Attention is drawn to the order prohibiting publication of certain information.

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 33
5556118

	BETWEEN	DAVID WALKER-ROGERS Applicant
	A N D	QUICK SKIPS LIMITED First Respondent
		X Second Respondent
		Y Third Respondent
Member of Authority:	David Appleton	
Representatives:	John Shingleton, Counsel for Applicant Peter Macdonald, Advocate for Respondents	
Investigation Meeting:	10, 11 & 18 February 2016 at Christchurch	
Submissions Received:	26 February and 15 March 2016 for Applicant 3 March 2016 for Respondent	
Date of Determination:	22 March 2016	

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

A. Mr Walker-Rogers was unjustifiably constructively dismissed by the respondent and he suffered an unjustified disadvantage in the way that he was suspended.

B. I decline to order that the respondent pay to Mr Walker-Rogers a back dated pay rise and bonus payments.

C. I decline to impose penalties upon the respondent.

D. Costs are reserved.

Prohibition from publication order

[1] Until further notice, there is a prohibition from publication order made pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting the publication of the names of the second and third respondents.

[2] The grounds for the prohibition from publication order are that the nature of the allegations against the second and third respondents are believed by them to potentially damage their professional standing. Whilst this is arguable, the applicant has not objected to a prohibition from publication order on a temporary basis, subject to the Authority's determination in respect of Mr Walker-Rogers' claim against the first respondent.

[3] This determination disposes of that matter and, accordingly, a case management telephone conference call will now be arranged in order to discuss a review of the order, and the claims against the second and third respondents.

Employment relationship problem

[4] Mr Walker-Rogers claims that he was unjustifiably constructively dismissed from his employment on or around 5 June 2015. He further claims that he was unjustifiably disadvantaged in his employment by being placed on paid suspension and that the first respondent breached his employment agreement by failing to increase his annual salary and to implement a suitable bonus scheme.

[5] The respondent denies that Mr Walker-Rogers was constructively dismissed, that he was unjustifiably disadvantaged in his employment by being suspended and that Mr Walker-Rogers had a contractual right to have his salary increased or to be awarded a bonus.

Brief account of the events leading to termination of the employment

[6] The respondent company operates a rubbish removal and skip hire business in Christchurch. It is owned by Mr Paul and Mrs Jan East. Mr Walker-Rogers was employed by the respondent company as its General Manager, commencing on or around 8 July 2013.

[7] Prior to commencing his employment, Mr Walker-Rogers had discussions with Mr and Mrs East which led to a document being drawn up which was in the form

of an agreement, although it was apparently neither signed nor dated by either party. This document was dated 22 May 2013 and will hereinafter be referred to as the 22 May document. The 22 May document contained a number of sections which set out a business plan in respect of the respondent company over five years. It set out what the role of Mr Walker-Rogers was to be, as well as the role of Ms Angela Gordon, Mr and Mrs East's daughter. The respondent says that Ms Gordon was the company's CEO and that Mr Walker-Rogers was answerable to her.

[8] The 22 May document contained the following text:

> ***Remuneration Package***
> *Salary - $105,000 per annual* [sic]*, paid monthly*
> *Suitable Vehicle for the role*
> *Company mobile phone (for reasonable personal use)*
> *Company laptop*
> *Fuel card (for Canterbury region use)*
> *After the first 12 months an annual review will be conducted with Angela, Paul [East] and Jan [East]. At this stage Paul and Jan will discuss with David a suitable incentive bonus using the sales and profit gross results with a goal of 25% per annum.*

[9] Mr Walker-Rogers was issued with an individual employment agreement which was signed by him and by Ms Gordon on behalf of the respondent company on 8 July 2013. This agreement contained the following terms, which are material to the issue before the Authority:

> *1.(b) This agreement shall replace all previous employment contracts between the parties and shall remain in force until it is terminated in accordance with its terms.*
> *…*
> *4.(b) The remuneration shall be inclusive of all allowances.*
> *…*
> *19.* ***Suspension***
> *(a) In the event the employer wishes to investigate any alleged misconduct, it may, after discussing the proposal of suspension with the employee and considering the employee's views, suspend the employee on pay whilst the investigation is carried out. The period of suspension will not be unreasonable.*
>
> ***20 Termination***
> *…*
> *20.(c) When the employment is terminated by the employer without the required notice, the employer may make payment in lieu of notice provided that nothing in this clause shall be construed as limiting the employer's right to summarily dismiss the employee for serious misconduct.*

> *20.(d) The following is a non-exhaustive list of conduct which typically constitute serious misconduct and may give rise to summary dismissal:*
>
> *(i) Being in possession, and/or under the influence of non-prescription drugs or the consumption of alcohol on company premises, in company vehicles, or when representing the company without company consent.*
>
> *(ii) Theft, unauthorised removal or possession of company or client's property.*
>
> *(iii) Deliberate acts causing damage to company or client's building or property.*
>
> *(iv) Damage as a result of negligence to company or client's vehicles, building or property.*
>
> *(v) Assaulting, threatening violence or sexual harassment to another staff member or customer on company premises or when representing the company.*
>
> *(vi) Using the company's vehicles or property without the company's authority.*
>
> *(vii) Persistent lateness or absence after having been specifically warned.*
>
> *(viii) Operating a vehicle in breach of the driving hours and logbook provisions.*
>
> *(ix) Smoking in any place where smoking is prohibited as a matter of safety policy.*
>
> *…*
>
> *28. **Amendments***
>
> *Any amendment or variation to this agreement shall be in writing and signed by both the employer and the employee.*
>
> *29. **Entire Agreement***
>
> *This agreement and the schedule specified later in this clause constitute the entire agreement between the employer and employee and supersede all previous representations, negotiations, commitments, and communications, either written or oral, between the parties.*

[10] This employment agreement made no mention of a salary review, nor the provision of a bonus.

[11] It is Mr Walker-Rogers' evidence that he was very happy with the work at the start and he had a cordial relationship with the Easts throughout his employment, until he was accused of various acts of misconduct. However, his evidence is that he had difficulty with Ms Gordon. Whilst evidence was given about the difficult relationship between him and Ms Gordon, it does not appear to be material to his claim for constructive dismissal, save to the extent that Ms Gordon played a key role in the disciplinary process.

[12] Mr Walker-Rogers says that, around December 2014, he asked Mr East when they could meet to discuss his salary review as per the 22 May document. He says

that Mr East replied that they would need independent advice, which they were going to obtain, and that they would then revert to him. Mr Walker-Rogers says he accepted that response at face value.

[13] Mr Walker-Rogers said that he asked Mr and Mrs East several times in early 2015 about his remuneration review and eventually obtained his own independent report from a company called Core Recruitment. He says that he handed this document to Mr and Mrs East on 23 March 2015. He says that Mr and Mrs East appeared not to be in any way upset about receiving the document.

[14] In early March 2015, a recently appointed non-executive director of the respondent company, Mr Paul Stoddart, Mrs East's brother, drafted an incentive bonus scheme for Mr Walker-Rogers which Mr and Mrs East gave to him for comment. This document proposed a baseline bonus pool of $15,000 per annum, with an opportunity to earn more if agreed targets were over-achieved. It set out three bonus components, with weighting and associated values. It is Mr Walker-Rogers' evidence that he said that he was happy with the methodology suggested in the bonus document, but that his salary first had to be reviewed before implementing the scheme.

[15] Mr Walker-Rogers went on holiday in April 2015, returning on Tuesday the 28th April. He says that, during his first week back, Mr and Mrs East completely avoided him and that the Operations Manager, Samuel McNaughton, seemed nervous and acting in an over-friendly way. Also, Mr Walker-Rogers says, he was dressed much more tidily than usual, which he found suspicious.

[16] Mr Walker-Rogers said that the next Board meeting had been rescheduled to take place on 5 May 2015 and that a number of issues were to be discussed at it, including the draft bonus scheme that Mr Stoddart had prepared. However, when he attended the meeting, he was immediately handed a sheet of paper by Mr Stoddart.

[17] The paper handed to Mr Walker-Rogers stated as follows:

> *Set out below is a summary of key concerns that I have identified that require further investigation.*
>
> - *Regular absence from work without authority or submission for leave.*

- *Behaving in a way that is belittling to staff who have felt bullied and undermined and repeated and ongoing occasions.*

- *Attitude towards both staff and Directors repeatedly belligerent and condescending.*

- *Failure to obey legitimate instructions from Directors.*

- *Frivolous and un authorised expenditure.*

- *Supplying services to staff and refusing payment without authorisation.*

- *Concealment of cash and associated transactions with unaccounted spending.*

- *Failure to discipline staff for breaches of company policy.*

- *Promoting the regular consumption, on site, of alcohol by staff.*

These matters are serious and I will investigate them fully and advise you in due course of my findings. I will schedule another meeting to discuss these matters further. At this meeting you may elect to bring a support person or adviser.

[18] The document was undated, bore no name at the bottom and had no contact details for Mr Stoddart, whom Mr Walker-Rogers had only met once before very briefly. Mr Walker-Rogers says that Mr Stoddart told him that he was suspended on full pay and that he needed to hand over any Board papers, his work phone and laptop and not come back to work until further notice. Mr Walker-Rogers says that, despite what was stated in a subsequent letter he received on 8 May 2015 from Mr Stoddart, there was no discussion with him about being suspended. He says the meeting lasted barely a minute, and that, when he tried to look at Mr and Mrs East, who were in the same room, they kept their eyes to the ground and said nothing.

[19] Mr Walker-Rogers says he was obliged to hand over his laptop, mobile telephone and board papers and to leave the premises immediately. He was also told that he was not allowed to contact any staff or clients of the respondent.

[20] It was the evidence of Ms Gordon that she had become aware of the allegations set out in the document prepared by Mr Stoddart when she had spoken casually to Mr McNaughton during Mr Walker-Rogers' absence on holiday. Mr McNaughton had first made mention of Mr Walker-Rogers' frequent absences away from the office, which had left Mr McNaughton struggling to answer the telephone at

times. The following day, Mr McNaughton told Ms Gordon about further concerns, including Mr Walker-Rogers' attitude towards the staff.

[21] After having been suspended, Mr Walker-Rogers instructed Mr Shingleton to raise a personal grievance on his behalf on 8 May 2015, which Mr Shingleton did that day by email. The personal grievance complained about the suspension, the manner of dealing with the allegations and the nature of the allegations themselves. Mr Shingleton also stated the following:

> *It is clear to David, that you have embarked on a badly advised process to fire David in order to avoid your contractual obligations to increase his salary and implement a bonus scheme to a reasonable and suitable level.*

[22] Mr Shingleton then set out a number of remedies he said Mr Walker-Rogers was seeking.

[23] Mr Walker-Rogers received a letter dated 8 May 2015 from Mr Stoddart on 10 May. In this letter, Mr Walker-Rogers was told that he was required to attend a disciplinary meeting on 12 May to discuss the allegations. This letter had crossed with the personal grievance letter. On 11 May 2015, Mr Macdonald wrote on behalf of the respondent to Mr Shingleton in reply to the personal grievance letter. In the letter, Mr Macdonald addressed various allegations contained in the personal grievance letter, and then stated that the company wished to meet with Mr Walker-Rogers, that notes were being collated and would be made available to Mr Walker-Rogers, and that, if Mr Walker-Rogers needed additional time to consider the notes or other documentation, a second meeting would be scheduled.

[24] However, Mr Shingleton and Mr Macdonald then agreed that Mr Walker-Rogers and the respondent company should attend mediation, and so the disciplinary investigation meeting was cancelled by agreement. The mediation was eventually set for 5 June 2015.

[25] On 14 May 2015 Mr Macdonald sent an email to Mr Shingleton attaching a six page document headed *David Walker-Rogers Suspension Investigation*. This document set out 6 categories of alleged misconduct:

a. details of various absences that Mr Walker-Rogers was accused of having without authority between July 2014 and April 2015;

b. quotations from unnamed staff which the document stated illustrated ways in which he was belittling to staff,

c. ways in which he was allegedly belligerent and condescending to staff and directors;

d. examples of alleged failings of Mr Walker-Rogers to obey legitimate instructions from the directors;

e. examples of alleged frivolous and unauthorised expenditure; and

f. alleged concealment of cash and associated transactions with unaccounted spending.

[26] Mr Macdonald sent a second email to Mr Shingleton on 16 May to which was attached a two page document entitled *Addition/Correction to Previously Provided Investigation Notes*. This document set out further details of the alleged expenditure.

[27] Mr Walker-Rogers says that he needed access to his laptop and diary in order to answer the many allegations contained in the document but did not worry about doing so at that stage because they were to attend mediation. He says that it was his expectation that he would be able to explain his position at the mediation to Mr and Mrs East, with whom he felt that he had a close working relationship.

[28] He also states that, during his suspension, one of the skip truck drivers, Mr Lance Harpur, came to see him unexpectedly at his home and told him that he and a few of the other drivers were worried about him and that Mr East had told the drivers on the day of his suspension that Mr Walker-Rogers had been suspended for serious misconduct, that he was not coming back, and that Mr McNaughton *was to be the boss now*. Having taken evidence from Mr Harpur[1], and another, former, employee of the respondent, Mr Owen Marsden, I believe that Mr East did not say that Mr Walker-Rogers would be not returning, but had said that, in Mr Walker-Rogers' absence, they were to take instruction from Mr McNaughton.

[29] The mediation was set for 5 June 2015 and, on 3 June, Ms Sarah Townsend, an Associate at Duncan Cotterill who was advising the respondent company in Mr Macdonald's temporary absence, sent two emails to Mr Shingleton with further

[1] Who remains an employee of the respondent

documents attached. These contained what Ms Townsend referred to as supporting documentation in relation to the allegations. Whilst there appears to be a number of documents attached to these emails, many of the pages attached had already been provided to Mr Walker-Rogers previously. Mr Walker-Rogers says that he did not understand how some of the documents related to the allegations, and, from my perusal of them, I would agree. Also, some words were blacked out inadvertently in Mr Walker-Rogers' version, which I understand he took to be redaction. This was a wholly reasonable conclusion to reach.

[30] It is Mr Walker-Rogers' evidence that he attended the mediation on 5 June, but found that Mr and Mrs East were not present. Although, of course, the Authority cannot know what occurred at that mediation as it is a confidential process, I infer from comments made in both Mr Walker-Rogers' brief of evidence and in evidence from the respondent, that the mediation either did not get underway or barely did so due to Mr Walker-Rogers refusing to take part in the absence of the Easts.

[31] Later that day, at 12.20pm, Ms Townsend emailed Mr Shingleton effectively saying that the respondent wanted to proceed with the disciplinary investigation and required a response to the allegations by no later than 5pm on Monday 8 June. She agreed that Mr Walker-Rogers would be afforded access to his cell phone, laptop and a folder in which certain financial reports and other key documents were kept. However, Ms Townsend stated that these items would only remain available for inspection at her offices during business hours until 5pm on Monday 8 June. Ms Townsend's email also attached an unsigned statement from Mr McNaughton making various allegations about Mr Walker-Rogers' conduct in the office.

[32] It is understood that, after Mr Shingleton protested at the short amount of time that was being given to Mr Walker-Rogers to respond to the allegations against him, he was given a further 24 hours, until 5pm on Tuesday 9 June 2015 to respond. The respondent, via Ms Townsend, refused to agree to Mr Walker-Rogers' request that he be given until 4pm on Friday 12 June 2015 to respond to the allegations.

[33] It was the evidence of Mr Stoddart that the company refused to allow Mr Walker-Rogers more time because the laptop contained the company's financial and customer contact information which the company needed in order to operate. He said that it was not contained anywhere else. I note that this explanation was not given by Ms Townsend in her emails to Mr Shingleton.

[34] Mr Walker-Rogers says in his brief of evidence that it was clear to him that he was going to be dismissed as he was not being given a proper and fair opportunity to defend himself against the multiple allegations. He states that he felt at a complete disadvantage and considered whether he should go along with the process, even if unprepared, in the hope that *a rushed letter might somehow persuade the Easts not to sack him* or, on the other hand, to resign and *avoid the stigma of a dismissal for serious misconduct*.

[35] It is Mr Walker-Rogers' evidence that he decided to resign because he formed the view that, even if he went along and got dismissed, challenged the dismissal and won in the Courts, there would be a stigma which would make it very difficult for him to find employment. In his oral evidence, Mr Walker–Rogers also made reference to the fact that the Easts appeared not to have any interest in hearing from him themselves.

[36] The resignation was communicated to Ms Townsend by Mr Shingleton by way of an email sent at 1.54pm on 5 June 2015. As the contents of the email are material to determining whether the resignation amounts to a constructive dismissal, I replicate it in full. It reads:

> *Dear Sarah,*
>
> *Your client's refusal to grant a further 4 days so that our client could have a reasonable opportunity to read and evaluate the information contained on his laptop, red folder and cell phone and then formulate a substantive response to what are numerous and at time opaque claims and documents, some only disclosed two days ago and today, leaves him with no other option but to conclude that your client breached the implied terms of the employment agreement to act fairly and reasonably in its treatment of him and not without reasonable cause conduct itself in a manner calculated to destroy the relationship of trust and confidence.*
>
> *This is the culmination of a prolonged breach of contract and flawed and deliberate process actively aided and abetted by* [names omitted]. *Our client has lost all faith in your clients.*
>
> *It was entirely foreseeable that our client would resign as a consequence.*
>
> *I am therefore instructed to give notice of my client's resignation.*
> *I further give notice that our client raises a personal grievance of constructive dismissal.*
>
> *I am instructed to outline further detail of my client's claims next week and how it is proposed these are resolved. These claims will*

> *relate to the failure to complete the salary review and bonus implementation and* [names omitted] *alleged aiding and abetting.*
>
> *Please ensure that the red folder, laptop and cellphone are not interfered with by your clients as they may contain information relevant to any future Employment Relations Authority investigation.*
>
> *Please advise how your clients wish to handle the handover of any other company property and notice period.*

The issues

[37] The Authority must determine the following issues:

(a) Whether Mr Walker-Rogers was unjustifiably constructively dismissed from his employment;

(b) Whether Mr Walker-Rogers was unjustifiably disadvantaged in his employment by being suspended;

(c) Whether, as requested by Mr Walker-Rogers, the Authority should *inquire into the going* [salary] *rate for his position and then backdate the increase to 7 July 2014*;

(d) Whether the Authority should order that Mr Walker-Rogers be paid a bonus in accordance with the scheme document given to him in March 2015; and

(e) Whether penalties should be imposed for breach of the employment agreement and breach of the duty of good faith.

Was Mr Walker-Rogers unjustifiably constructively dismissed?

[38] In order to determine whether Mr Walker-Rogers was unjustifiably constructively dismissed, it is necessary to examine the following sub-issues:

(a) Whether the allegations against Mr Walker-Rogers were a sham in order to avoid paying him a salary increase and bonus?

(b) Whether the respondent behaved unreasonably in not ensuring that Mr and Mrs East attended the mediation?

(c) Whether Mr Walker-Rogers should have been given more time in which to prepare his response?

(d) Whether the respondent company had predetermined the matter.

Were the allegations against Mr Walker-Rogers a sham in order to avoid paying him a salary increase and bonus?

[39] Having heard evidence from Mr McNaughton, and Ms Virginia Howell, the respondent's Accounts Manager, whose evidence appeared to be particularly credible, I am satisfied that the respondent had heard enough matters of concern from Mr McNaughton and some of the skip truck drivers to justify an investigation. In particular, I am satisfied there were credible allegations of frequent absences from the office and of swearing and aggressive or hostile behaviour or language used by Mr Walker-Rogers.

[40] Therefore, I reject the suggestion that the investigation was concocted because Mr Walker-Rogers had been pursuing a pay increase and bonus. Indeed, this would not be credible given that the respondent had asked Mr Stoddart to prepare a bonus scheme for Mr Walker-Rogers to consider just a few weeks previously.

Did the respondent behave unreasonably in not ensuring that Mr and Mrs East attended the mediation of 5 June 2015?

[41] It would appear that the parties had different understandings of the purpose of the mediation or, at least, what could realistically have been achieved at the mediation. Mr Walker-Rogers appears to have had the expectation that it would operate at a high level, and would afford him the opportunity to both explain his perspective of the allegations to Mr and Mrs East and to attain an understanding of their perspective.

[42] This was important to Mr Walker-Rogers as he had formed a close working relationship with the Easts. This fact was powerfully acknowledged by Ms Gordon in her oral evidence, in which she emphasised the trust that her parents had put in Mr Walker-Rogers, to the extent that they had, on at least one occasion, preferred his approach to business matters to hers, which had caused a bit of a rift between her and her parents. In addition, she said, the Easts were hoping to retire from active operation of the respondent company, and had envisaged Mr Walker-Rogers taking

over the reins of running the company. In addition, up to that point, Mr Walker-Rogers had never had any communication at all from the Easts about the allegations. He would therefore, naturally, be anxious to understand their perspective.

[43] The respondent company, however, appears to have had a different understanding of the purpose of the mediation. It appears that they had expected Mr Walker-Rogers to give detailed answers to the allegations. This is borne out by the drip-feeding to him of information relating to the allegations up to two days before the mediation took place, and by Ms Gordon saying in her oral evidence that *we would have been discussing with David* [at the mediation] *what we had put to him*. She also said that the mediation would have made clear what the next step would have been, which could have involved a disciplinary meeting or an agreed exit. This evidence of the purpose of the mediation was agreed with by both Mr East and Mrs East, although they were both hazy as to its precise purpose.

[44] Mr and Mrs East both said that they did not attend the mediation partly because they felt that Mr Stoddart and Ms Gordon had a better grasp of the detailed issues and had more appropriate experience. Neither of them had addressed their minds to what the next steps of the mediation would have been had Mr Walker-Rogers attended the mediation and answered the allegations. They both said that they had hoped that he would have been able to have answered the questions to their satisfaction and that things could have got back to normal. They did not think beyond that. Mr East also said that he believed that the mediation would have been more formal a process than a disciplinary investigation conducted at Mr Macdonald's offices.

[45] The other reason both Mr and Mrs East gave for not attending the mediation was that an earlier attempt had been made to get Mr Walker-Rogers to attend a meeting with them, but he had declined. Mrs East referred to that meeting as an *informal* meeting. It was referred to in a letter from Mr Macdonald to Mr Shingleton dated 11 May 2015, referred to above at paragraph 23. The letter does not suggest an informal meeting, but appears to be asking Mr Walker-Rogers to attend a meeting in which he was to address the allegations. However, it was overtaken by events when the company agreed to attend mediation on 5 June, so it was not clear that Mr Walker-Rogers had declined to attend.

[46] Given the understanding of the purpose of the mediation that Ms Gordon and Mr and Mrs East had, it is perhaps not surprising that Mr and Mrs East did not attend, as the mediation meeting was, in their minds, to go through the details of the allegations and information that Ms Gordon and Mrs East had been gathering together over the preceding month. As the Easts were not hands-on owners at that point, they felt they probably would have had little to add. I do not believe that their decision not to attend was unreasonable in all the circumstances.

[47] On the other hand, it is equally not surprising that Mr Walker-Rogers was bitterly disappointed to see that the Easts were not present at the mediation given that he expected to be able to talk to them and to clear things up with them.

[48] It is not possible to ascertain from where the lack of accord over the purpose of the mediation stems. However, I am satisfied that the Easts' absence was not as a result of bad faith on their behalf, or that of the respondent company generally.

Should Mr Walker-Rogers have been given more time in which to prepare his response?

[49] Mr Shingleton, on behalf of Mr Walker-Rogers, first formally requested access to his laptop, cell phone and a red folder (which contained financial and other information) by email at 11.52am on 5 June, after the failed mediation. Ms Townsend replied on behalf of the respondent company at 12.20 the same day agreeing that access to the items would be provided once they had been delivered to Duncan Cotterill's offices by the respondent. She said that they would remain available for inspection during business hours until 5pm on the following Monday, by which time the respondent required a response to the allegations. She also reiterated in the email that the concerns raised by her client about Mr Walker-Rogers' conduct were very serious. She also attached a statement by Mr McNaughton.

[50] Mr Shingleton replied to Ms Townsend's email saying that the request (for a response by Monday 8 June at 5pm) was unrealistic and requested that this deadline be extended until Friday 12 June.

[51] At 12.45 pm on 5 June Ms Townsend replied saying that the laptop, cell phone and red notebook (presumably, the folder requested by Mr Shingleton) were available for inspection, and that they would be available for inspection during normal business hours until 5pm on Tuesday 9 June. The time by which Mr Walker-Rogers' response

was required was also extended to that date and time. Ms Townsend stated that the request for an extension until Friday 12 June was refused, *given the length of time* [Mr Walker-Rogers] *was made aware of the allegations.*

[52] Mr Shingleton replied at 1.54 advising of Mr Walker-Rogers' resignation in the terms replicated at paragraph 36 above.

[53] Two explanations were given by the respondent's witnesses for the refusal to grant an extension to Friday 12 June. The first was given by Mr Stoddart. This was that the respondent only had the one laptop, which was needed for the operation of the business and which could not be released for an entire week. This was refuted by Mr Walker-Rogers and the respondent was forced to agree that Mr Stoddart's evidence was entirely wrong. It appears that Mr Stoddart simply made this evidence up on the spot.

[54] The second explanation is that the respondent believed that Mr Walker-Rogers had been given enough time to get the information together to prepare his response, and that he had never requested access to the laptop, cell phone and red folder until 5 June. I believe that this is the true reason for the refusal. Was this a reasonable stance to take?

[55] I conclude that it was not reasonable, for the following reasons.

a. Details of the allegations had been drip fed to Mr Walker-Rogers on six separate occasions over a period of time from 5 May (when the bare bones of the allegations were first made known) to 5 June;

b. The allegations eventually filled seven pages of A4 paper, purportedly supported by other documents, which contained a great deal of detailed allegations, referring to extracts from Mr Walker-Rogers' diary, quotations from unnamed staff members, allegations about failures to carry out instructions and a detailed breakdown of expenditure, amongst a great many other things.

c. One iteration of this seven page list contained blanked out sections. This was explained by Ms Gordon in her oral evidence as being due to an error in copying, but no such explanation was given to Mr Walker-

Rogers at the time; he reasonably understood that parts had been redacted.

d. Poor copies of various documents were also sent to Mr Walker-Rogers[2], which he said he had difficulty cross referring to the allegations.

e. Ms Gordon and Mrs East *worked tirelessly, up to 16 hours a day, without a break* and *carried out a forensic analysis*[3] to compile the detailed allegations. On the other hand, Mr Walker-Rogers had no access to the laptop, cell phone and written data from 5 May until half way through 5 June, and was expected to address the detailed allegations within two and a half days.

f. Notwithstanding the respondent's understanding of the mediation as an opportunity for Mr Walker-Rogers to answer the allegations, it was entirely reasonable for him not to have put in detailed work in preparation for the mediation as its typical purpose is to discuss matters at a high level, not to serve as a disciplinary investigation meeting.

g. Indeed, it is doubtful that any experienced mediator would allow a mediation to be used as a disciplinary investigation meeting, and it would be entirely unwise for an employee and an employer to agree to such a function being fulfilled by a mediation, given that a mediation is a confidential process, and no reference could be made to it in any subsequent Authority investigation, unless both parties agreed to waive confidentiality.

h. Given that Mr Walker-Rogers had been suspended for a month, it would not have prejudiced the respondent in any material way at all to have waited three more days to receive Mr Walker-Rogers' written response. Their refusal seems to have been based on petulance.

[56] Mr Macdonald submits that Mr Walker-Rogers had four separate opportunities to respond to the allegations against him, but never did. However, first, immediately after the mediation, Mr Walker-Rogers (through Mr Shingleton) asked for access to

[2] At least, the copies the Authority saw were of poor quality
[3] Mr Stoddart's oral evidence

his laptop, and so forth, for the very reason that he could provide a written response. Second, it was only immediately after the mediation that Mr Walker-Rogers was told in unequivocal terms that a written response was required by a set date. It was not reasonable to have expected Mr Walker-Rogers to have prepared a detailed reply beforehand, while the respondent was still sending him documents and the investigation was evidently still on-going.

[57] Having considered all these factors, I find that it was unreasonable for the respondent to have both expected Mr Walker-Rogers to have requested access to his laptop, cell phone and red folder prior to the mediation, and to have been able to have addressed the very detailed allegations within what would have been less than 20 hours (two and a half business days).

Had the respondent company predetermined the matter?

[58] I do not believe that there is sufficiently cogent evidence to enable me to reach this conclusion. Mr Walker-Rogers relies in part on what he was told the staff had been advised by Mr East when Mr Walker-Rogers was suspended; namely, that Mr Walker-Rogers would not be coming back and that Mr McNaughton was their boss now. However, evidence was taken from one of the drivers who was around at the time Mr Walker-Rogers was suspended, and his evidence was confused on this point. He conceded that Mr East may have meant that Mr McNaughton was to be their boss temporarily.

[59] All in all, I do not accept that there was a predetermined decision to dismiss Mr Walker-Rogers.

Discussion

[60] In considering whether Mr Walker-Rogers was unjustifiably constructively dismissed, it is first necessary to understand the fundamental legal principles relating to the law on constructive dismissal. These were enunciated in the Court of Appeal case of *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*[4], which set out three non-exhaustive categories of constructive dismissal:

(1) Where the employee is given a choice of resignation or dismissal;

[4] [1985] 2 NZLR 372 (CA) at 374-375

(2) Where the employer has followed a course of conduct with a deliberate and common purpose of coercing an employee to resign;

(3) Where a breach of duty by the employer leads a worker to resign.

[61] Mr Shingleton submits, I understand, that the third category applies in this case. For the record, I do not consider that either of the first two categories apply.

[62] With respect to the third of the three non-exhaustive categories of constructive dismissal referred to above, the Court of Appeal elaborated on that category in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc*[5]. The Court of Appeal stated at [172]:

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

[63] There are a number of duties of an employer that are potentially relevant in this field. One common duty, as affirmed by the Court of Appeal in *Auckland Electric Power Board*, is that *employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage a relationship of confidence and trust between employer and employee.*

[64] The Authority must also take into account the duty of good faith in s.4 of the Act, and the principles of s.103A of the Act. These are so well known, that I shall not replicate them here.

[65] In his oral evidence Mr Walker-Rogers explained that he resigned because, first, he had been *hugely disappointed* that Mr and Mrs East had not attended the mediation as he had been convinced that they could have *cleared up 90% of the allegations*. Second, he had believed that he could have answered the detailed allegations if he had been given sufficient time to do so, having been given access to

[5] [1994] 2 NZLR 415 (CA)

his laptop, cell phone and red folder. As he was not, he felt pressured and believed that he was likely to be dismissed. He felt that he was better off resigning than to be dismissed for serious misconduct.

[66] The issue is to examine whether there was a breach of duty by the respondent which was of sufficient seriousness to make it reasonably foreseeable that Mr Walker-Rogers would not be prepared to remain employed under the conditions prevailing.

[67] I believe that there were three breaches of duty by the respondent, which formed a material part of the *conditions prevailing*.

a. The first is the ambush to which Mr Walker-Rogers was subjected when he was confronted by the allegations for the first time by Mr Stoddart. Mr Walker-Rogers believed he was attending a board meeting. Instead, he was confronted with a list of allegations and immediately suspended. This was not the actions that a fair and reasonable employer could have done in all the circumstances.

b. The second was the failure of the respondent to abide by its contractual obligations imposed by the individual employment agreement when suspending Mr Walker-Rogers. I deal with this in greater detail below, when considering the unjustified disadvantage allegations.

c. Third, and most significantly, was the unreasonable failure to allow Mr Walker-Rogers access to the laptop, and other sources of information, for a further three days so that he could prepare his responses to the detailed allegations he was facing.

[68] The first and third of these failures amounted to a breach of the duty of good faith. The second failure was a breach of contract, and was also, arguably, a breach of the duty of good faith. I believe that, together, these failures amount to a repudiation of the employment agreement. I also believe that the third failure alone amounts to a repudiation, as detailed and serious allegations which could lead to his dismissal had been presented to Mr Walker-Rogers, but he was being allowed access to the information he needed to respond for an unreasonably short period of time.

[69] Were these breaches of sufficient seriousness to make it reasonably foreseeable that Mr Walker-Rogers would not be prepared to remain employed? I

believe that they were. I take into account particularly the fact that Mr Walker-Rogers had been told that the allegations were of serious concern to the respondent and could result in his dismissal. I also take into account the fact that Mr Walker-Rogers was expected to answer a seven page list of allegations, in respect of many of which he needed to access data from his laptop, etc., to respond to. Any reasonable employer could have seen that, in such circumstances, an extension of a further three days was not only reasonable to grant, but actually necessary in order to be fair.

[70] Being satisfied that the respondent's breaches of duty caused Mr Walker-Rogers to resign, and that they were of sufficient seriousness to make it reasonably foreseeable that he would do so, I conclude that Mr Walker-Rogers was constructively dismissed by the respondent. I also conclude that the dismissal was unjustified as no fair and reasonable employer could have acted in the way the respondent did, in all the circumstances.

[71] I find that the dismissal was both procedurally unjustified and substantively unjustified. Although I believe that some of the allegations made against Mr Walker-Rogers may have had some substance to them (and shall address this below when I consider contribution) I cannot be confident that Mr Walker-Rogers would have been fairly dismissed if he had been given a proper opportunity to respond to each allegation with the benefit of the data on his laptop, and so forth.

Was Mr Walker-Rogers unjustifiably disadvantaged in his employment by being suspended?

[72] I do not believe that the fact of suspension was unreasonable, as Mr McNaughton had made allegations against Mr Walker-Rogers which could be construed as allegations of bullying, at least against other staff members. Some of the allegations related to behaviours of aggressive conduct. Only three people worked in the office of the respondent, including Mr Walker-Rogers himself. Therefore, there was a significant chance that Mr Walker-Rogers would have worked out who had made the allegations, and a further chance that he would somehow have displayed his displeasure towards Mr McNaughton, given the nature of some of the allegations, and

his managerial status in relation to Mr McNaughton. Therefore, I accept that suspension was warranted for reasons of the welfare and safety of other staff.[6]

[73] However, the manner of the suspension was not fair and reasonable. Despite a letter being sent by Mr Stoddart to Mr Walker-Rogers dated 8 May 2015 which stated that there had been a discussion about his proposed suspension, I prefer the evidence of Mr Walker-Rogers that there was no such discussion. Therefore, the respondent breached the employment agreement by this failure as noted above.

[74] This failure amounted to a breach of contract, and a probable breach of the duty of good faith, and did create a disadvantage for Mr Walker-Rogers. I also accept that it created an unjustified disadvantage to Mr Walker-Rogers as no fair and reasonable employer could have failed to have followed its own employment agreement in its process of suspension.

[75] However, it would have been substantively reasonable for the respondent to have suspended Mr Walker-Rogers, even if he had been allowed to comment and protest first. In other words, a fair and reasonable employer could have suspended Mr Walker-Rogers in all the circumstances given the nature of the allegations and the environment in which Mr Walker-Rogers and the other office staff worked.

[76] Any unjustified disadvantage arising out of the failure to consult about suspension (as opposed to the paid suspension itself) was very short lived. Therefore, I am not satisfied that it is appropriate to award any remedies for the unjustified disadvantage caused by the suspension process.

Should the Authority *inquire into the going rate for Mr Walker-Rogers' position and then backdate the increase to 7 July 2014?*

[77] There are several problems with this claim. First, there is nowhere in the employment agreement that records an agreement to even review Mr Walker-Rogers' salary, let alone increase it.

[78] Second, the 22 May document upon which Mr Walker-Rogers relies is not signed or dated.

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[6] In reaching this conclusion I take no account of the entirely new evidence introduced by Mr Macdonald in his submissions at paragraph 65(h) which, as Mr Shingleton points out, was never put before the Authority by any witness and which is inflammatory and prejudicial.

[79] Third, even if the 22 May document were binding, it does not state that there would be any increase in salary. It merely states that *an annual review* would be conducted. It does not even refer to an annual review of salary.

[80] Fourth, the employment agreement, which is signed and dated, states that it replaces all previous employment contracts between the parties, and that it is the entire agreement between them.

[81] Fifth, even if there had been an oral agreement between the parties that Mr Walker-Rogers would receive a salary increase, the terms of such an agreement were not certain, contractually speaking, as no specific increase had been fixed upon;

[82] Sixth, the employment agreement required all variations to be in writing, and signed by both parties.

[83] Finally, as there is no evidence of an agreement to increase Mr Walker-Rogers' salary, the Authority does not have the jurisdiction to fix new terms and conditions of employment, as is made clear in s.161(2) of the Act. Mr Shingleton does not argue that any of the exceptions to that subsection apply in this case, and I do not believe that they do.

[84] Mr Shingleton submits that s.4(1) of the Contractual Remedies Act 1979 assists Mr Walker-Rogers. This section provides as follows:

> ***4 Statements during negotiations for a contract***
> *(1) If a contract, or any other document, contains a provision purporting to preclude a court from inquiring into or determining the question—*
> *(a) whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or*
> *(b) whether, if it was so made or given, it constituted a representation or a term of the contract; or*
> *(c) whether, if it was a representation, it was relied on—*
> *the court shall not, in any proceedings in relation to the contract, be precluded by that provision from inquiring into and determining any such question unless the court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case, including the subject matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time.*

[85] I understand that the provisions that Mr Shingleton refers to are the variation provision at clause 28 and the entire agreement provisions in clauses 1(b) and 29. He also submits that the respondent and Mr East waived these clauses (or, at least, the entire agreement clauses) and/or that the respondent is estopped from relying on such clauses due to their initial agreement. However, none of these submissions address the fundamental problem that there was no binding agreement reached between the parties as to the amount of any salary increase, and that the Authority has no jurisdiction in this matter to fix new terms and conditions. Arriving at a new salary for Mr Walker-Rogers would constitute the fixing of new terms and conditions.

[86] Accordingly, I decline to *inquire into the going rate for Mr Walker-Rogers' position and then backdate the increase to 7 July 2014*.

Should the Authority order that Mr Walker-Rogers be paid a bonus in accordance with the scheme document given to him in March 2015?

[87] Superficially this claim is stronger, in that the respondent did present Mr Walker-Rogers with a proposal document in March 2015. This was in the form of an offer, as it stated that it was *for your consideration and comment.* Mr Walker-Rogers' written evidence about this document is as follows, where he talks about a meeting with Mr and Mrs East on 23 March 2015. In regard to the proposed bonus scheme he states the following (some parts have been omitted as not directly relevant):

> *I then talked* [to Mr and Mrs East] *about the wording of the bonus scheme and I think that it was referenced to my current salary. I told them I was happy with the methodology but the salary had to be first reviewed before implementing the scheme.* ....[Mrs East] *then said that Paul Stoddart would cover all this at the next Board meeting which had been planned for early May 2015.*

[88] This evidence shows that an offer had been made to Mr Walker-Rogers proposing the terms of a bonus scheme, but that it was rejected by Mr Walker-Rogers by him making a counter offer which required the terms to be linked to a new, higher salary. That counter offer was to be discussed at the next Board meeting, but that discussion was overtaken by events; namely, the allegations against Mr Walker-Rogers and his suspension.

[89] Therefore, there was no binding agreement reached between the parties as to the terms of the bonus scheme that was proposed to be implemented.

[90] Accordingly, as I cannot fix terms and conditions of employment, I reject this claim.

Penalties

[91] Mr Walker-Rogers seeks penalties to be imposed against the first respondent for a breach of the duty of good faith. Section 4A of the Act states as follows;

> ***4A Penalty for certain breaches of duty of good faith***
> *A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—*
> *(a) the failure was deliberate, serious, and sustained; or*
> *(b) the failure was intended to undermine—*
> *(i) bargaining for an individual employment agreement or a collective agreement; or*
> *(ii) an individual employment agreement or a collective agreement; or*
> *(iii) an employment relationship; or*
> *(c) the failure was a breach of section 59B or section 59C.*

[92] I do not accept that there was any deliberate breach of good faith by the respondent. I believe that their actions were borne out of ignorance of the law and an unwarranted haste. Accordingly, I decline to impose a penalty upon the first respondent under s.4A.

[93] There was no breach of the employment agreement for *failing to conduct the review* as there was no such obligation. I reject this claim.

[94] There was a breach of the clause in the employment agreement relating to suspension, but a penalty in relation to a breach of that clause is not sought.

Remedies

[95] Sub-section 123(1)(a) to (c) of the Act provides as follows:

> ***123 Remedies***
> *(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*
> *(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:*
> *(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*

> *(c) the payment to the employee of compensation by the employee's employer, including compensation for—*
> *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
> *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:*

[96] Section 128 of the Act states as follows:

> ***128 Reimbursement***
> *(1) This section applies where the Authority or the court determines, in respect of any employee,—*
> *(a) that the employee has a personal grievance; and*
> *(b) that the employee has lost remuneration as a result of the personal grievance.*
> *(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*
> *(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[97] As a result of his unjustified dismissal Mr Walker-Rogers claims that he suffered a loss of earnings in the region of $52,598, calculated up to the day before the Authority's investigation meeting. It is understood that this takes into account the income he earned after his resignation as a car groomer for Avis, earning $15 an hour.

[98] Whilst the dismissal was substantively unjustified, so that it is appropriate to award loss of earnings, I am not satisfied that there is sufficient evidence that Mr Walker-Rogers was more likely than not to have stayed in employment beyond a further three months. I take into account that there may have been substance to the allegations relating to aggressive behaviour, and that even with a final written warning, Mr Walker-Rogers may have failed to have controlled that behaviour. The just approach, therefore, is to assume that he would have been more likely than not to have been employed for a further three months, but that it becomes less likely that he would have been employed beyond the expiry of that period. I therefore award three months' lost remuneration. This amounts to the gross sum of $26,250, based on an annual salary of $105,000.

[99] Turning to compensation for Mr Walker-Rogers' humiliation, loss of dignity, and injury to feelings, he seeks an award of $50,000. The Authority heard evidence

from his partner, and his GP, Dr Osselton, as to the effects of his constructive dismissal. Dr Osselton referred to conducting a Kessler 10 mental health questionnaire, which involves a self-scored assessment, involving answering 10 questions. A normal score is less than 20, and the maximum score is 50. Mr Walker-Rogers scored 40, indicting severe depression and anxiety.

[100] Dr Osselton said that he believed that Mr Walker-Rogers had not been exaggerating his symptoms, which had coincided with his overall clinical impressions. He believed that Mr Walker-Rogers had been significantly depressed and *quite to very* anxious. Dr Osselton said that there was no record of Mr Walker-Rogers having attended the surgery for depression or anxiety prior to that time, and he had been a patient since 2003. Mr Walker-Rogers was prescribed antidepressant medication, which he was still on at the time of the Authority's investigation meeting.

[101] Although Mr Walker-Rogers had experienced a bereavement following the loss of a close friend in February 2015, his partner believed that he was getting over that by the time he resigned.

[102] I am satisfied that Mr Walker-Rogers suffered a significant effect as a result of the way his employment ended. This effect arises out of his personal grievance and should be compensated for. I do not agree that $50,000 is an appropriate sum, as it falls outside the range of awards normally made by both the Authority and the Employment Court by a considerable margin. However, given that Mr Walker-Rogers did suffer significant adverse effects, I believe that an award of $20,000 is appropriate.

[103] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act).

[104] I believe on the balance of probabilities that there was some substance to the allegations of bullying conduct by Mr Walker-Rogers. This is because there was a number of witnesses, including Ms Howell, who was a particularly credible witness, who referred to conduct by him that could arguably amount to bullying, or at least

unprofessional behaviour. I make no findings with respect to the other allegations, as I heard insufficient evidence about them. Therefore, I believe that it is appropriate to reduce the awards I have made. However, as these matters were not properly explored with Mr Walker-Rogers, who did not have a fair opportunity to respond to the allegations prior to his constructive dismissal, I restrict the reduction to 10%.

Orders

[105] I order the respondent to pay to Mr Walker-Rogers the following:

a. Lost wages in the gross sum of $23,625; and

b. Compensation pursuant to s.123(1)(c)(i) of the Act in the sum of $18,000.

Costs

[106] I reserve costs. I will hold a case management telephone conference call in due course to deal with the applications against the second and third respondents. How costs will be dealt with will depend in part on how those further applications are disposed of.

David Appleton
Member of the Employment Relations Authority