

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 243
5416650

BETWEEN DAVID RODKISS
 Applicant

AND CARTER HOLT HARVEY
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Nicole Ironside, Counsel for applicant
 Daniel Erickson, Counsel for respondent

Investigation Meeting: 19 and 20 August 2013

Submissions Received: 5 and 18 September 2013 for the Applicant
 6 September 2013 for the Respondent

Determination: 28 November 2013

DETERMINATION OF THE AUTHORITY

- A Mr Rodkiss has a personal grievance that three actions of Carter Holt Harvey Limited caused him disadvantage and were unjustified.**
- B The Authority has not found that Mr Rodkiss was unjustifiably constructively dismissed.**
- C Carter Holt Harvey Limited is ordered to pay \$6000 compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000 for the grievance under s103(1) (b). No separate award of a penalty is made for the breaches of good faith.**
- D Costs are reserved and failing agreement a timetable has been set.**

Employment relationship problem

[1] The issue of this determination was delayed when the respondent challenged a preliminary finding of the Authority about admissibility of evidence [2013] NZERA Christchurch 172. The Authority was then advised by counsel in late October 2013 that it should, notwithstanding, proceed to determine the substantive matters.

[2] David Rodkiss was employed by Carter Holt Harvey Ltd (CHH) from 5 August 2002 until 17 April 2013. Mr Rodkiss was originally employed at CHH's Kawerau mill and then he was appointed as an engineering manager at CHH's Nelson sawmill in October 2005. He managed a team of 26 employees.

[3] Mr Rodkiss reported to Darryn Adams. Mr Adams had been appointed in January 2009 by CHH as Site Manager of the sawmill in Nelson. He had previously been Site Manager for CHH at Putaururu.

[4] David Rodkiss says that his employment was affected to his disadvantage by the following actions of CHH that he says were unjustified:

- (a) CHH concluded that he had failed to meet performance expectations and initiated a performance improvement plan (PIP) on 12 February 2013;
- (b) CHH initiated formal disciplinary action against him and continued to threaten him with dismissal;
- (c) CHH acted in breach of contract, trust and confidence and good faith.

[5] Mr Rodkiss says that his resignation on 17 April 2013 amounts to an unjustified constructive dismissal because CHH followed a course of conduct with the deliberate or dominant purpose of coercing him to resign and because of the cumulative effect of the unjustified actions and breaches of good faith, contract and trust and confidence. Mr Rodkiss seeks:

- (a) Reimbursement of lost income;
- (b) Compensation under section 123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$30,000;
- (c) Compensation for loss of benefits;

(d) Damages and penalties for breaches of the duty of good faith;

(e) Interest; and

(f) Costs.

[6] CHH says that Mr Rodkiss was not disadvantaged in his employment with CHH. It says that the PIP process was never in fact implemented because Mr Rodkiss did not sign the document and the three month timeframe contained in the document never in fact commenced. It says that the decision to issue a PIP and the commencement of a disciplinary investigation were steps open to a fair and reasonable employer in all the circumstances.

[7] CHH do not accept that Mr Rodkiss was unjustifiably constructively dismissed and do not accept that he has the grounds for a personal grievance. It denies he is entitled to any of the remedies sought by him.

The issues

[8] The issues for the Authority to determine are as follows:

- Were there actions on the part of CHH that affected Mr Rodkiss' employment to his disadvantage?
- Was there a breach of the statutory obligations of good faith?
- If it is found that there were actions that affected Mr Rodkiss' employment to his disadvantage, then were they unjustified?
- Was Mr Rodkiss' resignation caused by a breach of duty on the part of CHH?
- Was there a course of conduct undertaken by CHH with the deliberate or dominant purpose of coercing Mr Rodkiss to resign?
- If the resignation was as a result of a breach of CHH, then was the breach of duty of sufficient seriousness that a substantial risk of resignation was reasonably foreseeable?

- Was Mr Rodkiss unjustifiably constructively dismissed from his employment?
- If the Authority finds one or more of Mr Rodkiss' personal grievances are made out, then what remedies is he entitled to?
- If there is a breach of good faith found, then should there be a penalty or damages awarded?

Background against which the issues are to be determined

[9] I will start by setting out the material parts of Mr Rodkiss's employment agreement and the various policies, procedures and guidelines provided to the Authority as attachments to the statement of problem.

Individual employment agreement

[10] Mr Rodkiss was provided with a written individual employment agreement by CHH dated 29 September 2005 when he was employed as Engineering Manager. It is attached as 1 to the statement of problem and provides in clause 5 as follows:

Performance review

Your performance will be formally reviewed on a regular basis during the year, at least annually. The intention will be to review your performance against agreed key accountabilities (which will change in consultation with the CEO from time to time), to assess your potential and to identify any development needs.

[11] Clause 17 refers to company policies as follows:

17.1 The Company has policies, guidelines and procedures which form part of your terms of employment and you must comply with them at all times. The policies, guidelines and procedures are readily available and you should familiarise yourself with them.

17.2 The Company's policies, guidelines and procedures may be changed by Carter Holt Harvey in its discretion from time to time to meet operational or changing circumstances, but such changes will not be made without consulting you first where those changes will impact you.

Performance management policy

[12] This policy was attached as 2 to the statement of problem and provides the key components of the performance management policy. They are delivered through:

- Key accountabilities – aligned to the business plan and/or Chief Executives, General Managers, KAs and cascaded top down through the business.
- Regular schedule one on one's, at least 4 per year with the employee's immediate manager.
- Formal performance reviews mid and end year.
- Training and development plans – fit for purpose.

Disciplinary policy

[13] The disciplinary policy is attached as document 5 to the statement of problem. It provides a framework for management of disciplinary actions. One of the principles is that the employee is clearly informed of their performance deficiencies and any allegations made against them, together with the possible consequences if adequate performance standards are not achieved or satisfactorily maintained.

[14] The consequences of not improving performance as stated in the policy become more serious as the employee moves through the disciplinary process. The company's disciplinary process is set out and comprises a verbal warning, first written warning/first and final written warning and then dismissal. It is recorded in the disciplinary policy that minor faults or a one-off lapse in performance shall be managed outside of a formal disciplinary process. The policy supports that in these circumstances managers and supervisors should have a discussion with the employee as soon as the concern arises and that it should be fair and factual and identify the performance gap and focus on effective solutions.

The employee handbook

[15] As part of attachment 6 to the statement of problem which includes the handbook is a two page document that explains policies and guidelines in CHH. This provides that the policies are broad principles that explain the company's view of the functional areas of people management and that guidelines provide more specific details, including procedures and forms which enable effective implementation of policy intention. It is noted that some of the policies and guidelines are intended for

managers and supervisors and many are also intended for employees so they can be as certain as possible of the company's position on various employment matters.

Coaching for success document

[16] There is a document called Coaching for Success found at the first part of attachment 3 to the statement of problem. It is part of a PowerPoint presentation prepared by the People Development Manager at CHH, Catherine (Kate) Lyon. The Coaching for Success document was generated primarily as a training tool for managers and supervisors. Ms Lyon said in her written evidence that she developed it soon after she joined CHH in February 2012 as part of an initiative to develop a *softer* performance management style across the business. Although Ms Lyon said in her evidence that the coaching training material does not have the same status as formal company performance policies it is capable I find of falling into the category of a guideline to be read alongside the formal policies in the way contemplated by CHH guidelines would work.

[17] There was some dispute as to when training on this document took place for Mr Rodkiss. There was no dispute that it did and it was sometime during 2012. For present purposes that will suffice. There is a flow chart in the Coaching for Success document that refers to what occurs if performance expectations are not met. The Authority will refer to this matter further in its determination.

Other documents

[18] There was a further document within attachment 3 to the statement of problem called Performance Management Tool Kit. Ms Lyon said in her evidence that she was not familiar with that document until it was brought to her attention as part of the proceeding. Mr Adams said the document was not in use at the material time. There was another document in tab 4 of the bundle called Managing Performance Tool Kit. Ms Lyon had not seen that document until the Authority process. Mr Rodkiss gave evidence that he had found both documents in his drawer when he had commenced employment as Engineering Manager in 2005. That is not a satisfactory foundation for their inclusion into the documents before the Authority as policies or guidelines in place at the material time. I cannot be satisfied that either of these two documents were in use and current at the material time and therefore do not place weight on them.

[19] I shall turn now to the various meetings held.

12 February 2013

[20] Mr Rodkiss met with Mr Adams for his annual performance review on this date. Shortly before the meeting took place Mr Rodkiss supplied a personal score card to Mr Adams on which he had recorded his own performance as *on target*. Matthew Walker, the Nelson Commercial Manager was also present at the meeting with Mr Adams. He had also been present at Mr Rodkiss's quarterly review in October 2012 and was involved after that as a mentor to Mr Rodkiss in completing some actions agreed to at that time. Nothing improper can be read into his attendance.

[21] At the meeting Mr Adams raised some issues that he had about Mr Rodkiss' performance. These issues were of a limited nature and overall it was recognised that Mr Rodkiss was a good performer. Mr Adams referred to some feedback he had received and raised an issue as to whether Mr Rodkiss would be able to handle a *bow wave* of work that would be heading his way in the coming year. Mr Adams had formed a view and expressed this to Mr Rodkiss that he was getting *too bogged down in the detail of the job*. A PIP was then provided to Mr Rodkiss. Mr Adams explained to Mr Rodkiss he thought that it would be a good way to help him work on the areas that had been discussed. The PIP document handed to Mr Rodkiss at the meeting on 12 February 2013 is attachment 8 to the statement of problem. It sets out three performance issues. The first is a lack of planning and structure in the maintenance department. The second is a lack of decisive decision making, leading to confusion in the maintenance department and the third is timeliness issues being lateness to meetings with a further related issue as to whether attendance at meetings could be delegated to maintenance staff.

[22] Mr Rodkiss raised a concern that his knowledge of the PIP process was that it was used as a disciplinary document designed to give CHH the ability to easily exit staff from the business. Mr Adams and Mr Walker reassured Mr Rodkiss that the PIP was not considered a disciplinary document. In his written evidence Mr Rodkiss said that he considered this was misleading because the PIP had the potential to end his employment if he was unsuccessful. Mr Rodkiss said that he was shocked to receive the PIP document. He read it through and it was agreed he could go away and consider the PIP document and Mr Adams would organise another meeting in order to follow-up on its content.

[23] Mr Rodkiss became increasingly concerned about the PIP after he left the 12 February 2013 meeting. He began to suspect from the words in the PIP that there could be others behind it. Mr Rodkiss talked to his wife about his concerns and a family friend experienced in the human resources field. Mr Rodkiss made a decision to record future meetings. His intentions were that the recordings would be used to help him clarify any points that were not clear to him. From this point on Mr Rodkiss covertly recorded further meetings about the PIP. Mr Rodkiss' wife, Audrey Rodkiss, transcribed the recordings.

[24] A full transcript of all of the meetings after 12 February 2013 has been provided to the Authority. CHH took no issue with the accuracy of the transcripts.

22 February 2013

[25] Mr Rodkiss attended a meeting on this date with Mr Adams and Mr Walker. Mr Rodkiss continued to raise questions at this next meeting about why he was being asked to sign a PIP document and about its contents. Mr Adams made comments to the effect that whilst he had a reasonable perception of Mr Rodkiss, he was getting some negative noise. He said that Mr Rodkiss had some development issues and the PIP was about fine tuning some things to get an outstanding above target. The issues that were in the PIP were described as developing him to get to the next step. Mr Rodkiss raised an issue about why the PIP process was being followed and not a one-on-one process, including an opportunity for training and development.

[26] Mr Adams responded that the PIP was the same plan and there was talk about Mr Adams crossing out the words and replacing them with training and development although that did not actually occur. There were some suggestions about Mr Rodkiss increasing the formality of his communications with other managers by using emails, doing a meeting review to see if he could delegate some meetings to free himself up and attending sessions with a life coach and having training on his outwards communications. There was also a discussion on techniques to deal with negative noise as well as techniques to deal with communication with the CHH Wood Products Group General Manager of Operations, Tim Slade, and the Process Improvement Manager, Clayton Harris.

[27] Mr Rodkiss raised an issue about the inclusion of lateness for meetings as a performance issue. Mr Rodkiss said in his evidence that he had been late for a

meeting on one occasion and Mr Harris happened to be in attendance and made a note of it. Mr Rodkiss said that Mr Adams acknowledged this and said he would take timeliness out of the PIP, but he never did. Mr Rodkiss advised he would not sign the PIP document and another follow-up meeting was organised for Friday, 1 March 2013. This meeting however was cancelled by agreement with Mr Adams and the next meeting to take place was 8 March 2013.

[28] In between these times on Tuesday, 26 February 2013, Mr Adams emailed to Mr Rodkiss an amended PIP and asked if it could be signed off on Friday. There was a change to one of the measures with the words *no complaints* removed. That was following a concern being expressed by Mr Rodkiss at the earlier meeting. There was also a performance issue added in relation to *overall improvement in the way you portray yourself* with the measure being to attend life coaching sessions and feedback. This was consistent with the life coaching sessions discussed at the 22 February meeting. Mr Rodkiss was concerned that Mr Adams had not changed the PIP to a training and development plan and had not taken out timeliness issues as a concern.

[29] On 27 February 2013 Mr Rodkiss wrote to Mr Adams asking for clarification as to why CHH was not following its Coaching for Success three part process which would have, if expectations were not being met, involved a monthly 1:1 meeting before introducing a PIP. Mr Rodkiss wrote in his letter that during recent discussions Mr Adams had informed him that he had been marked on target for the 2012 annual review and that the issues raised on the PIP were only a small part of his overall performance. Mr Rodkiss wrote that given that it would be best dealt with using the process of monthly 1:1 meetings. He made no mention of the amended PIP document provided to him on 26 February 2013 in his letter or concerns about timeliness and changing the title. There was no response to that letter but I am satisfied that the concerns were discussed at the next meeting on 8 March 2013.

8 March 2013 meeting

[30] Mr Rodkiss attended a meeting on this date again with Mr Adams and Mr Walker. There was further discussion and debate about signing the PIP. It was suggested to Mr Rodkiss by Mr Walker that he have a discussion with somebody in Human Resources about the PIP so that he could be reassured that it was not a disciplinary process and it was the right process. Mr Rodkiss did not sign the PIP. He wanted to take it away and consider some words he would be putting in it. Mr Walker

on page 8 of the transcript suggests Mr Rodkiss simply put a comment on the PIP at the meeting even offering to write it himself but Mr Rodkiss was not prepared to do that and sign the PIP and wanted to take it away. Mr Adams agreed to that.

[31] At the time of the next scheduled meeting Mr Adams was on leave. On 19 March by email, Mr Rodkiss sent to Mr Adams the Performance Management Policy and Guidelines and advised that any optimising of his performance should be done through open and regular two way dialogue. Mr Adams did not respond to that email.

Discussion with Gary Andrews, 21 March 2013

[32] Mr Andrews is employed by CHH as Human Resources Operations Manager. He has been in that position since March 2012 and has considerable experience in human resources. Mr Rodkiss approached Mr Andrews on 21 March 2013 when Mr Andrews was about to go to the airport. Mr Rodkiss advised that he had concerns about the PIP he had been given by Mr Adams. The concerns expressed were that it was disciplinary, lacked detail and was not consistent with the coaching for success document that allowed for the monthly one on ones.

[33] Mr Andrews advised that the PIP was not disciplinary in nature and that he should discuss the contents with Mr Adams. Mr Rodkiss was concerned that Mr Andrews did not ask for a copy of the PIP or go through the processes with him but Mr Andrews said in his evidence that he did not ask for a copy of the PIP from Mr Rodkiss because he had already been given one by Mr Adams.

[34] Before the next scheduled meeting was to take place on 22 March with Mr Adam's, Mr Rodkiss telephoned Mr Andrews again and expressed concerns about the use of the PIP document and its inconsistency with existing processes. Mr Andrews advised Mr Rodkiss to seek specifics from Mr Adams on the details of the PIP and advised again it was not intended to be a disciplinary document.

22 March 2013

[35] There was further lengthy discussion and debate around the signing of the PIP at a meeting that took place on this date between Mr Rodkiss, Mr Adams and Mr Walker. On page 8 and 9 of the transcript provided from this meeting there was a discussion about Mr Adams having previously raised issues about parts of Mr Rodkiss's performance that he was not happy with. He accepted that he had not

documented them which he stated was *where he had gone wrong*. Mr Rodkiss did not appear to disagree from my reading of both page 8 and 9 of the transcript that some concerns had been verbally discussed with him. Mr Adams reiterated that he was not treating the PIP as a disciplinary process. The meeting ended with Mr Rodkiss advising to the effect that he would put something into the PIP which he was comfortable with. On page 28 of the transcript for example he said *What I'll do is I'll take this away and I might just put a sentence in here saying ...I agree to do this but I have some concerns which I would like noted....*

[36] Mr Adams was clearly frustrated with the delay in the signing of the PIP. There was agreement that each of the four meetings to that point in time had been about an hour in duration. From reading the transcripts the main concern throughout for Mr Rodkiss was the process rather than what was actually required of him. On page 7 of the 8 March 2013 meeting transcript Mr Rodkiss in answer to Mr Adams talking about his perception of Mr Rodkiss says; *That's right and I can happily change your perception...under the right process. You give me a performance development plan...take off the bottom line [of the PIP] which ...because that says I agree to shortcut the process...*

25 March 2013

[37] Mr Rodkiss contacted Mr Andrews by telephone and advised that he was putting in an amended PIP. Mr Andrews advised that the PIP was not disciplinary and that Mr Rodkiss could write what he wanted on it.

[38] On 25 March Mr Rodkiss emailed to Mr Adams an amended PIP for review. He added the following statement:

Further to discussions the Site Manager has stated that this PIP process is not to be considered disciplinary; it is to be considered as part of a coaching and development process to optimise my performance. NOTE: This PIP is not consistent with the CHH Coaching for Success documented process as I have not participated in any formal 1:1 discussions to review my performance and respond.

[39] Mr Rodkiss also added to some of the measures against which the performance issues were to be measured.

Incident – 26 March 2013

[40] During the daily stand-up production meeting which commenced at 8.45am, there was a report by the Manager of the Planner Mill, Brian Hartley that an event had cost him over four hours lost production time. Mr Rodkiss was asked what he knew about it and why the problem took so long to fix. Mr Rodkiss responded that his report from the day before only indicated 40 minutes lost time and he was unaware there had been a significant loss of production time.

[41] Mr Clayton Harris was in attendance and angrily shouted out words of the effect *You were the f...ing maintenance manager, you should know*. Mr Rodkiss felt that was an aggressive and intimidating response and he said in his evidence he felt humiliated. Mr Rodkiss responded to Mr Harris by advising he would investigate the circumstances and find out what the problem was. Mr Rodkiss said in his evidence the breakdown time had not been properly communicated to him by his staff.

[42] Mr Adams said in his written evidence that Mr Rodkiss had not prepared properly for the meeting by ensuring he had all of the right information and was unable to give a succinct answer to Mr Harris which may have explained his frustration. Communication had been one of the issues on the PIP and succinctness of communication had been discussed during the meetings since 12 February. Objectively assessed this incident may well have increased Mr Adams frustration that there was no progress being made in getting the PIP underway. Mr Adams in his written evidence said that because of the lack of progress he believed he would try a different tactic.

[43] That afternoon Mr Adams and Mr Harris attended the maintenance meeting and Mr Adams then had a general discussion with Mr Rodkiss, following him back to his office stated he did not believe he had engaged with the PIP and he was taking it to the next level. Mr Adams gave Mr Rodkiss a letter that stated he remained dissatisfied with Mr Rodkiss's arguments for not engaging fully with the PIP process and not accepting his reasoning for instigating the process.

[44] Mr Rodkiss was invited to attend an investigation meeting on 28 March 2013. He was advised of his entitlement to bring a representative. The purpose of the meeting was to determine the circumstances around his refusal to comply with a reasonable request to participate in a defined company process. Mr Rodkiss was

advised that the company had formed an initial view that his alleged behaviour may amount to serious misconduct. An extract from the Employee Handbook was enclosed to that effect:

A refusal to perform normal duties or refusal to comply with a lawful and reasonable instruction of a Manager.

[45] Mr Rodkiss was advised in the letter that he needed to be aware that an outcome of the meeting may be disciplinary action which may lead to dismissal.

[46] Mr Rodkiss recalled that he had confirmed an attendance with the Life Coach and took a copy of the planned meeting to Mr Adams as evidence of engagement with the process. Mr Rodkiss recalled Mr Adams was interested in this and Mr Rodkiss asked if he would reconsider that and withdraw the serious misconduct charges. Mr Adams advised he would give the matter some thought. Mr Adams did not return to Mr Rodkiss and confirm that there would not be serious misconduct charges and Mr Rodkiss then instructed Ms Ironside to represent him.

[47] Ms Ironside wrote to Mr Adams confirming that she had been instructed to represent Mr Rodkiss. Ms Ironside asked for information about the alleged behaviour and clarification on the allegations. Mr Adams responded to Ms Ironside advising that the meeting requested was not a disciplinary meeting but an investigatory meeting to determine whether a formal disciplinary process is entered into. More correspondence followed and Mr Erickson was instructed by CHH. I will go into that and two other meetings that were recorded on 2 and 3 April 2013 in more detail at a later point in this determination because there is an issue as to whether CHH provided information Ms Ironside requested and about statements made at the two meetings. There was agreement that a meeting be attended on 15 April 2013 so that Mr Rodkiss could ask questions about the PIP criteria.

Meeting – 15 April 2013

[48] Mr Rodkiss attended the meeting with his wife and Mr Adams attended the meeting with Mr Andrews.

[49] This was the first meeting in which Mr Rodkiss confirmed his intention to record the meeting. This was agreed to. Ms Ironside in a letter dated 4 April 2013 to Mr Adams had advised that Mr Rodkiss had taped the earlier discussions because he was concerned that the PIP was disciplinary and could lead to disciplinary action.

[50] There was discussion about the PIP and Mr Adams confirmed that the PIP was not about overall performance but about matters requiring improvement. Mr Adams was asked why he did not do a 1:1 and responded that he saw the PIP as an opportunity to sit down with Mr Rodkiss weekly to talk about how the maintenance department could be driven forward faster and better. He said that the PIP was to accelerate the process rather than deal with matters in twelve months' time.

[51] There was quite detailed discussion about the criteria in the PIP. Mr Rodkiss indicated that Mr Adams had made him aware of the issues and expanded his thoughts behind them.

[52] Towards the end of the meeting Mr Adams asked Mr Rodkiss whether he was now willing to sign the PIP document. Mr Rodkiss responded *he was unable to sign any document*. Mrs Rodkiss said that whether Mr Rodkiss would sign a document was dependent on the outcome of mediation that was scheduled to take place the following day. There was some concern expressed as to whether there was a connection between Mr Harris and what was happening. Mr Adams explained there was no connection. Mr Andrews also confirmed that..... *we are being open and honest and there is no hidden agenda behind this at all. Take that on face value*. Mr Rodkiss was asked whether he had recorded all of the meetings and he responded that he had.

[53] Mediation took place the following day on 16 April 2013. At the end of that process there was advice given that Mr Rodkiss intended to resign and consistent with that, he did not return to work on 17 April 2013.

[54] On 17 April 2013, Mr Adams wrote to Mr Rodkiss and stated that because of some noticeable improvement in the areas of concern since he had started discussing the PIP process with Mr Rodkiss, the best resolution would be to withdraw the PIP process. Ms Ironside raised a personal grievance of unjustified constructive dismissal.

Disadvantage

[55] Section 103 (1) (b) of the Employment Relations Act 2000 provides that an employee may have a claim against an employer that the employee's employment (including any condition that survives terminate of the employment) is or are or was (during the employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action of the employer.

[56] The test for justification is contained in s 103A of the Employment Relations Act 2000 and provides that the question of whether an action was justifiable must be determined on an objective basis as to whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. In considering that the Authority must consider the factors set out in 103A (3) (a) – (d) and as provided in 103A (4) any other factors that it thinks appropriate. As Ms Ironside set out in her submission s103A is informed by the statutory obligations of good faith.

[57] Mr Erickson accepted in submissions that it was not necessary for Mr Rodkiss to show that there has been a breach of the applicable employment agreement because it is sufficient that a condition of employment be affected to his detriment – *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (CA).

[58] In order for a grievance of unjustified action causing disadvantage to be established Mr Rodkiss must have been disadvantaged in his employment or conditions of employment by an action on the part of CHH and that action must be unjustified.

Three actions alleged to have disadvantaged Mr Rodkiss

[59] Ms Ironside has raised three main actions that she says disadvantaged Mr Rodkiss and were unjustified. The first concerns the conclusion that Mr Rodkiss was not performing acceptably and the subsequent issue thereafter of a PIP at his annual performance review on 12 February 2013. Ms Ironside submits that this was done without a proper investigation, without raising the concerns with Mr Rodkiss and without giving Mr Rodkiss a reasonable opportunity to respond. She further submits that the conclusion that Mr Rodkiss was performing unacceptably was substantively unjustified.

[60] Secondly she submits that CHH initiated formal disciplinary action against Mr Rodkiss and continued to threaten him with dismissal which was unjustified.

[61] Thirdly Ms Ironside says that CHH acted in breach of contract, breach of trust and confidence and good faith as set out below:

- a. Failed to observe its processes on performance management;

- b. Unilaterally changed its processes on performance management without consultation with Mr Rodkiss;
- c. Failed to provide Mr Rodkiss with access to information relevant to the continuation of his employment which was requested including information on alleged performance deficiencies before issuing the PIP;
- d. Failed to provide Mr Rodkiss with adequate representation or support at the first meeting in which the PIP was issued;
- e. Failed to be active and constructive in maintaining a productive working relationship and to be responsive and communicative to Mr Rodkiss.

Was the PIP ever implemented?

[62] The importance of the answer to this question is that if the PIP was never implemented then it is difficult to conclude that at least some of the actions alleged disadvantaged Mr Rodkiss.

[63] Ms Ironside submits that the PIP was implemented because Mr Rodkiss started to complete some tasks in it such as completing a meeting review and organising coaching with a life coach. Ms Ironside refers to the transcript of 22 February 2013 at pg 47 where Mr Rodkiss says that he already reviewed meetings before the PIP and Mr Walker advises it still counts towards the process. I do note that was a relatively early stage of the meetings and at each of the three initial meetings there was an expectation that Mr Rodkiss would sign the PIP.

[64] Ms Ironside refers to an acknowledgement in letters from Mr Erickson to Ms Ironside dated 10 April and 19 April that supported there had been implementation of the PIP and to CHH's offer to withdraw the PIP in Mr Adams letter dated 17 April 2013. In relation to the letter written by Mr Adams the second and final paragraph provided; *Since we have failed to move forward in our discussions about implementing your PIP and in the interest of moving forward positively I would propose your current PIP be removed and that we review your current performance against objectives as laid out in your Key Accountabilities during you next One on*

One. Read in its entirety that paragraph could suggest that there had been no movement forward about implementing the PIP.

[65] Mr Erickson submits that the PIP process was never in fact implemented because Mr Rodkiss did not sign the document and the three month timeframe never in fact commenced.

[66] The evidence from the recorded meeting transcripts is that from CHH's perspective the PIP needed to be signed to both commence the three month time frame and cross things achieved off. Mr Walker for example on page 6 of recorded meeting held on 8 March 2013 is recorded as saying in the context of a discussion about Mr Rodkiss's reluctance to sign the PIP – *We need to get this document live so we can start crossing things off. We can't cross things off...until this document is live.* The PIP was never signed. I find in all likelihood that Mr Adams and Mr Walker did not regard the PIP process as live, and having actually commenced until the document was signed by Mr Rodkiss. That is why matters escalated when it was not signed. I have placed in those circumstances less weight on the words used in the letters sent by lawyers who became involved at a later stage and more on the reality of what actually occurred.

[67] In conclusion I do not find that the PIP was actually implemented in the sense of regarded by CHH as underway. The PIP was an unresolved issue between the parties about which agreement was never reached. In those circumstances Mr Rodkiss could not be disadvantaged by his employment having been made less secure by virtue of the PIP when it was never implemented.

[68] In the event that I am wrong about that and given some of the claims of disadvantage do fall outside actual implementation of the PIP I will go on to consider the various heads of disadvantage.

Was the PIP issued as part of a disciplinary process or in itself a warning?

[69] One of the main concerns for Mr Rodkiss was that the process involving the PIP was a disciplinary one. The PIP has quite strong language about improvement including that *Slippage against agreed objectives will not be deemed acceptable* and written on the PIP is the following - *failure to improve satisfactorily may lead to disciplinary action* which requires a signature as an acknowledgement. The acknowledgment to be signed on the face of the PIP document that failure to improve

may lead to disciplinary action went further I find than anything to come from the quarterly meetings 1:1.

[70] Does that finding mean then that the meeting at which the PIP was presented was the start of a disciplinary process. A PIP can be issued as part of a disciplinary process and some are disciplinary sanctions such as a warning as will be apparent from an analysis of some cases I will undertake shortly. Each situation though turns on its own specific facts.

[71] The PIP was given to Mr Rodkiss at his annual performance review. It only addressed a limited part of Mr Rodkiss's performance and it was accepted that Mr Rodkiss was assessed as an *on target* performer. A key question is whether it was provided to Mr Rodkiss as part of performance management process or under a disciplinary process. The issues in the PIP were the sort I find that could be managed outside of the formal disciplinary process. They were focussed on development and training of Mr Rodkiss in some limited areas. In support of that human resources had not been involved in its preparation as is required prior to the commencement of disciplinary action. Ms Lyon assisted Mr Adams in preparing the PIP. Her key accountabilities are focused on training and developing people not on human resource functions.

[72] Mr Rodkiss was also constantly reassured by Mr Adams and Mr Walker that the PIP was not *disciplinary*. Mr Andrews confirmed that to be the situation as well from a human resources perspective. Further statements made to reassure Mr Rodkiss during the process were to the effect that the PIP was designed to train and develop and in that way improve some elements of performance. Mr Rodkiss was not only told on many occasions that the PIP was not disciplinary he had the additional protection of those statements being recorded by him without the knowledge of those saying them.

[73] The only indication that this was anything other than performance management was the acknowledgement on the PIP that failure to improve satisfactorily *may lead to disciplinary action*. Improvement or otherwise could only fairly and reasonably be assessed at the end of the PIP process. There was evidence to support that if the measures of the PIP were not met then the period of the PIP could be extended to enable them to be met. That would be less likely if it was a disciplinary process rather than a performance management process. CHH has a

disciplinary policy and process. If the PIP had been implemented and if Mr Rodkiss had failed to improve then CHH as a fair and reasonable employer was, I find, required to formally commence a disciplinary process under its disciplinary policy if it wished to go down that path. The PIP did not enable CHH to short circuit the performance process and its own disciplinary policy to issue Mr Rodkiss with a verbal or first/final written warning or dismiss him if there was no improvement to performance.

[74] Mr Rodkiss did not accept or trust that he was being told the truth about the process. Mr Rodkiss said in his evidence he had knowledge of Michael Coates who was the engineering manager of CHH at the Whangarei Saw Mill being placed on a three month PIP from October 2012, being unhappy with that and then resigning two months into the 3 month PIP. Mr Coates did agree under questioning at the Authority investigation meeting that he was on track to complete his PIP at the time he resigned. Mr Rodkiss also referred to another engineering manager who I did not hear from who was put on a PIP, challenged its justification but reached a settlement with the company. Mr Rodkiss said that it was common knowledge around CHH managers that PIP's are used to get rid of people Mr Slade or Mr Harris did not like.

[75] I turn now to two decisions from the Employment Court that have dealt with PIP's. Ms Ironside referred the Authority to the Employment Court judgment in *Rahul Bagchi v The Chief Executive of the Inland Revenue Department* (2008) 5 NZELR 767. Chief Judge Colgan stated at [33] about the PIP process that although within the performance management provisions, PIP's were treated as *disciplinary* in the employment context. He set out an extract from the Human Resource manual that stated: *Managing poor performance within the discipline provisions formalises the process. The person will be made fully aware that continued performance at that level is unsatisfactory and therefore unacceptable, and may lead to their employment being terminated.* Mr Bagchi was advised that after three months if there was no satisfactory improvement the consequence may be a warning and the setting of further targets. He was advised that if they were not met then dismissal could be a consequence. I find *Bagchi* is distinguishable from this matter.

[76] Ms Ironside referred to a number of other cases involving PIP's. Some were quite fact specific and of limited assistance. I do want to refer to the Employment Court judgment in *Nimon & Sons v Buckley* WC 26/07 5 October 2007.

[77] In *Nimon* Mr Buckley was also presented with a PIP following a meeting he had had with his employer two days earlier. He had been assured that the earlier meeting was not a disciplinary meeting. When the PIP was issued two days later it was clearly a disciplinary sanction because it provided that if Mr Buckley did not demonstrate immediate, sustained and consistent improvement this may result in dismissal. It was further set out that the dismissal may occur at any time during or after the timeframe of the plan. The PIP was in effect a written warning and a final warning. Not only that but Mr Buckley was presented with unachievable outcomes. It was noted in [78] of the judgment that Mr Buckley was required to achieve cost effectiveness in the work shop but had no control of the workshop budget. Judge Couch noted in [79] that Bill Nimon on behalf of the company accepted that the plan was unachievable and even admitted he did not understand what parts of it were. The facts of *Nimon* I find are generally distinguishable for those reasons. Mr Buckley was successful in his claim that he was unjustifiably constructively dismissed.

[78] Mr Rodkiss if the transcripts of various meetings are carefully read, was less concerned about the content of the PIP and/or his ability to meet the requirements which was very different to the PIP situation facing Mr Buckley – page 8, 8 March 2013 transcript Mr Rodkiss states... *The stuff's not an issue....it's the bit of paper stuff sits on and it's about the process...*

[79] The evidence I find supports on the balance of probabilities that the PIP was to be managed outside of the disciplinary process as a performance process. I agree with Mr Erickson's submission therefore that even if the PIP had been implemented and therefore was underway it was not a disciplinary process. It was not the same situation as if a warning had been issued or could be without a formal disciplinary process being undertaken at the end of the PIP process.

[80] In conclusion I am not satisfied the meeting at which the PIP was given to Mr Rodkiss was the commencement of a disciplinary process or that the PIP itself was a disciplinary sanction.

Conclusion reached that there were issues with Mr Rodkiss's performance and issuing him with a PIP on 12 February 2013

[81] The PIP was never implemented but Mr Adams stated in his written evidence that he did become dissatisfied with Mr Rodkiss's performance in some areas. Some

were around the succinctness of communication and Mr Adams said he wanted Mr Rodkiss to focus on his management functions and not get too bogged down in the job itself. In his oral evidence Mr Adams described Mr Rodkiss as a good engineer. He said that he was good at his role and very loyal but as it got busier he was not getting staff to do work instead he was doing it himself. He gave an example of Mr Rodkiss at the material time still doing performance reviews with *Phil* who was as I understood the evidence, a supervisor under Mr Rodkiss and that he did not really see Phil and the team picking up work from Mr Rodkiss to free him up. There was talk about Phil during the meetings. Mr Rodkiss was concerned that he was not provided with specifics but Mr Adams did from an assessment of the transcripts give some examples about why he had the broad concerns as is clear from the transcripts.

[82] I find that the evidence supports that some of the issues were informally raised before Mr Rodkiss was presented with the PIP. For example at the meeting on 22 March 2013 Mr Adams at page 8 of the transcript is recorded as saying that there are some things Mr Rodkiss has done really well. He then goes on to say *–there are parts to the role that I haven't been happy with and we have had those discussions about you getting out of the business and working on your business and consulting and managing your team better...so, we've had those conversations even though they haven't been documented which is where I've gone wrong and I will fix that... these are the great things that you're doing, this is some key things that we want to work on as part of your development... the PIP...my understanding of the PIP was yes...if you go back eighteen months it was a process to exit people from the business... That is not the case today and Gary would have reiterated that when you had a conversation with him,..today it's about these are the things that we want to do some focused...*

[83] Mr Walker also states at that meeting on page 9 of the transcript *...I was at your one on one ...your last quarter one on one 2012...that stuff was covered in that meeting.....* he goes on to say that it was just covered verbally.

[84] Mr Rodkiss did not actually disagree with Mr Walker or Mr Adams about some concerns being raised with him verbally. I would have expected him to have done so if that had not been the case given that he was the only person in the room who knew the discussion was being recorded. On balance I am satisfied that Mr Adams had mentioned informally to Mr Rodkiss some of the aspects of his performance that he was not happy about. He accepted quite properly and openly as

did Mr Walker to Mr Rodkiss at that meeting that he probably should have written the concerns down during the 1:1's. Mr Adams said in his evidence that he wanted Mr Rodkiss to step up his performance and move to a higher standard. I accept that Mr Adams had some area of dissatisfaction with Mr Rodkiss that he wanted improvement on. I now consider whether the evidence supports there was someone else behind the PIP with a motive to use it to exit Mr Rodkiss.

[85] Mr Rodkiss did have reasons to suspect that Mr Slade or Mr Harris may be behind the PIP. The Authority heard evidence from Grant Arnold who was the previous site manager at the Whangarei Mill for CHH from June 2006. He said when giving his evidence that Mr Slade told him he regarded Mr Rodkiss as a *dropkick*. It is hardly surprising though when Mr Rodkiss was told this by Mr Arnold in or about March 2013 that he became very suspicious and distrusting of the PIP process and speculated that Mr Slade and/or Mr Harris may have been behind the performance dissatisfaction. Then there was the timeliness issue in the PIP. It was at a meeting when Mr Harris was present that Mr Rodkiss was late. Mr Rodkiss did not mention this to Mr Adams during the process although Mr Adams had heard previously from others about this comment. Mr Adams said in his evidence that Mr Slade had made no specific reference directly to him about Mr Rodkiss but wanted performance to improve across the board.

[86] There was also recorded discussion between Mr Rodkiss and Mr Walker during the meeting on 22 February 2013 after Mr Adams left the room. Mr Walker tells Mr Rodkiss that he doesn't know where this is coming from and that he hasn't talked to Mr Adams about it. He says amongst other matter *...but I think...there might be a little bit of keeping the wolves at bay..around..that Tim..who doesn't like any of the current engineering managers in the wood products NZ group*. Mr Walker then confirms to Mr Rodkiss that *this is definitely not a PIP for an exit strategy...its not*.

[87] I accept that Mr Rodkiss was suspicious of the motive behind the PIP and believed Mr Adams was not the driver of the PIP. Objectively assessed the arrangement as part of the PIP for Mr Rodkiss to attend a life coach for 12 - 15 sessions in particular supports that the PIP was focussed on developing and retaining of Mr Rodkiss than on other more sinister motives driven by those more senior than Mr Adams. If the PIP was designed to exit Mr Rodkiss it is difficult to imagine CHH

wanting to spend money on life coaches. I am not satisfied on an objective assessment that the PIP was driven by someone other than Mr Adams with a view to exit Mr Rodkiss from CHH.

[88] I find that a fair and reasonable employer could in the circumstances have wanted to improve/develop Mr Rodkiss's performance in some limited aspects because overall he was a good performer on target. There was never a suggestion that overall Mr Rodkiss's performance was substandard by any means. Mr Rodkiss was allowed to take the PIP away after the meeting on 12 February 2013. There was considerable discussion about the PIP contents and the reason for it. Mr Rodkiss made a decision that he felt uncomfortable to sign it at least in its current form and did not do so at the time it was given to him or ever.

[89] Mr Adams remained firm on the content of the PIP. This is the subject of some criticism. The standard of performance though, unless clearly unreasonable and unachievable as in the *Nimon* case can be set by an employer. There should be discussion and understanding as to the basis for the concerns as there was in this case.

[90] The timeliness issue was not removed although I note in the fourth recorded meeting on 2 April 2013 after Ms Ironside was involved Mr Adams on page 3 of the transcript suggests Mr Rodkiss sit down and take some time to read the words in the PIP. He states that the *timeliness one will come off straight away because that been resolved*. I do not see the non-removal of timeliness earlier as a disadvantage because Mr Rodkiss had recorded that once the PIP was underway and signed that issue would come off. The *no complaints* by far the more unreasonable measure was removed much earlier after Mr Rodkiss raised an issue about it.

[91] The most structured discussion about why matters were on the PIP was on 15 April 2013 although if the transcript on 22 March is considered there was also considerable discussion about the issues that gave rise to the PIP. Understandably Mr Rodkiss wanted specifics rather than general examples. That was probably not easy to give on all matters. Some areas of concerns and proposed solutions were more developmental in nature. An employer is able to set their own standards for each workplace and generally the Authority will not question those standards.

[92] There is an allegation that Mr Adams treated Mr Rodkiss differently because others who were late to meetings did not get a PIP. Mr Adams explained to Mr

Rodkiss that there were additional matters over and above the lateness to meetings which appeared to have only occurred once and hence the PIP. I am satisfied that there were some other reasons Mr Rodkiss was given a PIP.

[93] The stronger ground under this head of unjustified action causing disadvantage, if the PIP had actually been implemented was that CHH did not follow its own procedures and guidelines in introducing the PIP when it did. Under the Coaching and Development document if at quarterly 1:1 meetings an employee was not meeting expectation then the next step is a monthly 1:1 and then a 3 month PIP is introduced. The main issue for Mr Rodkiss was that a step was skipped. Mr Erickson submits that the Coaching for Success document is not a company policy. I accept it is not a policy per se but as already set out I find it is a guideline and under clause 17.1 of Mr Rodkiss's employment agreement policies, guidelines and procedures form part of his terms of employment. Mr Rodkiss should also have under clause 17.2 of his employment agreement been consulted about any changes. I will deal with that matter shortly. Mr Andrews said, and I have no reason not to accept his evidence, that the usual practice was to move straight to a PIP and not hold a monthly 1:1.

[94] I find that Mr Rodkiss could expect that CHH as a fair and reasonable employer would comply with its guidelines and that included the flow chart in the Coaching and Development document and the steps on that chart in the event of a failure to meet performance expectation.

[95] Mr Rodkiss wrote on the PIP a statement which if accepted would in all likelihood have resulted in it being signed. Mr Andrews and Mr Adams knew and had agreed with Mr Rodkiss undertaking this step. There was unfortunately no further communication about that matter before Mr Rodkiss was given a letter about a proposal to commence a formal investigation process about a failure to follow a lawful and reasonable instruction.

[96] The PIP although not presented as part of a disciplinary process was a closer step to one than a monthly 1:1 for reasons already outlined. Mr Rodkiss was clearly quite troubled and upset about that. Had Mr Adams simply talked to Mr Rodkiss about what Mr Rodkiss had written on the PIP there was every chance that some acceptable pathway forward would have been agreed to in a common sense and pragmatic way. The disadvantage I find was the failure to communicate and respond at all to Mr Rodkiss about what he wanted on the PIP when both Mr Adams and Mr

Andrews had indicated that he could write a statement on the PIP to reduce his anxiety about its contents. That was not in accordance with the statutory good faith requirements to be responsive and communicative particularly in light of the Coaching for Success guidelines which had not been followed. The failure to respond was unjustified. A fair and reasonable employer could have been expected to follow its own guidelines in all the circumstances and having had its failure to do so pointed out to it should have considered and responded to Mr Rodkiss's written statement on the PIP. Mr Adams from the recorded meeting on 2 April seemed to believe that this situation would be fixed by an amendment to the Coaching for Success flow chart with an arrow for not meeting expectation going directly to a PIP. Long term that may have been sensible but did not resolve the immediate issue between Mr Rodkiss and CHH.

[97] Mr Rodkiss has a personal grievance for the reason set out above and his employment or conditions were affected to his disadvantage by an unjustifiable action of CHH. I shall turn to the issue of remedies after considering the other two heads of disadvantage.

The initiation of disciplinary action against Mr Rodkiss

[98] Ms Ironside submits that the initiating of formal disciplinary action against Mr Rodkiss on 26 March 2013 disadvantaged him and was unjustified. In his written evidence Mr Adams said that his intention behind initiating a disciplinary investigation was to get Mr Rodkiss to *recognise the seriousness of the situation and sign off on the PIP document. If he did then there would be no need to take the disciplinary investigation any further.* Mr Adams made similar statements to Mr Rodkiss in meetings with him which were recorded on 2 and 3 April 2013. The meeting on 15 February 2013 was for the purpose of Mr Rodkiss understanding the contents of the PIP primarily. In any event it was unrelated to the disciplinary process.

[99] Any disciplinary process beyond the letter being handed to Mr Rodkiss never actually commenced before Mr Rodkiss resigned. Had there been a disciplinary outcome following the 26 March letter it may well have been unjustified but there was no meeting between the parties about this matter, no explanation given and no outcome. The mere initiation of it I find in those circumstances does not constitute a disadvantage to Mr Rodkiss.

[100] The threat of formal disciplinary action was unlikely to resolve the impasse although clearly designed to do so. Before matters progressed further down that path the parties sensibly agreed to go to mediation. This is the sort of approach that should be encouraged- *Sky Network Television v Duncan* [1998] 3 ERNZ 917. The submission that the letter of 26 March 2013 was handed to Mr Rodkiss before Mr Adams had responded to him about the amended PIP is part of the same grievance found under the first head.

[101] The claim of disadvantage under this head is dismissed.

CHH acted in breach of contract, good faith and the relationship of trust and confidence.

[102] Ms Ironside sets out a number of matters under this head.

[103] The first is a failure by CHH to observe its processes and guidelines on performance management in issuing a PIP. The PIP was never implemented although I have found that the failure to be communicative and responsive to Mr Rodkiss's concerns about this caused him disadvantage.

[104] The second is that there was a failure to consult with Mr Rodkiss about the change to the performance management process by removing the process of monthly 1:1's from the flow chart under clause 17.2 of his employment agreement. I accept that consultation should have taken place about that. Mr Rodkiss was advised that change would probably occur in his discussion with Mr Adams on 2 April 2013 but that was not consultation. Any change would impact on Mr Rodkiss because of his views about CHH failing to follow its guidelines.

[105] The third issue is that CHH failed to provide Mr Rodkiss with access to information relevant to the continuation of his employment before concluding he was performing unacceptably and issuing the PIP. I have largely dealt with that and will not again. An additional issue is that CHH refused to respond in any substantive way to Ms Ironside's letters. I will consider that matter.

[106] Ms Ironside advised Mr Adams that she was representing Mr Rodkiss on 27 March 2013. She requested information about the allegation raised in the 26 March letter. Mr Adams responded on 28 March 2013 and advised that the meeting requested was an investigatory meeting to determine whether a formal disciplinary process is entered into. That was not adequate for Ms Ironside and she wrote a two page letter on 28 March 2013. When no response was received she wrote a longer letter on 4 April 2013. For the first time in that letter Ms Ironside mentions that previous meetings have been taped. Mr Adams responded to that letter and postponed the original meeting set for 5 April. Ms Ironside wrote again on 5 April 2013 and asked for some specific responses. Mr Adams answered the questions in a letter dated 8 April 2013. In between times he reissued the same letter handed to Mr Rodkiss on 26 March 2013 but with a new meeting date of 12 April 2013. Nothing turns on that. Ms Ironside wrote again to Mr Adams on 8 April 2013 and advised that he has failed to address the request for specific information, reminded him of the obligation to provide information and asks for further information in advance of the meeting. Mr Adams handed the matter over to CHH's solicitors Kiely, Thompson and Caisley.

[107] Mr Erickson from that firm responded by letter dated 10 April 2013 to Ms Ironside. It is important to note that at this point there has not been a meeting held. Mr Erickson answered some of the questions in his letter of 10 April 2013 and then set out that CHH's main concern was in progressing the PIP. He wrote CHH proposed a meeting with Mr Adams on 15 April 2013 to discuss, clarify and finalise the PIP criteria. He wrote in his letter that this was not intended to be a disciplinary meeting but Ms Ironside was welcome to attend and that Mr Rodkiss was welcome to ask any questions at the meeting which may include further information that Ms Ironside had requested of Mr Adams. Mr Erickson wrote that Mr Rodkiss needed to be aware that the final decision as to the content of the PIP is for Mr Adams.

[108] Ms Ironside responded by letter dated 11 April 2013 and advised amongst other matters that there were multiple failings to observe good faith requirements and that the actions outlined in her letters had disadvantaged Mr Rodkiss. She asked for information requested in her letter of that date and some remaining unanswered from her 4 and 8 April letters to be supplied in advance of the meeting. Mr Erickson responded to that letter by letter dated 12 April and wrote in paragraph 4 that if Mr Rodkiss believes he requires further information he can raise these issues at the meeting. He wrote that CHH is not refusing to provide Mr Rodkiss with relevant material but its preference is to meet face to face with its own employees to discuss relevant issues.

[109] Mr Rodkiss at the end of the meeting on 15 April appeared satisfied from the meeting that he was aware of the issues and Mr Adams had expanded his thinking behind the issues behind the PIP. Under questioning from Mr Erickson Mr Rodkiss was unable to refer to any specific information that would have assisted him at that time. Mr Rodkiss did not sign the PIP at the meeting because he wanted to take it to Ms Ironside and attend mediation. Looking at the matter in the round I am not satisfied there was a breach of good faith in failing to provide relevant information. Questions were asked and answered in part I find by virtue of the correspondence and then at the meeting on 15 April 2013 there was more information provided about the PIP criteria in particular. No disciplinary meeting was ever held and the PIP was never signed. The only matter that I find sits outside of that is the amendment to the Coaching for Success flow chart. I have found a failure to consult about that under Mr Rodkiss's employment agreement and dealt with it in that way already.

[110] The next and fourth issue is Mr Rodkiss not having a representative for the 12 February 2013 meeting. The meeting was not disciplinary. It was about performance management and I do not find any breach in that regard.

[111] Fifthly Ms Ironside submits that CHH misled and deceived Mr Rodkiss in 12 separate ways.

[112] The first was telling Mr Rodkiss that the PIP was not disciplinary. I have found it was not disciplinary so that was not misleading. Mr Rodkiss chose not to believe Mr Adams, Mr Walker and the Human Resource Manager about that. Had Mr Rodkiss signed the PIP on the basis of what was said and CHH had then acted otherwise then the Authority would indeed have found the conduct misleading and deceptive. That is not the case in front of the Authority.

[113] The second was telling Mr Rodkiss the purpose of the 12 February 2013 meeting was for an annual performance review and then surprising him with a finding of unacceptable performance and issuing a PIP. There was some surprise. Mr Adams was entitled to raise performance concerns. Mr Rodkiss was allowed to take the PIP away. He made a decision not to sign it and it was never implemented. I am not satisfied there was misleading and deceptive conduct about that matter.

[114] The third was stating that the PIP was out of date at the 22 March 2013 meeting when it was not. When I read the discussion in its full context it seems that Mr Rodkiss uses the word outdated first and Mr Adams then asks if the outdated aspect has been reaffirmed with Mr Andrews. I find it was more confusion rather than misleading and deceptive conduct.

[115] The fourth was that Mr Rodkiss could put comment on and say what he wanted to on the PIP when no modification to or comments on the PIP were entertained by Mr Adams. I have found a breach of good faith in the failure to be responsive and communicative.

[116] The fifth was Mr Adams in a meeting with Mr Rodkiss on 3 April 2013 said *it's irrelevant to me what bit of paper we use and how it all gets there ...it's the process ...it's the tool I've got about improving...my philosophy is about growing people and this is not about destroying them.* This Ms Ironside submits was misleading because the PIP process was not negotiable. I do not find that was misleading. Given that Mr Adams did not know the conversation was being taped he

was in all probability saying what he believed to be true. Mr Adams relied on Ms Lyon initially to guide him on what document to use and then Mr Andrews. The practice at this time was to issue a PIP which was not that shown in the flow chart on the guidelines.

[117] The sixth was that the PIP was the same as a training and development plan when it was not. The evidence from Mr Andrews supported training and development plans were not used. It seems clear that Mr Adams regarded the PIP as being to develop Mr Rodkiss. He was technically wrong if the flowchart is considered in the guidelines about it being the same as that sort of plan but I do not find misleading and deceptive conduct about that.

[118] The seventh was that Mr Adams said he would change the title to a development plan at a meeting on 22 February 2013 but never did when in fact CHH considered it would make no difference to the process being followed. Mr Rodkiss and then Ms Ironside had the benefit of the typed transcripts from the meetings it was agreed ran to perhaps an hour or so each to enable them to point to various matters not undertaken with comparative ease. I cannot rule out a possibility that Mr Adams simply forgot to do this rather than it being misleading and deceptive conduct. Mr Rodkiss did not change the title at a later date when he submitted the amended PIP.

[119] The eighth was that timeliness would be removed. I am not satisfied that was misleading and deceptive as it was discussed later and agreed it would be crossed off.

[120] The ninth was telling Mr Rodkiss there could be a debate on the PIP on 8 March when CHH wanted it to stop. Mr Rodkiss was encouraged at that meeting though to talk to Mr Andrews about the process and there was a further lengthy debate on 22 March 2013 and so I do not find a breach.

[121] The tenth and eleventh issues are relatively technical issues about the correlation between KA's and PIP's. I do have a concern that what was said in discussions recorded covertly because Mr Rodkiss was fearful that the PIP was disciplinary are then relied on later to demonstrate misleading and deceptive conduct about issues somewhat peripheral to the main issue. In short Mr Adams may simply have got it wrong. I cannot be satisfied that there was a breach of good faith.

[122] The twelfth was that others would be put on a PIP when that was not the case as these employees were dealt with directly without a PIP. There were more issues

that Mr Adams wanted to see an uplift on rather than simply timeliness. On 15 April Mr Adams explains at page 3 of the transcript *this is not about your overall performance as a manager, ok. This is about some specific things that we wanted you to work on...*

[123] Ms Ironside then refers to a further seven grounds on which CHH failed to be active and constructive in maintaining a productive working relationship to be responsive and communicative. I have not found in relation to the first that issuing a PIP to Mr Rodkiss was unjustified and unreasonable although I accept it was not in accordance with CHH guidelines. Mr Rodkiss was not prepared to sign it and it was never implemented. I have already found that CHH should have responded to Mr Rodkiss about his process concerns although it was entitled to set I have found performance standards and measures – issue two. It did appear that Mr Rodkiss was more concerned with the form of the PIP during the initial meetings than its contents. There was no suggestion that he could not have fulfilled the requirements and he confirmed that in the meeting with Mr Adams as late as 3 April 2013.

[124] Mr Adams then commenced a disciplinary investigation on 26 March 2013. That did not progress. The next five allegations under this head flow from that point.

[125] Mr Adams said to Mr Rodkiss during two meetings on 2 and 3 April which were covertly recorded words to the effect that involving a lawyer could mean that his relationship with CHH could be impacted in a negative way. To be fair to both parties the meeting notes need to be read in full rather than simply reading the extracts. Words were said to the effect that they should not be debating the process, it isn't about ending the relationship and that it should be about what is written in the PIP. It is in that context after Mr Adams says that this is not about the relationship ending that he refers to *staying in the business*. Mr Adams did say appropriately that it was up to Mr Rodkiss to involve a lawyer at page 4 of the meeting transcript on 3 April 2013. I do have some concern that Mr Rodkiss continued to record these meetings covertly after the involvement of his lawyer. The only purpose at this point could have been to use the recording for legal purposes. Good faith obligations go both ways in a relationship.

[126] Mr Adams though should not have made those statements about Mr Rodkiss's use of a lawyer. It is most unwise to have these sorts of discussions and they are inappropriate because an employee has a right to have a representative and

that right must be respected. There is also a need for care to be taken that pressure is not brought to bear on an employee when they are vulnerable. I find that Mr Rodkiss was disadvantaged by the statements made about his representative because they made him feel less secure about his relationship with CHH because of his decision to engage a lawyer. The comments were unjustified because they were not what a fair and reasonable employer could have done in all the circumstances. Objectively assessed what was said in its full context during both meetings does not go as far as the extent of Mr Rodkiss's belief expressed in para. 160 and 165 of his written evidence that there was a definite intent to find some way to dismiss him from his job and his continuing employment was at risk.

[127] In terms of the next three issues I am not satisfied that Mr Adams deliberately avoided Mr Rodkiss after issuing the invitation to a disciplinary meeting. The parties did go to mediation. The 15 April meeting did provide information to Mr Rodkiss and he could not think of further information that he required. I find no breaches in that regard.

[128] The final issue is that Mr Rodkiss was told by Mr Walker that Mr Slade did not like any of the current engineering managers and that this undermined Mr Rodkiss's security in his employment. Mr Walker advised Mr Rodkiss of this whilst Mr Adams was out of the room. Mr Walker simply speculated as a colleague in a friendly as opposed to a professional way that it may well be that the PIP was a political issues to keep Mr Slade off Mr Adams back. He did say that Mr Adams had not told him this. Ideally Mr Walker would not have speculated in this manner but Mr Rodkiss had heard the same from other sources. His anxiety did not simply come from Mr Walker about that matter. Not every speculation can be the basis of a legal claim without some concrete proof. I have found none in this case to support that Mr Slade was behind the PIP. Mr Adams did not accept in evidence that there was any third party involved in the PIP. Mr Rodkiss was always reassured by Mr Adams that the process was not designed to exit him from CHH. Mr Rodkiss chose not to trust Mr Adams about that. I am not satisfied there was a breach of good faith by what Mr Matthews said about Mr Slade.

[129] I would note finally that it will be apparent from reading this determination that the detail in this case has been minutely examined by Mr Rodkiss in relation to the various claims that he was disadvantaged unjustifiably in his employment. That

approach can give the wrong impression that this whole process from the point of presenting the PIP was a negative one. From my reading of the transcripts that could not be further from the truth. In the first three recorded meetings there is much positive and open discussion about a whole range of issues not simply the PIP as one would expect between three senior managers who had a good working relationship focussed on the success of the CHH business. It was only I find after those initial meetings that any actions of CHH I find can be criticised.

Conclusion on disadvantage

[130] In conclusion I have found the following actions disadvantaged Mr Rodkiss in his employment and were unjustified. They were not what a fair and reasonable employer could have done in all the circumstances. There is an overlap with the findings and the statutory good faith obligations. The first action is that CHH was not communicative and responsive to Mr Rodkiss when with the agreement of Mr Adams and Mr Andrews he wrote a statement on the PIP to the effect that it was not disciplinary and not in accordance with CHH guidelines. The process was not in fact consistent with CHH guidelines. Mr Rodkiss was quite right about that process. There was general agreement that it was not disciplinary. The only response was the issue of the letter inviting him to answer a disciplinary allegation.

[131] The second action is that Mr Rodkiss was not consulted about the change to the guidelines under clause 17.2 of his own employment agreement although clearly the changes would have an impact on him. That was unjustified and disadvantaged him. It was clear at that stage, 9 April 2013 that Ms Ironside had asked issues about the process and she was also not advised about the change. Although probably unintended because Mr Adams was quite open about the change to be made with Mr Rodkiss it looked as if there was a belated attempt to fix a problem.

[132] Finally Mr Rodkiss was disadvantaged and there was an unjustified action by Mr Adams when he made comments about Mr Rodkiss involving a lawyer in the process during meetings on 2 and 3 April 2013. Although there were some positive matters addressed at the time of both those meetings there was also a suggestion that involvement of Ms Ironside could have a negative effect on the continuation of the employment relationship.

[133] Mr Rodkiss has a personal grievance under s 103b of the Employment Relations Act 2000 and he is entitled to remedies. I shall return to these after considering the claim that Mr Rodkiss was unjustifiably constructively dismissed.

Constructive dismissal

[134] Mr Rodkiss says that his resignation falls within the second and third non exhaustive categories where the Court of Appeal in *Auckland etc Shop Employees etc IUOW v Woolworths* [1985] 2 NZLR 372 stated a constructive dismissal may occur. That is that CHH followed a course of conduct with the deliberate and dominant purpose of coercing him to resign and that there were breaches of duty that caused him to resign.

[135] I shall start with the reasons Mr Rodkiss gave to the Authority in his oral evidence as to why he resigned. Mr Rodkiss advised on 16 April following mediation of his intention to resign from CHH effective from 17 April 2013. He said that he did this because his concerns were not addressed, there was no acknowledgment they were valid, there was no apology for the distress, there was no retracting of the serious misconduct charge and there was no answer to his lawyers questions. He could no longer have trust in CHH.

Course of conduct

[136] I have already dealt in detail with the background leading to the resignation and will not set it out again.

[137] Mr Rodkiss was of the view that the PIP was to be used to exit him from CHH and that Mr Slade and Mr Harris were behind it. He was not persuaded by Mr Adams that the PIP was not disciplinary and/or not designed to exit him from CHH and did not accept it was to simply *fine tune* his performance in some areas. I have found that the PIP was not disciplinary, was never implemented and I have not been satisfied from the evidence an ulterior motive behind it.

[138] I agree with Mr Erickson's submission that there are documents and statements that support Mr Adams wanted Mr Rodkiss to stay in his position rather than that he followed a course of conduct with the deliberate and dominant purpose of coercing Mr Rodkiss to leave. One that I have not referred to earlier is a summary of staff performance reviews emailed to Mr Slade on 13 February 2013 in which Mr

Adams is quite positive about most aspects of Mr Rodkiss's performance. The PIP although given to Mr Rodkiss at that point on 12 February 2013 was never actually implemented. Mr Adams was required under the PIP to have weekly meeting with Mr Rodkiss which required an investment of his time and there was an investment in the life coach sessions. Both of those matter are inconsistent with a course of conduct designed to coerce Mr Rodkiss to leave. Comments in meetings made to Mr Rodkiss by Mr Walker and Mr Adams were generally supportive about his performance and reassuring about the process.

[139] Extracts from the conversations on 2 and 3 April 2013 between Mr Adams and Mr Rodkiss are relevant because as Mr Erickson submits Mr Adams did not know they were being recorded and they were taking place after the initiation of the formal disciplinary/investigation process. During these conversation Mr Adams confirms Mr Rodkiss is doing a good job and is a good manager and that the [PIP] process was not driven by anyone else. The transcript of the meeting on 15 April also supports it was a fairly constructive and quite open meeting.

[140] I am not satisfied that Mr Rodkiss has made out his claim that CHH through Mr Adams followed a course of conduct with the deliberate and dominant purpose of coercing Mr Rodkiss to resign.

Breach of duty

[141] The breaches relied on are those relied on for the claims of unjustified action causing disadvantage.

[142] The Authority needs to determine if the breaches found were causative of Mr Rodkiss's resignation and, if the answer to that is yes, whether the breaches of duty were of sufficient seriousness to make a risk of resignation reasonably foreseeable.

[143] Mr Erickson submits that if the Authority was to find a breach which it has, such breach was not causative of Mr Rodkiss's resignation because that was motivated in a large part by his view there was a plan to exit him from CHH using the PIP process. That submission is persuasive to a degree in that Mr Rodkiss always had an underlying suspicion that the process was about getting him out of CHH. I have not found a breach in that regard and the breaches I have found confirmed his view about that rather than on their own causing him to have a lack of trust and faith in CHH and resign. There is some danger though in the Authority reaching conclusions

about the exact motivation behind the resignation when I accept overall that Mr Rodkiss resigned because of matters to do with the PIP. The three breaches I have found were part of that process and therefore at least in part causative of his resignation and I so find.

[144] I have found three breaches of duty. The first was a failure to respond to what Mr Rodkiss had written on the PIP in circumstances where he was correct that the process was not that in CHH guidelines. The second was a failure to consult over a change to the guidelines as required in terms of Mr Rodkiss's employment agreement and the third was the comments made by Mr Adams about the involvement of Mr Rodkiss's lawyer in the process.

[145] I have to be satisfied that these were breaches of sufficient seriousness to make a risk of resignation on 17 April 2013 reasonably foreseeable. All of the breaches found occurred after the PIP was given to Mr Rodkiss and four initial meetings had been held and before the meeting on 15 April was held. Many actions were viewed by Mr Rodkiss as simply strengthening his view that there was a plan to exit him if he signed the PIP. I have not found such a plan to be established on the basis of the evidence. It is likely the failure to respond to Mr Rodkiss about what he wrote on the PIP, whilst unacceptable, arose simply from growing frustration on the part of Mr Adams after at least four hours of meetings that the PIP was not signed after considerable reassurance the process was not disciplinary.. Mr Adams in my view dug his heels in at that point. The failure to consult about the change to the CHH guidelines was probably overlooked rather than concealed because Mr Adams told Mr Rodkiss that there would be a change of arrows on the guidelines to PIP rather than 1:1 meetings before it formally occurred. It was not a situation where CHH maintained that the change had been made at the time Mr Rodkiss was given the PIP. That would have been much more serious. The discussion about Mr Rodkiss's decision to involve his lawyer whilst unacceptable has to be read in the context of the meetings overall. When done so it is not as serious as it may first appear. Mr Rodkiss continued to instruct Ms Ironside. The meeting of 15 April 2013 followed the breaches. It was appropriate that the matter be discussed at employer/employee level again to see if resolution was possible and to answer any questions. It was a robust reasonably positive exchange from reading the transcript. A mediation was to take place the following day.

[146] Having given the matter careful consideration I am not satisfied that the breaches separately or cumulatively viewed were fundamental or repudiatory in nature. Mr Rodkiss says that he could no longer trust in CHH that they would adhere to and perform their obligations in the future. I accept Mr Erickson's submission that there was no real basis for that conclusion. I do not find the breaches were found sufficiently serious to make a risk of resignation reasonably foreseeable.

[147] In conclusion I am not satisfied that that Mr Rodkiss was constructively dismissed from his employment but rather he resigned.

Remedies

[148] I turn to remedies for the personal grievance I have found. It was accepted by Mr Erickson that there was no issue of contribution.

[149] Mr Rodkiss became anxious and stressed because of the issue of the PIP and his views that it was designed to exit him from the business. His concerns were well known to Mr Adams. I was not satisfied that the process was disciplinary and CHH cannot be responsible for Mr Rodkiss's view that it was and the stress associated with that at that initial period. Mr Rodkiss was reassured that the process was not designed to exit him from the business and that the issues in the PIP were designed to provide an uplift in his performance only. He was reassured that he was on target.

[150] What I can take into account when assessing remedies is that Mr Rodkiss's concerns/stress and anxiety would in all likelihood have diminished if the words he wrote on the PIP and emailed to Mr Adams on 25 March 2013 had been accepted and/or there was at the least some discussion about them and some modification. Instead Mr Adams on 26 March 2013 without talking further about what was written on the PIP and after Mr Rodkiss had been spoken to harshly by Mr Harris gave Mr Rodkiss a letter inviting him to an investigation meeting to the process moved to a proposed investigation meeting to determine circumstances around his refusal to comply with a reasonable request to participate in a defined company process. I accept that at that point Mr Rodkiss's stress and anxiety increased.

[151] There is a letter from a doctor who saw Mr Rodkiss on 4 and 18 April – exhibit O stating that he was suffering from acute anxiety that had manifested itself in physical symptoms that required treatment. The doctor considered it was the stressful events at CHH that had caused the symptoms. I accept Mr Erickson's submission that

the Authority must be cautious about situation involving self-reporting. The stressful effect on Mr Rodkiss was also verified by Mrs Rodkiss in her evidence. Mr Rodkiss claims the sum of \$30,000. I find that an award of that amount would be too high particularly since not all of Mr Rodkiss's claims were successful. It is not a case however where a very low award would be adequate. There must be an award that reflects the effect on Mr Rodkiss of the unjustified actions I have found. In all the circumstance I am of the view that a compensatory award should be made in the sum of \$6000.

[152] I order Carter Holt Harvey Limited to pay to David Rodkiss the sum of \$6000 under s 123 (1) (c) (i) of the Employment Relations Act 2000 without deduction.

[153] I do not make award a penalty for the breaches of good faith.

Costs

[154] I reserve the issue of costs. If agreement cannot be reached I will set a timetable to recognise that the end of year is fast approaching. Ms Ironside has until 19 December 2013 to lodge and serve submission as to costs and Mr Erickson has until 23 January 2013 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority