

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Michelle McFarlane (Applicant)  
**AND** Quantum Chemicals Limited (Respondent)  
**REPRESENTATIVES** Brian Spong for Applicant  
Cynthia Sparling for Respondent  
**MEMBER OF AUTHORITY** Leon Robinson  
**INVESTIGATION MEETING** 22 March 2005  
**DATE OF DETERMINATION** 29 April 2005

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

[1] The employment relationship problem between these parties is Ms Michelle McFarlane's ("Ms McFarlane") claim that she was unjustifiably constructively dismissed from her employment with Quantum Chemicals Limited ("Quantum").

[2] By letter dated 24 September 2004, Ms McFarlane gave notice of her resignation. Quantum denies that it behaved unreasonably so as to cause Ms McFarlane to resign and counterclaims against her for losses it has sustained which it says were caused by her.

[3] Regrettably, the parties were unable to resolve the differences between them by the use of mediation.

[4] The well settled tests for constructive dismissal are: -

- (i) Did the employee resign?
- (ii) Was the resignation caused by a breach of duty on the part of the employer?
- (iii) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.<sup>1</sup>

**Was there a resignation?**

[5] Ms McFarlane resigned from her employment. That fact is made clear by her letter of 24

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<sup>1</sup> *Auckland Electric Power Board -v- Auckland Local Authorities Offices Union* [1994] 1 ERNZ 168 (CA)

September 2004:-

*Dear Tony,*

*This is to notify you that I am hereby tendering my resignation, effective immediately.*

*My last day of employment will be Thursday 30th of September 2004.*

[6] By letter dated 30 September 2004, Ms McFarlane reconfirmed her advice of 24 September 2004. In that further advice, she particularises events which caused her to resign.

### **Was there a breach of duty?**

[7] Ms McFarlane commenced employment with Quantum on 10 March 2003. At the time of her resignation she was employed as Business Manager. The terms of Ms McFarlane's employment were not recorded in writing.

[8] Ms McFarlane and her manager, Quantum's Managing Director Anthony (Tony) Hodgson ("Mr Hodgson"), formed a personal relationship which ended in August 2003. Thereafter, the working relationship between them deteriorated. Ms McFarlane says Mr Hodgson began to behave abusively towards her. This behaviour she says included manipulation, bullying and harassment.

[9] Mr Hodgson says Ms McFarlane suffered from outbursts of anger. He says that matters became strained in the office because Ms McFarlane had difficulty accepting his decision to end their personal relationship. He says she complained she was single and was anxious for a life partner and that she was oversensitive and intense. Ms McFarlane says it was she who ended the relationship when Mr Hodgson told her he preferred brunettes.

[10] On Friday 30 January 2004, Mr Hodgson was unhappy about a decision that Ms McFarlane had made. When they spoke on the telephone, Mr Hodgson castigated Ms McFarlane and told her she had made the wrong decision. Ms McFarlane of her own volition went into the office at 8.00 pm that evening to remedy the situation. When she advised him of her actions, he was angry and insisted on talking with her. She declined, saying she had had a stressful day and that she wanted to go home. As she exited the office lifts she encountered Mr Hodgson. When she informed Mr Hodgson she did not wish to discuss matters further with him, he became angry and told her that if she valued her job she should stay and talk with him. Mr Hodgson denied that statement was a threat when Ms McFarlane enquired. When she told him she was leaving, Mr Hodgson swore at her and told her she was fired. Ms McFarlane then left to go home.

[11] Mr Hodgson then telephoned Ms McFarlane on both her home landline and her mobile. She did not take his calls. Mr Hodgson turned up at her house. He apologised for his behaviour and asked to go inside. Ms McFarlane asked him to leave but he persisted and she eventually capitulated. Mr Hodgson apologised and continued to do so and said he hadn't meant to fire her. He said he had only said it because he was angry and that it would not happen again.

[12] Ms McFarlane complains about an incident when Mr Hodgson kicked a rubbish bin. He was frustrated over a computer problem and says his anger was not directed at Ms McFarlane.

[13] Mr Hodgson did not have an open door policy and he did not react well to being interrupted while he worked. Ms McFarlane complains that he was often unhelpful, impatient and aggressive when she sought his advice and assistance. They eventually came to an arrangement where Ms McFarlane would email Mr Hodgson requesting his attention and he would respond when it was convenient for him.

[14] On Monday 19 April 2004, Ms McFarlane and Mr Hodgson attended a meeting with Intransit Consulting Ltd by way of mediation. Although the relationship improved slightly it eventually deteriorated again.

[15] At a Landmark Forum course in August 2004, Mr Hodgson publicly apologised to Ms McFarlane for the way he had treated her as a boss and as a friend. He said that he was sorry for prying into her personal life and for being a manipulative bully. He said he was amazed that she had stayed working for him for so long. He thanked her for not leaving and for putting up with him. He said that she could count on him to be an inspirational leader and a valued friend. He said he was happy to have her working for him and did not want her to leave. Finally he thanked her for persisting with him to attend the course.

[16] At 2.00 am on 11 September 2004, Mr Hodgson telephoned Ms McFarlane at her home and on her mobile. She did not answer his calls. At 10.00 am that morning he phoned again and when she answered the call, he enquired as to who she had been with the previous evening.

[17] On 22 September 2004, Mr Hodgson left a message for Ms McFarlane on her home phone telling her that he was going to upload a photograph of her on an internet cyber-pageant page *Hot or Not*. The photographs are "rated" by visitors to the site. Ms McFarlane did not receive this message until 24 September 2004.

[18] At work on 23 September 2004, Mr Hodgson became angry and abusive when Ms McFarlane refused to look at the website with him. He told her she was selfish.

[19] Mr Hodgson threatened Ms McFarlane's business trip to China. When she advised she no longer wished to go in light of his threat, he told her there were a lot of other things he could take away from her. She refused to talk to him further and ended the conversation.

[20] Mr Hodgson later sent Ms McFarlane a text message *PS I can still talk to Jerry can't I? At least he appreciates me. PS 2 talk to the hand*. Jerry is Ms McFarlane's cat. Later Mr Hodgson called Ms McFarlane's landline and mobile but she did not answer his calls. He phoned again on both her landline and mobile at 2.00 am but she did not answer.

[21] Mr Hodgson then sent a text message at 2.22 am which was work related but there was no emergency and no reason why he could not have taken the matter up with Ms McFarlane during business hours.

[22] Ms McFarlane had had enough. She resolved that she had to leave. She left Mr Hodgson a letter dated 24 September 2004 giving notice of her resignation. She advised that 30 September 2004 would be her last day of work.

[23] Mr Hodgson asked her why she was leaving. She told him he had stepped over every personal boundary which she had put in place and that she found his behaviour to be manipulative and bullying. He told her he thought they had a special bond and that she was like family so he thought it was ok to step over her boundaries. There then followed a lengthy discussion over many hours and Mr Hodgson continued to plead with her to stay. He apologised and told her he would change.

[24] On the morning of 27 September 2004, Mr Hodgson arrived at work and placed a letter and a packet of Aropax (medication prescribed for depression) on Ms McFarlane's desk. The letter offered Ms McFarlane increased remuneration.

[25] The parties then engaged in discussions aimed at allowing Ms McFarlane to remain in the employment. They were unable however, to reach an agreement.

[26] Mr Hodgson frequently crossed the line. He was overly familiar, manipulative and bullying. I am satisfied that Ms McFarlane was harassed and manipulated in her employment by Mr Hodgson. I find that she made it clear to him his behaviour was inappropriate and unacceptable. I find too that Mr Hodgson acknowledged his behaviour and knew it was unacceptable. The employer's behaviour through Mr Hodgson constituted a breach of the implied terms of Ms McFarlane's employment that it would act fairly and reasonably towards her and that it would not do anything calculated or likely to destroy the relationship of confidence and trust between them. Quantum through Mr Hodgson's behaviour breached its duty to Ms McFarlane.

### **A substantial risk of resignation?**

[27] The breach of the duties cited above were serious enough to cause Ms McFarlane to resign. Mr Hodgson knew they would. He frequently apologised to her and publicly acknowledged the risk. He appreciated the seriousness of the situation. It was reasonably foreseeable that she would resign.

### **Determination**

**[28] I find that Ms McFarlane was unjustifiably constructively dismissed and accordingly she has a personal grievance. She is entitled to remedies in settlement of that personal grievance.**

[29] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Employment Relations Act 2000 to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[30] I find that Ms McFarlane did not contribute in any way to the situation that gave rise to the unjustifiable constructive dismissal and there was no blameworthy conduct on her part which could constitute contributory fault. There is therefore, no basis for reducing the nature and extent of the remedies to be granted.

### **Reimbursement**

[31] Ms McFarlane says that apart from one temporary assignment in January this year, she has not worked and has not earned any income. She says she has lived off her revolving credit loan facility and is now in substantial debt. She seeks reimbursement of lost wages since her resignation until the date of investigation meeting.

[32] Following her resignation from Quantum, Ms McFarlane registered with several recruitment agencies including Ultimate Recruitment, Goulter Russell, Lawson Williams Consulting, Hudson, Ultimate Recruitment, Tempforce, TMP Worldwide, Intransit Consulting, Executive Recruiters, Executive Appointments. She has attended four or five job interviews unsuccessfully. Those positions were all in the chemicals area and not commodities where her experience is. I am satisfied that Ms McFarlane has met her obligation to mitigate her losses.

[33] I am also satisfied that Ms McFarlane has suffered loss of wages as a result of Quantum's actions and Ms McFarlane is entitled to be reimbursed for that loss. I see no good reason why Ms McFarlane should not be awarded her actual lost income as far as I am able to quantify that amount. I consider her loss is four months salary (reduced by one month temporary assignment). On Ms McFarlane's annual salary of \$55,000.00, four months salary is \$18,333.33. **Quantum Chemicals Limited is ordered to pay to Michelle McFarlane the gross sum of \$18,333.33 as reimbursement.**

## **Compensation**

[34] Ms MacFarlane says she loved working with Quantum's customers. She had established a good rapport with them and felt that she was letting them down when she left. She says she made a point of calling the customers and thanking them for doing business with her and she offered apologies to them for her departure.

[35] She says she regarded working at Quantum as her whole future. She and Mr Hodgson had discussed the possibility of her taking shares in Quantum at some stage in the future and also the prospect of her managing the company. She was fully committed to Quantum.

[36] Ultimately however, she felt she had no choice but to leave. She says she endured months of bullying, harassment and manipulation from Mr Hodgson to the point where she had become miserable. She says she lost all enjoyment of life and her health began to suffer.

[37] She laments the futility of her exchanges with Mr Hodgson where he apologised for his behaviour and promised to change. She resolved however that he was not going to change and she was heartbroken that she had to resign.

[38] She says it has taken her many weeks to recover from the ordeal and has only just managed to regain her self-confidence and happiness. The events leading up to her resignation have been extremely painful for her and taken its toll on her emotionally.

[39] I accept Ms McFarlane has suffered loss of dignity, hurt and humiliation, and injury to her feelings as a result of Quantum's behaviour through Mr Hodgson. She is entitled to be compensated for that proved loss. Having regard to her evidence, the nature of the personal grievance and the length of her service with Quantum, **Quantum Chemicals Limited is ordered to pay to Michelle McFarlane the sum of \$7,500.00 as compensation.**

## **Quantum's counterclaims**

[40] At the investigation meeting, Quantum's counterclaims fell well short of establishing even a prima facie case. Its claims were imprecise and apparently tenuous at that stage.

[41] In fairness to Quantum and to Ms McFarlane, I provided Quantum with an opportunity to better present its claims. It subsequently did so and Ms McFarlane has responded by way of a full comprehensive statement answering the counterclaims against her. I have accepted both Mr Hodgson's subsequent statements and documentation, as well as Ms McFarlane's, as evidence.

### ***The claim for failing to give contractual notice***

[42] The claim for failure to give notice under an employment agreement that was not signed is not sustainable. Nor has it suffered any proved loss. **There will be no orders in relation to it.**

### *The claim for training*

[43] Quantum claims \$12,000.00 for training Ms McFarlane to do her job. It says that Mr Hodgson spent 16 - 20 hours a week training her over one year. That claim is without merit. There is no contractual basis for it. Quantum received the fruits of Ms McFarlane's better trained labours. It has suffered no loss and it has no entitlement in respect of the claim. **There will be no orders in relation to it.**

### *The claim for loss of profits*

[44] Quantum says that it has suffered loss of profits initially of \$10,000.00 but subsequently revised to \$7,800.00, because Ms McFarlane overpaid GST to the Inland Revenue in the sum of \$60,000 - \$70,000.00 (subsequently revised to \$52,174.78). Advisedly it is taking some time to recover these funds from the Inland Revenue. Quantum says that had those funds been available it could have acquired three more shipments of stock and realised profits of \$7,800.00.

[45] This claim is purely speculative and I am not persuaded that Quantum has suffered loss and it has not shown loss to my satisfaction. I would have taken a different view had Quantum concluded confirmed sales with particular clients that it was not subsequently able to meet. Without that kind of evidence, any alleged breach of duty is inconsequential. **I make no orders in relation to this claim.**

### *The letter of credit claim*

[46] Finally Quantum says that it has suffered a loss initially of \$6,000.00 (but subsequently revised to \$9,837.86) because Ms McFarlane overpaid a supplier by \$35,000.00. This it says, caused a letter of credit to go into default as there were insufficient funds in its bank account.

[47] Ms McFarlane had directed another employee Ms Michaela Vessey ("Ms Vessey") to pay a client an amount showing on a computer printout of creditors. Ms Vessey duly made out a cheque to that client on 26 July 2004. The payment to the particular creditor was in actual fact an overpayment.

[48] Mr Hodgson informed Ms McFarlane of the overpayment on 18 August 2004 - that was twenty-three days or three weeks after the erroneous payment. Ms McFarlane immediately obtained reimbursement from the overpaid client and the funds were remitted into Quantum's account that same day.

[49] Quantum says that because it did not have sufficient funds in its bank account on 28 July 2004, it could not settle a forward cover contract when the exchange rate was US\$0.5932. It says that the earliest it could settle this particular forward cover contract was when it had sufficient funds on 16 August 2004 by which time the exchange rate was US\$0.6254. The difference between settlements on both dates was a loss to Quantum of \$9,837.86. In essence, had the overpayment not been made, it would have been in funds to settle at the better rate.

[50] An employer can claim against an employee for losses caused to the employer by the negligence of the employee<sup>2</sup>. That is because the law implies in contracts of employment a duty on the employee to take care in their work.

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<sup>2</sup> The action will lie either in tort or for breach of contract see *Lister -v- Romford Ice & Cold Storage Co Ltd* [1957] 1 All ER 125, and two decisions of the Employment Court *Market Gardeners Limited -v- Fairfield*, unreported, WEC51/95, 31 July 1995, Goddard CJ and *F -v- Attorney-General* [1994] 2 ERNZ 62, Goddard CJ.

[51] Ms McFarlane was employed as the Business Manager. She disavows any responsibility for Quantum's cashflow. That she says was Mr Hodgson's responsibility. The standard of care required of such a person in that position is quite different from that to be expected from an accountant or person responsible for managing cash flows and liquid assets. I am not prepared to impose that standard on her in light of her position as Business Manager.

[52] I do not consider Ms McFarlane's actions were a breach of her duty of care. She made an error but she acted faithfully on the basis of the computer generated creditors report. There is nothing inappropriate about that. Nor do I accept that the loss incurred as alleged was foreseeable. It was not reasonably foreseeable that an overpayment innocently made would mean that a forward cover contract subsequently could not be closed at an advantageous time for Quantum.

[53] I am also not persuaded that Quantum took steps to mitigate any loss as alleged. There is no evidence that it did. Quantum has not demonstrated to my satisfaction that it was not in funds or did not have access to funding sources sufficient to mitigate any losses.

[54] For the above reasons, I am not persuaded that Ms McFarlane acted in breach of a duty that she owed to Quantum which was reasonably foreseeable to have caused actual loss to Quantum. **This claim is not established and I make no orders in relation to it.**

## **Costs**

[55] In the event that Ms McFarlane seeks costs, the parties are encouraged to resolve that question between them, but failing such agreement, Mr Spong is to file and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Sparling is to file a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

**Leon Robinson**  
**Member of Employment Relations Authority**

**Summary of orders**

- A. Quantum Chemicals Limited is ordered to pay to Michelle McFarlane the gross sum of \$18,333.33 as reimbursement pursuant to section 128 of the Employment Relations Act 2000.**
  
- B. Quantum Chemicals Limited is ordered to pay to Michelle McFarlane the sum of \$7,500.00 as compensation pursuant to section 123(c)(i) of the Employment Relations Act 2000.**