IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 139
5339827

	BETWEEN	MONIQUE MOIRA VAN DER HEIJDEN Applicant
	AND	TRELISE COOPER INTERNATIONAL LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	The Applicant in person G Stone, Counsel for Respondent
Investigation Meeting:	15 November 2011 at Auckland
Submissions Received	28 December 2011 for the Applicant 7 December 2011 and 20 January 2012 for the Respondent
Determination:	20 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Van Der Heijden, claims that her employment was affected to her disadvantage by an unjustifiable action by her employer, namely that her hours of work were unilaterally reduced. Ms Van Der Heijden also claims that she was constructively dismissed effective from on or about 3 December 2010, and that the dismissal was unjustifiable.

[2] Conversely, the respondent, Trelise Cooper International Ltd (TCI), says that Ms Van Der Heijden was a part time casual employee and that her hours of work varied from week to week depending on the requirements of the business, and that her resignation cannot be seen to be an unjustifiable constructive dismissal.

Background facts and evidence

[3] Ms Van Der Heijden was interviewed by Ms Jacinda Neal (Accountant) on 24 December 2009 for a retail sales assistant position with TCI. Ms Neal told the Authority that in addition to her accounting responsibilities, she is responsible for the staff duty rosters that apply throughout the TCI stores. The evidence of Ms Neal is that at the time of the interview with Ms Van Der Heijden, more casual staff to cover the Christmas break period were required; hence the interview took place on Christmas Eve.

[4] There is some disparity between the evidence of Ms Van Der Heijden and Ms Neal as to what was discussed at the job interview. Ms Van Der Heijden says that she was interviewed and offered employment and told by Ms Neal that the pay rate would be $16.50 to $17.50 per hour. Ms Van Der Heijden says that Ms Neal also told her that after being employed for 12 weeks, she would be eligible for a pay rise.

[5] The evidence of Ms Neal is that she did not make a job offer, or offer an hourly rate during the interview, as she was not authorised to do so; neither did she tell Ms Van Der Heijden that she would get a pay rise after being employed for 12 weeks. Ms Neal has produced the interview sheet and while the details are very brief, it seems that in response to a question regarding the hourly rate of pay that Ms Van Der Heijden was "looking for" - her response was $16 to $17 per hour. There is no written evidence of a formal offer and acceptance regarding a job for Ms Van Der Heijden. Neither is there any employment agreement, but it is established that she started work on 20 January 2010 and she was paid $16.50 per hour.

[6] It appears that the employment relationship progressed in a satisfactory manner for all concerned. Via an email to Ms Neal dated 14 October 2010, Ms Van Der Heijden requested an increase to her hourly rate of pay. Her evidence is that she felt that she had worked hard for the nine months that she had been employed. In her email, Ms Van Der Heijden informs that:

> During my interview last year, you said that the $16.50 per hour wage I would be starting on was indeed a starting rate and that after 12 weeks I would be eligible for a rise. I decided that it would most likely be in my best interests to wait until I was confident that my performance, flexibility, loyalty, and commitment to the company, yourself, and the team would be unquestionably apparent.

[7] Ms Van Der Heijden received a response to her request for a pay increase via an email from Ms Neal dated 26 October 2010. Ms Neal conveyed that she had spoken to the Chief Executive Officer and the outcome was that the company was not giving any pay reviews to employees "this side of Christmas" due to sales being down in wholesale and retail. Ms Neal gave an undertaking to "redress the matter" with the CEO early in the New Year.

[8] Very shortly after receiving the rejection of the wage increase request, on 27 October 2010, Ms Van Der Heijden notified Ms Neal that she was unable to work on 28 and 29 October 2010 as she was sick with the flu. Ms Van Der Heijden says that she believes her illness was partly due to the "stress and anxiety" she had experienced after not receiving a response to her pay rise request for two weeks. Ms Van Der Heijden subsequently obtained what can only be seen as a retrospective medical certificate. It informs that Ms Van Der Heijden consulted her doctor on 3 November 2010 and that she was unfit to resume work for a period of 11 days from 27 October 2010; that is, 6 November 2010.

The reduction in hours of work

[9] The evidence of Ms Van Der Heijden is that she had a telephone conversation with Ms Neal on 4 November 2010 and was informed during this conversation that three new staff had been employed. Ms Van Der Heijden says that she was surprised to hear this as she had previously informed Ms Neal that she wished to work as many hours as possible. Later that day, Ms Van Der Heijden received the work roster for the week ending 14 November 2010. She says that her regular hours had been reduced from an average of 25 hours per week to 16.5 hours per week and that another employee [L], who usually worked at another store, had been brought in to work Ms Van Der Heijden's hours. Ms Van Der Heijden sent an email to Ms Neal:

> I have just received the roster for next week and I want to know why you have reduced my hours to only two days. I have worked a minimum of four days a week consistently for the last nine months and have come to depend on those hours to support my lifestyle, which will be severely impacted by such a drastic reduction in my hours. Could you please get back to me about this as soon as possible.

[10] The evidence of Ms Neal is that after Ms Van Der Heijden had been refused a pay increase she became less reliable and hard to contact. A series of emails between Ms Neal and others inquiring into the whereabouts of Ms Van Der Heijden has been

produced and it tends to support this proposition to some extent. But there is no evidence of any discussion with Ms Van Der Heijden about this.

[11] The further evidence of Ms Neal is that Ms Van Der Heijden had nine days sick leave in October/November and then there were a further four days that Ms Van Der Heijden failed to arrive at work, either with no notice or very late notice that she was not available. Ms Neal attests that Ms Van Der Heijden had previously been reliable and punctual but something changed around about this time. Ms Neal says that another factor was that Ms Van Der Heijden reduced her availability for weekend work and hence this meant that there were less available hours that she could be rostered for. Ms Neal gave an example of a last minute call from Ms Van Der Heijden's boyfriend, informing that she was unable to work on a particular Saturday. While Ms Van Der Heijden has referred to Ms Neal being less communicative, Ms Neal says that Ms Van Der Heijden was not engaging with her.

[12] On 9 November 2010, Ms Neal sent an email to Ms Van Der Heijden:

> Thank you for your medical certificate I received this in the post today. I hope you are on the mend and will be back at work soon. Please let me know ASAP if you're unable to work the days I have you rostered this week and next week. Retail sales are down significantly from the previous year and this is resulting in a reduction of hours available for staff in our stores. Management have asked me to cut back the hours to reflect our current sales position. Unfortunately with part time staff there is [sic] no guaranteed days/hours and this change will have an effect on part time staff. Call me in the office tomorrow if you would like to discuss.

[13] A further email was sent by Ms Neal to Ms Van Der Heijden on 1 December 2010:

> I have been asked by management to run the store for the vast majority with only one staff member starting from next week. Unfortunately this means I have no hours to give you for this week. Call me if you would like to discuss.

[14] The reference to "the store" is, as the Authority understands it, to the Richmond Road store. The roster provided to Ms Van Der Heijden for the week ending 12 December 2010, shows that she was not allocated any hours of work for that week.

[15] The evidence is that Ms Van Der Heijden did not accept the invitation, extended by Ms Neal in her two emails, for Ms Van Der Heijden to discuss the hours of work with her.

The resignation

[16] The evidence of Ms Van Der Heijden is that receiving the email from Ms Neal on 1 December 2010 caused her "more stress and anxiety." Ms Van Der Heijden attests to suffering from sleeplessness, stomach pain, diarrhoea, loss of appetite, extreme anxiety and she was crying every day. It is the view of Ms Van Der Heijden that she had been "phased out" of her job because her hours had been reduced to "nothing."

[17] Ms Van Der Heijden says that she did not discuss the reduction in the hours of work with Ms Neal as she felt it would not make any difference.

[18] On 3 December 2010, via an email to the (then) General Manager of TCI, Mr Drew Steel, Ms Van Der Heijden forwarded her resignation thus:

> It is with great reluctance that I write to let you know that I will no longer be able to continue my employment at Trelise Cooper Ltd. I have thoroughly enjoyed working in the stores and have taken great pride in being able to work for such a well known and prestigious brand. I will really miss all of the lovely customers whom I have had the pleasure of getting to know over the course of my employment, but what I will miss the most however is coming to work and being able to spend the day with my gorgeous colleagues, all of whom I now consider friends. From starting at Trelise Cooper I have been rostered to work an average of 24.7 per week as a part time permanent employee, up until late October when my hours were unilaterally reduced. Unfortunately, due to the reduction in my hours to now nothing, without any agreement by me or consultation whatsoever, I feel I have been forced to resign, effective immediately. I believe that the actions of Trelise Cooper Ltd are a breach of duty owed to me and that I have been constructively dismissed from my employment. I hereby give formal notice of a personal grievance for constructive dismissal.

Analysis and conclusions

[19] There are three main issues that require the determination of the Authority:

(i) Was the employment status of Ms Van Der Heijden casual or part time permanent?

(ii) Was there a unilateral reduction to the hours of work?

(iii) Was the resignation brought about by a material breach of duty on the part of the employer that had the effect of converting the resignation of Ms Van Der Heijden into a constructive dismissal?

Was the employment status of Ms Van Der Heijden casual or permanent part time?

[20] Setting aside the first week (5 hours) and last week of work (6.5 hours), a summary of the hours of work for the period that Ms Van Der Heijden was employed by TCI shows that she was rostered for an average of 23.8 hours each week; albeit for reasons of illness and other unidentified reasons, Ms Van Der Heijden did not work the rostered hours on some days.

[21] In regard to the reduction of Ms Van Der Heijden's hours, the position of TCI is that because the employment relationship was casual in its nature, there was no obligation to provide her with any given hours of work or indeed, provide her with any work at all depending on the circumstances.

[22] Recently, the Employment Court examined the distinction between casual employment and more permanent employment arrangements, in *Jenkinson v Oceana Gold (New Zealand) Limited.*[1] The Court held that:

> The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship.

[23] I believe that the following statement of Couch J. in *Jenkinson* has particular relevance to the circumstances of Ms Van Der Heijden:

> The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work. Other obligations may also indicate an ongoing employment relationship, but if there are truly no obligations to provide and perform work, they are unlikely to suffice. Whether such obligations exist and their extent will largely be questions of fact.

[1] [2009] ERNZ 225

[24] Given the established pattern of the hours and days worked by Ms Van Der Heijden, contrary to the submissions for TCI, I conclude that the regularity of the work available to Ms Van Der Heijden is a persuasive factor. I find that the employment of Ms Van Der Heijden was sufficiently regular and continuous in its nature[2] to define it as ongoing and of a permanent part time status. This finding takes us to the next issue to be determined.

Was there a unilateral reduction to the hours of work?

[25] An examination of the summary of the hours worked by Ms Van Der Heijden, shows that up until the week ending 28 November 2010, she was rostered for a regular and consistent number of hours each week, albeit she was absent due to sickness for eleven days during the period 27 October to 20 November 2010 (inclusive), albeit Ms Van Der Heijden takes issue with the records provided by TCI. And for reasons unknown, Ms Van Der Heijden did not work on 26 November 2010, albeit she was rostered to work that day. Then for the week ending 5 December 2010, Ms Van Der Heijden was only rostered to work 6.5 hours that week. For the following week ending 12 December 2010, Ms Van Der Heijden was not offered any work at all. The first indication that there was a reduction in the hours of work available, was conveyed to Ms Van Der Heijden in the email to her from Ms Neal dated 9 November 2010 (above). Ms Van Der Heijden was notified of her rostered hours for the week ending 14 November (16.5 hours) and 21 November 2010 (12 hours) and she was also informed that management had asked Ms Neal to cut back the hours of work to reflect the current sales situation.

[26] There was no indication given to Ms Van Der Heijden as to what the possible effect of the proposed cut back in hours of work would be for her, or when it would take effect. But neither did Ms Van Der Heijden take up Ms Neal's offer to discuss the pending reduction in hours of work.

[27] Approximately three weeks later, via the email dated Wednesday 1 December 2010, Ms Neal informed Ms Van Der Heijden that there would be no hours of work available for her "this week", that is, the week ending 12 December 2010. Ms Van Der Heijden was invited to call Ms Neal if she "would like to discuss." As is now established, rather than enter into any discussion, Ms Van Der Heijden resigned.

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[2] *Rush Security Services Ltd t/a Darrien Rush Security v Samoa* [2011] NZEmpC 76, 1 July 2011, at para.[25]

[28] The evidence of Ms Neal is that Ms Van Der Heijden did not contact her to discuss the cut back in hours. This is at odds with the information provided in the statement in reply produced by Mr Drew Steele, the General Manager for TCI at the time. Mr Steele informs that:

> The business reasons for reduction in hours were communicated to the applicant in emails dated Tuesday 9 November and Wednesday 1st December as attached. It should be noted that on both communications, the applicant was invited to call in and discuss the matters further. A witness is available to confirm that she took up this invitation and had further discussions.

[29] But both Ms Neal and Ms Van Der Heijden acknowledge that there was no discussion about the content of the two emails previously mentioned. Mr Steele did not give evidence to the Authority as he no longer is employed by TCI; hence the evidence of Ms Neal and Ms Van Der Heijden must be accepted as being the true situation.

[30] While Ms Van Der Heijden was invited, on 9 November 2010, to discuss the pending reduction in her hours of work, with Ms Neal, she did not do so and she has not given any logical explanation regarding that particular failure. However, given that she is relatively young and inexperienced in the employment environment, I conclude that there was an obligation on TCI to ensure that further steps were taken in regard to consulting with Ms Van Der Heijden: to explain the consequences of the economic environment referred to and how that could or would affect her.

[31] Rather than consult with Ms Van Der Heijden, a further three weeks went by and then she was informed that there would be no work available for her in the week ending 12 December 2010; and of course, she was only offered 6.5 hours for the week ending 5 December 2010.

[32] I find that there was clearly an obligation upon TCI to consult with Ms Van Der Heijden about the consequences of the proposed reduction in working hours and the likely effect of this, including what was to occur in the foreseeable future. It was simply not enough to just send an email on the two dates in question, particularly the former email, and not follow that up with some meaningful discussion to ensure that Ms Van Der Heijden had the situation explained to her and to allow her to have some input, before her hours of work were reduced.

[33] Notwithstanding Ms Van Der Heijden's failure to accept the invitation on 9 November 2010, to discuss the matter further, I find that the fundamental failure to adequately consult and discuss the pending reduction in her hours of work, led to Ms Van Der Heijden having her hours of work unilaterally reduced without her input, understanding or agreement. I further find that this reduction was not what a fair and reasonable employer would have done in all the circumstances and hence Ms Van Der Heijden has a personal grievance because her employment was disadvantaged by an unjustifiable action by her employer; hence a remedy is appropriate.

Was the resignation of Ms Van Der Heijden an unjustifiable constructive dismissal?

[34] The leading authority in regard to constructive dismissal continues to be the Court of Appeal judgment; *Auckland Electric Power Board v Auckland Local Authorities IUOW*.[3] When considering the possibility of the existence of a constructive dismissal, it was held that:

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

[35] Applying the above dicta of the Court of Appeal to the circumstances of Ms Van Der Heijden, the first question is: Was the resignation caused by a breach of duty on the part of TCI?

[36] Consistent with my earlier finding, I conclude that the resignation of Ms Van Der Heijden was caused by a fundamental breach of duty on the part of TCI due to the unilateral and very substantial reduction in her hours of work (and income), without proper consultation. I also find that given that Ms Van Der Heijden's income had been reduced to firstly, payment for only 6.5 hours; and then subsequently, to nothing, without sufficient consultation and discussion, it was reasonable for Ms Van Der

[3] [1994] 1 ERNZ 169

Heijden to conclude that her employer was no longer going to provide her with a reasonable income consistent with that which she had enjoyed previously, and hence it should have been foreseeable by TCI that Ms Van Der Heijden would not be prepared to work under the conditions that prevailed.

[37] While I cannot help but think that Ms Van Der Heijden may have been a little too hasty regarding her decision to resign, a matter I will address further soon, I find that it was entirely foreseeable that the loss of earnings visited upon her by her employer would inevitably lead to a resignation. It follows that I find that the two criteria set out in the *Auckland Electric Power Board* judgment are established. The actions of TCI were not what a fair and reasonable employer would have done in the circumstances.[4]

[38] Ms Van Der Heijden was constructively dismissed and the dismissal was unjustifiable; she has a personal grievance.

Remedies

[39] Having found that Ms Van Der Heijden has a personal grievance on two counts; an unjustifiable disadvantage to her employment and an unjustifiable constructive dismissal, I turn to the remedies that may be available to her under s.123(1) of the Employment Relations Act 2000 (the Act).

Reimbursement of lost wages

[40] Pursuant to s.128(2) of the Act, if the Authority determines that an employee has a personal grievance and there has been lost remuneration because of the grievance, the Authority:

> …must, whether or not it provides for any of the other remedies provided in s.123 order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months ordinary time remuneration.

[41] It has been submitted for TCI that there is no basis for the Authority to award any loss of earnings to Ms Van Der Heijden. This is because, it is submitted, the reduction in her hours of work occurred because of a genuine business downturn and the redundancy of Ms Van Der Heijden's position may have been "lawfully

[4] Section 103A, Employment Relations Act 2000 - as it was then.

undertaken" by TCI. Notwithstanding the rather brief evidence of Ms Trelise Cooper, there is very little evidence to show what the trading position of TCI was at the time.

[42] Given the overall economic circumstances at that time it may well be that a reduction in staff numbers was justified. However, on the evidence produced, this is not proven to a satisfactory level.

[43] Ms Van Der Heijden has given some evidence of her attempts to mitigate her loss of income and I accept the submission for TCI that the nature of the roles that Ms Van Der Heijden applied for are quite different to her role at TCI; and not relevant to her tertiary qualifications.

[44] Nonetheless, I have to accept that Ms Van Der Heijden has made a reasonable attempt to mitigate her losses and given that she did not have any proven income, one would expect that she had good reason to have actively sought alternative employment. Therefore, I find that it is appropriate to award three months loss of wages, but due to the uncertainty regarding the overall circumstances as to mitigation of loss, it is not appropriate to exercise the further discretion available to the Authority, under s.128(3) of the Act, to award wages for longer than 3 months.

[45] Ms Van Der Heijden was paid $16.50 per hour and worked an average of 23.8 hours per week during the substance of the time she was employed. However, I am cognisant of the possibility that the trading situation had changed somewhat and therefore the above average hours of work may not have continued. Rather, I have adopted a lower multiplier of 20 hours per week which is a more consistent average for many of the weeks that Ms Van Der Heijden worked during her employment.

[46] Therefore the reimbursement of wages due to Ms Van Der Heijden is calculated as follows:

$16.50 x 20 hours per week x three months (13 weeks) - $4,290.00

Compensation

[47] Ms Van Der Heijden gave evidence about the stress and anxiety caused by the reduction in her hours of work. She also attested to suffering from sleeplessness, stomach pain, diarrhoea, loss of appetite and to crying every day. But I do not think

that all of those reactions can be associated directly with the reduction in her hours of work and the consequent resignation.

[48] Rather I observed that Ms Van Der Heijden had an earlier expectation of obtaining a pay rise after 12 weeks of working for TCI and when this was not forthcoming, she appears to have become less reliable and her attendance record deteriorated due to sickness and also, lack of attendance for unknown reasons: most of which appears to be associated directly with the failure to obtain a wage increase. And some of the symptoms Ms Van Der Heijden describes were also apparent prior to the reduction in her hours of work and the subsequent resignation.

[49] Indeed Ms Van Der Heijden appears to have been affected by the refusal of a wage increase to what can only be seen to be an irrational degree as I conclude that it is more probable than not that there was never a binding commitment by TCI that a wage increase would be forthcoming after 12 weeks of work, as Ms Van Der Heijden appears to have believed.

[50] Nonetheless, I accept that Ms Van Der Heijden was affected by the failure to adequately consult with her about the reduction in her hours of work and the effects of that reduction on her income and then also of course, the subsequent resignation. On the other hand, Ms Van Der Heijden is young and appears to have been relatively inexperienced in the work environment and some of her expectations and thoughts about being "phased out" are not proven or realistic.

[51] In the round I conclude that an award of $6,000 for compensation relating to the disadvantage to her employment and the unjustifiable dismissal is appropriate.

Contribution

[52] Pursuant to s.124 of the Act, when considering the nature and extent of the remedies to be provided in respect of a personal grievance, the Authority is required to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require it, reduce the remedies that would otherwise be awarded accordingly.

[53] I conclude that Ms Van Der Heijden contributed to the situation that gave rise to her personal grievances on two counts. Firstly it is clear that her attendance and reliability fell away markedly upon being told that she would not be eligible for a

wage increase. I find that it is likely that it was not a coincidence that her attendance became more irregular at this time. Secondly, while I have found that there was an onus on TCI to engage in a more meaningful manner in regard to the reduction in Ms Van Der Heijden's hours of work, she never saw fit to take up Ms Neal's invitation on 9 November 2010 to discuss the matter. Had Ms Van Der Heijden done so, she may have obtained information that could have been of assistance in regard to her gaining a better understanding of the overall circumstances, including, I suspect, her unreliability. I conclude that it is appropriate that the remedies awarded should be reduced by 30%.

Determination

[54] For the reasons set out above, I find that:

(a) Pursuant to s.103(1)(b) of the Act, Ms Van Der Heijden's employment was affected to her disadvantage by an unjustifiable action by her employer.

(b) Pursuant to s.103(1)(a) of the Act, Ms Van Der Heijden was constructively dismissed and the dismissal was unjustifiable.

(c) Pursuant to s.123(1)(b) and s.128(2) of the Act, Trelise Cooper International Limited is ordered to pay reimbursement of wages to Ms Van Der Heijden in the gross sum of $4,290.00 less 30% for contribution; being the due sum of $3,003.00.

(d) Pursuant to s.123(1)(c)(i) of the Act, Trelise Cooper International Limited is ordered to pay to Ms Van Der Heijden the sum of $6,000 less 30%; being the due sum of $4,200.00.

Costs: Ms Van Der Heijden represented herself but she is entitled to the application fee paid to the Authority. Trelise Cooper International Limited is ordered to pay to Ms Van Der Heijden the sum of $71.56.

K J Anderson
Member of the Employment Relations Authority