

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
OFFICE**

[2013] NZERA Christchurch 80  
5374352

BETWEEN            ANNETTE MANSON  
                                 Applicant  
  
AND                    MAPLES LIFECARE (2005)  
                                 LIMITED  
                                 Respondent

Member of Authority:    Christine Hickey  
  
Representatives:        Anna Oberndorfer, for Applicant  
                                 Linda Ryder, for Respondent  
  
Investigation Meeting:    26 November 2012 at Christchurch  
  
Submissions received:    At the hearing from both parties  
  
Determination:            6 May 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. Annette Manson was not constructively dismissed.**
- B. Annette Manson was unjustifiably disadvantaged.**
- C. Maples Lifecare (2005) Limited to pay Annette Manson \$2,000 in compensation.**

**Employment relationship problem**

[1] Annette Mason began work as a night shift caregiver at Maples Lifecare (2005) Limited on 23 August 2011. Clause 3.1 of Ms Manson's individual employment contract guaranteed her a minimum of 32 hours work per week.

[2] In the first 13 weeks of her employment Ms Manson worked on Friday and/or Saturday nights on 11 out of 13 weekends. On 2 November 2011 Ms Manson left a letter for Jenny Youngman, the manager of Maples. The letter stated:

*Due to a change in my family circumstances I am unable to work Friday and Saturday nights.*

*I would appreciate it not to be rostered on those nights.*

*I notice on the new roster that I am rostered on the weekend of 18<sup>th</sup>-19<sup>th</sup> November – Fri & Sat night. I am not available that weekend to work.*

[3] Ms Youngman rang Ms Manson on 2 November 2011 as soon as she received the letter. She told Ms Manson that she was responsible for finding her own replacement for her shifts in the weekend of 18-19 November 2011.

[4] There is a conflict of evidence about what else was said during the telephone call. However, I find that Ms Youngman also told Ms Manson that her unavailability for weekend work meant that Ms Youngman could no longer guarantee her a minimum of 32 hours of work per week. Ms Manson reiterated that she remained unavailable for weekend work. Ms Youngman then asked if Ms Manson would work some day shifts as well. Ms Manson said that she did not want to work any day shifts. Ms Youngman told Ms Manson that as a result of her unavailability for weekend nights Maples would need to advertise to get another night shift caregiver.

[5] In the following weeks Ms Manson was rostered by Ms Youngman for fewer shifts than previously; and less than 32 hours per week. However, Ms Manson worked more shifts than she was rostered for because she picked up shifts which other workers were unable to work. In the fortnight ending 4 December 2011 Ms Manson worked 44.33 hours<sup>1</sup>. In the fortnight ending 18 December 2011 Ms Manson worked 68 hours, including a Saturday night on 10 December 2011.

[6] On 1 December 2011 Ms Youngman and Ms Manson had a meeting which Ms Youngman called to discuss a conflict she understood that Ms Manson and another employee had with each other, and two performance related issues. Ms Youngman proposed to separate Ms Manson and the other employee by putting both

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<sup>1</sup> In addition she had one sick day, which would have been for a period of 8 hours. Ms Manson was not eligible at that time to be paid for sick leave. The two rosters were numbers 47 and 48 for the year.

of them on a mix of day and night shifts. Ms Youngman also extended Ms Manson's probationary period. Ms Manson then handed Ms Youngman her written resignation.

[7] Ms Manson claims Maples carried out actions that unjustifiably disadvantaged her and that Maples breached its duty of good faith to her. She also considers that she was constructively dismissed by the same actions. As a remedy Ms Manson seeks compensation of \$7,000 for humiliation, loss of dignity and injury to her feelings. She also seeks legal costs.

[8] Maples denies all Ms Manson's claims. Maples counterclaims that Ms Manson breached her employment contract by making herself unavailable for Friday and Saturday nights and should pay a penalty for that breach. It also seeks legal costs.

### **Issues**

[9] The issues that I need to determine are:

- a. whether Maples unjustifiably disadvantaged Ms Manson in her employment by rostering her for fewer than 32 hours per week;
- b. whether Maples breached its duty of good faith to Ms Manson;
- c. whether Maples constructively dismissed Ms Manson;
- d. whether Maples unjustifiably disadvantaged Ms Manson in any other way;
- e. whether Ms Manson breached an express term of her employment agreement;
- f. if so, whether Ms Manson should pay a penalty for that breach;
- g. what remedies, if any, Ms Manson is entitled to, and
- h. what costs should be awarded.

