

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA  
ŌTAUTAHI**

**[2025] NZEmpC 209  
EMPC 217/2024**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN DBM MEDICAL LIMITED (FORMERLY  
ORTHOMED NZ LIMITED)  
Plaintiff

AND PETER GAARKEUKEN  
Defendant

Hearing: 31 July and 1 August 2025  
(Heard at Christchurch)

Appearances: M Donovan, counsel for the plaintiff  
R Walsh, counsel for the defendant

Judgment: 17 September 2025

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**JUDGMENT OF JUDGE J C HOLDEN**

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[1] This judgment resolves a challenge to a determination of the Employment Relations Authority that found that Mr Gaarkeuken was unjustifiably constructively dismissed by Orthomed NZ Ltd.<sup>1</sup>

[2] The challenge is successful. Mr Gaarkeuken resigned; he was not constructively dismissed.

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<sup>1</sup> *Gaarkeuken v Orthomed NZ Ltd* [2024] NZERA 298.

## **Mr Gaarkeuken was employed by Orthomed as a category manager**

[3] Orthomed is a clinical and professional provider of arthroplasty products, which it supplies to surgeons who perform arthroplasty in New Zealand hospitals.<sup>2</sup> Earlier this year, it amalgamated with other companies to become DBM Medical Ltd.<sup>3</sup>

[4] Mr Gaarkeuken has extensive experience in arthroplasty products in New Zealand and in South Africa. He has held senior positions in several businesses. He is a specialist in hip and knee arthroplasty.

[5] After several approaches from Orthomed, Mr Gaarkeuken joined it as category manager from 7 February 2022. His previous experience was what attracted Orthomed to him. He was Orthomed's most well-paid employee. His role was to assist with the sales that Orthomed already had but also to grow those sales and help lead getting sales with other potential customers within his area of responsibility.

[6] Mr Gaarkeuken was initially employed in Auckland, but in June 2022, Orthomed was looking for someone in Christchurch and Mr Gaarkeuken asked if he could transfer to Christchurch. This was agreed. The move suited Orthomed as it would then have a Christchurch-based category manager. It suited Mr Gaarkeuken as he would be closer to his family. He also said he had relationships with surgeons in Christchurch, who were, effectively, Orthomed's customers.

## **Sales performance became an issue**

[7] Throughout 2022, Mr Gaarkeuken's sales figures were very disappointing. Although the figures varied, he very seldom achieved even 50 per cent of the budgeted sales. Those figures were shared with Mr Gaarkeuken, and he was becoming quite stressed about his situation at Orthomed.

[8] Orthomed also received a few complaints from hospitals about Mr Gaarkeuken's level of knowledge around hospital protocols and procedures, and

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<sup>2</sup> Arthroplasty is a surgery to restore the function of a joint, for example hip replacement or knee replacement surgery.

<sup>3</sup> For convenience, the plaintiff is referred to as Orthomed.

his failure to follow those protocols. As those complaints were raised, Ms Cropp, Orthomed's national sales manager, would pass them on to Mr Gaarkeuken in her one-on-one meetings with him, and work with him to try and resolve the issues.

[9] There was a firm-wide conference on 21 January 2023, at which Mr MacKay, a director of Orthomed, met with Mr Gaarkeuken to discuss the upcoming year. A territory plan was one matter discussed; it is something all the people involved in sales were expected to put together. Mr Gaarkeuken gave evidence that it was not an onerous job. All the sales representatives except Mr Gaarkeuken produced their territory plans at or shortly after the meeting in January 2023.

[10] By letter dated 2 February 2023, Mr MacKay invited Mr Gaarkeuken to a meeting to discuss his performance. The letter reads:

You will be aware that we have recently been discussing your performance with you and some concerns that we have. We have now reached the point where we are considering a formal performance management process, and we would like to discuss this with you before making any decisions on how to proceed.

I am writing to invite you to a meeting to discuss your performance, how we can support you, and potentially putting in place a performance improvement plan (PIP).

After we meet to discuss your performance, and you have had an opportunity to respond, we will consider the next steps. If we decide to implement a PIP, we will provide this to you and give you an opportunity to provide feedback before making any decisions.

You are welcome to bring a support person or legal representative to this meeting. I will attend this meeting.

I suggest we meet on Tuesday 7 February and can confirm a time with you separately.

[11] The meeting took place on 8 February 2022. It was via an audio visual link. Mr MacKay and Ms Cropp attended along with Mr Gaarkeuken. Unbeknownst to Mr MacKay and Ms Cropp, Mr Gaarkeuken recorded that meeting. He says he did so because he was stressed and worried about the meeting. He says he knew his sales figures were not good and that Mr MacKay was unhappy, and he was concerned he would miss the nuances in the meeting and what was required of him. He says it was not done to catch anybody out, but was purely for his own usage so that he could

compile a decent response to everything Mr MacKay said. The recording and the transcript were before the Court.

[12] The meeting was quite short, but civil. Mr Gaarkeuken came across firmly and confidently. Ms Cropp raised a recent complaint, received on 27 January 2023, and that was discussed. Mr MacKay was more focussed on the sales figures. Mr Gaarkeuken did not want to discuss those in any detail but as acknowledged in Court, he was very well aware of the poor sales figures. At the meeting, he advised that “of course” he had given thought as to how to improve them.

[13] The discussions did not progress, however, as Mr Gaarkeuken wanted to see Orthomed’s performance concerns in writing, which Mr MacKay agreed to. Mr Gaarkeuken and Mr MacKay agreed, however, that Mr Gaarkeuken would provide a territory plan by the following Friday, 10 February 2022. That date was seen as suitable as Mr Gaarkeuken did not have any particular commitments over the next couple of days, which was how long he thought it would take him to finalise his territory plan. At the end of the meeting Mr MacKay suggested, and Mr Gaarkeuken agreed, that they would then move forward and start implementing the territory plan, and setting forward the PIP the following week.

[14] At 3.30pm on Friday 10 February 2022, Ms Cropp called Mr Gaarkeuken. Again, Mr Gaarkeuken recorded the conversation without telling Ms Cropp he was doing so. During the conversation, Mr Gaarkeuken was very positive about leads and Ms Cropp was encouraging and supportive. At that stage, no territory plan had been received but Ms Cropp thought that she and Mr Gaarkeuken could go through that the following week. Orthomed had not put its performance concerns in writing by that time either.

[15] At approximately 5.00 pm that day, Ms Cropp emailed Mr Gaarkeuken a performance improvement plan (PIP), setting out areas of concern. The PIP was aimed at addressing and improving the performance of Mr Gaarkeuken’s territory. Mr MacKay was copied into that email. In her email, Ms Cropp advised Mr Gaarkeuken: “If you have any comments or response related to the attached

document, please reply in writing. Also please sign and return the attached document via email.” Ms Cropp had signed and dated the document.

[16] Ms Cropp then learned that Mr MacKay still wanted the territory plan that day, so she texted Mr Gaarkeuken at 5.45pm to advise him of that.

[17] At 7.00 pm that evening, Mr MacKay emailed Mr Gaarkeuken:

I am expecting today your plan for your territory so I can review over the weekend as discussed. This was what we talked about in our discussion and you agreed to in the meeting. You can respond to the PIP on Monday, however I need that plan today.

[18] Nothing was received from Mr Gaarkeuken that day and on 11 February 2023, Mr MacKay sent a further email:

I have noted that you didn't send the plan as agreed on the original meeting on Tuesday. And I have had no correspondence from you since the email below.

[19] In explaining why she signed and dated the PIP, Ms Cropp said that she had not done a PIP before and thought it would be appropriate for her to sign it and therefore date it. She says that she intended it to be a draft and signed it in error. She also thought, however, that, if Mr Gaarkeuken agreed with it, it would be convenient for him to simply sign and return it. Nevertheless, as indicated in her email, Ms Cropp was inviting Mr Gaarkeuken's comments or response.

[20] The PIP identified four issues:

- (a) non-achievement of sales targets;
- (b) lack of understanding and adherence to procedures and processes related to movement of equipment between hospitals;
- (c) lack of understanding of surgeons' preferences and how to communicate these clearly when instructing scrub staff in theatre; and

- (d) lack of progress on gaining access to key customers and low levels of sales-related activity with key customers.

[21] The PIP had further columns for expectation, support put in place, measuring progress and review date. Each issue was to be reviewed weekly. There were concrete expectations identified for measuring progress for the sales targets (90 per cent of budget) and sales-related activity (a minimum of eight sales calls to surgeons and key customers each month). The support put in place generally involved Ms Cropp meeting with Mr Gaarkeuken weekly to discuss and develop strategies.

[22] By 13 February 2023, Mr Gaarkeuken had instructed Ms Walsh to represent him. She wrote to Orthomed that day advising that Mr Gaarkeuken was unwell and not medically fit for work as a result of stress emanating from the workplace. She advised “Please deal with us exclusively on the matters raised in this correspondence.” Ms Walsh also asked for documentation including Mr Gaarkeuken’s personnel file, time and wage records, and workplace policies. She recommended that Orthomed seek legal advice from an employment lawyer or employment relations consultant.

[23] That afternoon, Orthomed’s then-solicitors emailed Ms Walsh confirming that they were acting for Orthomed and would take instructions regarding the request for information. They asked for a copy of Mr Gaarkeuken’s medical certificate. The medical certificate was supplied the following day and advised that Mr Gaarkeuken was unfit for work for two weeks, with a review on 27 February 2023.

[24] Orthomed’s solicitors replied advising that Mr Gaarkeuken had a current sick leave balance of six days and asking whether he wished to use annual leave for the remaining days, or take leave without pay. Ms Walsh responded, requesting special paid leave for Mr Gaarkeuken.

[25] By email dated 15 February 2023, the solicitors for Orthomed advised that it was not prepared to agree to special paid leave, reiterating the options for Mr Gaarkeuken, being to take annual leave or leave without pay once his sick leave had been exhausted. The solicitors went on to advise that Orthomed had presented Mr Gaarkeuken with a proposed PIP out of a desire to support him to improve at work

and that Orthomed remained keen to discuss the proposal with Mr Gaarkeuken, to ensure a constructive way forward for both him and Orthomed. The email concluded: “We are sorry to hear your client is feeling stressed by this process. Peter is welcome to contact Smartly (our client’s EAP provider).”

[26] Ms Walsh responded to that email on 16 February, advising that, given the way in which the process had proceeded to date, in particular that the PIP was signed and recorded a commencement date of 10 February 2023, Mr Gaarkeuken did not accept that the PIP was simply a proposal. She also said that Mr Gaarkeuken did not have access to Smartly.

[27] On 20 February 2023, Orthomed’s solicitors responded:

Our client discussed a performance improvement plan with Peter.  
There have been previous discussions with Peter about his work.  
Our [client] remains committed to assisting Peter with his performance.  
Our client does not accept the position set out in your email of Thursday 16 February 2023.  
Our client has always been committed to a fair and reasonable process to support Peter’s performance and encourage him to meet the expectations of the business.  
We are instructed that Peter will be on unpaid sick leave, after his sick leave balance has run out.

[28] On 22 February 2023, with Orthomed having learned that Mr Gaarkeuken had been approaching customers advising them that he was on stress leave, the solicitors for Orthomed sent a further email to Ms Walsh saying Mr Gaarkeuken should not have any contact with customers of the business or undertake work whilst on sick leave. Orthomed’s solicitors also noted that Ms Walsh’s original letter to the company was sent by post to the Christchurch office and opened by one of the administration team, so that word had spread across the office that Mr Gaarkeuken was on stress leave. Orthomed’s solicitors noted that people were obviously asking questions and that Orthomed was considering how best to address those questions.

[29] A further medical certificate was provided on 24 February 2023, which advised that Mr Gaarkeuken was medically unfit for a further two weeks, with that to be reviewed again on 10 March 2023.

[30] On 3 March 2023, Ms Walsh wrote to Orthomed's solicitors, notifying them that Mr Gaarkeuken tendered his resignation of employment with Orthomed, effective immediately. The letter went on to raise personal grievances claiming constructive dismissal and unjustifiable disadvantage, detailing Mr Gaarkeuken's concerns and saying that he had instructed Ms Walsh to file a claim with the Authority. Mediation was suggested.

[31] The following Monday, 6 March 2023, Mr MacKay emailed South Island staff:

I regret to inform you that for personal reasons Peter G has resigned from his position with us as Category Manager at DBM Medical.

It has been great having him as part of our team with his wealth of experience and his knowledge in the surgical space.

We want to thank him for all his hard work. We wish Peter all the best in the future.

Peter's last day was Friday the 3<sup>rd</sup> of March.

[32] On 7 March 2023, Ms Cropp texted Mr Gaarkeuken asking him what instructions he had been given regarding the return of his phone and laptop. It seems that is the only correspondence that went between Orthomed and Mr Gaarkeuken directly after he went on sick leave.

[33] On 8 March 2023, Orthomed's solicitors confirmed Orthomed's agreement to attend mediation.

**The main issue for the Court is whether Mr Gaarkeuken's resignation was a constructive dismissal.**

[34] The main issue for the Court is whether the actions of Orthomed meant that Mr Gaarkeuken's resignation was a constructive dismissal. If it was, the issue of remedies arises.

[35] Mr Gaarkeuken also claimed that he was subjected to an unsafe work environment and that the procedure adopted for the PIP, Orthomed's lack of response

to his resignation, and the email advice to staff on 6 March 2023 were unjustifiable actions that caused him disadvantage.<sup>4</sup>

### **An employer's actions can mean a resignation is a constructive dismissal**

[36] In order for there to be a constructive dismissal, the employer must have, in substance, dismissed the employee, although technically there has been a resignation.<sup>5</sup>

[37] The employer may have followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign. An employer also may have committed a sufficiently serious breach of duty, that foreseeably compelled the employee to resign.<sup>6</sup> In that scenario, it is not necessary for the employer to have intended the employee to resign – the question is whether:

- (a) the employer's actions, or inaction in breach of its duties, caused the employee to resign, and
- (b) the employer's breaches were sufficiently serious to make the resignation reasonably foreseeable.

[38] While employees can be unhappy with matters within their workplace, and resign as a result, that does not necessarily mean the resignation is a constructive dismissal. Although a PIP can be very stressful, a resignation to avoid an upcoming PIP is unlikely to be grounds for a constructive dismissal claim; it is not a constructive dismissal if an employee resigns in anticipation of possible future events.<sup>7</sup>

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<sup>4</sup> *Gaarkeuken v Orthomed NZ Ltd*, above n 1, at [53].

<sup>5</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374.

<sup>6</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA) at 172. The third recognised category of constructive dismissals, where an employer gives an employee a choice of resigning or being dismissed, is not relevant to these proceedings.

<sup>7</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [29].

## **Mr Gaarkeuken says he was constructively dismissed**

[39] Mr Gaarkeuken says that there was a course of conduct designed to effect his resignation and/or the actions of Orthomed were such that his resignation amounted to a constructive dismissal. He points to:

- (a) the level of support provided to him by Orthomed;
- (b) the level of detail provided to him prior to the meeting on 8 February 2023,
- (c) the letter inviting him to that meeting,
- (d) what took place at the meeting itself,
- (e) the PIP that was provided to him, in particular that it was signed and dated, and
- (f) the lack of contact from Orthomed after he went on leave, including after he resigned on 3 March 2023.

[40] The first claim, that there was a course of conduct designed to effect his resignation, can be dealt with quite briefly. The issue is whether there was a genuine desire to have Mr Gaarkeuken's performance improve or whether there was an unwarranted attempt to manipulate resignation.<sup>8</sup> In short, the evidence does not support the suggestion that Orthomed wanted Mr Gaarkeuken to resign, or that its processes were designed to force him out. Orthomed understandably had concerns about the sales figures, concerns that were shared by Mr Gaarkeuken. It was taking steps to work with Mr Gaarkeuken and to have those sales figures improve. There is nothing in its actions that is contrary to that aim. Mr MacKay and Ms Cropp were both surprised when Mr Gaarkeuken resigned. Mr MacKay gave evidence of the difficult position Orthomed found itself in when Mr Gaarkeuken resigned without notice; it took some time for Orthomed to find a replacement.

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<sup>8</sup> *Greetham v Lawter (NZ) Ltd* [2020] NZEmpC 174, (2020) 17 NZLR 645 at [66].

[41] Mr Gaarkeuken's claim turns on whether any breach(es) of Orthomed's duties were such that his resignation amounted to a constructive dismissal. It is convenient to consider each of the matters Mr Gaarkeuken referred to in turn before considering whether, when seen together, there were breaches that were sufficiently serious to make the resignation reasonably foreseeable.

### **Mr Gaarkeuken was a very senior employee, but was supported**

[42] Mr Gaarkeuken came to Orthomed with a wealth of experience in arthroplasty. The product training at Orthomed was self-led, using material provided in the company Google drive and training presentation/brochures. Mr Gaarkeuken undertook the training mainly from home. He also was trained in how to use Orthomed's customer relationship management system

[43] Ms Cropp had weekly meetings with Mr Gaarkeuken as well as frequent online full team meetings and journal club meetings. Ms Cropp's evidence was that she always took an interest in anything Mr Gaarkeuken wanted to share with her or discuss outside the allocated times. That evidence is consistent with Ms Cropp's engagement in the discussion on 10 February 2025.

[44] Mr MacKay noted that when he and Mr Gaarkeuken met at the sales conference in January 2023, they wrote out a list of opportunities, including surgeons for Mr Gaarkeuken to visit. The evidence was that there was a similar discussion at the sales conference the previous year. Mr MacKay also referred to having come to Christchurch several times to set up meetings and get surgeons together with Mr Gaarkeuken.

[45] It was not surprising that Orthomed looked to Mr Gaarkeuken to get new leads, given his seniority and experience. The level of support he was given was appropriate. I do not accept that there was a breach of duty in respect of the way that Mr Gaarkeuken was managed during his employment.

**The letter inviting him to a meeting and the information provided was sufficient**

[46] The letter dated 2 February 2023, inviting Mr Gaarkeuken to a meeting to discuss his performance, was unsurprising. I acknowledge that employees usually will be unhappy to receive such a letter, but Orthomed was well within its rights to send it. The letter does not threaten Mr Gaarkeuken's employment. It advises that the purpose of the meeting was to discuss Mr Gaarkeuken's performance and how Orthomed could support him, potentially through a performance improvement plan. It advised him that he would have an opportunity to provide feedback into a PIP before any decisions were made.

[47] Mr Gaarkeuken said he should have been provided with the schedule showing his sales figures when he was invited to the meeting. However, he acknowledged that the sales data sheet was regularly sent out to the sales team as a matter of course, and that he was well aware that he was tracking well below the target set for him each month.

[48] Mr Gaarkeuken also submits that Orthomed should have investigated the complaint made about him on 27 January 2023 before relaying it to him at the meeting. I do not accept that Orthomed ought to have carried out an investigation, questioning their customers further, before advising Mr Gaarkeuken of the complaint. It would have been detrimental to Orthomed, and to Mr Gaarkeuken, if Orthomed had sought to go further with the customer at that stage. As a matter of good faith, Orthomed was obliged to be communicative with Mr Gaarkeuken, so it also would have been contrary to that obligation to have withheld the complaint from him because of the lack of specificity. Further, even if Orthomed was thinking of taking the matter further, it made sense to first discuss it with Mr Gaarkeuken as he would likely have been aware of the matter and have relevant information and context. In any event, the complaint was not being raised as a disciplinary matter, but in the context of Orthomed's performance concerns.

[49] I do not consider that the letter of 2 February 2023, or the information provided to Mr Gaarkeuken in advance of the meeting was insufficient.

### **The meeting of 8 February 2023 was fair**

[50] Mr Gaarkeuken acknowledged that he was feeling stressed when he attended the meeting of 8 February 2023, which was why he recorded the meeting. He did not advise Orthomed that he was feeling stressed, and it does not come through from the transcript or the recording. Recording an employment meeting without advising the other party is inappropriate and goes against the duty of good faith. There was nothing preventing Mr Gaarkeuken from advising Mr MacKay and Ms Cropp that he was recording the meeting of 8 February 2023, or the later telephone discussion with Ms Cropp on 10 February 2023.

[51] Nevertheless, Orthomed accepts that the recordings show what was said at the meeting and the telephone conversation, and that the transcript provided to the Court is accurate.

[52] The transcript confirms that Mr MacKay wished to put in place a performance improvement plan and also that he wished to obtain a territory plan from Mr Gaarkeuken. Mr Gaarkeuken agreed to provide the territory plan by the end of that week, and as noted, his evidence was that it would not take much for him to complete that plan. He also confirmed in evidence that it was probably half done when he spoke with Ms Cropp on 10 February 2023.

[53] Although Mr MacKay and Ms Cropp had expected the meeting to canvas Mr Gaarkeuken's performance, and how he could be supported, Mr Gaarkeuken did not wish to have that discussion until he had seen Orthomed's performance concerns in writing, which Orthomed agreed to. For this reason, the meeting did not go into any detail on the performance concerns or how they would be addressed. It was a short meeting, but there was no breach of duty by Orthomed in respect to it.

### **On balance, the interactions that followed the meeting were fair**

[54] The discussion between Mr Gaarkeuken and Ms Cropp on 10 February 2023 likewise was civil. There is nothing in the course of that discussion that was in breach of any obligations owed by Orthomed to Mr Gaarkeuken; Ms Cropp was appropriate throughout, and supportive.

[55] Following on from that meeting, Orthomed provided Mr Gaarkeuken with the draft PIP, which set out its performance concerns. Mr Gaarkeuken has focussed on the fact the PIP was signed and dated. Ms Cropp has acknowledged that she regards that as an error on her part. If it is an error, it is not a significant one. The PIP has to be read in the context in which it was sent; the covering email invited comments and responses. That Mr Gaarkeuken was being asked to provide input into the PIP was reinforced by Mr MacKay's email later that day, which advised that Mr Gaarkeuken could respond to the PIP the following Monday.

[56] If Mr Gaarkeuken remained uncertain, the position was made clear in the email from Orthomed's solicitors to Ms Walsh on 15 February 2023.

[57] When Ms Walsh then raised that the PIP had been signed by Ms Cropp and recorded a commencement date of 10 February 2023, the solicitors for Orthomed replied again advising that Orthomed was keen to assist Mr Gaarkeuken with his performance and to undertake a fair and reasonable process.

[58] It therefore should have been clear to Mr Gaarkeuken and his representative that Orthomed did not consider the PIP provided by Ms Cropp to be a final document or effective immediately. As a matter of good faith, the assurances from Orthomed should have been accepted.

[59] It is also important to note that a PIP is not a disciplinary process. Rather, it is a process designed to improve the performance of an employee. While failure to improve following implementation of a PIP can lead to disciplinary action, that was not where things were at at that time.<sup>9</sup> This was confirmed in the PIP document itself, which set objectives and proposed schedule/steps so that Mr Gaarkeuken could meet the objectives, noting that if his performance did not improve within a reasonable period of time, further steps may be taken, including the extension of the PIP process for a further period, or disciplinary steps.

[60] Mr Gaarkeuken raised in evidence various issues that he felt were affecting his ability to meet his targets. These included a reduction in surgeries at Burwood

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<sup>9</sup> *Davis v Commissioner of Police* [2014] NZEmpC 152 at [38].

Hospital, what he said were shortages in some products, and, for him personally, that the surgeons with whom he had the best relationships were contemporaries of his and were starting to retire, meaning he needed to develop relationships with new surgeons.<sup>10</sup> In closing submissions, Mr Gaarkeuken also raised a concern that Orthomed had not presented its own suggestions for how it would assist him with his performance, including how he could increase his leads.

[61] All these issues would have usefully been discussed in the context of the PIP, and any such discussion may have altered or moderated Orthomed's views, or informed the steps needed, including the support to be put in place, for Mr Gaarkeuken's performance to improve.<sup>11</sup> Those discussions did not take place because Mr Gaarkeuken did not wish to engage with them during the meeting of 8 February, or with the PIP document provided on 10 February 2023.

[62] Mr Gaarkeuken also raised the advice provided to Ms Walsh by the solicitors for Orthomed that he should not have any contact with customers of the business or undertake any work whilst on sick leave. That instruction was made in the face of Orthomed being advised that Mr Gaarkeuken had been emailing customers of the business advising that he was on "stress leave". It is neither surprising nor a breach of duty for Orthomed to ask Mr Gaarkeuken to refrain from doing that, it was not in the interests of Orthomed, nor of Mr Gaarkeuken himself, for that information to be promulgated.

[63] In short, although it would have been preferable for the PIP to be sent to Mr Gaarkeuken unsigned and undated, on balance he was fairly treated by Orthomed. Certainly, there was no breach of duty serious enough to mean his resignation was a constructive dismissal.

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<sup>10</sup> At the time of the hearing, Mr Gaarkeuken was 71 years old. Accordingly, at the time of the events covered by this judgment, he would have been in his late sixties.

<sup>11</sup> *New Zealand Institute of Fashion Technology v Aitken* [2004] NZEmpC 128, [2004] 2 ERNZ 340 at [57].

### **Orthomed reasonably engaged lawyer to lawyer after it was told not to contact Mr Gaarkeuken**

[64] Ms Walsh submits that Orthomed ought to have contacted Mr Gaarkeuken directly after he went on sick leave. I do not agree. Mr Gaarkeuken did not approach either Mr MacKay or Ms Cropp after he went on sick leave and Ms Walsh undertook the correspondence on his behalf. In that context, she advised that she was his representative and asked Orthomed to deal with her exclusively on the matters raised in her letter of 13 February 2023. I do not accept that request should be read narrowly. The letter advised that Mr Gaarkeuken was stressed, emanating from the workplace, and recommended that Orthomed seek legal advice. Orthomed cannot be criticised for engaging a lawyer at that point or for it to thereafter correspond solicitor to solicitor. It could well have been criticised if, notwithstanding Ms Walsh's advice, it had approached Mr Gaarkeuken directly.

[65] Mr Gaarkeuken suggests Orthomed was at fault for not offering him the opportunity of a meeting or mediation to try and resolve the issues. I do not accept that suggestion. On 15 February 2023, Orthomed's lawyer noted that Orthomed remained keen to discuss the proposed PIP with Mr Gaarkeuken to ensure a constructive way forward for both him and Orthomed. Mr Gaarkeuken's response was to maintain that the PIP document was not simply a proposal. It was not until Ms Walsh sent the letter of 3 March 2023, in which she advised that Mr Gaarkeuken resigned, that mediation was suggested. In its reply the following week, Orthomed agreed to attend mediation.

### **The letter of resignation was unambiguous**

[66] Mr Gaarkeuken suggested that Orthomed should have followed up with him on receipt of Ms Walsh's letter of 3 March 2023, to check on his intentions. I do not agree. There was no ambiguity in the letter, it was sent by a solicitor to another solicitor. Orthomed was entitled to take it at face value; by Mr Gaarkeuken resigning "effective immediately" his employment ended on receipt by Orthomed of the letter.

[67] Mr Gaarkeuken seemed to suggest that Orthomed should have reverted to him to check that he was in fact intending to resign and/or to have sought to persuade him

otherwise. The first point is that resignation is a unilateral act, an employer cannot decline to accept a resignation.<sup>12</sup> The second point is that as the employment ended on resignation, there was no longer an employment relationship between the parties once the resignation took effect.

### **There was no constructive dismissal; Mr Gaarkeuken resigned**

[68] It follows from my findings that there was no serious breach of duty that foreseeably compelled Mr Gaarkeuken to resign. I accept that he was unhappy at the prospect of engaging in a PIP, and that he was understandably stressed both by his poor sales results and because he knew that Orthomed was unhappy about those. That does not make the resignation on 3 March 2023 a constructive dismissal. An employer is entitled to carry out a genuine, frank, and robust performance appraisal of an employee without that being a constructive dismissal.<sup>13</sup>

[69] Mr Gaarkeuken's claim of unjustifiable constructive dismissal is not made out and the Authority's determination to the contrary is set aside.

### **Was there an unjustifiable disadvantage?**

[70] Although I have found that Mr Gaarkeuken was not dismissed, I have considered whether any actions of Orthomed in the period leading up to Mr Gaarkeuken's resignation, individually or collectively, amounted to an unjustifiable disadvantage. I find they do not.

[71] As already addressed, I find the support given to Mr Gaarkeuken by Orthomed up until his resignation was appropriate for an employee of his seniority and experience. Orthomed also was looking to support Mr Gaarkeuken further through the PIP process.

[72] I also have found the communications prior to the meeting of 8 February 2023, and the meeting itself, was fair. I accept that Mr Gaarkeuken was stressed by the process, but he did not advise Orthomed of the degree of his stress and it was not

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<sup>12</sup> *Mikes Transport Warehouse Ltd v Vermuelen*. [2021] NZEmpC 197, [2021] ERNZ 1129 at [37].

<sup>13</sup> *Greetham v Lawter (NZ) Ltd*, above n 8, at [66].

apparent from his engagements with Mr MacKay or Ms Cropp; there was no reason for Orthomed to adopt a different approach. Once Ms Walsh advised Orthomed of Mr Gaarkeuken's stress, it assured him that it was committed to assisting and supporting him and, at Ms Walsh's request, refrained from contacting him directly.

[73] Mr Gaarkeuken claims he was "denied access" to Orthomed's EAP provider. That mischaracterises the position. Ms Cropp's evidence was that Mr Gaarkeuken had been given access to the app from soon after he started but that at one point, early on in his employment, he said he had difficulty using it. She says she referred him to Orthomed's chief financial officer at the time and heard nothing further from Mr Gaarkeuken about the issue. Ms Walsh raised the issue again on 16 February 2023, after Mr Gaarkeuken went on leave, and it does not appear that steps were taken by Orthomed to follow up before Mr Gaarkeuken resigned on 3 March 2023. I agree that ideally, they ought to have been, but that was a minor issue in the circumstances.

[74] I accept that the communications about the territory plan on the afternoon of 10 February 2023, were untidy. It seems Ms Cropp was relaxed about the late territory plan, but Mr MacKay had been expecting it. That meant that from approximately 3.30pm, Mr Gaarkeuken thought the late delivery of the territory plan was not an issue, but Ms Cropp corrected the position at 5.45pm, when she texted him. Not every imperfect communication between an employer and an employee amounts to an unjustifiable action, and they must be seen in context, as was noted in respect of the issue about the signed PIP. Here, any imperfections were addressed promptly. It was open to Mr Gaarkeuken to respond with any concerns about the confusion, or any implications it might have for him completing the plan, noting that the employee too has a responsibility to be communicative.

[75] I also accept that, at times, the territory plan and the PIP may have become blurred, at least in Mr Gaarkeuken's mind. The transcript of the meeting of 8 February conveys that he might have construed that the territory plan was to act as a formal response to the performance concerns, as a part of the process for developing the PIP. At its highest, this meant Mr Gaarkeuken was justified in not providing his territory plan until he had seen the PIP document provided at the end of 10 February 2023. There was no unjustifiable action on the part of Orthomed in not providing anything

more at that point. Any confusion was remedied by the provision of the PIP proposal and clarified by the later communications.

[76] It is also worth noting that developing a territory plan was a matter that had been pending for some time; it was discussed with Mr Gaarkeuken in January 2023, and was a task that others were required to complete for the areas for which they were responsible. It was the draft PIP that was to provide a basis for further discussions about the performance concerns; the PIP may have been informed by the territory plan, but was separate from it.

### **Actions following his resignation not actionable, and reasonable**

[77] As Mr Gaarkeuken employment ended on 3 March 2023, there was no employment relationship between the parties when Mr MacKay sent the email of 6 March 2023. It is not actionable.

[78] In any event, the email was not objectionable. Orthomed needed to advise staff of Mr Gaarkeuken's departure, and the email put a positive spin on that.

[79] Mr Gaarkeuken's personal grievance for unjustifiable disadvantage fails.

### **The money held on trust is to be returned to Orthomed**

[80] I direct that the Registrar return the money paid into the court by Orthomed, including any accrued interest, to Orthomed.<sup>14</sup> Mr Donovan, counsel for Orthomed, is to advise the Registrar of the details of the account to which payment is to be made.

### **Orthomed is entitled to costs**

[81] Orthomed is the successful party in these proceedings and is entitled to costs, both for the Court proceedings and for those in the Authority. If the parties cannot agree on costs, Orthomed may apply for an order by way of a memorandum filed and served within 28 days of this judgment. Mr Gaarkeuken then must file and serve his memorandum setting out his response to the application within a further 21 days. Any

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<sup>14</sup> *Orthomed NZ Ltd v Gaarkeuken* [2024] NZEmpC 172.

reply by Orthomed must be filed and served within a further seven days. The Court then proposes that it would deal with costs on the papers.

J C Holden  
Judge

Judgment signed at 2.45 pm on 17 September 2025