IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 53/09
5112278

	BETWEEN	MELT LOUW Applicant
	AND	BRIAN ANDERSON ACCOUNTING SERVICES LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Eska Hartdegen, Counsel for Applicant Paul Tremewan, Advocate for Respondent
Investigation Meeting:	28 January 2009 at Auckland
Determination:	19 February 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Louw), alleges that he was constructively dismissed by the respondent (the Firm) on 31 October 2007. Mr Louw seeks compensation for hurt and humiliation, penalties for two alleged breaches, reimbursement for the sitting fee for an examination, lost wages, interest and costs.

[2] The Firm resists those claims on the footing that Mr Louw resigned his employment and itself seeks penalties for breaches of the obligation of good faith and failure to give proper notice in accordance with the employment agreement and reimbursement of the notice period.

[3] Mr Louw was employed by the Firm on and from 11 April 2007 as an accountant. Despite two university degrees acquired from South African universities, together with a post-graduate diploma from Otago University, Mr Louw was, at the

time he was employed by the Firm, yet to gain certification as a chartered accountant in this country. Although some controversy attaches to the description, Mr Louw referred to himself as a *trainee* accountant.

[4] Mr Anderson, the principal of the Firm, attended to the various checks and interview processes when Mr Louw was considered for appointment and reached the conclusion, on balance, that Mr Louw was suitable for the position the Firm had available.

[5] A key issue for Mr Louw was the necessity for him to work in an environment where he could have time off to complete studies which would enable him to attain chartered accounting status within the accountancy profession. Mr Louw's obligation was to complete six modules over a six month period, each module commencing in the middle of a Friday afternoon concluding at 8.30pm that night and then continuing on the Saturday immediately following from 8.30am until 2.30pm.

[6] Over the six month period that this training programme was in place, it will be seen that there was a requirement for the employer to accept the absence of the student for perhaps two hours once a month or thereabouts for the purposes of participating in these modules. Other training obligations associated with the modules would also take the student away from the workplace as would the final examination and any study associated with it that might be allowed.

[7] As I indicated, it was a prerequisite of Mr Louw that any employer would enable him to fulfil his obligations and meet this timetable. As part of the selection process, Mr Louw's evidence is that he understood that Mr Anderson, on behalf of the Firm, was as committed to the programme as Mr Louw was.

[8] Mr Anderson's evidence was that he was indeed committed to Mr Louw obtaining certification as a chartered accountant but that he had no accurate idea of the extent of the obligation and that Mr Louw did not tell him. Mr Louw's evidence was that he thought he had emailed Mr Anderson with a schedule of the requirements but, in answer to a question from me at the investigation meeting, Mr Louw accepted that his recollection may have been faulty on this point and Mr Anderson was adamant that he had not received any such email. I think it likely no such email was sent or received.

[9] Mr Louw understood that the time he would take off, during working hours, to attend to the training obligations just referred to, would be made up at some later stage. Mr Louw's evidence on this point was that Mr Anderson had told him that the Firm … *follows a flexi time approach and the agreement was that I would have this time off from work as long as I worked back the time*.

[10] For his part, Mr Anderson deposed that, during the employment relationship, he became increasingly anxious about the professional standard of work being provided by Mr Louw and he said that he had to spend significantly greater time than he would have liked correcting errors made by Mr Louw and generally checking the quality of Mr Louw's output.

[11] Mr Anderson gave evidence that he had spoken to Mr Louw about his performance and, while Mr Louw accepted that there had been some criticisms of his work during the early part of the employment relationship, it seems clear that those criticisms were not expressed in any formal way and certainly were not internalised by Mr Louw as being in any way problematical or destructive of the continuing employment relationship.

[12] However, matters came to a head in the final two weeks of October 2007. On 11 October 2007, Mr Louw and Mr Anderson met together to review some of the accounts which Mr Louw had prepared on behalf of clients which had been allocated to him by the Firm. It seems that Mr Anderson became frustrated at the amount of time that reviewing Mr Louw's work was taking, apparently because of Mr Anderson's contention that Mr Louw's work was so fundamentally inaccurate and deficient.

[13] It is common ground that there was a discussion at this meeting about Mr Louw's performance and that Mr Anderson identified his criticisms of Mr Louw's work and Mr Louw defended himself as best he could. Mr Anderson's evidence, not supported by Mr Louw, is that this 11 October discussion was the second major discussion about Mr Louw's work, the first being on 15 August.

[14] Mr Anderson says that the earlier discussion on 15 August (which Mr Louw does not recall specifically), was the first occasion on which Mr Louw offered to resign his employment. Much was made by counsel for Mr Louw about Mr Anderson's use of the expression *tendering his resignation*, but Mr Anderson

confirmed that he had not intended to claim that Mr Louw had tendered his resignation in that formal sense, but had simply talked about resigning his position. For his part, Mr Louw absolutely denied offering to resign either on 15 August or subsequently. Whatever the truth of the resignation story, it is plain that there was no use made of the contention that Mr Louw had offered his resignation in August, because the matter was not referred to by either party in evidence apart from Mr Anderson's contention that there had been such an offer made some months before.

[15] After reflecting on the events of 11 October, Mr Anderson formed the view that Mr Louw's performance was defective and that a warning letter ought to be generated and this letter, dated 12 October, is in the following terms:

> *Unsatisfactory work performance*
>
> *As indicated to you yesterday, and on previous occasions, your present standard of work is unsatisfactory. You are making numerous errors, your work papers are untidy and your performance generally falls short of that required to fulfil your job satisfactorily.*
>
> *The time taken to complete some assignments is quite excessive given the straightforward nature of the work now being provided to you.*
>
> *You are advised that your standard of work must improve considerably or your position will be terminated.*

[16] Mr Louw told me that he was *devastated* to receive this letter, but he also made clear to me that he did not tell Mr Anderson that was the case. Mr Anderson deposed that Mr Louw made his second intimation that he might resign on this day (12 October) in response to the warning letter. Mr Anderson understood that Mr Louw was to discuss the resignation prospect with his partner.

[17] The following Monday, 15 October, Mr Louw attended at the office at his usual time and found his pay slip on his desk which indicated that a significant sum (in excess of $2,000) had been deducted from Mr Louw's salary. The Firm pays its staff monthly and Mr Anderson's evidence was that he had made the deductions from Mr Louw's salary over the weekend, conscious of the fact that he was about to leave for an overseas holiday. Mr Anderson says that he attended at Mr Louw's office in the morning and he says that Mr Louw told him that he (Mr Louw) understood how the calculations were arrived at.

[18] Mr Louw denied that contention vehemently at my investigation meeting. He said that he was *stunned and in shock*. Whatever Mr Louw's response, it is clear that the deductions relate to the various blocks of time which Mr Louw had taken, principally in connection with his studies.

[19] Mr Louw deposed that the effect of the deductions was to deprive him of approximately 50% of his net monthly salary and that this left him significantly financially embarrassed. Mr Anderson told me that if he had known that that was Mr Louw's position, he would have reinstated some or all of the deductions.

[20] Of course, Mr Anderson's evidence was that he had, if not got Mr Louw's consent to the deductions, at least got Mr Louw's understanding of how the calculations were arrived at and that Mr Louw had ample opportunity to raise any concerns that he might have had about the calculation and had not done so. Conversely, Mr Louw says that Mr Anderson did not raise the matter with him at all and simply imposed this calculation on him as a *fait accompli*.

[21] Mr Louw drew the Authority's attention particularly to the fact that the deductions were not all related to the month of October and indeed dated back to the month of August. Mr Louw asked the Authority to draw the inference that in taking into account deductions which properly were a charge against an earlier month, Mr Anderson had behaved inappropriately and vindictively.

[22] Conversely, Mr Anderson told me that he had reached the conclusion that Mr Louw would not make the time up. In his brief of evidence, he had this to say on the point:

> *It had become clear upon review in the first half of October that I had paid Melt [Mr Louw] for an amount of time for which he had not worked and the indications were he would not make the time up.*

[23] What is clear from the evidence of both the principal protagonists is that, having reached the conclusion that Mr Louw would *not make the time up*, Mr Anderson then did the calculations over the weekend 13 and 14 October 2007, and left the pay slip for Mr Louw to see first thing on Monday morning, 15 October 2007.

[24] The evidence is clear that Mr Louw saw the pay slip at that time, but there is dispute between the parties as to his reaction to it. Mr Anderson deposes that Mr Louw, in effect, agreed with Mr Anderson's calculation and made no objection to

the deduction. Indeed, Mr Anderson further deposed that had Mr Louw made clear that he was financially embarrassed by the deduction, he would have immediately reversed the deduction.

[25] Mr Louw's evidence is that he was *stunned and in shock* as a consequence of this dramatic reduction in his monthly income for October 2007, and considered that he would be financially embarrassed as a consequence. However, it is clear that Mr Louw did not raise the issue directly with Mr Anderson and Mr Louw hotly disputes Mr Anderson's contention that he (Mr Louw) gave Mr Anderson any reason to believe that the deduction was accepted by him.

[26] For the sake of completeness, I note that the deduction was significant; in effect, it amounted to a reduction in gross pay of $2,300 in round figures.

[27] Two days later on Wednesday, 17 October 2007, Mr Anderson asked Mr Louw to prepare a set of accounts for Mr Anderson's brother and sister-in-law. Mr Anderson left for holiday leave in Australia the following day, 17 October 2007.

[28] Mr Louw found the assignment just referred to difficult. It was given to him on an urgent basis and, of course, he had other work to do. Mr Louw deposed that this assignment felt like he was being *set up … to fail*.

[29] Mr Louw says that he attended to the work as best he could on the day that he was given the assignment but that he was unable to get responses to his questions from Mr Anderson himself or Mr Anderson's brother who was not available.

[30] When Mr Louw attended at the office again the following morning (18 October 2007), the file in question and his working papers had been removed. Mr Louw then went on unpaid study leave from 23 October through until 30 October which was the day that he wrote his exam paper. He returned to the office on 31 October to find a further warning letter from Mr Anderson on his desk.

[31] This second warning letter dated 30 October 2007 commences by reciting Mr Anderson's understanding that Mr Louw was *a qualified accountant*, referring to Mr Louw's academic qualifications and experience and then reaching the following conclusion in para.4 of the letter:

> *The reality is that you have not to date come close to displaying the abilities that you should and your performance is such that I am*

> *having to write off an unacceptable amount of time and cost as jobs are taking far longer than is acceptable. I feel you have misrepresented your abilities.*

[32] After referring to the support provided by the Firm to Mr Louw, Mr Anderson then went on to make the following observations:

> *It would be fair to say I am receiving mixed messages from you, twice you have verbally tendered your resignation and have made comments that you feel you may not be suited to chartered accountancy, but then proceed to state that you will do better.*

[33] Then, after setting a target of 95% recovery in respect of Mr Louw's work calculated with reference to previous years' fees, Mr Anderson then concludes the letter with this paragraph:

> *I will be reviewing these aspects of your performance both at the end of October and November and if they are not met you will be receiving a final warning in respect of your performance and your position with this firm.*

[34] Mr Louw clearly regarded this warning letter as the final straw and that day attended on his solicitor who prepared a letter of even date which Mr Louw hand delivered to the Firm. The letter raised the allegation of constructive dismissal and was followed on 9 November 2007 by a further letter raising a personal grievance.

Issues

[35] In order to determine whether Mr Louw resigned his employment while having his performance managed or whether Mr Louw was constructively dismissed from his employment by Mr Anderson, it will be useful for the Authority to consider the following questions:

(a) Did Mr Louw deceive the Firm about his credentials;

(b) Did Mr Louw offer to resign;

(c) What happened at the meeting on 11 October 2007;

(d) Is the first warning letter effective;

(e) Was the Firm's performance appraisal process satisfactory;

(f) Should the Firm have discussed the salary deduction with Mr Louw;

(g) Was the second warning letter effective?

Did Mr Louw deceive the Firm about his credentials?

[36] Mr Anderson alleges that Mr Louw deceived him about the extent of his experience. Mr Anderson makes that allegation in his evidence and in correspondence to Mr Louw during the employment. For instance, in the letter dated 30 October 2007 (the second warning letter), Mr Anderson writes as follows:

> *I feel you have misrepresented your abilities.*

[37] The essence of Mr Anderson's complaint is that, notwithstanding having had two relevant undergraduate degrees conferred on him, had certain successful post-graduate study credits, and had some three years of relevant practical experience including a period in a firm similar to Mr Anderson's and doing similar work, Mr Louw was incapable of meeting an appropriate professional standard, or at least that was Mr Anderson's view.

[38] In response, Mr Louw deposed that he was not a *qualified* accountant at all but a trainee accountant. He agreed that he had two relevant undergraduate degrees, but noted that they were conferred by South African universities, and although he had relevant practical experience in New Zealand (including working in the Tax Office) and a post-graduate qualification from Otago University, he was still some way off being able to practise as a chartered accountant, having not completed the appropriate New Zealand requirements.

[39] In response, Mr Anderson pointed out to the Authority that chartered accounting was an international profession and that jurisdictional differences were uncommon and that he would have expected a graduate with the experience that Mr Louw had to be significantly more able than Mr Louw appeared to be.

[40] I pressed Mr Anderson in my questioning of him as to whether he was simply endeavouring to sheet home the blame for a poor decision of his own to employ Mr Louw on to the applicant himself when in fact the real responsibility lay with the Firm which made the decision to employ.

[41] Mr Anderson denied that the Firm had made a poor judgment and believed that Mr Louw had misrepresented his abilities, particularly as it seemed that the

curriculum vitae supplied as part of the documentary evidence to the Authority was different in a material respect from the one provided to Mr Anderson.

[42] When this evidence came out, I naturally went back to Mr Louw and asked him to comment on the allegation; Mr Louw's evidence (which I accept) was that the change was simply a mistake made in word processing and that the curriculum vitae supplied to Mr Anderson (and on which Mr Anderson clearly relied) was accurate, whereas the one supplied to the Authority had a significant omission.

[43] Another curious aspect of the recruitment process was the reference checking as deposed by Mr Anderson. One of the referees to whom he spoke indicated that he would not re-employ Mr Louw. Despite this conclusion, Mr Anderson described the referee's report on Mr Louw as *positive*. I taxed Mr Anderson on this point, but he was convinced that his judgment was not astray and that Mr Louw was an appropriate person to be employed by the Firm.

[44] I am not satisfied on the evidence before me that Mr Louw misrepresented himself to Mr Anderson. I am satisfied that the curriculum vitae that Mr Louw provided was accurate and that Mr Anderson had all the appropriate opportunities to conduct inquiries about Mr Louw's background and experience. That he chose to employ Mr Louw was a decision he himself made, and any disappointment attaching to that decision cannot, in my judgment, be sheeted home to Mr Louw.

Did Mr Louw offer his resignation?

[45] The evidence from Mr Anderson, which the Firm relies on, is that Mr Louw offered his resignation on two occasions, the first apparently on 15 August 2007 and the second during a discussion on 12 October 2007.

[46] In the second warning letter of 30 August 2007, Mr Anderson makes this observation:

> *It would be fair to say I am receiving mixed messages from you, twice you have verbally tendered your resignation …*

[47] On the face of it, the reference to resignation in the warning letter written shortly after the second occasion when Mr Anderson says a resignation was offered, may be seen as corroborative of Mr Anderson's recollection.

[48] However, two points need to be made. First, Mr Louw vehemently denies ever offering or tendering his resignation. Second, there is, as counsel for Mr Louw correctly observed, a difference between *offering* a resignation and *tendering* a resignation. *Tendering* is an altogether more formal process than *offering* contemplates.

[49] When questioned closely on the matter, Mr Anderson properly acknowledged that the use of the expression *tender* in relation to a possible resignation from Mr Louw, went too far and that all that he was really talking about was the offer of a resignation.

[50] Given Mr Louw's vehement denials that any resignation was ever offered and the factual difference between a tender and an offer of a resignation, I am satisfied that no resignation was tendered, either on 15 August or on 12 October 2007.

[51] However, that still leaves the question of whether a resignation was offered by Mr Louw to Mr Anderson on either or both of those occasions. I have reached the conclusion, on the balance of probabilities, that it is more rather than less likely that resignation was discussed on one or both of those occasions, and that certainly on the second occasion (12 October 2007), a discussion about resignation seems more consistent with the evidence before me than the subject not being mentioned at all.

[52] Because neither party had a very clear recollection of the meeting on 15 August, I heard little evidence about that meeting and am simply in no position to make any judgment about any subject that was traversed on that occasion. However the position is otherwise in relation to the 12 October event where the evidence from both the principal protagonists does tend to support the contention.

[53] First, Mr Anderson says that Mr Louw left the workplace on Friday, 12 October, having received the first written warning, making the observation that he would go home and talk with his partner about his future. While Mr Louw hotly denies this exchange ever took place, I am inclined to prefer Mr Anderson's recollection of events because of what happened next.

[54] The following working day was a Monday, 15 October 2007. This was the day that Mr Louw received a copy of his pay slip with the dramatic deduction in it. Mr Louw's evidence is that, while reading his pay slip, Mr Anderson entered his office and asked *whether I had thought about what we had discussed on the Thursday*

(a reference to the meeting of 11 October). Mr Louw then deposes that Mr Anderson said *there is no future for you here*, and that there was then a further discussion about the quality of Mr Louw's work and what, if anything, would be done to improve it, and that Mr Anderson asked Mr Louw … *directly whether I was going to resign*.

[55] Mr Anderson, in his evidence, does not deny asking the question about resignation, but he puts that in the context of getting an answer to a question which had been posed by Mr Louw on the previous working day. Mr Anderson deposes as follows on this issue:

> *I waited for most of the day for some enlightenment from Melt [Mr Louw] as to his intentions, but none were forthcoming – he ignored the issue completely and it was left for me to make inquiry. Hence the question – are you going to resign? I needed to know his intentions and certainly do not recall the statement that he had no future with my company.*

[56] On balance, then, my considered view is that resignation was discussed at least on 12 October 2007 although I do not think the evidence supports the conclusion that Mr Louw offered a resignation on that occasion. However, having had the subject raised on 12 October 2007, it is not surprising that Mr Anderson would seek to know Mr Louw's intentions. That, I hold, is what the discussion on 15 October was all about.

What happened at the meeting on 11 October 2007?

[57] Mr Louw's evidence, which on this point I accept, is that this meeting was the first occasion on which he internalised the Firm's unhappiness with his performance. Mr Anderson maintains that there were previous discussions (for instance, on 15 August 2007), but while Mr Louw accepts that from time to time there was legitimate criticism of his performance, he accepted those earlier rebukes in good part and seemed to regard them as no more and no less than a component of the learning process.

[58] However, at the meeting on 11 October, it seems clear that Mr Louw got the message that all was not well. By both accounts of that meeting, there was a robust exchange of views. Mr Anderson was roundly critical of the work he was being invited to review, and Mr Louw defended himself.

[59] Amongst other things, Mr Louw recalls Mr Anderson saying that Mr Louw *did not think like an accountant*. While Mr Anderson had no recollection of making that remark, he did say in his evidence that, in his opinion, Mr Louw did not think like an accountant.

[60] There was apparently a discussion between the parties about whether Mr Louw was in the right occupation (that is, the public practice of accountancy rather than working as an accountant in a firm or government department), and Mr Louw's evidence is that he told Mr Anderson he was happy where he was.

[61] Mr Anderson's response to that discussion was to issue the first written warning, the text of which I quoted in full above.

Was the first warning letter effective?

[62] It is clear from the facts that the first warning letter dated 12 October 2007 was issued the day after the meeting between the two principal protagonists.

[63] It is not difficult to find fault with this letter. Given the timing, it is difficult to imagine that it could have been written other than in the heat of the moment. It fails in every respect to comply with the legal rules around performance management. It makes generalised criticisms without specificity and fails absolutely to identify specific concerns of the employer, suggest a remedial course of action and determine a timeline for remedy. It concludes with the intimation that Mr Louw's … *standard of work must improve considerably or your position will be terminated*.

[64] Clearly then the warning letter, at least when it was written, was intended to be a final written warning. There is nothing in the employment agreement which bears on the issue of such warnings. Given the want of process, it is difficult not to see this warning as defective and not surprising that Mr Louw was devastated by its receipt. Clearly, the arrival of this warning letter *ramped up* the performance complaints of the Firm against Mr Louw. It was the first step in the slippery slope to the termination of the employment. As such, it would have been important for the Firm to spell out the nature of its difficulties with Mr Louw's performance, identify what he needed to do to put things right, set an appropriate timeline for that to happen, arrange a review at which that enhanced performance could be considered and determine a measured and rational response by way of penalty in the event that Mr Louw was unable to achieve the Firm's aspirations within the timeline identified.

[65] On all these grounds, this letter fails. A final written warning issued one day after the substantive discussion on which it appears to have been based, without specificity, without timelines and without identified remedial action, cannot be the action of a fair and just employer.

[66] The Firm urges on me the contention that the deficiencies (if any) in this letter are somehow remedied by the second letter of 30 October 2007 which I come to shortly. I do not accept that submission. The fact is that the damage was already done by the receipt of this first letter. It fundamentally changed the dynamic between Mr Louw and Mr Anderson, and I hold that the failures evident in this first letter are the tipping point from which it was difficult for the parties to recover.

Was the performance appraisal process up to standard?

[67] I am quite satisfied that the performance appraisal process adopted by the Firm failed entirely to meet any appropriate standard of fairness and even handed treatment.

[68] It is clear that Mr Anderson had grave reservations about Mr Louw's performance and, from the way the evidence came out, it seems that those reservations dated from the very beginning of the employment relationship when Mr Anderson continued to maintain that he had been misled by Mr Louw about the latter's qualifications and experience.

[69] As I have already made clear, I do not think Mr Louw misled Mr Anderson at all; however Mr Anderson made a decision to employ Mr Louw when, on Mr Anderson's evidence, one of Mr Louw's referees said that he would not re-employ Mr Louw. Even on the most positive construction of this evidence, one would have to say that Mr Anderson was taking a calculated risk and I am absolutely satisfied, as I have already made clear, that no criticism of Mr Louw can be identified in his application for employment.

[70] However, for the purposes of the present issue, I think it fair to conclude that Mr Anderson's attitude to Mr Louw was soured by that early experience where, despite my conclusions on the matter, Mr Anderson thought he had been misled.

[71] Notwithstanding that, there is no precise evidence from the Firm that any steps were taken down the performance appraisal trail until the very end of the relationship. Mr Anderson deposed that he had had many discussions with Mr Louw about the

standard of his work, but there is no paper trail to demonstrate this, and even the oral evidence of Mr Anderson himself is less than compelling. For instance, Mr Anderson deposes:

> *He [Mr Louw] was very aware some of the jobs had made unsatisfactory progress.*

[72] Despite that, Mr Anderson admitted in answer to a question from me that he was not sure that he told Mr Louw that Mr Louw was not profitable.

[73] Further, with the exception of the reference to an actual meeting between the parties on 15 August, there is no reference of substance in Mr Anderson's evidence wherein he records a proper dispassionate discussion involving the review of Mr Louw's performance. Indeed, on this point, I prefer Mr Louw's recollection of events when he told me in answer to a question that *until the end of the employment relationship* [he is referring to the 11 October meeting] *I never had an objective performance review from Mr Anderson*.

[74] Even to dignify the discussion on 11 October 2007 as a performance review meeting, is to give it a status it does not deserve. As I have already observed, the 11 October meeting was not a performance appraisal meeting at all but was set up to review and get out Mr Louw's work for clients. In the course of that meeting of 11 October 2007, issues about Mr Louw's performance clearly came up and were discussed. There is no record, however, of the nature and extent of those discussions, there is no identified plan to deal appropriately with those performance concerns, and indeed no evidence whatever of a reflective and measured approach by the employer to the problems Mr Louw's alleged under-performance was causing. Indeed the only response was the warning letter issued the following day which, as I have already noted, was intemperate and inappropriate.

[75] In his own defence, Mr Anderson notes that the year 2007 was a difficult one for him and that there were a number of management failures that year which, in Mr Anderson's own words, *fell down in the turmoil of that year*.

[76] Of course one must have sympathy for any small business owner who suffers a succession of personal and professional crises in a short space of time which, of necessity, must have the effect of placing pressure on the business' ability to perform normally.

[77] However, Mr Louw, as an affected employee, is entitled to be treated fairly and to be given the benefit of due process, even where the allegation is that he is effectively contributing to the stress experienced by the business owner.

[78] I am satisfied that the performance appraisal process adopted by the Firm in managing Mr Louw's alleged inadequacies was completely inadequate in that it did not properly document the Firm's concerns, was not measured and reflective, and failed to deal with the Firm's concerns that Mr Louw's performance from the point in time at which those concerns first arose. Fundamentally though, the performance appraisal process was completely informal and undocumented and so incapable of any proper evaluation.

Should the Firm have talked to Mr Louw about the salary deduction?

[79] On Monday, 15 October 2007, Mr Louw attended work to find that his monthly salary payment had been debited with a sum of $2,300 odd dollars, in effect depriving him of about half of his monthly income. This caused him financial embarrassment.

[80] There was no warning to Mr Louw that this was about to happen. The evidence is clear that Mr Anderson did not discuss the matter with Mr Louw before the deduction was made although, as I have already noted, Mr Anderson's evidence is that had he known that Mr Louw was financially embarrassed by the deduction, he would have reversed it. I must say I was not greatly compelled by that evidence; one would have imagined any reasonable person, perhaps particularly a trained financial adviser, to have expected that the loss of half a man's income for a month would have the effect of creating financial difficulty.

[81] Mr Anderson says that Mr Louw *agreed* to the deductions, although when pressed, it seemed more that Mr Anderson was claiming that Mr Louw agreed to the **calculation** rather than to the deduction itself.

[82] Certainly, Mr Louw's evidence was that he was devastated by the deduction but he took no steps to advise Mr Anderson that the deduction was unwelcome.

[83] There can be no question that any deduction from a person's wages must be the subject of discussion and extensive consultation, particularly a deduction of this magnitude. That Mr Louw did not raise the matter specifically with Mr Anderson

may well be a function of his stress at the time, but the onus is clearly on the employer (the party making the deduction) to consult with the employee and explain the nature of the deduction and the reasons for it.

[84] Aside entirely from the unsatisfactory process, the substance of the deduction is plainly illegal. There can be no basis on which employers may simply deduct money from their employee's wages on the basis of some perceived right. Nothing in the individual employment agreement between the parties justifies the deduction and the effect of the Wages Protection Act 1983 absolutely precludes it.

[85] The deduction is illegal and the process used to effect the deduction is unfair and unjust.

[86] Mr Anderson claims that the justification for the action was his considered view that Mr Louw would not make up the time that he had already expended in attending to his studies and that, in effect, Mr Louw was being paid for time that he did not work. But that calculation is based on a quite arbitrary conviction on Mr Anderson's part that Mr Louw would not be able to make up the time lost in the future, and the short point is that by failing to discuss the matter with Mr Louw, there was no prospect of the two of them agreeing to some arrangement.

[87] The only part of the deduction which I hold was fair and reasonable in the circumstances, was the deduction for a day's pay when Mr Louw had an emergency situation in a private business in which he had an interest and sought a day's leave without pay to deal with it.

Was the second warning letter effective?

[88] The second warning letter dated 30 October 2007 is rather more measured than the first, and Mr Anderson encourages me in the view that this letter should be seen as *correcting* the deficiencies of the former letter. I do not accept that submission. The letter has its own deficiencies, including the suggestion that there be a review of Mr Louw's performance at the end of October when the letter is dated 30 October.

[89] Furthermore, and more fundamentally in terms of the second warning letter's efficaciousness in fixing the defaults of the first warning letter, is the fact that the first warning letter had already, in my judgment, fundamentally damaged the employment

relationship. It was, as I noted earlier, the tipping point for the employment relationship. In effect the damage from the first letter had already been done and, even if I were to accept the submission that the second letter could fix the legal deficits of the first (and I do not), the fact is that, in human terms, the first letter has been received and has done its damage.

[90] By the time that Mr Louw received the second letter, the employment relationship was already in serious jeopardy and the second warning letter was simply the final straw in a succession of events which, over a very short period of time, led to the termination of the employment relationship.

[91] Even without that context, the second warning letter failed to meet all the usual tests of a warning letter in exactly the same way as the first warning letter had failed. There was no specificity about the allegations complained of, there was no opportunity provided to put matters right, and no proper timeline at which to attend to that. Mr Anderson's submission on behalf of the Firm was that Mr Louw should have waited until the end of November (the second review date in the second warning letter) rather than leave his employment at the end of October.

[92] I do not accept that submission either. If the warning letter in question had met all of the other requirements of a warning letter, then perhaps that submission might have had some force and effect, but the reality is that none of the employer's obligations were properly met by this letter and accordingly I hold that this letter too was ineffective as part of a performance management plan.

Was this a constructive dismissal?

[93] I am satisfied that Mr Louw was constructively dismissed from his employment by the Firm on or about 31 October 2007. I analyse the reasons for my reaching this conclusion in this section of the determination.

[94] The tests for constructive dismissal are well known. Broadly, three different tests are applied:

(a) Was the employee given the option of resigning or being dismissed;

(b) Was there a concerted strategy adopted by the employer to get rid of the employee; and

(c) Was there a breach of duty by the employer so serious as to make the employee's resignation foreseeable?

[95] Counsel for Mr Louw submitted that this was a case where all three tests for a constructive dismissal were met, while the Firm's representative argued that the onus was on the applicant to show this was not a resignation and that the applicant had not met that onus. The Firm's representative also sought to rely on the initial letter from the solicitors acting for Mr Louw which referred only to constructive dismissal of the *course of conduct* kind.

[96] In my judgment, Mr Louw was in secure, stable employment until suddenly, in the period from 11 October 2007 down to 31 October 2007, everything changed. I am satisfied on the evidence I heard that, until 11 October 2007, Mr Louw was unaware of the real performance concerns of his employer. I accept the reason that happened may well have been because Mr Anderson had some very difficult personal experiences during that year, and one can only sympathise with him in his predicament. However, the reality is that Mr Louw was entitled to rely on the representations (and/or the lack of them) from the employer and I accept Mr Louw's evidence that until 11 October 2007 nothing alerted him to the seriousness of the employer's concerns about his performance.

[97] On 11 October, Mr Louw had a serious discussion with his employer which puts him on notice that the employer has grave concerns about performance. This is after he has been in the same employment for over six months.

[98] The very next day he received an intemperate and inappropriate final warning letter which, after making generalised allegations about his performance deficits, then told him that unless he improved his performance, he would be dismissed.

[99] That same day, I have found there was some discussion about Mr Louw resigning his employment, and on the very next working day (Monday, 15 October 2007), without notification or discussion, Mr Louw is confronted with a dramatic reduction in his monthly income of about 50% because of deductions made by the employer to compensate for the time that Mr Louw had taken off, principally for study purposes.

[100] On Wednesday, 17 October, Mr Louw is given Mr Anderson's brother and sister-in-law's accounts to prepare and he finds that assignment challenging and

difficult. From 23 October to 30 October, Mr Louw is on study leave. On 31 October, Mr Louw returns to the office for the first time after his study leave, only to find another written warning, again inappropriately drafted without specificity, without required remedial action identified and without an appropriate timeline.

[101] In a three week period from 11 October to 31 October, one week of which Mr Louw was completely absent from the office, a whole series of events, not one of which Mr Louw has any control over, conspire to make Mr Louw reach the conclusion that his job security is in grave jeopardy. Given the extent of the pressure exerted on Mr Louw over that very short period, I am satisfied that his fears were entirely justified and that it was a reasonable conclusion for him to reach that he was no longer wanted by the Firm.

[102] However, I do not accept Ms Hartdegen's submission that the facts in this case support each of the three heads of constructive dismissal. First, I am not satisfied that the *resign or be dismissed* test is made out. The evidence here is that there was discussion about resignation, but I do not think it goes so far as to create a situation where Mr Louw had to leave his employment or be dismissed. There is no explicit evidence that Mr Anderson ever behaved in this way and on the one occasion where I have found it clear that Mr Anderson asked Mr Louw if he was going to resign, I am satisfied that was in the context of Mr Louw having entered into some sort of discussion the previous working day about the possibility of resignation. Mr Anderson is entitled to know what his employees are doing so that he can continue to run his business effectively and efficiently.

[103] Nor do I think this is an example of the *course of conduct* constructive dismissal. I do not think the evidence supports any conclusion that the Firm sought to design a process for levering Mr Louw out of his employment.

[104] However, I do think that the Firm breached its duty to Mr Louw in so many particular respects as to create an environment where his resignation was a reasonably foreseeable consequence. I refer in that connection to the succession of events and actions which I alluded to above which were done by the Firm to Mr Louw over such a very short period of time. The events were so concentrated that it would be fair to say that Mr Louw had limited time to consider a response to each one before the next event imposed itself on his consciousness.

[105] At no stage during this short period of time did Mr Anderson or anybody else in the Firm sit down with Mr Louw and seek to walk him through what the future might look like. The events were, in my judgment, clumsily managed without thought and in an absolute breach of the good faith obligations imposed on all parties to an employment relationship by s.4 of the Employment Relations Act 2000.

[106] In the light of the succession of negative and disturbing events which Mr Louw suffered over that short period of time, it is, I hold, reasonably foreseeable that he would have felt constrained to leave the employment and the fact that he did so cannot, in my judgment, be a surprise to anyone.

[107] Accordingly, it is my considered view that Mr Louw has demonstrated successfully that he has suffered a constructive dismissal at the hands of Brian Anderson Accounting Services Limited, that in consequence Mr Louw has a personal grievance grounded on that finding, and he is entitled to a consideration of remedies.

Contribution

[108] Having reached the conclusion that Mr Louw has a personal grievance, I am required by law to consider whether he has contributed in any way to the circumstances giving rise to that personal grievance. I find that Mr Louw has contributed to the circumstances giving rise to his personal grievance in two particular respects.

[109] The first is in his continuing failure to raise objection to the Firm's process over the period just referred to. The evidence is clear that at no stage did Mr Louw ever raise a formal objection with the Firm about what was happening to him, and this may have led to the belief in Mr Anderson's mind particularly that Mr Louw somehow agreed with what was happening. I do not consider this contribution to be particularly major because I accept that the nature of the Firm's thoroughly inappropriate process over such a confined period of time was to have left Mr Louw with very little opportunity to reflect on what was happening to him and very little opportunity to respond to one issue before the next one reared its head.

[110] Despite that, it may perhaps have given Mr Anderson pause to reflect on what he was doing if Mr Louw had been more assertive. I consider this head of contribution at 5%.

[111] Of more concern is Mr Louw's failure to work out his notice or make appropriate arrangements with Mr Anderson for the hand over of files. Mr Anderson has given evidence about the nature of the difficulties that he experienced and I accept that evidence without reservation. Despite his distress at the way he was treated, Mr Louw ought to have made proper professional arrangements for the hand over of files and for dealing appropriately with his period of notice. The notice required in his employment agreement is eight weeks, but I note that Mr Louw was paid monthly. In all the circumstances, I think it appropriate to deem a month's notice as the default position rather than the two months allegedly required in the contract. I assess this aspect of contribution at 30%.

Determination

[112] Mr Louw has satisfied me he has a personal grievance by way of a constructive dismissal and he is entitled to remedies which will all be rebated by a total of 35%. The figures referred to in the balance of this determination reflect that reduction because of Mr Louw's contribution.

[113] Mr Louw seeks two penalties, one for the illegal deduction from salary and one for the illegal withholding of annual holiday pay. I am satisfied both claims are made out. The deduction from salary was blatant and illegal and the contention that Mr Louw agreed to it (a contention he vehemently denies) does not obviate the clear statutory prohibition. Further, the withholding of Mr Louw's holiday pay was again, completely illegal and the default was sustained for some three months.

[114] To remedy Mr Louw's personal grievance, I direct that Brian Anderson Accounting Services Limited is to pay to Mr Louw the following sums:

(a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 for hurt, humiliation and injury to feelings (which was amply demonstrated by Mr Louw in the evidence he gave before me) in the sum of $6,250;

(b) Reimbursement of the filing fee of $70;

(c) A penalty for the breach in illegally deducting moneys from salary, in the sum of $2,000 to be paid to Mr Louw;

(d) A penalty for the illegal withholding of payment of annual holiday pay, in the sum of $3,000 to be paid to Mr Louw;

(e) Interest on the late paid holiday pay at the sum of 6% per annum from 31 October 2007 down to the date of payment;

(f) A contribution to lost wages in the sum of $7,200.

[115] Mr Louw also seeks reimbursement for the examination fee which he sat unsuccessfully. He attributes the lack of success to the stress occasioned by the employer. I am not minded to make an award of this kind. I consider the awards referred to above to deal adequately with Mr Louw's personal grievance.

Costs

[116] Costs are reserved.

James Crichton
Member of the Employment Relations Authority