

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 87
5573926

BETWEEN MADDISON NOLET
Applicant
A N D EDGEWATER RESORT HOTEL
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Michael Guest, Advocate for Applicant
Don Rhodes, Advocate for Respondent

Date of Investigation Meeting: 26 May 2016 at Queenstown

Submissions Received: 26 May and 31 May 2016 from both parties

Date of Determination: 15 June 2016

DETERMINATION OF THE AUTHORITY

- A Maddison Nolet was not actually dismissed.**
- B Maddison Nolet was not unjustifiably constructively dismissed.**
- C Costs are reserved and failing agreement a timetable has been set.**

Employment relationship problem

[1] Maddison Nolet commenced employment on 8 April 2015 in the position of Food and Beverage Attendant with Edgewater Resort Hotel Limited (Edgewater Resort). Edgewater Resort owns and operates the Edgewater Hotel in Wanaka and its General Manager is Michael Barton.

[2] Ms Nolet was interviewed and appointed by the then food and beverage manager Kathryn Goodenough to her position. Ms Goodenough's last day at Edgewater Resort was 11 April 2015, three days after Ms Nolet started. A new food and beverage manager, Christopher Moore, commenced employment with Edgewater Resort in or about late May/early June 2015.

[3] Ms Nolet worked the breakfast shifts at Edgewater Resort and usually undertook about 20 hours of work per week in accordance with a roster. She was party to a written individual employment agreement and was paid \$15 per hour for each hour worked regardless of the time or day of the week.

[4] Ms Nolet says that she was unjustifiably dismissed on 28 June 2015 when she was told by Mr Moore that was her last day of work and she was not rostered beyond that date. Alternatively, Ms Nolet says that she was unjustifiably constructively dismissed after that date.

[5] A further claim that Ms Nolet was unjustifiably disadvantaged in her employment by the failure to roster her for 20 hours of work each week was withdrawn by Mr Guest at the commencement of the investigation meeting. This had been indicated in an earlier email sent to Mr Rhodes and the Authority dated 12 April 2016.

[6] Ms Nolet seeks lost wages in the sum of \$2,704.00 net, compensation in the sum of \$15,000.00 and costs.

[7] Edgewater Resort does not accept that Ms Nolet was unjustifiably dismissed, either actually or constructively. Edgewater Resort says that the issue before the Authority is based on Ms Nolet's misunderstanding of her employment and was avoidable.

The issues

[8] The Authority needs to determine the following issues:

- (a) Was Ms Nolet actually dismissed;
- (b) Alternatively, was Ms Nolet constructively dismissed after she undertook further work beyond 28 June 2015;

- (c) If a dismissal of either type is made out then was it unjustified;
- (d) If Ms Nolet was unjustifiably dismissed, either actually or constructively, what remedies is she entitled to;
- (e) Are there issues of contribution and mitigation?

Was there an actual dismissal?

[9] In this case, unlike many that come before the Authority, it is not accepted that there was a dismissal. Edgewater Resort says that there was simply a misunderstanding which it did its best to fix when it was brought to its attention. It regarded Ms Nolet as a very good employee and had no performance or other concerns with her and wanted the relationship to continue.

[10] Judge Williamson in *Wellington Clerical Union v Greenwich*¹ considered the concept of constructive dismissal and the meaning of the words dismissal and constructive. The focus for me at this point is on the meaning attributed to dismissal. It was stated in *Greenwich* that a dismissal is a word with a very wide meaning and should not be construed narrowly. A dismissal is a *sending apart, a sending away or sending forth*.

[11] Mr Guest in his submissions in reply placed some weight on aspects of the evidence Ms Nolet was not cross examined about particularly in respect of the actual dismissal which Edgewater Resort denies. Mr Guest submitted that those matters must be taken as proven unless inherently lacking in credibility.

[12] The Authority is an investigative body and its process is not adversarial where cross examination on disputed matters is a requirement if they are not to be taken as proven. In this case there was also documentary and other evidence contemporaneous with various interactions after 28 June 2015 upon which I have placed some weight.

[13] The early weeks of Ms Nolet's employment were uneventful. Mr Moore, I accept, did not commence employment until late May or early June 2015 by which time it is likely that Ms Nolet had become concerned at the reduction in her rostered hours. I do note that the staff rosters were completed before the week ending 21 June 2015 by someone other than Mr Moore. Mr Barton in his evidence said that around

¹ [1983] ACJ 965 at 973

May and June each year the occupancy and restaurant patronage drops and picks up again in early July when the local ski fields open and that would have impacted on the rostered hours allocated to Ms Nolet. It is helpful to include at this point what the written employment agreement says about hours and what was discussed at the time of her appointment.

[14] Ms Nolet's evidence is that she was told by Ms Goodenough that she would get no fewer than 20 hours a week and *it would be very odd if that did happen*. Ms Goodenough who now works in the North Island was connected to the investigation meeting by telephone and she said that in summer there would be at least 20 hours work but that winter was quiet. She did not accept including under questioning from Mr Guest that she guaranteed hours to Ms Nolet.

[15] Ms Goodenough knew that Ms Nolet had another job in a restaurant when she was appointed and she advised Ms Nolet that they should be able to work around that by Ms Nolet working the early breakfast shift so Ms Nolet could get away by about 2pm. Between the two jobs Ms Nolet envisaged being able to work about 40 hours per week.

[16] Ms Nolet's employment agreement contains a complete agreement provision which provided: *This agreement replaces all previous employment contracts, terms, conditions, agreements, understandings, between the Employer and Employee*. I am satisfied that Ms Nolet had an opportunity to discuss the contents of the agreement with her father Gregory Nolet before she signed it. Mr Nolet by virtue of his job was in a position to give I find some sensible advice.

[17] I shall set out what I regard as two other relevant provisions:

2. ***Position:***

The Employee shall be employed in the position of Food and Beverage Attendant as per the attached Job Description.

From time to time the Employee may be required to change duties to meet the operational requirements of the Employer. Flexibility and cooperation is required when such circumstances arise.

4. ***Hours of work:***

The ordinary hours of work will be those notified by roster. The rostered hours of work will be set 7 days in advance but may be subject to change due to business requirements on

reasonable notice. The Employee may be rostered on any day, but will receive at least 2 days off a week unless otherwise requested by the Employee, and agreed by the Employer.

The Employee will be paid for the number of hours actually worked each week.

[18] The evidence supported that there were only two occasions on which Ms Nolet and Mr Moore spoke before Mr Moore commenced a period of pre-arranged leave on or about 15 June 2015. It is during the second of these discussions that Ms Nolet says she was actually dismissed. Mr Moore does not accept that was the nature of the conversation or indeed his intention.

[19] I will briefly touch on the first discussion which Mr Moore says took place on 7 June 2015 which was his second rostered duty manager early shift. Mr Moore recalls introducing himself. He told Ms Nolet that he was only there for a short period to provide a report to Mr Barton. He did not accept Ms Nolet's evidence that he advised her she would be removed from a shift before other staff at that first meeting although I find it is not beyond the realm of possibility that Ms Nolet referred to her concern about reducing hours. For completeness the limited hours Ms Nolet raised in her written statement of evidence appear to relate to another period when Mr Moore was not undertaking rostering.

[20] Ms Nolet says that she had a second discussion with Mr Moore on or about 13 June 2015. Shortly before this Ms Nolet had been advised by a local real estate agent in Wanaka that she may have a job if she passed the real estate correspondence course. She had made enquiries of two employees at Edgewater Resort about how many weeks' notice would be acceptable in case she found the course too *full on*. Her written evidence supports that a few people came up to her the day after she had inquired about notice periods and congratulated her on her new job. She said that she advised them that her intention was only to do a correspondence course.

[21] It was against that background that Ms Nolet said that on 13 June 2015 Mr Moore approached her and brought up the real estate job. Mr Moore said that it was Ms Nolet who raised the matter but resolution of that dispute is not required for my purposes because it is enough to record that it was discussed.

[22] Ms Nolet said that Mr Moore told her he was leaving for a month and needed to do the roster. She said he then put her under pressure to tell him when she was

leaving but she made it clear that she was not planning on leaving and had simply been asking about notice. She said that Mr Moore then said in a demanding voice that she needed to give him a date or he was going to roster her off. Ms Nolet said that she advised the course did not start until the start of July 2015.

[23] Mr Moore denies that he told Ms Nolet that she did not have a job beyond 28 June 2015. He said that there was discussion about what he understood to be a real estate job and he asked her when she would be leaving. He said that Ms Nolet did not know when she was leaving. He said that he agreed to roster her until 28 June 2015 and that after that time she was to see the relieving duty manager about rosters in his absence. Objectively assessed it was understandable that Mr Moore would have wanted confirmation from Ms Nolet for the purpose of his rosters as to her availability until 28 June 2015.

[24] Mr Moore duly rostered Ms Nolet for the weeks ending 21 and 28 June 2015. Mr Moore said that was exactly the same approach he took with rostering all of his staff at that time because he was going to be away. Ms Nolet does not accept that she was ever advised to see the relieving duty manager. Mr Moore then departed for a month's leave two days after the conversation on or about 15 June 2015.

[25] Ms Nolet said that she believed she had been dismissed by Mr Moore and that everyone else at Edgewater Resort knew that she had been let go. She continued to work until 28 June 2015 but only talked to her flatmate Hannah who is also an employee at Edgewater Resort and her parents about her concerns that she had not been rostered beyond 28 June 2015.

[26] Mr Nolet said in his evidence that his daughter spoke to him in early to mid-June and was upset that she was to be rostered off after 28 June 2015. He said Ms Nolet advised him that she had given Mr Moore a date of 1 July 2015 for the start of the course but she had told Mr Moore that she was not resigning. Although Ms Nolet could not recall this Mr Nolet said that he advised her to talk to Mr Barton. Ms Nolet did not do this but she did obtain before 28 June 2015 additional shifts at her second job.

What happened after 28 June 2015?

[27] What occurred after 28 June 2015 informs the issue whether there was an actual dismissal and provides the background to be considered if the Authority gets to the point of considering whether Ms Nolet was alternatively constructively dismissed.

[28] On 26 June 2015, Hannah asked assistant manager, Henry Heard, whether Ms Nolet was to be put back on the roster. Mr Heard, Ms Nolet confirmed, was surprised that she was not rostered as the resort was busy and he spoke to Ms Nolet about putting her back on the roster and then spoke to Mr Barton. Ms Nolet worked 27 and 28 June 2015.

[29] On 29 June 2015, Mr Barton spoke to a senior employee and four breakfast shifts for that week were allocated to Ms Nolet. Mr Barton offered breakfast shifts to Ms Nolet on Wednesday, Thursday, Saturday and Sunday that week but Ms Nolet advised in a text by reply said that she was unable to work any weekend or the Wednesday because of other work commitments. She did advise that she could work the Thursday shift and did so.

[30] Mr Barton's evidence about the following week is that Ms Nolet did not respond to the duty manager who called Ms Nolet and left a message on or about 7 July 2015 to organise rosters for the following week ending 12 July 2015. The wage and times records do support that one shift was worked that week on 12 July 2015.

[31] On Tuesday 14 July 2015, Mr Barton sent a text to Ms Nolet for the days that she was available to work for breakfast shifts the following week. A further text was sent on 15 July 2015 which Ms Nolet responded to and explained that she had had work the previous night but that she was available for *a couple of days* the following week but it would need to be worth her drive in and out from Hawera and she wanted to talk about a pay rise. Mr Barton advised that Mr Moore was back the following afternoon, Thursday, and he would get him to give her a call about shift and pay.

[32] On Saturday 18 July 2015, Ms Nolet sent a text that Mr Moore had been *slandering her at work and* saying that she did not care about work and should have called him. Ms Nolet said in her text that it was not appropriate as he was a manager and that Mr Barton had said that he was going to get Mr Moore to call him. Mr Barton responded by text and said that he had checked with Mr Moore who said he had phoned Ms Nolet to sort out some shifts but there was no answer. He wrote in his

text that Mr Moore was on duty that day from 3pm so Ms Nolet should give him to a call to discuss the following week. Ms Nolet responded and wrote there were no missed calls on her phone and Mr Barton said that he would send Mr Moore a message to call her that afternoon. Ms Nolet was in the supermarket when Mr Moore left a brief message that she should call him.

[33] On Sunday 19 July 2015, Ms Nolet sent a text to Mr Barton and advised that she would like a meeting with him and Mr Moore on Monday bringing her father as support. She wrote that she would like to talk about how Mr Moore made her feel that she did not have a job anymore with her hours being cut to virtually zero and that Mr Moore used her second job to drop her first from the roster when Ms Goodenough had said that she would get a minimum of 20 hours. Ms Nolet said in her text that some weeks she had been getting as little as 2.5 hours and felt that she had been bullied out of working at Edgewater Resort although knew that would not be Mr Barton's intention. There were then a number of text exchanges between Mr Barton and Ms Nolet about organising a meeting time. Ms Nolet in response to a query from Mr Barton whether Mr Moore had sorted out shifts for her that week stated in a text that she did not feel comfortable talking to Mr Moore. A time of 1.45 pm on Monday 20 July 2015 was settled on for the meeting and in light of Ms Nolet's text that she did not feel comfortable talking to Mr Moore he did not attend the meeting.

Meeting 20 July 2015

[34] Mr Barton said that he typed notes after the meeting and these were attached as appendix 2 to the statement in reply. Ms Nolet, when I put Mr Barton's notes to her said in evidence that they reflected what was said at the meeting. Mr Nolet said in his evidence that he accepted the notes reflected much of what was said at the meeting but some additional matters were left out which he referred to in his evidence including that he said to Mr Barton that it feels like Ms Nolet has been constructively dismissed. Mr Barton could not recall that being said.

[35] I was not persuaded by the evidence of the discussion that Ms Nolet said that she had been dismissed from her employment as from 28 June 2015. I find that such an allegation was not clear to Mr Barton until he received a letter from Mr Guest with an 11 page statement from Ms Nolet dated 3 August 2015. There was discussion at the meeting on 20 June 2015 about the concerns that Ms Nolet had been dropped from the food and beverage roster and was not earning enough to live on. Ms Nolet said

that when she was employed Ms Goodenough had indicated she would get a minimum of 20 hours work per week and that had occurred but hours had *recently dwindled*. There was also a comment made that Mr Moore had said to Ms Nolet that she would be the first to be sent home after the breakfast shift because she had a second job. Mr Barton advised that he would talk to Mr Moore about including Ms Nolet on the roster and about the relationship between Mr Moore and Ms Nolet. Ms Nolet asked that the roster be emailed through and about a pay increase.

[36] In her written evidence Ms Nolet stated that two days after that meeting there was no contact from Mr Moore. Text and voice mail messages support that Mr Moore did leave a voice message on Ms Nolet's phone about shift availability on 21 July 2015. Ms Nolet sent a text to Mr Moore by way of reply advising that she was not available to do any shifts that week but could do Tuesday, Wednesday, Thursday and Friday morning the following week. Mr Moore asked for Ms Nolet's email address so that he could send the roster to her for the following week. That was duly done on 24 July 2015.

[37] Mr Moore said in evidence that the early morning shifts for that week had already been committed to and Ms Nolet was rostered for late morning shifts on the days that she was available which commenced at midday. Ms Nolet raised her concern about that with Mr Barton in a text dated 24 July 2015 and he spoke to Mr Moore. Mr Barton advised Ms Nolet in a text that Mr Moore had said Ms Nolet could only work certain days which he had cover for so he offered some late morning shifts so some hours would be available. He wrote that Mr Moore advised there would be a number of breakfast shifts available soon to cover some leave coming up. Mr Barton wrote that it was best for Ms Nolet to deal directly with Mr Moore about her availability as he does not interfere with the departmental roster except to help out when a manager is away.

[38] Ms Nolet by text in response the same day said that it was annoying when she said that she was only available in the morning and that she had to turn down the shifts. Mr Moore acknowledged that but also said it was hard for Mr Moore because she could only work certain days and certain hours. He wrote that hopefully they could find some compromise.

Telephone discussion between Ms Nolet and Mr Moore 25 July 2015

[39] Mr Moore said that Mr Barton asked him to telephone Ms Nolet to talk about the rosters and he duly did that on Saturday 25 July 2015. Ms Nolet said in her evidence that she found the call distressing and cried during it. Mr Moore said that he could not recall Ms Nolet crying. I find that there were two main issues discussed. The first was Mr Moore discussing how he was undertaking the roster and shifts available. Ms Nolet said that Mr Moore told her he had someone else as a full time breakfast person. Mr Moore denied that. He said that he tried to explain that Edgewater Resort had contractual obligations to full time staff and some staff who were sponsored to do 30 hours or more. He said that he referred during the discussion to the breakfast supervisor Jill who was full time. Ms Nolet's concern that she was rostered off first for a shift was discussed. Mr Moore said that he referred again to contractual obligations to some staff.

[40] Ms Nolet said that the only shifts Mr Moore could offer here were the evening shifts in the Wineglass bar. Mr Moore accepted that he did offer some evening shifts however as breakfast shifts were offered the following week I cannot be satisfied that they were the only shifts offered. Mr Moore said that occupancy for July had been low and that he could not *magic up shifts* when they were not there. He did recall Ms Nolet saying that she was promised 20 hours per week by Ms Good enough. Ms Nolet in her evidence said that Mr Moore told her she was not a priority and that Hannah was a priority as a full time staff member for breakfast. Mr Moore could not recall if Hannah was a full time staff member but he did not accept saying that Ms Nolet had been replaced by another breakfast person.

[41] The second matter discussed was the real estate course. Mr Moore said that he would have asked about what was happening with the job because he had not spoken to Ms Nolet since just before he went away in mid June. Ms Nolet said that she explained to Mr Moore that it was a course and not a job but that Mr Moore said words to the effect that she had said *directly to his face that she had a job*. Mr Moore accepted that he said that he believed she told him it was a job but there was no difficulty with clarification that it was a course and there were no issues with Ms Nolet working at Edgewater Resort. He said he could not recall an argument taking place during the call.

[42] I accept that Ms Nolet was unhappy with what was said during the telephone call. I cannot be satisfied that was Mr Moore's intention but he may have been somewhat brusque during the discussion. Ms Nolet contacted her father after the call and was upset. He was understandably also upset.

27 July 2015

[43] On Monday 27 July 2015, Mr Moore emailed to Ms Nolet the roster for the week ending 9 August. Ms Nolet was on the roster to do five breakfast shifts starting on 4 August. Mr Barton was copied into the email. By email the same date Ms Nolet said that she could do all the shifts but could not stay later than 12.30 because of her other job.

[44] Mr Nolet said in his evidence that he left a voice message with Mr Barton about the telephone discussion on 25 July 2015 but Mr Barton could not recall receiving that voice message. Mr Barton said that as far as he knew everything was back on track after what he accepted was somewhat piecemeal rostering for July.

[45] Mr Nolet said that he instructed Mr Guest on behalf of Ms Nolet and it was decided that a letter should be written to Mr Barton about the situation.

3 August 2015

[46] On 3 August Mr Guest wrote to Edgewater Resort raising personal grievances of unjustified constructive and actual dismissal and disadvantage.

[47] Ms Nolet did not return to work at the Edgewater Resort.

Conclusion on actual dismissal

[48] Mr Moore undertook preparation of the rosters to 28 June 2015 before he took his leave after which the responsibility fell to another manager until his return from leave in mid-July. Objectively assessed the only period that Mr Moore could or would be concerned with was the period he was rostering for and Ms Nolet's availability for that period. His evidence is that there was no correlation between rostering and the real estate job potential or actual and he had the same discussion with all his employees about seeing the duty manager after 28 June 2015. It does seem less likely in those circumstances that he would not have told Ms Nolet to check with the duty manager for further rostering but I am very alive to the possibility of

some miscommunication. In those circumstances what happened from that point becomes particularly important.

[49] Ms Nolet did not talk to any person about her belief she had been dismissed aside from another employee who was her flatmate and her father. She did ask for and accept other shifts at her second job which subsequently impacted on her availability at Edgewater Resort. Ms Nolet was of the view that it was general knowledge that she had been rostered off but accepted in her evidence that it was a surprise to the managers at Edgewater Resort that was the case. This is not a case where Edgewater Resort when they became aware of the failure to roster insisted that Ms Nolet had resigned. Steps were taken to remedy the situation by offering four breakfast shifts for the week commencing 29 June 2015 to Ms Nolet.

[50] The evidence viewed overall does not support that Ms Nolet was actually dismissed from 28 June 2015 by a sending away or a sending apart. The unfortunate matter of her being left off the roster was in all likelihood a mistake arising from a misunderstanding. Ms Nolet was a young employee at the time being 20 years of age and she said reluctant to approach Mr Barton about the issue but I do not find Edgewater Resort can be responsible for that decision which would have clarified and resolved matters before 28 June 2015. The personal grievance that Ms Nolet was actually dismissed is not made out.

Constructive dismissal

[51] Mr Guest in an email to the Authority dated 12 April 2016 responded to some questions from the Authority about the nature of the claims. He stated that *if and only if Ms Nolet's claim of actual dismissal was not sustained then the actions of Edgewater Resort after 28 June were such as to amount to sufficient circumstances to justify a resignation and a claim for constructive dismissal.*

[52] The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*² identified categories of constructive dismissal and stated that the concept includes but is not limited to cases where:

- (a) The employer gives the employee a choice between resigning or being dismissed.

² [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

(b) The employer embarks on a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

(c) A breach of duty by the employer leads an employee to resign.

[53] It was not altogether clear from submissions which of the categories of constructive dismissal Ms Nolet relies on. The date of the alleged constructive dismissal was also unclear. The 12 April 2016 email did clarify that the constructive dismissal claim relied on actions of Edgewater Resort after 28 June 2015. As Ms Nolet did not work at Edgewater Resort after she was allocated shifts for the week commencing 3 August 2015 it seems sensible to take that as the date of resignation.

[54] There was no evidence to support that Ms Nolet was given a choice between resigning or being dismissed. Of the second and third categories of cases referred to by the Court of Appeal in *Woolworths* the third is particularly broad and would seem to encompass the types of concerns Ms Nolet had although I will also consider the second category.

Did a breach of duty cause Ms Nolet to resign?

[55] In determining whether there has been a breach of duty on the part of an employer the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)*³ stated that the first relevant question for the Authority is whether the resignation has been caused by a breach of duty on the part of the employer. All the circumstances of the resignation have to be examined. If the answer to the first question is that there had been a breach then the next question is whether the breach of duty was of sufficient seriousness to make resignation reasonably foreseeable.

[56] I asked Ms Nolet why she did not return to work after 3 August 2015. Her text message of the same date to Mr Barton provided that she felt it would be best not to return until the matter was resolved and matters then went down a legal path. Ms Nolet did not return to work. The text message of 3 August 2015 was sent after Ms Nolet had indicated that she would accept the breakfast shifts offered to her by Mr Moore on 27 July 2015 provided she could leave no later than 12.30pm. Mr Barton

³ [1994] 2 NZLR 415 [1994] 1 ERNZ 168 (CA) at 419, 172

said in his evidence not unreasonably that he felt *everything was on track* as at 3 August 2015.

[57] Ms Nolet said that she was unhappy with the way she was treated by Mr Moore and set out three examples of this. This first was that he talked about her to Hannah about her. Mr Moore accepted that he may have said to Hannah that it was frustrating Ms Nolet was not getting back to him about her shifts. It is less professional for a manager to talk to an employee about another employee but the circumstances in which it occurred would not amount to a breach of duty of the implied term of trust and confidence and certainly not one of sufficient seriousness to make a resignation foreseeable.

[58] Another concern was that voice messages asking for Ms Nolet to contact Mr Moore indicated Mr Moore was unhappy. The evidence about this supported it was the tone of the voice message rather than what was said. It is not a breach of duty to have a tone in a voice message.

[59] Another concern was the telephone call on 25 July 2015. Ms Nolet found aspects of the call upsetting. The purpose of the call was for Mr Moore to explain rostering. Having heard the evidence from Ms Nolet and Mr Moore about the discussion there is a possibility that Ms Nolet may have been inclined to the most unfavourable interpretation of what Mr Moore was saying. Mr Moore said that he tried to explain contractual obligations to other staff may impact on rostering and hours of work. Ms Nolet said that she was told she was not a priority and had been replaced. Mr Moore denied that. I could not be satisfied that Mr Moore made a statement of that nature. The provisions in the employment agreement are relevant in that there was no minimum hours of work or time that work would be allocated and there is a completeness clause. Mr Barton said that notwithstanding the employment agreement the intention was to roster Ms Nolet wherever possible for the breakfast shifts.

[60] Ms Nolet was upset about the real estate issue that was discussed during the telephone call. I could not be satisfied that what Mr Moore said was unfair or oppressive rather than what he believed to be the situation. Parties to an employment relationship are entitled to have different views even if one party has a strong view that the other party is wrong.

[61] I could not be satisfied that the conduct of Mr Moore during the telephone conversation crossed the line referred to in *Greenwich*⁴ that separates inconsiderate conduct that causes some unhappiness or resentment to the employee to dismissive or repudiatory conduct that is sufficient to justify termination of the employment relationship.

[62] Finally I have considered the rostering for the month of July and whether it was such that it amounted to a breach of the employment agreement. Mr Guest submits that Ms Nolet should have been reintroduced to the same work plan she had prior to 28 June 2015. Mr Barton said that was what Edgewater Resort was moving to.

[63] There were five weeks in July 2015. For the first week commencing 29 June 2015 Ms Nolet was offered four of her usual breakfast shifts but had to turn down three because of her other job. For the second week commencing 6 June 2015 Mr Barton said that there was no response to a query from the duty manager on 7 July 2015 about Ms Nolet's availability to be rostered but one shift was worked. During the third week commencing 14 July 2015 Mr Barton sent two text messages about availability for the following week. There was nothing before the Authority to support that Ms Nolet said she was available for rosters for the week commencing 14 July 2015 but she did indicate availability for the week commencing 20 July 2015 for two days. Mr Moore who had returned back to work that week left a message to arrange some shifts with Ms Nolet on 21 July 2015 and on that day Ms Nolet advised him by text she was not available for any shifts that week which differed from earlier advice provided to Mr Barton that she was available for two days that week.

[64] Ms Nolet was disappointed to find that the shifts offered to her for the following week 27 July 2015 were the later morning shifts and therefore not suitable. I find it more likely than not that there were no uncommitted earlier shifts for the days Ms Nolet was available rather than a deliberate attempt to be difficult on the part of Mr Moore. Mr Barton investigated this concern with Mr Moore when Ms Nolet raised it.

[65] There were some difficulties with rostering Ms Nolet for July. Some arose because Ms Nolet was committed and unavailable because of her other job. Some

⁴ *Wellington Clerical etc IUOW v Greenwich* above at n 1 above

arose because of commitments already made on the roster at the times and on the days Ms Nolet was available. I find that Mr Barton genuinely wanted to get to a position where Ms Nolet was rostered on for as many breakfast shifts as possible in circumstances where the employment agreement did not guarantee hours or specify shifts. Although the rostering was somewhat piecemeal for July I do not find in all the circumstances set out above there was a breach of the employment agreement or a breach of the duty of trust and confidence.

[66] In conclusion I am not satisfied that the resignation was caused by a breach of duty or of the employment agreement on the part of Edgewater Resort. I do not find that the matters relied on individually or cumulatively were such that it could be said to undermine the trust and confidence in the employment relationship. Even if it could be said that there was a breach of duty then I am not satisfied that it was so serious that it would have been foreseeable that Ms Nolet would not have been prepared to continue to work in the prevailing circumstances as at 3 August 2015.

Was there a course of conduct with the deliberate and dominant purpose of coercing Ms Nolet to resign?

[67] There was no evidence to support that Edgewater Resort attempted to coerce Ms Nolet to resign. There were matters that Ms Nolet was upset about including that her rostered hours had decreased. Edgewater Resort was attempting to understand and resolve these concerns within its ability to do so and its obligations under the employment agreement.

Conclusion on constructive dismissal

[68] Ms Nolet became unhappy in her employment and decided not to return after 3 August 2015. She was concerned about her rostered hours decreasing and there was a misunderstanding about the events leading up to 28 June 2015. Although Ms Nolet relied on discussions with Ms Goodenough about hours and shifts that she could expect to be rostered for, her employment agreement was complete and did not provide a guarantee of hours or the working of a particular shift. Edgewater Resort attempted to resolve the concerns and took into account what Ms Nolet wanted. I have not found it coerced Ms Nolet to resign and I have not found it breached implied or contractual duties.

[69] I do not find that claim that Ms Nolet was unjustifiably constructively dismissed is made out.

Costs

[70] I reserve the issue of costs and I would encourage the parties to attempt to reach an agreement. If agreement is not possible than Mr Rhodes has until 27 June 2016 to lodge and serve submissions as to costs and Mr Guest has until 11 July 2016 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority