

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

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BETWEEN LOIS CONNELLY, MICHAEL  
CONNOLLY and REAGAN  
FOX  
Applicants

AND MOORHOUSE KITCHEN  
AND APPLIANCES LIMITED  
Respondent

Member of Authority: James Crichton  
Representatives: John Shingleton, Counsel for Applicants  
Jeff Goldstein, Counsel for Respondent  
Investigation Meeting: 18 June 2009, 15 September 2009 and 17 September 2009  
at Christchurch  
Determination: 12 October 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant Lois Connelly (Ms Connelly) was, until her dismissal, the service clerk or service manager at the Christchurch operation of the respondent (Moorhouse Kitchens). The applicant Michael Connelly (Mr Connelly) was employed as a service technician in the service department of Moorhouse Kitchens Christchurch until his dismissal for redundancy. Mr Connelly is Ms Connelly's son. The applicant Reagan Fox (Mr Fox) was also a service technician employed by Moorhouse Kitchens until his dismissal for redundancy.

[2] Each of the applicants contends that they have been unjustifiably dismissed from their employment by Moorhouse Kitchens and also have raised disadvantage grievances and the facts of each claim being broadly similar, by common consent, the

three matters were heard together and it was agreed by counsel should be determined together. In each of the applicant's claims, it is alleged that they were subjected to disadvantage as a consequence of unjustifiable actions of Moorhouse Kitchens and that they were unjustifiably dismissed from their employment under guise of a restructuring proposal or, in Ms Connelly's case, that she was constructively dismissed but in a redundancy context. In relation to Ms Connelly, there is also a claim for unpaid wages and unpaid holiday pay.

[3] In fact, although not referred to in Mr Connelly's statement of problem, the allegation relating to unpaid wages and holiday pay related to both Ms Connelly and Mr Connelly but not to Mr Fox. In the result, that particular allegation is no longer proceeded with as it is clear from the documents before the Authority that the wages issue in relation to both Ms and Mr Connelly has now been resolved. A claim remains, however, in respect of the allegedly unreasonable delay in obtaining payment of those sums.

[4] In respect of the substantive allegations of personal grievance, Moorhouse Kitchens denies first that any of the applicants was unjustifiably dismissed and secondly that any suffered disadvantage as a consequence of any unjustified actions of Moorhouse Kitchens. In essence, Moorhouse Kitchens says that it undertook a legitimate and genuine restructure of its business which had had the consequence that all three applicants lost their positions because of the complete closure of the service department of Moorhouse Kitchens.

[5] Ms Connelly was employed initially as a service clerk on 19 January 2008 but in May of that year she was promoted to the position of service manager and it was in that capacity that she continued her employment until its termination.

[6] Mr Connelly was employed on 15 January 2007 as a service technician and remained employed in that capacity until the termination of his employment which is the subject of this proceeding.

[7] Similarly, Mr Fox was employed as a service technician on and from 27 August 2008 and remained in that capacity until the termination of his employment.

[8] In effect, the three applicants were the service department of Moorhouse Kitchens. In fact, the service department of Moorhouse Kitchens traded under its own

name and certainly was accounted for separately by Moorhouse Kitchens. Nothing turns on the issue of the name of the entity; for all practical purposes, the entity in which the applicants worked was the service department of Moorhouse Kitchens and that is the way it will continue to be referred to in this determination. The issue of the separate accounting for the service department is relevant of course in terms of the justification or otherwise for the restructure which resulted in the personal grievances being raised.

[9] Moorhouse Kitchens says that at all relevant times Ms Connelly would have been aware of the financial position of the service department, certainly since her elevation to the role of manager. Mr Early, the managing director of Moorhouse Kitchens, gave evidence that the monthly profit and loss statements were provided to Ms Connelly and that she was *well aware that I was very concerned with the profitability of the Service Department*.

[10] Ms Connelly denies receiving monthly profit and loss statements of the service centre. She told me that she operated without a budget and only knew about the cost of parts but nothing more than that. She said that she *saw no accounts that would disclose what was going on*.

[11] It is common ground that Ms Connelly received from Moorhouse Kitchens a steady succession of emails starting in September 2008 which point to Mr Early's anxiety about the financial performance of the service department. Mr Early refers in his evidence to a meeting with Ms Connelly on or around 21 October last concerning the service department's operation. Mr Early says the focus of that meeting was *the need to ensure that the centre was profitable*.

[12] Ms Connelly acknowledges that she was:

*... told regularly that we were going to be closed down but never got any actual evidence. It became like a bad habit. Mrs Early [Mr Early's wife and a fellow director of Moorhouse Kitchens] said that the accountant wanted to close us down. I was never given the financial information.*

[13] Mr Early, in his evidence, acknowledged that the company's perspective was that the service centre was unprofitable and that there was pressure for it to turn around profitability or there would need to be some restructuring. Mr Early denied that the comments made by himself and his wife were meant in anything other than an

entirely serious way. So far as Moorhouse Kitchens was concerned, the future of the service department was very much in issue and observations about its profitability and the prospect of it closing down by the Earlys were serious statements and not made lightly or frivolously.

[14] Mr Michael Connolly, when giving his evidence at my investigation meeting, told me that he had heard on a number of occasions that unless the service centre put through more work, it would have to close. Mr Connolly said that these observations made by either Mr or Mrs Early seemed to him to be made *almost as a joke*. But Mr Early was very clear to me that he and his wife were absolutely serious and there was no joke intended or implied.

[15] Concerning Mr Connolly's knowledge of the financial situation, Mr Early relies particularly on an email exchange that he had with Ms Connolly immediately after the meeting the pair of them had on 21 October 2008. In Mr Early's email, he recites the basic accounting information for the service centre, refers particularly to the overhead costs totalling \$180,000 on an annualised basis and points out that if the present rate of sales from the repair work generated by the two technicians continued for the whole year, there would be an annualised deficit of around \$60,000. Ms Connolly responds to that with her own observation, but also, according to Mr Early, intimates in her response that she acknowledges that the service department is at risk.

[16] On 10 December 2008, Ms Connolly complained to Mr Early via email that she was having difficulties with another staff member outside of the service department and she sought his intervention. Ms Connolly says that Mr Early did nothing to resolve the issue but the evidence suggests that Mr Early commenced a process of resolution but was overtaken by events.

[17] Eight days later, Mr Early conducted a brief interview with Mr Fox about whom there had been a complaint when Mr Fox had been in a customer's house. Mr Early's evidence was that the customer had brought the complaint to his attention, asked him to ensure that Mr Fox did not attend at the premises again but also did not want Mr Fox to be told who the complaint was from. Mr Early dealt with this by talking to Mr Fox and re-emphasising the need for Mr Fox to only go into those parts of a client's home that were absolutely necessary in order for him to perform his

duties. Mr Fox was not told then who the complaint was from and he now complains that he has had no real opportunity to address that issue.

[18] Later that same day (18 December 2008), Mr Early called a meeting of the service department staff (that is the applicants), he says to provide them with information about a possible restructure of the service department. His evidence was that Moorhouse Kitchens needed to take some action to address the service department's ongoing losses and that he had a proposal which would have the service department close with the loss of the three positions. However, Mr Early sought to avoid that outcome if at all possible and so his evidence is that the meeting of 18 December was designed to convey the information that the service department had been losing money for some time and that if a way could not be found of increasing revenue and decreasing costs, then the service department would have to close. Mr Early's evidence is that this statement of position was consistent with remarks that he and his wife had regularly made over time and which certainly were recalled by Mr and Ms Connelly (albeit not in the context of serious statements about the future).

[19] With one exception that I will come to shortly, Mr and Ms Connelly and Mr Fox all say that the message that they got from the 18 December meeting was simply that the service department was losing money and ways had to be found to make more money. The oral evidence of the three applicants was that at no time at the 18 December meeting was it made clear to them that the service department might close and/or that their jobs might be at risk. Ms Connelly, for example, told me that she asked Mr Early if his proposals meant closure and he said no. Mr Early absolutely denied say any such thing.

[20] The exception to which I have just referred is an email from Mr Connelly to Mr and Mrs Early dated 23 December 2008. This email concerned the 18 December meeting and what was said then, together with the downstream consequences of that meeting's conclusion. At three points in the email, the writer refers to having received the message of *closing the service department*. In his oral evidence, Mr Connelly said this contemporaneous email was wrong and his oral evidence denying receipt of that message was right.

[21] There is agreement that the 18 December meeting did discuss possible future options and the applicants went away from the meeting with a conviction that they might be able to provide some alternative strategies to Moorhouse Kitchens which

would assist with the profitability of the service department. They met after the 18 December meeting and together started scoping some alternative strategies.

[22] Those alternative strategies were advanced to Moorhouse Kitchens at a subsequent meeting on 19 December. It is clear that the applicants requested this meeting; Mr Early's evidence is that he had proposed that the parties meet again on 22 December (the following Monday), but Mr Early is clear that the applicants (through Ms Connelly) requested an earlier meeting and this took place on Friday, 19 December 2008. At that meeting, the applicants went through a number of possible scenarios. It is common ground that Mr Early was interested in these ideas and took extensive notes.

[23] Then, according to the applicants, without giving a proper opportunity to consider their suggestions, Mr Early wrote to them by letter dated 22 December 2008 in which he formally set out the proposal of restructuring and made crystal clear that the applicants' positions could disappear as a consequence of the possible restructure. The applicants say that they were devastated by receipt of this letter and that this was the first occasion on which they were told their jobs could go while Moorhouse Kitchens simply says that this letter did no more than crystallise the proposal that had already been verbally expressed at the meeting on 18 December while the process of considering the proposed restructure continued.

[24] There were subsequently meetings between the parties in January 2009 at which there was a further opportunity for discussion about alternatives to Moorhouse Kitchens' restructuring proposal. At a meeting on 15 January 2009, at which Ms Connelly, her solicitor, Mr Early and his counsel were all present, Mr Early took the opportunity of responding to the various initiatives which the applicants had worked up and presented to Moorhouse Kitchens at the meeting on 19 December 2008. Ms Connelly's solicitor sought to know what happened next and was told by Moorhouse Kitchens that Moorhouse Kitchens would need to meet first with the other two affected persons (Mr Connelly and Mr Fox), and then consider all of the information before making a final decision.

[25] The meeting with Mr Connelly and Mr Fox took place the following day on 16 January 2009 at which Ms Connelly was the support person for the other two applicants. Again, it is common ground that Mr Early went through his indicative responses to the proposals put to Moorhouse Kitchens by the applicants at the meeting

on the previous 19 December. For her part, Ms Connelly raised personal grievances on behalf of all three applicants.

[26] Of the issues that were canvassed in this exchange between the parties, one that clearly was not discussed at this time was the prospect that Mr Connelly and Mr Fox might contract back to Moorhouse Kitchens to provide the same service but on an independent contractor basis. That suggestion was not canvassed by either side until a letter from the applicants' counsel dated 26 January 2009 responding to Moorhouse Kitchens' counsel's letter of 23 January 2009, the latter having notified the applicants of the disestablishment of their positions.

[27] Moorhouse Kitchens' evidence is that from that point (the notification of disestablishment of the applicants' positions), all three applicants became disinterested in the workplace and indeed at best actively disengaged and at worst sought to sabotage the continuing business. Ms Connelly, for instance, denies the allegation of sabotage and claims she *treated the business as her own* and was *passionate about the customer*.

[28] At the end of January, there were two incidents which resulted in Ms Connelly and Mr Connelly leaving the workplace prematurely and in Ms Connelly's case resigning her employment without notice. Mr Fox, although he was tangentially involved in one of these incidents (which I will describe shortly), worked out his period of notice.

[29] On 28 January 2009, Mr Early spoke with all three applicants because he became aware that Mr Connelly and Mr Fox were proposing to disconnect a customer's appliance and had in fact already disconnected appliances in the showroom, entirely without authority. Mr Early's evidence is that he got no sense out of anyone and that the discussion broke up without resolution. Mr Early's evidence is that Mr Fox and Mr Connelly left the workplace early. In this incident, each party accused the other of becoming agitated and refusing to sensibly engage.

[30] There was a similar but more dramatic incident the following day when Mr Early went into Ms Connelly's office to talk to her about leaving the job early the day before. He also wanted Ms Connelly to remove a password that had been put onto the business's computer by her. I will need to discuss this extraordinary meeting in more detail; there were a number of witnesses to part of this conversation at least,

but fundamentally two different versions of events. Ms Connelly accuses Mr Early of *holding her hostage* in her own office while Mr Early contends that Ms Connelly was making notes about the meeting which were simply untrue and that he observed what she was writing down and it bore no resemblance to what was actually happening.

[31] In the result, in response to this meeting, both Ms and Mr Connelly's employment terminated that day by resignation while Mr Fox continued in his employment until the effective end date of his employment in terms of the redundancy.

[32] Personal grievances having been raised on behalf of all three applicants by Ms Connelly at the meeting with Moorhouse Kitchens on 16 January 2009, that early intimation of grievance was followed up by extensive and detailed correspondence from the applicants' counsel shortly after the departure of Mr and Ms Connelly from the workplace.

### **Issues**

[33] In order to resolve the issues between the parties, the Authority will need to consider the following matters:

- (a) What did the applicants know about the financial position of the service department?
- (b) What happened at the meeting on 18 December 2008?
- (c) What happened at the meeting on 19 December 2008?
- (d) What is the significance of the letter of 22 December 2008?
- (e) Do the meetings on 15 and 16 January 2009 add anything?
- (f) What happened at the incidents at the end of January 2009?
- (g) What about Mr Fox's disadvantage claim?
- (h) Was the redundancy a genuine one?
- (i) Was the redundancy process fair?
- (j) Is the counterclaim sustainable?

- (k) Was there a refusal to pay wages due?
- (l) Was the contractor option considered?

**Did the applicants know the financial position?**

[34] I am satisfied on the evidence before the Authority that Ms Connelly certainly knew about the financial situation that the service department was operating in. This is so despite Ms Connelly's oral evidence to the contrary. The email traffic between Mr Early and Ms Connelly as the manager of the service department over the period from September 2008 down to December 2008 quite clearly identifies that Mr Early, as the managing director of the employer, was concerned about the financial performance of the service department and through his manager Ms Connelly was endeavouring to address that issue and encourage remedial action.

[35] Furthermore, I think it is clear from the evidence that Mr Early and Mrs Early separately and regularly raised with Ms Connelly in particular their concern about the financial performance of the service centre and I do not accept Ms Connelly's contention that these observations were just some sort of "habit" without any force or effect. I prefer the evidence of Mr Early that the remarks were made because he and his wife were genuinely and reasonably concerned about the financial performance of the service department.

[36] While I think the evidence is clear that Ms Connelly knew perfectly well that the service department was not performing satisfactorily and knew also that Moorhouse Kitchens were concerned about that fact, the evidence also seems to me to be unequivocal that Mr Connelly also had heard Mr and/or Mrs Early regularly refer to the financial position of the service department. He told me in his oral evidence that he was *told ... quite a number of times from the outset of his employment* that the service centre was or might have to close or that if there was not more profitable work put through the service centre then it would be closed down. Mr Connelly regarded these regular observations as *almost a joke* and plainly did not take them seriously.

[37] Again, I prefer Mr Early's evidence that the remarks were not humorous in tone or intended to be taken as an attempt at humour but were serious observations about a real issue which was of concern to Moorhouse Kitchens.

[38] I am satisfied that only Mr Fox did not hear comments about the possible closure of the service department. That may well be because he had joined the business most recently some two years after Mr Connelly and not much more than three months before the December meetings.

[39] I am clear that Ms Connelly, as the manager of the service department, was well aware of the financial performance of the business. I accept Mr Early's advice that Ms Connelly was provided with regular monthly updates of the financial performance of the department and was in regular email contact with Mr Early about that performance and about his concern in relation to it.

[40] It seems to me entirely appropriate that Mr Early would have engaged with his department manager in this way and one would have thought that Ms Connelly would have accepted an obligation to ensure that the staff responsible to her, namely her son and Mr Fox, were generally aware of the financial performance of the department and of the employer's concern about that financial performance. Given that Ms Connelly subsequently represented herself as the support person for the other two, it seems unlikely that there was not pretty open discussion about the financial realities of their part of the business.

#### **What happened at the meeting on 18 December 2008?**

[41] The key question really is whether Mr Early did tell the three staff employed in the service department (the applicants) at this meeting that the service centre might be closed. It is common ground that at the meeting, Mr Early referred to a possible restructure, said that the service department was losing money and noted that there would need to be a concerted effort made to make more profit. But the three applicants are adamant (with one exception I will come to) that Mr Early did not say that the service department might close with a loss of jobs.

[42] Mr Early's evidence acknowledges that he indicated he would try to keep the department going, but he says that he explained the service centre *was ... and had been for some time losing money and that if we could not find a way of increasing revenue and decreasing costs then the centre will have to close*. Mr Early then goes on in his evidence to express some puzzlement about any surprise that this notification would have had because he had been talking about the financial problems of the

service centre for some time and as I have already noted in the previous part of this determination, I accept that evidence as truthful.

[43] In terms of the 18 December meeting though, despite Mr Early's evidence that he spoke of *closure*, the oral evidence of the three applicants is that none of them heard that message. I have to say that I was not persuaded by that evidence of the applicants. I preferred Mr Early's evidence that he had spoken about closure as that evidence was consistent with the regular references to the possibility of closure which the applicants (or two of them anyway) referred to in their evidence.

[44] Furthermore, Mr Early's evidence about the meeting is consistent with an email which Mr Connelly sent to Mr and Mrs Early dated 23 December 2008. This email, which Mr Connelly was quite unable to explain in his oral evidence, refers at three points to the possible closure of the service department and critically, at the beginning of the email, refers to the 18 December meeting and to Mr Early telling the applicants that he was looking to close the service department. That email was written a matter of days after the critical meeting and it therefore represents a contemporaneous written record in a way that is not true of the briefs of evidence prepared for my investigation meeting, or indeed the oral evidence that the applicants gave at that meeting.

[45] Mr Connelly was pressed to explain how he could have written a contemporaneous email referring to Mr Early talking about the closure of the service department and then deny on oath that was what Mr Early said. Mr Connelly had no explanation whatever for the difference between his email and his oral evidence except to say that he was mistaken in the email. I confess I prefer the other explanation, namely that he was mistaken in his oral evidence on oath and that the email correctly states that Mr Early spoke of the possibility of the closure of the service department at the meeting on 18 December.

[46] It is common ground that in the latter part of the 18 December meeting, the parties started to talk about ideas that might help to enable the service department to continue and the meeting apparently concluded on a reasonably positive note.

[47] I do not accept the applicants' contention that this 18 December meeting was unfair and prejudicial because they were not provided with an agenda in advance and not told to obtain legal advice. Mr Early says he called the meeting to provide the

service department staff with information. This meeting, I hold, was not part of the formal process of consultation but simply the initial meeting at which the employer provided information about a possible restructuring.

[48] It is also unchallenged evidence that the applicants met after the 18 December meeting to work up their ideas and those were presented at the 22 December meeting between the parties.

### **What happened at the 19 December meeting?**

[49] There is little controversy about the 19 December meeting. I am satisfied it was called at the request of Ms Connelly who sought to advance the timetable for considering the future of the service centre and wanted an opportunity to explore the options that the applicants had come up with.

[50] Mr Early is adamant that the applicants chose not to have representation at this meeting. The meeting was called by the applicants, not by Mr Early. He had suggested a meeting on 22 December and had proposed they bring their representatives to that meeting. Mr Early's evidence is that he proposed this at the 18 December meeting and I am satisfied that is what happened. I thought Mr Early a straightforward and truthful witness and I prefer his recollection of events to that of the applicants. In effect, the meeting on 19 December was the applicants' meeting. They called it and they could have had representation there if they chose.

[51] The 19 December meeting proceeded to consider a number of suggestions from the applicants and both parties gave evidence that Mr Early was positive and engaged in the process of discussion and took extensive notes.

### **What message does the 22 December letter convey?**

[52] By letter dated 22 December 2008, Mr Early wrote to the applicants individually and confirmed what he had told them at the meeting on 18 December. The message was expressed in quite unequivocal terms as follows:

*If this proposal proceeds your position as ... will be disestablished.*

[53] The evidence of the applicants is that they received this letter with (to quote from both Ms Connelly and Mr Connelly's briefs, expressed in exactly similar terms) *absolute consternation and emotional trauma*. Essentially what the applicants say is

that the receipt of this letter was the first occasion on which they were told that their position could be disestablished. They also wanted me to accept that receipt by them of Moorhouse Kitchen's letter of 22 December showed that Moorhouse Kitchens was not genuine about considering the options that they worked up and presented to Moorhouse Kitchens on 19 December.

[54] I deal with each of those contentions separately. As to the contention that this was the first occasion that the applicants were made aware that their positions might be disestablished, I have already made clear that I do not accept the applicants' evidence in that regard and that I am satisfied that the applicants were told formally that their positions might be disestablished at the meeting on 18 December 2008. I have also held that the applicants were well aware that the performance of the service centre was poor and that Moorhouse Kitchens was anxious about that performance and that that intelligence pre-dated the 18 December meeting by some months, certainly in relation to Ms Connelly, the manager of the service department.

[55] However, I would also make the point that even if this letter were the first notification of the possibility that the applicants might lose their positions, nothing whatever turns on that. Clearly the applicants must be told at some point that their positions are in jeopardy and whether they were told for the first time formally on 18 December or 22 December, is actually neither here nor there. I am satisfied that they were told formally for the first time on 18 December, but if it were four days later it would be of no moment in terms of the legal consequences.

[56] The real issue is the second contention which the applicants make, namely that Moorhouse Kitchens failed to properly consider their options for remaining open by sending the 22 December letter immediately after the 18 December meeting at which the applicants had presented their various suggestions.

[57] I do not accept that contention either. What the letter of 22 December does is quite properly set out in a formal way for the applicants' attention the consequences of the proposed restructure **if it is to proceed**. There is no intimation in the letter (nor could there be) that the decision to proceed with the restructure has been taken. What the letter says is that **if** there is to be a restructure, then on the basis of the restructure proposal that has been presented to the applicants, these are the consequences.

[58] This interpretation of events is absolutely consistent with the subsequent events. On 15 and 16 January 2009, Moorhouse Kitchens met with the applicants (first with Ms Connelly and secondly with Mr Connelly and Mr Fox) and responded to their various suggestions. Those suggestions were considered by Moorhouse Kitchens in the period from their delivery on 19 December down to 15 and 16 January when Mr Early responded to them.

[59] In summary then, I am satisfied that Mr Early's letter properly alerted the applicants to the consequences of the restructure, if the proposal floated by Mr Early went ahead. His letter, I accept, was simply a formal confirmation of what he had said at the information meeting on 18 December and in no way pre-judged the suggestions the applicants had made about alternatives to closure. The letter, I find, could not be clearer that, if the restructure as proposed were to take place, then the consequences would include closure. Nowhere does it say or imply that any other proposal, if adopted, would have the same effect.

#### **What happened at the meetings on 15 and 16 January 2009?**

[60] These meetings were, I find, simply part of the consultation process which Moorhouse Kitchens was obligated to undertake. The meeting on 15 January 2009 was a meeting with Ms Connelly and in that meeting, as I have already noted, Mr Early went through the various options which had been presented to him by the applicants at the meeting on 19 December 2008. He responded to each of the suggestions made.

[61] Mr Early repeated the process the following day with Mr Fox and Mr Connelly and it was at the second meeting that Ms Connelly (present as a support person for her son and Mr Fox) gave the employer notice of personal grievance in relation to the three of them and rather uncharitably told Mr Early that she would be relieving his company of a significant sum in compensation.

#### **What happened in the incidents at the end of January 2009?**

[62] The first of these incidents happened on 28 January 2009 and is really just a precursor to the events of 29 January 2009. At the first incident, Mr Early sought to get an explanation from Mr Fox and Mr Connelly about their disconnecting of appliances in the showroom and their apparent intention to disconnect a customer's

appliance. Mr Connelly gave me a long explanation about what he had in fact done, but the issue is not what he told me but what he told his employer.

[63] I am satisfied on the evidence before me that Mr Early was seeking an explanation in a reasonable way about a matter that was of concern to him as employer and I am further satisfied that he got no sense out of either Mr Fox or Mr Connelly at the time.

[64] The following day, 29 January, there was an extraordinary discussion between Mr Early and Ms Connelly. Mr Early's evidence (which I accept) was that he wanted an explanation about why Mr Fox and Mr Connelly had left the workplace early the previous day. Mr Early saw this as inappropriate, but the explanation tendered by Mr Connelly and Mr Fox apparently was that they were *stressed* by the discussion they had had with Mr Early the previous day. I frankly doubt that evidence and prefer Mr Early's recollection of the events. Mr Early was also anxious about the appearance of sabotage developing in the behaviour of the applicants and it was in that context that he had raised the disconnection of appliances issue with Mr Fox and Mr Connelly the previous day.

[65] When Mr Early sought to engage with Ms Connelly on 29 January he was concerned first to progress the sudden departure of the two service personnel the previous day, but secondly to get Ms Connelly to remove a password from the Moorhouse Kitchens' computer. Mr Early's evidence is that the nature of the discussion that he had with Ms Connelly did not involve him in raising his voice or becoming excitable and that he was simply trying to progress legitimate inquiries with a member of staff. Mr Early's evidence is supported by the evidence of a number of employees of Moorhouse Kitchens who overheard bits of the conversation between Mr Early and Ms Connelly. None of that evidence suggests anything other than a normal discussion.

[66] Ms Connelly, on the other hand, maintains that Mr Early shouted at her, became excitable and truculent and effectively kept her hostage in her own office while he berated her. She says that she called her son, Mr Connelly, on the telephone to attend at the office to protect her and she rang her counsel's personal assistant and reported to her that she was effectively under attack by her employer and being held hostage in her own office. Ms Connelly's counsel's PA gave evidence at my

investigation meeting of the notes that she took of those telephone discussions and I accept that what the PA told me was truthful.

[67] However, I do not accept that what Ms Connelly represented on the telephone was in any way truthful. I think she made up a version of events to create more drama and colour. I prefer Mr Early's evidence that he noted what Ms Connelly was writing down as the alleged notes of the discussion that she and he were having as being completely erroneous. That is, Mr Early maintained (and I accept) that what he saw Ms Connelly writing down bore no relationship to what was actually happening.

[68] I accept it is a reasonably extraordinary situation to have to make a finding that a witness is deliberately fabricating evidence, but that is my conclusion in respect to Ms Connelly's evidence on this point. I have to say that I did not find Ms Connelly or her colleagues, Mr Connelly or Mr Fox, either truthful or impressive as witnesses and in general I preferred the evidence of the employer wherever there was a conflict.

[69] Ms Connelly says she was constructively dismissed by the events of 29 January 2009 and her version of what she says Mr Early did to her on that day. I have already made clear that I do not believe her evidence. I am satisfied that Mr Early behaved appropriately. It may be that Ms Connelly was upset as she claims; however, no one who was physically present when the meeting concluded said she was upset. The evidence for her upset comes from her own mouth and from her counsel's personal assistant who I accept told me the truth about her telephone discussions with Ms Connelly. But, of course, the source of that last piece of evidence is again Ms Connelly herself and, as I say, I do not believe her.

#### **What about Mr Fox's disadvantage claim?**

[70] Mr Fox says he was disadvantaged by an unjustified action of Moorhouse Kitchens causing him disadvantage. On 18 December 2008 he was called to Mr Early's office to discuss difficulties with a particular job he had performed. The customer had complained to Mr Early that Mr Fox had been found in an area of the house that he did not need to be in. The customer told Mr Early they did not want to be named and simply wanted the balance of their work performed by someone else.

[71] Mr Fox told me he wanted an opportunity to put matters right with the customer and that he had been denied that by the way Mr Early handled the matter,

thus creating the disadvantage. Mr Fox said that, at the very least, he wanted to apologise to the customer and that he continued to be troubled by the issue.

[72] Mr Fox's contention, as with all disadvantage claims, relies on the establishing of the two elements to the claim, viz is there disadvantage to the grievant and is that disadvantage caused by an unjustified action (or actions) of the employer?

[73] In the present case, I am not persuaded that Mr Fox has demonstrated either element. On the facts, it is difficult to see what else Mr Early could do; the customer had refused to formally complain and refused to allow their name to be given. On the other hand, Mr Early would have been failing in his obligation to the business if he failed to take any steps at all. So I conclude first that Moorhouse Kitchens was not guilty of any unjustified action.

[74] Second, Mr Fox has not satisfied me he has suffered a disadvantage. There was no negative consequence to him. He was told of the issue and told it had been resolved. No warning was issued, no note placed on file nor was there any other consequence of a disciplinary nature.

[75] It follows that I do not consider Mr Fox's disadvantage grievance, on its own special facts, is made out.

#### **Was the redundancy a genuine one?**

[76] I am satisfied the redundancy was absolutely genuine. Evidence of the financial losses was provided to the applicants (Ms Connelly as manager in particular), and to the Authority in the investigation meeting through the medium of the employer's accountant. Mr Veitch (the Accountant) told me that the wages of the service department were barely covered by the sales, let alone all the other costs of running that part of the business. Mr Veitch also noted that there was no rental apportionment for the portion of the building occupied by the service department and if that were included, the result would have been even worse.

[77] It is clear law that where an employer has genuine commercial reasons for restructuring, the Courts will not interfere. The financial evidence for closure was provided to the Authority and is compelling. The applicants complain that they were not provided with *additional* financial information. But the applicants were provided with the same information that Moorhouse Kitchens used to make the restructuring

decision. I accept Mr Goldstein's submission that that is enough to meet the legal test.

### **Was the redundancy process fair?**

[78] Moorhouse Kitchens has an obligation to run a fair process in its restructure, to consult genuinely, to consider the results of that consultation, to provide proper credible information and to try to *accommodate* the views of the affected employees. As the Chief Judge said in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 82 at para.[62]:

*Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then 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.*

[79] Furthermore, Chief Judge Colgan emphasises in the same decision that s.103A applies to all personal grievances, including those involving redundancy. And critically, His Honour emphasises that the essential elements of the consultation process which I listed above are strengthened by the requirements of s.4 of the Employment Relations Act 2000.

[80] I am satisfied that Moorhouse Kitchens has met its *process* obligations, including its obligations to behave with good faith. There was a meeting to set out the initial working hypothesis on 18 December, a response back with the employees' options, which was carefully and thoroughly considered over a reasonable period of time, a reporting back by the employer and only then was a decision conveyed to disestablish the service department with a loss of those positions.

### **Is the counterclaim sustainable?**

[81] Moorhouse Kitchens says that Ms Connelly sabotaged its operation once the possibility of redundancy became apparent. She did this, it is said, by failing to follow instructions of the employer and taking steps which either reduced revenue or increased costs or both. A particular example is alleged to be Ms Connelly's decision to send out the two technicians together to a job when one would have done.

[82] I accept that the evidence discloses that Ms Connelly was disgruntled about the prospect of losing her position and behaved badly, but I do not think it goes so far as to show actual economic harm was caused by her to Moorhouse Kitchens.

**Was there a refusal to pay wages due?**

[83] The applicants (Ms Connelly and Mr Connelly) say there was an unreasonable delay in the provision of their final pays and that it required the intervention of their lawyer to extract the money. Moorhouse Kitchens allege they were paid the final entitlements promptly enough but rely on the provision in the employment agreements allowing deductions for monies owing back to the employer.

[84] I agree with Mr Shingleton that such a provision is not “an authority to withhold wages”. I also agree that there was a delay in the payment of final wages and that reliance on the clause allowing for deductions of money owed back is misplaced. Wages are due and owing as soon as practical after the period in which they are earned and the same general provision applies to final pays.

[85] In the present case, final pays were made up and paid approximately two and a bit weeks after the employment suddenly and unexpectedly terminated and in these circumstances, I decline to award any penalty for actions I do not consider wrongful.

**Was the contractor option considered?**

[86] Much was made of the contractor option at the investigation meeting. It was contended that Moorhouse Kitchens failed to properly consider this option which might have well suited Mr Fox and Mr Connolly. However, the difficulty with this thesis is that the evidence is clear that this proposal was not suggested by the applicants in their list of options presented on 19 December 2008 and indeed was not advanced at all until 26 January 2009 in a letter between Counsel, after Moorhouse Kitchens had made a decision to close the service department.

[87] In my opinion, a fair and just employer is not obligated to “re-open” a restructuring process to consider a proposal that was not made in a timely fashion. If the applicants had wanted to have this matter considered by Moorhouse Kitchens, it would have been available to them to raise it as part of their suggestions at the 19 December meeting.

[88] It follows that I do not consider the employer's behaviour can be criticised in this regard.

### **Determination**

[89] I am satisfied that neither Ms Connelly, Mr Connelly nor Mr Fox have any personal grievance in respect to the actions of Moorhouse Kitchens. In my opinion, there is not a shred of evidence to suggest that the restructuring attended to by Moorhouse Kitchens was not anything other than an absolutely genuine attempt to deal appropriately with an entirely unsatisfactory financial situation. I consider that Moorhouse Kitchens applied a proper process to dealing with the employment consequences of that restructure and that the attempt by Ms Connelly, Mr Connelly and Mr Fox to create a grievance each out of that process is simply that, a creation.

[90] It follows that the grievances all fail in their entirety.

[91] I also dismiss the counterclaim as I do not consider the evidence supports any actual loss having been suffered.

[92] For the avoidance of doubt, I set out below the Authority's conclusions:

- (a) Ms Connelly's claim of constructive dismissal is unsuccessful as is her claim of having suffered disadvantage by unjustified actions of the employer in the process of the redundancy.
- (b) Mr Connelly's claim to have been unjustifiably dismissed for redundancy is also unsuccessful as is his claim to have suffered disadvantage by reason of an unfair redundancy process.
- (c) Mr Fox's claim for unjustified dismissal for redundancy fails as does his claim for disadvantage both by an unfair redundancy process and an unfair process in dealing with a customer complaint.
- (d) The counterclaim also fails.

### **Costs**

[93] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority