IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 236
CRC 40/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KAREN PATRICIA PIVOTT Plaintiff
AND	SOUTHERN ADULT LITERACY INCORPORATED Defendant

Hearing:	22, 23, 24 April 2013 and 18, 19, 20 September 2013 (heard at Invercargill)
Appearances:	Patrick O'Sullivan, advocate for the plaintiff Mary-Jane Thomas, counsel for the defendant
Judgment:	12 December 2013

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Introduction

[1] Up until 2010 the defendant was officially known as the Southland Adult Learning Programme Inc. Throughout the hearing it was referred to as "SALP" and for convenience I will continue to refer to it by that description. The plaintiff, Ms Karen Pivott, was employed by SALP as Workplace Coordinator under a fixed-term individual employment agreement which ran from 1 August 2006 to 31 July 2007. The agreement was then rolled over for a further 12-month term expiring on 31 July 2008. The parties signed a new fixed-term individual employment agreement which took effect from 1 August 2008. Thirteen days later Ms Pivott resigned. In a letter dated 12 October 2008 she raised a personal grievance alleging that she had been unjustifiably constructively dismissed and

unfairly disadvantaged. The issue in this Court is whether her claim of constructive dismissal has been made out.

[2] In the letter raising her personal grievance and in her statement of claim, Ms Pivott appeared to raise a number of disadvantage grievances going back over the course of her employment. The problem she faced in this regard, however, was that s 114(1) of the Employment Relations Act 2000 (the Act) provides that, subject to stated exceptions, a personal grievance must be raised within a 90-day period. One of the exceptions is where the employer consents to a personal grievance being raised outside of this period. This issue was clarified by the parties' representatives at the hearing. Counsel for the defendant, Ms Thomas, made it clear that the defendant had never consented to any disadvantage grievance being raised out of time but she had no objection to the various incidents Ms Pivott had complained about being taken into account by the Court as part of the "contextual background" to any consideration of the plaintiff's constructive dismissal claim. Mr O'Sullivan, advocate for the plaintiff, confirmed that the matters raised should be dealt with on that basis.

[3] There is another preliminary issue relevant to the pleadings. In her second amended statement of claim, in addition to the constructive dismissal claim under the Act, the plaintiff sought alternative relief under the Contractual Remedies Act 1979 and raised several "equitable causes of action in estoppel". These matters were not pursued at the hearing, however, and did not figure in Mr O'Sullivan's extensive (667 paragraphs) closing submissions. I, therefore, put them to one side. On that basis, the sole issue before the Court is whether the plaintiff has made out her alleged unjustified constructive dismissal claim.

[4] The case involved another complication. At all material times Ms Pivott's advocate, Mr O'Sullivan, had a close personal involvement with SALP. Ms Pivott and Mr O'Sullivan both served on the SALP Committee - Ms Pivott as Chairperson and Mr O'Sullivan as a committee member. While Ms Pivott was employed by SALP as Workplace Coordinator, Mr O'Sullivan was employed as a grammar tutor. Mr O'Sullivan, who had joined the SALP committee in April 2007, resigned from the committee on 7 May 2008 and from his tutoring employment position on

4 July 2008. Ms Pivott resigned as chairperson of the committee on 29 April 2008 and she resigned from her employment position as Workplace Coordinator on 14 August 2008.

[5] Both Mr O'Sullivan and Ms Pivott made claims in the Authority alleging disadvantage grievances and constructive dismissal. The claims were investigated and dealt with together. In a relatively lengthy determination (166 paragraphs) dated 17 October 2012,[1] the Authority upheld Mr O'Sullivan's claim that he had been unjustifiably constructively dismissed. He did not seek lost wages but sought compensation for hurt and humiliation in the sum of $10,000. The Authority awarded him $5,000, which was subsequently reduced to $2,500 on account of his contribution to the situation that gave rise to his grievance. The contribution was said to be his provocative communication style.

[6] Mr O'Sullivan did not challenge the Authority's determination but I refer to his background involvement in this introductory section of my judgment because it had all the hallmarks of the dangerous conflict of interest-type scenario envisaged by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[2]. There, Wilson J observed that:[3]

> Whatever the court or tribunal in which they are appearing, it is undesirable for practitioners to appear as counsel in litigation where they have been personally involved in the matters which are being litigated. In that situation, counsel are at risk of acting as witnesses and of losing objectivity.

[7] As well as acting as Ms Pivott's advocate, Mr O'Sullivan ended up giving evidence on her behalf. Although the statements in *Vector Gas* were directed towards legal counsel who are subject to strict professional obligations to provide independent judgment and advice on behalf of their clients,[4] these cautionary observations should nevertheless be of equal import to non-practicing advocates representing parties in this Court. I record, however, that to his credit Mr O'Sullivan acted professionally throughout the hearing itself although there were occasions

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[1] [2012] NZERA Christchurch 223.
[2] [2010] NZSC 5 at [146]-[149].
[3] At [147].
[4] See, for example, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 5.3.

when, perhaps understandably, he obviously had some difficulty in maintaining his objectivity. It was clear from the evidence, nevertheless, that Mr O'Sullivan had played a significant role in many of the crucial events the Court heard about in relation to Ms Pivott's claim.

[8] In its determination of 17 October 2012, the Authority rejected Ms Pivott's claim that she had been constructively dismissed but it upheld two of her alleged disadvantage grievances, namely her exclusion from attendance at the national hui and revocation of her access to SALP committee meetings. It concluded that she had suffered moderate stress on account of these grievances and it awarded her $7,500 under s 123(1)(c)(i) of the Act for hurt and humiliation.

[9] Ms Pivott challenged by way of a de novo hearing the whole of the Authority's determination as it related to her claim. In doing so she put at risk the Authority's finding and the award made in her favour of $7,500 in respect of the disadvantage grievances. In [2] above I set out my conclusions, which were accepted by Ms Pivott's advocate at the hearing, namely, that Ms Pivott's alleged disadvantage grievances had not been raised within the 90-day statutory limitation period. The Authority had dealt with the limitation point interpretation in this way:

> [100] Ms Pivott raised her personal grievance by way of a letter from her advocate, Mr O'Sullivan, on 12 October 2008. Neither of the issues had been resolved to Ms Pivott's satisfaction when she had resigned and, as the issues were failures whose effects were ongoing, they continued to be live when the grievance was raised. I therefore accept that personal grievances were raised in time in respect of these two issues.

[10] With respect, this approach by the Authority misapplies the law. Section 114(1) of the Act, which stipulates that the grievance must be raised within a period of 90 days, provides that the period of 90 days begins, "with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the latter ..."

[11] In relation to the two disadvantage grievances upheld by the Authority, Ms Pivott pleaded in her statement of claim that she had been officially informed on 20 June 2008 that she would not be attending the national hui and that she had been told in April 2008 that she would not be permitted to attend board meetings. Those

are the respective dates on which the 90-day period commenced to run. The letter of 12 October 2008 fell outside the 90-day period and, as noted above, at no stage did the defendant consent to the grievances being raised outside the 90-day period. It therefore follows, that this Court is not prepared to uphold the plaintiff's alleged disadvantage grievances.

[12] Finally in this introductory section, I make brief reference to the delays associated with this case. The Authority explained the background in these terms:

> [5] The events referred to below took place in 2008. The reason that the personal grievances took four years to come before the Authority involves a concatenation of events including, but not limited to, a prolonged skirmish over discovery between the parties, a foray into the Employment Court, the February 2011 Christchurch earthquake and the transfer to another registry of the Member originally dealing with the matter ...

[13] The initial statement of claim was filed in this Court on 25 October 2012. It was anticipated that the hearing could have been completed in April 2013 but, unfortunately, the principal witness for the defendant, Ms Nellie Garthwaite, was unwell on the day she commenced giving her evidence and the hearing had to be adjourned. The next available date that suited both the parties and the Court was not until September 2013.

Background

[14] SALP was established in 1978 to provide training for adults who wanted to improve their basic reading, writing, spelling and numeracy skills. It is very much a community-based organisation with limited funding sources. Initially it provided one-on-one tuition to pupils in their own homes. In more recent times the bulk of SALP's funding has come from a national organisation, Literacy Aotearoa Inc. SALP is one of approximately 45 literacy training organisations (witnesses gave conflicting evidence as to the actual numbers) around the country which operate independently and autonomously under the umbrella of Literacy Aotearoa. They were sometimes referred to in evidence as "programmes".

[15] The Court was told that Literacy Aotearoa, which is based in Auckland, receives funding from the government and the organisation is responsible for then

distributing those funds between the member providers. Literacy Aotearoa sets and maintains performance standards for the literacy programmes under its auspices and undertakes the necessary training and quality control. To that end, it enters into a confidential agreement with each programme provider which sets out the obligations of Literacy Aotearoa on the one hand and the obligations and duties of the programme provider on the other. The 2008 and 2009 agreements between Literacy Aotearoa and SALP (each was referred to during the hearing as the "Head Agreement") were produced in evidence. The Head Agreements set out full particulars of the services to be provided by SALP. The funding obligations of Literacy Aotearoa were detailed in a schedule attached to the agreement.

[16] Ms Nellie Garthwaite is the Manager of SALP. She has a long association with the organisation. There is a conflict in the transcript of evidence as to the start date of her involvement but it would seem most likely that she commenced employment as Programme Coordinator with SALP on 23 March 1996. Prior to that she had served as a volunteer committee member for three and a half years. The SALP committee is made up of volunteers. Ms Garthwaite told the Court that when she became coordinator, SALP had about 30 students and around the same number of tutors. She explained that SALP would not give her more than a six-month contract because of uncertainty over funding. Ms Garthwaite said that she enjoys the job which she has a passion for, having seen the programme grow from small beginnings to where it is now helping "large numbers of people".

[17] As already indicated, unfortunately, some of the evidence was conflicting. At one point Ms Garthwaite said that SALP has three funding streams, namely, community funding from sources such as the Invercargill Licensing Trust; workplace funding from commercial organisations; and Foundation Learning Programme funding through Literacy Aotearoa. At another point in her cross-examination, however, the witness said that, "today we have about five different funding streams within our programme". Whatever the exact number of funding streams, Ms Garthwaite was clear that there were only two funding streams that involved the plaintiff. She described them in her examination-in-chief:

> 11. There were two funding streams with the organisation that involved the Plaintiff:

11.1 The first was the Work Place Literacy programme "WPL". WPL was a pilot scheme to see if we could partner with employers to provide literacy and numeracy assistance to employees to enhance their abilities and productivity. Being a pilot scheme it needed seeding funding which we were able to obtain from community funders, the ILT (Invercargill Licensing Trust) and the Community Trust of Southland. At no stage did the Plaintiff have the power to either appoint or dismiss employees in the WPL programme.

11.2 The second programme was the Foundational Learning Programme "FLP" programme which was a focused and intensive literacy and numeracy scheme where students attended in groups for up to three hours per day, five days per week for around 20 weeks. This was funded by government funding provided through Literacy Aotearoa (LA) and it was performance based.

12. At no time were there two separate autonomous programmes. WPL and FLP were always within and under SALP.

[18] The plaintiff, Ms Karen Pivott, joined SALP as a volunteer tutor in 2004. At that time SALP had one programme for the provision of literacy and numeracy to the community. The Programme Coordinator was Ms Garthwaite and the Community Coordinator was Ms Averil Mawdsley. In April 2005, Ms Pivott was elected chair of SALP. Ms Pivott explained to the Court how in 2006 SALP was struggling to get community funding in a highly competitive environment and Ms Garthwaite had suggested that they research the viability of a workplace programme. A viability study was carried out and the end result was that the Work Place Literacy programme (WPL) came into being. SALP was granted $30,400 from the Invercargill Licensing Trust and the Community Trust of Southland for WPL which, the Court was told was sufficient funding for two years if used prudently.

The WPL employment agreement

[19] In October 2006, Ms Pivott was appointed Workplace Coordinator under the WPL programme. At the same time she continued in her role as chair of the SALP management committee. Ms Garthwaite wrote up a "simple workplace contract" along the lines of the employment agreements entered into by other employees. The employment agreement in question (which I will refer to as the "employment agreement" so as to distinguish it from a later agreement dated 1 August 2008) was

produced in evidence. It was a four-page document and it provided for 15 hours of work per week.

[20] The employment agreement was undated but it was expressed to be for a fixed-term of 12 months. Ms Pivott acknowledged in evidence that she always understood that her employment was dependent upon funding. Clause 1(b) provided:

> This employment will begin August 1st 2006 and cease July 31st 2007 but may be terminated at any time prior to that if finance is not available. The period of employment may be re-negotiated if finance is available.

[21] Certain provisions in the employment agreement assumed some significance as the case progressed. They provided:

> **2. RESPONSIBILITY**
>
> The Workplace Coordinator will be responsible to the SALP committee represented by the Programme Coordinator.
>
> **3. DUTIES**
>
> The Workplace Coordinator shall:
>
> ...
>
> (iii) Comply with all reasonable directions given on behalf of the Committee by the Programme Coordinator in accordance with the policy decisions of the committee;
>
> ...
>
> **8. PERFORMANCE APPRAISAL**
>
> Committee members shall conduct an initial four month appraisal of the Workplace Coordinator's performance in relation to the Job description. Such appraisal shall be conducted in accordance with procedures agreed in discussion between the Workplace Coordinator and Committee and Programme Coordinator.

[22] Parts of the job description annexed to the employment agreement also assumed some significance during the hearing. They were:

> **PRIMARY FUNCTION**
> The Workplace Coordinator is to be local contact for the programme. The person will work in close contact with the Programme Coordinator of the Southland Adult Learning Programme (SALP) to coordinate the Workplace Training Programme

KEY TASKS

- Work in a cooperative manner with the SALP Programme Coordinator

...

- Provide a monthly report to the SALP Management committee and attend committee meeting as scheduled.

...

OTHER

- Attendance at 1 2 day Regional Hui and 1 2 day National Hui is required.
- The Workplace Coordinator will also undertake any other duties that may from time to time be requested by the SALP Coordinator or the Chairman.

...

The Foundation Learning Programme (FLP)

[23] Towards the end of 2007, SALP needed more revenue and Ms Pivott was instrumental in filing an application for FLP funding from Literacy Aotearoa (see 11.2 under [17] above). Funding for the FLP programme, referred to as 'Moving Right Along' was secured for two years. Ms Garthwaite explained in evidence that whereas students for the WPL programme came from the workplace, students for the FLP programme came predominantly from Work and Income New Zealand (WINZ).

[24] Ms Pivott agreed to act as Lead Tutor under the FLP programme. In evidence, which she acknowledged "gets confusing", she explained that at the time she took on the Lead Tutor role, no new contract was drawn up but she was given an additional job description. In other words, as I understand it, her employment agreement with SALP continued to operate but in addition to the original job description relating to the WPL programme, from 2008 she had an additional job description covering her FLP role.

[25] The FLP job description recorded Ms Pivott's duties in that role, her hours of work (16 hours per week) and remuneration. She said:

> The agreement was for a 12 month fixed term contract with a rollover clause dependent on funding running from January to December of each year - 2008 and 2009. In effect, a two-year fixed term with two 12 month segments, the second of which was renewable dependent on funding.

[26] There was another complicating factor. Ms Pivott claims that she also had a separate employment agreement with Literacy Aotearoa under which she was to be trained to become a National Trainer for the organisation. That agreement was signed in March 2008. It was the subject of a separate determination of the Authority dated 20 September 2012.[5] The Court is aware, however, that Ms Pivott has challenged that determination electing a non de novo hearing and I say no more about that agreement.

Conflict of interest

[27] The fact that Ms Pivott held an employment position with SALP (involving two roles) while still serving as SALP Chairperson was bound to give rise to a conflict of interest situation. This is illustrated by the requirement in her WPL job description (see [22] above) to undertake any other duties that may from time to time be requested by "the Chairman" (herself). The plaintiff acknowledged this problem in her evidence and in her statement of claim where it was pleaded:

> 13. A potential conflict of interest arose between the plaintiff's position as chair and her paid employment as WPL coordinator.

[28] At the end of its initial 12-month term on 31 July 2007, the SALP employment agreement was rolled over for another 12 months. Ms Pivott said that nothing was put in writing but she was simply told (she did not say by whom) that it was "rolled over". It was clear from the evidence, however, that towards the end of 2007 the conflict of interest situation was beginning to manifest itself. Ms Garthwaite said that following an internal audit in late 2007 she became aware that Ms Pivott was the largest income earner in the organisation whilst also the Chair.

[29] Ms Garthwaite explained, in evidence which I accept, that she raised the conflict of interest issue with Ms Pivott and was told "we are managing this". Ms Garthwaite sought advice from Literacy Aotearoa and they confirmed to her that the situation of being both an employee and being chair raised governance issues. The SALP committee had also received external advice from Internal Affairs with respect to both the conflict of interest situation and the reporting structure.

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[5] [2012] NZERA Christchurch 202.

[30] Ms Garthwaite continued:

> 19. The conflict over performance appraisals, governance/management issues and the unhappiness of Patrick O'Sullivan with the way the Committee were operating were affecting the operation of SALP so Literacy Aotearoa was told the circumstances and they were asked for assistance.
>
> 20. At the April 2008 AGM the Plaintiff stood again as chair and was voted in. There was no doubt that by this stage there were tensions between myself and the Plaintiff. The Plaintiff eventually resigned as chair on 29 April 2008.
>
> 21. At the committee meeting following the 2008 AGM, Patrick O'Sullivan took me to task in a derogatory and insulting manner. He railed at me for approximately 15 minutes. I was upset that the Plaintiff was in the chair and did nothing to stop it.
>
> 22. As a result of a review of our employment documents early in the first third of 2008 it was apparent that what we had (a simple four page contract) was not sufficient to go forward. I sought outside advice from Preston Russell Law on new IEAs and Literacy Aotearoa on Job Description templates.
>
> 23. The advice I received was to revise our Individual Employment Agreements, update the job descriptions to enhance accountability and to alter our way of operating to be in line with the external advice we had received.

[31] In her evidence, which was comprised of a written brief of 436 paragraphs and further evidence-in-reply, Ms Pivott was quite scathing about Ms Garthwaite and other members of the SALP committee who she considered had failed to support her. She accused Ms Garthwaite of trying to take over her job and she told the Court that Mr O'Sullivan saw Literacy Aotearoa's intervention as "an assault on the sovereignty of SALP". Ms Pivott described in evidence many incidents and grievances, of the type referred to in [2] above, which occurred during the first seven months of 2008.

The resignation

[32] Despite these developments, Ms Pivott acknowledged that on 1 August 2008 she entered into a new WPL individual fixed-term employment agreement which was expressed to run from that date until 31 December 2008, "subject to the continued availability of funding for this project". For ease of reference, and in

order to distinguish it from her first employment agreement I will, in the main, refer to this agreement as "the August agreement".

[33] On 14 August 2008, Ms Pivott wrote her letter of resignation addressed to Ms Garthwaite and copied to Ms Ann Boyles who had taken over as the SALP Chair. The letter read:

> 14 August 2008
>
> Dear Nellie,
>
> I am resigning from my positions of Workplace Coordinator, and FLP Lead Tutor and hereby give the required two [weeks'] notice as of 14th August 2008.
>
> My last day of employment with the Southland Adult Learning Programme Inc, will be 28th August 2008.
>
> I am still available for Tutor Training and all ongoing Professional Development related to that.
>
> I am also available for ongoing professional development with the Southland Adult Learning Programme Inc, in my role as a Volunteer Tutor.
>
> Yours Sincerely,
>
> Karen Pivott

The law

[34] The legal principles relating to constructive dismissal are well established and were considered by this Court most recently in *Munro v Hibiscus Coast Security Ltd*[6] and *Strachan v Moodie.*[7] In *Auckland Shop Employees Union v Woolworths (NZ) Ltd*,[8] the Court of Appeal enunciated three non-exhaustive categories of constructive dismissal:[9]

> - Where the employee is given a choice of resignation or dismissal;

[6] [2012] NZEmpC 38.
[7] [2012] NZEmpC 95.
[8] [1985] 2 NZLR 372 (CA).
[9] At 374-375.

- Where the employer has followed a course of conduct with the deliberate and common purpose of coercing an employee to resign; and
- Where a breach of duty by the employer leads a worker to resign.

[35] In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc*,[10] the Court of Appeal stated certain principles which have been invariably followed by this Court in subsequent decisions involving claims of constructive dismissal:[11]

> 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. ...

[36] If the Court 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, as it stood prior to the insertion of the new test which took effect from 1 April 2011. To this end, the employer must satisfy the Court that its actions, and how it acted, were what a fair and reasonable employer would have done in all the circumstances at the time.

[37] The thrust of Mr O'Sullivan's voluminous written and oral submissions was threefold. First, he submitted that the August agreement was signed by Ms Pivott under oppression, undue influence or duress in breach of s 68(2)(c) of the Act, and that SALP (through Ms Garthwaite) had not acted in good faith. Secondly, he submitted that the pattern of the defendant's conduct which Ms Pivott had to endure in the months leading up to the signing of the August agreement had amounted to a "serial and sustained" breach of duty by the employer in terms of the third category of constructive dismissal identified by the Court of Appeal in *Woolworths*. Thirdly,

[10] [1994] 1 ERNZ 168 (CA).
[11] At 172.

he contended that after the signing of the August agreement there was a "final straw" act, namely a letter Ms Pivott had received from Ms Bronwyn Yates of Literacy Aotearoa dated 5 August 2008, which when taken in conjunction with the earlier acts, made the risk of resignation reasonably foreseeable.

[38] In response to the duress argument, Ms Thomas, in her submissions, stressed the fact that Ms Pivott had taken legal advice on the August agreement before she signed it. In response to Mr O'Sullivan's breach of duty submissions, Ms Thomas denied that there had been any breaches of duty by the employer and contended that even if there had been certain breaches they did not cause Ms Pivott's resignation but she resigned because she had another job to go to. In response to the 'final straw' submission, Ms Thomas highlighted the fact that the letter from Ms Yates was not from Ms Pivott's employer and it had not been raised at the time of Ms Pivott's resignation.

Discussion

Duress

[39] In his submissions before me, Mr O'Sullivan tended to focus on the findings and alleged errors of law made by the Authority in its determination. Given that this was not an appeal in the conventional sense but a challenge by way of de novo hearing, I did not find that approach particularly helpful. The same criticism can be made about Ms Pivott's brief of evidence. In it she continually made reference to different parts of the Authority's determination whereas the focus ought to have been on the evidence that she was presenting to this Court. In essence, however, it was alleged on behalf of Ms Pivott that SALP had acted in breach of ss 60A, 63A(2), 66 and 68 of the Act in the way it dealt with Ms Pivott in respect of the August agreement.

[40] Essentially for the reasons advanced by Ms Thomas, I reject those allegations. The evidence was clear that Ms Pivott had signed the August agreement on the advice and recommendation of her then legal adviser, Mr Jim Ogilvy of the Southland Community Law Centre. One of the unusual features of the case was that

Ms Pivott voluntarily elected to disclose details of communications between herself and Mr Ogilvy.

[41] It appears that Ms Pivott first consulted Mr Ogilvy in early June 2008 because she said in evidence that he helped her prepare a memorandum she had given to Ms Garthwaite dated 4 June 2008. In that memorandum Ms Pivott raised queries about her pending job appraisal and she pointed out that she had still not received her new job description or individual employment agreement.

[42] One of the other documents Ms Pivott produced was an email she sent to Mr Ogilvy on 21 July 2008. Of particular relevance, were the following passages:

> Dear Jim,
>
> I have had my meeting with Nellie today to discuss the Job Description. Everything that we had discussed that needed to be changed is to be changed except the attendance [at] the committee meetings. I queried this and was told "I was not the only one to have my wings clipped."
>
> ...
>
> I have also taken on board your suggestion of seeking other employment which I think I have secured. In any event how can I leave and not jeopardise my position.
> My position now is this. For 7 months I have been waiting for Job Descriptions and an Employment Agreement. The SALP Programme is in breach of my existing contract due to my attendance at the Hui's being stopped. Now I am being discriminated against by my not being able to attend committee meetings which is also in my existing contract (another breach) but not mentioned in my new job description and I am the only coordinator treated this way.
> Is that enough for constructive dismissal or is there another way I can leave and [get] these matters addressed?
>
> ...

[43] In her examination-in-chief, Ms Pivott outlined the advice she had received from Mr Ogilvy:

> 339. His advice was to sign the IEA when it arrived because unless I was contracted I had no standing and a new committee would be more responsive to my situation.

[44] Earlier she had explained that Mr Ogilvy was of the view that there would soon be a new SALP committee and he told Ms Pivott that he had been approached

himself to join the committee. Ms Pivott described that information as "a significant development". She said that it persuaded her that Mr Ogilvy's advice about getting to the committee might work.

[45] Ms Pivott said that on 31 July 2008 she discussed her situation with "people I trusted" at Employment Connections during a visit she made to that firm as part of her WPL work. She said that they provided "a second corroborative opinion" supporting the advice she had received from Mr Ogilvy. On 1 August 2008, she was given the new individual employment agreement (the August agreement) by Ms Garthwaite who told her that she had 48 hours in which to get it signed and delivered back to her. Ms Pivott said that she asked why the rush and she was told by Ms Garthwaite that she was going to Auckland and everyone had to have their agreements signed before she went. She said that she also noticed that the expiration dated was 31 December 2008 and she asked about the shortened term. She said that Ms Garthwaite replied that there was "uncertainty about the funding but you know we always rollover".

[46] Ms Pivott told the Court that she then tried to contact Mr Ogilvy but she was informed that he was away for the next two weeks, and so she signed the individual employment agreement. Although the job description was not attached, Mr Ogilvy's advice had been that if she signed the agreement then she could still negotiate the terms of her job description. She asked Ms Garthwaite about the proposed changes to her job description and Ms Garthwaite told her that they would go to the August board meeting.

[47] In her evidence, Ms Garthwaite denied that she had placed any deadlines on Ms Pivott for the signing of her new employment agreement. In her examination-in-chief she said that Ms Pivott, "had time to take it away, look at it and come back with questions and I would have explained at the time that it was because of uncertain funding ahead that her contract would be to December the 31st and we would look at it from then on." She made exactly the same statement in her subsequent cross-examination by Mr O'Sullivan.

[48] I accept Ms Garthwaite's evidence in this regard; it was not challenged. In any event, I found her to be a conscientious and credible witness and, to the extent that there were any conflicts in the evidence generally, I preferred Ms Garthwaite's account as being the more reliable. I reject any suggestion that she acted other than in good faith and I also accept her evidence that at quite critical times in the narrative Ms Pivott was "uncommunicative". In the same vein, I accept the explanation Ms Garthwaite gave to the Court for her decision to restrict the term of the August agreement to the period expiring 31 December 2008. In any event, as Ms Thomas submitted more than once, the case was not about the term of a fixed-term agreement.

[49] For these reasons I reject the plaintiff's allegations that, in breach of the Act, she was coerced into signing the August agreement in one or more of the ways alleged.

Prior conduct

[50] Mr O'Sullivan submitted that the defendant's conduct during the months leading up to the signing of the August agreement amounted to a serial and sustained breach of duty on the part of the employer which led to the plaintiff's resignation. There were two principal breaches he sought to rely on. First, there was the decision of the committee to exclude Ms Pivott from attending committee meetings when one of the "Key Tasks" set out in her original job description was stated to be: "Provide a monthly report to the SALP Management committee and attend committee meeting as scheduled". Secondly, Mr O'Sullivan referred to the decision to exclude Ms Pivott from attending the national hui which was another task provided for in her original job description.

[51] Mr O'Sullivan also referred to and relied upon a number of other incidents which he dealt with in his closing submissions under the heading, "Pattern of Undermining". They included a performance appraisal said to have been sprung on Ms Pivott by Ms Garthwaite in breach of the House Rules; Ms Garthwaite's preparedness to suppress information going in the SALP committee, including a memorandum from Mr O'Sullivan himself which he referred to as the "O'Sullivan Report"; an allegation by Ms Garthwaite that Ms Pivott had breached a student's

confidentiality; and the removal of Ms Pivott's cheque-signing rights. Mr O'Sullivan also referred to the cumulative effect of other incidents such as: "interference in appointment of staff; locking of filing cabinets and the office door; [and] the curious disappearance of her cellphone at a critical juncture in accessing information about National Rollouts".

[52] I have considered all the evidence relating to these matters but I agree with Ms Thomas' submission, that none of the incidents and breaches relied upon either individually or collectively caused Ms Pivott to resign. All the matters relied upon by Mr O'Sullivan were historical in the sense that they had arisen during the terms of Ms Pivott's original employment agreement. By the time of the August agreement all the issues Ms Pivott wanted to have addressed had been resolved with the one exception, namely, her future attendance at committee meetings. In that regard Ms Garthwaite had undertaken during their discussion about the new job description on 21 July 2008 to take the issue up with the committee at its August meeting to see how Ms Pivott could obtain access to the committee through an appointment process. Ms Pivott agreed with that proposition. She confirmed that following her discussion with Ms Garthwaite on 21 July, her attendance at committee meetings was the only outstanding matter under her new job description and she acknowledged that she had not heard anything further about that topic prior to her resignation on 14 August. The evidence was that the August management committee meeting did not take place until after Ms Pivott had resigned. For her part, Ms Garthwaite considered that following their meeting and discussion on 21 July about the new job description, the parties had an agreement.

[53] I agree with Ms Thomas that by signing the new individual employment agreement on 1 August Ms Pivott had clearly indicated that whatever concerns she may have had about the treatment she had received under her previous employment agreement, that was in the past and she was now prepared to work under the terms and conditions of the new August agreement. In relation to her attendance at committee meetings, she was happy to accept the assurance she had received from Ms Garthwaite that her concerns about access to committee meetings was something that would be taken up with the committee itself at the August board meeting.

[54] Ms Thomas also submitted that Ms Pivott resigned because she had another job to go to but the evidence on that issue was equivocal. Ms Pivott said that she had applied for a position as a Probation Officer at the Department of Corrections on 9 June 2008 but she was unsuccessful. Later she contacted the YMCA about two jobs that had been advertised in the paper. She had an interview for one of the positions on 24 July but again she was unsuccessful. Subsequently, she was contacted by the YMCA about a completely different position which she accepted and she commenced working for the YMCA on 1 September 2008. She said that when the YMCA called her, she had already decided to resign from SALP.

[55] At one point in the course of her cross-examination, Ms Garthwaite was asked by Mr O'Sullivan what active steps, if any, she had taken to keep Ms Pivott on after she resigned. The witness answered: "None after she resigned because she said quite clearly and without any embellishment, 'I'm going to do something that I really want to do.'" Ms Garthwaite was not challenged on that answer and I accept her evidence. She said that Ms Pivott was quite adamant and that she had made the remark to many people.

[56] For the foregoing reasons, I do not accept that any breach of duty by the employer under the original employment agreement was of sufficient seriousness, individually or collectively, to make it reasonably foreseeable that Ms Pivott would tender her resignation under the August agreement. I would add that in respect of what was probably her principal complaint, namely, her exclusion from attendance at committee meetings, I consider that the decision of the management committee was at the time a justifiable action in terms of the test of justification in s 103A of the Act. The evidence disclosed quite dramatically how in the period immediately prior to and after Ms Pivott's resignation as chair, there was a systematic attack on the committee and Ms Garthwaite in particular by Mr O'Sullivan and to a lesser extent Ms Pivott, which was both provocative and unrelenting. The committee needed to take urgent and quite desperate action in order to ensure the survival of the organisation.

The final straw

[57] Ms Pivott acknowledged that at the time of the earlier incidents she had no thought of resigning but she told the Court that at the point where she did resign she viewed the past events in a different light and they did become a factor in her decision to resign. She said that the "last straw" was a letter that she received from Ms Yates of Literacy Aotearoa dated 5 August 2008. Mr O'Sullivan referred to this letter as "the straw that broke an already overburdened and anxious camel's back" and he submitted that, when considered in conjunction with the actions of the employer referred to above, the letter made the risk of resignation reasonably foreseeable.

[58] The letter from Ms Yates was in response to a letter from Ms Pivott dated 30 April 2008 about governance matters and her resignation from the SALP management committee. Ms Pivott's letter had stated in part:

> As of April 29 2008 I resigned from both the Chairman and committee member positions under duress due to the issue of 'Conflict of Interest' being continually raised and used as a bullying tactic for management to have me removed from the position of Chairman ...

[59] Given the force of the plaintiff's reliance upon the letter, I set out Ms Yates' response in full:

> 5 Here turi koka (August) 2008
> ...
>
> Dear Karen
>
> Tena koe. On 30 Paenga whawha (April) 2008 you wrote to Nga Kaiwhakahaere, Kim Currie and Serenah Nicholson, regarding your resignation as Southland Adult Learning Programme (SALP) Committee Chair and Committee member. They have requested that I respond to the issues you have raised.
>
> These issues would seem to have arisen out of the performance appraisal process and confusion over the generally understood nature of the relationship between governance and management.
>
> The governing committee is selected by the membership to establish the direction and goals of the organisation and to monitor the performance of the manager/coordinator in progress against the achievement of those goals.

The manager/coordinator is an employee of the governing committee and is accountable to them. It is proper that the governing committee appraise the performance of the manager/coordinator.

Management appoints the employees - in this instance that largely means the tutors. The tutors are accountable to the manager/coordinator so it is proper that the manager/coordinator is the person that appraises the performance of the tutors.

In your case you were both the employer of the manager/coordinator (when you were acting as Committee Chair) and an employee (when you are acting as a coordinator or tutor). It is important for people to be clear about which role they are in.

Literacy Aotearoa National Office notes the positive 2007 quality audit report SALP received and congratulates the organisation on that achievement. Your resignation is regretted, and given the situation, I hope you can recognise the potential difficulties this could create. Thank you for your service.

The current SALP Committee will continue to receive the support of Literacy Aotearoa National Office. The same support will be available to all other Poupou.

Heoi ano.

na Bronwyn Yates
TE TUMUAKI

Cc: Chairperson, Southland Adult Learning Programme

[60] Ms Pivott said in evidence that she received the letter from Ms Yates on 7 August. She stated: "What really upset me was the letter confirming that I was to be relegated to a mere tutor for WPL - that my existing job of developer and manager was gone." Ms Pivott continued:

379. ... I read the letter again a few days later and saw something I had overlooked. It was tucked away towards the end of the letter and referred to me as a workplace tutor - this was the last straw. ...

380. When I re-read that letter a week later, I saw the game was well and truly up. I had long suspected that Bronwyn was working with Nellie to remove me. I only know for certain now that it was part of the National Rollout deal but at the time this letter was the living proof that they had worked together to get me out of the way.

381. I could not fight both of them so I wrote my letter of resignation. ...

[61] The legal position regarding 'final straw' cases, as they are often referred to, was considered by the English Employment Appeal Tribunal in *Triggs v GAB Robins (UK) Ltd.*[12] There, the Tribunal provided a concise restatement of the principles first enunciated by the Court of Appeal of England and Wales in *Omilaju v Waltham Forest London Borough Council.*[13] The Tribunal outlined these principles as follows:

> [32] We derive the following principles from *Omilaju's* case. (1)The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial. (2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous. (3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test. (4) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence.

[62] Although overseas authorities need to be approached with a degree of caution, I do not see any reason why the statements of principle in *Triggs* should not have equal application to constructive dismissal cases in this jurisdiction. In that regard, two observations can be made about the letter from Ms Yates which the plaintiff claims was the "final straw" act leading to her resignation. First, the letter was not from Ms Pivott's employer. In his submissions, Mr O'Sullivan said this:

> 539. The Authority discounts this letter from Ms Yates because it did not come from the [employer]. It did not need to come from the employer. It simply needed to underpin or amplify what the employer had already done and remove any hope that Ms Pivott had of a resolution. It did that. That letter confirmed that she was now just a tutor - that not only her development and management role as workplace coordinator was gone - but the job as well because funding or not, none of it would swing her way.

[63] No authority was cited for the proposition that the final straw act did not need to be an act of the employer and I do not accept it. It is fundamental that the

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[12] [2007] 3 All ER 590 (EAT). The directions of the Appeal Tribunal as to remedies were successfully appealed in *GAB Robins (UK) Ltd v Triggs* [2008] EWCA Civ 17, although its findings relating to constructive dismissal were unaffected.

[13] [2005] 1 All ER 75 (CA) at [19]-[22].

breaches of duty relied upon in a constructive dismissal case, including final straw acts, must be the conduct of the employer.

[64] In any event, and this is the second observation I make about Ms Yates' letter, it appears to me to be a perfectly reasonable and innocuous response on the governance issues that had been raised by Ms Pivott in her earlier letter. Ms Pivott seemed to read more into the letter than what was intended and what was actually said. She had done more than affirm an existing contract. She had entered into a new employment agreement (the August agreement) and nothing in Ms Yates' letter could alter that. If she did have a genuine concern about some aspect of the letter then it was always open to her to consult her legal adviser, Mr Ogilvy. On her own evidence, Mr Ogilvy was due to return to his office on or about the very day that Ms Pivott tendered her resignation.

Conclusions

[65] For the foregoing reasons, the plaintiff fails in her claim and this judgment now stands in place of the Authority's determination.

[66] The defendant is entitled to costs and the parties are encouraged to endeavour to reach agreement on this issue. If costs cannot be resolved, however, then given the pending legal vacation, Ms Thomas is to file a memorandum by 31 January 2014 and Mr O'Sullivan will have until the end of February 2014 in which to file submissions in response.

A D Ford
Judge

Judgment signed at 10.30 am on 12 December 2013