

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 442  
3193899

BETWEEN

LORRAINE FRANCIS  
Applicant

AND

SEAFOOD CENTRAL  
LIMITED t/a Scott Seafood  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Simon Greening, counsel for the Applicant  
Chris Rowe, advocate for the Respondent

Investigation Meeting: 1 August 2023 at Auckland

Submissions and/or further evidence: 1 August 2023 from the Applicant  
2 August 2023 from the Respondent

Determination: 14 August 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Lorraine Francis, claims that she has been constructively dismissed by the Respondent, Seafood Central Limited t/a Scott Seafood (Scott Seafood).

[2] Scott Seafood denies that Ms Francis was constructively dismissed and claims that she voluntarily resigned from her employment.

**The Authority's investigation**

[3] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Lorraine Francis.

[4] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: James Mullany, Patrick Mullany and Ian Peiries.

[5] As permitted by s 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. It has not recorded all evidence and submissions received.

### **Issue**

[6] The issue requiring investigation are whether or not Ms Francis was unjustifiably constructively dismissed by Scott Seafood.

### **Background**

[7] Scott Seafood supplies fish to both wholesalers and retail customers. It was purchased by Mr James Mullany, sole Director and joint shareholder, in October 2020. Mr Patrick Mullany, his son, is Manager and the other shareholder.

[8] Ms Francis said she had extensive experience in the seafood retail industry. Mr Mullany said he had employed two experienced employees who had been made redundant by another seafood company, who were highly recommended to him. One of these was Ms Francis, who he engaged as Retail Manager.

[9] Mr Mullany said he understood that Ms Francis was the best seafood retail manager in New Zealand and therefore he engaged her to build the Scott Seafood small retail unit without close supervision. Ms Francis had two employees who reported to her, and she set the retail department rosters, including her own.

[10] Ms Francis was employed on a salary of \$86,500.00 per annum and said she worked on average approximately 50-55 hours per week, although in February 2022 her usual rostered hours were reduced to 47.5 per week without any reduction in salary.

[11] Mr Mullany said that in common with most businesses, Scott Seafood was adversely affected during the Covid-19 pandemic and experienced a downturn in revenue. The retail area was more impacted by this than the wholesale side of the business. Mr Mullany said the ratio of retail hours against revenue showed a 19.47% decrease in Q4 in 2021 and Q1 in 2022. He said this was not sustainable and needed to be addressed.

[12] He and Patrick Mullany discussed the situation with their accountant and employment advisor; and then initiated a restructuring proposal for the retail team.

[13] During March 2022 Ms Francis said she had been absent from work on sick leave. When she returned to the workplace, her two retail staff told her that they had been asked by Mr Mullany if they had been interested in taking over responsibility for her role, or a part of it.

[14] Mr Mullany denied that he had done so. He said that the two retail employees were unreliable and incapable of undertaking the Retail Manager job. Patrick Mullany also denied he had done so and confirmed Mr Mullany's assessment of the two retail employees inability to do the role of Retail Manager.

[15] Ms Francis confirmed that the two retail employees were very unreliable. She had spoken to them on a number of occasions about the issue, but was unable to effect an improvement. She had therefore raised her concerns with Mr Mullany in order that he could address the issue, however neither of them was able to lift the employees' performance and attendance.

#### *Restructuring Proposal*

[16] Mr Mullany said he and Patrick Mullany discussed the restructuring proposal with Ms Francis in March 2022 and asked her advice on a draft letter to be given to the retail employees. Ms Francis denied that she knew about the restructuring proposal until 5 April 2022 when she received the following letter dated 5 April 2022:

As discussed, we are proposing some changes to the business to arrest a decline in profitability.

We have made some changes to our initial proposal we showed you last week. Please find the latest draft proposal attached to this letter. Before making any decisions on this proposal, we are looking for your feedback please. You can provide your feedback in writing or in person. If you wish to meet us to give your feedback, you are welcome to bring a support person with you.

If you wish to give us feedback, please provide this by Monday the 11 April 2022

After we have considered all feedback and related circumstances, we will make a decision about the proposal.

That could result in an altered proposal, or we may decide to proceed as we have proposed. It is unlikely things will stay the same as at present, because that would not be sustainable for the business.

For these reasons, we need to alert you to the possibility that your current role and/or hours may change. However, we emphasise we will make no changes until we have heard from you.

We realise that this is a very difficult time for you with your mother being unwell and we delayed matters as we didn't want to put you under any additional pressure.

[17] Attached to the letter was the Restructuring Proposal which set out the reasons for the restructure under various headings which detailed below the heading the rational for the proposed change. The headings were:

- 1) New roster for the working week.
- 2) Day to day schedule of tasks to complete.
- 3) Weekly feedback forms.

[18] The proposal incorporated a number of questions on the proposal to assist the employees prepare their feedback. These questions included: “Would these hours work for you? If so: Why/Why Not?” and “What changes would you advise and why?”.

*Meeting 11 April 2022*

[19] There was a meeting held on 11 April 2022 at which Mr Mullany and Patrick Mullany met with Ms Francis and her team. During that meeting Ms Francis presented her feedback on the proposal which she started by congratulating Mr Mullany and Patrick Mullany on the fact that the decrease in sales in Scott Seafood was less than in other companies.

[20] Ms Francis gave verbal feedback on the roster proposal, in particular raising questions about her hours as proposed. She also took issue with the proposal that there would be daily feedback forms to be filled in and daily task sheets to be completed, which she said was already part of the retail department everyday set up and break down process to trade for the day.

[21] Ms Francis said she did not believe Mr Mullany was interested in hearing her feedback. Mr Mullany denied this and said he had welcomed the feedback from Ms Francis as a key member of the team, although apart from Ms Francis’ feedback, there was no real engagement by the two other employees during the meeting.

[22] . Following the meeting Mr Mullany prepared a summary dated 20 April 2022 of what had been discussed during the meeting which was provided to Ms Francis and the two other affected employees. The feedback summary set out the three employees feedback under the headings on the feedback form. Comments included:

- Lorraine has reviewed the roster and she has said does not agree with it.
- She has also said that continuing work her regular hours will not be possible for her anymore as the hours are too long and she needs some weekends off work. She has requested an 11 am finish every Wednesday going forward due to her mother’s illness. ...
- Lorraine has said that there are many more items that could be added that are completed in the morning. We have asked for a list of these items that should be added to the task list .
- Lorraine described the list as “naff” as some tasks can be completed naturally ...

[23] On 21 April 2022 Ms Francis prepared an email in which she set out her feedback in writing. Mr Mullany said he did not receive this email until he received the Statement in Reply to which it was attached.

*28 April 2023 Outcome of Restructuring Proposal*

[24] Mr Mullany sent a letter to Ms Francis dated 27 April 2022 which she received on 28 April 2022. The letter stated:

Thank you for your feedback. We didn't receive any email from you on 21/4/22. We do understand that you have a lot on and have allowed extra time.

However we now need to move forward for the benefit of the business.

...

In the restructure we proposed, your current position of Retail Manager would be disestablished.. ...

Under the proposed structure, as we said, your current role disappears. But there is a Team Leader position available for you if you are interested and available for it. It is not a salaried position. It would pay \$26.00 per hour (gross). We are happy to discuss this further with you in case anything about it is unclear. We emphasise we are keen to retain your employment with us if you wish to remain. Please let us know whether you need further discussion, and if so, when you would be available. We need to finalise this matter by Monday 2 May.

[25] Ms Francis said she was shocked to find her position as Retail Manager was being made redundant and replaced with a 'Team Leader' position because this was the first time she had been advised that redundancy was a possibility. She had emailed Mr Mullany and highlighted that she might need to seek more information and to take advice.

[26] On 28 April and 1 May 2022 Ms Francis requested a copy of the proposed job description and employment agreement for the Team Leader position.

[27] On 2 May 2022 the draft job description and employment agreement were left on her desk. Ms Francis also requested a copy of her current employment agreement and job description. That same day, 2 May 2022, Mr Mullany emailed her a list of the tasks that differentiated the Retail Manager and Team Leader roles.

[28] Ms Francis said she believed that the Team Leader job description and the list of tasks provided were either identical to the role she was currently performing, or in the case of the task list, did not currently occupy a significant part of her role. Her conclusion was that Scott Seafood wanted to take her off a salary and put her on a lower hourly rate.

### *3 May 2022 Ending of employment*

[29] On 3 May 2022 Mr Mullany said he had been told that Mr Francis was “throwing her toys out of the cot” so he went to speak to her. He had said he heard she was unhappy and asked the nature of the problem, whereupon she had told him she needed some advice.

[30] Ms Francis said Mr Mullany approached her and spoke to her about her attitude to other employees. He told her she looked stressed and needed to go home, so she collected her personal items and left the workplace.

[31] Mr Mullany said he had subsequently been told that Ms Francis had left work taking all her personal belongings with her, including the knives she used but leaving the company laptop and mobile phone, which she would usually take home with her, behind.

[32] He had emailed Ms Francis to enquire if she would be in to work her rostered hours the following day, and Ms Francis responded: “I will let you know today after seeking advice as to whether I will be in tomorrow.”

[33] On 5 May 2022 Mr Mullany received an email from Watermark Employment Law advising that it had been instructed by Ms Francis . It also advised that Ms Francis was unwell and unable to attend for work, and enclosed a medical certificate. Ms Francis remained absent from work on sick leave until the termination of her employment with Scott Seafood.

[34] On 20 May 2022 Watermark advised that Ms Francis had not resigned but had reached the view that Scott Seafood had repudiated her contract with it.

[35] On 24 May 2022 Watermark advised Scott Seafood that : “Our client has no choice but to resign, resignation to take effect immediately.”

### **Was Ms Francis constructively dismissed by Scott Seafood?**

[36] An employee who has resigned has not been dismissed. A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[37] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether or not

there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.<sup>1</sup>

[38] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* there are three fundamental situations in which a constructive dismissal claim may arise:

- i. An employee is given a choice between resigning and being dismissed;
- ii. There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;
- iii. There had been a breach of duty by the employer which causes an employee to resign.<sup>2</sup>

[39] Ms Francis is claiming a breach of the duty of good faith on the part of Scott Seafood. The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*<sup>3</sup>. The Court of Appeal in examining the question of constructive dismissal observed that in examining whether a constructive dismissal under this heading has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation?

[40] Williamson J in *Wellington Clerical Workers IUOW v Greenwich* observed in describing this type of constructive dismissal:

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct

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<sup>1</sup> *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

<sup>2</sup> *Auckland Shop Employees etc IUOW etc v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; [19785] 2 NZLR 372

<sup>3</sup> *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW* [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

reasonably sufficient to justify the termination of the employment relationship.<sup>4</sup>

[41] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where he or she had no other option.

[42] In the case of *Harrod v DMG World Media (NZ) Ltd* the then Chief Judge observed that the unsuccessful plaintiff failed in her claim of constructive dismissal in circumstances in which: "... she knew or ought to have known that it could have been discussed further if it was troubling her."<sup>5</sup>

[43] The Restructuring Proposal was made in circumstances in which Scott Seafood had experienced a downturn in revenue, in particular in the retail department. The Restructuring Proposal identified the rationale as including a new roster for the working week. The letter dated 5 April 2022 advised Ms Francis that there was a possibility that her current role and/or hours might change, but also advised that there would be no changes made until there had been discussion with her.

[44] At that time Ms Francis who had been previously been working a 50 – 55 hour week, had reduced her weekly hours to 47.5, although there had been no corresponding decrease in her annual salary. During the feedback meeting on 11 April 2022 Ms Francis advised as set out in the feedback summary prepared by Mr Mullany, that she believed her hours were too long, and she needed more weekends off.

[45] On 27 April 2022 Ms Francis received the notification from Mr Mullany it was proposed as part of the restructure that the position of Retail Manager would be disestablished. It also advised of a Team Leader position in which she might be interested and advised her to let him know if she would like to discuss the proposal further and if so, of her availability.

[46] The letter also stated that Scott Seafood was keen to retain her employment.

[47] Ms Francis' evidence was that she was shocked to receive the notification that her position as Retail Manager was being made redundant.

[48] I observe that whilst the Retail Manager position was being proposed to be disestablished, that decision had not been confirmed as finalised at that stage, and no date for that to occur had been advised.

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<sup>4</sup> *Wellington Clerical Workers IUOW v Greenwich* 1983] ACJ 965

<sup>5</sup> *Harrod v DMG World Media (NZ) Ltd* at [54]

[49] The letter dated 27 April 2022 gave Ms Francis an opportunity to discuss the matter further.

[50] Ms Francis concluded that the decisions had been made and believed that she was being offered a position with a lower hourly rate which would impact her remuneration level adversely.

[51] Despite being the opportunity to meet and discuss the situation, Ms Francis did not raise either of these concerns with Mr Mullaney before leaving the workplace on 3 May 2022.

[52] Ms Francis is claiming a breach of the duty of good faith on the part of Scott Seafood. That duty applies to both the employer and the employee. There was evidence of a positive working relationship between Mr Mullany and Ms Francis, she had been highly regarded as the best seafood retail manager in Auckland at the time of her employment, and Mr Mullany had allowed her to operate the retail area with little supervision.

[53] I am not convinced that during Ms Francis' absence in March 2022 Mr Mullany approached the two other retail employees and asked if they would be interested in undertaking all, or part of Ms Francis' role as Retail manager. There is no evidence that Scott Seafood had any issues with Ms Francis' performance at that point, and more importantly, it is the evidence of Mr Mullany, Patrick Mullany and Ms Francis herself, that the employees were unreliable.

[54] There had been an opportunity for Ms Francis to provide verbal feedback at the meeting held on 11 May 2022 to be discussed following the Restructure Proposal and despite her evidence that she felt Mr Mullany had not listened to her, I find that the summary document of the feedback following the meeting indicated that her comments had been listened to and recorded by him.

[55] However despite that evidence, Ms Francis failed to take the opportunity for further discussion and to raise any concerns about the proposed disestablishment of the role of Retail Manager, the establishment of a Team Leader position and the impact of a potentially lower remuneration. Instead she chose to leave the workplace on 3 May 2022 and engage legal advice. Ms Francis did not engage with her employer again directly during the remainder of her employment, and provide it with an opportunity to discuss her concerns.

[56] I find that Ms Francis should have been aware that it could have been discussed further but rather than doing so, she left Scott Seafood on 3 May 2022 taking her personal possessions with her which I conclude was an indication that she did not intend to return to the workplace.

[57] I find that an employee acting in good faith pursuant to s4(1A) of the Act would have been responsive and communicative and would have advised Scott Seafood of her concerns and that she was unhappy and resentful about the information in the 27 April 2022 letter. Acting in good faith, I consider Ms Francis should have given Scott Seafood the opportunity to address her concerns by raising them and by giving it the opportunity to address them.

[58] I do consider that that Scott Seafood acted in an inconsiderate manner towards Ms Francis by advising her in a letter about the proposed disestablishment of the Retail Manager position and creation of a Team Leader position on a differing remuneration system.

[59] However I am not persuaded that its behaviour was dismissive or repudiatory when the lines of communication were still open for Ms Francis to discuss the proposal, and it had expressed its keenness to retain her employment.

[60] In those circumstances I find that Scott Seafood did not breach the duty of good faith to Ms Francis in regard to the proposed change in her employment which had not actually occurred, let alone that it had foreseen that it was of sufficient seriousness as to cause her to resign.

[61] The threshold for constructive dismissal is high, and I find is not met in this case.

[62] I determine that Ms Francis was not constructively dismissed by Scott Seafood.

### **Costs**

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

[64] If they are not able to do so and an Authority determination on costs is needed the Applicant 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 Respondent would 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.

[65] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[66] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>6</sup>

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>6</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].