

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jonelle Phillips (Applicant)
AND Primecare New Zealand Limited (Respondent)
REPRESENTATIVES Phillipa Muir, Counsel for Applicant
Stephen Langton, Counsel for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 1 November, 2 November 2005
SUBMISSIONS 9 November, 16 November 2005
DATE OF DETERMINATION 3 April 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] Ms Phillips first went to work for the respondent (Primecare) as Group Accountant in August 1998. She became well regarded there, advancing first into the role of Chief Financial Officer and eventually (in September 2003) to that of General Manager. At that point, the respondent's owner, Mrs Beverley Collins, saw Ms Phillips as an "up and coming young executive" who could in time be groomed to take over the Chief Executive's position.
- [2] When Primecare appointed Ms Phillips as General Manager it also appointed a new Chief Executive, Mr Tim Cook. From then on what had been a positive working relationship between Ms Phillips and the respondent began to deteriorate and disagreements arose over a number of financial and management issues. Finally, in January 2004, Ms Phillips resigned.
- [3] Ms Phillips says that this was the result of a course of conduct by Mr Cook and Mrs Collins which was designed to force her from her employment. In submissions it is argued that the conduct consisted of undermining her in her employment in three ways, as follows:
- a. *"They put undue pressure on her to accept reduced terms and conditions of employment;*
 - b. *They subjected her to unwarranted criticisms and undermined her in relation to:*
 - i. *The Knightsbridge residents refund;*
 - ii. *The refurbishment of the Primecare offices; and*
 - iii. *The centralisation and remote access projects; and*

c. *They bullied and harassed her and made unjustified accusations against her when she raised concerns about how she was treated.*”

[4] In the alternative, Ms Phillips says that even if the conduct were not a deliberate course to force her out of her job, it breached the implied terms in her employment agreement, namely Primecare’s duties:

a. *“Not to conduct itself in a manner calculated to cause Ms Phillips undue mental distress, anxiety, humiliation, loss of dignity or injury to feelings or to destroy or damage the relationship of trust and confidence between the parties...”*

b. *To act fairly and reasonably and in good faith in its treatment of Ms Phillips...and*

c. *To be a good employer.”*

[5] Ms Phillips says that Primecare’s breaches of these duties forced her to resign. She says her resignation was foreseeable because of the nature of the breaches, because she raised her concerns about them and because nothing appropriate was done in response. As a whole, she says, the conduct was such that she could not be expected to put up with it.

[6] In addition to claiming that she has a grievance of constructive dismissal Ms Phillips now claims that the conduct Mr Cook and Mrs Collins exhibited before and after she submitted her resignation to them gives rise to further and/or alternative grievances of disadvantage.

[7] Finally, Ms Phillips claims that at the time her employment ended she did not receive a bonus payment to which she was entitled. Primecare disputes that any bonus is payable.

[8] As set in my Minute of 14 October 2004 (attached) my investigation to date (and this determination) deals only with the question whether there has been a personal grievance. I have yet to receive evidence and submissions on remedies.

Issues

[9] The issues for determination are as follows:

- i. Whether the conduct alleged in paragraph [2] has been established on the evidence and whether it did in fact cause Ms Phillips to resign (what happened);
- ii. Whether what happened amounted to a course of conduct with the purpose of forcing a resignation;
- iii. Alternatively whether it amounted to a breach of duty on the part of the respondent such that a resignation was foreseeable;
- iv. If not, whether it or any part of it amounted to an unjustified action to Ms Phillips’s disadvantage.

What happened

[10] At the time Ms Phillips and Mr Cook were appointed to their new roles it was not anticipated that Mr Cook (who had other business interests of his own) would continue in

the Chief Executive's role long term. Mrs Collins told Ms Phillips that she hoped she could be groomed to take over from him in due course, and Mr Cook was aware of this. Ms Phillips considers that she was promised the Chief Executive's job in six to nine months, but Mrs Collins told me that she did not give Ms Phillips any guarantees. I prefer Mrs Collins evidence on this point as I do not consider it credible that any employer would give Ms Phillips such an undertaking without having seen how she performed in the General Manager's role.

[11] In the meantime, Mrs Collins would serve as Managing Director working closely with Mr Cook and Ms Phillips, who would be on an equal footing. Mr Cook would take responsibility for "front end" functions, such as marketing and advertising and Village managers would report to him. Ms Phillips was to take responsibility for "back end" functions.

[12] Ms Phillips now believes that Mr Cook never intended her to take over the Chief Executive role. She believes he planned to use her for her knowledge and then push her out and stay on as Chief Executive himself. She believes he gave her the General Manager's role (rather than leaving her as Financial Controller) just to keep her happy.

(a) Reduction in terms and conditions of employment

[13] Ms Phillips was confirmed in her role as General Manager on 1 September 2003. She was also appointed to associated trusteeships. From that date her remuneration was increased substantially to reflect her promotion, to the following:

- i. Salary of \$200,000.00 gross per annum;
- ii. A payment of \$25,000.00 (gross) per annum in consideration of her trustee roles;
- iii. A motor vehicle and car park, along with a company cell phone (worth approximately \$30,000.00 per annum);
- iv. Payment of an annual bonus of 20% of salary (\$40,000.00 gross.)

[14] Ms Phillips was also asked by Mrs Collins to prepare a new employment agreement for herself and one for Mr Cook, for their new positions. Ms Phillips did so and presented drafts to Mrs Collins for execution. Apart from the remuneration provisions contained above, Ms Phillips own draft agreement carried over all the terms and conditions contained in her earlier employment agreement.

[15] However at an executive meeting on 19 September, Mrs Collins advised Ms Phillips that the respondent was not prepared to carry over all terms from her previous agreement. Redundancy compensation was proposed to be reduced (from six months to four weeks) and new criteria were proposed to apply to the payment of the bonus. Agreeing to these provisions was a condition of her continuing in the new role.

[16] Ms Phillips was not happy with these proposals or with the fact that they had not been raised with her at the time her appointment was confirmed. Feeling she had no choice however she reluctantly executed a new agreement on the terms proposed by the respondent.

(b) *Unwarranted Criticisms/Undermining*

(i) *Knightsbridge resident refund*

- [17] The first issue under this head has been characterised by the applicant as relating to the payment of a refund to residents at one of the respondent's villages, Knightsbridge. In mid November, it became apparent that the Resident's Scheme Account for this village was under spent and it was agreed that residents would receive a refund accordingly. There was nothing inherently controversial about this as the money in that account had been levied from residents in the first place.
- [18] However in the mind of one of the Village shareholders, Mr Baulcomb, the issue of resident levies became connected with shareholder top-ups of set up costs. He wanted to know whether shareholders like him might similarly be reimbursed for those. Despite having received an explanation of how and why the resident refund was needed, he says he remained confused, and asked first the Village Manager Peter Sanders and later Mr Cook, for an explanation.
- [19] Mr Baulcomb's concerns did not fall within Mr Cook's area of expertise and he was not clear about precisely what the issues were. He was unable to answer the query to Mr Baulcomb's satisfaction, and Mr Baulcomb continued to bring it up on repeated occasions.
- [20] As a result, on several occasions, Mr Cook passed on these concerns to Ms Phillips. Sometimes this was in the presence of others. She felt that he did so in a manner which implied that Mr Baulcomb was unhappy about the refund and that she had been somehow at fault. She concluded that Mr Cook was attempting to undermine her, particularly in her relationship with Mr Baulcomb.
- [21] Ms Phillips was distressed at this. She had always had a particularly good relationship with Mr Baulcomb, who attended the Authority's investigation to give evidence in support of her. With the permission of the previous Chief Executive, Ms Phillips had in the past accepted substantial gifts from Mr Baulcomb. I was told that he intended these as thanks for supporting him as a minority shareholder in the group of which the respondent is part.
- [22] Ms Phillips met with Mr Baulcomb in November and December in an attempt to address the issues he had. Mr Baulcomb welcomed these efforts and found them useful. However, he appears to have confined his discussions with Ms Phillips to certain areas only. Meanwhile, he continued to raise issues with Mr Cook that Mr Cook was unable to address. Mr Baulcomb told me in his statement:
- "I had spoken to Tim [Cook] around mid-January and during our discussion, [put] some questions that I wanted him to answer for me as the CEO, which he was unable to answer...I asked Tim where the Village share valuation was at, and about dividends which were soon due to be paid to the shareholders. Tim was struggling with my questions, and at this point immediately proposed that we meet with Jonelle to discuss these things."*
- [23] Mr Cook accordingly called on Ms Phillips to join him in a meeting with Mr Baulcomb to clear all his concerns up once and for all. This was, in my view, an eminently sensible suggestion. However, instead of waiting to join Mr Baulcomb and Mr Cook in the meeting Mr Cook had arranged for 29 January, Ms Phillips decided to see Mr Baulcomb separately the day prior. They had a pleasant lunch and Mr Baulcomb reassured Ms Phillips that he had not sought a meeting with her and had no further issues about the refund itself.

[24] Mr Cook went into the meeting on 29 January 2004 with no idea that Ms Phillips and Mr Baulcomb had already met the day before. He asked Mr Baulcomb to chair the meeting, however he said:

“as soon as the meeting started it became apparent that Rod [Baulcomb] had changed his tack and was low key about the resident refund issue. He asked Jonelle a couple of minor questions, and Jonelle took us through the situation. Rod proposed improving a process for invoice coding to ensure that charges went to the correct cost centre.

It seemed likely there had been a coding error (or several) in the Primecare office...I asked Jonelle who was to blame for what I believed to be a major error...Jonelle became angry ..and told me to stop looking for someone to blame...I told her she was impossible to deal with...”

[25] Mr Cook then asked Mr Baulcomb if there were any other issues Mr Baulcomb wanted to discuss with Ms Phillips. He said no. Despite being prompted by Mr Cook, and to Mr Cook’s frustration, he refused to address any of the other matters about which he had on-going concerns, and ended the meeting.

[26] This meeting was an opportunity for Mr Baulcomb to obtain answers to questions of a financial nature he had earlier put to Mr Cook. I consider it understandable that Mr Cook was frustrated that Mr Baulcomb chose not to take up this opportunity, particularly as there appeared no doubt on any side that Ms Phillips was the person most suited to answer any questions of a financial nature. At my investigation meeting, Mr Baulcomb himself told me:

“I knew I could trust Jonelle to respond to my queries, to provide me with information and to be completely on top of the finances for each of the Villages. No one else at Primecare, including Tim and Bev, had the same level of knowledge or experience.”

[27] Mr Baulcomb also told me that he continued (when we met) to have unanswered questions. Precisely why he behaved as he did at the meeting of 29 January remains unclear but it would appear to have been in part an attempt to protect Ms Phillips from a perceived threat from Mr Cook. The meeting which resulted was frustrating for both Mr Cook and Ms Phillips but I attribute this to Mr Baulcomb’s approach, and not to any conduct on Mr Cook’s part.

[28] Ms Phillips also raised another issue in connection with the Knightsbridge Village. On 22 December 2003 Mr Cook met with residents and staff at Knightsbridge Village to tell them that the Village Manager had resigned and to introduce to them the Acting Manager who would be stepping into the role. Ms Phillips says she was undermined in several ways connected with this meeting. She says she was not consulted about the appointment of the Acting Manager, excluded from the meeting and not told until immediately beforehand that she was not invited. Although the Village Managers reported to Mr Cook, operational issues involving the Villages were an area where the work of the Chief Executive and the General Manager overlapped. Ms Phillips conceded that her attendance was not essential, but felt that she should have been consulted about the appointment and about whether she should attend.

(ii) Refurbishment

[29] Ms Phillips had been in charge of a project to refurbish the Primecare offices and felt it was going well. In early December Mrs Collins visited the offices and expressed to Ms Phillips her dislike of the proposed colour scheme. She then asked other staff for their opinion without involving Ms Phillips in those discussions. A few days later Mrs Collins engaged a new colour consultant and the colour scheme was changed. Ms Phillips says Mrs Collins manner was rude and abrupt and her actions caused her stress and embarrassment.

(iii) Remote Access and Centralisation

[30] The final area in which Ms Phillips felt undermined related to a proposal for remote access and centralisation which she and the financial controller, Ms Foote, had developed. (Ms Foote was a friend and former colleague of Ms Phillips whom Ms Phillips had recruited to fill the position of Financial Controller when she vacated it to become General Manager.)

[31] Ms Phillips and Ms Foote first presented their proposal to Mr Cook and Mrs Collins on 15 January 2004. Both expressed reservations about the proposal, but asked Ms Foote and Ms Phillips to present it to a Managers Meeting on 23 January. There managers outlined problems they saw with it and raised concerns that they had not been consulted. Ms Phillips found this rude and felt that her professional judgement should have been trusted. Ms Foote and Ms Phillips considered that the ensuing discussion became heated and objected to what they saw as the failure by the Chair (Mr Cook) to prevent this.

(c) Bullying and harassment

[32] On 2 December 2003 Ms Phillips told Mr Cook that she had concerns about the manner in which she had been treated by Mrs Collins in relation to two issues. One was the change to the colour scheme of the office, which has already been detailed above.

[33] The other related to an approach to her from Mrs Collins about the timetable for a proposed buy out of shares held by Mr Baulcomb. Mrs Collins was eager to see work begin on a proposal to Mr Baulcomb, however this could not happen until a share valuation was completed by the appropriate agency. As early as September management committee minutes had contained the following:

“[valuers] are running behind the timetable. Jonelle to speak to [valuer] on Monday and re-set timetable.”

[34] Over the next couple of months successive minutes referred to the issue again. Then, on 2 December, Ms Phillips told me that Mrs Collins walked in to her office and *“demanded that negotiations be completed by 19 December.”* This is denied by Mrs Collins, who says she inquired as to progress because she was becoming very concerned at the delays. Ms Phillips described Mrs Collins as aggressive in her approach and asserted that Mrs Collins should have known both that the valuation was still some time away and that it was not possible to work on the proposal until the valuation was in. She described Mrs Collins as *“bolshie.”* Ms Phillips did not accept that it may have been time (as Mr Cook claimed) to push the valuers a little harder about meeting the timetable. Nor did she accept that Mrs Collins may have been anxious (as Mrs Collins claims) rather than aggressive.

[35] After Ms Phillips had spoken to Mr Cook, he repeated what she had said to Mrs Collins, warning her that Ms Phillips intended to *“get stuck into her”* and encouraging Mrs Collins to

“go on the front foot” if she did so and treat her like one of her daughters. Mrs Collins attempted to follow this advice, calling Ms Phillips to a meeting and asking her “*why she had such an attitude.*” Ms Phillips started at first to cry but then outlined the two areas of concern to her. According to Ms Phillips evidence, Mrs Collins told her :

“she did not see any problems with the way I had been treated although she did acknowledge to me that she knew I was stressed out and a bit tired...”

[36] Mrs Collins does not dispute this part of Ms Phillips evidence.

Resignation and aftermath

[37] Although she had not previously considered leaving Primecare since she was “*focussed on attaining her promised promotion into the Chief Executive role*” Ms Phillips describes herself as coming away from the meeting of 29 January “*very disillusioned.*” She says she felt stressed and lacking in confidence and decided the situation had become intolerable. During that day and that evening she talked things over with the previous Chief Executive (whom she considered a mentor and who was then working for Primecare’s competitors) and her husband.

[38] The next day, at the Executive Meeting, she handed a letter of resignation to Mrs Collins, explaining her decision by saying she felt undermined. The letter read in part as follows:

“I hereby give my resignation as General Manager /CFO of Primecare New Zealand Limited, effective as at today’s date.

I’m extremely disappointed and feel personally insulted with how I have been treated over the past six months and in particular the recent few months. I have been misled from representations made to me regarding my future with Primecare and actually feel extremely used.

...

The resulting loss of respect and trust in my executive colleagues combined with significant amounts of unnecessary work place stress over recent months has made it impossible for me to continue in my role.”

[39] I am satisfied that the impetus for Ms Phillips’s decision to resign was the breakdown in her relationship with Mrs Collins and Mr Cook.

[40] Mr Cook responded defensively, saying that it was she who had been undermining him. He mentioned Ms Phillips’s contact with the former Chief Executive, and Mrs Collins expressed fears that Ms Phillips might go to work for a competitor. Ms Phillips replied that she had complete integrity. Mr Cook then came back with a disparaging reference to the gifts Ms Phillips had accepted from Mr Baulcomb. Ms Phillips then left to take her company car to be serviced.

[41] When she returned the discussions continued, becoming heated, and personal, on the part of Mr Cook and Ms Phillips. At one point Ms Phillips left the room and began gathering her things together to leave. After a few moments Mr Cook went after her, closed the door of her office and sat down at the meeting table to talk to her again. At some length,

he set out the frustrations he had in working with her, before suggesting that he would get Mrs Collins to discuss the possibility of re-considering the resignation. He and Mrs Collins then returned together and spoke with Ms Phillips about the future of the business. Mr Cook and Mrs Collins both recall that the meeting ended with Ms Phillips leaving to reconsider her resignation over the weekend.

[42] Ms Phillips denies this however she is prepared to concede that Mr Cook had opened the door for her to come back. Over the weekend she talked things over with Mr Baulcomb, who urged her to stay on in some capacity. She also talked to Ms Foote, who had decided she did not want to stay if Ms Phillips left. Together the two women prepared a proposal that they continue to work for the respondent pursuant to a contract for services.

[43] Ms Phillips actions on the weekend are in my view consistent with having been invited by Mrs Collins and Mr Cook to reconsider her position over the weekend. I am satisfied on balance that this is the clear intent of, and implication in, what they told her.

[44] The proposal was presented to Mrs Collins on the Monday (2 February.) It confirmed the resignations of Ms Phillips and Ms Foote and acknowledged the difficult position in which their departure left the company. It then went on:

“we would like to...propose a constructive way forward...following concerns expressed on Friday, to ensure that that commercial knowledge and sensitive Company information we hold is kept confidential from other key players in the industry for an agreed period...”

[45] The letter went on to offer “*exclusive consultancy services*” to Primecare for a maximum of ten hours per week for a period of twelve months, in return for one years salary including bonus, paid in advance, and transfer of the company car to Ms Phillips. Any additional hours (over and above the ten per week) were to be billed at \$450.00 per hour.

[46] When Mrs Collins read this, she said, she felt blackmailed. The threats to confidentiality were of particular concern since the Baulcomb buyout had yet to be completed. She decided Ms Phillips and Ms Foote had breached her trust and was not prepared to have them working at Primecare any longer. The next day she told them so and advised that they would not be required to work out their notice.

[47] Two matters remained in contention. Ms Phillips proposed a draft of notification to staff of her departure, but Mrs Collins was not satisfied with it and sent out her own version. Primecare also declined to pay a bonus to Ms Phillips.

Was there a course of conduct with the deliberate and dominant purpose of coercing Ms Phillips to resign?

[48] In submissions Counsel for the applicant has pointed out, quite correctly, that it is not necessary to show that the employer intended the repudiation of the employment agreement in order to establish that there has been a constructive dismissal. However, that principle applies to consideration of whether there has been a resignation caused by a breach of duty, not to the category which results from a course of conduct with the deliberate and dominant purpose of coercing a resignation. In order for there to be a constructive dismissal in that category, there must be evidence of the purpose alleged, that is, intent.

[49] There is no direct evidence of such deliberate purpose in this case. It is argued for Ms Phillips that it can be inferred from the circumstances and that it can be inferred that Mr Cook wanted to push Ms Phillips out in order to secure his position.

[50] This argument is undermined by the simple fact that Mr Cook appears to have been secure in his position, and to have had no reason to think otherwise. I am prepared to accept that by the end of the employment Mr Cook found it almost as difficult to work with Ms Phillips as she did with him, but I do not accept that Ms Phillips posed any sort of threat to him or that there was any reason why he might think that she did.

[51] I have also accepted that Mr Cook and Mrs Collins invited Ms Phillips to reconsider her decision to resign. This is not consistent with either of them having an agenda of forcing her out. I accept that both relied on her financial knowledge and were very concerned at the prospect of losing this. I do not accept that either of them wished her to leave.

[52] **I am not satisfied that the evidence establishes a course of conduct with the purpose of coercing a resignation.**

Was there was a breach of duty such that a resignation was foreseeable?

[53] In the alternative, it is argued for Ms Phillips that between September 2003 and the end of January 2004 she was subjected to criticisms, undermining and harassment which breached her employer's duties to her. It is submitted that Mrs Collins and Mr Cook were insensitive, unfair, aggressive and non-constructive, and that their behaviour caused Ms Phillips humiliation and stress.

[54] It is submitted that it was foreseeable that these breaches would cause Ms Phillips to resign because of the nature of the breaches and because they were brought to the attention of Mr Cook and Mrs Collins. It is alleged that nothing was done about them, except to tell Ms Phillips that she had an "attitude" and to treat her like a child.

[55] In submissions Counsel noted that in assessing whether there has been a constructive dismissal in this category the Authority must ask:

- i. whether the resignation was caused by a breach of duty on the part of the employer; and
- ii. whether the breach was sufficiently serious to make it reasonably foreseeable that the employee would not be prepared to continue working; and
- iii. in so doing, the Authority may consider the cumulative effect of a number of incidents which taken individually might not give rise to a constructive dismissal. (*Lewis v Motorworld Garages Ltd [1985] 1 ICR 157, at page 169.*)

[56] As I have already noted, I am satisfied that Ms Phillips left her employment because she was upset about the way she felt she was being treated by Mr Cook and Mrs Collins. The question for determination is whether, taken separately or cumulatively, their actions amounted to breaches of the respondent's duty to Ms Phillips.

[57] I begin by discussing the specific conduct complained of.

- [58] Regarding the reduction in terms and conditions of employment, this was a new position and so it was open to the respondent to negotiate fresh terms and conditions. Ms Phillips traded some conditions away in return for others but overall, the terms of the new agreement (including a remuneration package of almost \$300,000.00 per annum) were much more beneficial to her than her previous terms and conditions of employment. The only criticism that can fairly be levelled at the respondent relates to the delay in finalising the new terms, this being a period of almost three weeks during which Ms Phillips had already assumed the duties of the new role. However Ms Phillips was not disadvantaged by this as she went on to her new salary immediately and it is not, in my view, a serious matter.
- [59] I do not accept that there was any wrong doing by the respondent in relation to the resident's refund issue or associated matters. I consider that Mr Cook called the meeting of 29 January in a genuine attempt to clarify the issues Mr Baulcomb had and to provide answers to those issues. I do not consider that the meeting undermined Ms Phillips, either by accident or design. Indeed, I consider that Mr Cook was undermined by Mr Baulcomb's conduct at this meeting and that Ms Phillips contributed to this by her undisclosed meeting with Mr Baulcomb the day before.
- [60] Regarding the issue of the refurbishment, I consider that it was open to Mrs Collins (as managing director and owner) to choose her own colour scheme. Mrs Collins was not obliged to accept Ms Phillips's recommendations about the consultant to be used or any other aspect of the refurbishment. I do not accept that there can be any question of any sort of breach by Mrs Collins in choosing not to adopt the proposals preferred by Ms Phillips.
- [61] Similarly with the centralisation and remote access projects I do not accept that there can be any question of breach relating to the questioning or even ultimate rejection of Ms Phillip's advice. It was the employer's prerogative to submit the proposal to rigorous debate and its obligation to consult those who would be affected. The evidence of respondent witnesses who had attended the meeting of 23 January was that there was a robust but reasonable discussion of a contentious matter. I consider it simply a normal part of Ms Phillips duties to attend such a meeting to present her proposal and do not accept that it was conducted in any way out of the ordinary.
- [62] Finally, on the matter of the appointment of an Acting Manager at Knightsbridge, I note that Mrs Collins believes that Ms Phillips was included in discussions relating to this decision, which was a temporary measure and routine in nature. Since Village managers reported to Mr Cook I do not consider it a breach for the decision to have been made without full input from Ms Phillips.
- [63] In each of these examples, of course, Ms Phillips's complaint was not just that she was undermined in relation to the substantive matters at issue between her, Mr Cook and Mrs Collins, but also that she was subjected to bullying and harassment and generally treated by them in a manner which was unacceptable in the workplace.
- [64] I must start here by saying that I have not found Ms Phillips to be a credible witness. Three key factors led to this conclusion.
- [65] The first was the way Ms Phillips and Mrs Collins related to each other in front of me. Ms Phillips told me that until Mr Cook's arrival she had got on well with Mrs Collins but that afterwards, Mrs Collins became aggressive and bullying towards her. Mrs Collins, of course, denies this. Having had the opportunity to observe the conduct and demeanour of the two women over the course of a two day investigation meeting I consider that Mrs Collins's

perception is far more likely to be accurate. The way the two interacted (as they did across the table during the investigation meeting) was quite the opposite of what Ms Phillips has described occurring during the employment. Ms Phillips appeared unable to acknowledge viewpoints which differed from her own (for example, on the question of the appropriate colour scheme for the offices) and expressed her views in a dogmatic manner. Mrs Collins, in contrast, appeared diffident and struggled to stand up to Ms Phillips. If anyone appeared intimidated it was Mrs Collins.

[66] For these reasons I cannot accept the assertion that Mrs Collins's manner towards Ms Phillips was bullying or aggressive. I also consider that Ms Phillips's perception of events is indicative of a serious lack of self awareness.

[67] The second factor which undermined Ms Phillips's credibility was her association with Mr Baulcomb. He was not her employer or even a majority shareholder. Accepting gifts from him may not have amounted to serious misconduct (having been authorised by the former Chief Executive) but it does demonstrate a poor understanding of how a professional in her position should conduct herself. Similarly, in the last stages of her employment Mr Phillips failed to recognise that with share purchase negotiations imminent, Mr Baulcomb was not an appropriate person for her to confide in or take counsel from. At the very least, this conduct indicates poor judgement on Ms Phillips's part.

[68] The final factor which undermined Ms Phillips's credibility concerns some of the content of the proposal Ms Phillips put to Mrs Collins after she had resigned. Ms Phillips has attempted to explain her reference to potential disclosure of confidential information by saying that someone else drafted the letter for her and she was not aware of its implications. I find this completely disingenuous coming from someone in a very highly paid and purportedly senior position. This represents, at the least, a further lapse of judgement, at worst, a complete lack of integrity. It is no surprise to me that Mrs Collins construed it as blackmail.

[69] Combined, Ms Phillips lack of ability to see the viewpoints of others, lack of awareness of the effect her own behaviour might have, unprofessional behaviour and lack of judgement all have the effect of undermining her credibility with me. Evidence was provided in support of her by Ms Foote and Mr Baulcomb however their evidence was not disinterested. Not only do they both have a degree of personal loyalty to Ms Phillips, but each is linked to an aspect of the unprofessional conduct to which I have referred here. In general I prefer the evidence of respondent witnesses, particularly Mrs Collins.

[70] Having rejected the assertion that Mrs Collins behaved in a way that amounted to bullying or harassment. I need to record my conclusions about Mr Cook's manner towards Ms Phillips.

[71] I found Mr Cook, unlike Mrs Collins, to be a blunt and forthright person. At times he did not handle interactions with Ms Phillips as well as he might have, and I consider that some of the confrontation between them could have been avoided if he had displayed more tact. However, with one exception which I will discuss below, I do not consider his behaviour was more extreme than hers. In addition, in the respondent structure, he and Ms Phillips were on an equal footing (both reported directly to Mrs Collins.) In these circumstances, on balance, I cannot find that Mr Cook bullied and harassed Ms Phillips.

[72] In short, none of the actions complained of amounted individually to a breach of duty, much less a serious breach of duty. In circumstances where there has been no wrongdoing at

all in any of the separate incidents there can be no question of there being a cumulative effect. It follows that the resignation has not been caused by a breach of duty and that there was no constructive dismissal.

Does Ms Phillips have a disadvantage grievance?

[73] It has been argued for Ms Phillips that the events described as giving rise to a constructive dismissal amount in the alternative to a disadvantage grievance. Having found that there was no wrongdoing at all on the part of Mr Cook or Mrs Collins I conclude that there was no unjustified action towards Ms Phillips in the period leading up to her resignation. A disadvantage grievance has not been made out in relation to that conduct.

[74] In addition, it is argued for Ms Phillips that that after Ms Phillips resigned on 30 January, but while she was still in Primecare's employment, she was disadvantaged by Mrs Collins and Mr Cook's conduct towards her. Specifically the conduct was:

- Mrs Collins reaction in accusing Ms Phillips of trying to destroy her business;
- Mrs Collins instruction to Ms Phillips to "*sit down and listen*" after Mr Cook had become abusive and angry;
- Mr Cook's statement that he was not surprised at her resignation;
- Mr Cook's attack on her integrity;
- Various other comments by Mr Cook, which included telling her to grow up, telling her that she had a big ego and had "*f*****en well pissed [him] off*" telling her that she had got in his way and that she had "*a screw loose*."

[75] Mr Cook did not dispute that these things were said. He also acknowledged that Ms Phillips did not offer, or return, comments of a similar nature to him.

[76] Ms Phillips was entitled to give her resignation without offering an explanation and certainly without being drawn into an argument about the whys and wherefores of the breakdown in her relationship with the respondent. Mr Cook's conduct was not justified and Mrs Collins was at fault for permitting it.

[77] I am also satisfied that Ms Phillips was distressed by the conduct. However I note that later in the day, the situation calmed down and (as I have found) Ms Phillips left to consider whether she might stay on with the respondent. Taking both these factors into consideration I am satisfied that Ms Phillips was disadvantaged however I do not consider the disadvantage to have been extensive.

Outstanding issues: remedies and costs

[78] This determination has dealt only with the question of whether there was a personal grievance (initially of constructive dismissal, but later of disadvantage also.) This leaves outstanding the issue of remedies (compensation for the disadvantage grievance which has been made out as well as the separate claim for bonus payment.) The question of costs also remains.

[79] I consider that the most appropriate approach to these issues is for the parties to return to mediation to discuss them. **I direct that this be completed no later than six weeks after the date of this determination.** After that, if the parties are unable to resolve their differences, I will expect Counsel for the applicant to advise the Authority accordingly in which case I will convene a teleconference to timetable the investigation of those issues.

[80] If mediation does not resolve the issue of costs along with the other outstanding issues between the parties, it will be addressed when the second stage of the Authority's investigation is complete.

Y S Oldfield
Member of Employment Relations Authority