IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 3
5311299

	BETWEEN	MARK CHAMBERLAIN Applicant
	AND	DYNAMIC COMPOST TEA LTD Respondent

Member of Authority:	David Appleton
Representatives:	Steven Zindel, Counsel for Applicant John Levenbach, Counsel for Respondent
Investigation Meeting:	16 and 17 November 2011 at Nelson
Submissions received:	28 November 2011 from Applicant 2 December 2011 from Respondent
Determination:	10 January 2012

DETERMINATION OF THE AUTHORITY

A. The applicant was not constructively dismissed and accordingly his personal grievance fails.

B. The applicant's claim for unpaid wages fails.

C. The applicant's claim for unpaid business expenses succeeds.

D. The respondent's counterclaim succeeds to the extent set out in this determination.

E. Costs are reserved.

Employment Relationship Problem

[1] Mr Chamberlain alleges that he was constructively dismissed following a course of conduct by the respondent which either had the dominant purpose of forcing Mr Chamberlain to resign or which cumulatively amounted to a breach of duty sufficiently serious that it would be reasonably foreseeable that Mr Chamberlain would have no choice but to resign.

[2] Mr Chamberlain also claims unpaid wages in respect of the period of Monday 10 May to Friday 14 May 2010 together with unpaid expenses incurred by him during his business trip to Southland on behalf of the respondent. The respondent has withheld these sums as a set off against two months' salary, being the notice of termination required to have been given by Mr Chamberlain to the respondent.

[3] The respondent counterclaims in respect of the value of the balance of the notice period that it asserts is owed by Mr Chamberlain to the respondent.

Issues

[4] The following are the issues to be determined:

(i) Was Mr Chamberlain constructively dismissed?

(ii) Did Mr Chamberlain breach the terms of this employment agreement by failing to give two months notice of resignation?

(iii) Was the respondent entitled to withhold salary in respect of the period of Monday 10 May to Friday 14 May 2010 and expenses incurred by Mr Chamberlain during his business trip to Southland?

Facts

[5] The respondent operates a business manufacturing and supplying fertiliser to farms throughout the South Island of New Zealand. Mr Chamberlain was recruited by the respondent in around November 2008 and signed an employment agreement on 8 December 2008. His job title was Sales Representative and Soil Consultant.

[6] Mr Chamberlain had never worked in the industry before, having previously worked primarily as a science teacher. A job description had been prepared for Mr Chamberlain which he denied ever having received. The respondent also employed the managing director, Robert Luff, Mr Luff's daughter Rebeccah Simpson, his son in law Tane Simpson, and two other employees.

[7] Mr Chamberlain alleged that he had encountered a number of problems during his employment which he relies upon in his claim for constructive dismissal. These are as follows:

(i) he had no clear duties or role and the respondent had failed to clarify them despite Mr Chamberlain having asked several times for clarification;

(ii) the family nature of the business had been challenging;

(iii) the workplace had been unsupportive;

(iv) he had raised concerns which had not been addressed;

(v) he had received verbal abuse from Tane Simpson which Mr Luff had not dealt with satisfactorily;

(vi) Mr Simpson had called him at home and had subjected him to abuse;

(vii) Mr Luff had subjected Mr Chamberlain to argumentative phone calls at home;

(viii) Mr Luff had regularly belittled him and his background as a teacher, often in front of clients and staff;

(ix) Mr Luff had told Mr Chamberlain never to question him in front of clients and staff;

(x) Mr Luff had given Mr Chamberlain a warning for having viewed pornographic images on his work computer without having given Mr Chamberlain a chance to respond;

(xi) Mr Chamberlain had not been given the same benefits as other staff;

(xii) Mr Chamberlain had been pressured to drive a forklift truck without having been trained;

(xiii) Mr Chamberlain had been required to drive heavy goods vehicles which had been overloaded and without the correct endorsement on his licence;

(xiv) he had suffered nausea because of urea stored in the factory;

(xv) he had been required to work on an unsafe platform at height;

(xvi) Mr Chamberlain had not been given the external training he had been promised;

(xvii) he had been recruited to take on the role of Mr Luff, but Mr Luff had not relinquished the role;

(xviii) the respondent had not given Mr Chamberlain a pay review as required in his employment agreement;

(xix) he had been offered a bonus scheme which had an unobtainable performance target;

(xx) the respondent had not given Mr Chamberlain a promised lap top computer until 14 May 2010, and when it had been given to him it had been password protected and he had not been furnished with the password;

(xxi) when Mr Chamberlain had said that he may have to leave the company, Mr Luff had said *write it down*.

The resignation

[8] Before examining these many allegations, it is worth examining in some detail the circumstances of the resignation on 17 May 2010. It is a fundamental requirement of a successful claim of constructive dismissal that the employee making the claim must have elected to cancel the employment agreement in the face of a repudiatory breach by the employer; that is to say, the employee must "accept" the employer's repudiatory breach by resigning. A failure to resign because of the breach will render the termination of employment a voluntary act by the employee rather than dismissal arising out of the repudiatory conduct by the employer. (See *Business Distributors Ltd v Patel* [2001] 1 ERNZ 124 (CA)).

[9] In the present case, a great deal of evidence was heard as to the precise nature and reason for the resignation on Monday 17 May 2010. Although there was some dispute between Mr Chamberlain and Mr Luff as to exactly how it had played out, the following elements were undisputed:

(i) Mr Chamberlain had, on at least two previous occasions, threatened to resign during his employment, and had been persuaded not to by Mr Luff;

(ii) On the Friday before Mr Chamberlain's resignation Mr Luff had given to Mr Chamberlain for his consideration a proposed new employment agreement which had referred to a proposed bonus scheme but which had stated the same salary as he had already been receiving;

(iii) On Monday 17 May 2010 the first words said by Mr Chamberlain to Mr Luff that morning were either *I don't think I can work for the company*

any longer (as reported by Mr Chamberlain) or *I am going to resign* (as reported by Mr Luff);

(iv) Mr Luff replied *write it down*;

(v) Mr Chamberlain then wrote on a piece of the respondent's headed notepaper the words:

I Mark Chamberlain hereby give notice of my employment with Dynamic Compost Tea Nelson Ltd effective immediately.

Regards Mark Chamberlain. 17-5-10.

[10] The evidence differs as to whether Mr Luff stood over Mr Chamberlain when he wrote the letter or not, and whether he handed Mr Chamberlain the paper to write on or not. There is also a difference as to whether Mr Luff stated insulting words to Mr Chamberlain upon his departure. I do not believe it is necessary for me to make precise findings about these issues.

[11] After detailed questioning of both Mr Chamberlain and Mr Luff on the circumstances surrounding the events of that morning, it is my belief that Mr Chamberlain had said the words he did (whatever they were precisely) not to indicate a genuine intention of resigning, but rather as an opening gambit to commence a negotiation, in the same way as he had done in the past, this time to negotiate about the bonus scheme and the employment agreement, and to signal his dissatisfaction with what he understood to be the offer from Mr Luff.

[12] Mr Luff, recognising this threat to resign as another gambit on Mr Chamberlain's part, decided this time to call his bluff, and so said the words *write it down*. To Mr Luff's surprise, Mr Chamberlain did so.

[13] Mr Chamberlain's evidence was that he had not intended to resign when he had gone into work that day and, when Mr Luff had said *write it down*, Mr Chamberlain had thought *it looks like I'm leaving then*. It is my belief that Mr Chamberlain had not written the resignation letter because he, at that point, had formed an actual intention to resign, but rather because he had realised that Mr Luff was calling his bluff and did not want to appear weak in what he hoped would still

turn into a negotiation. Mr Luff, on his part, simply waited to see what Mr Chamberlain would do. Neither party then withdrew from their respective positions.

[14] I conclude that, at some point over the following days, Mr Chamberlain realised that Mr Luff would not ask him to come to the negotiating table, and rather than admit it had been a bluff, decided to treat himself as having resigned and raise a personal grievance. In other words, Mr Chamberlain's action in writing the words he did crystallised into a genuine resignation only at the point when it dawned on him that Mr Luff would not make the first move in a negotiation.

[15] This analysis means, in my view, that Mr Chamberlain did not resign because of a repudiatory breach by the employer, but because he had had his bluff called and he did not wish to lose face. On this analysis, it cannot be said that Mr Chamberlain resigned in the face of a repudiatory breach which he chose to accept, for the following reasons:

(a) before Mr Luff said the words *write it down* Mr Chamberlain had had no intention of resigning, but simply of opening a negotiation, and

(b) after Mr Luff had said the words, Mr Chamberlain seemed surprised to have had his bluff called, but realising it was being called, dealt with it by writing down the words, so as not to lose face.

Neither of these actions is consistent with the actions of an employee who has resigned because of a repudiatory breach of his employer.

[16] Mr Chamberlain has suggested that Mr Luff saying *write it down* was an act that entitled him to resign. I do not accept that Mr Luff saying the words *write it down* or his calling Mr Chamberlain's bluff amounted to an instruction to resign, nor a repudiatory breach in itself, nor a *last straw* following a cumulative series of actions by the employer. As Mr Luff suspected that Mr Chamberlain was bluffing when he had referred to resigning or wanting to leave, his words *write it down* were intended to elicit from Mr Chamberlain an indication of his actual intention.

[17] Whilst Mr Luff could have adopted a more neutral means of eliciting Mr Chamberlain's actual intention, such as enquiring whether he really meant it, some impatience on Mr Luff's part may be understood in light of the fact that Mr Chamberlain had adopted the negotiating tactic of threatening to resign, on his own admission, at least twice before. In any event, I do not believe that Mr Chamberlain's writing down the words he did reflected an intention to leave at that point and so, as before, a critical element of a constructive dismissal claim has not been made out.

[18] For this reason, Mr Chamberlain does not satisfy a fundamental element of constructive dismissal, and must fail in his claim.

Should the respondent have attempted to dissuade Mr Chamberlain from resigning?

[19] Counsel for Mr Chamberlain refers me, in his written submission, to the case of *Boobyer v Good Health Wanganui Limited* (WEC 3/94; W 17/94, 24 February 1994) in which the Court stated, referring to the communication of a resignation:

> *Where the communication is equivocal* [and] *the employee learns that the employer has misunderstood it as a resignation contrary to the employee's intention* [then] …[i]*n such a case the employee must suffer the adverse consequences of passively standing by and letting the employer think that a resignation has taken place.*

[20] It is my view that Mr Luff had initially not been sure whether Mr Chamberlain had truly intended to have resigned, but that Mr Luff had formed the view that Mr Chamberlain had so intended at some point a day or so later when it became clear that Mr Chamberlain was not going to approach him to explain himself. I am unable to ascertain whether Mr Luff formed his view before or after the point at which Mr Chamberlain decided to treat himself has having resigned. However, Mr Chamberlain certainly did nothing to disabuse Mr Luff of a belief that he had truly intended to resign.

[21] In the days following 17 May, Mr Chamberlain did nothing to approach the respondent until he wrote a letter to Mr Luff dated 22 May 2010 complaining about non payment of wages and expenses, and a further letter dated 24 May 2010 raising a personal grievance. Mr Chamberlain is not an unsophisticated man, and had not hesitated during his employment to assert his views and make his point. The fact that he did not approach Mr Luff in the days immediately after he had written out his resignation to ask to withdraw it indicates that he formed the view at some point between 17 and 22 May that he had ended his employment by resignation. Therefore, Mr Chamberlain had stood passively by (to use the words of *Boobyer*) until he had written to Mr Luff in terms that would have reasonably confirmed in Mr Luff's mind that Mr Chamberlain had indeed resigned.

[22] Counsel for Mr Chamberlain also refers me to the case of *Chicken and Food Distributors (1990) Ltd v Central Clerical Workers Union* [1991] 1 ERNZ 502 in which the court had stated that an employer cannot safely insist on its interpretation of what an employee said or wrote where the resignation forms part of an emotional reaction or an outburst of frustration and is not to be taken seriously, and either it is obvious that this is the case or it would have become obvious upon enquiry made soberly once the heat of the moment had passed.

[23] I believe that Mr Chamberlain's resignation had not ostensibly been part of an emotional reaction or an outburst of frustration. Mr Chamberlain had calmly written out his resignation. Whilst Mr Luff had initially wondered whether this was a bluff on Mr Chamberlain's part, it is by no means clear that, if Mr Luff had enquired whether Mr Chamberlain had intended to resign, Mr Chamberlain would have said no. Furthermore, Mr Luff had known that they were in a negotiation initiated by Mr Chamberlain. Mr Luff had called Mr Chamberlain's bluff in a high stakes gambit on the latter's part, and it was reasonable for Mr Luff to have waited to see what Mr Chamberlain would do. I do not believe that this case fits in with the usual *heat of the moment* resignations referred to by Mr Chamberlain's counsel.

[24] In these circumstances I do not find that Mr Chamberlain had been dismissed by the respondent or that the respondent had been unreasonable in not checking to see what Mr Chamberlain's real intentions had been.

Other aspects of Mr Chamberlain's claim

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[25] Although I believe that my analysis of the status of Mr Chamberlain's resignation above means that his claim must fail, I am required by the Court of Appeal decision in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 to go further:

> *The first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation*. (Emphasis added).

[26] In order to examine all the circumstances of the resignation, I am therefore bound to examine the 21 complaints relied upon by Mr Chamberlain, as set out in paragraph 7 above, to determine whether, either separately or cumulatively, they entitled him to treat the employment agreement as repudiated. Whilst it has been submitted by Mr Chamberlain's counsel that it is not necessary to make specific findings about each incident relied on by Mr Chamberlain, I believe that it is worth addressing each one briefly.

Lack of clear duties or role

[27] Mr Chamberlain alleged that he had had no clear duties or role and that the respondent had failed to clarify them, despite Mr Chamberlain having asked several times. A job description had been created for Mr Chamberlain's position in August 2008, which had set out in some detail the duties attached to Mr Chamberlain's role. Mr Chamberlain gave evidence that he had never seen the job description. However, even if this is the case, whilst I believe there may have been elements of Mr Chamberlain's job which were not entirely clear, on Mr Chamberlain's own evidence, he had been willing to pitch in and do work that may have fallen outside his job role (such as making the product and loading it). In addition, it is in the nature of a relatively small family business that the lines between different job roles often get blurred. Therefore, insofar as there may have been a lack of preciseness in Mr Chamberlain's job role, I do not believe that this caused Mr Chamberlain significant disadvantage or confusion at the time, nor that it was unreasonable.

Challenging family nature of the business

[28] Mr Chamberlain has stated that the family nature of the business had been challenging. However, Mr Chamberlain had no doubt been aware of the family nature of the business when he had accepted the offer of employment and, in any event, did not give evidence of any cogent nature which showed that he had been particularly disadvantaged by not being a member of the family (save with respect to the receipt of certain benefits, with which I deal below). He was not the only staff member who was not a member of the family. I do not find that this could in any way form part of any repudiatory conduct by the respondent.

Unsupportive workplace

[29] Mr Chamberlain alleged that the workplace had been unsupportive. This is a generalised complaint and is best examined in terms of the more specific complaints raised by Mr Chamberlain about being unsupported, most particularly by Mr Luff.

Unaddressed concerns

[30] Mr Chamberlain complains that he had raised concerns that had not been addressed. Again, this is a generalised complaint and is best considered in the light of other specific incidents raised by Mr Chamberlain.

Verbal abuse

[31] Mr Chamberlain complained that he had received verbal abuse from Mr Simpson which Mr Luff had not dealt with satisfactorily. This complaint arises from an incident in which Mr Simpson had asked Mr Chamberlain for information which Mr Chamberlain had not believed he could impart. The exchange had ended in Mr Simpson becoming frustrated and swearing. When Mr Chamberlain had complained to Mr Luff about Mr Simpson's conduct, which I accept may have been aggressive, Mr Luff's solution had been to speak to Mr Simpson and to suggest to Mr Chamberlain that he try to avoid Mr Simpson. Mr Simpson had subsequently apologised to Mr Chamberlain, although Mr Chamberlain did not believe it had been a genuine apology.

[32] It appears that Mr Chamberlain had expected Mr Simpson to have been put through a full disciplinary process for the matter. Mr Chamberlain also complained

that it had not been practicable for Mr Simpson and him to have avoided one another. It is my view that Mr Luff had dealt with the matter in a sensible and practical way and had obviously asked or directed Mr Simpson to apologise to Mr Chamberlain. In all the circumstances, including that Mr Luff had held Mr Chamberlain partially responsible for the falling out, and the small family nature of the business, I believe that Mr Luff had dealt with this matter appropriately, and that this incident cannot reasonably be relied upon by Mr Chamberlain as forming part of any repudiatory conduct by the respondent.

Abusive calls at home

[33] Mr Chamberlain complained that Mr Simpson had called him at home after working hours and had sworn at him. I accept that calls had been made to Mr Chamberlain at his home after hours, although these had been for legitimate reasons and none of them appear to have lasted for very long. It was denied by Mr Simpson that he had ever sworn at Mr Chamberlain over the telephone, although I accept that he had probably sworn and raised his voice.

[34] It appears that Mr Chamberlain and Mr Simpson had a difficult working relationship and evidence was put before the Authority by more than one member of the respondent's company that Mr Chamberlain had been a difficult employee to work with. Under those circumstances, whilst I accept that Mr Simpson had raised his voice whilst calling Mr Chamberlain at his home and may also have sworn at him, this was not something which the respondent company can be legitimately blamed for.

[35] Mr Chamberlain gave evidence that he had complained to Mr Luff about Mr Simpson telephoning him at home and shouting or swearing at him but that nothing had been done. Mr Luff's evidence was that he had looked into every complaint made by Mr Chamberlain. I do find that Mr Luff could have done more to have communicated with Mr Chamberlain about what he was doing to address his complaints, but this failing is not enough upon which to found a constructive dismissal claim.

Argumentative calls from Mr Luff

[36] Mr Chamberlain also alleges that Mr Luff subjected him to argumentative phone calls at his home. Mr Chamberlain accepted in evidence that Mr Luff had never sworn or shouted at him. I accept the evidence put before me that

Mr Chamberlain would engage in discussions with Mr Luff that questioned Mr Luff. Whilst I do not suggest that Mr Chamberlain had no right to ask questions of Mr Luff, it would appear that Mr Luff sometimes found Mr Chamberlain's approach and manner argumentative. Therefore, whilst I can believe that telephone conversations between Mr Luff and Mr Chamberlain were argumentative at times, I do not believe that this was the sole fault of Mr Luff, nor that these calls caused Mr Chamberlain undue distress.

Belittling conduct

[37] Mr Chamberlain alleged that Mr Luff had regularly belittled him and his background as a teacher, often in front of clients and staff. It is my view from the evidence that Mr Luff probably had made remarks about Mr Chamberlain's teaching background. However, these appear to have been intended as a joke and there is no evidence that Mr Chamberlain raised a complaint about these comments at the time. Mr Chamberlain would write semi-monthly reports for Mr Luff and in some of these reports Mr Chamberlain raised concerns about how the company was being run and about his prospects within the company. He was not shy of doing so and he did not present himself before the Authority as someone who would have hesitated to raise a concern if he had felt it had been important. I am therefore satisfied that Mr Luff had never been asked by Mr Chamberlain to desist from making what were probably jocular remarks about Mr Chamberlain's background as a teacher. I therefore do not believe that any such remarks had caused Mr Chamberlain any particular distress or concern at the time.

Order not to question Mr Luff in front of clients and staff

[38] With respect to the complaint by Mr Chamberlain that Mr Luff had told him never to question him in front of clients and staff, on the evidence I believe that this did happen. However, as already commented above, I believe that Mr Chamberlain had readily engaged in discussions with Mr Luff which Mr Luff had found, at times, to have been disrespectful. Mr Luff had had many years of experience in the business and Mr Chamberlain had been quite new to it. It is quite likely, therefore, that Mr Luff had found it necessary to advise Mr Chamberlain at times not to question him in front of clients when Mr Luff had known better. It is possible that Mr Chamberlain had found that message to be demeaning to his sense of status. However, I do not believe, on the evidence, that Mr Luff had been unjustified in telling Mr Chamberlain

not to question him or that he would have done so in an unwarrantedly aggressive or disrespectful way.

Warning for pornography

[39] Mr Chamberlain complains that Mr Luff had given him a warning for having viewed pornographic images on his work computer without having given him a chance to respond. In response to this allegation, the respondent produced a sexually explicit image involving Mr Chamberlain which it had found on his work computer.

[40] I fully accept Mr Luff's evidence that he had given Mr Chamberlain advice, rather than a formal warning, that he should not have had images on his work computer that could have been construed as pornographic. I also accept that Mr Luff had believed Mr Chamberlain's explanation that he had been sent unsolicited emails from friends which could have contained explicit images. Therefore, I do not believe that, at the time, a formal warning had been given to Mr Chamberlain in respect of viewing pornographic images. I believe that the matter had been dealt with by Mr Luff in an informal and practical manner appropriate to the circumstances, and that, as far as Mr Luff had been concerned, that had been the end of the matter. I do not believe, therefore, that this incident in any way forms any basis upon which Mr Chamberlain can reasonably found a claim of constructive dismissal.

Disparate benefits

[41] Mr Chamberlain complains that he had not been given the same benefits as other staff, including private use of his company car or mobile phone. I do not accept that it was unreasonable for Mr Luff to have afforded more generous benefits to his family members working in the company in circumstances where it had been made quite clear to Mr Chamberlain from the outset what the terms and conditions of his employment would be, including expressly that he was not to make personal use of his car or mobile phone.

Pressure to drive a forklift truck

[42] Mr Chamberlain stated that he had been pressured to drive a forklift vehicle without training. I am satisfied, on the evidence, that nobody within the respondent company had forced or pressured Mr Chamberlain to drive a forklift and that

Mr Chamberlain had done so voluntarily. I therefore do not find the respondent to have been in anyway at fault.

Pressure to drive overloaded trucks

[43] Mr Chamberlain has also complained that he had been required to drive heavy goods vehicles which had been overloaded and without him having had the correct endorsements on his driver's licence to permit him to do so. Again, I do not believe that Mr Chamberlain had been required to drive heavy goods vehicles which had been overloaded or which had exceeded the endorsements on his driver's licence. On Mr Chamberlain's own evidence, when he mentioned his concern to Mr Luff that he may have been driving trucks that he was not permitted by his licence to drive, Mr Luff had told him immediately that he could not cart the product anymore. I therefore do not find the respondent to have been in anyway at fault.

Nausea

[44] Mr Chamberlain complained that he had suffered nausea because of the storage of urea (required in the production of the respondent's products) in the factory. I am satisfied that Mr Chamberlain had not been required to work in the area where the urea had been stored save on an infrequent basis and that, if there had been an occasional problem with the storage of urea which had caused feelings of nausea, it had not been a problem suffered solely by Mr Chamberlain. I am also satisfied on the evidence that the respondent took reasonable steps to try to prevent the problem.

Unsafe work at height

[45] Mr Chamberlain has also complained that he had been required to work on an unsafe platform at height. Again, I accept the evidence of the respondent that Mr Chamberlain had not complained about working on a platform at height whilst he had been employed. I also accept that, whilst the respondent company had been required to fit some additional safeguards on the platform, it had not been inherently dangerous for its staff at the time when Mr Chamberlain had worked on it. I do not find, therefore, that this issue was sufficiently grave to have justified Mr Chamberlain's resignation.

External training not given

[46] Mr Chamberlain complained that he had not been given external training which he had been promised. The training in question was to have been provided by an accepted expert in the field. However, I accept the evidence of the respondent that that expert had not come to New Zealand during the period of Mr Chamberlain's employment and that, whilst she had visited Australia, the respondent reasonably had concluded that it would not have been appropriate to have spent money on sending Mr Chamberlain to Australia at that point in his employment.

Mr Chamberlain was recruited to take over from Mr Luff

[47] Mr Chamberlain also complained that he had been told when he was being recruited that he would take on Mr Luff's role but that Mr Luff subsequently would not relinquish it to him. The evidence was somewhat confused on this matter. Mr Chamberlain's wife gave evidence that Mr Chamberlain had told her on joining the company that he would be given the opportunity to become a shareholder in it. Mr Chamberlain's brief of evidence suggests that he had been told that he would take over from Mr Luff as managing director. Mr Chamberlain's oral evidence was that he simply meant that he would take over from Mr Luff in servicing the company's clients. Mr Luff's evidence was that, during his employment, Mr Chamberlain simply did not have the experience or knowledge to take over the respondent's clients, and that there had never been an intention to make him a shareholder or the managing director. I entirely accept the evidence of Mr Luff.

No pay review

[48] Mr Chamberlain complains that the respondent company had not given him a pay review as had been required in his employment agreement. Clause 4.3 of Mr Chamberlain's individual employment agreement provided that his remuneration would be reviewed annually no later than on the anniversary date. The anniversary date was December 2009.

[49] I accept that the respondent company did not give Mr Chamberlain a pay review as required by clause 4.3. However, a pay review is not the same as a pay increase and it is clear from the evidence, which I accept, that Mr Luff would not have considered it appropriate to have increased Mr Chamberlain's pay, even if he had conducted a review, because Mr Luff did not feel that Mr Chamberlain's performance

warranted it. There was no obligation in the individual employment agreement to increase Mr Chamberlain's pay. Therefore, I do not find that the failure to review Mr Chamberlain's pay in December 2009 was sufficient upon which to found a constructive dismissal claim.

Bonus scheme

[50] It is clear from the evidence put before the Authority that Mr Chamberlain had been under the misapprehension that his employment agreement had expired upon the anniversary date of the commencement of his employment, which had not been the case. It is perhaps understandable, therefore, that Mr Chamberlain had been concerned that he had not been given what he had thought (mistakenly) he had been entitled to; namely a new contract. By March 2010, Mr Chamberlain was clearly feeling very frustrated at certain administrative problems he had been suffering (not having his own laptop and issues with printing, for example) and had become dissatisfied with his overall remuneration package. He was also keen to clarify what his prospects within the company were. Mr Chamberlain had made all this clear in his written monthly report to Mr Luff dated March 2010.

[51] Apparently in response to these concerns, Mr Luff put thought into conceiving a bonus scheme which he felt would incentivise Mr Chamberlain and improve his remuneration. It was his intention not to increase Mr Chamberlain's salary but to offer him an incentivising bonus scheme. Mr Luff described this scheme in outline to Mr Chamberlain in around April 2010.

[52] Mr Chamberlain gave evidence that, after the bonus scheme had been explained to him by Mr Luff, and upon being given the draft new employment agreement, Mr Chamberlain had worked out over the weekend immediately preceding his resignation that the targets were, in his view, unachievable and that, therefore, his remuneration would not increase at all. He relies on this as another incident of unreasonable behaviour that entitled him to resign and claim constructive dismissal. It is, being the most proximate in time to the resignation, worthy of close examination.

[53] Taking into account the evidence heard from both parties, it would appear either that Mr Chamberlain misunderstood the way that the bonus scheme was intended to work or that Mr Luff had not adequately explained it. Mr Luff contends that he had given to Mr Chamberlain a written copy of the scheme which explained

how it was intended to work and which Mr Luff was adamant would give Mr Chamberlain a genuine opportunity to significantly increase his remuneration. Mr Chamberlain was equally adamant that he had not received this document.

[54] Overall, I prefer the evidence of Mr Luff insofar as I believe that he had never had the intention of giving to Mr Chamberlain details of a bonus scheme that was practically unworkable or which set unachievable performance targets. Whilst I accept that Mr Chamberlain genuinely believed that that was the case and that it was this belief that was the catalyst for him saying to Mr Luff on Monday, 17 May 2010 that he did not believe he could stay with the company (or words to that effect), it is my view that Mr Chamberlain was to a large degree the author of his own misfortune.

[55] Instead of embarking on the conversation with Mr Luff in the way that he did, he should have explained to him that he believed that the bonus scheme was unworkable. Mr Luff could then have explained to him how, in his view, it was not and they would have been able, all other things being equal, to have hammered out a deal which both would have found agreeable and acceptable. Unfortunately, Mr Chamberlain did not make this clear to Mr Luff, either at the start of the conversation or after Mr Luff had said *write it down*. It is safe to say that Mr Luff had no idea when Mr Chamberlain had said he felt he had to leave that this was because Mr Chamberlain believed that the bonus scheme was unworkable.

[56] Mr Luff has asserted, using profit figures that had become available after the resignation, that had Mr Chamberlain stayed, he could have earned a bonus of $32,256. Mr Chamberlain has asserted that the bonus would have been $4,800, although he calculated this without the benefit of profit figures. I have not analysed in detail the bonus scheme to determine who is right because I accept that the written bonus scheme was not ever given to Mr Chamberlain to consider. I do find, however, that it had never been Mr Luff's intention to provide details to Mr Chamberlain of a bonus scheme which would not have worked. Whether it did work or not in practice is irrelevant in the sense that Mr Chamberlain did not take up the opportunity to seek clarification of its terms.

Laptop computer

[57] Mr Chamberlain alleges that the respondent did not give him a laptop that he had been requesting for many months and that, when it had been given to him, it had

been password protected so that he had been unable to use it. It so happens that the laptop had been given to Mr Chamberlain on or around 14 May 2010, immediately before the weekend in which Mr Chamberlain had concluded that the bonus scheme would not work for him. Mr Chamberlain's evidence was that the laptop had been deliberately given to him password protected so that it would frustrate him. I do not accept that. It is much more likely to be the case that the person who prepared the laptop password protected it as is normal practice and forgot to tell Mr Luff what the password was. Mr Luff then passed the laptop on to Mr Chamberlain in an informal manner. Again, as with the bonus scheme, Mr Chamberlain did not ask Mr Luff or anyone else what the password was but simply sprung to the conclusion that it had been deliberately password protected to prevent him from using it.

[58] I accept that the provision of the laptop many months after he had requested it would have been frustrating for Mr Chamberlain but given that it was provided to him prior to his resignation means, in my view, that the mere fact of it having been given to him late does not constitute an action that he can rely on in his constructive dismissal claim.

The words *write it down* were a repudiation

[59] I have dealt with this allegation in paragraph 16 above.

Summary

[60] In summary, whilst I find that Mr Chamberlain may have suffered frustrations during parts of his employment, some due to the fact that Mr Luff was a busy man who did not always attend quickly to Mr Chamberlain's questions and concerns, I do not find that any of the actions of the company alleged by Mr Chamberlain gave rise to a repudiation of his employment agreement, either when viewed cumulatively, or when viewing incidents in isolation.

[61] I therefore find that Mr Chamberlain was not dismissed by the respondent, either constructively or otherwise. Accordingly, I decline his personal grievance.

Mr Chamberlain also claims reimbursement of his expenses for his trip to Southland together with unpaid wages for the period Monday, 10 May to Friday, 14 May 2010

[62] The respondent admits that these sums have not been paid but claims a right to set them off against damages due for Mr Chamberlain's breach of contract in not giving two calendar month's notice in accordance with the requirements of his employment agreement.

[63] Section 4 of the Wages Protection Act 1983 provides that, subject to ss.5(1) and 6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[64] Section 5(1) provides that an employer may, for any lawful purpose, with the written consent of a worker, or on the written request of a worker, make deductions from wages payable to that worker. Section 6(2) deals with overpayments, which is not relevant here.

[65] Clause 5A2 of the individual employment agreement between Mr Chamberlain and the respondent provides as follows:

> *Deductions may be made from remuneration for time lost due to the Employee's sickness, (other than sickness provided for under clause 9), accident, default (including leave without pay) or other absence or as otherwise agreed between the parties to this agreement.*

[66] Clause 5A3 provides:

> *Upon termination of employment the Employer may make deductions from the Employee's remuneration or holiday pay in respect of any money owed to the Employer whatsoever.*

[67] Clause 10.1 of the employment agreement provides that not less than two nor more than four calendar months' notice shall be given in writing by either party of the termination of the employment, unless a lesser period is agreed in writing between the parties.

[68] Clause 10.2 provides:

> *Where the Employee fails to give all or part of the required notice, the Employee agrees that a penalty payment equivalent to his/her pro rata remuneration for that part of the notice period not given, will be deducted from the Employee's final pay (including holiday pay).*

[69] Mr Chamberlain did not give notice in accordance with his employment agreement when he resigned. I am therefore satisfied that clause 10.2, in conjunction with clauses 5A2 and 5A3, entitle the respondent to withhold payment of the final five days pay otherwise owing to Mr Chamberlain.

[70] With respect to repayment of Mr Chamberlain's Southland expenses, clause 20.1 of the employment agreement provides that Mr Chamberlain would be reimbursed for reasonable business-related travel, accommodation, meal and vehicle running expenses. I do not find that clauses 5A2 and 5A3 cover the reimbursement of expenses incurred by Mr Chamberlain (as they do not constitute *remuneration*) and, therefore, find that the withholding by the respondent of these expenses was in breach of Mr Chamberlain's employment agreement. Accordingly, I order that the respondent pay to Mr Chamberlain the expenses owing to him in relation to the Southland trip. No evidence was given as to the amount of these expenses and the parties are invited to consult with one another so as to agree the amount outstanding.

Counterclaim

[71] The respondent counterclaims against Mr Chamberlain in respect of the sum of $6,933.33. The respondent relies on clause 10.2 in this respect, which refers expressly to the payment of a *penalty payment* in case of a failure to give the required notice. The fact that the parties have used the expression *penalty* does not conclude the matter, and the Authority must decide whether the sum fixed is a genuine forecast of the probable loss. *Law of Contract in New Zealand, 3rd edition, Burrows, Finn & Todd* 21.2.6.

[72] Despite the label attached to the payment in clause 10.2 as a penalty, I do not find the sum of two months' salary to be extravagant or unconscionable an amount in comparison with the greatest loss that could possibly follow from the breach. *Clydebank Engineering and Shipbuilding Co v Yzquierdo-y-Castaneda, Don Jose Ramos* [1905] AC 6. Mr Chamberlain walking out no doubt caused inconvenience to the respondent which is difficult to quantify in terms of damage suffered, a situation in which a pre-estimate of loss approach is appropriate. I therefore find that the terms of clause 10.2 do bind Mr Chamberlain and award the sum of two months salary, less the amount of the unpaid wages for the period Monday, 10 May to Friday, 14 May 2010 already lawfully withheld by the respondent.

Costs

[73] Mr Chamberlain is in receipt of legal aid. The respondent is reminded that s.40(2) of the Legal Services Act 2000 provides that:

> *No order for costs may be made against an aided person in a civil proceeding unless the Court is satisfied that there are exceptional circumstances.*

[74] In *Wadley v. Salon D'Orsay Ltd* [1998] 1 ERNZ 369, the Employment Court construed the expression *exceptional circumstances* as meaning *quite out of the ordinary*.

[75] Costs are in the meantime reserved. Any claim for costs by the respondent should be made by lodging and serving a memorandum within 28 days of the date of this determination. The respondent's memorandum should address the issue raised by s.40(2) of the Legal Services Act 2000 and *Wadley*. Mr Chamberlain will have a further 14 days to lodge and serve any reply.

David Appleton
Member of the Employment Relations Authority