

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 303
3227699

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| BETWEEN | DANIEL BALLINGER Applicant |
| AND | ASGA INVESTMENTS LIMITED Respondent |

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|------------------------|--|
| Member of Authority: | Lucia Vincent |
| Representatives: | Linda Ryder, advocate for the Applicant Anna Oberndorfer, advocate for the Respondent |
| Investigation Meeting: | 19 February 2024 in Christchurch |
| Submissions Received: | 19 February 2024 from the Applicant 22 February 2024 from the Respondent |
| Determination: | 22 May 2024 |

DETERMINATION OF THE AUTHORITY

What is the Employment Relationship Problem?

[1] Initially the applicant, Daniel Ballinger, and the respondent, ASGA Investments Limited trading as FloorPride Rangiora (**ASGA**), had high hopes of a successful long-term employment and business relationship. Mr Ballinger started work as Assistant Manager mentored by ASGA's Business Manager, Mr Mark Wotton (a former owner of the business with decades of relevant experience). These two roles came at a cost to the business but would enable Mr Wotton to teach and transition Mr Ballinger into the Business Manager role after a

period of 12 to 18 months (when Mr Wotton planned to retire). Sadly, after less than six months, the employment relationship had ended. The parties disagree about how and why.

[2] Mr Ballinger says ASGA unjustifiably constructively dismissed him after issuing an ultimatum to resign or be terminated. He says this ultimatum followed an unsuccessful campaign by Mr Wotton to see him fail, and ASGA's Business Advisor Colin Gray sowing seeds for Mr Ballinger's resignation. Mr Ballinger also points to breaches by ASGA of its obligation to train and support him adequately, unjustifiably disadvantaging him. He says ASGA breached the employment agreement by failing to follow correct procedures when addressing perceived performance concerns.

[3] ASGA says Mr Ballinger freely resigned after reflecting on his options and realising the role was not for him. It says it acted fairly given the expectations of someone in a senior role. ASGA claims the parties agreed to vary the employment agreement to allow for a shorter timeframe to assess suitability and denies breaching the agreement.

How did the Authority investigate?¹

[4] I investigated this problem by reviewing all written material provided to the Authority and holding an investigation meeting. Written material included statements of evidence from Mr Ballinger, his wife Gemma Ballinger, Mr Wotton and Business Analyst Colin Gray.

[5] At the investigation meeting I asked questions of Mr Gray and Mr and Mrs Ballinger under oath or affirmation. Representatives also asked questions of the witnesses then gave oral and written closing submissions.

[6] Mr Wotton did not attend the investigation meeting. I could not ask him questions about his statement. I have given his evidence less weight because of that.

¹ As permitted by s 174E of the Employment Relations Act 2000 (**Act**) I have stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. I have not recorded all evidence and submissions.

What are the issues?

[7] The issues I investigated and determined were:

- (a) Did ASGA unjustifiably constructively dismiss Mr Ballinger?
- (b) Did ASGA unjustifiably disadvantage Mr Ballinger by failing to train and support him adequately in his role of Assistant Manager?
- (c) Did ASGA breach the employment agreement by failing to follow the process for managing performance concerns?
- (d) If I answer yes to any of the above questions, then what (if any) remedies should I award such as:
 - i. Reimbursement of a sum equal to the whole or any part of the wages or other money lost by Mr Ballinger as a result of any grievance(s);
 - ii. Compensation for humiliation, loss of dignity and injury to feelings of Mr Ballinger; and
 - iii. Should I reduce any remedies due to contribution?²

Did ASGA unjustifiably constructively dismiss Mr Ballinger?

What is a constructive dismissal?

[8] Case law defines a dismissal as an employer initiated termination covering constructive and actual dismissals with or without notice.³ When considering a case of constructive dismissal and distinguishing it from a voluntary resignation, I must look at who drove the end of the employment relationship.⁴

² Section 124 of the Act.

³ *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (T/A Greenwich and Associates Employment Agency and Complete Fitness Centre)* [1983] ACJ 965 at [103]. Many cases refer to and rely on this definition and the sending away concept also described in *Greenwich*.

⁴ At [104]: “If the real source of the initiative for termination is the employer, or the basic causation comes from the employer, then the case is one of constructive dismissal.”

[9] Two key questions are often asked:⁵

1. What were the terms of the contract?
2. Was there a breach of those terms by the employer of a seriousness sufficient to warrant the termination action actually taken by the employee?

[10] The Court of Appeal put it this way:⁶

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

[11] Three inclusive categories of constructive dismissal are often referred to:⁷

- (a) The ultimatum: When an employer gives a worker an option of resigning or being dismissed.
- (b) The engineered result: Where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing a worker to resign.
- (c) The repudiatory breach: where a breach of duty by the employer leads a worker to resign.

[12] For reasons I outline below, I have found ASGA issued an ultimatum and that this formed the primary reason for Mr Ballinger's constructive dismissal. In submissions, Mr Ballinger relied on all three categories. I acknowledge there are elements of each category in how the relationship ended which has assisted in understanding the context for why and how his resignation resulted from the ultimatum.

⁵ At [113].

⁶ *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA) at [172].

⁷ Summarised from the categories described in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Limited* (1985) ERNZ Sel Cas 136 at [139].

[13] I have considered case law establishing an employer’s ability to fairly and frankly discuss performance issues without it amounting to a constructive dismissal. For example:⁸

An employer is entitled to carry out a genuine, frank and robust performance appraisal of its employee without fear of it giving rise to allegations of constructive dismissal. The facts will determine whether the appraisal is a genuine attempt to improve performance given in a moderate way or is an unwarranted attempt to manufacture disharmony or manipulate a resignation.

[14] Again, for reasons I outline below, I have found that while there may have been genuine, frank and robust performance discussions between ASGA and Mr Ballinger, the context leading to and fact of the ultimatum undermined the claim those discussions were a genuine attempt to address perceived performance concerns with an intent to maintain the employment relationship.

The ultimatum

[15] Mr Gray called Mr Ballinger on the morning of Wednesday 25 January 2023 asking to meet with Mr Ballinger for a coffee later that day. Mr Ballinger assumed it would be a mentoring session to help prepare for the next Board meeting.

[16] When they met, Mr Gray got straight to the point. He said, “I’m sorry Dan, this isn’t working.” Mr Gray’s notes from the meeting on 25 January 2023 include a paragraph that says:

But I have to make a call here
My conclusion sadly is this isn’t going to work out.
I have enough concerns and being blunt I just don’t see you being the “face” of the business and managing all aspects of it.

Where to from here – in the circumstances where no misconduct – you can resign.
I will support the view that you decided not for you due to a number of factors - act as a referee in that regard.
– notice period
– gardening leave
– exit to suit you.

[17] Mr Ballinger recalled Mr Gray gave him two options – resigning immediately, or staying on to the end of the month (being Tuesday 31 January), when his contract would be

⁸ *Greetham v Lawter (N.Z.) Ltd* [2020] NZEmpC 174 at [66].

terminated. He understood that to be by way of dismissal rather than resignation. Mr Gray suggested he take the rest of the week to take it all in and consider the two options, and that ASGA would be happy to pay out his four weeks notice.

The resulting resignation

[18] Mr Ballinger discussed the two options with his wife that night. It seemed the only option was to resign as he did not want to be dismissed and wanted a reference. He called Mr Gray the next day to let him know he would take option one and resign. He asked what he should put in his email - he was told not to go into too much detail. His resignation said: "... It is with sadness I look to resign from my position of assistant manager. I thank you to the opportunity and wish you all well for the future."⁹

What was the context of the ultimatum?

[19] To understand the context of the ultimatum, I found it useful to understand where it came from. Before the relationship even began, ASGA recognised Mr Ballinger required mentoring and training to transition successfully into the Business Manager role from the Assistant Manager role it later employed him in:¹⁰

The role is that of assistant manager with Mark and FPR team providing training and mentoring. Our expectation is that this training period will be 12-18 months. It could be a little less, but we all need to be realistic. Once all parties agree that you are ready to move into the business manager role, we make that transition.

...

From a FloorPride Rangiora perspective there is a significant cost in having the manager and the assistant manager role. As such this is not a forever set up but rather, we need to give everyone enough time to get up to speed and enable every chance of success.

[20] As the AIP makes clear, the parties recognised a realistic timeframe of at least 12 months and up to 18 months for training related to the Business Manager role. It was clear Mr Ballinger

⁹ Email from Mr Ballinger to Mr Gray at 2:21pm on 26 January 2023.

¹⁰ An Agreement in Principle signed and dated 11 and 13 July 2022 details the "key bits" of an employment agreement and planned equity participation in ASGA (AIP). These commitments are set out on page one and two of the AIP.

would remain in the Assistant Manager role until everyone agreed he was ready to make the transition. The AIP did not address what would happen if the parties did not agree.

[21] About a week later, Mr Wotton offered Mr Ballinger employment on behalf of ASGA as a permanent full time Assistant Manager, starting on 15 August 2022.¹¹

[22] The Agreement did not include a job description. A document called “Training and Mentoring” contained a list of areas for Mr Wotton to train and mentor Mr Ballinger in. Mr Ballinger said Mr Gray asked him to prepare a job description and he used this document as a base. It was never finalised.

[23] Clause 14 of the Agreement required ASGA to follow a procedure if it considered Mr Ballinger’s performance unsatisfactory. The second schedule of the Agreement set out that procedure which included progressive warnings before termination could be considered.

[24] The relationship started well. Mr Wotton emailed the team saying he had appointed Mr Ballinger as Assistant Manager.¹² He had started the process for exiting the business with the idea that Mr Ballinger would become the next Business Manager.

[25] Mr Ballinger enjoyed his early months working with Mr Wotton. Although he found Mr Wotton to be blunt (a word Mr Wotton used to describe his own communication), Mr Ballinger focused on learning from Mr Wotton’s valuable experience and knowledge of the business.

[26] Despite that positive start, Mr Ballinger recalled red flags as early as September. For example, Mr Wotton appeared unreasonably offended by Mr Ballinger’s accidental use of an

¹¹ The covering letter enclosing the individual employment agreement is dated 18 July 2022 (**Agreement**).

¹² Email dated 16 August 2022.

adapted template for a garage carpet quotation. Mr Wotton emailed Mr Ballinger to tell him another employee would handle all garage carpet quotations.¹³ Mr Wotton then said:

My biggest pet hate is to be undermined and ignored and after a full and frank discussion the other day with [Mr Gray], we made it quite clear that everything needs to be run past me until further notice.

I am more than happy to finish today and you can do it your way with 18 days experience.

Your call.

[27] Mr Ballinger replied later that day apologising and attempting to placate Mr Wotton:¹⁴

Sorry it wasn't my intention to do that, I had played round with the quote before discussing just to see how it would look and forgot to change it back.

I appreciate the time and effort you are putting in and also understand your frustration.

Give me a yell when you are free to talk.

[28] On another occasion, Mr Ballinger recalls Mr Wotton confronted him in an agitated state about why he had started a process for obtaining security passes for three waged installers to work in prisons, including Mr Wotton's grandson. Mr Wotton appeared upset about the possibility of his grandson working in a prison.

[29] Mr Gray acknowledged he would have worded things differently to Mr Wotton. Mr Ballinger went further, saying when Mr Wotton addressed any issues with him, he was often aggressive and threatening, creating fear, stress and tension in the workplace – like walking on eggshells all day. Mr Ballinger reached a point in November 2022 when he said he felt miserable because of Mr Wotton's manner and because Mr Wotton had started to withdraw from training and mentoring him and gave him menial tasks.

[30] Behind the scenes, Mr Wotton began to express concern and frustration to Mr Gray about Mr Ballinger's performance and capability. He expressed these concerns in emails that showed he did not see Mr Ballinger as a future Business Manager. For example, he described feeling "extremely frustrated and annoyed," outlined a number of perceived problems, and

¹³ Email 9 September 2022 at 2:20pm from Mr Wotton to Mr Ballinger.

¹⁴ Email 9 September 2022 at 3:25pm from Mr Ballinger to Mr Wotton.

although he could be a good Assistant Manager (if he listened, followed and applied himself), the same did not apply to being a manager.¹⁵

[31] What followed was a series of meetings, emails and conversations between Mr Gray, Mr Wotton and/or Mr Ballinger, during which the relationship deteriorated.

[32] On 30 November 2002, Mr Ballinger met with Mr Gray to express his frustrations about feeling unable to do things because of Mr Wotton's behaviour. He said it was affecting his mental health. Mr Gray understood Mr Wotton was challenging to work with and would look into it.

[33] Mr Gray and Mr Ballinger met for coffee on Monday, 19 December 2022. He said Mr Wotton had told him he thought Mr Ballinger had some aspects of being a Business Manager, some aspects he could achieve with training, and other aspects he did not have. He did not share what those aspects were. Mr Ballinger expressed surprise. When asked how he wished to approach it, Mr Ballinger suggested they make a plan for January 2023. They agreed to meet after the next Board meeting, on Tuesday 20 December 2022.

[34] When Mr Gray, Mr Wotton and Mr Ballinger next met, Mr Wotton raised concerns and said Mr Ballinger did not have enough "mongrel" to be a manager - there were parts of being a manager that did not suit him. Mr Gray told Mr Ballinger he had to prove he could do the job or there was only one other option, dismissal. He said he did not believe Mr Ballinger would get to the level needed. Mr Gray recalled it being a frank discussion in which they alerted Mr Ballinger to concerns about his capabilities, and that if they did not see improvement, they had to consider whether the employment relationship was viable long term.

¹⁵ Mr Wotton's email to Mr Gray on 16 October 2022.

[35] Mr Gray largely accepted what Mr Wotton told him he had done in terms of training and mentoring Mr Ballinger. He believed it was extensive. Mr Gray described the commercial decision about how much more could be invested:¹⁶

The business had invested considerable, time, money, support and resources into training Dan, so I didn't want to have any decisions made until a point was reached where it was in the business's best interests to cut their losses and look at alternatives to having Dan as the next business manager.

[36] Mr Ballinger left that meeting with a genuine fear his position would be terminated. He sent an email to Mr Gray that night expressing concern at the lack of feedback over the previous four months about his performance, lack of responsibility given to him so that he had not had an opportunity to grow in the job, lack of any warnings, and fact he had worked past his 90 day trial period. Mr Ballinger did not think it was fair to dismiss him.

[37] The next morning Mr Gray responded by email and a follow up call. He acknowledged they had "... significant concerns about progress and maybe capability." He then said:

One possibility is we use January as an opportunity to increase your exposure to tasks that we have been reluctant to let you loose on to date because of our uncertainty around whether you could fulfil them. Perhaps a structured programme with weekly meetings to gauge progress? We would be crystal clear however that we are concerned and would need to see a significant demonstration of capability. This would be documented.

[38] Afterwards, Mr Ballinger had a good (and he thought honest) discussion with Mr Wotton to clear the air. He felt comfortable with the challenge ahead. He responded to Mr Gray saying so.

[39] Mr Wotton set tasks for Mr Ballinger for the New Year in emails to him on 22 and 23 December 2022, including a task relating to cash flow.

¹⁶ At [18], statement of evidence.

[40] What happened next assumed some significance because ASGA claimed it varied the Agreement. Mr Gray sent an email to Mr Ballinger, copying in Mr Wotton, dated 23 December 2022:

Dear Dan,

As promised in our telephone discussion on Wednesday this week, I set out below a brief summary of events this week and what we have agreed.

1. You and I met on Monday to discuss how things were going for you. I also expressed concerns that both Mark and myself had.
2. On Tuesday Mark, you and I met to have a cards on the table meeting. This was very honest from all parties I thought. Thank you for that – I appreciate this is stressful and difficult. You said that you felt you could grow into the role. Mark and I both mentioned we had serious doubts re some aspects of it and your ability to manage the place in several regards.
3. You emailed me Tuesday evening with your reaction to the meeting. You felt we had predetermined to give you notice of termination.
4. I emailed you on Wednesday morning (after a very early chat with Mark). In that email I proposed that we would make January an opportunity for you to prove capability.
5. In our telephone call following my email we had a very clear discussion around what January will involve and how we see things working. You are keen to give this a crack. We will have a plan for giving you input into areas that to date we have been concerned about letting you handle. There will be weekly meetings between the three of us. These will be conducted in a robust manner with honest feedback – good and bad. It will be incumbent on Mark and yourself to take notes during each week or what takes place. In our call I made it clear that if Mark and my concerns or observations are not put to bed – we are looking at the termination route. You accepted this. You also expressed your thanks for the opportunity (as you had thought notice was effectively already given – I note on this point that by agreeing to our proposal you acknowledge that we have communicated clearly with you and that you agree the way forward. And accept that termination is very clearly on the cards here if things dont work out to our satisfaction)

Dan I appreciate this is difficult. Thank you for being upfront with your thoughts and reactions and for agreeing to the January “make or break” approach. This is your opportunity in a supervised manner to make it work for you.

I understand Mark and yourself had a good chat about all of the above as well at work. Mark will work on tasks and opportunities for you Dan. It is critical from my perspective that everything still goes via Mark from your desk (the cc on emails needs to be done please). Being blunt I want Mark to see everything before it is circulated to staff or customers or suppliers or installers – this is for 2 reasons.

Firstly it means we can ensure quality control is in place. Secondly I want to be able to measure your performance. If we dont capture all the information via a collegial process with Mark – I cannot make the necessary assessments.

I will leave it to the two of you to agree on a work plan, and details around how things work internally. You need to also coordinate weekly meetings with me from mid January. I also want regular feedback via emails and phone calls from both of you.

Dan can I ask that you review the above. Let me know anything I have missed or got wrong. And send me an email saying you are in agreement (or not).

Many thanks

Colin

[41] Mr Ballinger responded briefly the next day agreeing with the process.

[42] Upon his return on 4 January 2023 Mr Ballinger started with one of the tasks – an advertising matter. Mr Wotton responded to Mr Ballinger’s email in a way he felt criticised and belittled most of his ideas - not at all in line with the approach that had been agreed for January which would be Mr Wotton continuing to train and support him. Mr Wotton had also met with him and picked faults in most things he had done. He directed Mr Ballinger remain permanently on the shop floor and not in the upstairs office. This embarrassed him and signalled a demotion of sorts to him and other staff.

[43] Unbeknownst to Mr Ballinger, Mr Wotton was also emailing Mr Gray saying he had considerable concerns about his performance and that he had “... kept right out of his way.”¹⁷ A few days later Mr Wotton repeated that he had “kept upstairs and away” and expressed further concerns about Mr Ballinger’s performance.¹⁸

[44] On Wednesday 18 January 2023, Mr Wotton, Mr Gray and Mr Ballinger met for their first progress meeting. Mr Ballinger believed he had completed all tasks except for the cashflow task he had difficulty doing and required assistance with. In hindsight, he acknowledged he should have chased Mr Wotton for assistance. The delay occurred in part because of Mr

¹⁷ Email from Mr Wotton to Mr Gray dated 12 January 2023.

¹⁸ Email from Mr Wotton to Mr Gray dated 16 January 2023.

Ballinger's sensitivity regarding Mr Wotton's absence due to a private matter. Mr Wotton told Mr Ballinger he was working at the level of a Contract Manager, not a Business Manager.

[45] The next day, Mr Wotton sent an email to Mr Gray summarising his recollections of the meeting. This included statements Mr Ballinger, "Will not make a Business Manager," and "Nice Guy, But not tough enough to withstand the pressures of being a Business Manager."¹⁹

[46] Mr Ballinger sent a summary to Mr Gray too.²⁰ His email summarised what was discussed in more detail including three areas of frustration for Mr Wotton and concern about the delay in completing the cashflow task. Mr Ballinger thought the aim at that stage was to upskill him on areas of the business that were perceived not to be his strengths – communication and financials.

[47] Mr Gray emailed Mr Ballinger on 21 January 2023 highlighting his concern about him not communicating about not completing the cashflow task nor asking for help. He then said:

... As we promised direct and honest feedback I have to say this does concern me. The report not being done in itself isn't fundamental (perhaps – if I am being generous), but the way you handled it (ie doing nothing), perhaps is. Now I understand how you got to that place – human nature sometimes to ignore a problem, or go do other things so we feel busy and productive and try to forget about the more important task. That behaviour is acceptable for a junior staff member – but I wouldn't expect that at your level.

Add to that the lack of communication and you not front footing things with me during the first two weeks of a month trial period and I am wondering if the role is right for you. The thought processes don't feel consistent with the skill set we need for someone who needs to be the fact of the Company and confidently dealing with everything that arises.

[48] Mr Ballinger sent a lengthy reply to Mr Gray on 22 January 2023 expressing his concern about the training process and Mr Wotton's failure to mentor him. Despite this he felt motivated to stay and fight for his job:

.... The most frustrating bit of this whole process is my initial meeting with Paul and Mark. We spoke and have documented that this was a training process with the view of taking 12-18 months.
I feel let down by the failing to teach, I also find it ridiculous, the student should be the one having to push to be taught.

¹⁹ Email from Mr Wotton to Mr Gray at 7.43am on 19 January 2023.

²⁰ Email from Mr Ballinger to Mr Gray at 8:49am on 19 January 2023.

Wasn't the long term plan for a change in management.
I have made a huge commitment to take this position on and will not step away lightly.
I will happily admit I am not the finished product, but I also have a hell of a lot of strengths when used properly.
I have leadership skills, and there are more than one way to manage.
I think anyone would struggle to learn and thrive with this process with no true step by step description on how I can step into this role successfully.
I envisaged when I took this job working side by side with Mark to make it a success for everyone, instead I been made to feel my input to be worthless.
Happy to have chat/catch up tomorrow.

[49] Mr Gray called Mr Ballinger the next day. Mr Gray's notes from that call confirm the two discussed the email then Mr Gray said "... is this the job for you?" Mr Ballinger asked him if Mr Wotton would be the same manager with six months experience than one with twenty years experience? They agreed to meet up after the next board meeting on 26 January 2023. But as described above, Mr Gray pre-empted that by taking Mr Ballinger to coffee the day before and issuing the ultimatum, resulting in Mr Ballinger resigning before the Board meeting took place.

Unjustified constructive dismissal?

[50] I do not need to decide whether the concerns raised by ASGA about Mr Ballinger's performance were well founded. Even if I did, ASGA appeared to be assessing Mr Ballinger's performance based on his capability as a Business Manager, despite having employed him as an Assistant Manager. Setting that issue aside, I note that the parties had agreed it was realistic to spend at least 12 months and up to 18 months training and mentoring Mr Ballinger before deciding to transition him into the Business Manager role. It struck me that truncating that timeframe to a mere month (or less than six months if the entire employment is factored in), was unrealistic at best, and at worst, set Mr Ballinger up to fail. Even if the concerns were significant enough to warrant embarking on the "termination route" referred to by Mr Gray in his email of 23 December 2022, then ASGA should have followed the process outlined in the Agreement that required counselling and progressive warnings before considering termination. On that basis alone, a fair and reasonable employer could not have concluded any concerns were well founded and certainly not serious enough to justify termination at the end of the month as stated by Mr Gray during the meeting in which he issued the ultimatum.

[51] ASGA seemed to say it could bypass the process in the Agreement because the parties had varied their Agreement. Even if that was the case, ASGA did not follow the process it had outlined in the email of 23 December 2022, not least because they had only one joint progress meeting and the promised training, mentoring and documentation left much to be desired.

[52] When Mr Gray met with Mr Ballinger on 25 January 2023 to tell him he could resign or have his contract terminated at the end of the month (reasonably interpreted by Mr Ballinger to mean by way of dismissal), Mr Ballinger had already been told more than once that ASGA did not see him as the face of the business, they thought he lacked capability and termination was on the cards. To say he could resign, or stay and have his contract terminated at the end of the month (31 January was a week away), was an ultimatum I find was unjustified and a sufficiently serious breach to make it reasonably foreseeable he would resign as a consequence.

[53] In addition, ASGA failed to follow the process set out in the Agreement to address any perceived performance concerns, failed to follow the requirements of section 103A and significantly shortened what had been agreed was a realistic timeframe for training and mentoring Mr Ballinger before concluding he was not going to transition into the Business Manager role. Even if it was reasonable to assess his performance on that basis (and I do not think it was, given his role was Assistant Manager), these were all sufficiently serious breaches that made Mr Ballinger's resignation reasonably foreseeable following the ultimatum. The appreciative tone of his resignation was understandable given his desire to retain his dignity and Mr Gray's suggestion to keep his email brief.

[54] I reject the idea Mr Ballinger had reasonably reflected on his options and chosen to resign because he had decided the role was not for him. He had repeatedly stated his commitment to the role in the face of what was harsh criticism at times. He had been pressured to prove his capability over a short and unrealistic timeframe for a role he was not employed to do yet, told he did not and would not have the capability, and that his options were to resign, or have his contract terminated at the end of the month. His options as communicated by ASGA were clear and unfair.

[55] I also reject that ASGA were simply frankly discussing performance concerns. ASGA were not attempting to maintain Mr Ballinger's employment. In frank discussions about his performance in December and January, ASGA made it clear it did not see Mr Ballinger as its next Business Manager. To then present him with an ultimatum was the opposite of a genuine attempt to improve his performance and continue the relationship.

[56] ASGA unjustifiably constructively dismissed Mr Ballinger.

Did the parties vary their Agreement?

[57] I address the argument of ASGA that it had varied the Agreement. Although clause 18 of the Agreement allowed for the parties to vary the Agreement in writing, Mr Gray's email did not say that it was doing that. For example, the email did not say it would remove or modify clause 14 or the Second Schedule.

[58] In addition, I do not accept Mr Ballinger's response meant he had agreed to forego his minimum entitlements to a fair and reasonable process as set out in the Agreement (and which required ASGA to move through progressive warnings before termination could be fairly considered). Even if he had, I accept Ms Ryder's submission that it would have been inconsistent with the Act (including the requirements of section 103A) and processes required by well established performance management principles.²¹ In addition, the requirements of section 63A(2) of the Act were not met.²² That could have consequences if I accepted a variation had occurred.²³

²¹ Such as those outlined by the Employment Court in *Greetham v Lawter (N.Z.) Ltd* [2020] NZEmpC 174 at [67] referring to *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC) endorsed by *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36.

²² Section 63A of the Act sets a minimum standard when bargaining for an individual employment agreement (including any variations as captured by section 63A(1)(e) of the Act). These include providing a copy of the intended agreement under discussion, advising them that they are entitled to seek independent advice about it, giving them a reasonable opportunity to seek that advice and considering any issues that the employee raised and responding to them.

²³ For example, section 68 of the Act may apply regarding unfair bargaining for an employment agreement with the potential for an order under section 69. However, the Authority could not make such an order until satisfying the requirements of section 164 including directing the parties to mediation.

Did ASGA unjustifiably disadvantage Mr Ballinger by failing to provide adequate training and support?

[59] Mr Wotton trained and mentored Mr Ballinger to begin with - even if the training may have been informal at times. This may have been indicative of an on-the-job approach to training and support a small business may reasonably take.

[60] Although I accept ASGA may have given Mr Ballinger adequate training and support initially, it became inadequate during the period leading up to the termination of Mr Ballinger's employment. This formed part of the relevant events leading up to Mr Ballinger's constructive dismissal and is not, I find, grounds for a separate unjustified disadvantage personal grievance.

[61] I conclude that the disadvantage grievance arises from the same set of facts that the constructive dismissal claim does. However, if I am wrong in that, I would have considered the grievance and its impact inextricably linked so as to justify awarding remedies globally.

Did ASGA breach the employment agreement?

[62] ASGA did not follow the process set out in the Agreement to deal with performance concerns. I have found that if any concerns were well founded (insofar as they related to Mr Ballinger's Assistant Manager role), then ASGA should have followed the process set out in the Agreement for managing these. However, I consider the constructive dismissal claim subsumes this claim too.

What remedies should I award?

Compensation

[63] Under s 123(1)(c)(i) of the Act, I may award payment of compensation for humiliation, loss of dignity and injury to feelings of the employee.

[64] Mr Ballinger described how events triggered his depression and caused him anxiety resulting in him seeking medical help. It took until September and October 2023 for him to reconnect with friends socially. The whole experience impacted him and his family greatly.

Mrs Ballinger spoke with sadness about witnessing his relationship with his two young sons deteriorate after previously being a fun-loving father.

[65] Mr Ballinger also had issues sleeping requiring medication. He felt shame and embarrassment at what happened and remained distant for a long time, withdrawing into himself affecting his personal and social relationships for a significant amount of time. He described having gone through anger, sadness and frustration.

[66] Having considered the extent of the harm Mr Ballinger suffered, where it sits when compared with other cases, and stepped back and assessed what I consider a fair amount in the circumstances,²⁴ I am satisfied an award of \$25,000.00 is appropriate.

Lost remuneration

[67] Section 128 of the Act requires me to order an employer pay an employee the lesser of a sum equal to the remuneration lost as a consequence of the personal grievance or three months ordinary time remuneration. Despite that, I may use my discretion to award a sum greater than that. The Court of Appeal has emphasised that moderation is required when exercising the Authority's discretion to give an increased award for lost remuneration.²⁵

[68] Mr Ballinger secured employment immediately after his resignation and claims the difference for 51 weeks which is \$12,406.77 gross. He seeks an award of that amount plus KiwiSaver and holiday pay.

[69] I consider an appropriate amount to be Mr Ballinger's actual loss for the equivalent of three months, totalling \$3,162.51. This reflects how long it the relationship may have lasted if the circumstances giving rise to personal grievance had not arisen.

²⁴ See for example, *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [153] to [164]. General trends in recent compensation levels can be found at [Compensation for personal grievance claims: Jul - Dec 2023 » Employment New Zealand](#).

²⁵ *Sam's Fukuyama Food Services Limited v Zhang* [2011] NZCA 608 at [36].

Contribution?

[70] Mr Ballinger did not contribute to the circumstances giving rise to his grievance.

Summary of Orders

[71] ASGA Investments Limited unjustifiably constructively dismissed Mr Ballinger.

[72] I order ASGA Investments Limited pay Mr Ballinger:

- i. \$25,000 in terms of section 123(1)(c)(i) of the Act; and
- ii. \$3,162.51 in terms of section 123(1)(b) of the Act.

Costs

[73] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[74] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Ballinger may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum ASGA will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[75] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.²⁶

Lucia Vincent
Member of the Employment Relations Authority

²⁶ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1