*Did Maples carry out an action that unjustifiably disadvantaged Ms Manson by rostering her for fewer than 32 hours per week?*

[10] Ms Manson says that after she told Maples that she was no longer available to work Friday and Saturday night shifts it breached its contractual obligation to roster her for a minimum of 32 hours per week. She says that was an unjustified action which disadvantaged her in her employment.

[11] However, Maples says that in making herself unavailable for Friday and Saturday nights Ms Manson changed the basis on which she had been employed and made it impossible to roster her for a minimum of 32 hours on night shifts every week.

[12] Ms Manson says she was employed to work night shifts between Sundays and Thursdays, and only occasionally to fill in for other staff on weekend nights. She says that she reached that understanding by talking to Ms Youngman at the interview. She says she told Ms Youngman that she was able to work weekends but did not wish to work every weekend. She says Ms Youngman told her that she would have to work *the odd weekend to give the girls a break*.

[13] Ms Manson had orientation from 23-25 August 2011 with Ms Youngman. Ms Youngman says she told Ms Manson that all employees were expected to relieve weekend workers when required. She meant by that other staff would relieve Ms Manson so that she did not have to work every weekend. Ms Youngman says she did not tell Ms Manson that she would only have to work *the odd weekend*.

[14] Ms Youngman says that when Ms Manson rang her to enquire about the position she asked her whether she was available for weekend work. She would not have interviewed Ms Manson if she had not been available for weekend work.

[15] I consider that Ms Manson was employed on the basis that she would be available for night shift work on any of the nights of the week. Ms Manson's note saying that because her family circumstances had changed she was *unable to work Friday and Saturday nights* supports the view that she knew that she was expected to be available for weekend nights.

[16] My conclusion is supported by documentation prepared by Ms Youngman when she interviewed and appointed Ms Manson:

- The advertisement is for an experienced night shift caregiver. It does not set out which nights of the week the shifts are expected to cover.

- The application form completed by Ms Manson shows that she answered ‘Yes’ to the question of whether she was *flexible to hours of work/shift work*.
- Ms Youngman’s notes of her interview with Ms Manson record that Ms Manson answered ‘Yes’ to the questions *are you available weekends?* and *are you available for shift work?* Ms Manson also said that she required 32-40 hours of work per week.
- Maples’ letter of offer to Ms Manson was for a position of *night caregiver* to work *nights as rostered* but does not limit in any way the nights she would be rostered.

[17] Ms Youngman says Ms Manson told her at the interview that she could work most but not all weekends.

[18] Ms Youngman says that she told Ms Manson that if she wanted a particular weekend off work she needed to put a leave request form in before the roster was published for that weekend. I accept that Ms Manson was made aware that if she had been rostered for a shift she was responsible for finding a replacement worker if she became unavailable.

[19] To be successful in a claim for unjustifiable disadvantage an employee must show that their employment or one or more conditions of their employment were affected to their disadvantage by an unjustifiable action by their employer.<sup>2</sup>

[20] The test of justification for an employer’s action is set out in section 103A of the Employment Relations Act 2000. I need to look at whether the way that Ms Youngman acted was what a fair and reasonable employer could have done in all the circumstances at the time.<sup>3</sup> It is not up to me to substitute my view of the employer’s action but instead to objectively assess it.<sup>4</sup>

[21] I also need to consider the procedural aspects of s.103A(3), as far as they can sensibly be applied to this situation, and any other factors that are relevant. In this case I consider it necessary to examine whether before rostering Ms Manson on for Rosters 47 and 48:

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<sup>2</sup> Section 103A(1)(b)

<sup>3</sup> Section 103A(1)(b)

<sup>4</sup> *Angus v Ports of Auckland* [2011] EmpC 160

1. Ms Youngman put her concern about the difficulty of rostering Ms Manson for 32 hours minimum once she made herself unavailable for Friday and Saturday nights;
2. Ms Youngman gave Ms Manson an opportunity to respond to that concern; and
3. Ms Youngman considered Ms Manson's views.

[22] In all the circumstances I consider that Ms Youngman carried out a fair procedure before rostering Ms Manson for fewer than 32 hours minimum per week.

[23] The circumstances leading to Ms Manson being rostered for fewer hours per week included her making herself unavailable for Friday and Saturday nights after 20 November 2011. Ms Manson sought to vary that aspect of her employment agreement unilaterally.

[24] Maples did roster Ms Manson for fewer than 32 hours per week over the two rosters after 18/19 November, which were her last rostered weekend shifts. However, Ms Manson continued to work over those weeks picking up more shifts as they became available to her.

[25] Ms Youngman says that Ms Manson's sudden unavailability for weekend work coincided with the resignation of one staff member, one staff member being on extended special leave and another staff member being unable to increase her hours. Ms Youngman found it difficult to fill the weekend night shifts from within the existing staff and advertised for another night shift caregiver.

[26] Ms Manson may have been disadvantaged by being rostered for fewer shifts. However, I consider the action was justifiable. Ms Manson had requested that she no longer be rostered for weekend nights and Maples respected her request. Maples accepted that Ms Manson could work more than the shifts that it rostered her for in any fortnight if they became available. Ms Youngman had also offered Ms Manson day shifts which she refused.

[27] I consider that Maples' decision to roster Ms Manson as it did was a decision that a fair and reasonable employer could have made in the circumstances at the time. Therefore, Ms Manson was not disadvantaged by an unjustifiable action of her

employer. Her personal grievance claim for unjustified disadvantage fails in relation to the rostering.

*Did Maples breach its obligation of good faith to Ms Manson when rostering her for fewer than 32 hours a week?*

[28] On 2 November 2011 Ms Youngman communicated in a timely way by advising Ms Manson that her weekend unavailability might lead to fewer hours of work. It offered her a mix of day and night shifts to accommodate her wish to no longer work weekends and her need for 32 or more hours per week. Ms Manson did not wish to work a mix of day and night shifts. However, I consider Maples' offer to make up the hours with day shifts to have been an act of good faith in trying to accommodate both Ms Manson's needs and Maples' needs. I do not accept there was a punitive or bad faith aspect to that.

[29] Ms Manson submitted that Ms Youngman should not have telephoned Ms Manson in the morning of 2 November 2011 after she had finished her shift and before she had any sleep to discuss the letter she had left for Ms Youngman. However, the duty of good faith is a two-way obligation. If Ms Manson felt herself to be at any disadvantage through tiredness she should have let Ms Youngman know that and made another time to talk with her about her desire to no longer work weekends and what that might mean for Maples and for herself. However, she did not do that. She could also have made a time to speak to Ms Youngman at any time after Roster 47 was produced to talk about her dissatisfaction with only being rostered for three night shifts and what might happen in the future. She did not do that.

[30] Maples did not breach its obligation of good faith to Ms Manson.

*Was Ms Manson constructively dismissed?*

[31] Ms Manson says that by failing to roster her for a minimum of 32 hours a week and by expressing its intention to roster her for a mix of day and night shifts Maples breached her employment agreement in such a fundamental way that it was foreseeable that she would be unable to continue working. She says that it was the fact that she could not get a minimum of 32 hours of work per week which caused her to resign.

[32] In October 2011 another staff member had accused Ms Manson of assaulting her. Ms Manson absolutely denied that had happened. There had been a meeting on 3 October 2011 after the alleged assault. The two employees were not put on separate shifts at that time as Ms Youngman *gave them an opportunity to retrieve their relationship*.

[33] Ms Manson says that at the 1 December 2011 meeting Ms Youngman said she was extending the probationary period and made it clear that she would not roster Ms Manson and the other employee on the same shifts, so proposed a mix of day and night shifts for both of them. Ms Manson believed that it was unreasonable to ask her to work a mix of day and night shifts because that would be *too hard on my body*. She also believes the offer of day shifts to be unfair as she applied for and had been appointed to a night shift position.

[34] Ms Manson says that she was told by the other employee before the meeting that she would be offered a mix of day and night shifts to make up to 32 hours minimum work per week.

[35] Ms Manson says she felt unsupported in her work because of the allegations made about her by other staff, which she refuted. She prepared her resignation letter before the meeting. However, she says that she only decided to resign once she was told she would not be offered enough night shifts:

*Due to my hours of work being cut from 4-5 shifts a week, down to 2 shifts per week I can't live on that, e.g. rent, power, food etc.*

*I feel I am being forced into handing in my notice which takes effect of 2 weeks notice of the above date.*

*I would like to thank you for the opportunity for [sic] working at the Maples.*

[36] 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.

[37] Constructive dismissal includes, but is not limited to, cases where:

- An employer gives an employee a choice between resigning and being dismissed.
- An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- A breach of duty by the employer causes an employee to resign.<sup>5</sup>

[38] There is no suggestion that Ms Youngman's behaviour on behalf of Maples fell into either of the first two categories of constructive dismissal. Therefore, I need to determine:

1. Whether Maples breached a term or terms of the employment agreement.
2. If it did, did that breach or breaches cause Ms Manson to resign?
3. If it did, was the breach or were the breaches sufficiently serious to make it reasonably foreseeable to Maples that there was substantial risk that Ms Mason would resign?

[39] It is not every breach of a duty or every unjustified action by an employer that can entitle an employee to cancel their contract of employment:

*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.<sup>6</sup>*

[40] I have already decided that rostering Ms Manson for less than 32 hours per week did not amount to an unjustified disadvantage to her in her employment. In all the circumstances, including that Ms Manson had made herself unavailable for weekend work, I do not consider that Maples breached Ms Manson's employment agreement when it rostered her for fewer than 32 hours.

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<sup>5</sup> *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA)

<sup>6</sup> *Wellington Taranaki and Marlborough Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC) at 104

[41] Rather, I consider that Maples was acting as if the parties were in the process of negotiating a variation to the agreement in trying to honour Ms Manson's need for a minimum 32 hours of work a week, without working Friday or Saturday nights, by offering her a mix of day and night shifts. That process ended with the parties being unable to agree on a variation and Ms Manson tendering her resignation.

[42] In addition, I do not consider that in reducing Ms Manson's rostered hours Maples breached the implied term of trust and confidence.

[43] Even if I am wrong in that, it was not reasonably foreseeable to Maples that the lower number of rostered hours would be likely to cause Ms Manson to resign. That is because on 2 November 2011 Ms Youngman told Mr Manson that the consequence of her not being available for weekend work was likely to have that effect. Ms Manson appeared to accept that by reiterating her non-availability.

[44] In all the circumstances I do not consider the proposal not to roster Ms Manson and the other staff member on the same shifts amounted to dismissive or repudiatory conduct. In addition, it was not reasonably foreseeable Ms Manson would resign if offered a mix of day and night shifts as she had already declined the offer of day shifts on 2 November 2012 but had continued in her employment.

*Did anything at the 1 December meeting amount to constructive dismissal?*

[45] Ms Youngman says that she was surprised to be told by Ms Manson at the meeting on 1 December 2011 that she was worried that she might be dismissed. Ms Youngman says that the meeting was not a disciplinary meeting. However, I consider that it was a meeting of a disciplinary nature; it related to perceived shortcomings in Ms Manson's performance. The record of the meeting is headed *Performance Issues*:

*This is a written record of the discussion on issues related to your conduct or performance and the outcomes to be achieved from this discussion.*

*The areas of concern are:*

*-General attitude towards staff & residents*

*-Manner of impatience, intolerance of residents*

*-Often disputing whos [sic] turn it is to answer bells, mop floors & other tasks*

*-This creates an air of tension for all night shift workers*

*-The '90 day' trial to be extended until Jan 18<sup>th</sup> 2012<sup>7</sup>*

*The actions required to achieve improvement are:*

*-Improve attitude & manner towards staff & residents*

*-To be rostered on nights that the other staff member is not working*

*-Have offered some day shifts to make up the hours*

*The timeframe within which improvement is required is immediate.*

*The probable consequence if there is insufficient improvement in your conduct or performance will be a written warning.*

[46] Ms Manson says that by 1 December 2011 there was no longer any problem between her and the other staff member. She says that she was not offered the opportunity to bring a support person with her to the meeting and she was not consulted about the proposed change that she and the other employee would not be rostered on the same night shifts or on the extension of the probationary period.

[47] The record of the meeting does not contain Ms Youngman's proposal to separate Ms Manson and the other employee but Ms Youngman agreed that her goal was not to have them working together. She offered Ms Manson and the other employee a mix of day and night shifts to enable them to get the number of hours they wished to work.

[48] Ms Youngman says that she and Ms Manson discussed how Ms Manson and the other staff member got on and Ms Manson told her that she had no ongoing problems with her. However, Ms Youngman had already met with the other staff member and *was not convinced* there were no ongoing problems between them.

[49] Ms Manson's employment agreement included a probationary period. Clause 2 sets out Maple's options in the event it was not satisfied with Ms Manson's work:

*2.1 This agreement is for a probationary period of three months to enable the employer to properly assess the employee's standard of work within that time and, if completed to the satisfaction of the employer, the employer shall notify the employee and the agreement shall be deemed to be a permanent appointment subject to the other provisions of this agreement.*

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<sup>7</sup> There was not a 90-day trial period under sections 67A and 67B of the Employment Relations Act 2000 but a probationary period under section 67.

2.2 *Should the employee not meet the standard of work required by the employer during the probationary period then the employer may terminate the agreement by giving one week's notice. As an alternative to termination the employer may elect to offer the employee an extension of the probationary period for further assessment of the employee's standard for work.*

[50] In and of itself I do not consider that purporting to extend the probationary period amounted to dismissive or repudiatory conduct. Therefore it was not a kind of breach that could fundamentally undermine the trust and confidence Ms Manson was entitled to have in her employer.

[51] In addition, Ms Manson did not tell Ms Youngman on 1 December 2012, or at any subsequent time, that she considered the purported extension of the probationary period was a reason for her resignation, nor did she tell me that at the investigation meeting. So, even if it had been a fundamental breach it did not cause Ms Manson to resign or contribute to her decision to do so. Therefore, it cannot amount to constructive dismissal.

*Was Ms Manson unjustifiably disadvantaged by the 1 December 2011 meeting?*

[52] However, telling Ms Manson that her probationary period was to be extended was disadvantageous to Ms Manson. Whether it was unjustified requires consideration of the factors set out in s.103A(3)<sup>8</sup>. Maples did not give Ms Manson any warning that an extension of the probationary period was to be discussed at the meeting or give her the chance to respond to that proposal before Ms Youngman decided to impose it. It follows that Maples failed to use a fair process in coming to its decision to extend the probationary period. It was also unfair that Ms Manson was not given the opportunity to bring a support person or representative to the meeting with her. I consider those factors to have been more than minor. The purported extension of the probationary period on 1 December 2011 was not a decision that a fair and reasonable employer could have made in all the circumstances at the time.

*Did Ms Manson breach her employment agreement? If so, should she pay a penalty?*

[53] Maples claims that in making herself unavailable for weekend nights Ms Manson breached her employment agreement and therefore she should pay a penalty.

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<sup>8</sup> As set out in paragraphs 20 & 21 above.

[54] Section 134 of the Act provides that every party to an employment agreement who breaches that agreement is liable to pay a penalty. Section 135(2)(a) provides that the maximum penalty an individual can be liable for is \$10,000.

[55] Clause 15 of Ms Manson's individual employment agreement signed on 24 August 2011 says:

*The parties may vary the terms of this agreement by mutual agreement. Any such variation shall be recorded in writing, signed and appended to this agreement.*

[56] Maples submits that in making herself unavailable for weekend work Ms Manson breached her employment agreement, which could only have been varied in writing and by mutual agreement and therefore she is liable to pay a penalty.

[57] I have found that Ms Manson was bound under her employment agreement to work shifts as rostered, including weekends. However, I do not consider that the circumstances were such as to be a breach of a term of the employment contract. Rather, the parties were in the process of negotiating a variation to the agreement initiated by Ms Manson's unavailability for Friday and Saturday nights. That process ended with the parties being unable to agree on a variation and Ms Manson tendering her resignation.

[58] The purpose of a penalty is to punish a person for their actions. Even if there had been a breach of the employment agreement I do not consider this would have been appropriate situation for the imposition of a penalty against Ms Manson. Ms Manson genuinely believed that she was entitled to make herself unavailable for weekend night shifts. Any breach would not have been deliberate. Ms Manson was incorrect but did not know that at the time she withdrew her ability to work weekend shifts.

[59] Ms Manson is not liable to pay a penalty.

### **Determination**

[60] Ms Manson was not unjustifiably constructively dismissed. Neither Ms Manson nor Maples breached their duties of good faith or the employment agreement.

[61] Ms Manson has a personal grievance that she was unjustifiably disadvantaged by the 1 December 2011 disciplinary meeting and is entitled to remedies for that grievance.

**Remedies**

[62] Ms Manson claims \$7,000 compensation for humiliation, loss of dignity and injury to her feelings. Her evidence about the effects on her was minimal. However, I also heard from Mr Alex Dunlop, Ms Manson's former partner. He said that she became very stressed and believed *they were trying to get rid of her and was constantly worrying and she started smoking again.*

[63] I consider that Maples should pay Ms Manson \$2,000 for humiliation, loss of dignity and injury to her feelings.

[64] Section 124 of the Act requires me to consider whether Ms Manson's actions contributed to the situation that gave rise to her personal grievance. I do not consider that her actions contributed in any way to the unjustifiable disadvantage and so consider it unfair to reduce the remedy awarded.

**Costs**

[65] Ms Manson as the successful party is entitled to a reasonable contribution towards her actual legal costs. The parties are encouraged to resolve costs themselves. However, if that is not possible, then Ms Manson has 28 days within which to file a costs memorandum and Maples has 14 days within which to respond.

[66] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey

Member of the Employment Relations Authority