

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 101
5336716

BETWEEN ALAN GARVIN
Applicant

AND PROGRESSIVE EQUIPMENT
LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: M Hammond and P Dawson, Counsel for Applicant
E Burke, Counsel for Respondent

Investigation Meeting: 26 August 2011 at Hamilton

Submissions Received 8 September 2011 and 30 September 2011 for Applicant
27 September 2011 from Respondent

Determination: 20 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Alan Garvin, claims that he was constructively dismissed, effective from the date of his resignation on 13 February 2011. Mr Garvin also claims that he was entitled to be issued with shares in Progressive Equipment Limited, pursuant to clause 6.2 of his employment agreement, and he now seeks the cash value of such. Finally, Mr Garvin claims that he is entitled to arrears of wages related to the calculation of his final pay which he says was deficient in regard to his entitlement. For completeness, I record that Mr Garvin was seeking payment for an absence due to sickness, on or about 9 February 2011, but this claim was withdrawn at the investigation meeting. Conversely, Progressive Equipment Limited denies and resists Mr Garvin's claims and submits that they should fail accordingly.

[2] In addition to the evidence of Mr Garvin, evidence was given for him by Mrs Tabatha Garvin, Ms Rosalind Henshaw and Ms Lisa Olding. For Progressive Equipment, evidence was received from Mr Rodney Sharp, Mrs Angela Sharp, Mr James Baird, Mr Trevor Harris, Mr Ben Sharp, Mr Scott Sullivan, Mr Alex Smith, Ms June Rowland, and Mr Luis Stenbridge. Ms Deborah Brookes gave evidence under summons from the applicant. The Authority has given close consideration to all of the available evidence, including various relevant documents; and the respective submissions of the parties, albeit not all of this material is referred to in this determination.

Background Facts and Evidence

[3] Progressive Equipment Limited (PEL) is one of three limited liability companies within the Progressive Group. The Progressive Group has grown over the years and the Managing Director, Mr Rodney Sharp, told the Authority that he came to the conclusion that he required assistance in his role. This was in order to take the Group to the next level, specifically in the area of marketing, nationally and internationally, an innovative machine; the WoodWeta.

[4] PEL initially advertised for an Operations Manager but upon receiving Mr Garvin's curriculum vitae, it was decided that he should be interviewed for the position of Chief Executive Officer (CEO). Mr Garvin was subsequently appointed as the CEO and commenced his employment with PEL on Monday 13 September 2010, having signed an employment agreement on 8 September 2010.

The business plan

[5] The common evidence of Mr Garvin and Mr Sharp is that at the beginning of Mr Garvin's employment it was agreed that Mr Garvin would produce a business plan (the Plan) for PEL; particularly in relation to marketing and promoting the WoodWeta machine. It was understood that Mr Garvin would be able to produce the Plan within a few weeks of the commencement of his employment.

[6] From 22 September to 12 October 2010, Mr Sharp and his wife were in Australia, albeit there was continuing contact between Mr Garvin and Mr Sharp as evidenced by emails during that time.

[7] The evidence of Mr Sharp is that by mid December 2010 he was becoming concerned about the fact that “*the all important business plan*” had not been produced. Mr Sharp says that whenever he asked Mr Garvin about the Plan he was told “*it was nearly ready.*” Mr Sharp attests that at that point (mid December 2010) he had not seen the draft of the Plan or “*even any indication*” that Mr Garvin had commenced work on it.

[8] Mr Sharp incurred further frustration when he was informed by Mr Garvin on 16 December 2010 that he would be taking leave over the Christmas break because he had visitors from Australia coming to stay, albeit he had only been employed for approximately four months at that stage. The means by which Mr Sharp became aware of Mr Garvin’s requirement to take leave was via an email dated 16 December 2010 in reply to one sent by Mr Sharp to Mr Garvin, relative to an apparent job candidate who would be present on Monday 20 December 2010. Mr Garvin informed that he would not be available on Monday 20th, Thursday 23rd and Friday 24th December as he had visitors from Australia coming. Mr Garvin also informed in the email that he required 29, 30 and 31 December 2010 as leave, as his guests were returning to his home then.

[9] The evidence of Mr Sharp is that he was upset that Mr Garvin required more leave as he had only been employed a short time and had already taken some leave in November 2010.

[10] The common evidence of Mr Sharp and Mr Garvin is that there was a heated discussion on 17 December 2010. This centred on the fact that Mr Sharp was most unhappy about Mr Garvin requiring leave and, most importantly, that the business plan had not been produced.

[11] The evidence of Mr Garvin is that on 20 December 2010 he met with Mr Sharp and the heated discussion of 17 December was discussed. The two men agreed that it was inappropriate for such an atmosphere to be present and that they should attempt to work together better for the future. The outcome was that it was agreed that Mr Garvin could take six days unpaid leave over the Christmas/New Year period and that he would work on the business plan and have it ready to show Mr Sharp in early 2011.

Events of 2011

[12] The evidence of Mr Garvin and Mr Sharp is that when Mr Garvin returned to work in 2011, Mr Sharp inquired (several times he says) about the progress on the Plan. Mr Sharp says that every time he made such inquiry of Mr Garvin the response was that it “*was nearly ready*” and Mr Garvin just needed “*a couple more days.*”

[13] The evidence of Mr Garvin is that he told Mr Sharp that he “*needed more time to get the plan ready for him to review.*” Mr Garvin says that Mr Sharp was accepting of this, but I conclude that if Mr Garvin really believed such, then he had a very mistaken perception, as revealed by subsequent events.

[14] The evidence of Mr Sharp is that by 4 February 2011, Mr Garvin had still not produced the Plan and there was no “*demonstrable progress*” on any of the matters that Mr Garvin was supposed to be attending to. Mr Sharp requested Mr Garvin to compile a list of twenty potential WoodWeta fuel consumers. The WoodWeta converts waste wood into kindling sized pieces for use in large industrial boilers.

[15] The evidence of Mr Garvin is that “*last thing*” on Friday 4 February 2011, Mr Sharp approached him “*out of the blue*” and “*demanded*” a list of twenty potential customers for the WoodWeta and ideas about how Mr Garvin was going to sell it; by the end of March 2011. Mr Garvin’s evidence is that Mr Sharp began the discussion by asking him how many additional contacts Mr Garvin had added for the WoodWeta to which he replied “*none.*” Mr Garvin says that he did not have any contacts in the forestry industry and he had been using Mr Sharp’s contacts to explore potential sales. But there is no evidence of him making any attempt to establish any potential sales contacts.

[16] On Sunday evening, 6 February 2011, Mr Garvin sent a cursory email to Mr Sharp:

Here’s the 20 potential targets for the Weta you wanted. It is actually 58. Most of which are probably worth a call once we have quantified our performance, market positioning and test/history experience.

[17] Mr Sharp says that Mr Garvin seemed to have treated his request as a joke as he had merely cut and pasted 58 forestry contractors from a search engine. Furthermore, one of the potential clients listed was a silviculture contractor who is “*entirely at the wrong end of the wood supply chain*” in that this company plants

trees; it does not process them. It was the view of Mr Sharp that Mr Garvin was not taking his concerns seriously and hence an email was sent to Mr Garvin on 7 February 2011; the content of which informed Mr Garvin that his list (6 February 2011) had not identified consumers of WoodWeta fuel. And Mr Garvin was also informed that he was required to produce for the directors of the company (Mr and Mrs Sharp) the following:

- The completed PE business plan, spanning the next five years, including market information of NZ and international, target markets, market penetration, strategy, costs, cash flow, and execution.
- A list of 20 sites around NZ who have the potential to utilise a WoodWeta, their consumption and contact details and a plan of meeting them.
- A list of current hogging operations in New Zealand who they work for, their contacts, their potential to utilise a Weta and a plan of meeting them.
- A list of everyone who has expressed interest in the Weta, what their issues are and what we can do to make a sale happen.
- Progress on large R to R plan.
- Plan of action for Panpack, backup plan if CWR do not commit to purchase.

From today on, you will brief the Directors every Friday morning on progress with sales and marketing, and any other issues you have been tasked with. You will also give the Directors an update of progress, recommended plan and deliverables for month, and the coming month at the end of each month. It is imperative the Weta is off our books prior to the end of March and that we are into making the next unit before the end of April.

[18] I note that Mr Garvin was required to brief the Directors every Friday morning in relation to progress on various matters. The evidence of Mr Garvin is that following the discussion that he had with Mr Sharp on 20 December 2010, he suggested that he and Mr Sharp commence weekly meetings in 2011, to “*facilitate and expedite communication and discussion*” and that Mr Sharp agreed to this suggestion. However, that is somewhat at odds with the evidence of Mr Sharp who says that the claim by Mr Garvin that he had scheduled weekly meetings with Mr Sharp; and that Mr Sharp failed to attend are completely false. Mr Sharp says it is clear from his email

of 7 February 2011, that there were no scheduled meetings in place and that there needed to be.

[19] The evidence of Mr Garvin is that on Monday 7 February 2011, Mr Sharp expressed to him his displeasure at the “*glib*” email of the day before. Mr Garvin apologised and acknowledged that the email had been facetious. He says that there was a discussion about Mr Sharp’s “*uppermost expectations*” of him. But Mr Sharp’s evidence is that he was discussing his “*minimum expectations*” of Mr Garvin and that these were the tasks set out in Mr Garvin’s employment agreement that he had failed to perform, despite five months’ of employment.

[20] Mr Garvin took some notes of the matters he says were discussed in regard to requiring attention by him. The heading of the notes is *First week of March*. One of the items on the list is: *Complete BP*, which I take to be a reference to completing the Plan, albeit Mr Garvin had given an undertaking to have this available in January 2011.

[21] The evidence of Mr Garvin is that from Monday 7 February to Wednesday 9 February 2011, he proceeded to work on the matters that required his attention, as required by Mr Sharp. Mr Garvin says that he was unwell on Wednesday 9 February 2011 but worked from home that day and by the morning of Thursday 10 February 2011, he had completed all the tasks on his list (as previously noted) except for the Plan which was “*completed to the point that it should be discussed*” with Mr Sharp, albeit there is no evidence of the Plan being at such stage.

Wednesday 9 February and Thursday 10 February 2011

[22] According to the evidence of Mr Sharp (which I accept) there is somewhat more to the events of Wednesday 9 February 2011 than indicated by the evidence of Mr Garvin. Mr Sharp’s evidence is that on the morning of Wednesday 9 February he met with Mr Garvin and attempted to give him a letter (dated 8 February 2011). Mr Sharp says that he also informed Mr Garvin that the Directors¹ wished to meet with him on Friday 11 February, to discuss the matters set out in the letter.

[23] Mr Sharp attests that Mr Garvin’s response was that he was feeling sick and that he would have to go home. Mr Sharp’s view is that he had previously seen Mr

¹ Mr and Mrs Sharp.

Garvin in the workshop first thing that morning and he looked fine health wise, as he also did when he first started to talk to him about the letter. Mr Sharp says that there was no indication that Mr Garvin may have been unwell until he mentioned the letter and conveyed the requirement to meet with Mr Garvin on Friday morning. In any event, Mr Garvin went home for the rest of the day.

[24] The following day, Thursday 10 February 2011, upon Mr Garvin's return to work, Mr Sharp met with him again and gave Mr Garvin the letter that he had attempted to give him the previous day. Mr Sharp also read aloud a copy of the letter to ensure that there were no misunderstandings.

[25] It is commonly accepted that Mr Garvin attempted to then respond, but Mr Sharp informed Mr Garvin that he should take some time to consider his response, put it in writing and present it at a meeting the next morning.

[26] The further evidence of Mr Sharp is that he requested Mr Garvin to spend the day "*solely focusing*" on the questions that he wished to discuss at the meeting on 11 February 2011. Mr Sharp says that he also suggested that Mr Garvin leave his cellphone with him as it was Mr Sharp's view that Mr Garvin had an "*obsession*" with his phone² and that he would be distracted from focusing on the questions that Mr Garvin was required to answer the next day.

[27] While Mr Garvin informed that he was expecting some business calls, it was the opinion of Mr Sharp that Mr Garvin had only received "*a handful*" of calls during the five months of his employment, all of which appeared to be from Mr Garvin's wife. In any event, the cellphone was left in Mr Sharp's office, albeit Mr Sharp says that at one point he left his office for a brief time and returned to find Mr Garvin in an agitated state "*going through*" his phone.

[28] The evidence of Mr Garvin about the cellphone is that Mr Sharp "*demand*" the phone and when he advised Mr Sharp that he was expecting some calls he was informed that he only needed the cellphone if he left the premises and that Mr Garvin would not be leaving the premises without authorisation. Mr Garvin subsequently left the meeting and proceeded with the work he was required to carry out.

² Mr Sharp gave an earlier example of Mr Garvin "programming" his phone to remind him to get a coffee.

The content of the letter dated 8 February 2011 – received by Mr Garvin on 9 February 2011

[29] The letter opens as follows:

Dear Alan,

It is with concern we are writing this letter to you outlining our deep concerns regarding your performance in your capacity as CEO. We have given you five months to find your feet, implement your own style of leadership and have specifically not told you how to do your role. To date we have not seen any results in systems, leadership, growth or strategies to take the Progressive Group forward. Below is the position description you were contracted to undertake that you signed. We have put comments in all areas of concern.

[30] There then follows the details of Mr Garvin's position description setting out, for example, the position summary. This includes providing strategic leadership of the Group by working with the Board of Directors and the Executive Management Team to establish, implement and oversee the long range goals, strategies, plans and policies of the Group. The prime focus of the CEO will be the development and marketing of Proquip and taking the WoodWeta, GreenWeta and Katipo products to world markets. The point is then made to Mr Garvin that:

After five months and numerous prompts we have seen none of the above.

[31] Under the heading *Leadership and Corporate Responsibility* Mr Garvin is informed that:

The Progressive Group zero waste and sustainability policies have not been adhered to. After five months there has been no practical display of following these principles: still bringing disposable coffee cups, leaving the light on when not in the room, and does not encourage it through leadership or leading by example. Please explain why as CEO you find it so hard to follow simple sustainable practices that other staff have no issue with.

[32] Then under the next heading: *Lead the Executive Management team to be effective developers of solutions to business challenges thereby establishing credibility throughout the organisation and with the Board*, Mr Garvin is informed that he:

Implemented the machining of 16 punch blocks (six months worth) while Directors were on holiday instead of investigating JIT and

implementing these practices. No processes to analyse the manufacturing costs have been implemented by you, or tools given to staff to assist. An afternoon was spent involving Deborah, Jared and you, with no outcome, report or system recommendations. Spreadsheet to track manufacture was set up entirely by Deborah and Rodney, no assistance offered by you. Please explain why. Spreadsheet that you set up to speed PM job book entry still not implemented some two months later. Please explain why.

[33] Then, under the bullet point: *Be responsible for driving the Progressive Group to achieve and surpass sales, profitability, cash flow, business goals and objectives*; Mr Garvin is informed:

- Have seen nothing regarding any financials, advice on provisional tax, terminal tax, or cash flow. Angela, Deborah and Rodney doing the best they can with no guidance: some issues five months later. We have a debtor going back 8 months and we have seen absolutely nothing from you regarding what should be done or how to do it. The Directors have received no reports, cash flow estimates or projections despite the five month time you have held this position. If the system is not set up to extract accurate information, please explain why it has not been rectified.
- Motivate and lead a high performance management team; attract and recruit members of the Executive Team not currently in place and retain the Executive Leadership Team; provide mentoring as a cornerstone to the management career development programme.

[34] Mr Garvin is then informed that:

- No mentoring seen to date. Please supply instances where you have. All staff still come to Rodney for any advice or guidance. Two employment assessments done but have not been completed, as no formal response has been given to either, no mention of pay rates or indication if there will be any pay review. Please explain why.

[35] And:

- Alex Smith IEA took from October to February to sort. Scott (who has no authority to sign a contract) was left to sign Alex up as an apprentice. Alex was left wondering where he stood for two months over Christmas when the decision to take him on was made in October. Why did this take so long?
- Represent the Progressive Group and its valuers with customers, vendors, shareholders, government and regulatory bodies, other stakeholders and the public generally. No progress with Pan Pack despite numerous requests for a plan.

No backup plan or timeline. The Weta has been idle for six weeks. Please explain why.

- When Framacad had an issue with leaks while the Directors were on holiday, nothing was resolved. What was worse, the subcontractor who made the parts for us was introduced to Framacad by you, opening the door for Framacad to deal direct. Please advise what benefit this was to the Group and why this was done.
- Support the recruitment, selection, individual development and monitoring of the Executive Management team and other management personnel to ensure the Progressive Group maintains a strong succession plan.

[36] Mr Garvin was then informed:

- Jared Bolton and Kevin Beetham left since you have been employed. Jared left while we were away. We have never seen any information regarding what happened or why. You were well aware of the issues and gave no guidance or direction. Please explain why.
- Collaborate whenever appropriate within the Progressive Group of Companies.

[37] And:

- We have seen no systems put in place to assist or encourage collaboration. Deborah and Rodney set up the Group spreadsheet with no guidance from you, despite the fact both are novices when it comes to spreadsheets. Please explain why.

[38] Then under a heading ***Business Management, Strategy and Marketing:***

- Spearhead the development, communication and implementation of effective growth, sales and marketing strategies and processes. Barry Caulfield contacted you while we were in Australia, asking about the Weta. You sent his information to us via text. Further contact information was given to you by Rodney in October. Barry was very interested in the Weta and described it as extremely innovative. He has the hogging contract for the Whakatane Board mills and was to purchase Weta 1. However, it burnt on November 5th 2010. He has had no contact from you during the last two months, and has since purchased a similar sized hogger from Seattle. You had to ask me for his name this week, despite the fact he contacted you in September last year. You also took time off in late December and early January, advising the Directors that

“nothing happens over this time”. Barry Caulfield made his purchase during this time. Please explain why.

- No business plan has been produced after five months, despite persistent requests by the Directors for this: specific instructions given on the 17th of December that it was to be completed urgently in the New Year have not produced any results. Please explain why.
- Natures Flame engaged Pedersen’s to hog for them for two weeks and you were totally unaware of this. Rodney advised you. Please explain why and what you have done and intend doing to develop this potential client.
- We have an \$850k asset³ languishing in Napier with no plans to utilise it at all. It is now devaluing by the day. Please explain your plans for it over the next two months.
- You were specifically instructed to supply a list of 20 potential users of the Weta in NZ. You supplied a “Gopher” listing 58 potential “customers”, 56 of which would never have the resources or inclination to purchase one. Not one mention was made of any sawmills, pulp mills or wood processing facilities anywhere in the list. Please explain why.
- Collaborate with the Executive Management team to develop and implement plans for the operational infrastructure of systems, processes and personnel designed to accommodate the growth objectives of the Progressive Group, particularly ProQuip.

[39] Mr Garvin was informed of various requirements:

- No systems have been put in place after five months. At the specific request from Rodney on 26.01.11, the outlook calendar was to be set up by you. Two weeks later it is not in use. Please explain why simple systems like this have not been suggested or implemented in the five months.
- Assist, as required, in raising additional capital at appropriate valuations to enable ProQuip to meet sales, growth and market share objectives.
- Assist in developing the strategy and implementation of mergers, acquisitions and divestitures.
- Foster a success-oriented, accountable environment with ProQuip.

[40] The letter concludes:

³ The WoodWeta.

Alan, there are numerous instances that a total lack of communication by you has left the Directors unsure what or where we are as a Group. The Residues to Revenues is a case in point. You were advised on the 13th December that an advert was going in Friday Offcuts on the 28th January. This has a link to our website. This went in with no knowledge of Rodney or Angela, with no discussion regarding what would be the best things to put on the website, or the most up-to-date information. As Directors we have paid a substantial amount of money as sponsors to this event. To not capitalise on the opportunities is extremely disappointing. Please explain why.

You will have a meeting with the Directors at 09.15 on Friday 11.02.11 to put your responses to them regarding the above. Please be advised that this is [sic] meeting of a serious nature as it involves performance values on all these issues. If you need to bring a support person you must advise us immediately. The outcome of this meeting may have serious consequences on your continued employment with the Group. Please take this matter seriously.

Yours faithfully,

Rodney Sharp
Director
Progressive Group of Companies

[41] The statement of evidence for Mr Garvin sets out what his response to the points raised in the letter of 8 February 2011 would have been if he had “*the opportunity to provide a considered response,*” but of course this is now well after the event, as it were. Also, Mr Garvin’s response to a question from the Authority was revealing.⁴ What actually happened is that Mr Garvin went into work early on the morning of 11 February 2011 and at 7.22am he sent an email to Mr and Mrs Sharp as follows:

Rodney and Angela,

Reviewing your letter dated 8 February 2011 given to me yesterday (10/2/11). The meeting you are requesting states it is of a serious nature, and several points have been raised which require responses. Friday at 9.15am is not a sufficient amount of time to prepare for this meeting. I suggest Wednesday at 3.15pm to discuss these issues, please confirm.

The mobile phone is part of my tools of business and having it removed from me makes it difficult to conduct business. Please advise your intentions.

[42] Mr Sharp’s evidence is that he did not receive Mr Garvin’s email until 8.40am. He says that he was surprised to receive it as Mr Garvin had worked on his responses

⁴ At para [78] of this determination.

all of the previous day and had not indicated that he required more time. It was also too late to postpone the meeting as Mrs Sharp was on her way, having made arrangements so she could be there. Mr Sharp sent an email to Mr Garvin at 8.45am:

Hi Alan,

You have been well aware of the issues laid out in this letter. You were instructed on Friday to produce results, which have not been forthcoming. You were given the letter and discussed it yesterday morning, some 24 hours before the meeting. You were asked if there was anything you did not understand, required a support person or if there was adequate time. You advised that you did not require a support person, that you fully understood the implications of the meeting and that you were prepared to attend. You had all day yesterday to advise if anything was unacceptable. The Directors have made time available in their busy schedule and to give less than an hour notice to one of them, and none to the other is totally unacceptable and unprofessional. The meeting will proceed as planned. Please ensure you attend.

With regard to the cellphone you do have access to a cellphone. It is in the office you reside in. You will only require a cellphone if you are off site.

The meeting on Friday 11 February 2011

[43] Mr Garvin met with Mr and Mrs Sharp at approximately 9.45am. Ms Deborah Brooks, the Office Administrator, was also present in the role of note taker. There is some disparity in the respective evidence about the general tone of the meeting. The evidence of Mr Sharp is that Mr Garvin refused to answer most of the questions and that he became very agitated; yelling several times. Mrs Sharp says that Mr Garvin shouted at Mr Sharp several times and began to rise from his seat and that he struggled to keep his temper under control. Mrs Sharp says she was shocked by Mr Garvin's violent reaction. When asked by the Authority to explain this, Mrs Sharp told the Authority that Mr Garvin was getting out of his seat and clenching his fists.

[44] But Mr Garvin says that he "*repeatedly and calmly*" advised Mr Sharp that he was not going to comment because he needed more time to properly construct his responses. Probably the most objective view of the tone of the meeting comes from Ms Brooks. She told the Authority that the meeting started off "*reasonably calm*" but there were raised voices at times with both Mr Sharp and Mr Garvin trying to get their respective views across.

[45] The further evidence of Mr Garvin is that at the conclusion of the meeting he was informed by Mr Sharp that the situation was “*very serious*” and that he and Mrs Sharp needed to consider what the next step would be. Mr Garvin was requested to leave his laptop behind as apparently it had not been backed-up during the five months that he had been employed. Mr Sharp told the Authority that the backing-up of computers is important to the business and it is done at least on a weekly basis. Mr Sharp also gave an emotional recollection of an employee leaving the company some time ago taking with him the only source of certain intellectual property. The evidence of Mr Sharp is that he asked Mr Garvin to return his own office and spend more time on: “*concentrating on his responses to our questions so that we could reschedule and discuss.*” Mr Sharp says that:

I gave Mr Garvin another letter rescheduling the meeting for the following Monday 14 February 2011. I also asked him to set up outlook calendars for two design engineers as Mr Garvin told me previously he had done it but it was subsequently discovered he had not. My wife and I needed to leave at 3pm that day for a pre-booked event. I telephoned the office at approximately 4pm to ensure that the back-up of the laptop had been completed, in order to allow the return of the laptop to Mr Garvin. I was advised that it had not been completed. I then organised for it to be removed from the premises.

[46] The letter that Mr Sharp refers to is dated 11 February 2011:

RE: Performance issues

Dear Alan,

We were unable to stop the meeting you agreed to yesterday morning as the Directors were unaware before they arrived. We note you refused to answer any questions pertaining to the letter we wrote. We have recorded the general responses you offered specifically on questions not in response to the letter, these being:

1. You have been employed by Progressive Equipment for five months.
2. You have not presented the Directors any financial information in this time.
3. You have not presented a business plan in this time.
4. You undertook to present a business plan early in the New Year in return for being able to take time off in late February which you were not entitled to.
5. You have not visited, or found, or talked to any potential customers relating to the WoodWeta that were not given to you or introduced by Rodney.

6. You understand the shareholders current accounts show the net value of the business.
7. You are not aware that the Progressive Group of Companies owes any money to anyone and it came as a complete surprise to find that this was not the case.

To ensure you have adequate time to respond, obtain independent advice, and provide a support person if required, we will reconvene the meeting at 09.00 hours 14 February 2011. Please be aware that all of the concerns outlined will require a response.

Rodney and Angela Sharp
Directors
The Progressive Group of Companies

Retention of Mr Garvin's laptop computer

[47] An issue has arisen about the retention of Mr Garvin's laptop for back-up purposes. Mr James McKeller, an employee of the company, was requested by Mr Sharp to carry out the back-up. Mr McKeller was summoned by Mr Garvin to give evidence to the Authority, but in the event did not do so. But there is evidence from Mr Ben Sharp. He attests to Mr Sharp instructing Mr McKeller to back-up the computer "*completely*" and then give it back to Mr Garvin. The further evidence of Ben Sharp is that there were "*numerous hidden files*" that were not accessible to the back-up process and that Mr Garvin had to be asked for the password again. The evidence of Ben Sharp is that there were some difficulties in accessing some files from the laptop and hence the back-up took longer than would normally be expected.

The use of the company car

[48] There is some disparity in the evidence regarding whether Mr Garvin was deprived of the use of his company car after the meeting on 11 February 2011. The evidence of Mr Garvin is that at the conclusion of the meeting he was told by Mr Sharp that:

I was not to use any of the company's vehicles without authorisation. When I asked whether this meant that I could not use my company car, Mr Sharp repeated that I was not to use any of the company's vehicles without authorisation and then added that I was not to leave the premises until 5pm.

[49] The further evidence of Mr Garvin is that at 5.01pm on Friday 11 February 2011, Ms Brooks advised him that she had Mr Sharp on the phone. Mr Garvin says that when he spoke to Mr Sharp he was told:

Alan, you can use the car to get home now but you are not to use it during the weekend.

[50] But Mr Sharp says that there was never a discussion with Mr Garvin about him not being able to use the car in the weekend and that Mr Garvin's evidence about this is "a fabrication." Mr Sharp's evidence is that he informed Mr Garvin that he was to remain on site and focus on preparing a response to the matters that had been raised with him. Mr Sharp says that he told Mr Garvin that he did not want him "driving around." The further evidence of Mr Sharp is that Mr Garvin asked him if he was taking the car off him, to which he responded that "no" he was not.

[51] The evidence of Ms Brooks is that at the meeting, Mr Garvin was asked to leave his car keys and cellphone and told that he was not to leave the premises during the day. Ms Brooks confirms that Mr Garvin asked if Mr Sharp was taking his car off him and that Mr Sharp responded to the effect that Mr Garvin was not to use the car to leave the premises during the day. Ms Brooks made no mention of the phone call later in the day that Mr Garvin referred to and while it is established that Mr Garvin was not to use his company car to leave the premises that day, obviously he had the car to drive home that evening and hence the argument that he was deprived of the general use of the car is built on a rather weak foundation.

The resignation of Mr Garvin

[52] The evidence of Mr Garvin is that on Friday 11 February 2011 upon going home he was in some turmoil in regard to what had happened that day. He consulted with his lawyer and was advised to "think over things" during the weekend.

[53] Mr Garvin attests that over the weekend he deliberated on everything that had happened between him and Mr Sharp. His evidence is that:

I thought about how Mr Sharp had spoken to me, how he had involved other staff in our meetings and over the laptop, and how he treated me like a naughty child when he had taken the cellphone and motor vehicle off me and told me I could not leave the premises until he said so. I thought also about how he had made me sit in the office all day Friday in front of everyone with no phone or laptop. I was totally humiliated by him. I kept thinking to myself that if this was

how he treated his Chief Executive, there was no hope for our relationship going forward.

[54] The further evidence of Mr Garvin is:

I truly tried to find a good reason to return to work but could not find one. I could think of nothing good to say about Mr Sharp after what he put me through and certainly no good that might come out of my returning to work.

At 8.03pm on Sunday 13 February 2011, after extensive deliberation all weekend, I emailed Mr Sharp with a letter advising of my resignation with immediate effect.

[55] The content of Mr Garvin's resignation letter is:

It is with deep regret that I find you have left with me no option but to advise of my resignation as CEO for Progressive Group, effective immediately. Following the treatment of me by Rodney on Thursday and Friday (10th and 11th February) of last week, in particular the total humiliation Rodney subjected me to throughout the day on Friday, I find myself in a completely untenable situation and no longer able to work with Rodney. I will arrange to drop the car off at 38C Northway Street premises on Monday morning (13th February) at around 10.30am. I would appreciate if you could have my belongings boxed up for me to take with me at this time, the books and photos on the shelves and some personal effects in the drawers. Other matters, such as final pay can be sorted out subsequently.

[56] Mr Sharp responded via an email at 10.34pm on Sunday 13 February 2011:

Dear Alan,

Please find enclosed our response to your email below. We totally reject any allegation of humiliation and encourage you to attend to meeting plan tomorrow at 0900 hours.

[57] The email appears to have had a letter attached to it of the same date reading as follows:

RE: letter of resignation

Dear Alan,

Thank you for your email at 20.03 hours with your resignation letter enclosed. Please be aware we absolutely refute all allegations regarding humiliation by Rodney. We have attempted to engage with you to find a resolution, particularly to the lack of progress in the development of the Progressive Group business plan over the last five months. We encourage you to reconsider and engage with us in the

meeting scheduled for tomorrow morning at 0900 hours to address these areas of concern. We need to understand the issues that have prevented progress and identify systems and implement tools that will ensure that the deliverables outlined in your IEA of September 2010 are produced: a robust business plan, financial planning, and sales/marketing plan spanning the next five years.

[58] Mr Garvin replied via a further email at 9.08am on Monday 14 February 2011:

Rodney, you have set this ridiculous course. I tried to talk to you on Thursday but you shut that down and proceeded to humiliate me for the whole day on Friday. Ending with you ringing at 5 to tell me I could use my car to go home! I believe very strongly in the Weta. It is a shame it is not well engineered but that can be fixed. Unfortunately, I do not believe our relationship can be fixed now. At the start we clicked so well on so many things but to react this way and treat me the way you have is something I cannot look past. Your behaviour on Thursday and Friday and on Friday in front of the staff, has completely undermined and destroyed my ability to lead the staff and to work with you. I have reflected over the weekend and in the light of your letter late last night. Your letter only reinforced my sense of having lost all confidence in you because it gave no indication that you might have reflected that you might have overstepped your mark in any way. I wish you all the luck with the Weta. I strongly believe it is a world beater. I will not be meeting with you today and will drop in the car as stated in my letter of resignation.

Subsequent to Mr Garvin's departure

[59] The evidence of Mr Sharp is that subsequent to the departure of Mr Garvin, he obtained information from Mr Garvin's laptop that suggested that he had been continuing to actively search for another position while employed by PEL. Mr Sharp referred the Authority to an email from Mr Garvin dated 23 September 2010, to a consulting group, whereby it appears that Mr Garvin is "still very interested" in a position with another company; [W]. The consultant's reply, in substance is:

It may transpire that [W] choose to continue on with just the one short listed candidate. Reference checking has been very positive. I will let you know if they decide to revisit your application.

[60] When this matter was put to Mr Garvin at the investigation meeting, his response was that he was interested in the [W] position from an "*industry perspective*" and whether or not the position was filled and who the successful candidate was. I did not find this response to be convincing, given the tenor of the exchange of emails.

[61] Mr Sharp also referred the Authority to a further email dated 17 December 2010 from Mr Garvin to another consultant [R]. Mr Garvin inquires as to whether [R] is still doing “mentoring/consultancy” and he informs that he would be “very interested in catching up and discussing options.” There is a further email exchange dated 17 December 2011 between Mr Garvin and another consultant [S] whereby Mr Garvin indicates that he would like to: “discuss your business mentoring/consulting as I have some interesting challenges at present.”

[62] Mr Garvin’s explanation in regard to his contact with these two consultants is that he was simply looking for a mentor and if taken solely at face value, this appears to be reasonably plausible.

Analysis and Conclusions

[63] The primary issue for the determination of the Authority is: Was the resignation of Mr Garvin on 13 February 2011, in reality, a constructive dismissal?

[64] In summary, it is submitted for Mr Garvin that the respondent (in the form of Mr Sharp) through his actions breached its obligations to Mr Garvin in that his employment was repudiated by the unilateral variation of express and implied terms of the employment agreement. It is further submitted that it could be reasonably expected that the resignation of Mr Garvin was a foreseeable consequence of the actions of Mr Sharp.

[65] Conversely, it is submitted for the respondent that the allegations of Mr Garvin are rejected. PEL says that Mr Garvin voluntarily resigned when he was asked to attend a meeting to explain why a number of tasks required from him under his employment agreement were not being performed.

The law

[66] Mr Garvin’s argument that he was constructively dismissed substantially rests on the premise that there was a breach of express and implied terms of his employment agreement, or in other words, a breach of duty by his employer. Therefore, as was stated by the Court of Appeal in *Auckland Electric Power Board v. Auckland Local Authorities IUOW*⁵:

⁵ [1994] 1 ERNZ 169

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether a breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[67] Applying the above dicta of the Court of Appeal to the circumstances of Mr Garvin, the first question is: Was the resignation caused by a breach of duty on the part of PEL?

[68] The submissions for Mr Garvin rely on several examples of behaviour by Mr Sharp that the Authority should take into consideration in determining whether there was a breach of duty by the employer.

The requirement by Mr Sharp that Mr Garvin attend two disciplinary meetings

[69] The Authority is referred to the letter dated 8 February 2011. I accept that Mr Sharp attempted to give this letter to Mr Garvin on the morning of 9 February 2011 and that Mr Garvin then, rather suddenly, became unwell; according to Mr Sharp. Effectively, Mr Sharp casts doubt over whether Mr Garvin was genuinely feeling unwell or whether (as Mr Sharp appears to believe) he feigned illness in order to avoid addressing the matters that Mr Sharp was concerned about. The evidence of Mrs Tabatha Garvin is that when her husband returned home on Wednesday 8 February 2011 he was “*on the toilet for the rest of the day.*”

[70] While it has to be accepted that Mr Garvin was quite possibly unwell for the remainder of 8 February 2011, subsequent to his meeting with Mr Sharp, I am inclined to accept Mr Sharp’s observation that there appeared to be little wrong with Mr Garvin until it was made known to him that he was going to be required to account for his performance at a meeting on Friday 11 February 2011. Nonetheless, the practical reality of the situation is that Mr Garvin did not actually take receipt of the letter in question until the following morning, Thursday 9 February 2011. Mr Garvin was then taken through the content of the letter by Mr Sharp to ensure there were no misunderstandings about what was required.

[71] The common evidence of Mr Garvin and Mr Sharp is that Mr Garvin attempted to give an explanation at that time. However, he was persuaded by Mr Sharp that he should take some time to prepare a response in writing and the matter was left there. Mr Garvin was given the rest of that day to prepare a written response for the proposed meeting on Friday 11 February 2011.

[72] However, on that morning, at 7.22am, Mr Garvin informed, via an email, that there had been insufficient time for him to adequately prepare his response. Mr Garvin sought to have the meeting postponed to 3.15pm on Wednesday 16 February 2011. This proposal was rejected by Mr Sharp on the basis that Mrs Sharp had made arrangements to be present and hence the meeting should go ahead.

[73] The question then arises as to whether Mr Garvin was given reasonable time to prepare his response to the matters raised in the letter dated 8 February 2011. Given the content of the letter and that there were numerous issues raised for Mr Garvin to address, many of which appear not to have not been discussed with him previously, I conclude that he was not given adequate time to prepare a complete response to all matters before the meeting on Friday 11 February 2011. However, Mr Garvin was given most of the working day of Thursday 10 February 2011 (and that evening also) to prepare his response, and while this was clearly not sufficient time to make a comprehensive response to all of the issues raised, the evidence is that Mr Garvin's response at the meeting on 11 February 2011, was that he was not going to comment on the matters at issue because he needed more time to properly construct his responses. That Mr Garvin should adopt such an approach is quite remarkable, given his role as CEO and the investment that the employer had made in his remuneration.⁶

[74] If one peruses the matters set out in the letter of 8 February 2011, it is clear that while some of those issues probably needed more time in order for Mr Garvin to prepare an adequate response, there were several others that, as a CEO with considerable business experience, Mr Garvin, should have been able to quite easily have been able to answer "off the top of his head" and at the very least, have prepared a response to in the time made available. For example; the rather simple matter of complying with the company's sustainable practices, the employment assessments, the apprenticeship contract for Alex Smith, and the departure of Jared Bolten. Furthermore, Mr Garvin was well aware that he was required to produce a business

⁶ A salary of \$160,000 plus benefits.

plan by early in 2011. This was not a new issue. It had been raised on several occasions and he had given a commitment to produce such, but clearly nothing had been done about it, even up to the date of his resignation. Given that he most certainly knew that this was important to his employer, by any objective analysis, one would conclude that Mr Garvin would have at least offered some explanation for his failure to provide even a draft version of the business plan.

[75] Therefore, while I accept the argument that it was not reasonable to expect Mr Garvin to provide a comprehensive response to all of the issues that had to be presented to him in the time available, I do not accept that it was reasonable on his part, as the CEO of the company, to adopt the stance that he did and not comment on any of the matters in question. While on the whole, Mr Sharp's expectation in regard to receiving a full response from Mr Sharp was probably too ambitious, he was certainly entitled to expect at least a constructive response from Mr Garvin, rather than the dismissive attitude that was forthcoming.

[76] It has been submitted for Mr Garvin that the circumstances pertaining to him were analogous to those that arose in *Donaldson & Youngman (trading as Law Courts Hotel) v. Dickson*⁷ whereby Ms Dickson resigned after being confronted with a two page list of concerns at a meeting called at short notice. But in *Dickson* the employee was given no warning of the concerns of the employer and had not been told of any of those concerns before meeting with the employer. Mr Garvin's situation was quite different. He was given a letter setting the concerns of his employer, including the matter of the failure to produce a business plan; which he was very aware of.

[77] Furthermore, while it can be accepted that Mr Garvin was not given a reasonable amount of time to prepare a response to the matters raised in the letter of 8 February 2011, before the meeting on 11 February 2011; that was not the end of the matter. Mr Garvin was then given most of that day and the weekend, effectively a further three days, to spend time on preparing a response in anticipation of a further meeting on Monday 14 February 2011. However, rather than utilising this time to prepare a more comprehensive response and then meet with his employer, Mr Garvin decided to resign. So while Mr Garvin may have felt under some pressure prior to the meeting on Friday 11 February 2011, the fact of the matter is he was given a further

⁷ [1994] 1 ERNZ 920

three days to prepare a better response than the most inadequate one he gave on that day.

[78] I have to say that there is another peculiar aspect relating to Mr Garvin's evidence, as it relates to him preparing a response to the issues raised with him in the letter dated 8 February 2011. This is that in his written statement of evidence (paras. 63 to 80, covering some four pages of his overall witness statement), Mr Garvin attests:

Had I had the opportunity to provide a considered response it would have been along these lines.

[79] The written evidence of Mr Garvin then proceeds to set out in some detail his response to 13 of the 16 matters that had been raised in the letter. When asked by the Authority when he prepared these 13 responses, Mr Garvin told the Authority that he prepared them:

Partly on Thursday afternoon [10 February 2011] and mostly on the Friday [11 February 2011] and over the weekend [12 and 13 February 2011].

[80] Mr Garvin's further oral evidence was that: *I gave it more thought following that.*

[81] Given that Mr Garvin told the Authority that he had prepared comprehensive responses to the matters that were of concern to his employer, the question goes begging as to why he did not present these responses at the meeting that was scheduled for Monday 14 February 2011. It seems that we are left to conclude that Mr Garvin decided at some point on Sunday 13 February 2011, that he was going to resign rather than meet with his employer and present his responses to the matters that had been raised.

[82] Of course it was Mr Garvin's prerogative to tender his resignation, but taking into account all of the circumstances, I do not find that the requirement by Mr Sharp that Mr Garvin should attend the meetings in question, was a breach of duty or an implied term of the contract between the parties of a sufficiently serious nature: in the words of Goddard CJ in *NZ Woollen Mills IUOW v. Distinctive Knitwear*⁸:

⁸ [1990] 2 NZILR 438

To bring a reasonable employee to the conclusion that the employer does not intend to be bound by the contract and therefore cannot be relied upon to perform it consistently and in the future.

[83] But even if I am wrong about that, there is a second criterion that must be met under the *Auckland Power Board v. Local Authorities IUOW* test. This is that even if Mr Garvin's resignation was caused by a breach of duty on the part of the employer, the next question is:

Whether the breach of duty was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing?

[84] The evidence of Mr Sharp (which I accept) is that it was never intended that Mr Garvin's employment would end. Mr Sharp told the Authority that he was "disappointed" when he received Mr Garvin's resignation particularly as by that point, the company had "invested \$60,000" in Mr Garvin's employment and all that had been put to Mr Garvin were "simple questions" for him to give answers to. Mr Sharp's further evidence is that in regard to the meeting on 11 February 2011:

We were very careful to keep the meeting low key and not disclose it to any other members of our team aside from Deborah, whose senior role in the Group includes taking minutes.

[85] Mr Sharp also points to arrangements that had been made for Mr Garvin to attend a conference in Melbourne in the first week of April 2011 and the confirmation of Mr Garvin's travel arrangements on 8 February 2011; the same day that the letter setting out the concerns of PEL was written. Mr Sharp says that had the company been looking to end the employment relationship, the bookings would not have been made with a subsequent loss of money due to a cancellation, albeit the sudden resignation of Mr Garvin presumably had this effect.

[86] I accept the evidence of Mr Sharp that essentially, PEL had made a reasonably substantial investment by employing Mr Garvin and it was not intended or foreseeable, that any of the subsequent actions regarding his accountability for his performance as CEO, would result in the resignation of Mr Garvin.

The cellphone, laptop and company car

[87] Mr Garvin says that there was a unilateral removal of his cellphone, laptop and access to the use of the company car. It is argued that the circumstances pertaining to the lack of access to these benefits constituted direct breaches of his employment agreement and that this equipment was so fundamental to Mr Garvin's role that he was entitled to consider their removal as dismissive and repudiatory of the employment agreement.

[88] Clause 6.8 of Mr Garvin's employment agreement states:

ProQuip will provide a mobile phone and laptop for your use. Safe care of these will be your responsibility.

[89] And at clause 6.9 of the agreement:

ProQuip will provide a sedan type vehicle for your use. It must be kept clean, tidy and presentable at all times, as per the standard Progressive Group vehicle policy. You will be solely responsible for the safe and lawful use of this vehicle at all times.

[90] Mr Garvin says that the cellphone was a critical "*tool of trade*" for him. It seems to be the view of Mr Sharp that Mr Garvin had an obsession with the cellphone and because he did not want Mr Garvin to be distracted while he was preparing his response to Mr Sharp's concerns, Mr Garvin was required to relinquish the phone. This all seems rather analogous to confiscating a toy from a child and it is remarkable that Mr Sharp should subject the Chief Executive Officer of the company to such demeaning behaviour. But it is equally astonishing that as a senior executive, Mr Garvin was taken to be so transfixed with his phone that it had to be removed from him in order to ensure that he would concentrate on the job in hand. The evidence is that Mr Garvin still had access to a landline and another company or "pool" cellphone should he have required it. I also understand that the deprivation of Mr Garvin from his cellphone was only a temporary measure while he focused on the task that was required of him.

[91] In the round, while I conclude that the removal of the cellphone from Mr Garvin was a particularly petty action on the part of Mr Sharp, I do not accept that there was a breach of Mr Garvin's employment agreement that was so serious as to be repudiatory in nature. I also find that the removal of the laptop for back-up purposes

was a fair and reasonable action in the circumstances; and as Mr Garvin, as the CEO, was more senior than any of the other staff taking responsibility for the back-up, he could quite simply have reclaimed the laptop at any time if he required it for any reason.

[92] I have already set out above (para [52]) my view on the issue of Mr Garvin's access to his company car and I do not consider that this matter, taken individually, or combined with the cell phone issue and the requirement to attend the meetings in question, to constitute a breach of his terms and conditions of employment of a sufficiently serious nature, to warrant and consequently convert, his resignation into a constructive dismissal.

The claim of constructive dismissal - conclusion

[93] In summary, I find that there was not a breach of contract or of any of the express or implied terms of Mr Garvin's employment, which was of a sufficiently serious nature that could reasonably bring him to a conclusion that his employer did not intend to be bound by the contractual terms and conditions essential to the relationship.⁹ Or in the terms of the *Auckland Power Board* case, I find that the resignation of Mr Garvin was not caused by a breach of duty on the part of his employer that would have the foreseeable consequence that Mr Garvin would resign.

[94] It follows that I find that Mr Garvin was not constructively dismissed and that his resignation was a voluntary action on his part.

The share options

[95] Clause 6.2 of Mr Garvin's employment agreement provided for him to be issued with fully paid up shares as follows:

As soon as practicable following the execution of this agreement ProQuip will issue to you a number of fully paid up Shares such that you will hold 4% of the total issued Shares. Such shares will be issued in consideration for you agreeing to accept the terms of this agreement. One third of these shares will immediately vest into your ownership, one third at the second anniversary of the initial tranche, with the remaining third of the shares vesting on the anniversary of the vesting of the initial tranche provided you are still employed by ProQuip at the relevant time.

There is a further provision at clause 7 of the agreement for share options to be granted provided certain conditions are fulfilled:

⁹ *Distinctive Knitwear* (Ibid).

- 7.1 You will be granted options to purchase shares in ProQuip in three tranches (if you are still employed by ProQuip at the relevant time). These options will be for up to 4% of the post funding equity of ProQuip and the granting of these options will be linked to the business achieving specific milestones. The specific milestones and the issue price will be agreed in writing with you within 120 days of you commencing employment reflecting the key goals set out in the Business Plan that you will be involved in preparing.
- 7.2 One-third of any options granted will immediately vest in your ownership upon achievement of the specific goals set by ProQuip with the remaining two-thirds of the shares vesting on the second anniversary of the vesting of the initial tranche.
- 7.3 Each option will lapse upon the third anniversary of the grant of the option unless exercised. For the purpose of clarity, you will not be granted any further options should you cease to be employed by ProQuip for whatever reason.

[96] The provisions of subclause 7.1 rely on certain conditions being met.

- (1) The granting of the share options is linked to the business achieving specific milestones.
- (2) The specific milestones and the issue price of the shares should have been agreed, in writing, with Mr Garvin within 120 days of him commencing employment.
- (3) The specific milestones and the share issue price would reflect “the key goals set out in the Business Plan” that Mr Garvin was to prepare.

[97] Regrettably, as we have seen, Mr Garvin failed to produce a business plan within 120 days, or indeed any semblance of such. Given this was the essential requirement in regard to activating the granting of any share options, it follows that without the business plan there could not be any share options; as the specific milestones had not been set, let alone achieved. It logically follows that before Mr Garvin could become entitled to any share options, he had to carry out his commitment under the contract. Because he did not carry out his obligations in regard to producing the business plan, the share options would not be available.

[98] However, I find that the clause 6.2 is not conditional on the conditions of clause 7 being met as they apply to two separate and distinct entitlements. Mr Garvin’s claim for “fully paid up” under clause 6.2 shares is valid, as according to its

terms, his entitlement became available “as soon as practicable” following the execution of the employment agreement. The agreement was signed on 8 September 2010 so the entitlement was available after that date. As I understand the words of the clause, Mr Garvin is only entitled to one third of 4% of the total issued shares as he was not in continuous employment long enough to reach either of the two anniversaries in order to have any further entitlement.

The wage arrears claim

[99] While Mr Garvin’s statement of problem claims that PEL made unlawful deductions from his final pay, there have not been any details or calculations provided as to the basis of this claim. On the other hand, PEL have provided calculations relating to Mr Garvin’s final pay, and without any evidence being produced by Mr Garvin to the contrary, I am left to conclude that the claim for arrears is not proven for want of probative evidence and hence it must be declined.

Determination

[100] Having closely considered all of the evidence available to the Authority and for the reasons set above, I find that:

- (a) Mr Garvin was not constructively dismissed. He does not have a personal grievance and the claim is unsuccessful.
- (b) Pursuant to clause 6.2 of the employment agreement, Mr Garvin is entitled to a number of fully paid up shares in Progressive Equipment Limited; to be defined, being one third of 4% of the total issued shares of the company. Mr Garvin seeks to be paid the cash value of these shares as of 13 September 2011. That appears to be a somewhat arbitrary date and no reason has been given for it. It seems to me that according to the words of the agreement, the value of the shares would be assessed at a date shortly after the commencement of Mr Garvin’s employment, but in any event, the parties are left to resolve that matter if they can, with the assistance of a mediator from the Department of Labour as a second option. In the event that these two options are not successful, leave is granted to return to the Authority for further determination.

- (c) The claim for wage arrears relating to the calculation of Mr Garvin's final pay is not supported by any tangible evidence and therefore fails.

Costs

[101] Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority