

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 374
5595780

BETWEEN

CLAIRE VAN DER NET
Applicant

A N D

TEXCO INTERNATIONAL
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: H White, Counsel for the Applicant
D Organ, Advocate for the Respondent

Investigation Meeting: 16 August 2016 at Auckland

Submissions Received: 16 August 2016 from both parties

Date of Determination: 15 November 2016

DETERMINATION OF THE AUTHORITY

A. The applications for personal grievance and penalties are dismissed.

B. Costs are reserved.

Employment relationship problem

[1] Claire van der Net claims that she was unjustifiably disadvantaged and constructively dismissed by Texco International Limited (Texco). She also alleges there have been breaches of good faith by the same actions.

Relevant facts

[2] Texco supplies commercial linen, textiles and associated products throughout New Zealand, the South Pacific and Australia.

[3] Ms van der Net was employed initially as a sales manager in 2014.

[4] In March 2015, Texco appointed Peter Broome as a director. There is a dispute about whether his appointment was for the purposes of replacing Ms van der Net.

[5] On 16 April 2015 Ms van der Net signed her employment contract appointing her as General Manager.

[6] On 9 October 2015, Ms van der Net overheard then recorded a Texco directors meeting. The detail of that discussion is the genesis of this dispute.

[7] Ms van der Net met with the directors on 14 October 2015. An issue of stock shortage was raised. This prompted an exchange of terse correspondence with a Texco director, Guy Nelson.

[8] Ms van der Net emailed Mr Nelson on 19 October 2015 about the stock shortage noting there had been intense criticism directed at her. She asked if the Board supported her or was the behaviour calculated to cause her to resign. The email was not answered.

[9] Ms van der Net then instructed a lawyer to write to Mr Nelson on 22 October 2015. She alleged the directors had been acting unreasonably towards her in a way that was calculated to cause her to leave. Another director, Ian Witters then became involved.

[10] The parties met on 28 October 2015 but were unable to resolve Ms van der Net's concerns. That same day Ms van der Net's lawyer raised a personal grievance including for the first time detail that she had overheard the three directors discussing terminating her employment and recorded the conversation. She refused to release the recording until the directors had answered her questions.

[11] Texco replied by email on 29 October 2015 to Ms van der Net's lawyer alleging serious misconduct because she had listened to and recorded a private conversation between the directors without their knowledge or consent. They required she attend a disciplinary meeting, answer their specific questions and supply a copy of the recording by 30 October 2015. Failure to comply with any of the above could result in dismissal.

[12] Ms van der Net's lawyer emailed complaining about the deadline. She then wrote answering some of the specific questions and providing a copy of the recording on 30 October 2015.

[13] By November 2015 both parties were accusing the other of being non-responsive:

- On 4 November Ms van der Net's lawyer emailed seeking answers from the respondent before Ms van der Net attended a disciplinary meeting.
- The same day Mr Witters alleged Ms van der Net had failed to respond to his previous letter as requested and sought her response by 9 November. He denied any wrongdoing by the Directors.
- On 5 November Ms van der Net's lawyer repeated concerns about attending a meeting without detailed answers to her questions. She also raised concerns about Mr Witters role as decision maker, sought an agreed investigator to look into all matters raised by the parties and mediation.
- On 6 November 2015 Mr Witters again denied wrongdoing and sought Ms van der Net's response by 9 November 2015.

[14] Ms van der Net did not respond by 9 November 2015. Instead she took sick leave. Medical certificates stated she was unfit for work until 23 November 2015 and had been suffering headaches related to her work environment.

[15] Ms van der Net's lawyer wrote the same day alleging Texco was harming her by its aggressive approach, repeated complaints about Mr Witter's potential bias and the attempts at termination without answering her questions.

[16] Mr Witters replied on 16 November 2016. He denied responsibility for Ms van der Net's illness stating Texco was providing her with the opportunity to respond. He then detailed the reasons for the 9 October meeting and discussions about Ms van der Net. It was agreed mediation should occur.

[17] On 19 November 2016 Ms van der Net's lawyer emailed disagreeing with the Texco's 16 November letter and her concerns the transcript of the recording showed the directors were conspiring to remove her. Mr Witter replied denying Ms van der Net's claims.

[18] On 24 November 2015 Ms van der Net provided a further medical certificate stating she was unfit to return to work until 12 January 2016.

[19] Mediation occurred on 10 December 2015 but was unsuccessful.

[20] On 14 December 2015, Ms van der Net's lawyer wrote stating her continued employment was now unsustainable and raised a grievance of constructive unjustified dismissal.

[21] The parties now seek a determination about Ms van der Net's grievances and alleged breaches.

Issues

[22] At a telephone conference on 3 June 2016 the following issues for hearing were determined by consent:

- (a) Was there was an unjustified disadvantage by the collusion of directors to remove Ms van der Net from her position?
- (b) Alternatively, was there was a breach of good faith under s.4(1A)(c) of the Employment Relations Act 2000 (the Act) for the same behaviour?
- (c) Was there was a constructive and unjustified dismissal?

Credibility

[23] There are a number of factual disputes about what was said and done up to and during the meeting on 9 October 2015. Those factual disputes are central to Ms van der Net's allegation there was collusion by the directors to remove her.

[24] To resolve the factual disputes requires me to make findings of credibility. This requires consideration of what each witness has told me and whether that is supported or contradicted by other evidence.

[25] I have also considered just how reasonable, plausible and probable the evidence is. This may require that I draw inferences and fill gaps in evidence by applying common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.

[26] The burden of establishing each of the disputed factual elements lies with Ms van der Net and the standard of proof is the balance of probabilities.

Was there an unjustified disadvantage by the collusion of directors to remove Ms van der Net from her position?

[27] Ms van der Net submits the unjustified action arose from the 9 October 2015 directors meeting where her termination was discussed. She further alleges there were indications prior to and following this meeting that the directors were colluding to terminate her employment by:

- Appointing Peter Broome to replace her in April 2015;
- Aggressive behaviour by Guy Nelson from April 2015; and
- Disciplinary action by Texco.

What happened on 9 October 2015?

[28] It is accepted:

- The directors met to discuss the prospective purchase of their business on 9 October 2015.
- Ms van der Net rang Mr Broome during the meeting.
- Mr Broome mistakenly omitted to end the call. He placed his cellphone in his pants pocket.
- Ms van der Net remained on the cellphone and was able to hear and record parts of the conversation between the directors Peter Broome, Guy Nelson and Ian Witters.
- The recording was made without the directors' knowledge.
- The directors discussed Ms van der Net's continued employment.

[29] I have now listened to the recording and read the transcript, briefs of evidence and bundle of documents. I also have heard from all three directors and Ms van der Net about what occurred prior to, on and following 9 October 2015.

Pre-recording conversation

[30] Before the start of the recording Ms Van der Net alleged she heard Mr Nelson call her a ‘stupid bitch’ in reply to a comment from Mr Broome that her “ears must be burning.” Both Mr Broome and Mr Nelson denied this occurred.

[31] At hearing Ms van der Net accepted she heard a word that “sounded like ‘bitch’”. Given the circumstances of how she came to hear this statement, her now uncertainty about the words used and the above denials, it is possible she was mistaken. At best I am uncertain whom to believe about this point. This is insufficient to prove this allegation.

Recording and transcript

[32] Ms van der Net has had the recording transcribed. She submits the transcript is an accurate record of the conversation between directors.

[33] The admissibility of this recording was raised but not fully argued. The parties were provided with a copy of a recent Employment Court decision admitting a secret recording but declining to give it any weight due to its poor quality.¹

[34] The Authority has a wide discretion to take into account evidence and information in equity and good faith it thinks fit, whether strictly legal evidence or not.² The touchstone for admissibility in this jurisdiction is relevance. The recording and transcript are relevant to this matter and admissible.

[35] The recording quality was very poor. Ms van der Net listened to the conversation on her personal cellphone. She then put her phone on loudspeaker and used another phone to record that conversation as it occurred.

[36] Parts of the recording cannot be heard. When I listened to the most relevant parts of the discussion, the recording was at times inaudible. Ms van der Net accepted the transcript did not contain everything she had heard on the recording. She confirmed where there were dots (...) in her transcript, this indicated parts where she could not hear what was being said. The transcript is incomplete. It cannot be an accurate record of this conversation.

¹ *Graham D'arcy-Smith v Natural Habitats Limited* [2015] NZEmpC 123 at [52]-[54].

² Section 160(2) Employment Relations Act 2000 (Act).

What did the Directors discuss on 9 October 2015?

[37] Mr Witters confirmed there was a proposed purchase that had yet to be reduced to writing. The purchasers were undertaking due diligence. One proposal was purchasing the company assets only and bringing in another managing director. The directors believed if this purchase occurred, it would trigger staff redundancies including Ms van der Net's. It was within this context the directors met then discussed Ms van der Net's role in the company going forward as part of possible staff redundancies. I accept that evidence because it logically fits with the accepted purpose of the meeting and other parts of the transcript that the witnesses accept are correct.

[38] Ms van der Net isolates parts of the transcript to support her allegation the directors were working out the best way to get rid of her from the business. She heavily relies upon Mr Nelson's comments "as long as we do not open our mouths and it's a restructure", "we have a new shareholder coming in and part of the deal was that we agreed on a different structure for the business", "if the re-structure is underway and then the restructure goes further ... it triggers a technical redundancy ..." "the driver is the restructure ... that's why it's so clean" and in reference to "if she asks" meaning Ms van der Net "there is no new role ... we don't have to be specific."

[39] All of those comments reasonably support the conclusion this was a discussion about the effects of the possible purchase upon Ms van der Net and others. Parts of the transcript are missing where it is likely other staff may have been discussed as well. Given she was the highest paid and most important employee, it would not be unexpected for their discussions to primarily focus on potential effects for her.

[40] Mr Nelson stated his reference to not opening "our mouths" was to shut down any discussion outside the directors given the impact for staff and the business. This was reasonable given the uncertainty about the purchase.

[41] Mr Nelson's comments "It's a matter of getting the consultation process done" and "there is no new role in the restructure ... so she has to take redundancy as there is no new role... pay her 1 month and that's it ..." adequately summarises Ms van der Net's position if the purchase occurred. This again focuses upon the effects for Ms van der Net of the purchase – it does not evidence collusion.

[42] Mr Witters accepted he said he “did not want to get rolled on this” but was not referring to Ms van der Net. He says he was referring to wanting the deal to occur because he had financial commitments to meet. I cannot exclude this as a reasonable conclusion about that comment.

[43] Mr Nelson accepted he said “we are going to be talking about opportunities and we can’t involve her”. This referred to the fact Ms van der Net was neither a shareholder nor director. Previous general manager’s had been both. At the time of the meeting, the purchase had not been reduced to any legally binding form. No adverse decision had been or was proposed to be made. At best there were preliminary discussions about a prospective purchase. Until the Directors had made a decision adverse to the continuation of her employment, there was no need to involve her in discussions. These cannot be a breach of the duty of good faith or evidence of collusion.

[44] Ms van der Net has not proven on the balance of probabilities these directors were colluding to bring about her termination on 9 October 2015.

Appointment of Peter Broome (April 2015)

[45] I accept Peter Broome’s evidence he was never brought in to replace Ms van der Net. He was to provide mentoring and assist the general manager (Ms van der Net) in developing new business. He was the general manager of a commercial linen company merged with Texco 10 years ago. He was semi-retired and did not seek a full time job. He could only offer 4 hours per week due to other commitments which would have been insufficient to act as Texco’s general manager.

[46] There is other contemporaneous evidence supporting Mr Broome. An email dated 3 April 2015 from Mr Witters to Ms van der Net confirmed Mr Broome’s appointment was to help not replace her.

[47] Subsequent to Mr Broome’s appointment Ms van der Net was offered and signed an employment agreement on 16 April 2015. It appears illogical Texco would offer her an employment agreement as general manager if they intended Mr Broome to take on the role.

[48] There is little other than speculation to suggest Mr Broome’s appointment was for any other purpose than mentoring.

Behaviour of Guy Nelson (March 2015 onwards)

[49] Ms van der Net alleges in late March 2015 Mr Nelson stopped calling her to discuss strategies, unfairly blamed her for a stock shortage issue and supplier mistakes, required warehouse staff to work overtime to get orders out and set unrealistic budgets. She believed his attitude and correspondence was calculated to cause her resignation.

General behaviour

[50] It is accepted Mr Nelson spent some time teaching and assisting Ms van der Net into her role because she had never been a general manager before. It seems logical when Ms van der Net accepted the role in April 2015 Mr Nelson would cease training her including discussing strategies. If she could not fulfil the expectations of her role, she should not have accepted it.

[51] It was clear from his evidence that Mr Nelson has a direct manner. It may have appeared abrupt and unhelpful to Ms van der Net. He accepted he may at times have been upset with Ms van der Net for example when she missed a flight and Texco had to purchase a new ticket. He accepted his standard response to her mistakes would have been to tell her not to make the same mistake again but denied being inappropriate in his behaviour towards her. He did not recall any other criticism of Ms van der Net.

[52] His evidence was supported by Mr Broome's observations of Mr Nelson towards Ms van der Net. He believed Mr Nelson's behaviour was appropriate as between a manager and Board member. There is nothing in his behaviour to suggest he was colluding to have her employment terminated. She was also offered the General Manager role in April 2015 – it seems illogical for Texco do so if Mr Nelson and others were colluding to terminate her in March 2015.

[53] Two further examples of his behaviour about supplier mistakes and warehouse staff working overtime seem unrelated to collusion by the directors. Overall this behaviour appears to be a clash in management style and attitude between Ms van der Net and Mr Nelson. That type of disadvantage has not been raised and/or placed before me for determination.

[54] The evidence about Mr Nelson's behaviour as part of the directors' collusion is not persuasive. I am not convinced on the balance of probabilities it was inappropriate or calculated to cause her resignation in collusion with the other directors.

Budget expectations

[55] Mr Nelson produced emails between Ms van der Net and himself discussing the budget dated 30 March 2015. Ms van der Net appears to be in agreement with the budget. Despite the budget shortfall, the revenue achieved was close to expectations. The budget did not appear to be either unrealistic or designed for her to fail to achieve. It does not evidence collusion.

Stock Shortage

[56] It was agreed there was a stock shortfall that impacted upon the budget. Ms van der Net alleged Mr Nelson's emails regarding a stock shortage issue from 16 to 19 October 2015 were calculated to cause her to resign.

[57] I have read the email exchange. These emails are being exchanged after Ms van der Net has overheard the conversation between the directors but before she has told them. It is not improbable to suggest Ms van der Net's suspicions about the directors were heightened as a result of what she thought she heard.

[58] There is nothing on the face of the emails to suggest Mr Nelson was attempting to cause Ms van der Net's resignation. The tone of the emails is blunt but not abusive. Both parties clearly disagree about the cause of the shortage – Mr Nelson believes it was a process fault. Ms van der Net blamed his management of staff and late payment for an order. At best the majority of the emails appear to blame the others performance as causing the stock shortage. It is not until Ms van der Net's email dated 19 October that the issue of this behaviour "being calculated to cause [her] to resign" is raised.

[59] The stock issue was of legitimate concern to Texco. Identifying the source of problem was imperative given its direct effect upon profits. It would not be uncommon for the general manager of a company to be held accountable for this issue. Ms van der Net was the most senior and highly paid employee. Part of her performance measures required meeting budgets. Issues such as stock shortage

needed to be identified in advance and resolved before it impacted upon profits. I do not accept Texco's concerns about the stock issue evidenced collusion or any breach of good faith.

Disciplinary action

[60] Ms van der Net alleged Texco's aggressive and inappropriate approach undermined her confidence in her employer. This is primarily based upon its decision to implement disciplinary action about her recording.

Was Texco entitled to start a disciplinary process about the recording?

[61] An employer is entitled to start a disciplinary process where serious misconduct is alleged to have occurred. Serious misconduct is conduct which "*deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*"³ Secret recording of meetings by an employee without an employer's knowledge the employee would hear and record that discussion could destroy trust and confidence. This is a possible breach of the implied duty of fair dealing between the parties to an employment relationship.

[62] When the decision to instigate disciplinary proceedings was made on 29 October 2015, there was sufficient evidence Ms van der Net had recorded a directors meeting where a confidential purchase was discussed without their knowledge. It was not inappropriate for Texco to take the action it did. She cannot be disadvantaged by that decision.

[63] The disciplinary process was never completed because Ms van der Net resigned before this could occur. It is irrelevant whether her conduct was serious misconduct or not because that decision was never made by Texco.

Was there bias?

[64] Mr Witters was the complainant, investigator and decision maker. Ms van der Net alleges this disadvantaged her in her employment because he was a biased decision maker.

³ *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

[65] Bias is a predisposition to decide a cause or issue in a certain way which does not leave one's mind properly open to persuasion.⁴ The Courts have emphasised there is no requirement on an employer in carrying out disciplinary functions to be independent in the way a person acting in a judicial capacity would be required to be.⁵ Given the personal nature of the employment relationship, there can be no expectation that an employer will approach decision-making processes involving an employee unaffected by any prior knowledge or views.⁶

[66] It was agreed Mr Witters had little contact with Ms van der Net during her employment. The main protagonist, Mr Nelson was not involved in the disciplinary process. Mr Witters was aware of the tension between them. Mr Witters was unhappy about the recording of the meeting. This did not automatically equate to bias.

[67] His correspondence reads at times as insistent and perhaps a touch forceful. However it was not abusive or inappropriate. It requested information about the concerns arising from the serious misconduct. It also set out the possible consequences ranging from dismissal to suspension. Given Ms van der Net was represented at the time, it is not unreasonable to assume she was adequately advised about the correspondence irrespective of its tone.

[68] My impression from the correspondence between the parties is that by 4 November they had reached a standoff – unwilling to provide the other with any further information and/or to meet. This does not evidence bias or inappropriate behaviour by Mr Witters. Both parties have a statutory duty of good faith to be active and constructive. Neither appeared to be willing to take steps to resolve the conflict.

[69] By 16 November 2016 matters had changed. Mr Witters set out a fulsome reply about Ms van der Nets concerns regarding the 9 October meeting and mediation was arranged. This does not evidence Mr Witter's was biased or colluded with other directors to terminate Ms van der Net's employment.

[70] Given the above findings, I do not accept there was unjustifiable disadvantage by the collusion of directors to remove Ms van der Net from her position.

⁴ *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36 at [45].

⁵ *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36 [2015] NZCA 401 at [12]; *Keepa v Go Bus Transport Ltd* [2015] NZEmpC 180 at [31].

⁶ *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36 at [48].

Was there was a breach of good faith under s.4(1A)(c) of the Employment Relations Act 2000 (the Act) for the same behaviour?

[71] Given the above findings, there cannot have been any breach of the duty of good faith. I have found there was no collusion to terminate Ms van der Net's employment. Texco was not required to advise Ms van der Net about their discussions because no adverse decision about her employment had been made. No breach of the duty of good faith can occur in the circumstances.

Was there was a constructive and unjustified dismissal?

[72] It is accepted Ms van der Net resigned on 14 December 2015. However given my above findings, no course of conduct or breach of duty has occurred. Ms van der Net's subsequent resignation 4 days after the unsuccessful mediation could not in all probability have been foreseen as a consequence of Texco's action.

[73] The applications for personal grievance and penalties are dismissed.

[74] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority