

**ATTENTION IS DRAWN TO
THE ORDER PROHIBITING
PUBLICATION OF CERTAIN
INFORMATION
(REFER PARAGRAPH 4)**

**THE EMPLOYMENT RELATIONS
AUTHORITY AUCKLAND**

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

[2022] NZERA 242
3133857

BETWEEN

KEVIN BREEN
Applicant

AND

RENTOKIL INITIAL
LIMITED
First Respondent

Member of Authority: Eleanor Robinson

Representatives: Sam Houliston, counsel for the Applicant
Justine Foden, advocate for the Respondent

Investigation Meeting: 3 and 4 May 2022

Submissions and/or further evidence: 4 May 2022 from the Applicant and
from the Respondent

Determination: 10 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Kevin Breen, claims that he was unjustifiably disadvantaged by the actions of the Respondent, Rentokil Initial Limited (Rentokil Initial), specifically by the allegations made during a meeting held on 24 November 2021 in which Mr Breen claims he was accused of fraud and of being disrespectful.

[2] Mr Breen further claims that this situation resulted in him being constructively dismissed by Rentokil Initial because its actions which left him with no option but to resign from his employment.

[3] Rentokil Initial denies that Mr Breen was accused of fraud and denies that he was either unjustifiably disadvantaged or constructively dismissed.

Prohibition on publication

[4] **I order that the name of the clients of Rentokil Initial involved in the events outlined in this determination are not to be published. The clients will be referred to by letters bearing no relationship to the clients' actual names. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

The Authority's investigation

[5] During the investigation meeting held on 3 and 4 May 2022 I heard from Mr Breen, and witnesses for the Respondent, Mr Brendan Douglas, Ms Kennedy Short, Mr Mufaddal Ranjiwalla and Ms Michelle Drubé.

[6] I considered the statement of problem, the statement in reply, supporting documents, the witnesses evidence, and submissions from the representatives.

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

Issues

[8] The issues requiring investigation are whether or not Mr Breen was:

- Constructively dismissed as a result of the actions of Rentokil Initial?
- Unjustifiably disadvantaged by Rentokil Initial as a result of being accused of perpetuating a fraud?

Background

[9] Rentokil Initial is a global business which operates in New Zealand under the brands of Rentokil, Initial and Ambius.

[10] Mr Breen was employed as a Regional Sales Manager – Pest and Ambius, on 16 March 2020. In that role he managed 7 team members and reported to the Auckland Regional Sales Manager. At the time of Mr Breen's employment with Rentokil Initial Mr Douglas, who is

Head of National Accounts, was caretaking the role of the Auckland Regional Sales Manager and it was to him Mr Breen directly reported.

[11] Mr Douglas, together with Ms Short, Head of Sales, had initially interviewed Mr Breen, and both had believed him a suitable candidate for employment.

[12] Ms Short said that during Mr Breen's induction period, because she was responsible for ensuring compliance of Rentokil Initial's authority matrix and pricing tools, she provided him with training in authority levels. She explained that Mr Breen's authority level was limited to contracts below \$50,000 and therefore it was standard practice for her and Mr Douglas to meet with Mr Breen and his team members to discuss contracts which exceeded Mr Breen's authority.

[13] Mr Ranjiwalla, a Key Account Manager and a member of Mr Breen's team, said a notice had been received in October 2020 from a major client, AGB, stating that it had purchased another client, ZLP. The combined account of AGB and ZLP was worth approximately \$200,000 per annum to Rentokil Initial.

[14] Mr Ranjiwalla said there were pricing discrepancies between the two businesses. Due to confidential information not normally provided to a client being provided to AGB's Procurement Manager by an inexperienced new employee, AGB's Procurement Manager emailed Rentokil Initial on 16 October 2020 expressing her concerns and stating that she wanted to align the pricing between AGB and ZLP and achieve a reduction in costs of circa \$30,000 across both business' sites.

[15] During a regular Pacific trading call meeting in October 2020 Mr Douglas said he was surprised when Mr Breen disclosed the price reduction as part of his sales figures report to the Pacific Managing Director. As Mr Breen's manager, he would have expected to have been informed of it by Mr Breen prior to the trading call.

[16] Ms Short, who was present at the meeting, said that Mr Breen should have engaged with her and Mr Douglas about the issue because the AGB contract exceeded his authority level.

Meeting held on 19 November 2020

[17] Ms Short said she called a meeting on 19 November 2020 with Mr Douglas, Mr Breen, Mr Ranjiwalla and Mr Alex Kuklin, Sales & Marketing Analyst. The purpose of the meeting was to discuss the situation which had arisen with AGB and ZLP and consider options to address it.

[18] During the meeting it became apparent how the situation had arisen, and the meeting focus was thereafter on discussing the data. It concluded with a request that Mr Ranjiwalla and Mr Kuklin work together on the data to provide more information before the meeting reconvened.

Meeting held on 20 November 2020

[19] A second meeting took place on 20 November 2020 attended by Ms Short, Mr Douglas, Mr Breen, Mr Ranjiwalla and Mr Alex Kuklin. The information provided by Mr Ranjiwalla and Mr Kuklin and potential strategies were discussed, and it was agreed to meet again on the day prior to the meeting with AGB which was scheduled to take place on 24 November 2020.

Meeting held on 23 November 2020

[20] During the meeting held on 23 November 2020, the day prior to the AGB meeting, which was again attended by Ms Short, Mr Douglas, Mr Ranjiwalla, Mr Kuklin, and Mr Breen (attending via google hangout) Ms Short said an agreed alignment of rates was reached. Ms Short said this still offered the AGB customer an overall \$10,000 saving, in addition to offering value through a product upgrade.

[21] Ms Short said she wrote some figures on a whiteboard to demonstrate the breakdown between AGB and ZLP. She said the analysis had shown that while some sites were overpaying for the service provided, many were underpaying for the service provided. On that basis if Rentokil Initial were to offer a price decrease for the sites which were over paying, it was only fair and reasonable to include a price increase for the sites that were under paying.

[22] Ms Short said that at the end of the meeting she asked if the strategy was understood and supported. All present, including Mr Breen confirmed their understanding and support for it.

[23] Mr Breen said that he was asked at the conclusion of the meeting if he was prepared to see the AGB Procurement Manager the next day and present the agreed strategy. He had confirmed he was and when Mr Douglas asked if he wanted him to be present at the meeting, Mr Breen confirmed he was prepared to proceed with only Mr Ranjiwalla accompanying him.

[24] Mr Breen said that although he had agreed with the strategy at the meeting, in fact the reasoning or justification for the costs increases was not apparent to him.

Meeting held on 24 November 2020

[25] On the morning of the meeting with AGB's Procurement Manager, Mr Breen said he thought through the logical reasons for the increase for the AGB sites. He was concerned there

was no justification for the price increase at AGB sites and considered he needed a rationale to explain what Rentokil Initial had to offer to its clients.

[26] Mr Ranjiwalla said that he and Mr Breen met at approximately 10.00 a.m. to prepare for the meeting with the AGB Procurement Manager. At that time Mr Breen told him he was not comfortable with the strategy that had been agreed the previous day and he was brainstorming other options which would make him more comfortable in the presentation.

[27] Mr Ranjiwalla said he had already mentioned *ad hoc* jobs in relation to a pest infestation problem carried out by a technical manager at an AGB site in 2019. These were additional services provided above the contract but which were not charged to customers.

[28] On Mr Breen's instructions, he had spoken to the technical manager and asked the relevant account manager to join him and Mr Breen and provide information about the *ad hoc* services which had been provided.

[29] Mr Ranjiwalla said Mr Breen indicated to him that he intended to change the agreed strategy and use his own approach during the meeting.

[30] Mr Breen said that although the technical manager's time at the AGB site was well documented in the Rentokil Initial system, there were no charges to the account to recover the additional service costs.

[31] He said his strategy had been based on the premise that in the future the same level of service would need to be continued to ensure the AGB pest control was maintained. On that basis, it would not be financially viable to give a \$30,000 reduction in cost considering the increase in the level of service to AGB.

[32] He decided to use that state of affairs to explain to the AGB Procurement Manager that she was not comparing like with like, namely that there was a larger 'unseen' level of service being provided to address the client's problem, but where that same level of service needed to be maintained, the best reduction Rentokil Initial could offer while aligning pricing across all sites was \$10,000 rather than the \$30,000.

[33] Mr Breen said his approach did not conflict with the strategy agreed with Mr Douglas and Ms Short, but it did offer important context.

[34] Mr Breen said he had found a solution five minutes before the meeting started. He had not telephoned either Mr Douglas or Ms Short to discuss the change in strategy prior to the meeting with the AGB Procurement Manager.

[35] During the meeting with AGB's Procurement Manager at 11.30 a.m. he had explained the *ad hoc* services on which basis Rentokil Initial could offer a \$10,000 reduction rather than that \$30,000 sought.

[36] Mr Ranjiwalla said that the AGB Procurement Manager had acknowledged the *ad hoc* services and requested quantifiable data on them.

[37] Mr Breen said he was not sure how Rentokil Initial would want the information presented, and he asked Mr Ranjiwalla and Mr Kuklin to put together a spreadsheet document (the spreadsheet) which he wanted to provide to the AGB Procurement Manager as soon as possible so that the strategy looked authentic.

[38] Mr Ranjiwalla said he advised Mr Breen that Rentokil Initial had carried out *ad hoc* work for only one site and there was no means of being able to support the extra work performed with dates or service reports. He said Mr Breen instructed him to make up the services and amount to make it seem real for presentation to the AGB Procurement Manager.

[39] Mr Ranjiwalla said because Mr Breen was his Sales Manager, he respected his instructions and he and Mr Kuklin started to create the spreadsheet, however he could see that Mr Kuklin was uncomfortable doing so. He also was not comfortable and joked with Mr Kuklin that that they 'were going to jail' for creating the spreadsheet.

[40] Mr Ranjiwalla said he felt so uncomfortable with preparing the spreadsheet that he sent a hangout message to Mr Douglas and Ms Short at 2.09 p.m. on 24 November 2020 asking if they could have a meeting at 4.00 p.m. to discuss the new strategy and the spreadsheet which would be shared with the AGB Procurement Manager.

[41] Mr Breen said it was he who directed Mr Ranjiwalla to arrange a meeting with Mr Douglas, Ms Short and Mr Ranjiwalla following the meeting with the AGB Procurement Manager, and to have the spreadsheet ready for discussion.

Meeting on 24 November 2020

[42] Ms Short said she had started the meeting by asking how the presentation to the AGB Procurement Manager had gone, Mr Ranjiwalla told her that the meeting had gone well but approval was needed from her and Mr Douglas to present additional information to the client.

[43] Mr Breen said he had been pleased at what he had achieved at the meeting with the AGB Procurement Manager and he attended the meeting on 24 November 2020 expecting to

receive an accolade. However both Ms Short and Mr Douglas became very angry with him about his presentation to the AGB Procurement Manager and accused him of fraud.

[44] He said he had explained that the spreadsheet and the information it contained had not been presented to the AGB Procurement Manager, and he had been offended and surprised by the accusation of fraud.

[45] After making the accusation of fraud, he said Ms Short and Mr Douglas dismissed Mr Ranijwalla from the meeting, telling him that the conversation was now 'above his pay grade'.

[46] Ms Short said it was clear that the data had not been presented to AGB, however Mr Ranijwalla and Mr Breen were seeking permission to present it.

[47] She said Mr Breen explained that during the meeting with the AGB Procurement Manager he had presented an alternative strategy. This had involved him explaining to her that, based on historical work undertaken for the client but not invoiced, and an expectation that similar work would be required in the future, he was unable to offer her the expected \$30,000 reduction. He told them that she was satisfied with that approach but required Rentokil Initial to produce supporting data about the unbilled work.

[48] Ms Short said Mr Breen and Mr Ranijwalla shared a spreadsheet which detailed assumed hours of work undertaken by the Rentokil Initial technical team to support AGB on one of its sites during a high infestation period. The hours had an hourly rate assigned to them and equated to the value of the work that Rentokil Initial should supposedly have billed the client.

[49] However she said that the information about the pest infestation control work undertaken should not have been presented to AGB, and further that the work had not been billed to the client.

[50] Mr Douglas said he had been surprised and shocked to learn that the presentation to the AGB Procurement Manager had not been in accordance with the agreed strategy, and that Mr Breen had acted outside what had been authorised.

[51] Mr Ranijwalla said Ms Short asked him if the spreadsheet information was true, and if the work had been carried out at the identified sites, to which he had responded that it was a false document and the numbers were "totally made up".

[52] Ms Short asked who had instructed him to create the spreadsheet and he had replied that Mr Breen had asked him and Mr Kuklin to do so. He said Ms Short then asked Mr Breen to explain why he had deviated from the agreed strategy and Mr Breen explained that he had

not understood or agreed with the strategy so he had worked towards achieving an outcome which would result in only a \$10,000 reduction.

[53] Mr Douglas said that Ms Short had asked, in relation to the numbers on the spreadsheet document, how they had been calculated for each site. When Mr Breen said that they had been assumed for the supplementary sites using the same formula as for the original site, Ms Short had said, referring to the spreadsheet numbers: 'these are fictional'.

[54] Mr Douglas confirmed he had suggested to Mr Ranjiwalla that he might like to leave the meeting. He said the meeting had become extremely uncomfortable and he did not think it appropriate that Mr Ranjiwalla, a member of Mr Breen's team, remain.

[55] Mr Ranjiwalla said Mr Breen had become aggressive and spoken rudely to Ms Short when she expressed concern that the document was a false document and went against Rentokil Initial's values. He said he was shocked to hear Mr Breen speak so disrespectfully to a senior manager. The meeting had been heated and he had been glad to leave when Mr Douglas suggested he might like to do so. He said Mr Douglas had spoken to him courteously and there had been no reference to his pay grade.

[56] Mr Ranjiwalla said that he had not heard Mr Breen being accused of fraud by Mr Douglas or Ms Short while he was in the meeting

[57] Mr Breen said that after Mr Ranjiwalla had left the meeting, Ms Short and Mr Douglas continued to make accusations against him that: (i) he had provided a piece of fraudulent information to AGB; (ii) he had been less than transparent in his dealings with AGB; (iii) he was failing to show respect to them; and (iv) he had failed to follow his employer's directions.

[58] As a result he had felt betrayed because the spreadsheet had not been presented to the AGB Procurement Manager, and therefore there had been no fraudulent behaviour whatsoever.

[59] Mr Douglas said he was surprised that Mr Breen appeared not to understand that he had done anything wrong, and that he could not understand that making up the data was unethical. He confirmed he had referred to the data as being 'fraudulent' because it was based on inaccurate anecdotal information and assumptions and was designed to mislead. His key concern was that Mr Breen had disregarded the agreed strategy, and his lack of awareness of the situation he had created.

[60] He said that when the word 'fictious' was used about the data Mr Breen became defensive and accused him and Ms Short of accusing him of fraud.

[61] Ms Short denied she accused Mr Breen of fraud. She said it was Mr Breen who first introduced the word 'fraudulent' into the discussion in reference to the agreed plan, and she in response commented that the spreadsheet information was 'verging on fraudulent'

[62] Ms Short said that she also raised concerns that Mr Breen had exceeded his authority, deviated from the agreed plan and exposed Rentokil Initial by presenting a pitch to AGB which Rentokil Initial would be unable to substantiate.

[63] The meeting was concluded by Ms Short who suggested that they reconvene the following day to work on a response to the AGB Procurement Manager.

Resignation 25 November 2020

[64] Mr Breen said that after the meeting he had felt deeply embarrassed, especially as the allegation of fraud had been made in front of Mr Ranjiwalla. He had been deeply upset by the allegations that he had acted like a criminal. After thinking about the situation overnight, he wrote a resignation letter and an email to the Managing Director and copied it to Mr Douglas.

[65] The email copied to Mr Douglas stated:

I would like to inform you that I am resigning from today's date and will be giving my 4 weeks notice as per my contract.

My last day will be 24.12.20.

I would like to thank you for any assistance or guidance given on Rentokil ways during my short stint with the organisation. I do not however feel as though we are a good cultural fit and would like to wish the business the best for the future.

[66] Ms Michelle Drubé, HR Manager, said she had been verbally advised about Mr Breen's resignation by Mr Douglas. The news had been a surprise to her and she asked Mr Douglas if he knew the reason for Mr Breen's decision. In response he had told her briefly about the meeting the previous day.

[67] Ms Drubé said it had been agreed with Mr Douglas that she would contact Mr Breen to discuss his resignation, as they were both concerned at the haste of it.

[68] Her initial attempts to contact Mr Breen on 25 November 2020 were unsuccessful, however Mr Breen called her on 26 November 2020 and they discussed his resignation.

[69] Ms Drubé said Mr Breen had expressed concerns regarding the meeting with Mr Douglas and Ms Short on 24 November 2020 and referred to a recording of it. Mr Breen confirmed that neither Mr Douglas nor Ms Short had been aware of the recording.

[70] Ms Drubé said she had told Mr Breen she considered he was being hasty and asked him to reconsider his options, but he had not been interested in this because he had told her his mind was decided.

[71] Nonetheless she encouraged him to take the following 24 hours to consider his decision to ensure he was making an informed decision.

[72] Mr Ranjiwalla said he had not seen Mr Breen at work after the meeting on 24 November 2020 and discovered that he had resigned. He messaged Mr Breen on LinkedIn to apologize if his actions had contributed to the reason why he had resigned, but Mr Breen told him it was not his fault and said to him: “I’ll be giving feedback when I leave. Was it Brendon or Kennedy that called it fraud?”

[73] Mr Ranjiwalla said he had not heard anyone using the word fraud.

[74] Nothing further was heard from Mr Breen and he did not rescind his resignation, so on 30 November 2020 Rentokil Initial had finalised his resignation.

Was Mr Breen constructively dismissed as a result of the actions of Rentokil Initial?

[75] A constructive dismissal occurs where an employee appears to have resigned but the situation is such that the resignation has been forced or initiated by an action of the employer. In this case Mr Breen claims that he was constructively dismissed as a result of Rentokil Initial accusing him of perpetuating a fraud. He regards this as an unjustifiable action by Rentokil Initial and a breach of duty which was sufficiently serious to give him no option but to resign.

[76] In examining whether a constructive dismissal has occurred two questions arise:

i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and

Second, if there was such a breach,

ii. was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation

Was there a breach of duty?

[77] An employer is expected to behave in good faith towards an employee. Fraud is defined in the Online Oxford English Dictionary as: “A Type of dishonesty calculated to obtain

advantage, generally financial advantage, generally financial advantage, by some wrongful means (a tort or crime).”¹

[78] Mr Breen claims that he was accused of fraud by Ms Short and Mr Douglas. If that was the case, it would be a breach of the duty of good faith.

[79] I observe that the meeting on 24 November 2020 clearly became heated. It took place within the context of a strategy having been devised and agreed the previous day with Ms Short and Mr Douglas on the approach to be adopted by Mr Breen and Mr Ranjiwalla in the meeting with the AGB Procurement Manager.

[80] There is no dispute that Mr Breen had the opportunity to comment on the strategy in the meeting held on 23 November 2020 and he confirmed that he had agreed with it. Subsequently Mr Breen decided he did not agree with the plan, adopted one of his own devising, and presented that in the meeting with the AGB Procurement Manager. He did so without having informed Ms Short and Mr Douglas, his senior managers, of his intention to do so or seeking their prior approval.

[81] Following the meeting with the AGB Procurement Manager and her request for information to support what had been presented, Mr Breen instructed Mr Ranjiwalla and Mr Kuklin to prepare data and a spreadsheet which supported the assertion of unbilled work he had made to the AGB Procurement Manager. Mr Ranjiwalla’s evidence was that he had been so concerned by what he was being asked to do that he asked for a meeting with Ms Short and Mr Douglas.

[82] The first part of the meeting on 24 November 2020 was not recorded, but I accept that it became heated. Mr Breen’s evidence was that he had expected to be congratulated on his presentation, however Ms Short and Mr Douglas were concerned to discover that Mr Breen had deviated from the agreed strategy without their knowledge or approval.

[83] They were advised that the information in the document was false by Mr Ranjiwalla and were concerned that the proposed spreadsheet could not be supported by accurate information. This concerned them as being contrary to Rentokil Initial’s concerns.

[84] It is clear from the evidence that Mr Ranjiwalla confirmed in the meeting that the information on the spreadsheet was ‘made up’ and created based on a false premise, and

¹ [Oxford Dictionary of English - Oxford Reference](http://www.oxfordreference.com/view/10.1093/acref/9780199571123.001/acref.97801957123)
<http://www.oxfordreference.com/view/10.1093/acref/9780199571123.001/acref.97801957123>

thereafter that the words ‘fictional’ ‘false’ and ‘fraudulent’ were used in respect of the spreadsheet data.

[85] Ms Short and Mr Douglas denied that they accused Mr Breen of fraud in the first part of the meeting. Mr Ranjiwalla’s evidence is that he did not hear Ms Short or Mr Douglas, nor Mr Breen, use the word fraud in the first unrecorded part of the meeting before he left it

[86] In the sense that the spreadsheet data was intended to support an assertion made by Mr Breen to the AGB Procurement Manager to support a reduction in pricing, it could be described as ‘fraudulent’ but would be so only if it had been presented to AGB. However all the parties were aware it had not been presented and the purpose of the meeting with Mr Douglas and Ms Short was to discuss the spreadsheet.

[87] Following Mr Ranjiwalla’s departure Mr Breen started to record the meeting. Neither Ms Short nor Mr Douglas were aware that they were being recorded.

[88] There is no evidence on the recorded part of the meeting of Ms Short accusing Mr Breen of fraud.

[89] Mr Douglas is heard using the work ‘fraudulent’.. The recording notes the following statements being made by Mr Douglas:

... to now sit in this room with a surprise and almost border on the line of fraudulent
... then have a person say well this is the numbers that we have come up with and we
have to almost be fraudulent like yeah we can’t do that in our organisation ...

We thought that was aligned we got AGB in Australia as well as a customer of ours
as well, right and especially in that fraudulent piece of information we just don’t know
what is going on ...

No one, no, no, no one’s calling you fraudulent ...
[in response to Mr Breen’s comment “Well, it’s been mentioned five times so]

No one’s calling you fraudulent we’re saying we have mentioned fraudulent

[90] I find there is no accusation of fraud made to Mr Breen, although Mr Douglas does refer to the information as “almost be fraudulent”.

[91] I find that using the words fictitious or false to describe made up’ information on a spreadsheet is not an accusation that Mr Breen had committed a fraud and was perpetuating a fraud since it was understood that the information had not been presented to the AGB Procurement Manager.

[92] On the basis that there is no evidence supporting Mr Breen's assertion that he was called a fraud or of acting fraudulently in the meeting held on 24 November 2020, I find that there had been no breach of duty in that respect on the part of Rentokil Initial.

[93] Mr Breen further claims a breach of duty on the basis of being accused of showing a lack of respect to Ms Short and Mr Douglas. The recorded conversation sets out the concern of Ms Short and Mr Douglas that Mr Breen had deviated from the agreed plan, and done so without consulting them.

[94] Mr Ranjiwalla's evidence was that it was Mr Breen who was rude and disrespectful to Ms Short in the meeting prior to his leaving it. Following his departure and the rest of the meeting being recorded by Mr Breen, I note the annoyance expressed by Ms Short and Mr Douglas at Mr Breen's actions.

[95] However, despite the second part of the meeting being recorded, there are no raised voices on the part of Mr Douglas and Ms Short. In addition, on the basis that they were unaware that Mr Breen was recording the discussion, I consider it is unlikely that they would have moderated their tone in the second part of the meeting for the recording.

[96] Ms Short on the recording whilst explaining her concern at what had occurred, also acknowledges that there was some merit in Mr Breen's strategic thinking, remarking:

... so, my biggest problem here is not the fact that you found an alternative solution I love the thinking My problem is that we took the time to work out a strategy and you have made a decision to go in a different direction without conversation.

[97] I find that this indicates that whilst she was concerned by Mr Breen's deviation from the agreed strategy, she was not disrespectful to him or his thinking on the issue.

[98] I find that while Ms Short and Mr Douglas did accuse Mr Breen of showing a lack of respect to them, his senior managers, given that the AGB contract exceeded his authority levels and his actions in deviating from the agreed strategy without informing them prior to the meeting with the AGB Procurement Manager, I consider this was not a breach of duty.

[99] I also note that the expressing of annoyance by Ms Short and Mr Douglas was tempered by a degree of respect shown by Ms Short of Mr Breen's strategic thinking.

[100] I find no breach of duty in the actions of Rentokil Initial.

Reasonably foreseeable Mr Breen would resign?

[101] Moreover to amount to a constructive dismissal, it must also have been reasonably foreseeable that Mr Breen would resign as a result. Such resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where he or she had no other option.

[102] I observe that during the meeting on 24 November 2020 Ms Short acknowledged Mr Breen's finding of an alternative solution stating: "I love the thinking ...". The conclusion of the meeting indicates that Ms Short and Mr Douglas envisaged a team approach to the Situation with AGB, with their suggesting that they have a break to think about the situation overnight:

MS: Look why don't we all just have a look at what data sets we got, have a little think about this overnight. I think we've all said our piece there is a level of frustration from all angles for different reasons and all of them in different ways are justifiable so why don't we leave it be for today.

BD: ... happy to have some further conversations on. I will leave it there

[103] Neither Ms Short nor Mr Douglas knew they were being recorded but I detect no repudiation of the employment relationship with Mr Breen in what is discussed. Neither Ms Short nor Mr Douglas have raised voices and their concluding comments indicate that they foresaw an ongoing relationship with Mr Breen in which they would work together on the approach going forward.

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

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

[105] Mr Breen may have felt unhappy by the description of the numbers in the spreadsheet document as being 'almost fraudulent', and by being informed that he acted disrespectfully towards his senior managers by deviating from the agreed strategy, however I find no evidence of dismissive or repudiatory conduct on the part of Ms Short and Mr Douglas such as to make it reasonably foreseeable that Mr Breen would resign.

[106] In the case of *Harrod v DMG World Media (NZ) Ltd* the then Chief Judge observed that the unsuccessful plaintiff failed in her claim of constructive dismissal in circumstances in

² [1983] ACJ 965

³ at [975]

which: "... she knew or ought to have known that it could have been discussed further if it was troubling her."⁴

[107] Mr Breen made a decision to resign almost immediately following the meeting on 24 November 2020. Following his resignation being received, Ms Drubé contacted him, informed him he was being hasty, and asked him to reconsider his decision, suggesting that he took 24 hours to do so.

[108] Apart from the possibility of discussing how he felt with Ms Short and Mr Douglas when they reconvened to discuss the strategy further, Mr Breen had an opportunity to discuss how he felt with Ms Drubé.

[109] Given the manner in which the meeting with Ms Short and Mr Douglas had ended, and the opportunity to discuss his decision prior to it being finalised made by Ms Drubé, I find that Mr Breen's resignation was neither proportionate nor reasonable, especially as I have found no breach of duty on the part of Rentokil Initial.

[110] I find that Mr Breen was not constructively dismissed as a result of the actions of Rentokil Initial.

Was Mr Breen unjustifiably disadvantaged by Rentokil Initial as a result of being accused of perpetuating a fraud?

[111] To qualify as a disadvantage grievance, Mr Breen must therefore establish that there was some unjustifiable action by Rentokil Initial which affected his terms and conditions of employment to his disadvantage.

[112] I have not found that there was an unjustifiable action on the part of Rentokil Initial.

[113] In regard to the detriment to Mr Breen's terms and conditions of employment I note there was no disciplinary action indicated for a lack of respect shown and no attempt to address the situation with AGB without Mr Breen's input in a further meeting, and the positive accolade made by Ms Short that she 'loved' Mr Breen's thinking.

[114] I find no detriment to Mr Breen or his terms and conditions of employment resulting from the accusation.

⁴ *Harrod v DMG World Media (NZ) Ltd* [2002] 2 ERNZ 410 at [54]

[115] I determine that Rentokil Initial did not unjustifiably disadvantage Mr Breen during his employment.

Costs

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

[117] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicant 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.

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

[119] 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.⁵

Eleanor Robinson
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].