ms Rolston, who appeared to persist in regarding the process as a disciplinary one despite Mr Morgan's email dated 12 July 2015.

[119] The evidence of Mr Morgan and Ms Trimble is that no meaningful discussion took place at the meeting held on 13 July 2015 which appears to be attributable to the somewhat aggressive representation by Ms Rolston who had predominantly spoken on Ms Jones' behalf.

[120] I observe that whilst a representative may participate in a meeting held with an employee he or she cannot substitute his or her self and stand in the place of the employee as observed in *New Zealand Baking Trades ETC Union (NC) v Foodtown Supermarkets Limited*⁹:

The authority given to the representative may be very wide or it may be very narrow. It may never, however, be so wide as to substitute the representative entirely for the employee or the employer whom the

⁹ 3 ERNZ 305

representative represents. This is because of the personal nature of the contract of employment.

[121] Most significantly, Ms Jones' input to the meeting had been minimal and I find that the result was that the intervention of Ms Rolston was not constructive to the employment relationship that was in existence between SPG as the employer and Ms Jones as the employee.

[122] It was to set the pattern for future communication between Ms Jones as the employee and SPG as the employer.

[123] Following the meeting held on 13 July 2015 Ms Jones instructed Ms Rolston to raise a personal grievance on her behalf, the letter dated 2 August 2015 from Ms Rolston, stating clearly in that letter that SPG was to communicate directly with Ms Rolston rather than herself.

[124] I observe that the statutory duty of good faith¹⁰ requires both parties to the employment relationship to be: "*active and constructive in establishing and maintaining a productive employment relationship in which the parties are ... responsive and communicative*". That duty rested upon Ms Jones personally as the employee as well as on SPG as the employer.

[125] Ms Jones had previously indicated an intention of resigning in May 2015 and further indicated in the letter dated 2 August 2015 that she might feel that her position was so untenable that she had no option to resign. However she in fact returned to her employment on 14 September 2015.

[126] In so doing I find that Ms Jones reaffirmed her employment¹¹ and by so doing cannot raise a claim of constructive dismissal based on any perceived breaches of duty prior to that date.

[127] Moreover I find no breach of good faith in SPG commencing a formal performance improvement process with Ms Jones. Whilst Ms Jones may have: experienced inconsiderate conduct on the part of Mr Morgan causing her some unhappiness or resentment, I do not find dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship

[128] Once Ms Jones returned to her employment at SPG as Office Manager in September 2015, I find no breach of good faith, rather Mr Morgan:

¹⁰ S 4(1A)(b) of the Act

¹¹ Cf: *NZ Woollen Workers IUOW v Distinctive Knitwear NZ*

- did not resume the discussions about a proposed PIP;
- retained the services of a temporary administrative assistant to assist Ms Jones ease back into the workload after her lengthy absence;
- sought to implement the regular morning meetings at which daily issues could be raised and discussed ;
- agreed to implement the weekly meetings as discussed with Ms Rolston, and had sought to resume the morning meetings; and
- tried to engage with Ms Jones about the her concerns about the proposed employment agreement

[129] I find these to be the actions of a fair and reasonable employer.

[130] I accept that Mr Morgan did not agree with the proposed work schedule to which Ms Jones adhered when she recommenced work after her absence on annual and sick leave. However I observe that the work schedule was not drawn up in consultation with him as Ms Jones' employer, nor was he consulted at any stage, rather it was presented with a *fait accompli*.

[131] I find this to be extraordinary. I also observe that Ms Jones did not participate in the morning meetings as convened by Mr Morgan, nor did she schedule the weekly meeting she had requested and to which Mr Morgan had agreed.

[132] Significantly when Mr Morgan tried to discuss her concerns about the proposed employment agreement with him, she responded in the email dated 18 September 2015 stating: "*The negotiations have to be done via Rachel*".

[133] I find that these actions do not accord with Ms Jones' duty of good faith to be: "*active and constructive in establishing and maintaining a productive employment relationship*".¹²

[134] Following Ms Jones' return to SPG employment in September 2015, whilst there may have been what Ms Jones perceived to be inconsiderate conduct causing some unhappiness or resentment on her part, I find no breach in the duty of good faith such as to constitute: "*dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship*".

¹² S.4 (IA) of the Employment Relations Act 2000

[135] I determine that Ms Jones was not unjustifiably constructively dismissed by SPG but that she resigned voluntarily.

Reasonably foreseeable

[136] Having already found no breach of the duty of good faith, I further find there was not any fundamental breach of duty so serious to make it reasonably foreseeable to SPG that Ms Jones would resign.

Costs

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

[138] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority