

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 23  
5598926

BETWEEN                      MARSHA WHAIAPU  
Applicant

AND                              P & W PAINTERS LIMITED  
Respondent

Member of Authority:        Christine Hickey

Representatives:             Linda Ryder and Georgia Milne, counsel for the  
applicant  
Gwen Drewitt, counsel for the respondent

Investigation meeting:      20 October 2016 with submissions 2 November 2016 by  
teleconference

Determination:                8 February 2017

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**DETERMINATION OF THE AUTHORITY**

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- A. P & W Painters Limited unjustifiably constructively dismissed Marsha Whaiapu.**
- B. P & W Painters Limited must pay Marsha Whaiapu:**
- (i) \$9,360 gross in lost wages; and**
  - (ii) Interest at 5% on lost wages from 30 May 2016 until the date of payment in full; and**
  - (iii) Compensation of \$12,000.**
- C. I have reserved the question of legal costs and set a timetable for submissions.**

[1] This reserved determination was due to be provided no later than 2 February 2017, in compliance with s 174C(3) of the Employment Relations Act 2000 (the Act). The Chief of the Authority has decided exceptional circumstances exist, and in line with s 174C(4) of the Act, has approved it being issued later than 2 February 2017.

### **Employment relationship problem**

[2] P & W Painters Limited (PWP) employed Marsha Whaiapu as a brush hand from January 2015 until she resigned on 12 October 2015. Ms Whaiapu says PWP constructively dismissed her. By way of remedy, Ms Whaiapu seeks compensation for humiliation, loss of dignity and injury to her feelings, lost wages and other lost benefits, as well as interest on lost wages and costs.

[3] PWP denies Ms Whaiapu's claims. It says she resigned of her own accord.

[4] The witnesses provided written statements of evidence before the investigation meeting. At the investigation meeting, the witnesses affirmed or swore that their written evidence was correct. They also answered questions from me and the parties' representatives, under oath or affirmation. The representatives have also submitted closing submissions on the facts and law.

[5] I have considered those submissions and the evidence, including relevant documents provided by the parties.

### **Issues**

[6] The issues for determination are whether:

- PWP's actions or inactions seriously breached one or more of its contractual obligations to Ms Whaiapu making it reasonably foreseeable that she would resign as a result;
- Ms Whaiapu resigned as a result of PWP's breaches of duty;
- Ms Whaiapu resigned in the heat of the moment and whether PWP had a duty to explore whether she would stay on as an employee;
- Ms Whaiapu is entitled to any remedies.

**Background facts**

[7] Warren Pitches, PWP's director and manager, lives in Oamaru but a significant amount of PWP's work is in Canterbury. He is usually in Christchurch once a week or at least every fortnight. In his absence, Stephen Hill was Mr Pitches' "2IC", and site supervisor at any site he was working on. Mr Hill lived in Oamaru too, but he was in Christchurch for a number of days most weeks.

[8] Work took place at multiple sites and Mr Pitches and Mr Hill were not always present at a work site. In those cases, trade-qualified painters, such as Peter Powell, were effectively in charge of the quality and standard of work produced on the site, including by brush hands and labourers. Often that meant Mr Powell taught and supervised techniques, although he did not have the official title of supervisor or foreman.

[9] Mr Hill was not in charge of employee issues, such as hiring and firing or disciplinary matters, even in Mr Pitches' absence. Mr Pitches retained those duties.

[10] Mr Powell began working for PWP in about mid-2014. He lived in a flat on-site at PWP's Christchurch yard.

[11] Ms Whaiapu's partner, Paul Morris, began working for PWP a couple of months after Mr Powell, prior to Christmas 2014. Ms Whaiapu was unemployed at the time. Ms Whaiapu, Mr Morris and Mr Powell spent Christmas 2014 together at Mr Pitches' bach south of Oamaru. At that stage, they got on well.

[12] In about January 2015 Mr Pitches offered Ms Whaiapu some casual work as a brush hand/labourer. Ms Whaiapu accepted the work. In April 2014, Ms Whaiapu signed an individual employment agreement as full-time employee.

[13] In late 2014 or early 2015, she and Mr Morris moved into a caravan at PWP's Christchurch site. They did not pay rent to Mr Pitches or PWP, but to another person.

[14] Ms Whaiapu, Mr Morris and Mr Powell socialised together from time to time, mainly in early 2015.

[15] Mr Pitches told Ms Whaiapu to report any work-related concerns she had to him. I am satisfied that was the way he managed all PWP's employees at the relevant time.

[16] Ms Whaiapu's evidence is that from at least March 2015 (the first Dux Central incident) Mr Powell's behaviour towards her was inappropriately rude and abusive, or bullying.

[17] Ms Whaiapu cites a number of complaints and incidents involving Mr Powell's treatment of her and Mr Morris, most of which she reported to Mr Pitches. She says Mr Pitches did not take her complaints seriously and did not ensure Mr Powell treated her more appropriately. She says these particular incidents culminated in Mr Powell's behaviour on 12 October 2015 and caused her to resign:

- The first Dux Central incident;
- Two incidents of Mr Powell driving without a licence, including one while he was still affected by alcohol from the night before;
- Mr Powell telling her that Mr Pitches was angry with her because he was sick of Mr Powell ringing him to complain about her. He also told her Mr Pitches was thinking of firing Mr Morris because of lack of work. When Ms Whaiapu asked Mr Pitches about those two matters, he denied telling Mr Powell either thing.<sup>1</sup>
- Mr Powell telling Ms Whaiapu that Mr Pitches had accepted their resignation, when what they had done was give notice to their landlord, but not resigned from their employment.
- Mr Powell accused her of telling lies about him to Mr Pitches, but then told her the accusation was a joke. She told Mr Powell his lies were "affecting her mental stability and compromising her livelihood".
- The second Dux Central incident – in which Mr Pitches was the antagonist;
- Mr Powell's lie to her on 12 October 2015 at the Chateau site.

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<sup>1</sup> During the investigation meeting, Mr Powell and Mr Pitches' evidence was that they decided to keep Ms Whaiapu and Mr Morris on different work sites as they used to bicker. They also confirmed that Mr Powell had asked Mr Pitches to fire Mr Morris, but Mr Pitches told Mr Powell he was more likely to get rid of Mr Powell.

## Credibility and reliability

[18] There was a conflict of evidence about many of the key facts. Therefore, I have had to assess the credibility and reliability of the witnesses.

### *The applicant's witnesses*

[19] Ms Whaiapu had two witnesses, in addition to her evidence. They were her partner, Paul Morris, also a former employee who has his own employment relationship problem with PWP, and Josh Kereama, a former employee who the applicant summoned to give evidence.

[20] I have borne in mind that Mr Morris had his own reasons for giving evidence that was supportive of his partner and not supportive of PWP. However, when he was questioned about inconsistencies in his written evidence and other evidence that had come out at the investigation meeting, he made a reasonable concession that he had been late to work at the Awly site on 12 October 2015, but just not as late as Mr Powell is alleged to have said he was.

[21] Mr Kereama struck me as the most objective witness. He has worked for PWP more than once. He gave credit where it was due to Mr Pitches and agreed that Mr Pitches had assisted him greatly by employing him a second time, had been helpful when he had to work away from home, and in making a car available to him to help him get to and from work. However, Mr Kereama pointed out that he could not use the car as he only had his learner's licence.

[22] Mr Kereama gave evidence that PWP is "horrible" work environment and that:

Pete<sup>2</sup> was abusive to everyone. He was not a very nice person.  
 I thought that Pete's behaviour to Marsha was inappropriate.  
 Pete swore at me and abused me as well as Marsha.  
 Pete ... was also a racist.  
 Pete often yelled and swore at Marsha. He always took the piss out of Marsha.  
 I often heard employees being incredibly racist towards Marsha, both to her face and behind her back.  
 I once heard Pete call her 'black bitch'.  
 I also heard [another employee] call her 'nigger'.<sup>3</sup>

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<sup>2</sup> Peter Powell.

<sup>3</sup> Mr Kereama's written evidence.

[23] In addition, Mr Kereama said that Mr Powell heard racist comments from other employees and when Mr Kereama expressed concern about the racist comments Mr Powell told him that was just the way those employees were “so accept it”.

[24] Mr Kereama was questioned by counsel for PWP about why, if it was such a negative work atmosphere, he returned to work a second time. Mr Kereama was candid about his desperation and need for a job and said that overrode his view of PWP as a negative work environment. In addition, he says, and I accept, that before engaging him a second time Mr Pitches told him that Ms Whaiapu had raised a personal grievance and asked him if he was going to be a witness for her. Mr Kereama said he was not and Mr Pitches said, “Good, otherwise I’d have a big issue.” Mr Kereama was reluctant to appear as a witness, and was summoned.

*The respondent’s witnesses*

[25] The case for the employer was presented through three witnesses, Mr Pitches, Mr Powell and Mr Hill. Mr Hill’s evidence was of limited use as he had not been witness to a number of alleged incidents/exchanges and had not been the one Ms Whaiapu took her concerns to. Mr Hill no longer works for PWP, but left on good terms. He gave evidence that he had not been made aware by Ms Whaiapu of her concerns about the first Dux Central incident. He had been the on-site supervisor. That did not add anything extra to Ms Whaiapu and Mr Pitches’ evidence as they both agree the incident was dealt with between them.

[26] Generally, I have placed little weight on the issue of witness demeanour because it is not a reliable indicator of credibility.

[27] However, some of Mr Powell’s behaviour and comments at the investigation meeting revealed some aspects of his character, which make it more likely that certain things he is alleged to have said are correct.

[28] Mr Powell likes to say things that are amusing to him and to see people react to them, even if it affects them negatively. He characterises what he says as banter and humour. He admitted being behind gossip and rumours about Mr Kereama’s relationship with his uncle and with his cousin in Oamaru. The rumours were malicious and had negative consequences, particularly for Mr Kereama’s cousin.

[29] Mr Powell also agreed that he used to call Ms Whaiapu ‘Rabbit’. When he was asked why, he said it was “because she’s got 11 children”, and then added as an after-thought that it was because she worked quickly. He volunteered that he called Mr Kereama ‘Suitcase’ because he had to carry him everywhere.

[30] During the investigation meeting, I also heard evidence about racist insults and other name-calling directed at Ms Whaiapu, and at other non-white staff. Mr Powell was alleged to have made racist comments, as were some other employees.

[31] There was no allegation of racist comments in the statement of problem or the resignation text, but they were mentioned in the written evidence prepared by Ms Whaiapu and Mr Kereama.

[32] Mr Powell denied that he called Ms Whaiapu “black bitch”<sup>4</sup>. He did not comment on the accusation that he also called her “baby killer”.<sup>5</sup> However, I find it proved that he called her both names.

[33] A striking feature of Mr Pitches and Mr Powell’s evidence is that they had the same approach to Ms Whaiapu’s complaints and concerns during her employment. That is, they did not take her complaints seriously. Mr Pitches called many of Ms Whaiapu’s concerns “petty”.

[34] There was a serious conflict between Mr Powell and Mr Pitches’ evidence in relation to the question of how long Mr Pitches knew that Mr Powell did not have a valid driving licence. Mr Pitches denies that he knew Mr Powell did not have a valid licence. He also says he had always intended Mr Powell to drive, but would not have required that if he knew Mr Powell was not legally able to do so.

[35] Mr Powell’s written evidence and his oral evidence about this issue were greatly at odds. His written evidence says, “Warren did not know that I had let my licence lapse until he found out around [June/July 2015]”. In his oral evidence, he variously said, “I probably mentioned it in a drunken state” around June/July, and that Mr Pitches had known since he was first employed.

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<sup>4</sup> Mr Kereama’s evidence was that during the second driving incident when Ms Whaiapu and others got out of the van and refused to ride with Mr Powell, Mr Powell called Ms Whaiapu “black bitch”.

<sup>5</sup> In 2004, Ms Whaiapu was found guilty of manslaughter in tragic circumstances and, was sentenced to a two-year prison sentence.

[36] Mr Pitches' evidence was inconsistent in some respects. In particular, Mr Pitches strongly denied that there had ever been any accusations of racist language and/or name-calling made to him. However, his diary entries showed that in August 2015 he had spoken to a staff member about racist language after three complaints. He was unable to give any evidence of what the outcome had been or whether that staff member had faced any disciplinary action. He was not able to recall who made the complaints. However, I am satisfied it was not Ms Whaiapu.

### **What is constructive dismissal?**

[37] The very nature of a claim for constructive dismissal is dependent on the events that preceded the employee leaving their employment; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty or other actions by the employer.<sup>6</sup>

[38] One type of constructive dismissal scenario occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence.<sup>7</sup> If an employer acts that way it is not necessary to show that the employer intended to repudiate the contract.<sup>8</sup>

[39] To found a claim for constructive dismissal the breach or breaches of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable.<sup>9</sup>

[40] Repudiatory conduct by the employer may involve a series of events over a period such that no single event may be sufficiently serious to enable the employee to treat the contract as repudiated but the cumulative effect of all the events may be.<sup>10</sup>

[41] In deciding whether an employer's conduct amounted to a breach of the implied term of trust and confidence in *Wellington etc. Clerical Workers Union IUOW v Greenwich Justice Williamson* said:

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing

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<sup>6</sup> *Commissioner of Police v Hawkins* [2009] NZCA 209

<sup>7</sup> *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372

<sup>8</sup> *Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407

<sup>9</sup> *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

<sup>10</sup> *Lewis v World Motor Services Limited* [1986] ICR 157 (CA)

some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.

[42] It is possible that the history of the relationship between Ms Whaiapu and Mr Powell could form part of the basis of a personal grievance of constructive dismissal. In *Ramkissoon v Commissioner of New Zealand Police* Chief Judge Colgan wrote:

...there are many cases in which a dismissal takes place after a very long period of disputation, unsatisfactory relations, and the like which, to the extent that they are relevant, must all be taken into account in determining the question of justification for an actual or constructive dismissal<sup>11</sup>.

[43] The breach or breaches must actually cause the employee to resign. All the circumstances surrounding the resignation must be examined.

[44] I must also ask whether the breach or breaches were so serious as to make it reasonably foreseeable that the employee would not be prepared to work under the conditions prevailing.<sup>12</sup>

### **The incidents**

[45] Ms Whaiapu claims that she was bullied by Mr Powell.

[46] PWP says there was no bullying and the first time Mr Pitches heard any allegation about bullying was when the first statement of problem was lodged in May 2016. Mr Pitches said that an employee would have to describe what they were complaining of as bullying for him to consider that bullying might be happening.

[47] Ms Whaiapu says Mr Powell frequently told lies to Mr Pitches about her and Mr Morris. She says she told Mr Pitches that Mr Powell was telling lies about her. She says she complained to Mr Pitches a number of times and was always told he would sort things out but that nothing changed in the way Mr Powell treated her.

*What is bullying?*

[48] There is no statutory definition of workplace bullying. There is a useful definition in “Best practice guidelines – preventing and responding to workplace bullying”:

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<sup>11</sup> [2013] NZEmpC 147

<sup>12</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc.* [1994] 2 NZLR 415 (CA) at 419.

repeated and unreasonable behaviour directed towards a worker ... that creates a risk to health and safety.

Repeated behaviour is persistent and can involve a range of actions over time.

Unreasonable behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person.<sup>13</sup>

[49] There is no requirement in the Guidelines, or in case law, that an employee must label that kind of repeated and unreasonable behaviour “bullying” before an employer should take action to investigate allegations and protect an employee from bullying.

[50] In addition, employers have a duty to their employees to provide a safe working environment under the Health and Safety at Work Act 2015.

### **The particular incidents relied on**

#### *The first Dux Central incident*

[51] The facts are disputed. However, I find that Ms Whaiapu was sanding in a way that Mr Powell disapproved of. He shouted at her, swore at her and went to show her the correct way to do the task. Ms Whaiapu was upset by this, left the site and sat in the work van from where she rang Mr Pitches. She told him that Mr Powell had sworn and yelled at her.

[52] Mr Powell agrees that he probably said “what the f\*\*k are you doing”, but says he did not intend to bully her. Ms Whaiapu also says that Mr Powell threatened to get her fired. Mr Powell denies that.

[53] Mr Powell’s written statement says that what Ms Whaiapu was doing was “scratching the aluminium doorframe around the door”. At the investigation meeting, he said she had not scratched the doorframe, but could have if she kept sanding it the way she was. That is another inconsistency in Mr Powell’s evidence. Mr Pitches did not report Mr Powell telling him that Ms Whaiapu had scratched an aluminium doorframe.

[54] Mr Pitches told Ms Whaiapu to take some time out to cool down and to have a coffee break. Ms Whaiapu also says Mr Pitches told her to sort it out with Mr Powell herself.

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<sup>13</sup> From page 6, February 2014, a joint Worksafe and MBIE publication.

[55] At some point, Mr Pitches rang Mr Powell to talk about Ms Whaiapu's allegation. Mr Powell told him that Ms Whaiapu was in a "shit mood" and that "he'd had a go at her for using the wrong sander on an old door ... Marsha had, apparently, lost her cool at being told she'd done wrong."

[56] Mr Pitches says he rang Ms Whaiapu back the next day and asked if everything was OK, and she replied "all good Wazza".

[57] Ms Whaiapu denies Mr Pitches rang her the next day, and denies telling him that things were 'all good'. She says that when Mr Pitches asked her a week later how things were going between her and Mr Powell she told him they were not getting along.

[58] This incident forms part of the background to the later events. It shows that Mr Pitches was aware early in Ms Whaiapu's employment that Mr Powell "had a go at" her. To "have a go at" someone means to criticise them angrily. Mr Pitches did not reprimand Mr Powell for acting angrily towards Ms Whaiapu.

[59] However, I do not consider the incident itself forms a part of the matrix of events that could give rise to constructive dismissal for the reason that within one month of it occurring Ms Whaiapu entered into an ongoing employment relationship. I consider if that incident did amount to a breach of contract then Ms Whaiapu affirmed the contract in signing her employment agreement.

*When did Mr Powell and Ms Whaiapu stop being friends, or friendly?*

[60] The parties agree that at Queen's Birthday Weekend 2015 a trailer was stolen from PWP's yard. After this, the relatively friendly social relationship between Ms Whaiapu, Mr Morris and Mr Powell broke down. In its statement in reply, PWP relied on this as the reason Ms Whaiapu resigned. However, no evidence was raised about why that would be the case. There was no evidence about who was responsible for the theft. PWP did not take any disciplinary action and no criminal charges were laid against Ms Whaiapu or Mr Morris.

[61] The relationship between the three employees was not overtly hostile but certainly cooled after Queens Birthday Weekend. Despite that, Ms Whaiapu invited Mr Powell to her 40<sup>th</sup> birthday, which was the weekend before she resigned.

*The driving incident/s*

[62] At some stage around June/July 2015 Mr Powell told Ms Whaiapu and Mr Morris that he did not have a valid driver's licence, possibly when he was drunk. The van was parked at the yard overnight. Mr Powell regularly drove the work van with other employees in it to and from work sites.

[63] I am satisfied that there were two separate incidents in which Mr Powell was driving the work van on the way to or from work sites and was challenged by Ms Whaiapu and/or other employees.

[64] The first incident Ms Whaiapu complains of was when she said Mr Powell crossed the centre line while driving and she asked him to slow down. She says Mr Powell told her "I'm the f\*\*\*ing driver, if you have a problem with it get out." Ms Whaiapu says she complained to Mr Pitches that Mr Powell was driving without a licence and had driven erratically.

[65] The second incident occurred the following day, 7 July 2015, which was Mr Kereama's second day. Another employee asked Mr Powell whether he should be driving because he considered Mr Powell was:

... still under the influence and did not have a licence peter told (the other employee) to f\*ck off and drove anyway as we were pulling out of the yard peter pulled over and started verbally abusing you (Marsha) and accused her of telling warren pitches stories, and you then told him he shouldn't be driving because he reeked of alcohol and feared for your safety you Paul and (the other employee) then exited the van while peter continued to verbally abuse you and made your own way to the site<sup>14</sup>

[66] Mr Kereama remained in the van while the other employees got out and went to the site separately. Ms Whaiapu rang Mr Pitches to say she did not feel comfortable being driven by Mr Powell, who she understood to have been disqualified from driving. She told him that she, Mr Morris and the other employee would not travel in the work van if Mr Powell were driving.

[67] I accept that Mr Pitches rang Mr Powell and told him he should not drive the van without a licence. Mr Pitches agrees that the issue of whether Mr Powell was fit

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<sup>14</sup> Text from Mr Kereama to Ms Whaiapu after her employment ended but before he was summoned to give evidence.

to drive because staff could smell alcohol on his breath was raised with him. He says he did not address this with Mr Powell, but addressed the licence issue.

[68] At the investigation meeting, Mr Powell denied drinking in the mornings and said he only ever drank at night.

[69] Mr Pitches came up from Oamaru to the Synlait site the following day, 8 July 2015, and talked to Mr Powell. His written evidence says that he spoke to everyone who was at the site about who was to drive the van. He said that he told them Mr Powell was not to drive the van. However, he did not take the keys from Mr Powell.

[70] On 13 July 2015, Mr Pitches wrote a letter to Mr Powell asking him not to drive company vehicles until he got a current licence. He asked him to get a current licence as soon as possible.

[71] Mr Powell says that he ignored the letter and probably threw it away.

[72] Mr Pitches' oral evidence at the investigation meeting was that the keys were kept at the house Mr Powell lived in. Mr Pitches was aware that Mr Powell drove the work van after the verbal direction and after receiving the letter. There were no disciplinary consequences for Mr Powell for driving against Mr Pitches' instructions.

[73] When Mr Pitches was asked why he did not deal with the fact that Mr Powell was ignoring his instructions he said that he was not Mr Powell's "minder" and that he had done his best.

*Mr Powell's lies and the resignation remark*

[74] Ms Whaiapu alleges that Mr Powell deliberately told Ms Whaiapu that Mr Pitches had accepted her and Mr Morris' resignation. She asks me to conclude he did so maliciously.

[75] However, I am satisfied that it was a misunderstanding and that Mr Powell was referring to the fact that Ms Whaiapu and Mr Morris had given notice to the landlord of the caravan.

[76] The 'resignation remark', while contributing to Ms Whaiapu's sense of disquiet in working with Mr Powell, is not one for which PWP bears any responsibility and is likely to have been simply a poor choice of words by Mr Powell.

[77] I accept that Mr Pitches was somewhat annoyed that Mr Powell, not Ms Whaiapu or Mr Morris, told him that. Mr Pitches had helped Ms Whaiapu and Mr Morris out by paying some rent arrears to their landlord and he believed he was due the courtesy of knowing where they were going to move to.

[78] There are two specific instances Ms Whaiapu refers to which she characterises as examples of the lies Mr Powell told about and to her. Ms Whaiapu has not been able to give dates for these instances. The first instance was Mr Powell telling her Mr Pitches was thinking of terminating Mr Morris' employment, and that Mr Pitches was angry with her because Mr Powell rang him a number of times to complain about Ms Whaiapu.

[79] Mr Powell denies saying either of those things. Ms Whaiapu rang Mr Pitches to check with him and he denied having said either thing to Mr Powell. However, Mr Pitches and Mr Powell agree that Mr Powell asked Mr Pitches to fire Mr Morris.

[80] I find it proved that Mr Powell did say those things to Ms Whaiapu, and that Ms Whaiapu rang Mr Pitches to tell him what Mr Powell had said. Therefore, Mr Pitches knew that Ms Whaiapu considered that Mr Powell told her lies.

[81] The second instance was when Mr Powell accused her of telling lies to Mr Pitches about him. When she started to get upset, he told her his accusation had been a joke. I accept that Ms Whaiapu told Mr Powell his lies were upsetting her mental stability and compromising her job, or more likely, some words to that effect. However, I do not find it proved that Ms Whaiapu told Mr Pitches about this incident.

*Ms Whaiapu's requests to be moved from working with Mr Powell*

[82] Ms Whaiapu says she repeatedly asked to be moved from working with Mr Powell. Mr Pitches says she never asked for that but if she had, he would have told her he would not move her to another team because she needed to learn skills Mr Powell could teach her, such as gib-stopping.

[83] Ms Whaiapu says he never told her that he would not move her and, as far as she knew, he just ignored her requests.

[84] I find that Ms Whaiapu did ask Mr Pitches if she could stop working with Mr Powell. However, I cannot be sure how many times she made the request.

*The second Dux Central incident*

[85] The date of this incident is likely to have been 5 September 2015. There had been a paint malfunction. All staff were required to work that Saturday to urgently strip and repaint the area in time for the bar to open.

[86] Mr Pitches had taken staff out for dinner and drinks the evening before. Ms Whaiapu and Mr Morris were not invited, although I do not find that to have been deliberate on Mr Pitches' part. Some staff were hungover.

[87] At the beginning of the workday, Mr Pitches held an on-site meeting. Some staff, including Ms Whaiapu, had forgotten to bring their duster brushes. There may have been other staff who had forgotten one or other items of personal protective equipment. I find that Mr Pitches lost his cool and swore, saying something like "I am running a f\*\*king circus" and "I am employing clowns". He took off his hard hat and threw it on the ground. It bounced and hit Ms Whaiapu on the shin.

[88] Mr Morris, Mr Powell and Mr Pitches say his words and actions were directed at everyone, not at Ms Whaiapu. Ms Whaiapu was upset by Mr Pitches' behaviour.

*The Chateau incident – 12 October 2015*

[89] On 12 October 2015, Ms Whaiapu was due to work at the Chateau on the Park with Mr Powell and Mr Kereama.

[90] Mr Morris was due to start work at the Awly site at 7.00 am. However, Ms Whaiapu and Mr Morris' car would not start. They rang Mr Powell and asked him for a ride to work. He went and picked them up and drove to the Chateau where he and Ms Whaiapu got out at about 7.30 am. Mr Morris took the van to the Awly site, leaving the Chateau at about 7.35 am and arriving at about 7.50 am.

[91] At some point, either Mr Powell or another employee at the Awly site, who had to wait for Mr Morris to begin working that morning, told Mr Pitches that Mr Morris had been late to work.<sup>15</sup> Mr Morris and Mr Pitches had a conversation during which Mr Morris said he would work later to make up the time. However, there was a disagreement or a misunderstanding about how late Mr Morris had been to work.

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<sup>15</sup> In his written evidence, Mr Morris denied that he had been late to work. However, he accepted that he had been late to work, although not as late as 8.30.

[92] Mr Morris rang Ms Whaiapu to tell her that he would be working late. For some reason, Ms Whaiapu understood that it was alleged that Mr Morris had not started work until 8.30 am. She became upset because she thought that was unfair, because she understood he had started work earlier than 8.30 am.

[93] Ms Whaiapu says that later that morning, she told Mr Powell that Mr Morris had to work late because Mr Pitches believed that he had started late and Mr Powell replied “that is what you told me Marsh”. She believed then that he had deliberately told Mr Pitches that Mr Morris had not started work until 8.30 am.

[94] Ms Whaiapu says she told Mr Powell that it was Mr Kereama who was late to work and not Mr Morris. She says that Mr Powell repeated that it was her who told him Mr Morris had been so late to work.

[95] Ms Whaiapu told Mr Powell that she thought he and Mr Pitches were trying to get rid of her and Mr Morris, but that she would not stand for his behaviour any longer. She says that Mr Powell told her the whole situation was her fault. She says she was very angry and very tearful.

[96] Mr Kereama was working at the Chateau that day too. However, he was significantly late and did not get to work until about 10 am.

[97] She says told Mr Kereama what had happened and told him she was going home because she “was tired of Pete’s shit.” Mr Kereama’s evidence is that she said something like “I cannot handle this, I have to go.” I accept Mr Kereama and Ms Whaiapu’s evidence in relation to what she said when she was leaving.

[98] Text records, from 12 October 2015, show that at 11.57 am Mr Morris texted Mr Pitches that he had just got off the phone to Ms Whaiapu:

and we both agree that pete bullshit lies are getting old and what makes it worse is that you believe him

[99] Mr Pitches replied;

Why you on the phone during work no bullshit plz

[100] Mr Morris replied:

cause I got a phone call from marsha

[101] Almost an hour later Mr Pitches tried to call Mr Morris. He did not leave a message.

[102] Ms Whaiapu left the work site. She rang Mr Morris who came, collected her in the work van, and took her home. They dropped the work van off in the afternoon at the Chateau. Neither of them returned to work that day.

[103] Ms Whaiapu's mobile phone battery was dead. At 3.31 pm, she used Mr Morris' phone to text her resignation to Mr Pitches:

im not going to sugar coat anything, I really like working with pete but its coming down to me resigning sick of the lies, shit stirring and made up stories he makes up in his head, pete admitted to me that he had told you that I had said paul started work at 8:30 this morning. i told pete that I never said anything like that to him and that he needed to get his facts straight before he makes false allegations.why would I say that when me paul and pete went to work in the same car paul left us at 7.35.. sorry wazzah can't work with a liar and shit stirer, im really hurt over the allegations and cant be bothered with the same bull shit, this aint the first second or third time hes done this, seems to be lie after lie so im handing in my resignation as of now.<sup>16</sup> Marsha

[104] Mr Pitches replied 9 minutes later:

With regret I accept your resignation. Good Luck

[105] Mr Pitches says he thought Ms Whaiapu was a good worker and was learning useful techniques well. He understood that she had been happy in her work partly because the week prior he had sent her to Synlait alone to complete the job. She had reacted well to having more responsibility. He says his acceptance of her resignation was a knee jerk reaction because she had "chosen to throw everything in my face and walk off a job".

[106] He says he tried to call her a few times after that but the phone went directly to voice mail.

### **Conclusion on constructive dismissal**

[107] I consider that there were a number of breaches of the employer's duty to provide a healthy workplace for Ms Whaiapu that taken all together were sufficiently repudiatory to destroy the relationship of trust and confidence. These breaches were mostly in relation to how seriously PWP took Ms Whaiapu's concerns about how she was treated by Mr Powell.

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<sup>16</sup> Spelling and grammar are as in the text.

[108] Counsel for PWP submits that Mr Powell's acts were not acts of PWP as the employer. I do not accept that absolves PWP of a responsibility for Mr Powell's behaviour for two reasons. First, much of the time Mr Powell was Ms Whaiapu's direct supervisor and manager in all but title. Secondly, Ms Whaiapu drew Mr Pitches' attention to her concerns about Mr Powell's behaviour a number of times. However, he had a fixed view that "she was good friends with Peter but every now and again they'd have a falling out". Even if they were still friends after June 2015, which Ms Whaiapu denies, that does not mean their employer can ignore complaints about inappropriate behaviour in the workplace. In the workplace, and in any discussions about work, their relationship to each other was as employees, not friends.

[109] PWP was their employer and Mr Pitches could not just shrug off Ms Whaiapu's complaints because he believed she and Mr Powell were merely bickering like brother and sister. Nor is it an answer that Mr Pitches considered Ms Whaiapu gave as good as she got. Mr Pitches says:

... Peter, Paul and Marsha had arguments and disagreements from time to time. I always dealt with them when they were drawn to my attention but a lot of the time the issues were petty. I put it down to the fact that they were such good friends and bickered like brothers and sister.

I do not accept that Marsha was the victim in these instances. Marsha has got a good temper and a foul mouth and on more than one occasion I had to tell workers not to get into an argument with her. She gave as good as she got and I was never aware that she felt bullied or intimidated by Peter, or anyone else for that matter.

[110] Sticking up for yourself does not negate the possibility of feeling intimidated by more senior employees.

[111] Mr Powell was in a position of authority over Ms Whaiapu at times when Mr Pitches and Mr Hill were not working on the same site.<sup>17</sup> That is shown by the first Dux Central incident, where Mr Pitches acquiesced in Mr Powell's way of admonishing Ms Whaiapu and teaching her the correct sanding method.

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<sup>17</sup> This case is factually different from *D v E Ltd* [2013] NZERA Auckland 338, and is in relation to a different kind of personal grievance. In that case, a "representative" of the employer is defined in the legislation in relation to discrimination personal grievances, and requires that person to have "authority" over the employee. In *D v E Ltd* the employees worked in the same building as the company's managers.

[112] A fair and reasonable employer should have investigated complaints by Ms Whaiapu and reported back to her after the investigation, having reached a conclusion.

[113] I consider Mr Pitches' behaviour in the second Dux Central incident to have been inappropriate in the way he expressed his anger. His behaviour confirmed for Ms Whaiapu that Mr Pitches was unlikely to deal adequately with any complaint of similar behaviour towards her from Mr Powell.

[114] I am satisfied that on 12 October 2015 Mr Powell was stirring, as Ms Whaiapu saw it, or winding her up. I accept her view that he was lying about what she had said to him about Mr Morris' lateness. Her view that he had or would tell Mr Pitches that she had said Mr Morris did not start work until late was a reasonable one in the circumstances. That was the "final straw" for Ms Whaiapu. On its own, it may not have justified a finding of constructive dismissal, but it did in the context of the previous incidents.

[115] Ms Whaiapu was clear in her evidence that it was not so much that Mr Powell may have lied to Mr Pitches about how late Mr Morris got to work but Mr Powell's barefaced insistence that it was her who told him how late Mr Morris had started work; it was the continuation of his "bullshit" and his "stirring" that was the final straw for her.

[116] Sometimes there is a fine line between acceptable banter and humour and unacceptable abusive and unreasonable work behaviour. However, racist comments, such as 'black bitch', and name-calling such as 'baby killer', are far over that line and well into unacceptable and unreasonable work behaviour. Even if Mr Pitches had not heard Mr Powell calling Ms Whaiapu those names, he knew that there had been other racist abuse within his company that occurred while Ms Whaiapu was employed.

[117] His evidence was at first to deny that, and when shown his own diary entry, to say that he had asked the accused person if they had said what was reported. He said when they denied it he believed he could not take it further. Although he also said he might have written a letter to the alleged perpetrator. However, a reasonable employer could have taken further action and let all employees know, including all new employees, that racist name-calling and insults were not acceptable in the workplace.

[118] There was a history of racist abuse at PWP and it is not surprising that the employees to give evidence at the investigation meeting were two of the Maori employees, Mr Kereama and Ms Whaiapu. PWP failed to protect its employees from racist abuse.

[119] Ms Whaiapu, justifiably, felt that Mr Pitches would not deal properly with Mr Powell's lies and stirring. A stark example of Mr Pitches not dealing appropriately with problems with Mr Powell was the issue of Mr Powell driving without a licence. First, until the investigation meeting Ms Whaiapu and Mr Morris believed that Mr Powell had been disqualified from driving. Mr Pitches did not correct that impression during her employment.

[120] Secondly, Ms Whaiapu was aware that Mr Pitches told Mr Powell he should not continue driving but she was also aware that Mr Pitches did not stop him from driving, because he continued to drive without a licence. Mr Pitches' response was that he was not Mr Powell's "minder". That is not a sufficient answer. Mr Pitches' company was Mr Powell's employer and as such did have a certain amount of control over him, but did not bother to exert that control. The letter was not a sufficient way of resolving the problem. In addition, Mr Pitches never addressed the issue of whether Mr Powell was still under the influence of alcohol one morning while driving the van.

[121] Ms Whaiapu gave evidence that one of the things that caused her to resign was her continuing to feel unsafe about Mr Powell continuing to drive, as far as she knew, without a licence. I do not accept that because she and Mr Morris called him on 12 October to give them a ride to work. However, I do accept that she remained dissatisfied with how Mr Pitches dealt with the issue. That was reasonable in all the circumstances.

[122] PWP's counsel submitted that because Ms Whaiapu said she really liked working with "Pete", he could not have been the reason she resigned. However, the bulk of the text was also about Pete, and about why she could no longer work with him. I am satisfied that what Ms Whaiapu liked about working with Pete was his skill level and ability to teach her new techniques, such as the gib-stopping she was learning on the Chateau job. There were other aspects of working with him that she did not like and she clearly outlined those in her text.

[123] A fair and reasonable employer would have investigated when Ms Whaiapu made complaints about Mr Powell, and taken whatever action was appropriate at the time. That did not happen, so it was reasonable that Ms Whaiapu believed that if she complained again about Mr Powell nothing would come of it.

*What is the significance of Ms Whaiapu attempting to retract her resignation?*

[124] Ms Whaiapu says in the evening of 12 October Mr Morris and Mr Pitches were talking on the phone, on speakerphone. She says she and Mr Pitches began talking to each other. She says that she told Mr Pitches that she wanted to come back to work, but he told her he had accepted her resignation, and the conversation ended with both of them shouting and swearing at each other.

[125] Mr Pitches denies having spoken to her that day or evening, and says she did not attempt to retract her resignation. He says that he did have a telephone discussion with Mr Morris and he could hear Ms Whaiapu “screaming and shouting” in the background. He said she “was clearly in no state to speak to me and I said that much to Paul”.

[126] I am satisfied that what happened lies somewhere between Ms Whaiapu’s memory and Mr Pitches’ memory of the call. That evening both of them were still so upset with each other that they could not have a civil conversation.

[127] I am satisfied that Ms Whaiapu did want to discuss the possibility of coming back to work. But she did not want to work directly with Mr Powell again. Ms Whaiapu’s attempt to explore if she could return to work was not an affirmation of her contract accepting the repudiatory breaches by PWP.

*Heat of the moment resignation?*

[128] There is another way of analysing the end of the employment relationship. Ms Whaiapu leaving the Chateau and her resignation text were clearly done while she was in the grip of strong emotions. That remained the case in the evening of 12 October. A fair and reasonable employer, especially one who had been given a warning in the form of Mr Morris’ text that Ms Whaiapu was fed up with Mr Powell’s “bullshit”, should have not taken her resignation text at face value without allowing her a cooling off period and seeking to discuss it after that. Mr Pitches never sought to explore what Ms Whaiapu meant about Mr Powell’s lies, bullshit and stirring.

[129] I accept that Mr Pitches tried to telephone Ms Whaiapu. However, he did not leave her a message or send her a text asking how things could be resolved or suggesting they talk in person in the next day or so, once she (and he) had calmed down.

[130] In the Employment Court case of *Kostic v Dodd*<sup>18</sup> Judge Couch, quoted approvingly from an earlier Employment Court judgement, *Boobyer v Good Health Wanganui Ltd*<sup>19</sup>, describing the circumstances in which an employee, against his or her will, may be treated by an employer as having resigned. One circumstance Chief Judge Goddard outlined was:

where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once “the heat of the moment” had passed and taken with it any “influence of anger or other passion commonly having the effect of impairing reasoning faculties.”<sup>20</sup>

[131] A fair and reasonable employer would not take at face value what Ms Whaiapu had texted, in such circumstances. Rather, such an employer would allow a cooling down period and then discuss with the employee what had occurred.

[132] Ms Whaiapu was unjustifiably dismissed.

## **Remedies**

### *Lost wages*

[133] Section 123(1)(b) of the Act allows me to provide for the reimbursement by PWP of the whole or any part of wages Ms Whaiapu lost as a result of her grievance.

[134] Ms Whaiapu did not get another job until almost a year after she stopped working for PWP. Her last day of pay with PWP was 12 October 2015 and her first day of work in her new job was 9 October 2016. She seeks lost wages for that whole period.

[135] Section 128(2) of the Act provides that I must order PWP to pay Ms Whaiapu the lesser of a sum equal to her lost remuneration or to her three months’ (13 weeks) ordinary time remuneration.

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<sup>18</sup> Employment Court Christchurch, CC14/07, 11 July 2007.

<sup>19</sup> Unreported, 24 February 1994, WEC 3/94, Goddard CJ

<sup>20</sup> Footnotes omitted.

[136] In this case, the minimum I am obliged to award is thirteen weeks of what Ms Whaiapu ordinarily earned working for PWP. According to Ms Ryder's submissions, Ms Whaiapu earned \$16 per hour and worked an average of 45 hours per week making her earnings \$720 gross per week. That means 13 weeks lost remuneration is \$9,360. I have no evidence that Ms Whaiapu worked a lower number of average hours per week prior to her dismissal.

[137] In addition, s 128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s 128(2); that is, for more than 13 weeks. Ms Whaiapu seeks a total of 51 weeks lost remuneration.

[138] Ms Whaiapu submits that PWP should have known that she, as a non-skilled worker with a conviction, would take longer to find employment.

[139] PWP submits that Ms Whaiapu has not produced sufficient evidence to demonstrate she appropriately mitigated her loss. I agree, the written evidence produced is from March and September 2016. I accept that Ms Whaiapu had an interview with a labour hire agency in late October, but there is insufficient evidence about how and when Ms Whaiapu first began seeking employment. I consider that I cannot award more than three months lost remuneration.

[140] I have also considered this another way, by undertaking a counter-factual analysis. There was no imminent prospect of Ms Whaiapu being moved from working with Mr Powell. Despite Mr Pitches' consideration of whether or not to offer Ms Whaiapu an apprenticeship, I do not consider Ms Whaiapu's employment with PWP would have lasted longer than three months from 12 October 2015.

[141] Ms Whaiapu seeks interest on her lost wages. The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908, which is currently 5% per annum.<sup>21</sup>

[142] I consider it reasonable that 5% interest is paid on the amount of \$9,360 from the date that Ms Whaiapu lodged her claim in the Authority, 30 May 2016, until the date the lost remuneration is paid in full. The amount of interest owing to the end of January 2017 is \$312.

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<sup>21</sup> Judicature (Prescribed Rate of Interest) Order 2011.

*Compensation*

[143] Ms Whaiapu claims \$20,000 compensation for humiliation, loss of dignity and injury to her feelings. Ms Whaiapu and Mr Morris gave evidence of Ms Whaiapu's distress and upset both on 12 October 2015 and subsequently.

[144] Ms Whaiapu says she has anxiety, feels stressed and is depressed most days. She has not been to see a doctor as she says she cannot afford it. She is very tired but has trouble sleeping.

[145] Mr Morris says that the constructive dismissal made Ms Whaiapu very angry and she is not usually an angry person. He says her dismissal had a negative effect on their relationship. He says Ms Whaiapu is a very strong person but the dismissal "really hurt her and brought her down".

[146] I consider that the evidence supports the payment of compensation and PWP should pay Ms Whaiapu compensation of \$12,000.

*Contribution*

[147] Having determined Ms Whaiapu has a personal grievance s 124 of the Act requires me to consider the extent to which her actions contributed to the situation giving rise to her personal grievance. If there was a causal connection between those actions and the situation that gave rise to the dismissal and if those actions so require, I must reduce the remedy that would otherwise be awarded.

[148] Mr Pitches' evidence was that he considered Ms Whaiapu to have been a very good worker. Some months before her employment ended, he separated her and Mr Morris into separate work teams, which he said ensured they did not bicker at work. He said that when she resigned he had been thinking of offering her an apprenticeship.

[149] Mr Powell also considered Ms Whaiapu to have been a good worker. At the investigation meeting, he said that on the way to the meeting he asked Mr Pitches if he would consider taking her back.

[150] I do not consider Ms Whaiapu engaged in any blameworthy conduct that gave rise to the situation leading to her personal grievance, so remedies are not to be reduced on the grounds of contribution.

**Costs**

[151] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[152] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is \$3,500. The investigation meeting lasted two days, including submissions.

[153] If the parties cannot reach an agreement the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey  
Member of the Employment Relations Authority