IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 46
5535016

	BETWEEN	KELLI BALANI Applicant
	AND	TCS OLD CO LIMITED First Respondent
	AND	CRAIG IRELAND Second Respondent
Member of Authority:	Robin Arthur	
Representatives:	Michael Smyth, Counsel for the Applicant Mark Frogley, Counsel for the First Respondent Craig Ireland, in person, as Second Respondent	
Investigation Meeting:	17, 18 and 19 November 2015	
Determination:	17 February 2016	

DETERMINATION OF THE AUTHORITY

A. TCS Old Co Limited (TCSOCL) was a joint employer of Kelli Balani and was liable for any remedies awarded to her.

B. The evidence in support of Ms Balani's allegations that she was sexually harassed by Craig Ireland did not meet the statutory standard for such a finding.

C. Ms Balani was unjustifiably disadvantaged by how Mr Ireland dealt with her in the employment relationship.

D. Breaches of good faith and fair dealing by TCSOCL caused Ms Balani's resignation so the end of her employment was really an unjustified constructive dismissal.

E. Mr Ireland must pay Ms Balani $6,000 as a penalty for instigating breaches of her terms of employment.

F. In settlement of her personal grievance, TCS Old Co Limited must also pay Ms Balani the following sums within 28 days of the date of this determination:

(i) $7,025 as reimbursement of lost wages; and

(ii) $1,000 as a contribution towards reimbursement of health costs incurred as a result of her grievance; and

(iii) $6,000 as compensation for humiliation, loss of dignity and injury to her feelings.

G. Costs are reserved (with a timetable set for memoranda).

Employment Relationship Problem

[1] Kelli Balani resigned from her job as a manager of a retail store in Pukekohe on 2 September 2014 and finished work there on 13 September 2014. The store was part of a business operated by a company now named TCS Old Co Limited (TCSOCL).

[2] On 19 September 2014 Ms Balani raised a personal grievance about the circumstances that led to her resignation. She said she resigned because the operations manager of the business, Craig Ireland, sexually harassed her. Mr Ireland was a director of the company named as Ms Balani's employer on her employment agreement. He was also a director and shareholder of TCSOCL.

[3] In her application to the Authority, lodged on 31 March 2015, Ms Balani claimed she was sexually harassed, unjustifiably disadvantaged in her employment and her resignation was really a constructive dismissal. She sought orders for lost wages and distress compensation and for a penalty to be imposed on Mr Ireland personally on the grounds that, by his treatment of her, he had instigated breaches of her employment agreement.

Legal status of the Respondents

[4] Ms Balani's statement of problem initially identified two companies as her employer but by the time of the Authority's investigation one company was in

liquidation so the investigation proceeded against only TCSOCL, as well as Mr Ireland in his personal capacity.

[5] Ms Balani's employment agreement named her employer as People Direct Limited (PDL).[1] The agreement stated PDL operated a business supplying staff to its clients which operated retail businesses trading as "The Clearance Shed" in various locations in Auckland and throughout New Zealand. Her obligations were stated to include complying with instructions from PDL and from the on-site manager or personnel of The Clearance Shed outlets.

[6] At the time of her employment and until April 2015 the outlets were owned and operated by The Clearance Shed Limited, a company that on 25 March 2015 changed its name to TCSOCL.[2]

[7] The chain of Clearance Shed outlets was a business developed by Allen Court and Craig Ireland from around 2009. Both men were the directors of PDL as well as the company that became TCSOCL. For most of the relevant period the two men each owned half the shares in TCSOCL. Directly and indirectly (through respective trust companies) they were also the shareholders of PDL.

[8] On 10 July 2015 PDL was placed in liquidation by shareholder resolution. The liquidator's report gave this description of the reason:

> The business of the company was contracting staff and placing [them] with a retail operation. That retail business was sold and all staff terminated. The company now has no business operation and the shareholders/directors concluded the company should be placed in liquidation.

[9] The Clearance Shed business was sold in an asset sale to a company incorporated on 31 March 2015. The newly-incorporated purchaser was named The Clearance Shed Limited.[3] That company name was available by that time because of the name change adopted by the company that became TCSOCL on 25 March 2015. The existing store staff, previously employed through PDL, were re-employed by the new company under new employment agreements.

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[1] Company number *3134805.*
[2] Company number *2313368.*
[3] Company number *5651211.*

[10] Mr Ireland and Mr Court remained involved in the ongoing operation of the business as directors and managers but their company, TCSOCL, became a minority shareholder owning just under 20 per cent of the new company. Both men also had one personal share, from a total of 1000 shares. The majority of the company – around 80 per cent – was purchased by the business interests of an Auckland family and a Hawkes Bay family. The current registered legal entity bearing the company name 'The Clearance Shed Limited' and operating the business through its retail outlets had no involvement or role in relation to Ms Balani's claim against her previous employer. Its only relevance was that Mr Court and Mr Ireland were involved in the ongoing business and their company, TCSOCL, had the asset of its shareholding in the new company.

[11] Ms Balani's claim related only to the period in which Mr Ireland and Mr Court were the owners and the senior managers of the business. However, as a result of its liquidation, Ms Balani could not continue her claim against PDL.[4] What remained live were her claims against TCSOCL and Mr Ireland.

[12] A statement in reply, lodged on 22 April 2015, denied Ms Balani was sexually harassed, unjustifiably disadvantaged through her dealings with Mr Ireland or that her resignation amounted to a constructive dismissal. Mr Ireland denied instigating any breach of Ms Balani's terms of employment.

The Authority's investigation

[13] For the purposes of the Authority's investigation written witness statements were lodged by Ms Balani, her sister Niki Balani, her father George Balani, former Pukekohe store employee Alicia Jeffrey, Ms Balani's psychologist John Thickpenny, her psychiatrist Anthony Asteriadis, Mr Court, Mr Ireland, Mr Ireland's son Jason Ireland (who was also involved in the business as a manager), and the Pukekohe store's current assistant manager Rebecca Insley.

[14] Apart from Mr Thickpenny and Dr Asteriadis each witness attended the investigation meeting in person and, under oath or affirmation, answered questions from me and the parties' representatives. Mr Thickpenny and Dr Asteriadis each attended by telephone and, under affirmation, answered questions.

[4] Companies Act 1993, s 248(1)(c).

[15] Mr Ireland did not attend the third day of the investigation meeting. The third day closed with Mr Smyth (for Ms Balani) and Mr Frogley (for TCSOCL) delivering written and oral submissions on the issues of fact and law for resolution by the Authority.

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

The issues

[17] These, broadly, were the issues for determination:

(i) Was Ms Balani's employment relationship really with PDL or TCSOCL?

(ii) Were her terms of employment breached by acts or events amounting to sexual harassment and/or unjustified disadvantage?

(iii) If Ms Balani was sexually harassed and/or unjustifiably disadvantaged, was her resignation really a constructive dismissal (being reasonably foreseeable she would resign in the circumstances of those breaches of her terms of employment)?

(iv) If Ms Balani was found to have been sexually harassed and/or unjustifiably disadvantaged and/or constructively dismissed and TCSOCL was found to have been her employer, what remedies should be granted (considering claims for:

(a) lost wages; and

(b) compensation for hurt and humiliation; and

(v) If any remedies were awarded, should they be reduced under s 124 of the Act for any conduct by Ms Balani that contributed to the situation giving rising to her grievance?

(vi) If Ms Balani was found to have been harassed and/or unjustifiably disadvantaged and/or constructively dismissed, did Mr Ireland instigate, aid or abet those breaches of her terms of employment?

(vii) If so, should a penalty be awarded against Mr Ireland, and if so, of what amount?

(viii) Should all or some of any penalty awarded against Mr Ireland be paid to Ms Balani?

(ix) Should any party contribute to the costs of representation of any other party?

The employment relationship – was Ms Balani employed by TCSOCL?

[18] The essential reason that the identity of Ms Balani's employer was in issue concerned remedies. As PDL was in liquidation proceedings against it could not continue without the liquidator's consent.[5] If TCSOCL was not found to be either Ms Balani's actual employer, or at least her employer jointly with PDL, her only potential remedy for any established personal grievance would have been a penalty against Mr Ireland in his personal capacity (if he was found to have instigated a breach of her employment agreement in how he treated her). If TCSOCL was found to be either solely or jointly her employer and she established that the end of her employment amounted to an unjustified dismissal, potential remedies then included lost wages and distress compensation. Put frankly Ms Balani's motivation for making this argument was that TCSOCL, as a minority shareholder in the new company now operating the stores, was likely to be good for the money if ordered to pay remedies.

[19] For reasons that follow I was satisfied Ms Balani met the onus of establishing, on the balance of probabilities, that she had an employment relationship with TCSOCL. The degree of control and integration exercised over her work by TCSOCL established that the relationship was, at the least, on a joint basis with PDL. Alternatively TCSOCL was, in reality, was her actual employer with PDL acting as its agent in the employment relationship. On either conclusion TCSOCL was liable for remedies awarded to Ms Balani.

[20] In considering whether she had an employment relationship with TCSOCL the Act requires the Authority to determine "the real nature of the relationship between them".[6] In making such an assessment the Authority must:[7]

> … consider all relevant matters, including any matters that indicate the intention of the persons; and
>
> … not to treat as a determining matter any statement by the persons that

[5] Companies Act 1993, s 248(1)(c).
[6] Section 6(2).
[7] Section 6(3).

describes the nature of their relationship.

[21] The inquiry is an all-inclusive and largely factual exercise.[8] Relevant principles include the following:

(i) A contract of service may be implied where the express contractual arrangements and relevant words and conduct in a supposed tripartite employment situation do not genuinely represent the actual relationship at its outset.[9]

(ii) An "implied" contract may exist where the necessary incidents of a contract (offer, acceptance, intention, consideration and certainty) are established by implication from the parties' overt conduct rather than by reference to their expressed intentions.[10]

(iii) Employees may argue they were employed not by the entity originally identified as their employer but rather by an entity with which the named supposed employer had a commercial relationship (that included exclusive provision of the employee's services to that supposed third party).[11]

(iv) Those controlling a business may select which company should be the employer, provided the selection was consistent with the financial and administrative organisation of the business and not otherwise a sham.[12]

(v) The identity of the entity that pays an employee's wages was a relevant factor but not necessarily determinative of whether or not an employment relationship (or joint relationship) existed.[13]

(vi) The question to be asked was who an independent observer, with knowledge of all relevant communications between the parties, would objectively conclude was the employer.[14]

(vii) A finding of joint employment requires a sufficient degree of relationship between the legal entities, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships and

[8] *McDonald v Ontrack Infrastructure and Anor* [2010] NZEmpC 132 at [24].
[9] *McDonald*, above n 8, at [28].
[10] *McDonald*, above n 8, at [39].
[11] *McDonald*, above n 8, at [52].
[12] *Hutton v ProvencoCadmus Limited* [2012] NZEmpC 207 at [85].
[13] *Hutton*, above n 12, at [89] and [91].
[14] *Colosimo v Parker* (2007) 8 NZELC 98,622 at [29] citing *Mehta v Elliot* [2003] 1 ERNZ 451 at [22]-[23].

with the essence of that relationship being an element of common control.[15]

(viii) Merged managerial and operational control over the employee's activities throughout the employment was a relevant factor.[16]

(ix) Who benefited from the services provided by the employee was also relevant to the question of who was or was not the employer.[17]

[22] Ms Balani's employment agreement named PDL as "the Employer" with the following clauses relevant to the issue of who was her actual employer or employers:

> 3.1 The Employer operates a business supplying staff to its clients which operate retail businesses trading as "The Clearance Shed" in various locations in Auckland and throughout New Zealand. The Clearance Shed businesses may open additional branches and/or close existing branches as market demands dictate. The Clearance Shed businesses will have varying staffing requirements depending on customer and seasonal demand.
>
> 3.3 By signing this agreement you accept that the Employer has the right at its sole discretion to require you travel between or be based at differing branches of The Clearance Shed within your city of employment on a temporary or permanent basis from time to time to meet client demands.
>
> 4.1 You shall:
> (a) Comply with all reasonable instructions and lawful instructions provided by the Employer and by the on-site manager or personnel of The Clearance Shed outlets;
> …
> (f) Comply with all policies and procedures implemented by the Employer from time to time and with all on-site policies and procedures of The Clearance Shed outlets.
>
> 5.1 While the Employee has the obligation to perform certain employment related duties for and at the Clearance Shed outlets, the Employee acknowledges and accepts that he/she is employed solely by the Employer and has no employment relationship with The Clearance Shed retail outlets.
>
> 5.2 The Clearance Shed retail outlets are the Employer's clients which utilise the staff of the Employer on a contract basis directly between the Employer and The Clearance Shed.

[23] Evidence from Mr Court and Mr Ireland established that, in the earlier stages of establishing the Clearance Shed business, their staff were employed directly by the company now known as TCSOCL. The mechanism of employing staff to work at the

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[15] *Orakei Group (2007) Ltd (formerly PRP Auckland Ltd) v Doherty (No 1)* [2008] ERNZ 345 at [53]-[58].
[16] *Orakei*, above n 15, at [58].
[17] *Hutton*, above n 12, at [98].

stores through PDL was adopted on advice from their solicitor and their accountant, with that company being incorporated in September 2010. The arrangement was not continued on sale of the Clearance Shed business. The company now operating the business employs its store staff directly. Prior to sale of the business to the new company Mr Court and Mr Ireland themselves had employment agreements with TCSOCL, not PDL.

[24] Staff wages were paid through PDL accounts, with pay slips or bank transactions identifying PDL as the payer. Reimbursement by TCSOCL to PDL for wages paid to staff for work in the stores was done on the basis of monthly invoices. No such invoices were produced in evidence but Mr Court's evidence was that the accounts were organised so PDL was paid a staff hire fee, comprising a five per cent margin on the pay roll, along with other administration fees and charges.

[25] PDL's business comprised solely the provision of staff to Clearance Shed outlets. Its sole client was effectively TCSOCL, although some stores outside Auckland did operate as joint ventures with local partners.

[26] PDL was not an independent labour hire agency. It was established for accounting reasons that neither Mr Court nor Mr Ireland could fully explain in their evidence. The arrangement for invoices, with a five per cent payroll surcharge, may have demonstrated a genuine contractual arrangement between the technically distinct legal entities of PDL and TCSOCL for those accounting purposes but that arrangement was not a complete picture of the actual employment relationships created with staff in the stores, which were broader than the paper construct.

[27] The reality from the outset of Ms Balani's employment was that she worked exclusively in the Clearance Shed stores – first as an assistant manager in Manukau and then, from November 2013, as manager of the Pukekohe store. Instructions for, and control of, her work came entirely from Mr Ireland and Mr Court in their respective capacities as operations manager and marketing manager of the business and as directors of TCSOCL. Her work was entirely integrated into that business operated by TCSOCL.

[28] While the pay she got came directly from PDL, the work she did to earn that pay was carried out exclusively in and for the stores operated by TCSOCL. As an on-

site manager, in the phrase used in clause 4.1(a) of her employment agreement, Ms Balani not only received instructions from TCSOCL personnel (particularly Mr Ireland as operations manager) but also gave such instructions on behalf of TCSOCL to other employees.

[29] In that respect the pay-for-work bargain, fundamental to the employment relationship, could only be seen as being complete if it involved both corporate entities as her joint employers.

[30] The words of the employment agreement did not reflect that reality but Ms Balani, by accepting the job and working in the stores in the roles to which she was appointed, had established the necessary intention and certainty for implication of a contract of service not only with PDL but also TCSOCL. Her exclusive service in its stores confirmed that relationship. The interlocked shareholdings and directorships of the two companies, along with the managerial and operational control exercised for the benefit of TCSOCL in its business of running the stores, supported the conclusion I was satisfied an independent observer would have objectively reached as to the joint nature of the employment in the facts of this particular situation.

[31] It was not necessary to go beyond that conclusion but there was an arguable alternative analysis that PDL was merely an agent in establishing the employment relationship with Ms Balani in which TCSOCL was PDL's principal and therefore her employer. The employment agreement referred to the Clearance Shed retail outlets as PDL's clients and did not identify the entity operating the outlets. In that respect, and because the service secured from her was exclusively for its benefit, TCSOCL could be said to have been the principal for which PDL acted.

[32] On the basis that PDL and TCSOCL had, at least, a joint employment relationship with Ms Balani, their liability to her was joint and several. Consequently, in light of the liquidation of PDL, any remaining liability to Ms Balani rested with TCSOCL.

Did Mr Ireland sexually harass Ms Balani?

[33] Ms Balani's case, summarised in closing submissions, focussed on her allegations that Mr Ireland's behaviour and conduct in his dealings and contact with her amounted to sexual harassment. However she also submitted that if one or more

of the identified instances of such behaviour or conduct were found not to be of a sexual nature but had nevertheless caused detriment or disadvantage in her employment, it was open for the Authority to make a finding of unjustified disadvantage instead of sexual harassment.

[34] TCSOCL submitted that even if Mr Ireland were found to be seeking an intimate relationship with Ms Balani, involving social contact outside of work, his actual conduct, closely analysed, lacked a sexual nature sufficient to meet the statutory definition of sexual harassment. It accepted Ms Balani was unjustifiably disadvantaged though because Mr Ireland had not told her of the true reason for some off-site meetings he requested that were, on his evidence, sought for a valid but undisclosed business reason. TCSOCL's submissions conceded that those later actions, if Mr Ireland's evidence of the reason he gave for them was accepted, were not what a fair and reasonable employer could have done in all the circumstances.

[35] Reaching conclusions on this aspect of Ms Balani's case required consideration of (i) the events allegedly amounting to harassment and (ii) analysis of those events that were established to the necessary balance of probabilities, against the statutory criteria for a finding of sexual harassment.

(i) The conduct and communication

[36] Although lengthy the following account has not recorded all evidence given about various interactions between Ms Balani and Mr Ireland. Some of that evidence, specifically from those two witnesses, amounted to what I considered to be 'retro-fitting' accounts of what they thought or meant at the time. Such assertions were not corroborated or able to be corroborated and were sometimes at odds with what was apparent about their view or conduct from other evidence generated at the time of the interactions (particularly the content of text exchanges). I have referred only to evidence I considered relevant for the purposes of determination of the issues.

Hugs on greeting and departure

[37] At the end of a job interview with her in September 2013 Mr Court and Mr Ireland each gave Ms Balani a hug. In her evidence Ms Balani said she thought the hug was congratulatory. She already knew them informally from previous contact when she worked at the store of a different business in a shopping centre that included

a Clearance Shed store. She had also met Mr Ireland's son, Jason Ireland, through that informal contact and he had encouraged her to work for the business. She was offered a job in 2011 which she turned down but after an accident in December 2012, and a resulting break from work for recovery, she had contacted Mr Ireland about job prospects. She was again offered a job in July 2013. She delayed taking up that role because she found she was pregnant. After the baby was born, and Ms Balani had completed steps for its adoption, she met Mr Ireland and Mr Court in the September interview. During that conversation Ms Balani explained her personal circumstances as the reason she had delayed taking up the July job offer and they agreed she would start work on 26 September 2013. It was at the end of that meeting the two men had hugged her.

[38] As operations manager Mr Ireland visited the Pukekohe store on a weekly or fortnightly basis and typically gave Ms Balani a hug on arrival and departure. The evidence of Mr Court and Mr Ireland established that was their common practice from the early days of establishing their business in which they said managers and employees were treated as 'family'. Most of the stores' managers and assistant managers were women and both men said they had also hugged the woman who previously managed the Pukekohe store. They did not hug the men who were managers.

[39] Ms Balani's oral evidence during the Authority investigation meeting established that she became uncomfortable about Mr Ireland hugging her once other interactions with him (which included arranging off-site meetings, phoning her and sending her texts) had "overflowed the bucket" for her. Her earlier written evidence that she always found the hugging inappropriate was not compelling or consistent with evidence that she had exchanged hugs with Jason Ireland, who she had contact with on work matters during 2013 and 2014, and that she had no problems in her interactions with Mr Court. In an email to Mr Court on 4 May 2015, eight months after raising her personal grievance, Ms Balani wrote:

> I particularly want you to be aware that I have no issues with you. I've always found you to be a complete gentleman in the way you have treated me and for that I thank you.

A kiss on the cheek or the lips?

[40] Ms Balani's evidence was that Mr Ireland's interactions with her had "started with what seemed like a casual hug with a peck on the cheek and extended to a kiss on the lips … which very quickly became the expected thing".

[41] There were some occasions where such behaviour could have been corroborated by the evidence of other witnesses. One such occasion was when Ms Balani had (at Mr Ireland's instigation) arranged an evening meeting at a bar and her sister, Niki Balani was also at the bar. Other occasions were at the Pukekohe store when Ms Jeffrey and Ms Insley were at work at times that Mr Ireland visited there.

[42] Niki Balani said she saw Mr Ireland give her sister a hug and a kiss on the lips as they parted outside the bar. However Kelli Balani did not refer to a kiss on that occasion in a written account of events she prepared soon after her resignation in September 2014 (and which was around a year before the witness statements of both sisters were lodged for the Authority investigation). In that context I was not persuaded Niki Balani's evidence should, on the balance of probabilities, be preferred over Mr Ireland's denial that he had kissed Kelli Balani on the lips as they parted that evening.

[43] There were conflicting accounts from Ms Jeffery and Ms Insley as to whether Mr Ireland had or had not kissed Ms Balani at the store. Both agreed he had hugged her. However Mr Ireland did accept there was one occasion he had given Ms Balani "a peck on the cheek" as well as a hug. That particular occasion was probably during Christmas 2013 when he and Mr Court had visited the Pukekohe store during an in-store promotional campaign.

[44] Overall the evidence did not, on the balance of probabilities, support a conclusion that Mr Ireland had ever or routinely given Ms Balani a kiss on the lips as part of the hug. There was the single admitted instance of a 'peck' to her cheek.

Evening meeting at a bar – 6 May 2014

[45] On 1 May 2014 Mr Ireland telephoned Ms Balani and suggested they meet for coffee or a drink outside work hours. In his evidence he agreed he told her that was "just so we can get to know each other better". Mr Ireland agreed he arranged the

meeting at a time when his wife, Pauline Ireland, was out of town. Ms Balani's evidence was that he told her Mrs Ireland would be upset if she found out they were meeting. Mrs Ireland worked as an administrator at TCSOCL's head office. Around this time Ms Balani had also complained to Mr Ireland that Mrs Ireland had been nasty and rude to her when they spoke by telephone about various work matters.

[46] Mr Ireland and Ms Balani met at a Parnell bar suggested by Ms Balani. She chose the bar because it was near the apartment she shared with her sister and father. She arranged for her sister to visit the bar around the time she was due to meet Mr Ireland. Her sister arrived, with a friend, soon after Ms Balani and Mr Ireland. They spoke briefly to one another and then Niki Balani and her friend sat at a nearby table. They could not hear the conversation of Ms Balani and Mr Ireland which lasted around two hours and ended at about 8.30pm. Mr Ireland drank two beers and Ms Balani said she drank a soft drink during that time.

[47] In his evidence about the conversation Mr Ireland accepted he had referred to his wife as "a bitch" and "an alcoholic", which he said was "a standing joke before them". He agreed however, that if it was a joke, it was not one Mrs Ireland would consider should be shared with other people.

[48] Ms Balani said Mr Ireland had talked about his business background and she had talked about her father, her mother and her sister. She talked about having previously worked for her father and joked that she had been fired from that job. Either during this discussion, or some other conversation, she told Mr Ireland that she suffered from anxiety issues and saw a counsellor for assistance. She also told him that evening of having been sexual harassed by a previous employer. The harassment occurred when she was around 18 years old and lived in Italy.

[49] In a conversation three days later Mr Ireland asked Ms Balani whether she felt uncomfortable having a drink with him. He said he asked her that question because he wondered why Ms Balani's sister and a friend were also at the bar. Ms Balani said he asked whether that was because of her "experience in Italy" and she had replied "no, no, it's ok".

Incidents on interview day – early June 2014

[50] During early June Ms Balani and Mr Ireland conducted interviews for new staff at the Pukekohe store. Ms Balani's evidence referred to three incidents on the day of the interviews that she said made her feel uncomfortable. Firstly, after one interview, Mr Ireland had said to her: "You know you and I have a lot more in common than you think don't you." Secondly, after an interview at which a 16-year-old young woman was offered the job, Mr Ireland had hugged the successful candidate. Thirdly, Ms Balani had shown Mr Ireland and another staff member a photo of her and her daughter (the child born in September 2013). The photo showed the child standing between Ms Balani legs, with her hands holding on to Ms Balani's knees. Ms Balani said Mr Ireland had laughed and said: "She'd recognise that area wouldn't she, she's been there before".

[51] Mr Ireland's explanation of the three incidents denied Ms Balani's interpretation of them. Firstly, he said his comment about having a lot in common referred to the standards and attitudes he thought they both had to their work. Secondly, he accepted he had initiated the hug of the young recruit. He said he had done so because she was excited about getting the job but he described it as "in hindsight, a silly move". Thirdly, he denied saying the words ascribed to him about the photo of Ms Balani's daughter. He said he recalled saying "she knows where she came from", meaning the child knew who her mother was, and denied his comment had any of what he called a "sexual connotation".

Texts in May-June 2014

[52] Ms Balani submitted various texts sent to her by Mr Ireland were "attempting to achieve access and intimacy" with her.

[53] In earlier conversations she and Mr Ireland had talked about rugby. On the evening of 23 May he sent her a picture text while attending a Super Rugby game with the words "sorry you can't be here". He said he had sent the same message to other people as well. Ms Balani had replied with a message that said: "I was just bloody thinking of you. Hope you're having a fantastic time."

[54] On 7 June he also sent her a text about the likely score for a rugby game that evening. Her reply text included these words: "Lol. I can't wait! Thought you were going to send a photo from the game!"

[55] Between 10 and 12 June Ms Balani and Mr Ireland exchanged several texts about her being off work due to what she called "a flu thing". It included the following exchange:

Ireland:	Sounds good. I've sent you a big hug as well to speed recovery.
Balani:	Thanks. It better work!
Ireland:	It will I'm sure.
Balani:	I'll be in tomorrow … Just got a cold now but I can function! Yay.
Ireland:	Well done told you hug would work.
Balani:	☺

Meeting at café – 30 June 2014

[56] During a phone call to Ms Balani on 20 June Mr Ireland said he would be in the area next week and would like to catch up for coffee on Monday, 23 June. Monday was Ms Balani's day off but she agreed to meet. On that Monday Mr Ireland called her to confirm the arrangement but later sent a text that said the day had "turned pear shaped" and "Rain check please on the coffee meet". Ms Balani replied with a text that read: "Ok. No problem. I'm in botany doing sleepy head stuff for dad any WY (sic)". The 'sleepy head' reference was to her father's retail business that sold beds.

[57] On 28 June Mr Ireland sent a text asking if Ms Balani was "okay for the rain check to be used on Monday". On Monday, 30 June he sent a further text: "Am I able to cash in my rain check today. Let me know if you are free." Ms Balani replied suggesting they meet at the Sylvia Park shopping centre.

[58] Ms Balani described the meeting at a café there as "strange" with the only work matter discussed being when she again complained about how Pauline Ireland treated her and she told Mr Ireland he would need to do something about it.

[59] Mr Ireland's evidence was that he had arranged the 30 June meeting at the cafe to "get to the reason" for customer complaints received about dealings with Ms Balani. The complaints he referred to comprised a telephone call from one customer in December 2013, a phone call from another customer in April 2014, and an email

from a customer dated 29 May 2014 about how Ms Balani had spoken to her when giving a refund for a faulty appliance.

[60] However Mr Ireland's evidence confirmed that he did not discuss those complaints, or the instances to which they related, with Ms Balani at the café that day. Instead his evidence was that Ms Balani had told him a story about an incident that occurred before meeting with her psychiatrist that day. He said she talked about having got out of her car to abuse a slow driver that she was stuck behind while looking for a park but that the driver turned out to be her psychiatrist who had said it looked as though she had not learnt to control her anger and the therapy was not working. Ms Balani confirmed she had met her psychiatrist earlier that day but denied both that she told Mr Ireland that story and that the incident recounted had occurred.

[61] The evidence of Ms Balani's psychiatrist, Dr Asteriadis, confirmed she had seen him on 30 June. She had an appointment for a medication review, something she did every three to six months. Dr Asteriadis described Ms Balani's symptoms as comprising panic attacks, anxiety and, periodically, depression. His evidence was that he recalled no situation of the sort described in Mr Ireland's parking story. Relying on that evidence, it was more likely than not that the incident described in Mr Ireland's story did not occur and that Ms Balani did not tell him any such story.

Lunch request – 26 July 2014

[62] On 26 July Mr Ireland called Ms Balani on her mobile phone during the first day of three days of leave she had arranged. She was in Whangarei that day helping her father and sister set up a pop-up bed store they were running there. She did not immediately answer Mr Ireland's call but telephoned him back soon after. After describing work he was doing that day, Mr Ireland asked Ms Balani if she would meet him for lunch the following week. Her evidence about that request, not substantively challenged by Mr Ireland, was that he said:

> I hope this is not presumptuous but I thought we could meet for lunch sometime next week. Pauline is away for the new store opening and I thought we could have a catch up. You know, a social thing, not for work, just a social thing.

[63] Ms Balani agreed to his request and Mr Ireland soon after ended the call saying that he had to go because Mr Court was coming. Ms Balani formed the

impression from that comment that Mr Ireland was keeping the lunch arrangement secret from Mr Court.

[64] She said began crying after the call and then talked to her sister and father about what she described as her "realisation" that "there was something very wrong". After hearing her account of events, including that Mr Ireland had hugged and kissed her, Mr Balani told Ms Balani that Mr Ireland's actions were not correct and also suggested she see her GP about her high anxiety levels. She did see her GP soon after. Her GP referred her to a psychologist, Mr Thickpenny.

[65] Ms Balani did not respond to other texts she received from Mr Ireland during her days off but responded to an email query from him on 29 July in which he wrote: "Are you okay. Left a couple of text messages, a couple of messages no reply". Ms Balani responded by email: "Yes all ok. Am avoiding my phone. Sorry to worry you". Mr Ireland then replied: "Thanks for the reply. Enjoy the next couple of days".

[66] The next morning, on 30 July, the following text exchanged occurred:

Ireland:	Are you okay to talk if I call understand if no.
Balani:	Not really a good time … Dog has taken a turn for the worse so am at vets now, going to emergency vets soon. It is urgent?
Ireland:	No not urgent just a social catch up thought something might be up and that you might need cheering up Good luck with the vet.
Balani:	Yea hasn't been a good few days at all actually. Quite a few things going on but nothing anyone else can do for me. It's just life. Thanks for your concern.
Ireland:	Well you are wrong. You have someone like me who cares and happy to try and help, or at least try and cheer you up. Not being nosey but being down a hole is not fun, I actually have a ladder to help you out. Smile at least once when you read this.

[67] Later the same day, the following texts were exchanged:

Ireland:	How did the vet end up.
Balani:	All ok thanks.
Ireland:	If you need an ear, I have one available. Here's another saying "involve me and I understand". Food for thought.

Text on 1 August 2014

[68] Over the next two days Ms Balani did not respond to two missed calls to her mobile phone from Mr Ireland. She then received the following text from him on 1 August:

Hey,
It's funny when you get so tired you seem to see things a lot clearer.
All the contact I have with you on a personal level over last few weeks must seem like I'm a stalker.
Hell no. Just someone who cares.
If I have upset you or given the impression of stalking you I'm sincerely sorry.
I am a very kind person and have no bad bones yet found.
I will stick to business unless invited by you to venture off that path.
I am firing on 1 cylinder at present so if you find this just the ravings of an overworked person may be you would be correct.
Cheers
Craig

[69] Mr Ireland telephoned Ms Balani at the store the next day and asked if she had received his text. She said yes and nothing more. He then said he was just making his usual calls around the stores to check everything was ok and, after Ms Balani told him things were fine, he ended the call.

Events at store - 5 August 2014

[70] On 4 August Ms Balani met with her psychologist Mr Thickpenny. He suggested Ms Balani could offer a handshake to Mr Ireland as a way of dealing with her discomfort about receiving a hug from him and, if questioned by Mr Ireland about why she did that, Ms Balani should tell him she found the hugging unacceptable.

[71] On 5 August Mr Ireland came to the store to conduct further job interviews. When he put out his arms to hug Ms Balani she put out her hand for a handshake. A conversation along the following lines then occurred:

Ireland: Why, what's this?
Balani: I'm not really comfortable with that.
Ireland: I really don't want you to feel uncomfortable.
Balani: I understand. I don't want to talk about it.

[72] After finishing the job interviews they had arranged that day, a further conversation occurred which Ms Balani recalled was:

Ireland: Just quietly, I am sorry for making you feel uncomfortable.
Balani: Well I am. I am really uncomfortable with it. Let's just leave it at that.
Ireland: Well – I'm really sorry about that. You know that you and I have chemistry don't you. I'm not happy with the handshake thing and it's not the way we do things around here. I'm sorry you are not comfortable but I will break you.
Balani: What does that mean?
Ireland: I will break you.

Balani: What do you mean by you'll break me. Is this some sort of challenge for you?
Ireland: No, no – it's just things will get back to the way they were. This is not the way we do things around here.
Balani: Well you won't, due to my past.

[73] Mr Ireland agreed with much of Ms Balani's account of the conversation but not all. He accepted however that he had made the 'break you' comment and had said they had "good chemistry".

Phone call – 5 August 2014

[74] On returning home Ms Balani sent Mr Ireland the following text: "Hi Craig. I'm a bit confused. What did you mean today when you said we had chemistry and you would break me?"

[75] Mr Ireland rang her mobile soon after and Ms Balani took the call using the speaker function on her phone. Her father and a business associate who was also present both heard the conversation that followed. Mr Ireland did not know they were also listening in on what he said.

[76] Ms Balani said Mr Ireland referred to them having 'chemistry' on a professional level. She said the tenor of his explanation was that he wanted to go back to doing things "the Clearance Shed way" which she interpreted as including him hugging her. She responded: "Even though you know it makes me uncomfortable you want to continue doing that?" He repeated that he would get things back to the way they were as they had a good relationship and he did not want that "fucked up". He also referred to still needing to call her on her personal mobile phone. She agreed saying: "Only if it's work related".

[77] After discussing the situation with her father Ms Balani decided to keep working. She had no phone calls from Mr Ireland for the remainder of the month and he did not visit the store. However she remained highly anxious in the following weeks about the prospect that he would visit. During that month she also had two further sessions with Mr Thickpenny. His evidence confirmed she reported high levels of stress and anxiety about Mr Ireland visiting the store.

[78] After further discussion with her father, Ms Balani sent a notice of resignation by email to Mr Ireland on 2 September. She forwarded a copy of the email to Mr

Court the following day. In a brief reply email Mr Court described resignation as "a bolt out of the blue" and wrote that he did know she was unhappy.

Phone call – 4 September 2014

[79] On 4 September 2014 Mr Ireland rang Ms Balani at the store. She took the call a speaker phone in the staff room with Ms Insley present. Her evidence of the conversation, accepted by Mr Ireland, was as follows:

> Ireland: I've read your email.
> Balani: I really don't want to discuss it.
> Ireland: So you don't want to discuss it.
> Balani: No. I've made a decision. I really don't want to discuss it Craig.
> Ireland: Nothing at all I can do? Changing stores or something?
> Balani: No. I've made a decision, please respect that.
> Ireland: Alright, I had to try and see if I could do something.
> Balani: No you can't.
> Ireland: Alright then.

Store visit – 11 September 2014

[80] On 11 September 2014 Mr Ireland came to the store. Ms Balani was in the public area of the store talking to the assistant manager. Mr Ireland asked the assistant manager to leave them alone. He then talked with Ms Balani for a period that she said lasted around 40 minutes while he said it was less.

[81] At the beginning of the conversation Mr Ireland referred to Ms Balani not wanting to talk with him about her decision to resign but that as he paid her wages he though she should listen to him. He said he hoped she was not leaving because she had misinterpreted his kindness. Ms Balani told him that she had resigned because she was uncomfortable and wanted to move on. From her account of the conversation Mr Ireland accepted that he had made the following comments:

> You have misinterpreted everything. I would never do what you are thinking.
> The age gap is too big and there are too many people in the business. I would never even consider something like that.
> The only reason I invited you for a coffee outside of work was because I have received three complaints about you and I wanted to see what was behind your exterior. You are a very black and white person.
> The complaints I received from customers greatly concerned me so I thought if I took you outside of work I would be able to understand you better.
> You had potential to be a great manager but you need to be tempered. You have a lot to learn and I can teach you things.
> You would be making a huge mistake leaving because you have potential and there are great opportunities for you in this company in the future – but I needed

> to understand you better and understand why I had received these complaints about you.
> I am a caring and nice person and you have misinterpreted my kindness and concern for you.

[82] He suggested Ms Balani take a two week holiday and then meet him for coffee to discuss what she wanted to do.

[83] Ms Balani said Mr Ireland had not previously referred to any customer complaints. After Mr Ireland left the store Ms Balani rang her father in tears and met him for lunch. She finished work at the store two days later.

(ii) Was the statutory standard for sexual harassment met?

[84] For the purpose of establishing a personal grievance under the Act, sexual harassment is defined as follows:

> **108 Sexual harassment**
>
> (1) For the purposes of sections 103(1)(d) and 123(d), an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer—
>
> (a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains—
> (i) an implied or overt promise of preferential treatment in that employee's employment; or
> (ii) an implied or overt threat of detrimental treatment in that employee's employment; or
> (iii) an implied or overt threat about the present or future employment status of that employee; or
>
> (b) by—
> (i) the use of language (whether written or spoken) of a sexual nature; or
> (ii) the use of visual material of a sexual nature; or
> (iii) physical behaviour of a sexual nature,—
>
> directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance, or job satisfaction.

[85] Ms Balani relied on subsections (b)(i) and (iii) to submit Mr Ireland had used language and physical behaviour of a sexual nature that was unwelcome or offensive to her and, by its repetition, had a detrimental effect on her employment, job

performance and job satisfaction. She did not allege any form of coercion seeking sexual activity of the type referred to in subsection (a).

[86] The statutory standard required her case to establish three elements:

(i) Language and behaviour of a sexual nature was used by Mr Ireland (assessed on an objective test of what would be apparent to a reasonable person); and

(ii) Such language and behaviour was unwelcome or offensive to her (assessed on the subjective test of how she saw or experienced that herself); and

(iii) Such language and behaviour had a detrimental effect on her employment, job performance and job satisfaction (assessed on a combination of both objective factors of what others could identify and subjective factors of her own reported experience.

[87] Determinative in this case was the first element of whether what Mr Ireland said and did, according to what has been accepted from the evidence on the balance of probabilities, was "of a sexual nature".

[88] Some words and deeds, considered in isolation, may not appear to be of a sexual nature but in combination with or the context of what else is said and done may amount to conduct of that sort. Sexual harassment of this type is not limited to what the decision in one case called "sexual propositions or unwanted physical libidinous contact".[18] As noted by the Human Rights Review Tribunal, in interpreting and applying the same statutory standard under the Human Rights Act 1993 s 62(2), context is everything and seemingly innocent words are capable of taking on a sexual nature.[19] What is said and done may have a superficially harmless nature but nevertheless have "something of the subtle sexual proposition" about it. In combination and frequency such conduct may become language and physical behaviour of a sexual nature.[20] Comments or physical behaviour associated with intimate relationships such as those between a parent and child or between siblings (such as the use of endearments or a kiss or embrace as a greeting) are not regarded as

[18] *L v M* [1994] 1 ERNZ 123 at 154 (ET).
[19] *DML v Montgomery* [2014] NZHRRT 6 at [106].
[20] *Proceedings Commissioner v H* (1996) 3 HRNZ 239 at 247

sexual behaviour in that context but in other contexts, such as between strangers, may operate as indications of sexual interest.[21]

[89] The facts in *Rodger v Fogelberg, Vice Chancellor of the University of Otago* provided an example of the combination of apparently innocent or equivocal conduct with other words or deeds to establish whether the behaviour was of a sexual nature.[22] There an employee had taken a photo of the complainant from a notice board, which the Court accepted did not seem to fit the description of being an act of a sexual nature. However the employee had also told the complainant he found her attractive and he had taken the photo to "fantasise" over it. Those comments, in combination with the removal of the photo, provided the basis on which the Court accepted the employer could legitimately conclude the employee engaged in behaviour of a sexual nature.

[90] The Court's decision in *Kumar v Icehouse (NZ) Limited* included this description of relevant principles in making the assessment of whether actions were sexual in nature, and an example of the application of those principles:[23]

> The present case is one where the alleged actions of the plaintiff … were not unequivocally sexual in nature. In such borderline cases, where the sexual nature is not immediately manifested by the manner of the physical behaviour or the nature of any accompanying words used, it may be helpful to take into account the context of the behaviour. Here it took place in front of a witness … who, according to her diary entry, laughed, and apparently therefore did not take it seriously. It occurred in an open-plan factory in which some 13 other employees worked. Apart from an alleged apology for the contact there were no accompanying words or gestures which would indicate that the plaintiff's physical actions were sexual in nature. Where there has been an element of repetition this can lead to a conclusion that words or acts, which individually were equivocal as to the sexuality of their nature, were indeed sexual. Where equivocal behaviour is not repeated it is not likely to be objectively viewed as sexual in nature.

[91] I was not persuaded the behaviour of Mr Ireland in hugging Ms Balani, particularly not having accepted her evidence of any accompanying kiss to the lips, was established to the necessary standard as being of a sexual nature. Considering as the Court did in *Kumar* the context in which the hugs occurred, in the store with other staff present and on two occasions outside the work environment in a public place (a bar and a café), the behaviour were less likely to be sexual in nature. I was not

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[21] *Proceedings Commissioner v H*, above n 20, at 247.
[22] [2003]1 ERNZ 223 at [25].
[23] [2006] ERNZ 381 at [35].

persuaded its repetition demonstrated anything other than what had become a habitual ritual of greeting within the business.

[92] That conclusion may have differed if there was reliable evidence of some other physical aspect to that behaviour, such as having pressed closely to Ms Balani's body or having held her longer than might be typical or socially acceptable. There was not. Evidence from Mr Thickpenny about his discussion with Ms Balani on 4 August 2014, which I considered had the necessary degree of objectivity, established she had told him then that she had not been "sexually touched" but did feel Mr Ireland was manipulating their business relationship towards a personal level that made her feel uncomfortable and anxious.

[93] The conclusion on whether the hugs were of a sexual nature could also have differed if their combination with some other words or activity established a sufficiently unequivocal sexual nature to the interactions overall, as explained by the Court in *Rodger*. I was not persuaded any of Mr Ireland's other interactions were, either in themselves or in combination, established to be sexual in nature.

[94] In reaching that conclusion I have not accepted the opinion (very broadly paraphrased here) expressed by Mr Balani in his oral evidence that any situation where a 65-year-old senior manager hugged a 34-year-old junior manager and met with her away from the workplace inherently had a sexual nature or was intended to pursue a sexual relationship. It was a view that required an attribution of intention by Mr Ireland that was beyond the criteria set by the statutory definition and was not, in my conclusion, one that could be reached on the evidence as being more likely than not. The statutory reference to whether words or actions were "of a sexual nature" required an objective assessment of the actual behaviour, as it existed at the time, rather than subjective speculation about what its intention might be.

[95] A blanket rule that a male manager and a female manager could not meet off-site or out of work hours to discuss work matters or generally socialise without it being of a sexual nature would not fit easily with either general business practice or modern notions of gender equality. Rather the issue was whether what occurred on such occasions was within the range of appropriate workplace and social behaviour.

[96] In this case it was Ms Balani who chose the particular venues where she met with Mr Ireland outside work, at his request, on two occasions. The evidence disclosed nothing of a sexual nature was said or done on either occasion. This was so despite a reasonable doubt that it was necessary to meet outside working hours (at the bar) or on Ms Balani's day off (at the café).

[97] Some of Mr Ireland's actions were also cause for doubt. His 26 July request to meet for lunch "as a social thing", his 30 July text offering "a ladder", his 4 August text referring to seeming like "a stalker" and his 5 August comments about having "chemistry" with Ms Balani and that he would "break" her to get back to the way things were after he had declined her offered handshake, were each actions capable of being interpreted as at least being equivocal behaviour. They were actions that either assumed a level of personal intimacy with Ms Balani or sought to exert some power over her but they were not, in my assessment of the evidence overall, behaviour and language of a sexual nature.

[98] Similarly Mr Ireland's ambiguous comment about a photo of Ms Balani and her daughter and his actions in hugging a new recruit at the store exhibited a degree of poor judgment or over familiarity but were not actions of a sexual nature.

[99] His references to his wife being away on two occasions when he talked to Ms Balani about meeting (at the bar chosen by Ms Balani on 9 May and when suggesting lunch on 26 July) could be seen as equivocal. However there was a valid reason that Mrs Ireland was mentioned in their conversations because of Ms Balani's complaint to Mr Ireland about how Mrs Ireland treated her over work matters. I have not accepted the references to Mrs Ireland's absence amounted to innuendo of a sexual nature.

[100] Having not established the first element in the statutory definition of sexual harassment, it was not necessary to consider under this heading whether Mr Ireland's behaviour was unwelcome and offensive to Ms Balani or resulted in detriment to her. Her evidence about his behaviour being unwelcome and causing her detriment was however relevant to her claim of having been subjected to unjustified disadvantage and her argument that her resignation was really a constructive dismissal.

Unjustified disadvantage

[101] The Act allows for a personal grievance where an employer has by some unjustified action affected their employee's employment, or a condition of that employment, to the employee's disadvantage.[24] It also requires parties to the employment relationship to deal with one another in good faith, which includes not misleading or deceiving one another.[25] The parties must be active, constructive, responsive and communicative, which includes providing relevant information to one another, in a timely way.[26]

[102] Ms Balani's claim of unjustified disadvantage was established by Mr Ireland's own evidence as well as that of Ms Balani. There were two elements to that disadvantage.

[103] One element related to his frequent contact with her and his reaction to her attempt (on 5 August) to create appropriate distance and standards with which she would be comfortable in the employment relationship. The other element related to his failure to properly disclose to Ms Balani the customer complaints which he said were his reasons for taking a close interest in her and to meet and talk with her outside the workplace.

Pestering

[104] In oral argument on its closing submissions TCSOCL described Mr Ireland as having "made a pest of himself" in his dealings with Ms Balani.

[105] Some activities, such as texts and phone calls about work matters, might reasonably need to occur outside work hours for someone in a managerial or supervisory role. And the text exchanges about rugby games were within a normal range of social contact that might reasonably occur between colleagues in a business outside of working hours.

[106] However the arrangements Mr Ireland made to meet away from the workplace, on 9 May and 30 June, stretched the boundary of reasonable requirements. Even if his reason for wanting to talk with Ms Balani at the time were valid (as a way

[24] Employment Relations Act 2000, s 103(1)(b).
[25] Employment Relations Act 2000, s 4(1).
[26] Employment Relations Act 2000, s 4(1A).

of seeking background to three customer complaints), there was no need for those to be discussions held away from her workplace. The store had a staff room that could be used as an office for private discussions (as it was for job interviews held there).

[107] The 26 July lunch invitation indicated Mr Ireland was seeking a degree of personal connection with her that was solely what he called "a social thing, not for work".

[108] Both the 30 June café meeting and the 26 July call to invite Ms Balani to lunch occurred on days that she was away from work, on a day off or on arranged leave – a fact known to Mr Ireland. His contact with her on those days was an intrusion into her private time.

[109] It was in that context, after Ms Balani had what she described as her 'realisation' and had sought advice from a psychologist on how to deal with her feelings of discomfort, that Mr Ireland's comment that he would 'break' her occurred. His rejection of her offered handshake and that comment made it clear that he meant to continue with conduct Ms Balani had clearly communicated made her uncomfortable.

[110] Although she was able to emphasise that boundary in her telephone conversation with him later on 5 August, and get his agreement that calls to her mobile phone would be only on work-related matters, she reasonably doubted his intention given that he had said he would "get things back to the way they were".

[111] His actions had seriously damaged the trust and confidence she was entitled to have in the employment relationship which, in all the circumstances, was an unjustified disadvantage in her employment.

Breaches of good faith

[112] On his own evidence Mr Ireland also failed to act in good faith towards Ms Balani in two ways.

[113] Firstly, he said that the two off-site meetings were so he could better understand Ms Balani and whether three customer complaints (in December 2013, April 2014 and May 2014) were caused by what he said were "anger outbursts" by

her. If that were so, he misled and deceived her by not disclosing his supposed reason for the discussions.

[114] Secondly, he produced two emails from two customers – one dated 29 May 2014 and another dated 7 July 2014 – which included complaints about their interactions with Ms Balani at the store. Neither email had been shown to her and no response sought from her about what the customers had written.

[115] Mr Ireland conceded in answer to questions at the Authority investigation meeting that, if his explanation was true, his conduct had confused Ms Balani because she could not understand why he wanted to meet and talk with her in the way that he had. If she had misunderstood his purpose, his breach of good faith by not being upfront with her was responsible for that situation.

[116] Ms Balani, by contrast, had been prompt and communicative about the situations where she had come into conflict with customers. None of the four situations were news to Mr Ireland because at the time each had occurred, Ms Balani had contacted him and either asked for advice or confirmed that he approved of what she had done at the time in each case.

[117] Mr Ireland could not convincingly explain why he had not provided the information about the two emails to Ms Balani or why his meetings with her, which he said were motivated by those incidents, occurred weeks later rather than in a day or so. His delay (if that was what it was) was not within the range of prudent business practice and risk management where a senior manager would promptly seek a response (and any relevant background) from a local or site manager about a customer complaint.

[118] His failure to deal with her in good faith over those matters breached both statutory obligations to her as well as the implied contractual term of fair dealing. Both breaches amounted to unjustified disadvantage in her employment.

Was Ms Balani's resignation really an unjustified constructive dismissal?

[119] In closing submissions TCSOCL described Mr Ireland's 5 August comments about his "chemistry" with Ms Balani and that he would "break" her as "totally inexcusable". However it submitted that, because Mr Ireland had endeavoured to mend fences with Ms Balani later that day and then had no contact with her from then

until she submitted her notice of resignation on 2 September, it was questionable whether those statements had made her work environment intolerable.

[120] A delay between the employer's breach of duty, said to be the cause of the resignation, and the date of resignation is not determinative of whether the supposed resignation was really a constructive dismissal.[27] What is determinative is whether Ms Balani would have left but for, through Mr Ireland's actions, the breaches of duties owed to her by her employer.[28]

[121] The evidence of Ms Balani, Mr Balani and Mr Thickpenny established to the necessary degree that following 5 August she was in a continued state of heightened anxiety caused by Mr Ireland's earlier breaches of duties owed to her (even if she was not aware of the true nature or full extent of his breach of good faith duties). In those circumstances it was reasonably foreseeable she would find the situation intolerable and resign. The grounds of constructive dismissal were established.

[122] In reaching that conclusion I have not accepted TCSOCL's submission that Ms Balani had an effective avenue of complaint available by approaching Mr Court. The company had no written or established complaints policy. It was not unreasonable to doubt, if she had thought about it, that Mr Court would vigorously pursue a complaint from her about his longstanding business partner and fellow director. Significantly Mr Court did not independently approach Ms Balani about the reason for her resignation once she forwarded a copy of her notice of resignation on 3 September. Mr Court's evidence was that he and Mr Ireland had a clear division of management responsibilities and he left operational matters to Mr Ireland.

[123] What Mr Court did do in early September was to ask Mr Ireland if he knew what was happening and told him to "fix it", meaning to persuade Ms Balani to stay with the business. It was that conversation that motivated Mr Ireland's contact with Ms Balani by phone on 4 September and in person on 11 September. What was also clear from the evidence of both men was that when told to "fix it" by Mr Court, Mr Ireland did not tell him anything he already knew about the reasons Ms Balani had given notice of her resignation. Mr Ireland had not told Mr Court about the 5 August handshake incident, her comments about Mr Ireland making her feel uncomfortable,

[27] *Para Franchising Limited v Whyte* [2002] 2 ERNZ 120 at [28].
[28] *Z v A* [1993] 2 ERNZ 469 at 483.

his comment about breaking Ms Balani or their subsequent telephone conversation. It was apparent during the investigation meeting that Mr Court was deeply disappointed that his business partner had not done so at the time.

Remedies

[124] Having established the grounds of her personal grievance of an unjustified constructive dismissal, Ms Balani was entitled to an assessment of remedies.

A penalty against Mr Ireland

[125] Mr Ireland's role in carrying out the behaviour or activities that breached duties owed to Ms Balani made him liable for a penalty under s134(2) of the Act for instigating those breaches of her employment agreement.

[126] As a matter of practicality and the overall fairness of the outcome in the particular circumstances of the case, any penalty imposed on Mr Ireland was relevant to the overall basket of remedies that might be awarded to Ms Balani. For that reason I considered it should be determined first.

[127] The various acts by him that seriously undermined the trust and confidence Ms Balani could have in the employment relationship and his breaches of good faith (in respect of the customer complaints and his declared reasons for off-site meetings) could have been itemised as particular breaches each attracting a penalty. However I concluded the result was better expressed on a globalised basis – with firstly, the 'pestering' breaches culminating in the 'break you' conversation and, secondly, the breaches of good faith over the customer issues, each warranting a penalty of $3000, totalling $6000. Globally it was an amount appropriate to punish Mr Ireland for his actions and the harm caused to Ms Balani as well as to generally deter such conduct by others. As Ms Balani suffered the effects of Mr Ireland's actions, I have ordered that the penalty must be paid to her under s 136(2) of the Act.

Lost wages

[128] Ms Balani sought an award for lost wages totalling $7025 and comprised of two elements. Firstly, she sought $1825 for wages she would otherwise have earned from TCSOCL from 15 September to 4 October 2014. Secondly, she sought $5200 for the difference for a further 26 weeks between the wages she earned in a new job

and what she would have been paid if she had not left TCSOCL. The difference was $200 a week.

[129] The role Ms Balani took up in early October was at a new bed store opened by his father's business. TCSOCL submitted it should not be liable for reimbursing her for the difference created by the lower wage she accepted to take up that role because she made that choice as a matter of convenience and for the longer term benefit of being part of a family business. I have not accepted that argument.

[130] Ms Balani made reasonable endeavours to mitigate her loss by securing a new job within a month and offsetting greater losses for which TCSOCL would otherwise have been liable. Six months was a reasonable period to claim the wage differential and accordingly I have ordered the amount sought by Ms Balani in her closing submissions as lost wages under s123(1)(b) of the Act.

Reimbursement of health costs

[131] Ms Balani sought reimbursement of health costs she had incurred in seeing her GP, her psychiatrist and her psychologist in relation to events that led to her personal grievance. In closing submissions Ms Balani suggested that aspect of her claim be dealt later when legal costs and expenses came to be considered. I considered the claim should be resolved in this determination along with other remedies.

[132] I have agreed with TCSOCL's closing submission that Ms Balani would likely have incurred the costs of visits to her GP and her psychiatrist in any event as part of regular medication reviews and have made no award for them. What was additional was the costs of counselling sessions with Mr Thickpenny that were directly related to her work experiences of being dealt with unfairly by her employer.

[133] Mr Thickpenny's evidence suggested that four sessions with Ms Balani focussed on work issues but later on-going sessions dealt with wider anxiety issues that were pre-existing.

[134] In those circumstances I concluded $1,000 was the appropriate amount for TCSOCL to pay as reimbursement of a portion of the $2,295 Ms Balani claimed for cost of her sessions with Mr Thickpenny.

Compensation for humiliation, loss of dignity and injury to feelings

[135] Ms Balani's evidence established she was humiliated by how Mr Ireland treated her, particularly on 5 August. The evidence of her sister and her father confirmed the upset and distress Ms Balani experienced, particularly from 26 July onwards. Overall she experienced a loss of dignity from the circumstances of her constructive dismissal.

[136] Her pre-existing experience of anxiety and resulting vulnerability to distress did not reduce her entitlement to compensation. TCSOCL had to take the consequences of her sensibilities or relatively greater vulnerability, particularly because Ms Balani had disclosed to Mr Ireland in May that she suffered from anxiety issues and had some sensitivity around the prospect of sexual harassment because of the bad experience she had as a younger woman with a previous employer.

[137] In setting the appropriate level award of compensation for TCSOCL to pay, it would be highly artificial to ignore the value of the penalty that Mr Ireland has also been awarded to pay Ms Balani. While compensation under s 123(1)(c)(i) of the Act and a penalty serve different legal functions, their total value to Ms Balani was relevant to the fairness of the overall outcome. Without the penalty, and being mindful of the need not to keep compensatory payments artificially low but balancing the need for moderation, the particular circumstances of Ms Balani's case and the general range of awards would have warranted a compensation award in the range of $10,000 to $14,000.[29] Allowing for the value of the penalty which Mr Ireland must personally pay Ms Balani, I concluded TCSOCL should also pay her $6000 as compensation under s 123(1)(c)(i) of the Act.

Contribution

[138] Under s 124 of the Act the Authority must consider whether any remedies that the employer has been ordered to pay should be reduced due to conduct by Ms Balani that contributed to the situation giving rise to her personal grievance. I did so and concluded no conduct by her warranted such a reduction.

[29] *Hall v Dionex Pty Limited* [2015] NZEmpC 29 at [87] and [90].

Costs

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

[140] If they are not able to do so and an Authority determination on costs is needed Ms Balani may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this written determination. From the date of service of that memorandum TCSOCL and Mr Ireland 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.

[141] 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.[30]

Robin Arthur
Member of the Employment Relations Authority

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