

the required standard, and voluntarily terminating her employment without giving the required contractual notice when this issue was addressed by Waterforce.

Issues

[4] The issues for determination are whether Ms King:

- was unjustifiably constructively dismissed from her employment or whether she voluntarily terminated her employment.
- was unjustifiably disadvantaged in her employment.
- breached her employment agreement by failing to provide the required contractual notice.

Background Facts

[5] Waterforce supplies, installs and services a range of water management and irrigation products from a number of locations throughout New Zealand.

[6] Ms King commenced employment with Waterforce as an Administrator on 4 October 2010 at the Winton location, having been interviewed by Mr Ron McFetridge, Managing Director, and Ms Judith McNaughton, the Manager of the Winton office.

[7] Ms King's main responsibilities were to ensure that the time sheets were kept up to date on a daily basis, and that the invoicing of these time sheets was completed as soon as possible to ensure that Waterforce remained financially secure

[8] Ms King had been provided with an Individual Employment Agreement ("employment agreement") which had been signed by Ms King and by Ms McNaughton.

[9] Clause 5 of the first Schedule of the Employment Agreement states that Ms King's contractual hours were from 7.30 a.m. to 5.00 p.m. Monday to Friday, a total of 45 hours per week, and added that:

The duties of your position may require you to work hours additional to your standard hours of work. You must work any additional hours required. No additional payment will be made for those additional hours.

[10] Ms King said that her duties required her to work in excess of her contractual hours from the outset of her employment. Ms King said that she had initially attributed the additional hours she had to work to her being in the process of learning the duties of her position, but she had expected the hours to reduce to those stipulated in the employment agreement after this initial period; however they had not done so.

First Performance Review

[11] Ms King said her first performance review took place in March 2011 with Mr McFetridge and Ms McNaughton.

[12] Ms McNaughton stated that during the initial period prior to the first performance review, Ms King had been very eager and enthusiastic about the job, and that she had worked well. As a result, Ms McNaughton said that she and Mr McFetridge had been very pleased with Ms King's performance, and she had been given a \$4,000.00 increase in salary, together with a \$1,000.00 bonus.

[13] Ms King said that at the time of her performance review she had told Mr McFetridge that she had been working a significant amount of overtime. However Ms McNaughton said that a large number of issues had been covered during the performance review, but she did not recall Ms King raising an issue about overtime.

[14] Ms King, who went on holiday overseas shortly after the performance review in March 2011, had sent Mr McFetridge an email dated 9 March 2011. In the lengthy email, the overall tone of which Ms McNaughton described, and which Ms King agreed, was 'bubbly', she had made the following comments:

Hi Ron,

Just before I head off tomorrow I would firstly like to say a huge thank you for what you have done for me since I started and especially the last couple of weeks (ie: our meeting when you were down). As much as I am looking forward to a break, I am also looking forward to coming back to Winton and getting stuck into my job and making a really good job of it, as we discussed.

...

When I get back I look forward to working hard but getting better at my job, especially the coordinating side of things ... Cant' wait.

...

[15] Ms McNaughton and Ms Wells, the office manager of Waterforce, both said that following Ms King's return from America, her interest in her work appeared to deteriorate and she had been unable to complete her daily tasks in a timely manner.

[16] Ms Wells said that she had raised this matter with Ms King and had discussed her own experience that it was sometimes difficult to resume work after a holiday. At the Investigation Meeting Ms King agreed she had lost interest in her job when she had returned from America.

[17] Ms Wells said that she had to reprimand Ms King for carrying out tasks which were not part of her position responsibilities, causing her to fall behind in her own work. Ms Wells explained that this situation had put pressure on her and other employees in her team who had to assist Ms King with the data entry side of her role. Ms Wells stated that this became a continuous problem.

Overtime following March 2011

[18] Ms King stated that despite having voiced her concern at her performance review in March 2011 about the amount of overtime she had working, Waterforce had taken no steps to reduce her workload. Ms King stated that she had continued to work excessive overtime, which had a detrimental effect on her well-being, in particular Ms King said that she began feeling constantly run down, sick and tired.

[19] Mr Philip King, Ms King's father, said that he had noticed that Ms King had been constantly tired following the first few months of her employment, and that he had voiced his concern to her.

[20] In May 2011 Ms King said she had asked Ms McNaughton and Ms Wells if there was any way in which her workload could be reduced as she considered it to be too large. Ms King said that the response she had been given was that her workload could not be decreased and that she ought to be able to complete her workload.

[21] Ms McNaughton said that she had informed Ms King that she considered the workload was possible to complete within the normal contractual hours with

occasional overtime, as she herself had previously undertaken the tasks involved in addition to managing the Winton office.

[22] Ms King said that following this meeting she had completed a weekly timetable for herself and had shown it to both Ms McNaughton and Ms Wells to demonstrate how difficult it was for her to complete the allocated work tasks in a given day or week, but she had not received any response to this.

[23] Ms McNaughton said the weekly timetable prepared and presented by Ms King showed that there was ample time for her to complete the daily tasks within the allocated hours, however Ms King was not sufficiently disciplined to keep to it.

[24] Ms King said during May 2011 Ms McNaughton had informed her that she wanted her to start quoting service jobs, which had the effect of increasing her work load further.

[25] Ms McNaughton said that the quotation work was a normal part of the duties involved in the position Ms King was fulfilling, however during the initial period of Ms King's employment, another employee had been carrying out this part of the role while Ms King became familiar with the total requirements of the role. At this stage Ms McNaughton said she had considered Ms King to be ready to assume this part of her duties without the need for excessive overtime to be worked.

Second performance review

[26] In June 2011 Ms King said that she had her annual performance review with Mr McFetridge and Ms McNaughton during the course of which she had complained about her workload, however nothing had been said in response by either Mr McFetridge or Ms McNaughton.

[27] Ms McNaughton said that on the questionnaire Ms King had completed prior to the review taking place, Ms King had made a large number of comments, one of which alluded to her achieving a work-life balance, but that there had not been significant discussion at the review about overtime in particular, with the discussion being focused on encouraging Ms King to discipline her day and the structure of her job.

Overtime in July and August 2011

[28] Ms King said that during July and August 2011 she had worked extremely hard trying to complete all her work, but that she had found it impossible to keep up with her work load without doing an excessive amount of overtime.

[29] Ms King said that she had raised the excessive overtime issue with Ms McNaughton and Ms Wells, but that nothing had been done in response.

[30] The annual leave and sick leave record produced in evidence by Waterforce showed that Ms King had 2.75 days given in lieu during July and August 2011. Additionally Ms McNaughton explained that Ms King worked overtime as was contractually anticipated but disputed that it had been excessive, pointing to the fact that in the last month of Ms King's employment her overtime hours were:

- 15-16 August 2011 3 hours

- 22-26 August 2011 worked 41.5 hours in 4 days

- 29 August – 2 September 2 hours

[31] Ms McNaughton explained that the extra hours during the week commencing 22 August 2011 had been worked as a result of Ms King having the Monday of that week as a day's paid leave to help her parents move house. This day had been noted as having been given in lieu.

Emails

[32] During July and August emails were sent from her office computer by Ms King to various friends:

- Emails between Ms King and a friend, Ms Moran, dated 15 and 18 July 2011 refer to alternative employment prospects which Ms King and Ms Moran were interested in pursuing.

- In an email dated 15 July 2011 Ms King refers to Ms McNaughton as *“a dragon”* and in another email sent later that same day Ms King writes: *“Wots goss, apart from us hating our jobs”*.
- In a stream of emails sent on 3 August 2011 between Ms King and another friend, Ms Bayliss, Ms King informs Ms Bayliss:
 - at 9.04 a.m. in answer to a question as to what she is doing: *“Nothing much – Jude away so I just f.....g around lol.”*;
 - at 9.31 a.m.: *“Man Ive done no work today lol”*;
 - at 9.17 a.m.: *“All I said was I am mucking about because Jude not here”*
 - at 3.40 p.m. *“Works sucks”*;
 - at 3.56 p.m. *“Na mate – haven’t done buggar all work all day. Just bored lol”*;
 - at 3.58 p.m. after Ms Bayliss had commented that Ms King *“will end up working on sat if you don’t start doing your work LOL”* Ms King responded: *“Gunna have to anyway – I need to make up hours from all my hospital visits lol”*

Meeting on 10 August 2011

[33] Ms King explained that on 10 August 2011 she had been summoned to a meeting together with another employee. Ms King said that during the course of this meeting Ms McNaughton had turned to her, pointing a finger and saying: *“Now you Bridget, I have to tell you you are f.....g useless of late”*. Ms King said that Ms McNaughton had also told her that her desk was in the wrong place and she had been directed to move her desk into Ms McNaughton’s office.

[34] Ms King said that at the conclusion of this meeting she had been in tears and that having to move her desk into Ms McNaughton’s office would be degrading.

[35] Ms McNaughton said prior to this meeting she had discussed the fact that Ms King was struggling to keep up with her work with Ms Wells. Ms McNaughton explained that Ms King's desk had been sited close to the reception counter and that a consequence of this was that Ms King was being constantly interrupted by visitors to the reception desk.

[36] Ms McNaughton said she had decided that she could best assist Ms King by relocating Ms King's desk to her own office where Ms King could not only learn from her interactions with visitors to her office, but would also not be constantly interrupted by the store men and customers appearing at the reception desk. Ms McNaughton stated that she had realised in discussing the location of Ms King's desk with Ms Wells that this should have happened from Ms King's first day of employment.

[37] Ms McNaughton agreed that she may have sworn at Ms King, but explained that the use of robust language was commonplace in the office environment, and was freely used in addressing each other. Ms McNaughton denied that she had yelled or raised her voice to Ms King.

[38] Ms McNaughton agreed that Ms King had been upset at the meeting, and said she believed Ms King had misinterpreted her attempts to assist her.

[39] Ms King said she had moved her desk into Ms McNaughton's office and had continued working normally. Ms King said that Ms McNaughton had spoken to her the day following the meeting and commented that she hoped she had not taken the decision the wrong way as it was her hope that moving Ms King's desk into Ms McNaughton's office would make her job easier for her.

[40] Ms King said that on 31 August 2011 she had spoken to Ms Wells about the fact that she was falling further behind in her work, however Ms Wells had done nothing to assist her. Ms King stated that this had made her feel as if no one cared if she was struggling, and that she was stressed.

[41] On 1 September 2011 there were a stream of emails between Ms King and Ms Bayliss, in one of which Ms King had written in response to a query as to whether or not she would like to go to a craft fair on Sunday: "*Yea man why not should be good*

– mite find some red shit for my house. I getting my hair done tonight. Man work not good. I applied for another job yesterday”.

[42] Ms Wells said that on 2 September 2011 she had asked Ms King how she was maintaining her workload because she and some of the other employees in the office had been assisting Ms King with her work load prior to this and she wanted to know if she was managing to keep up to date with the timesheet entry and the invoicing.

[43] Ms Wells said she had been in the process of talking to Ms King and asking how she could assist her when Ms King had just walked away from her into Ms McNaughton’s office.

[44] Ms Wells said that she felt quite angry at Ms King’s action because she was offering to help Ms King, so she had followed Ms King into Ms McNaughton’s office and told Ms King that walking away would not solve the matter. Ms King said she had responded by saying that she did not have time to discuss it.

[45] Ms King said that at the end of that working day Ms McNaughton had commented to her that it was not working and asked her what she was going to do about getting the money charged out. Ms King said she had reluctantly offered to come in and work on the Sunday to which Ms McNaughton had observed that it would be a start. Ms King said this had made her extremely angry.

[46] Ms McNaughton said that she did not recall telling Ms King that “*it was not working*”, but that she did recall their having discussed Ms King working on the Sunday to catch up on the invoicing.

[47] Ms King stated that over the course of the weekend she had decided that she could not continue in the job, and on Monday 4 September 2011 said she had gone into the office to see Ms McNaughton, handed her a letter of resignation, and returned her keys and uniform.

[48] Ms King said that Ms McNaughton had asked her if she was going to work her contractual notice period, and she had responded that she could not do that, and had turned and walked out of the office.

Determination

Did Ms King resign or was she unjustifiably dismissed as a result of a breach of duty owed to her by Waterforce?

[49] Ms King's claim that she was unjustifiably constructively dismissed by Waterforce is based upon an alleged breach of duty by Waterforce in not reducing her workload after she had informed it that she was working excessive overtime.

[50] The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*¹. The Court of Appeal in examining the question of constructive dismissal observed:

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 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.

[51] Therefore in examining whether a constructive dismissal 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.

¹ [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

[52] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*² observed in describing this type of constructive dismissal:³

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 reasonably sufficient to justify the termination of the employment relationship.

(i) *Was there a breach of duty on the part of the employer?*

[53] It is accepted by Waterforce that Ms King worked overtime, which was a contractual expectation.

[54] The claim by Ms King that the overtime hours she worked were excessive and that she was unable to take time off in lieu I do not accept for the following reasons:

- The records provided indicated that during the last period of her employment Ms King had not worked excessive overtime.
- The records also indicate that, despite her assertion to the contrary, Ms King had been allowed to take, and had taken, time off in lieu in respect of the overtime hours worked.
- In addition to the days in lieu, Ms King had also taken a significant number of annual leave days, 20 days in an 11 month period, which I would not expect an employee struggling to complete an excessive workload to have been able to do.
- Contrary to the assertion that her workload required her to work excessive overtime which made her feel tired and stressed, the emails sent by Ms King indicated her to be an employee with an active and positive social life,

² [1983] ACJ 965

³ at [975]

- The emails also indicated an employee who rather than feeling stressed, was prepared to shirk work when her manager was absent, was disengaged from her job and looking for alternative employment

[55] Ms McNaughton and Ms Wells agreed that Ms King had raised the issue of her working overtime, but they did not accept that this was excessive.

[56] I note that the employment agreement provided a contractual provision for overtime, and the records produced indicate that time off in lieu was provided for which there was no contractual requirement. I also note that the overtime record for August 2011 belies the claim by Ms King that she worked excessive overtime during this period.

[57] Moreover I accept that Waterforce responded to Ms King's concern that she was not coping with her work by providing assistance by Ms Wells and her team.

[58] I further consider that whilst overtime was worked by Ms King, this was attributable to time she had taken off from work together with the fact that her time management was poor. This was acknowledged by Ms King herself in the email to Mr McFetridge dated 9 March 2011 in which she writes: "*I have been cracking back into my daily routine and trying to be more disciplined to a timetable ...*", and by the fact that she produced a weekly time table for herself.

[59] Ms King admitted at the Investigation Meeting that she had not been as enthusiastic about her job when she returned from annual leave towards the end of March 2011. It is clear from the emails that Ms King had been considering alternative employment, and those sent during August 2011 indicate that Ms King was bored by her work and had little respect for her Manager, Ms McNaughton.

[60] In these circumstances I find that Ms King's dissatisfaction arose from her having lost interest in the job and that the cause of this was not attributable to excessive overtime.

[61] I do not find that there was a breach of duty on the part of Waterforce. I determine that Ms King was not unjustifiably constructively dismissed from her employment, but that she voluntarily resigned.

(ii) Was a breach reasonably foreseeable?

[62] I have not found a breach of duty on the part of Waterforce; accordingly there is no requirement to address this issue.

Was Ms King was unjustifiably disadvantaged in her employment?

(i) Company telephone

[63] Ms King said that she had been provided with a company mobile telephone following her performance review in March 2011, which she was able to use to make personal telephone calls. Ms King said she had informed Mr McFetridge at the performance review meeting that she did not make many calls, but that she did send many text messages.

[64] Ms King stated that after a couple of months the company mobile telephone had been taken away from her by Ms McNaughton and she had been informed that the reason for this was that the telephone bill had been high due to the telephone not being on a text plan option.

[65] Ms King said that following the first month of using the company mobile telephone, she had been informed that her personal usage amounted to approximately \$150.00 and that she had been asked to repay this amount, which she had done.

[66] Ms McNaughton said she had considered that Ms King's personal usage was far in excess of what was reasonable, and that Ms King had been asked to repay approximately \$600.00 which represented the total personal usage Ms King had incurred during the 3 months of using the company mobile telephone.

[67] Ms King said she had thought a text plan had been purchased by Waterforce in respect of her personal use of the company mobile telephone as she had explained at the performance review that she sent a lot of texts. However despite this Ms King, who had made full repayment for her personal usage of the company telephone, said at the Investigation Meeting that she had not raised the question of why a text plan option had not been purchased with either Mr McFetridge or Ms McNaughton when the issue of repayment had arisen.

[68] Ms King stated that she had been angry about the telephone issue, especially as she had had to purchase a personal telephone to use for her personal calls. On 31 May 2011 Ms King had received an email from a friend who had written: "*Didn't get slapped across the wrists for your cellphone I hope!*", to which Ms King had responded in an email: "*Cellphone didn't even get mentioned – I was pretty stoked about that actually!*"

[69] At the Investigation Meeting Ms King explained the emailed comments as arising from the fact that although she had been angry, she had also been expecting some form of disciplinary action to be taken, observing that this was the usual course of action when an employee had done something wrong, and that she had been relieved when this had not occurred.

[70] Ms King had raised no objection to making reimbursement for the personal usage of the company mobile telephone and indicated that she had been anticipating disciplinary action as a result of her excessive personal usage of the company mobile telephone and had been relieved when this had not occurred.

[71] I do not find that Ms King was unjustifiably disadvantaged by the removal of her personal use of the company mobile telephone.

(ii) Non-payment of salary increase or bonus

[72] Ms King said she had been told at her second performance review meeting in June 2011 that no employees would be receiving a pay increase or bonus due to Waterforce not having made sufficient profit; however she had subsequently discovered that some of the other employees had received them.

[73] Ms McNaughton explained that salary increases and bonuses were paid relative to 1 March each year. Ms King had received a significant salary increase and bonus at her review in March 2011, and as such no salary increase or bonus was due to be paid to Ms King in June 2011.

[74] In the circumstances I do not find that Ms King was unjustifiably disadvantaged by not being given a salary increase or bonus.

(iii) Use of abusive language at the meeting on 10 August 2011

[75] Ms King said she had been upset when Ms McNaughton had sworn at her during the meeting on 10 August 2011.

[76] I accept that the comment made by Ms McNaughton and which contained a swear word was directed at Ms King, rather than being used more generally; however I also accept Ms McNaughton's assertion that the use of such coarse language was commonplace in the workplace and that employees did address such words to each other as well as using them in general conversation..

[77] This assertion was supported by Ms King herself, who freely used coarse language during the course of the Investigation Meeting, and had used it in the emails produced in evidence.

[78] I do not consider that the use of a swear word, even if directed at her, would have unduly concerned or upset Ms King

[79] I do not find that Ms King was unjustifiably disadvantaged by being sworn at by Ms McNaughton during the meeting on 10 August 2011.

(iv) Instruction to move Ms King's desk into Ms McNaughton's office

[80] Ms King said that she had been very distressed by the instruction at the meeting on 10 August 2011 to move her desk into Ms McNaughton's office. Ms McNaughton and Ms Wells both agreed that Ms King had been in tears and upset at the instruction.

[81] I accept that Ms King found the request to be degrading and I accept that other employees would also have viewed the matter in a similar light.

[82] I find that Ms McNaughton had acknowledged the effect the instruction had had on Ms King by her comments the morning following the meeting, although I accept that Ms McNaughton's motivation for the decision had been made with the intention of assisting Ms King to manage her work more efficiently..

[83] I find that Ms King had been unjustifiably disadvantaged by the instruction to move her desk into Ms McNaughton's office.

Did Ms King breach the employment agreement by failing to provide the required contractual notice?

[84] Contractually Ms King was required to provide one month's notice of termination. Ms King failed to work any part of her notice period and therefore she breached the employment agreement.

[85] Pursuant to s 134(1) of the Act: "*Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.*". However Waterforce have not applied for a penalty.

[86] I observe that parties who enter into contractual agreements should abide by them. Additionally, apart from the contractual agreement between the parties, I also note that there is an expectation that parties in an employment relationship will act in good faith towards each other.

[87] In this case Waterforce had acted in good faith towards Ms King during her employment: Waterforce had given Ms King a significant increase and bonus payment following the first performance review in March 2011, she had been allowed to take 14 days annual leave in advance of having earned them, and she had been provided with assistance in carrying out her duties.

[88] I find that whilst Waterforce acted in good faith towards Ms King, she failed to act accordingly in breach of the good faith requirement set out in clause 4 (1)(a) of the Employment Relations Act 2000..

Remedies

[89] I have found that Ms King was unjustifiable disadvantaged in respect of the instruction to move her desk into Ms McNaughton's office.

[90] Waterforce is to pay Ms King \$500.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[91] Costs are reserved. Given the extent to which both parties have been successful, I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any rely submissions by the Respondent to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority