IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2013] NZERA Christchurch 57
5361298

	BETWEEN	ANNEKE TEDING VAN BERKHOUT Applicant
	AND	THE COMMISSIONER OF POLICE Respondent

Member of Authority:	David Appleton
Representatives:	Linda Ryder and Jeff Goldstein, Counsel for Applicant Karen Sagaga, Counsel for Respondent
Investigation Meeting:	22 and 23 January 2013 at Christchurch
Submissions received:	13 February and 11 March 2013 from the applicant 1 March 2013 from the respondent
Determination:	22 March 2013

DETERMINATION OF THE AUTHORITY

A. The Applicant was unjustifiably constructively dismissed.

B. The Applicant was not unjustifiably disadvantaged.

C. Costs are reserved

Employment relationship problem

[1] Ms Teding van Berkhout claims that she was unjustifiably constructively dismissed on 30 July 2011 following a change to her roster patterns which she found difficult to work. She also claims an unjustified disadvantage in her employment arising out of a refusal by the Police to consider her annual leave application until she had signed a new agreement accepting the changes to the roster which she was unhappy with.

[2] The respondent denies that Ms Teding van Berkhout was unjustifiably constructively dismissed and that she had suffered an unjustified disadvantage and argues that the change in Ms Teding van Berkhout's shift pattern was justified for the needs of the operation.

The principal events leading to Ms Teding van Berkhout's resignation

[3] Ms Teding van Berkhout joined the New Zealand Police in 1988 as a constable (known at that time as *a sworn member*) and received a gold medal for bravery in 1993. She worked, inter alia, in the Criminal Investigation Branch in Christchurch and, after having her first child in 2000, returned to work in May 2001. Around January 2002 she applied for, and was approved to work reduced hours under the respondent's Flexible Employment Option Policy (the FEO). After having her second child, she transferred to the respondent's Communications Centre in Christchurch, continuing to work reduced hours under the FEO. Between June 2004 and 2010 Ms Teding van Berkhout worked as a call taker/dispatcher, working under the FEO on the same reduced hours, save for one variation in 2006 when her start time changed from 17.00 to 1800 hours. Throughout this period she worked a total of 16 hours per week.

[4] The FEO policy was originally part of the general instructions police officers worked under but was replaced in June 2003 by an FEO policy which was issued by the Manager of EEO and Diversity. This policy remained in place throughout the remainder of Ms Teding van Berkhout's employment.

[5] From 2008 to 2010 the respondent took steps to put in place a change referred to as the *virtualisation* of the National Communications Operation so that, instead of the operation consisting of three separate centres (in Christchurch, Wellington and Auckland), it consisted of a single centre with three different locations. In effect, it meant that any call taker or dispatcher, no matter where they were located, could deal with a call from anywhere in New Zealand.

[6] The respondent's evidence is that this change was made so that the peaks and troughs which had been experienced before virtualisation, with one centre being overly busy at the same time as another was too quiet, were evened out. The evidence of the Manager of the Communications Centre for the Southern region, Inspector

Kortegast, was that the operation became much more efficient as a result of virtualisation.

[7] The respondent's evidence is that, as a result of the virtualisation of the operation, a National Management Group analysed the needs of the operation and how they would impact on the rosters worked by its staff. The National Management Group concluded that it was necessary to have the same rosters worked throughout the country rather than them being localised. This had a relatively minor impact upon the full-time staff working in the Communications Centre but had the potential of having a much more significant effect on those staff who worked fewer than full-time hours (permanent part-time staff and staff working reduced hours under the FEO policy).

[8] On 27 May 2010 Ms Teding van Berkhout signed a letter under which she agreed to a change to her working arrangements. These new arrangements had her working two 8 hour shifts per week, the first week from 18.00 to 02.00 on Thursdays and from 18.00 to 02.00 on Fridays, and the second week from 09.00 hours to 17.00 hours on Fridays and from 20.00 to 04.00 Saturdays/Sundays. The letter stated that the new FEO agreement would run for a six month period, with a review on 24 November 2010. It also stated:

> *The parties to this agreement recognise that in order to meet operational needs the hours of work may be subject to change, consultation between the parties will occur prior to any changes taking place.*

[9] On 27 July 2010 the Work Force Analyst for the Southern Communications Centre, Ms Moira Carey, emailed Ms Teding van Berkhout (and other staff) to say that the current arrangements would be rolled over until the end of March 2011, unless any staff member wished to renegotiate their arrangements. On 28 August 2010, Ms Teding van Berkhout emailed to say that she wished to renegotiate her arrangements at the end of the six month contract.

[10] From 24 November 2010 Ms Teding van Berkhout started working a new roster which had her working two 8 hour shifts per week, the first week from 18.00 to 02.00 on Wednesdays and from 18.00 to 02.00 on Fridays, and the second week from 09.00 hours to 17.00 hours on Fridays and from 20.00 to 04.00 Saturdays/Sundays. A letter was sent to Ms Teding van Berkhout which stated that this new FEO arrangement would run for four, rather than six months to ensure that she was *aligned with the Communications Centre roster review period*.

[11] These changes had little practical impact upon Ms Teding van Berkhout but, in February 2011, she and all other Christchurch based staff working part-time hours and reduced hours under the FEO policy were advised that the forthcoming winter roster, which was due to start in April 2011, would need to comply with certain basic criteria. At a meeting with all potentially affected staff on 1 February 2011, templates were handed out on which the staff were asked to indicate their preferences for the winter roster. The dispatcher self preference template stated that the following criteria needed to be satisfied over each four week period to ensure that the roster met South Communications operational requirements:

> *One Friday shift must include 17.00-23.00;*
> *One Friday shift must include 20.00-04.00;*
> *One Saturday shift must include 17.00-23.00;*
> *One Saturday shift must include 20.00-04.00;*
> *One Saturday shift during 07.00-13.00;*
> *One Sunday shift during 07.00-13.00.*

[12] The staff were also informed that everyone had to work a minimum of 20 hours per week. The template that was given to Ms Teding van Berkhout gave her and other similar dispatcher staff options to indicate which hours they wanted to work during weeks 1, 2, 3 and 4. They were able to choose between 07.00-13.00 hours; 17.00-21.00 hours and 20.00-04.00 hours. Certain slots were not available (for example, 07.00-13.00 hours was never required during any of the four weeks from Monday-Friday on the dispatcher's template).

[13] It had been agreed at the meeting that all staff would return their templates by 8 February 2011 so that Ms Carey could work out how the various shifts would be allocated to the various part-time and FEO staff. Ms Teding van Berkhout did not return the template but did send an email to her supervisor, Inspector Stuart Leighton, in the following terms:

> *Hi Stu*
>
> *I don't have Moira's email address at home and I need to reply to the roster proposals today so I will send the e mail to you.*
>
> *This is a very difficult situation for me since I need to fit in with Davitts* [Ms Teding van Berkhout's husband, also a police officer] *shift work roster. But the hours in negotiation for me are:*
>
> *Wed/Thurs 18.00-02.00 hours or Fri/sat 18.00-02.00 hours.*

Since Davitt doesn't finish work till 17.00 hours, its very difficult for me to start at this time. I tried it some years back and we ended up swapping kids in Ngai Tahu carpark, making the changeover a very tight timeframe. Since working an 18.00hrs start, I have never arrived late.

I would like to retain my 16 hours per week as per the Police FEO Policies minimum required hours.

I understand the dispatch roster requires dispatchers between 17.00-21.00 hours, however in the last year, I have been required for dispatching approximately 16 times and end up call taking a majority of the time. Therefore, I could be available to dispatch till 21.00hrs and call take after that. Only on one occasion in the last year have I dispatched for the whole eight hour shift and only a handful of times was I required to cover more breaks as most groups have dispatching positions covered.

I have always made myself available to come in for extra hours to cover training.

The fortnightly roster that I currently work, is working out quite nicely.

Regards

Anneke

[14] On 4 March 2011 a Human Resources Adviser, Ms Maitland, who was responsible for processing applications for FEO agreements and ensuring FEO agreements were reviewed according to the FEO Policy, wrote to Ms Teding van Berkhout in the following terms:

Dear Anneke

Communications Centre Roster Review – FEO application

You attended the Roster Review meeting on 1st February 2011 for staff on FEO agreements. At this meeting it was outlined to everyone:

- *The reasoning behind aligning all FEO staff to 6 monthly reviews;*
- *Explanation of the rostering gaps that the Communications Centre as a business require to be filled by FEO staff;*
- *The criteria required to be met with each FEO roster (in terms of hours, and shifts); and*
- *The process for applying for and* [sic] *FEO agreement for the next roster review period (1 April 2011 – 30 September 2011).*

The deadline for staff to have their FEO applications into the WFA [Work Force Analyst] *was agreed (as a group) for Tuesday 8th February 2011. All those that attended the meeting also agreed that applications received by this date would be pooled together, and the WFA would allocate the available shifts evenly and fairly. Any applications that were not received by this date will be allocated as closely as possible to the desired days and times that remain available (this means there will be less shifts available to choose from for late applicants).*

Staff were also encouraged to discuss with their colleagues to identify if a complementary roster arrangement could be found (i.e. if one staff member prefers night shifts, and another staff member prefers early shifts, they could work each others undesirable shifts).

You would have also received an email recently from Inspector Leighton further explaining the parameters of, and business requirements for the Roster Review, as well as our desire to work through this with you.

I note your FEO application has not been received by the deadline, or subsequently. However, I am happy to grant you a further week to consider and seek independent advice if you wish to. We therefore require your FEO application to be with us by no later than ***Friday 11th March 2011, 3pm****.*

If we do not receive an FEO application by this date you will revert to the contracted hours you were originally employed on – which was full-time 40 hours (on average) per week – as a Communicator/Dispatcher, from 1st April 2011. Alternatively, if you prefer to do so, you could be placed on either the 33 hour or 36 hour generic roster.

We encourage you to discuss your FEO application with us (Inspector Leighton, Moira Carey, and myself) and participate in this process, in order to achieve an outcome that meets your needs, and the needs of the business.

We look forward to hearing from you Anneke.

Yours faithfully

Carissa Maitland
Human Resources Advisor
Southern Communications Centres

[15] Ms Teding van Berkhout emailed Ms Maitland on 11 March 2011 forwarding a second proposal, which was to work Monday-Friday 18.00-02.00 hours the first week, and Tuesday-Saturday 18.00-02.00 hours the second week. She stated in her email that she would like to keep her 16 hours per week to fit in with her Police

husband's hours and the rest of the family, and that she would like to keep her eight hour shifts, and was available to both call take and dispatch.

[16] As Inspector Leighton had believed mistakenly that Ms Teding van Berkhout had not replied to Ms Maitland, he wrote to her requiring her to attend a meeting. However, this requirement was withdrawn when he found out that she had in fact responded to Ms Maitland. Inspector Leighton then sent an email to Ms Teding van Berkhout on 15 March 2011 to say that she still needed to speak with Ms Carey to work out suitable hours that met the operational needs of the business in order to be able to reach a new FEO agreement. He stated that Ms Teding van Berkhout's current second proposal did not meet the Police's current operational requirements and that they needed her to increase her hours from 16 to 20 hours per week and commence work at 17.00 hours, as that was when the business needed her to dispatch.

[17] A letter was sent to Ms Teding van Berkhout by Ms Maitland dated 25 March 2011 reiterating that, if an agreed FEO arrangement was not in place by 1 April 2011, Ms Teding van Berkhout would *revert to full-time hours and be aligned to a group roster*.

[18] Also on 25 March 2011 Ms Teding van Berkhout, accompanied by a representative from the Police Association, met with Ms Maitland and Ms Johnson, the Human Resources Manager. At the suggestion of the representative, Ms Teding van Berkhout went into a separate meeting with Ms Carey and indicated to Ms Carey hours within the requirements that she would work. These were:

> *Week 1 – Monday 17.00-21.00; Friday 20.00-04.00; Saturday 20.00-04.00*
>
> *Week 2 – Monday 17.00-21.00; Tuesday 17.00-21.00; Thursday 17.00-21.00, Friday 20.00-04.00.*

[19] Ms Carey said that her impression was that Ms Teding van Berkhout had agreed these times, whereas Ms Teding van Berkhout's evidence was that she felt that she had had no option but to agree them as, otherwise, she would have to become a full-time member of staff working at least 33 hours per week. She says that she told Ms Carey that the hours would not work for her but that Ms Carey essentially gave no response and just shrugged and said *oh well* and carried on.

[20] Ms Maitland wrote to Ms Teding van Berkhout on 28 March 2011, confirming that her *application* dated 25 March 2011 had been approved. It set out a 20 hours per week roster over a four week period which required her, amongst other things, to work a four hour shift on Monday 4 April 2011 commencing at 17.00 hours in the first, three four hour shifts in the second week, each commencing at 17.00 hours, two four hour shifts in the third week, each commencing at 17.00 hours, together with a six hour shift on Sunday commencing at 17.00 hours and a four hour shift in the fourth week commencing at 17.00 hours.

[21] The letter from Ms Maitland went on to say that the application had been approved for a period of six months from 1 April, that the approval would then expire and her hours of work would return to the generic full-time dispatcher roster. It said that if the FEO agreement was to be extended, a fresh FEO application would have to be submitted and approved prior to the expiry date. If no agreement were reached, then Ms Teding van Berkhout *would return to full-time hours*.

[22] Ms Teding van Berkhout gave evidence that she had applied in December 2010 or January 2011 for annual leave to be taken in April/May 2011 and that, when she had asked about her leave applications in February 2011, Ms Maitland had told her that her leave applications would not be considered until the roster issues had been resolved and her new FEO agreement had been signed. Ms Teding van Berkhout said that the implication of this statement was that, if she *failed to tow the line, accept the new regime, [her] leave applications would be declined.* In her written brief of evidence she said that it was as a result of this that she felt she had no option but to work the new roster. In her oral evidence to the Authority, she said that it was this together with the threat that she would revert to full-time hours that led her to conclude that she had no option but to accept the new roster. I am satisfied that her oral evidence in this respect is credible.

[23] On 15 April 2011 Ms Maitland wrote to Ms Teding van Berkhout referring to the meeting on 25 March 2011 and stated that, following Ms Teding van Berkhout sitting with Ms Carey to see what shifts were available, an FEO arrangement for Ms Teding van Berkhout was discussed and agreed. Ms Maitland stated that she had prepared documentation which had been provided to Ms Teding van Berkhout to sign the following week and that Ms Teding van Berkhout had told an Inspector Weston that she would read it and bring it back on the following roster day of work. The

letter goes on to say that Ms Teding van Berkhout had been reminded to bring the paperwork back on 11 April and that Ms Teding van Berkhout had told a Senior Sergeant Ellis that she had decided to seek independent advice. The letter concluded as follows:

> *Police have also encouraged you and given your [sic] reasonable opportunity to engage in dialogue with us in relation to your FEO roster. We are yet to hear from you in relation to your current FEO Agreement and any concerns you have in relation to it. You will be aware that an FEO agreement is a variation to your full time hours of work as an employee of Police. If we have not reached an FEO agreement with you by Tuesday 26 April 2011 at 12:00 noon (taking into account the Easter holidays from 22 and 25 April) you will revert to the generic full-time Dispatcher roster. Moira Carey will confirm the date this would commence and which group you will be aligned to.*
>
> *Yours faithfully*

[24] On 18 April 2011 Ms Maitland wrote an email to Ms Teding van Berkhout requesting that she either advise the Police that she would be returning to the full-time dispatcher roster or have a signed FEO agreement in place by 26 April. Another copy of the FEO agreement was attached. On 20 April 2011 Ms Teding van Berkhout signed a document headed up *FEO Application Form*. Ms Teding van Berkhout then annotated a box which had originally been headed *Additional comment by supervisor*, by deleting the word *supervisor* and adding the word *Member* and then the words *this application is signed under protest and subject to my legal rights.*

[25] On the same date, 20 April, Ms Teding van Berkhout wrote a letter to the District Commander, Superintendent Cliff, asking him to assist her in relation to the new rostered hours. Part of the letter stated as follows:

> *3. I have had several meetings with Comms representatives in Christchurch and attempted to explain why the hours being proposed are difficult to meet. For instance,*
>
> - *I explained it would be difficult for me to start at 17.00 hours and would prefer to stay at 1800 hours to fit in with my husband's shifts. Senior Constable Lavery is on the motorbike STU roster and completes his shift at 16.30 hours. To have me starting at 17.00 hours is too tight a timeframe placing stress on both of us and the family.*
> - *I also stated that in my view 4 hour shifts in the Comms centre is not family friendly. I suggested I work 4 hours dispatching and 4 hours call taking over two 8 hour shifts to make up my 16 hours per week, but was told this is not*

> *an option since I am sworn and therefore paid as a dispatcher. However, on arrival at work I am utilised as a call taker more often than a dispatcher.*
>
> *Further reasons the 4 hour shifts are unsatisfactory include:*
>
> *a. Considerably more time away from home.*
> *b. Greater organisation between work/home required.*
> *c. Increased travel time and parking.*
> *d. Increased childcare from 2 days per week to 4.*
>
> *4. The response I have had to my representations is that the proposed hours are all that are available to FEO staff as these hours suit the needs of the business and further, if an agreement is not reached then I would have no option but be placed on a full-time roster (or resign my employment). There has been no discussion or real negotiation by NZ Police to try and reach a mutually acceptable compromise.*
>
> *...*
>
> *I enjoy my job in the Comms Centre but the strict hours being introduced for staff on FEO arrangements make it difficult for me to remain working in the Police. I attended the Women's Conference on Thursday 7th April 2011 where both yourself, the new Commissioner Peter Marshall and the Minister of Police, Judith Collins all spoke on the commitment of NZ Police to retaining women in the Police. What is happening in the Comms area for FEO staff seems to me to be contrary to these sentiments.*
>
> *With both my husband and myself working for the same organisation and both with long service to our names, I would like to think there may be some form of give and take with my hours especially since I am the only sworn Police Officer in the Comms Centre on FEO. In the event that you are unable to assist me I will have no alternative but to explore my legal options.*

[26] Ms Maitland, to whom Ms Teding van Berkhout had sent a copy of her letter, replied suggesting that, as Superintended Cliff did not have any involvement in the FEO applications for the Southern Comms Centre, Ms Teding van Berkhout should write to Carol Train, the EEO and Diversity Manager. Superintendent Cliff did respond to Ms Teding van Berkhout on 24 May suggesting that Ms Teding van Berkhout speak to Mr Shield, the Human Resources Manager. Superintendent Cliff stated in his letter the following:

> *... We strongly support FEO as an excellent option to assist all staff wishing to work reduced hours. As you will appreciate, the type of work, the hours and the days of the week do need to meet the organisational needs as well as considering the individual circumstances of the staff member. To that end, good faith and compromise are often required in order to achieve a "win/win".*

[27] Ms Teding van Berkhout did communicate with Ms Train over a period of time, until her resignation. Ms Teding van Berkhout worked the new roster for approximately three months until, on Saturday 16 July 2011, when she met with her direct supervisor, Sergeant Turner, she handed him a note stating the following:

> *16/7/11*
>
> *To whom it may concern*
>
> *As per my contract under the New Zealand Police, I hereby give 14 days notice of my intention to retire from the Police.*
>
> *Yours sincerely*

[28] Sergeant Turner attempted to persuade Ms Teding van Berkhout to defer her retirement so that she could seek advice from a lawyer, HR and explore other avenues but Sergeant Turner's evidence was that Ms Teding van Berkhout had been adamant that she wished to retire and that her 14 days' notice would be taken as sick leave. Sergeant Turner's evidence was that Ms Teding van Berkhout had been upset during their meeting and so he allowed her to leave early from that shift. She was allowed to take the remaining 14 days as sick leave and was allowed to be treated as having retired from the Police rather than having resigned.

[29] A personal grievance was raised by Goldstein Ryder McClelland by way of a letter dated 17 October 2011 claiming that Ms Teding van Berkhout had resigned because of a unilateral variation of her work hours and days of work.

The issues

[30] The following are the issues that the Authority must consider:

i. Was Ms Teding van Berkhout constructively dismissed from her employment with the New Zealand Police?

ii. Did Ms Teding van Berkhout suffer an unjustified disadvantage in her employment in respect of her application for leave?

Was Ms Teding van Berkhout unjustifiably constructively dismissed?

[31] The law in relation to constructive dismissals in New Zealand is well settled. Constructive dismissal includes a case where there has been a breach of duty by the

employer causing an employee to resign (*Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372). The essential questions to be addressed in constructive dismissal cases are:

a. What were the terms of the contract?

b. Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

(Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich & Associates Employment Agency v Complete Fitness Centre) [1983] ERNZ SEL CAS 95 (AC))

[32] A claim for constructive dismissal is dependant on the events that preceded it; the focus of such claims is to be on the employee's motivation for their decision to leave, and whether the motivation arises from a breach of the employer's duty or other actions by the employer (*Commissioner of Police v Hawkins* [2009] NZCA 209).

[33] A typical constructive dismissal scenario occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship or trust in confidence. In such a case, it is not necessary to show that the employer intended any repudiation of the contract (*Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407). Based upon the common law principle that acceptance of a repudiatory contract must be clear and unqualified, a claim of constructive dismissal will only succeed where the employee has made it plain that they are leaving because of the employer's conduct (*Holland v Glendale Industries Limited* [1998] ICR 493).

[34] A resignation need not take effect immediately, and an employee may still succeed in a claim of constructive dismissal by giving notice (*Para Franchising Limited v Whyte* [2002] 2 ERNZ 120). However, an employee cannot wait a significant length of time without good reason. (See for example *Barry v Anoop Investments Limited*, ERA Auckland, AA11/07).

[35] It is well established that the repudiatory contract by the employer may involve a series of events over a period of time such that no single event may be sufficiently serious to enable the employee to treat the contract as repudiated but the cumulative effect may be. (*Lewis v, Motor World Garages Limited* [1986] ICR 157 (CA)).

[36] To found a claim for constructive dismissal the breach of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable. (*Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140).

[37] There are a number of elements that need to be considered in Ms Teding van Berkhout's claim of constructive dismissal. These are as follows:

a. Can Ms Teding van Berkhout's retirement constitute a constructive dismissal?

b. Was Ms Teding van Berkhout a permanent part-time employee or a full-time employee working reduced hours?

c. Did the Police fail to consult with Ms Teding van Berkhout about the general parameters imposed on all staff, and if so, does this constitute grounds for a constructive dismissal?

d. Did the Police fail to consult with Ms Teding van Berkhout about her specific arrangements and, if so, does that constitute grounds for a constructive dismissal?

e. Did Ms Teding van Berkhout affirm any breach by the Police by working the new hours?

Can a retirement from the Police constitute a constructive dismissal?

[38] None of the respondent's witnesses, including two Inspectors and a Sergeant, were able to assist the Authority in understanding exactly what the difference was between an officer resigning and an officer retiring from the Police when that officer was too young to take advantage of accrued superannuation benefits. It would appear that, in effect, there was no difference, save that retiring from the Police appears to be viewed as a more honourable reason for departing than resigning. It is for this reason that Inspector Kortegast approved Ms Teding van Berkhout's departure as being characterised as a retirement rather than a resignation when the HR Department declared that she could not retire. It appears to be a matter of how the departure is characterised in the Police records.

[39] For this reason, I am satisfied that, for the purposes of her constructive dismissal claim, there is no significant difference between Ms Teding van Berkhout resigning and retiring and that she can be treated for the purposes of her claim as having left the Police as if she had resigned.

Was Ms Teding van Berkhout a permanent part-time employee or a full-time employee working reduced hours?

[40] Counsel for Ms Teding van Berkhout argues that she was a permanent part-time employee in order to show that her hours were unilaterally varied and that she had effectively been threatened with being put in a full-time contract in breach of her employment agreement. If Ms Teding van Berkhout was indeed a permanent part-time employee, such actions by the Police would almost certainly have constituted a fundamental breach of her employment conditions.

[41] The position of the respondent is that Ms Teding van Berkhout joined the Police as a sworn Constable and that there are no, and have never been any sworn Constables employed on permanent part-time contracts.

[42] It appears to me that, throughout her employment, Ms Teding van Berkhout clearly regarded herself as a full-time employee working reduced hours in accordance with the FEO policy. At no time during her employment did she argue that she was anything else. Neither did she ever argue, it seems, that she was not subject to the FEO policy.

[43] Paragraph 3.1.2 of the FEO policy states as follows:

> *FEO does not apply to non-sworn jobs that are temporary or casual, or permanent part-time positions. Non-sworn members have provisions in existence for part-time work in the conditions of employment for non-sworn members, and there are permanent part-time positions established and advertised as part-time with fixed hours or duties (examples include: Occupational Health Nurse, File Briefer, Staff Welfare Officer, Help Desk Analyst). FEO provides sworn and non-sworn members with the ability to work less than full-time in their current role and have the option of reverting to full-time work later.*

[44] In my view, this paragraph referring to permanent part-time positions does not only mean non-sworn jobs that are permanent part-time positions. Therefore, the fact that the FEO policy was applied to Ms Teding van Berkhout (and accepted by her as

applying to her) indicates to me that she was a full-time employee working reduced hours in accordance with the FEO policy.

[45] Furthermore, by way of a letter dated 8 June 2004 from Inspector Kortegast to Ms Teding van Berkhout, which was signed by her and the Inspector, she agreed to a change in her employment conditions under the provisions of the flexible employment option (*General Instruction C493*— It was accepted by Inspector Kortegast that reference to general instruction C493 was a mistake and that the reference should have been to the FEO policy). Ms Teding van Berkhout agreed in this letter to work 16 hours per week over a ten week roster period on Thursdays and Fridays from 20.00 hours to 04.00 hours each night, and also agreed to the following:

> *The parties to this agreement understand that the stated hours of work are not permanent part-time hours.*

[46] Ms Ryder asserts that this extract must be read in the context of the overall letter, which makes clear that Ms Teding van Berkhout was being seconded to the Southern Communications Centre for three months only, and that what occurred within the agreed secondment period is irrelevant. However, I disagree. Ms Teding van Berkhout remained in the Centre for the rest of her employment with only one change in her hours in the following four years. Nothing else of material importance changed. Therefore, in the absence of some mechanism which changed Ms Teding van Berkhout's employment status to a permanent part time one, I cannot see how Ms Ryder's submission can be supported. It was only during the Authority's proceedings that this assertion was made. It appears clearly to be an ex post facto rationalisation that cannot be supported by the actualities of the relationship between the parties at the material time.

[47] I am satisfied that Ms Teding van Berkhout remained working in the Southern Communications Centre at Christchurch, working 16 hours per week, until 2011 and that she did so throughout this period as a full-time employee working reduced hours in accordance with the terms of the FEO policy.

Did the Police fail to consult with Ms Teding van Berkhout about the general parameters imposed on all staff, and if so, does this constitute grounds for a constructive dismissal?

[48] Counsel for Ms Teding van Berkhout agreed at the investigation meeting that Ms Teding van Berkhout was not pursuing an argument that there had not been consultation with her in respect of the decision to amalgamate the Communications Centres. Therefore, although Ms Ryder makes mention of this allegation in her submissions, I shall ignore them, as the respondent did not have the opportunity, relying on Ms Ryder's agreement, to present evidence on that point. However, it is Ms Teding van Berkhout's case that there was no consultation with her with respect to the general parameters that were being imposed by the Police within which FEO arrangements going forward had to be accommodated.

[49] It appears from the evidence of the respondent that these parameters had been carefully worked out by the National Management Group after the demands of the Communications Centre had been analysed. The conclusion of the National Management Group was that the criteria for dispatchers set out above at paragraph 11 were needed in order for the demands on the service to be met. The respondent gave evidence that the highest demands on dispatchers came between 17.00 and 21.00 hours. Seventeen hundred hours also happened to be the time when the early shift of dispatchers left and the time when staff who had commenced their shifts at 13.00 hours started to become due to have their meal break. I understand from the evidence of the respondent that it was for these reasons that it needed part-time and FEO staff to be available from 17.00 hours to fill in the gaps. It was to address these issues, amongst others, that the parameters within which FEO and part-time staff had to fit, had been designed.

[50] There does not appear to have been any consultation with the part-time and FEO staff with respect to these parameters before they were imposed. Although generalised information had been given to the staff by way of memoranda from Superintendent McGregor, the National Manager of the Communications Centre, dated 20 August 2010 and 21 January 2011, and in a meeting on 1 February 2011, the Police did not seek the views of the affected staff with respect to these parameters. What they did do was ask their staff to *negotiate* their hours within the parameters. The proposals made by Ms Teding van Berkhout which fell outside of the parameters, on two occasions, were rejected.

[51] I accept Ms Ryder's submissions, relying on *Simpsons Farms Limited v Aberhart* [2006] AC 52/06, that consultation in an employment setting goes beyond

simply meeting with an employee in an endeavour to force them to accept new terms of employment. In particular, genuine efforts must be made to accommodate the views of the employees. No such efforts were made by the Police. The changed parameters were simply imposed upon Ms Teding van Berkhout and her colleagues.

[52] Paragraph 5.4 of the FEO policy deals with cancellation of an FEO arrangement. It states as follows:

> *Unless the staff member wishes to return to full-time work, an approved FEO arrangement should not be cancelled without a full review.*
>
> *An approved FEO arrangement can be cancelled if it:*
>
> a. *Expires.*
> b. *Ceases or needs to be changed due to operational or workplace requirements. (A staff member on FEO and looking to transfer to another district would be expected to make a new application to work FEO to the HR Manager of that district. The HR Manager would make the decision as to whether FEO could be accommodated in the position they are applying for or have been appointed to).*
> c. *Is considered to be not working satisfactorily at annual review.*
>
> *Upon cancellation the employee will assume full-time duties in their position.*

[53] I believe that this failure to consult with the affected staff in respect of the general parameters constitutes a breach of paragraph 5.4 of the FEO policy and s.4(1A) of the Act. It was a breach of paragraph 5.4 of the FEO policy because the changes required by the Police to the parameters inevitably led to a need to change Ms Teding van Berkhout's hours and those of other staff on FEO arrangements. This, in turn, amounted to a cancellation of their approved FEO arrangements, requiring them to reapply for different reduced hours under the FEO policy or face reverting to full time hours.

[54] The failure to consult about the general parameters was also a breach of s. 4(1A) of the Act because it is entirely predictable that the changes in hours were likely to have an adverse effect on the continuation of employment of at least some of these staff, and so an opportunity to comment on the information to their employer before the decision was made should have been afforded to those staff.

[55] However, the next question to consider is whether these breaches amounted to a fundamental breach of Ms Teding van Berkhout's employment agreement, entitling her to resign.

[56] Assessing the reasons why Ms Teding van Berkhout resigned, it is clear that she did so because she could not make her particular hours fit in with her personal commitments. It was not the general parameters in themselves that led to her resignation, but the refusal of the respondent to consider and to accommodate reduced hours that fell outside of them. Therefore, even if the failure of the respondent to consult about the parameters themselves constituted a breach of its duties, that failure did not lead to her resignation.

Did the Police fail to consult fully with Ms Teding van Berkhout about her specific arrangements and, if so, does that constitute grounds for a constructive dismissal?

[57] The communications and contact between Ms Teding van Berkhout and the various representatives of the respondent between the beginning of February and 20 April 2011, when Ms Teding van Berkhout signed the FEO application form *under protest* cannot, when viewed objectively, amount to consultation in the sense referred to by Colgan CJ in *Simpsons Farms*. To quote more fully from His Honour's statement, at [62], he stated that fundamental elements of consultation that are now strengthened and required by s.4 in redundancy cases include:

- *Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and deciding what will be done.*

- *The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.*

[58] Although *Simpson's Farms* was a case concerned with redundancy, I am satisfied that the principles stated therein apply equally to any situation in which s. 4(1A)(c) applies, as it does in the current matter before the Authority.

[59] Although the various representatives of the respondent with whom Ms Teding van Berkhout dealt during the period referred to above gave her information (such as, the requirements of the operation and how they impacted on the rosters of the staff in the Southern Communications Centre), there was no dialogue of a constructive nature, in which the respondents listened to Ms Teding van Berkhout's concerns and actively

explored ways of resolving her concerns. This was, to a certain extent, due to these representatives having little or no influence over the parameters that had been cascaded down to them. Ms Carey did say that she could agree hours which fell outside of the parameters provided the hours suited the needs of the business. In Ms Teding van Berkhout's case, for example, she did not have to work a Sunday shift from 07.00 to 13.00.

[60] However, there was no discussion between the parties about exploring whether it was possible to grant flexibility to Ms Teding van Berkhout in areas where she needed to make the shift change work. Ms Carey agreed, in a question from Ms Ryder during cross examination, that her role had been to ensure that staff agreed to one of the shifts within the parameters. Ms Maitland and Ms Train had no power to change the parameters, and Inspector Leighton, Sergeant Turner and Inspector Kortegast, all of whom gave evidence, did not take any substantively active role in the negotiations with Ms Teding van Berkhout between February and April 2011.

[61] It was my understanding of the evidence of Ms Teding van Berkhout and her husband that the major problem she faced was having to start at 17.00 hours (although Saturday mornings also caused problems occasionally). I heard no evidence to suggest that anyone discussed and explored the possibility of Ms Teding van Berkhout starting work at 17.30 hours. Ms Teding van Berkhout said that she was simply told that she could only negotiate within the parameters.

[62] It was the evidence of the Police that they rejected a proposal to start at 17.30 because a handover within the Southern Communications Centre took place at 17.00 hours and that Ms Teding van Berkhout would effectively not be able to take part in it. However, upon closer examination of this explanation, it does not appear to hold water entirely. This is because it was clear that dispatchers did a hand over whenever it was needed (for example, even where someone went on a 30 minute lunch break) so it certainly was not essential for a dispatcher to hand over to Ms Teding van Berkhout at 17.00 precisely. It is also the case that her supervisor would have been present when she started work and he/she could have also told Ms Teding van Berkhout anything that she needed to know in general terms.

[63] It is not possible for the Authority to fully test the validity of the proposition that Ms Teding van Berkhout needed to commence work at 17.00 rather than 17.30 as the Authority did not have the opportunity to fully analyse all of the rosters that were

in operation. However, it would appear that, being a gap filler, Ms Teding van Berkhout was not one of the eight dispatchers who were required to be present at all times (or at least during busy periods) but was effectively a ninth person who floated.

[64] However, I do accept that a number of dispatchers go off duty at 17.00 and others take their lunch break at around that time. If Ms Teding van Berkhout had started work at 17.30, either the service would have been short of a dispatcher for 30 minutes while someone took their lunch at 17.00, or a dispatcher would have had to have waited an extra 30 minutes before they could have their lunch.

[65] I also accept that 17.00 is a busy time for dispatchers, and that, being one person short for 30 minutes could have degraded the service, as was posited by Inspector Kortegast. I also believe that working as a dispatcher is a stressful, demanding job, and to make someone wait to take a lunch break could have an effect on morale, even if it had been for 30 minutes. However, none of these propositions had ever been tested by the Police at the time MS Teding van Berkhout was negotiating her hours, as they did not ask the other dispatchers whether they could have accommodated Ms Teding van Berkhout starting 30 minutes later. It is possible that the other dispatchers would have been able and willing to do so. Indeed, it is my finding, on balance, that a 17.30 start for Ms Teding van Berkhout could have been accommodated without a significant adverse impact upon the service. It must follow that the respondent was unnecessarily inflexible in its insistence that Ms Teding van Berkhout must commence at 17.00.

[66] Such inflexibility potentially had a real adverse impact on Ms Teding van Berkhout. Section 4(1A)(b) of the Act imposes upon the parties the duty to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative. By failing to explore fully whether the Southern Communications Centre could have accommodated a 17.30 start, I believe that the respondent failed to comply with its duty.

[67] This is especially so given that Ms Teding van Berkhout made it clear to Ms Carey that she could not work the hours that had been imposed. By saying this, I believe that Ms Teding van Berkhout was effectively putting the respondent on notice that she would be left in a position where she may have to resign. Unfortunately, I

believe that Ms Carey was simply interested in getting Ms Teding van Berkhout to sign an agreement and stop being difficult.

[68] Ms Sagaga has submitted that Ms Teding van Berkhout had not acted in good faith because she did not negotiate within the parameters. It is true that Ms Teding van Berkhout's communications about the hours she was willing to work made little concession to the parameters, and she was, therefore, herself inflexible in the hours that she proposed. It is for this reason that Ms Teding van Berkhout had appeared to Ms Carey to be a little unreasonable in focussing on her own difficulties rather than acknowledging the restraints under which Ms Carey and the Communications Centre were operating. However, just because an employee is being unreasonable in one respect does not negate the employer's fundamental duties under s.4 of the Act, unless the employee's actions prevent the employer from fulfilling their duties. This was not the case with Ms Teding van Berkhout.

[69] It is my view that no fair and reasonable employer could have failed to have consulted properly with Ms Teding van Berkhout in circumstances where a fundamental change to Ms Teding van Berkhout's working hours were being required, in the knowledge that the changes would cause her significant problems. This failure constitutes a breach of s 4(1A) of the Act, as well as a breach of clause 5.4 of the FEO policy, for the same reasons that have been explained above with respect to the failure to consult about the general parameters.

Did the respondent's breach entitle Ms Teding van Berkhout to treat herself as constructively dismissed or did she affirm the contract despite the breaches?

[70] It is the respondent's case that Ms Teding van Berkhout accepted the changes to her hours, which eventually proved to be too difficult for her to work, orally at a meeting with Ms Carey on Friday 25 March 2011. She communicated to Ms Maitland by email on 4 April 2011 that she would be seeking independent advice before signing the new FEO agreement and on 20 April 2011 she wrote to District Commander Cliff saying that the strict hours being introduced for staff on FEO arrangements made it difficult for her to remain working in the Police. On 20 April 2011 she also signed an FEO Application Form saying that the application was signed under protest and subject to her legal rights.

[71] Ms Sagaga has submitted that, in reliance upon *Wellington District Hotel Etc IUOW v Castlecliff Club Inc* [1984] ACJ 773, the words *under protest* have no legal or binding effect in the context in which they were used in that case. In that case, three club stewards were advised of reduced hours that their employer proposed would apply in four weeks' time. The judgement of the majority records that:

> *All three continued to be reluctant to accept the reduction of hours. However, they did so under protest. …The simple fact of the matter is that those workers accepted, although unwillingly, the change in the terms of their respective contracts of employment which, as a matter of law in each case, continued in amended form.*

[72] Ms Ryder, in response, submits that the decision of the majority was limited to the facts of the case, and that the views of the dissenting judge in *Castlecliff* apply normal contract principles. In that case, the dissenting judge, Ball J, found that there had been a lack of consideration for the reduction in hours and that subsequently forced the three workers to resign.

[73] In the current matter, it is important to consider the wider context in which Ms Teding van Berkhout *accepted* the new hours *under protest, and subject to her legal rights*. I believe that it is relevant to consider the following, which lead me to conclude that the majority view in *Castlecliff* can be distinguished:

a. The repeatedly stated position of the respondent that, in the absence of an agreement to terms that suited its business needs, Ms Teding van Berkhout would have her employment terms change so as to revert to full time hours;

b. The knowledge of the respondent that Ms Teding van Berkhout could not work full time hours;

c. The lack of any serious attempt by the respondent to explore whether alternative hours could be accommodated by the Southern Communication Centre dispatch teams; and

d. The lack of any meaningful consultation with Ms Teding van Berkhout.

[74] It is my finding that Ms Teding van Berkhout accepted the new hours because she genuinely felt she had no choice, as a requirement to work full time hours would have left her having to resign, and as she had tried to argue for a roster that she could

have worked, but with no indication from the respondent that her representations would be considered. This raises the question whether Ms Teding van Berkhout's *agreement* was an agreement at all, and whether she was put in the position of having to accept the new roster or be dismissed.

[75] In order to assess that argument, the next step to consider is whether the statements about Ms Teding van Berkhout reverting to full-time hours were lawful. I have already found that Ms Teding van Berkhout was employed as a full time employee who had been allowed to work reduced hours under the FEO policy. Therefore, once an arrangement came to an end, or needed to be reviewed because of changes to the business needs of the operation, I accept that the employee's terms of employment could revert to full time if an alternative arrangement could not be agreed upon. Therefore, the position adopted by the respondent that Ms Teding van Berkhout could revert to full time hours was not incorrect.

[76] However, the respondent had previously agreed an FEO arrangement with Ms Teding van Berkhout and was obliged, pursuant to its statutory duties of good faith, to abide by the FEO policy when it wished to change the arrangement. I have already found that the respondent failed to abide by clause 5.4 of the FEO policy, by not consulting fully with Ms Teding van Berkhout about cancelling her then current arrangement. This failure amounted to a breach of s. 4(1A) of the Act in addition.

[77] It is my view that no fair and reasonable employer could have opted to exercise its contractual right to make Ms Teding van Berkhout revert to full time hours without having first consulted effectively with her about the changes. Reversion to full time hours should have been treated as a last resort and only after a full and genuine consultation had been carried out. The failure to do so meant that Ms Teding van Berkhout did not agree to the changed roster on 25 March 2011 by willing consent. This conclusion is supported by the fact that she continued to pursue her attempts to change her roster by writing to District Commander Cliff, and corresponding with Ms Train, and by trying to find other positions within the police force. Her actions are not those of someone who had acquiesced to the new roster or to the circumstances that had led to the new roster being imposed upon her.

[78] My conclusion, therefore, is that Ms Teding van Berkhout did not affirm the contract despite the respondent' breaches, but maintained her objection to them by her actions after she had started to work the new roster.

[79] In light of my finding that, on balance, a 17.30 start could have been accommodated by the respondent, the failure by the respondent in breach of its good faith duties to explore that possibility, which arose out of its failure to fully and genuinely consult with Ms Teding van Berkhout, led directly to her resignation.

[80] It is not a significant step further to conclude that Ms Teding van Berkhout's resignation amounted to a constructive dismissal that was unjustified. In applying s. 103A of the Act (as enacted after the 1 April 2011 amendment to that section), I conclude that the respondent's actions, and how the respondent acted, were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. Those actions were to require Ms Teding van Berkhout to accept new hours of work, knowing she would encounter real difficulties in doing so, without consulting fully with her and without exploring whether the requirements could be relaxed, even to a relatively small extent, to ease her difficulties.

[81] Even after Ms Teding van Berkhout had started to work the new roster, although she continued to try to effect a change to the hours, no real effort was made by the respondent to explore whether small changes could be made to the Southern Communications Centre dispatchers' roster to ease her most severe difficulty. Therefore, the unreasonable actions of the respondent continued until the resignation.

Conclusion

[82] In conclusion, I find the following:

a. That the respondent breached its duty of good faith to Ms Teding van Berkhout by failing to consult effectively with her about her concerns that she could not work any roster that complied fully with the parameters imposed by the National Management Group;

b. In addition, the respondent breached its duty of good faith by failing to genuinely explore whether any accommodations or adjustments could be made to the 17.00 start time;

c. That these two breaches were serious breaches which, in practice, put Ms Teding van Berkhout in a position where she either had to work full time hours (which she could not do) or work a roster which caused her significant problems with managing her family life;

d. She chose the latter option, which led directly to her resigning because of those resultant problems;

e. That Ms Teding van Berkhout did not affirm the employment agreement after the breaches but accepted the breaches when it became clear to her that she could not work the new roster;

f. That her resignation was foreseeable in light of her telling Ms Carey and other representatives of the respondent that she would not be able to work the new roster;

g. That her resignation therefore amounted to a constructive dismissal;

h. That that constructive dismissal was unjustified in law.

Did Ms Teding van Berkhout suffer an unjustified disadvantage in her employment in respect of her application for leave?

[83] Ms Teding van Berkhout complains that she was told in March 2011 that her application for leave in late April 2011 had been declined. She was told by Ms Maitland in an email dated 1 April 2011 that her application for leave had not been considered until she had agreed the new rosters, which had not been until 25 March 2011. Ms Maitland also stated that, *as long as you get your new FEO application (for the October roster review) signed off within the timeframe, you will have the same chance as everyone else to get the leave you want*.

[84] The consistent evidence of Ms Maitland, Ms Carey and another witness for the respondent, Mr Boddy, was that it had not been possible for the respondent to have agreed her application for leave because they did not know what rosters she would be working. It is the argument of counsel for Ms Teding van Berkhout that the Police could have rostered around her leave. I believe that this is true. However, for Ms Teding van Berkhout's disadvantage personal grievance to succeed, she must show that the actions of the employer were unjustified. As the refusal was communicated prior to 1 April 2011, the pre-amendment test of justification at s. 103A of the Act applies:

> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and*

reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[85] I do not believe that the rationale applied by the Police in telling Ms Teding van Berkhout that she needed to agree her rosters before her leave application could be considered was irrational or capricious and I also do not accept that it was a ruse to force Ms Teding van Berkhout to accept the new rosters. I believe that it was reasonable for the Police to have awaited agreement with Ms Teding van Berkhout as to what roster she would work before considering her leave application.

[86] Accordingly, this personal grievance is dismissed.

Remedies

[87] Having established that Ms Teding van Berkhout had been unjustifiably constructively dismissed, I must now consider what remedies she is entitled to. Section 123(1)(b) of the Act provides that the Authority may provide the reimbursement of a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128(2) provides that, subject to s. 123(3) and s. 124, the Authority must, whether or not it provides for any other remedies, order the employer to pay the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration. Section 123(3) provides that, despite subsection (2), the Authority may, in its discretion, order the employer to pay a sum greater than provided in subsection (2).

[88] Ms Ryder argues that, taking into account her seniority, her position held, her length of service and her exemplary service record, Ms Teding van Berkhout would have been employed by the respondent for at least 10 years, but that it is appropriate to award her 2.5 years' lost remuneration, from 30 July 2011 to January 2014.

[89] However, I am mindful of the fact that Ms Teding van Berkhout's new winter roster had been set until the end of September 2011 and that she would have had to have renegotiated her hours for the forthcoming Summer period. Even if the Police had consulted fully with Ms Teding van Berkhout prior to the Summer roster, it is possible that it would have determined genuinely that its operational needs were only to be met with Ms Teding van Berkhout working a roster which she found too difficult to work, or the respondent may have exercised its right to require her to work full time hours. Either of those scenarios are likely to have forced Ms Teding van

Berkhout to have left the employment of the respondent, but without recourse to a constructive dismissal personal grievance. Therefore, as the likelihood of her remaining in the employment of the respondent beyond 30 September 2011 is too uncertain, I consider that the only certainty Ms Teding van Berkhout had of remaining in her employment was for the period between 30 July 2011 and 30 September 2011, a period of nine weeks.

[90] However, it would be unjust to limit Ms Teding van Berkhout's loss to nine weeks' pay, given that the uncertainty I speak of can cut both ways; namely, Ms Teding van Berkhout may have persuaded the respondent to have allowed her to start at 17.30 or 18.00 for the Summer roster, in which case she may have continued in employment, at least until the conclusion of that roster.

[91] All in all, I consider it fair to award Ms Teding van Berkhout reimbursement for a period of three months ordinary time remuneration but, given the uncertainty referred to, not to exercise the Authority's discretion to extend that period pursuant to s. 128(3) of the Act.

[92] Ms Teding van Berkhout did attempt to find alternative employment after her resignation, thereby attempting to mitigate her loss, and did earn moderate earnings after her resignation, which show that three months' ordinary time remuneration is less than her actual loss. I believe that the correct amount to award Ms Teding van Berkhout is therefore three months' ordinary time remuneration, calculated at $35.72 an hour for 20 hours per week. This results in the gross sum of $9,287.20.

[93] Turning to s.123(1)(c)(i) of the Act, I accept that Ms Teding van Berkhout suffered humiliation, loss of dignity and injury to her feelings as a result of not being able to consult fully with the respondent about her new roster and about the impact it would have on her, as well as the resultant difficulties she suffered in trying to work to the new roster. Accordingly, I accept that she is entitled to compensation pursuant to s.123(1)(c)(i) of the Act. Ms Teding van Berkhout's evidence was that it was extremely upsetting for her handing over her resignation. It is accepted by the respondent that she was upset at the time, and Ms Teding van Berkhout relived that upset in the Authority's investigation meeting when she gave evidence about resigning. I am also mindful of the fact that Ms Teding van Berkhout had worked for the respondent for 23 years, and evidently enjoyed her job and the challenges it brought.

[94] Ms Ryder argues that Ms Teding van Berkhout should be awarded $20,000 under s. 123(10(c)(i) of the Act. I believe that this is excessive. Ms Teding van Berkhout is a robust individual who, whilst upset at her experience, did not appear to have suffered any long lasting significant effects. I believe that an award of $10,000 is fitting and in keeping with the views expressed by Chief Judge Goddard in *Trotter v Telecom Corporation of New Zealand Limited I* [1993] 2 ERNZ 659.

[95] Turning to s. 124 of the Act, I must consider whether the remedies should be reduced to reflect the extent to which Ms Teding van Berkhout's actions contributed towards the situation that gave rise to the personal grievance. Counsel for the respondent argues that Ms Teding van Berkhout's actions have not been in good faith or tending to promote settlement of the complaint. She says that Ms Teding van Berkhout failed to meet agreed deadlines, failed to be communicative and responsive, and failed to negotiate within the parameters. Finally, she failed to sign the FEO agreement in a reasonable time.

[96] It is true that Ms Teding van Berkhout was often late in responding to the deadlines imposed by the respondent, which were always reasonable ones. I am not so convinced that she failed to be communicative and responsive, other than in respect of being late in responding to deadlines. Ms Teding van Berkhout did, of course, fail to negotiate within the parameters, but that was because she was hoping to convince the respondent to exercise a discretion in her favour.

[97] All in all, even if Ms Teding van Berkhout was late in responding to deadlines, that did not lead to the situation giving rise to her personal grievance. It was the respondent's failure fully to consult which led to it. I therefore do not believe that it would be just or appropriate to reduce Ms Teding van Berkhout's remedies.

Orders

[98] I order the respondent to pay to Ms Teding van Berkhout the following sums:

a. The gross sum of $9,287.20; and

b. The sum of $10,000 pursuant to s. 123(1)(c)(i) of the Act.

Costs

[99] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. In the absence of agreement within 28 days of the date of this determination, any party seeking costs are to serve and lodge a memorandum of counsel. Any response is to be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority