

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 299
3046216

BETWEEN MARIA LODGE
Applicant

AND SMITH & SMITH
ENTERPRISES (2018) LIMITED
Respondent

3049792

BETWEEN SMITH & SMITH
ENTERPRISES (2018) LIMITED
Applicant

AND MARIA LODGE
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Margaret Revell for the Applicant
Kirsty McDonald for the Respondent

Investigation Meeting: 01 April 2019

Submissions [and further
Information] Received: 04 April 2019 from the Applicant
04 April 2019 from the Respondent

Date of Determination: 22 May 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Smith & Smith Enterprises (2018) Limited (Smith & Smith) is the owner of New World, Tokoroa. Maria Lodge was employed by Smith & Smith from 6 August 2018 as a Checkout Manager. Prior to that time she had worked for a period of approximately 18 years for other owners of Tokoroa New World.

[2] In September 2018 Ms Lodge resigned. She alleges she was constructively dismissed and suffered disadvantages to her employment. She claims lost wages, compensation for hurt and humiliation, and a penalty for breach of good faith. Ms Lodge's claim is denied by Smith & Smith. It maintains Ms Lodge resigned of her own accord and not due to any breach or any unjustified action on its part.

[3] Smith & Smith filed a cross claim alleging that Ms Lodge breached the express terms of her individual employment agreement (IEA), her implied duty of fidelity, and her statutory duty of good faith by working for a third party whilst on sick leave and working out her notice period. It seeks damages and penalties. Its claim is denied by Ms Lodge.

[4] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Issues

[5] The issues requiring investigation and determination were:

- a. Did Ms Lodge suffer an unjustified disadvantage to one or more conditions of her employment?
- b. Was Ms Lodge constructively dismissed?
- c. If so, was this justified?
- d. If Ms Lodge suffered an unjustifiable disadvantage, or was unjustifiably constructively dismissed, what remedies should be awarded?
- e. If any remedies are awarded, should they be reduced for blameworthy conduct by Ms Lodge that contributed to the situation giving rise to her grievance?
- f. Did Smith & Smith breach its duty of good faith? If so, should a penalty be ordered?

Counterclaim

- g. Did Ms Lodge breach the terms of her IEA and/or her implied duty of fidelity and/or her duty of good faith?
- h. Should either party contribute to the costs of representation of the other party?

Relevant background facts

[6] Following the purchase of Tokoroa New World, Smith & Smith identified areas for improvement in several of its departments including checkouts. As a consequence, following the acquisition of the business on 6 August 2018, Mr Smith met with each of the store's departmental managers, including Ms Lodge, to address the implementation of the changes that affected their respective departments.

7 August 2018

[7] On 7 August 2018 Mr Smith met with Ms Lodge to discuss the appointment of three checkout supervisors to assist with the smooth running of an alcohol policy.

[8] During the meeting Ms Lodge agreed that the appointment of these supervisors was necessary, but expressed unhappiness when Mr Smith advised her that the HR Administrator was to attend to the hiring of these staff members.

[9] Mr Smith explained to the Authority that as Ms Lodge was going on annual leave from 9 August 2018, he did not consider she would have sufficient time to undertake the recruitment. When Ms Lodge raised concerns about this during the meeting, the parties agree that Mr Smith advised her that she would be involved in the interviews. Ms Lodge said she felt this was "great news and felt she had been listened to".

[10] Ms Lodge was on annual leave from 9 August to 19 August 2018.

29 August 2018 – morning events

[11] On 29 August 2018 Mr Smith and Darin Morgan, the Store Manager, came to the checkout area where Ms Lodge was working. Mr Smith asked Ms Lodge how refunds occurred and she explained the process. Mr Smith then asked Ms Lodge to move the refund till to a different line as the surveillance camera was not working on

the line she was working on. He further told her not to do any more work on that line until he told her the camera was working.

[12] Ms Lodge took offence to the request. She said she felt the request was made in a “vicious and aggressive” tone of voice. This is denied by both Mr Smith and Mr Morgan.

[13] After speaking to Ms Lodge about the camera Mr Smith said words to the effect that he and Mr Morgan wanted to have a meeting with Ms Lodge to discuss various matters at checkout.

[14] Following this request Ms Lodge became worried. She recalled seeing the security camera in her office being left watching her computer and fretted about the purpose of the meeting.

29 August 2018 – the afternoon meeting

[15] When the meeting had not been convened by the time Ms Lodge finished for the day, she decided to return and ask that the meeting take place. Mr Smith explained to her that they could catch up the following day and she needn't be worried. He reassured her that she was not in trouble and that the meeting was so that he could address problems that were arising at checkouts.

[16] The meeting went ahead with the parties discussing numerous issues and the implementation of changes. Ms Lodge said she agreed with the changes but expressed concern that implementation may be difficult due to being short-staffed. Mr Smith acknowledged her concern but said he wanted the changes done. He told her that he was able to support her with addressing these changes.

[17] The next part of the conversation is partly in dispute. Having heard from the parties I find the following occurred.

[18] Mr Smith told Ms Lodge that she needed to be concentrating on the checkout and was not to be doing any work on the food safety programme. Ms Lodge was visibly upset and asked to keep working on the food safety programme. Mr Smith handed Ms Lodge a tissue and said words along the lines that she should “stop welling up”. I pause here to note that I do not accept Ms Lodge's oral evidence that Mr Smith threw the box of tissues at her. This is inconsistent with the notes taken by Ms Lodge

shortly after the meeting, her personal grievance letter that stated she was “handed the tissues”, her resignation letter, as well as Mr Smith and Mr Morgan’s recollections.

[19] Mr Smith then reiterated that he wanted Ms Lodge to concentrate on checkout. She couldn’t do that and food safety. He suggested they catch up again later to go over things when she was feeling better.

[20] Upon leaving this meeting Ms Lodge slammed the door.

30 August 2018

[21] On 30 August 2018 Mr Morgan and Ms Lodge spoke. Mr Morgan asked Ms Lodge how she was after the meeting. Ms Lodge expressed concern about the tone of voice that Mr Smith had used with her on 29 August. Mr Morgan did not agree that Mr Smith had used an inappropriate tone but suggested they speak to Mr Smith about this. Ms Lodge refused.

31 August 2018

[22] Mr Smith had previously asked Ms Lodge to ensure her staff did not leave purses or mobile phones in the office. On this day he noticed a mobile phone in the office. He beckoned for Ms Lodge, who was working on checkouts, to come over to him. He then said words to the effect that he had made it clear that he did not want mobiles in the office and if she didn’t take appropriate action then he would. Ms Lodge said he was pointing his finger in her face while saying this. This is denied by Mr Smith.

4 September 2018

[23] On 4 September 2018 New World received a customer complaint. Upon reviewing the video footage of the incident, Mr Smith and Mr Morgan became aware that Ms Lodge was involved.

[24] Mr Morgan asked to talk to Ms Lodge about this. He told her that the video footage showed a customer waiting for eight minutes at the Lotto counter and café for Ms Lodge to serve her. Ms Lodge explained that she had been getting her daughter’s lunch and apologised to Mr Morgan that the customer had to wait.

[25] There is a dispute as to whether Ms Lodge asked Mr Morgan to view the video footage. I find it more likely than not that she did not. Mr Morgan had already told

her what the video showed, she was familiar with the events that took place, and she had full access to the camera footage from her office if she had wanted to view the footage.

[26] Mr Smith then joined the conversation to discuss unrelated checkout matters. This included a request for Ms Lodge to investigate staff taking excessive breaks. Mr Smith had viewed staff on the weekend taking 25 minute breaks, instead of their rostered 15 minute breaks, and asked Ms Lodge to follow up on this. He told her that if the staff continued to abuse their breaks they would face disciplinary action.

[27] Ms Lodge informed Mr Morgan and Mr Smith that she was trying her hardest to implement the new rules, but she didn't have enough resources and was short-staffed. She also explained it was hard when her staff saw other staff in other departments not following the rules. Mr Smith replied he was aware what was happening in other departments, but she needed to focus on her own team.

[28] Ms Lodge's slamming of the door on 29 August 2018 was also addressed. Mr Smith advised Ms Lodge that he would not tolerate that sort of behaviour and, if it continued, they could be parting ways. Ms Lodge explained that the door handle had slipped from her hand and apologised.

[29] Mr Smith concluded the meeting by suggesting that he have 15 minute daily meetings with Ms Lodge, starting the following day, to discuss checkout and go over any issues she had with her team. Ms Lodge agreed.

5 September 2018

[30] On 5 September 2018 Ms Lodge had a number of tearful conversations with her partner about how she was feeling about work. The outcome of those discussions was that she decided to resign.

[31] Later that day she met with Mr Smith at their scheduled catch-up. She had a handwritten resignation letter with her.

[32] Mr Smith noticed she was upset and asked her if she was okay. Ms Lodge responded with words along the lines that she was not happy, felt she was failing miserably, and was terrified of meeting with him because her meetings with him

ended with her in tears and feeling like a failure. She said she had spoken with her husband and then handed Mr Smith the resignation letter and her keys.

[33] Mr Smith stopped Ms Lodge and told her that they needed to discuss this. He reassured Ms Lodge that his concerns were not about her. He said if there were problems at the checkouts this was something that they needed to address and that he was there to help her in her managerial capacity.

[34] The parties then proceeded to have, what Ms Lodge described as, a “decent meeting”. She said:

25 I sit back down and we have a decent meeting about how I came to get the role as Checkout Manager and how I had no formal training on dealing with large teams, I explained how important the food safety programme was to me, how I loved dealing with customers and was good at it, I explained how checkout wasn't something I wanted to do but took on because I knew I could do it. How all these different roles were added to my job. I said how if I could I would give up checkout and do my food safety and something to do with customer service, but that if I was just coming in to do food safety for eight hours a week that wouldn't motivate me to come into work for just eight hours.

26 Viv said that I was always defensive with him, to which I said that was because every meeting I had ever had with him was me ending up in tears.

27 Viv explains how he didn't know all this and would come up with something if I didn't want to do checkout he would contact Foodstuffs to see how long a programme would take in a store this size and we would have a meeting the next day at 8am to discuss some ideas. I asked if I could go home to think things over, to which he agreed and I left feeling like finally the lines of communication were open again.

6 September 2018

[35] The parties met again on the morning of 6 September 2018. Ms Lodge said she was feeling very positive after the discussions held the previous day, but still felt a bit anxious. Mr Smith was also feeling positive about the meeting the day before and conveyed this to Ms Lodge who said she told him “I went away feeling really good”.

[36] The conversation then turned to a discussion about a food safety role at New World. Ms Lodge said she told Mr Smith:

I owe that to you and to myself to give you a opportunity to come up with a plan after 18 years of working here I really don't want to end it like this, at least if you tell me what you have in mind I can tell you if I think I want to give it a go and if I don't like your proposal then we can go our own separate ways, with me wishing you good luck and me going on to do my own thing.

[37] Mr Smith told Ms Lodge that he was still awaiting a reply from the food safety specialist at Foodstuffs to see how many hours a week Ms Lodge would need to work to keep the food safety programme up to date. He went on to say that in the meantime he thought there was another option that may be available. This was for Ms Lodge to contract herself to the store to run the food safety programme. Ms Lodge was receptive to this and they discussed her desire to continue on with this programme.

[38] What happened next is in dispute. Having considered both parties' evidence, I find it more likely than not that the parties agreed Ms Lodge would step down from her role as checkout manager and Mr Smith would find another role for her that included food safety. If she was not happy with the proposed role then she intended to resign and "go our own separate ways".

[39] I am fortified in this finding by the discussions between the parties on 5 and 6 September that I have already detailed. In addition, at the meeting on 6 September the parties discussed a replacement for Ms Lodge's role, with Ms Lodge advising "I have a couple of people [I could put forward] but I would have to ask them if they are interested". The parties agreed Ms Lodge would organise a meeting the following week with all her supervisors to discuss what was happening at checkout. In answer to questions from the Authority she said she expected to announce at that time that she was standing down as checkout manager and to see if anyone wanted to fill the role. Following the meeting Ms Lodge advised her supervisors of the planned meeting.

The managers' meeting

[40] Immediately after this meeting a departmental managers' meeting took place. Although Ms Lodge had received a general email inviting her to this meeting, she was told by Mr Smith that she was not required to attend because the meeting concerned matters that did not involve her department.

[41] At the end of the meeting, Mr Smith decided to address rumours that had been circulating in the store about Ms Lodge resigning. He mentioned to the managers present that Ms Lodge had decided to step down as checkout manager and he was discussing with her the details of the role that she would have moving forward.

[42] Following this meeting Ms Lodge became aware of the comments made by Mr Smith at the manager's meeting. She spoke with Mr Morgan. She explained that she was upset that Mr Smith had told the managers that she was stepping down.

Ms Lodge then asked Mr Morgan what his take on the earlier meeting with Mr Smith was. He told her that it was his view that she had agreed she was stepping down as checkout manager and Mr Smith was now looking for a new role for her that included food safety. Ms Lodge did not correct Mr Morgan's view of their conversation. Mr Morgan then asked if she wanted him to talk to Mr Smith about it or if she wanted to do that herself. Ms Lodge told him to "leave it".

The sick leave

[43] Later that evening Ms Lodge sent an email to Mr Smith and Mr Morgan advising them that she would not be in to work the following day as she was not feeling well. She advised:

I have been throwing up, and have a huge headache, I have barely had any sleep this week because of all these issues at work. I believe it is stress related from all that has been happening. I feel totally embarrassed and miserable about how this whole situation has been handled and not it is starting to effect my health and well being. To be honest I really thought we were starting to get some communication going after yesterday's meeting but the way things were handled in the managers meeting today, when I believed we were still in consultation has made me feel isolated, embarrassed and distrusted by long term team members. This has caused me terrible stress to the point where I feel I need to get medical attention.

[44] Mr Smith replied the following day, informing her that he was sorry she was not feeling well and advising the last thing he wanted was to cause her any stress. He advised he was happy to sit down with her and discuss her concerns when she was feeling better the following week and would try and resolve them as soon as possible. He assured her that her health and wellbeing was important to him as he had mentioned on several occasions.

[45] This email was followed up with a similar email on 14 September 2018, which reiterated that Ms Lodge's health and wellbeing was of the utmost importance to Mr Smith and if there was anything that he could do to help then he was happy to discuss this with her. He also offered to grant her sick leave in advance of her entitlements to which she agreed. She advised him that she would not be back at work until she had clearance from her doctor. Mr Smith thanked Ms Lodge for the update and told her to let him know if there was anything more he could do to help.

[46] On 19 September 2018, Ms Lodge raised a personal grievance. Her letter maintained that her employment had come to an end; she had been constructively dismissed, and she was seeking lost wages for 6 months.

[47] Mr Smith replied advising that he would respond once he had received legal advice.

Resignation

[48] On 25 September 2018 Ms Lodge tendered the resignation she had prepared prior to the meeting on 5 September. Her resignation was said to be “effective immediately” although the email from her representative that accompanied this letter asked Mr Smith to advise what notice period was required.

[49] In response to questioning from the Authority Mr Smith said he accepted Ms Lodge’s request to end her employment immediately and considered the employment relationship ended on 25 September 2018. Consistent with this agreement he thereafter notified staff that Ms Lodge had resigned and asked the Company’s health insurer to stop her insurance. Correspondence from the insurer shows Smith & Smith stopped paying for Ms Lodge’s health insurance by 28 September 2018.

[50] In these circumstances I find the employment relationship came to an end, at the latest, on 25 September 2018.

[51] On 28 September 2018 Ms Lodge commenced working for a third party.

[52] On 1 October 2018 Mr Smith wrote to Ms Lodge expressing disappointment at her resignation. He advised that he didn’t accept there had been any threats or demotion as claimed however he would provide a more fulsome response as soon as he could. He also pointed out that he didn’t agree that Ms Lodge had been pushed out or that the relationship had broken down. He maintained that he “would be very happy to continue the positive discussions we were having about an arrangement that would suit Maria, however if her decision remains that she wishes to resign, I will respect that decision”. He concluded by advising that he agreed to attend mediation and, in terms of Ms Lodge’s notice period “if Maria is unwell then I do not expect her to work her notice period”.

Issue 1: Did Ms Lodge suffer an unjustified disadvantage to her employment?

[53] Under s 103(1)(b) an employee may commence a personal grievance claim if one or more of the conditions of the employee's employment have been affected to the employee's disadvantage by an unjustifiable action by the employer.

[54] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

Alleged disadvantage due to removal of duties

[55] Ms Lodge claims that she was unjustifiably disadvantaged when Smith & Smith removed her food safety duties on 29 August 2018. For reasons that will become apparent, I disagree.

[56] Ms Lodge was provided with a draft IEA on 11 July 2018. She then had a period of 3 weeks to seek independent legal advice and to clarify any aspect of the IEA with Mr Smith, an option that she took up.

[57] The IEA contained a detailed description of Ms Lodge's role and duties. "Food safety" was not included. Ms Lodge said she was aware of this before executing the IEA but decided not to raise it with Mr Smith as she believed he was not willing to negotiate the terms of the IEA. She hoped to address this at a later stage but this did not occur.

[58] With knowledge that her role did not include "food safety" Ms Lodge accepted the terms and conditions and executed the IEA on 2 August 2018. This IEA replaced any implied conditions, based on custom or practice, which Ms Lodge had enjoyed with former employers.

[59] Following commencement of her employment it is unlikely that Ms Lodge undertook any food safety role for Smith & Smith in the 10 days between when she returned from holiday and Mr Smith advising her not to undertake duties outside of

check out. Certainly, the evidence was clear that this was not a task that she was asked to perform.

[60] Ms Lodge has failed to discharge the onus of establishing that one or more terms or conditions of her employment were affected to her disadvantage.

Alleged disadvantage arising due to failure by Smith & Smith to respond

[61] While not identified as an issue during the initial case management conference held with the parties, submissions filed on behalf of Ms Lodge pursued an additional claim of disadvantage that was pleaded in the Statement of Problem as follows:

Unjustified disadvantage – determine if IEA Dispute Resolution clause has an adequate process to resolving disputes as it caused disadvantage to resolving issues when presented to the Employer. Between the email 6 September up to resignation formally being handed in on 25 September the Employer made no attempt to respond to the issues with a view to resolving it either formally or through MBIE when the request was first made on 19 September.

[62] Having reviewed the IEA I find it complies with s 65(2)(vi) of the Act in that Clause 28 contains a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised.

[63] I am also satisfied that the actions taken by Smith & Smith following receipt of Ms Lodge's email correspondence of 6 September 2018, up to receipt of her resignation on 25 September, were what a fair and reasonable employer could have done in the circumstances.

[64] Up until receipt of Ms Lodge's personal grievance letter on 19 September 2018, Smith & Smith was not aware of the issues that Ms Lodge considered were affecting her employment. She did not bring to Smith & Smith's attention any of the matters that she raised in her personal grievance including that she had not agreed to step down from her role as checkout manager. This is despite Mr Morgan advising her that this was his understanding of what had been agreed at the meeting on 6 September and despite Mr Smith's emails of 7 and 14 September 2018 where he sought to have meetings with her to discuss her concerns.

[65] It was not until 19 September 2018 that Ms Lodge raised her concerns. Her personal grievance letter maintained that Mr Smith's "actions and comments to other

employees have resulted in the employment relationship ending”, that she had been constructively dismissed and she sought lost income “to cover 6 months and contribution to legal costs”. She further asked Smith & Smith if it would attend mediation. Mr Smith immediately responded advising that he would respond substantively as soon as possible.

Finding on issue one

[66] Ms Lodge did not suffer an unjustified disadvantage to one or more of the terms or conditions of her employment.

Issues two and three: Constructive dismissal and duty of good faith

The legal position

[67] The legal principles relating to constructive dismissal are well established and are not in dispute. Constructive dismissal includes, but is not limited to, cases where:¹

- a. An employer gives the employee the choice of resignation or dismissal;
- b. An employer follows a course of conduct with the ‘deliberate and dominant purpose’ of coercing an employee to resign;
- c. A breach of duty by the employer leads an employee to resign.

[68] Submissions filed on behalf of Ms Lodge rely on the third of these categories. The Statement of Problem pleads Smith & Smith breached its duty of trust and confidence by:

failing to provide alternate position before announcing to Managers that Maria had stepped down. Maria felt pushed out of her employment and when members from New World and its customers were informing her she had left, she lost confidence that Viv wanted her and most of all valued her.

[69] In reference to the third category of case, the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* stated:²

¹ *Auckland Etc Shop Employees Etc IUOW v Woolworths (NZ) Limited (NZ) Ltd* [1985] 2 NZLR 372.

² [1994] 1 ERNZ 168 (CA).

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 the 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.

[70] In *Hamon v Coromandel Independent Living Trust* Judge Perkins confirmed that the duty of trust and confidence the Court of Appeal referred to in *Auckland Electric Power Board* is now encapsulated in s 4(1)(a) of the Act which requires the parties to an employment relationship to deal with each other in good faith.³

[71] Section 4(1A)(a) specifically provides that such a duty “is wider in scope than the implied mutual obligations of trust and confidence”. Section 4(1A)(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[72] If, after applying the above principles, the Authority concludes that there has been a constructive dismissal, it must then determine objectively whether it was justifiable in terms of the statutory test of justification under s 103A of the Act. To this end, Smith & Smith must satisfy the Authority that its actions were what a fair and reasonable employer could have done in all the circumstances at the time.

Analysis

[73] Against the foregoing legal background, I turn to consider the first question posed by the Court of Appeal in *Auckland Electric Power Board*. Whether it can be said, after examining all the circumstances that Ms Lodge’s resignation was caused by a breach of duty on the part of Smith & Smith. Namely, a breach of its implied duty of trust and confidence.

[74] Having carefully assessed the evidence of the parties I conclude that Smith & Smith did not breach either its implied obligations of trust and confidence or its statutory duty of good faith by announcing Ms Lodge was stepping down before an

³ [2014] NZEmpC 54 at [49].

alternative position had been agreed. Nor did it breach its duties by failing to “act on Maria’s concerns when the email was sent on 6 September 2018”.

[75] In terms of the allegations regarding stepping down:

- a. At all material times I find Smith & Smith engaged in good faith with Ms Lodge about her role. It provided support to her for her role, explored alternative role options with her when she expressed a desire to work in food safety rather than as check out manager, and made a commitment to her that it would make an alternative role work. Prior to Mr Smith making the announcement to the departmental managers, Ms Lodge had agreed to step down, had agreed to ask certain members of her staff if they were interested in the checkout manager role and had agreed to organise a meeting the following week with all her supervisors to confirm that she was stepping down. All that remained to be done was for Mr Smith to confirm the exact number of hours that would attach to the food safety aspect of her role and those that would make up the additional hours of work.
- b. In those circumstances, Mr Smith’s actions in announcing Ms Lodge was stepping down from her role as check out manager, prior to a new role being finalised, could not be viewed as dismissive, repudiatory or intended to undermine the parties’ relationship of trust and confidence. In light of the rumours circulating in the store regarding Ms Lodge resigning, I accept Mr Smith acted appropriately, and with proper cause, by notifying the department managers that she was stepping down (not resigning) and he was discussing another role with her. This information was just enough to quash the rumours.

[76] In terms of the allegations regarding failing to act on Ms Lodge’s concerns after 6 September 2018, communications from Mr Smith show that he was actively and constructively engaging with Ms Lodge in order to maintain the employment relationship while Ms Lodge was on sick leave. His emails of 7 and 14 September 2018 show him advising that he wanted to meet with her and discuss her concerns when she felt better. On 17 September 2018 he again checked in on Ms Lodge and asked if there was anything he could do to help. Immediately after receiving her

personal grievance letter Mr Smith responded and advised he would respond following advice being sought. He emailed her on 1 October 2018 expressing his disappointment at her resignation and advising he would be “very happy to continue the positive discussions we were having about an arrangement that would suit Maria” He concluded by advising that he agreed to attend mediation.

Additional comments

[77] For completeness, I also considered various other conduct identified by Ms Lodge as occurring prior to her resignation to assess whether this conduct, viewed either in isolation or together with the matters I have addressed earlier, could be viewed as a breach of a duty. I am satisfied they cannot.

[78] In terms of Mr Smith calling Ms Lodge “Marie” instead of “Maria”, I accept Mr Smith’s evidence that this was unintentional. The parties’ relationship was short. Ms Lodge only commenced employment with Smith & Smith on 6 August, took annual leave from 9 to 19 August and then went on sick leave from 6 September. She did not work weekends. With over 100 staff it is not surprising that Mr Smith may have called her the incorrect name in the early stages of the employment relationship.

[79] The allegation that Ms Lodge was not supported, and was under resourced, is not borne out by the evidence. I accept Mr Smith and Mr Morgan’s evidence that Mr Smith offered support to Ms Lodge in the meeting on 29 August 2018 and 4 September 2018. He suggested that they have 15 minute daily catch ups so that Ms Lodge could raise any concerns or issues she had so that Mr Smith knew what resources Ms Lodge needed. In addition, on 7 August 2018, Mr Smith advised Ms Lodge he would be hiring 3 new supervisors for the checkouts. Mr Morgan confirmed during questioning that two new employees were hired for checkouts during Ms Lodge’s employment.

[80] I also find, on balance, that there is insufficient evidence of any inappropriate or bullying conduct by Mr Smith. I am not persuaded that Smith & Smith was using its surveillance cameras to watch Ms Lodge, nor that Mr Smith raised concerns about check out as an excuse to “pick on” Ms Lodge. The matters raised by Mr Smith were genuine concerns that required addressing. In addition, while Mr Smith’s tone may, on occasion, have caused offence to Ms Lodge, the evidence is not sufficient to

establish that this was substantial enough to destroy or at least seriously undermine trust and confidence.

Finding on issues two and three

[81] Smith & Smith did not breach either its implied obligations of trust and confidence or its statutory duty of good faith. Ms Lodge was not constructively dismissed.

Issue Four: Counterclaim

[82] Smith & Smith filed a separate statement of problem. This claim alleged that Ms Lodge breached the express terms of her IEA, her implied duty of fidelity, and her statutory duty of good faith by working for a third party whilst on sick leave and whilst working out her notice period.

[83] As foreshadowed to the parties at the investigation meeting I do not find strength in Smith & Smith's claim that Ms Lodge breached the IEA or her duty of fidelity. For reasons already stated, I have found that Ms Lodge's employment came to an end on 25 September 2018. The evidence was that Ms Lodge did not start working for a third party until 28 September 2018. This being the case, there is no evidence that Ms Lodge breached the terms of the IEA or her implied duty of fidelity. Smith & Smith's counterclaim for these claims is dismissed.

[84] In terms of the claim for breach of the duty of good faith, I am not satisfied, on balance, that Ms Lodge directly or indirectly misled Smith & Smith as to her ability to work out her notice period. While I accept she was well enough to work for a third party from 28 September 2018 onwards, the medical evidence I viewed was to the effect that Ms Lodge was unwell to work for Smith & Smith because of the situation that had developed. This had led to Ms Lodge becoming stressed, feeling anxious and not being able to face returning to work at New World.

Finding on issue four

[85] Maria Lodge did not breach the terms of her IEA, her implied duty of fidelity or the duty of good faith owed to Smith & Smith.

Costs

[86] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[87] If they are not able to do so and an Authority determination on costs is needed the parties may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the opposing party will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Outcome

[88] The overall outcome that I have reached is:

- a. Maria Lodge did not suffer an unjustified disadvantage to one or more of the terms and conditions of her employment with Smith & Smith Enterprises (2018) Limited.
- b. Smith & Smith Enterprises (2018) Limited did not constructively dismiss Maria Lodge from her employment or breach its duty of good faith.
- c. Maria Lodge did not breach the terms of her individual employment agreement, her implied duty of fidelity or the duty of good faith owed to Smith & Smith Enterprises Limited.
- d. Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority