

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Maureen Zillah Briggs (Applicant)
AND New Zealand Gem Trading Company Ltd (Respondent)
REPRESENTATIVES Pamela Wright, for Applicant
Graeme Norton, for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 28 April 2004
SUBMISSIONS RECEIVED From the Applicant – 12 May 2004
From the Respondent – 26 May 2004
DATE OF DETERMINATION 4 June 2004

DETERMINATION OF THE AUTHORITY

The employment relationship problem

- [1] In a statement of problem received on 3 February 2004 the applicant, Ms Maureen Briggs says that the respondent, New Zealand Gem Trading Company Ltd (“NZGTC”), subjected her to an unjustifiable disadvantage in her employment and thereby constructively dismissing her. Ms Briggs claims that she was subjected to bullying in the workplace, to the extent that she could no longer work there and had no option but to leave her employment.
- [2] Ms Briggs says NZGTC failed to provide her with a written employment agreement, contrary to section 65 of the Employment Relations Act 2000, and she seeks a penalty in respect of that failure.
- [3] In its statement in reply NZGTC denies Ms Briggs was subject to bullying in the workplace and states that there was no unjustifiable action which could cause Ms Briggs to leave her employment. NZGTC says Ms Briggs never resigned from her job, she simply did not return to work. Further, NZGTC says that it believed that at the time of raising her employment relationship problem, Ms Briggs considered herself to be an employee who intended to return to work.
- [4] An investigation meeting was held on 28 April 2004 after mediation assistance had not assisted the parties to resolve the employment relationship problem between them.
- [5] At the Investigation Meeting I interviewed Ms Maureen Briggs, Ms Towers, Ms Hawkins, Ms Ryan-Anderson and Ms Megan Briggs (Ms Briggs daughter) on behalf of the applicant. For the respondent I interviewed Mr Nodder, Mr Whiting and Ms Mowbray.

Background

- [6] NZGTC began as a partnership between Mr Paul Bunker and Mr Peter Whiting, 12 years ago. NZGTC carry on the business of importing cut and polished diamonds of all sizes which are then sold to manufacturing jewellers, retailers and others associated with the jewellery industry both domestically and in Australia.
- [7] Ms Briggs commenced employment on 20 February 2002 in a part-time capacity working 3 days a week. It was common ground that Ms Briggs did not have a written employment agreement. This is the subject of an application for penalty against NZGTC and I will discuss this more fully later on in this determination.
- [8] In January 2003 Mr Bunker left NZGTC and the partnership. In that same month Mr Craig Nodder joined the company with a view to purchasing part of the business. Mr Nodder had previously held senior management positions in investment banking groups in Europe, North America and New Zealand. Mr Nodder's uncontested evidence is that he was a very experienced manager, having previously had responsibility for up to 200 employees.
- [9] In early 2003 Mr Nodder became a 50% shareholder of the business.
- [10] NZGTC employs a total of six staff including Messer's Whiting and Nodder. Four of the six staff, including Mr Whiting, are employed as Diamond Traders. The Diamond Traders sit around a square work area set in the middle of the office space. Each having their own side of the square from which to work. The other two staff members are Ms Briggs and Mr Nodder. Ms Briggs' workstation was adjacent to Mr Nodder's workstation. When they were both sitting at their workstations, Ms Briggs and Mr Nodder faced toward each other.
- [11] The office environment at NZGTC was completely open plan. I have reviewed the plan drawn for my benefit at the investigation meeting and have concluded that it would be difficult, for all staff not to hear everything being said in the event that a staff member was to yell or raise their voice at another staff member.
- [12] Mr Whiting, as the founding director of the business told me that he was not a manager. He told me that before Mr Nodder came on board the company had had some major problems on the administration side with out-of-date administrative processes and computer systems. He was very much hands-on and involved in the business and needed to have a partner who could focus on the systems and staff management of the business. Once Mr Nodder came on board, Mr Whiting told me he left the management of the business to him.
- [13] In his evidence Mr Whiting says:
- Over my time in the business I have taken a fairly relaxed and laid-back approach with staff...When Craig came into the company he was from a large corporate background, in international investment banking. ... Craig set out to improve a number of our processes. I can understand that we needed to change from the laid-back style, which was probably quite inefficient in a number of ways, and move towards a more professional and businesslike approach. Craig took on the role of moving us from the old to the new style.*
- [14] Mr Nodder says that as part of his process of evaluating the company he spent a week undertaking due diligence at the company. During that time Ms Briggs met with Mr Nodder and told him that she was under-utilised in her current role and was capable of much more than she was doing. Ms Briggs also told Mr Nodder that she could do a better job than the

current office manager, Ms Alison Gwilliam. Ms Briggs also told Mr Nodder that she would have to find alternative employment as she needed a job with more challenges and higher pay.

- [15] Ms Briggs says that from her first encounters with Mr Nodder, it became obvious that it was not going to be smooth sailing and the pleasant and enjoyable working conditions she had enjoyed were to change. Ms Briggs told me Mr Nodder “...*appeared to wield enormous power and control*”.
- [16] Ms Briggs explained to me that Mr Nodder took instant control, dealing with banks and dealing with staff. She told me he gave a lot of directions to staff and introduced new systems.
- [17] Ms Briggs told me that it seemed to be “...*a take over by Craig*”, but that things did improve in the office particularly in respect of new equipment.
- [18] In February 2003 the previous Office Manager (Ms Gwilliam) left. It was common ground that Ms Briggs and Ms Gwilliam did not get on well together. Ms Briggs told me Ms Gwilliam left 3 days after she [Ms Gwilliam] started working with Mr Nodder. Although she did not say so directly, it seems Ms Briggs would have me conclude that Ms Gwilliam left as a direct result of having to work with Mr Nodder.
- [19] Mr Whiting told me that Ms Gwilliam resigned from her position before Mr Nodder officially joined the company and while Mr Nodder was absent in Australia. He also told me that Ms Gwilliam’s reason for leaving was that she was not comfortable with the new systems being put in place.
- [20] Following Ms Gwilliam's resignation, Ms Briggs was approached by Mr Whiting and Mr Nodder together and asked if she would like to take on the role. Ms Briggs agreed to “...*give it a go...*”.
- [21] Mr Whiting and Mr Nodder gave evidence that the discussion they had with Ms Briggs included some counselling of Ms Briggs about her general tendency to treat whatever she was doing at a particular time as being critical and all-important and that her work took a priority over everything else in the business. They told me they asked Ms Briggs to evaluate the importance and relevance of what she was doing and to be less intrusive and demanding of attention.
- [22] Ms Briggs denies this point was raised with her.
- [23] It was common ground that Ms Briggs was in the habit of talking to herself while undertaking her duties.
- [24] Mr Whiting and Mr Nodder also told me that at that initial meeting they counselled Ms Briggs about the fact that she continually talked to herself and told her the habit created a situation where directors and other staff never knew when she was talking to herself or trying to talk to others. This habit was viewed as disruptive in the workplace.
- [25] Ms Briggs acknowledged that this was raised with her but viewed this as an instruction, not counselling.

Workplace Bullying

- [26] Ms Briggs' evidence was that Mr Nodder eroded her confidence by treating her in a "condescending and overbearing" way. When I asked her for specific examples of Mr Nodder's behaviours to support her contentions Ms Briggs told me that Mr Nodder told her to "shut-up" while pointing his finger at her. (I have referred to the "Shut-up" incident later in this determination). Ms Briggs also told me that it was not so much what Mr Nodder said to her, but his tone of voice when he spoke to her.
- [27] Ms Briggs told me that Mr Nodder embarked on a "...slow but systematic bullying..." regime. She told me that he would use "put-downs" when talking to her. In answer to my questions at the investigation meeting Ms Briggs told me that at first she didn't see the behaviours as bullying. Ms Briggs went on to describe an example of the type of behaviour she felt was "bullying". She outlined the situation that when she was dealing with Mr Nodder, she would put her point of view, and he would say "...yes..." but then would do whatever he wanted.
- [28] I then asked Ms Briggs to provide examples of the "put-downs". In response Ms Briggs referred me to the "safe incident".

The safe incident

- [29] Ms Briggs told me that while she was sitting at her desk, Ms Mowbray, one of the Diamond Trading staff went into the room called the "safe" and began to clean it up. Mr Nodder told me that Ms Mowbray wasn't busy at the time and so to utilise her time he asked her to clean up the safe.
- [30] The safe is the size of a small office and was used for storage.
- [31] Ms Briggs told me that Mr Nodder mentioned to Ms Briggs that there was a lot of banging in the safe and asked her to sort it out.
- [32] Mr Nodder told me he asked Ms Briggs if she had a problem with Ms Mowbray to which Ms Briggs replied in the negative. At the investigation meeting it was common ground that there was a problem between the two ladies.
- [33] Ms Briggs says that Mr Nodder said:
- If you have a problem with Sheryl just sort it out, okay, it can only be to your detriment, no-one else's, so just sort it.*
- [34] Mr Nodder agrees that he told Ms Briggs that if she had a problem with Ms Mowbray she should sort it out.
- [35] Ms Mowbray gave evidence that Ms Briggs had taken exception to her cleaning the safe and that this had caused considerable friction to the extent that there was a heated exchange between them. Ms Hawkins confirmed to me that Ms Mowbray approached her after the exchange and told her she [Ms Mowbray] was sick of the disruptive, unfriendly manner in which Ms Briggs treated her and sick of all the whispering. Ms Mowbray told Ms Hawkins that she was contemplating leaving the company. Ms Hawkins confirmed that she told Ms Mowbray not to make any hasty decisions which she may regret and that she should go home, think about matters and come back the next day.

- [36] Ms Hawkins reported the incident to Mr Nodder including her advice to Ms Mowbray.
- [37] After discussing the matter with Mr Whiting, Mr Nodder then had discussions with both Ms Mowbray and Ms Briggs separately about it.
- [38] Ms Briggs told me Mr Nodder asked her to accompany him into the lunch room where he proceeded to tell her she was “*a square peg in a round hole*” and that diamond sales people were the company and inferred that she was unimportant in the bigger scheme of things. Ms Briggs told me she took this to mean she should think about leaving.
- [39] Mr Nodder does not recall telling Ms Briggs that. Mr Nodder told me he counselled Ms Briggs on her need to address her inter-personal skills, the disruptive manner in which she went about her work, her lack of effective prioritizing and her continual talking with herself.
- [40] Ms Briggs accepted that these issues were raised with her.
- [41] Ms Briggs relies on this incident to support her complaint of bullying by Mr Nodder. I find that there is no evidence to support a conclusion that in dealing with this incident Mr Nodder adopted an unreasonable approach toward Ms Briggs.

Shut-up Incident

- [42] Ms Briggs does not recall how this incident came about but says that Mr Nodder stood in front of her while pointing his finger very close to her face and saying “*shut-up, just shut-up*”. Ms Briggs says she felt very threatened.
- [43] Mr Nodder does not recall telling Ms Briggs to “*shut-up*” in the way described.
- [44] This incident is also relied on by Ms Briggs in her claim that she was treated unreasonably in the workplace. Certainly from appearances this would have been an intimidating situation for an employee. It is not generally acceptable for a Manager to tell an employee to “*shut-up*” while pointing a finger at them. However, I am concerned that no other information around this incident was able to be recalled from Ms Briggs and therefore I am reluctant to draw any conclusions from the evidence provided.

The 24 September 2003 incident

- [45] The final incident leading to the ending of the employment relationship occurred on 24 September 2003.
- [46] Ms Briggs had received an email and was having difficulty opening it. Ms Briggs told me that Mr Nodder was speaking to her and that she frowned at him. Ms Briggs told me Mr Nodder “*...became furious, stood up, and stated – if you are unhappy you can pack your bags and go now*”.
- [47] Ms Briggs says that after Mr Nodder made this statement he invited her to have a discussion with her. She told me she was too upset to discuss things at that time. Ms Briggs says Mr Nodder then proceeded to tell her what he thought of her. Ms Briggs felt she had to get away from him. Ms Briggs says she told Mr Nodder she would like to think about things.
- [48] Mr Nodder told me that over the time he had worked closely with Ms Briggs he had gotten into the habit of blocking out Ms Briggs continual talking to herself. He told me that on 24

September 2003 he does recall Ms Briggs asking aloud, about how to respond to something, but he ignored her because he thought she was talking to herself. He says Ms Briggs then became frustrated and angry. He says Ms Briggs said very loudly and in a demanding way “*What do we respond, do we need to send a reply*”.

- [49] Mr Nodder told me he asked if Ms Briggs was speaking to him to which she responded “yes”. Mr Nodder says he explained to Ms Briggs that he thought she was talking to herself, going through the options aloud. He asked Ms Briggs what it was she was asking about. He says Ms Briggs then “...*gave a gesture of utter exasperation*”.
- [50] Mr Nodder suggested to Ms Briggs that their working relationship could not continue like this and they needed to have a chat. Mr Nodder told me he gestured toward the small meeting room. He says Ms Briggs refused to “...*have a chat*”. Mr Nodder told me he then told Ms Briggs that if she was not prepared to discuss the matter then “...*she might as well pack her bags and go*.”
- [51] It was common ground that Ms Briggs enquired about receiving payment for her notice period and that Mr Nodder committed to pay whatever was in her contract.
- [52] It is common ground that Ms Briggs then proceeded to inform the rest of the staff that she had been told to “*pack my bags and leave*”.
- [53] Mr Nodder’s evidence is that Ms Briggs returned to her work area and he then invited her once again to discuss matters. He says they went into the meeting room and Mr Nodder covered off the impact her mannerisms had in the workplace. Mr Nodder says he advised Ms Briggs that she needed to focus on her interactions with staff and that matters needed to be sorted out as NZGTC is only a small company with a small office environment. Mr Nodder says Ms Briggs did not say anything.
- [54] Ms Briggs then left the premises to have a cup of coffee. She returned to the office and she spoke briefly to Mr Whiting. She left again and has not returned.
- [55] Mr Whiting says he was told by Ms Hawkins that Ms Briggs had been told to leave and had left the building. Mr Whiting quickly left to go after her but could not see her. Mr Whiting told me that Ms Briggs then returned to the office, mentioned something about a medical certificate and left.
- [56] Mr Nodder was advised by Ms Hawkins that Ms Briggs would not be returning for the rest of the day. Mr Nodder felt that was a sensible thing to do and would provide for a cooling off period. At that point he fully expected Ms Briggs to return the following day.
- [57] The material difference between Ms Briggs version of events and Mr Nodder’s, is on the very critical point of how the statement uttered by Mr Nodder came about. In other respects they are very similar. Ms Briggs has asked me to accept that after a very short exchange Mr Nodder told her to pack and go. Whereas, Mr Nodder’s explanation is that he told her that she may as well pack and go only after Ms Briggs refused to discuss issues with him. I have accepted that Mr Nodder’s version of events is the more likely of the two.

Post 24 September 2003

- [58] After Ms Briggs left work on 24 September 2003 she attended her doctor. Subsequent medical certificates confirmed that Ms Briggs would return to work on 10 October 2003.

- [59] Ms Briggs contacted Mr Whiting on 1 October 2003 and asked him what he thought of the events that had taken place on 24 September 2003. Ms Briggs says he said he didn't know. That is consistent with Mr Whiting's evidence that he did not know what had taken place on 24 September 2003.
- [60] Ms Briggs told me she asked Mr Whiting if he wanted Ms Briggs to stay or leave. She says Mr Whiting told her he was only part of the partnership and couldn't really answer her questions.
- [61] Ms Briggs told me she felt quite strongly that Mr Whiting should at least have had an opinion on how he felt about the unjustified treatment by Mr Nodder.
- [62] Mr Whiting says he doesn't really recall the conversation except to say that Ms Briggs was trying to get Mr Whiting to agree to describe Mr Nodder in a very derogatory way.
- [63] Ms Briggs had a sick leave entitlement of 10 days. By 2 October 2003 Ms Briggs entitlement had been exhausted. Mr Nodder attempted to contact Ms Briggs at home and left messages for her to contact him. In one of the messages Mr Nodder explained that Ms Briggs had been paid all her sick leave and he wanted to discuss whether she wanted to use annual leave to facilitate her continued leave on pay.
- [64] Ms Briggs did not respond to the messages.
- [65] Mr Nodder asked Ms Hawkins to contact Ms Briggs. Ms Hawkins went to Ms Briggs home address and discussed the sick leave issue with her.
- [66] On 16 October 2003 the company received a letter from Ms Briggs representative (not Ms Wright) who indicated that a meeting was needed to enable a return to work for Ms Briggs. The company were also told not to make direct contact with Ms Briggs.
- [67] Ms Briggs confirmed that at the time this letter was written she considered herself to still be employed by NZGTC.
- [68] The parties attended mediation but were not successful in resolving their differences. Ms Briggs told me she then decided she would not be returning to work.

Constructive Dismissal – The Legal Framework

- [69] Ms Briggs is claiming that a constructive dismissal occurred, therefore the onus of proof falls upon her to show that there was indeed a dismissal, rather than just a resignation offered at her own initiative. As was held by the Employment Court in *Compass Union of NZ Inc v Carlton United Breweries (NZ) Pty Ltd* [1992] 1 ERNZ 1 at p.2:

Although it is clearly established by authority in cases such as this that justification for a dismissal must be established by an employer, when such a preliminary question as the existence of an employment relationship or the fact of a dismissal as opposed to a resignation are challenged, the onus of persuading the Court that such necessary prerequisites exist rests upon the applicant. See, for example, the judgments of the Labour Court in Northern Hotel etc IUOW v Little Ponsonby Tavern Ltd [1990] 2 NZILR 113 and Airline Stewards and Hostesses of NZ IUOW v Air New Zealand [1998] 2 NZILR 883.

[70] Generally speaking, a constructive dismissal is difficult to establish and the onus is on the employee to show that there has been a substantial action or inaction on the part of the employer that leads to the ending of the relationship. There are some cases where the employee is given no choice but to leave their employment, either because of a threat, i.e. resign or be dismissed, or alternatively, the employer makes it so uncomfortable for the employee that a resignation is forced. Such circumstances were discussed by Judge Williamson in *Wellington etc Clerical Workers IUW v Greenwich* [1983] ACJ 965:

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

[71] The Court of Appeal in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136, found that constructive dismissal includes, but is not limited to, cases where:

- *An employer gives an employee a choice between resigning or being dismissed;*
- *An employer has followed a course of conduct with the dominant purpose of coercing an employee to resign;*
- *A breach of duty by the employer causes an employee to resign.*

Determination and Discussion

[72] In arriving at my determination in this matter I have had regard to the evidence and the submissions of the parties.

[73] It was common ground at the investigation meeting that Mr Nodder's management style was very different to the previous approach, in that he was very businesslike and efficient. He implemented new systems that were not previously in place and generally set about making the business more effective.

[74] I was fortunate to be able to observe Mr Nodder closely during the one day hearing, and found his approach to be very businesslike and direct.

[75] It was common ground at the investigation meeting that Mr Nodder has a very deep masculine voice. Having heard from him over the course of a day I agree with that description.

[76] Ms Hawkins acknowledged at the investigation meeting that she did not actually witness any incidents, and she could not hear what was being said when Mr Nodder talked with Ms Briggs. I find that surprising given her description of his interactions with Ms Briggs as being in an aggressive tone of voice. I would have thought that if Mr Nodder raised his voice or was aggressive toward Ms Briggs, other staff working within the open office environment would certainly have heard what was being said.

[77] It was common ground that Ms Briggs would regularly seek the assistance of Ms Hawkins during the working day. Ms Hawkins was one of the four Diamond Traders sitting in the Diamond Trading area. Ms Hawkins sat directly opposite Mr Whiting and next to Ms Mowbray on one side and Ms Towers on the other.

- [78] Ms Hawkins told me Ms Briggs would seek her assistance on average between two to six times in the course of one days work. This would necessarily involve Ms Briggs approaching Ms Hawkins while she was seated at her workstation. Ms Mowbray told me it was up to 15 times a day.
- [79] It was common ground that soon after Mr Nodder commenced working at NZGTC Ms Briggs would visit the Trading area and tell the other staff about her interactions with Mr Nodder in a very negative way. This usually took place when both Mr Nodder and Mr Whiting were absent from the workplace. Ms Mowbray gave evidence that prior to Mr Nodder coming into the company the target of Ms Briggs comments was Ms Gwilliam. This evidence was not refuted by Ms Briggs.
- [80] Ms Towers, Ms Hawkins and Ms Briggs agreed that they trusted and had a good working relationship with Mr Whiting.
- [81] Ms Towers told me she raised with Mr Whiting, issues about Mr Nodder's style – but Ms Towers did not tell Mr Whiting that she considered Mr Nodder to be a “*bully*” or that he was the cause of staff wanting to leave the company. Ms Towers' evidence was that Mr Nodder would speak in a loud aggressive voice but that she could not hear what was being said.
- [82] For a company with only 4 staff, apart from the working directors, I find it surprising, given the evidence from Ms Towers and Ms Hawkins, that neither of them felt concerned enough during Ms Briggs employment to alert Mr Whiting that there was a problem between Ms Briggs and Mr Nodder. In situations where there is such a small number of staff, friction between an employee and her manager would surely make being at work extremely uncomfortable for all staff. This would particularly be the case in a situation where, as is alleged in this case, a manager was purportedly systematically bullying another employee in a very open workplace.

Did the employer give Ms Briggs a choice between resigning and being dismissed?

- [83] The effect of Ms Wright's submissions in relation to this point is that when Mr Nodder told Ms Briggs you “...*might as well pack your bags and go*” he was giving Ms Briggs a choice between resigning and being dismissed.
- [84] Taking into account the context in which that statement was made I do not accept that submission. There has been no evidence produced to show that Ms Briggs ever actually resigned from her job. She left one day and simply never returned.
- [85] I find that it is not proven that the employer gave Ms Briggs a choice between resigning and being dismissed.

Did the employer follow a course of conduct with the dominant purpose of coercing an employee to resign?

- [86] The effect of Ms Wright's submissions on this point, is that the words uttered by Mr Nodder combined with his “*bullying*” behaviours in the workplace was a course of conduct which had the dominant purpose of coercing Ms Briggs to resign her employment.
- [87] Ms Briggs left her work on 24 September 2003 and was on paid sick leave until her sick leave entitlement ran out in October 2003. A letter from her then representative indicated that the employment agreement was still on foot as they were seeking a way to return Ms Briggs to the workplace.

- [88] In October and November 2003 when the parties exchanged correspondence and attended mediation, it was on the premise that Ms Briggs continued to be employed by the respondent.
- [89] Mr Nodder's had concerns over Ms Briggs ability to do the job she had been promoted to when Ms Gwilliam left NZGTC which he attempted to address. The question Mr Nodder had about Ms Briggs ability to do the job is supported by the evidence from Ms Hawkins and Ms Mowbray that Ms Briggs would constantly seek Ms Hawkins' assistance and advice on work related matters.
- [90] A lot of general evidence was given about Ms Briggs attending the bathroom in tears on a number of occasions. However, this was only general evidence and no specific details could be provided. Not only that, but no one felt that the situation was so untenable at any stage, that the matter needed to be raised with Mr Whiting, who was the most trusted of the two directors and who got on very well with all the staff and who worked directly alongside four of them.
- [91] The evidence does not support a finding that Mr Nodder acted with the deliberate and dominant purpose of coercing Ms Briggs to resign. Mr Nodder's dealings with Ms Briggs were entirely reasonable. Whatever conclusions may be drawn about his management style I heard nothing to indicate that his purpose was to see Ms Briggs depart from the company.

Was there a breach of duty by the employer which caused Ms Briggs to resign?

- [92] Ms Wright has correctly submitted that under this head the Authority must have regard for the employers conduct overall and determine whether it is such that its effect judged reasonably and sensibly is such that the employee can not be expected to put up with it.
- [93] Ms Wright submitted that the evidence shows that the combination of Mr Nodder's tone of voice; the two incidents referred to above; Mr Nodder's dominant and blunt management style; his overbearing and demeaning manner of dealing with people; the derogatory comments made by Mr Nodder on a regular basis; the meetings with Ms Briggs where her habit of talking to herself and difficulties with her work were discussed with her; and the fact that no courtesy or respect was shown to Ms Briggs constitutes a breach of the implied term of the employment agreement. Further, that the behaviour and management style of the employer was conducted in a manner that was likely to and did seriously damage the relationship of confidence and trust between the employer and Ms Briggs.
- [94] As already stated in this determination, a lot of very general evidence was provided by Ms Briggs about the types of behaviours outlined in Ms Wright's submission which were simply not proven. No specific details about these complaints could be provided to the Authority.
- [95] Mr Norton submitted that the evidence suggests Ms Briggs reacted adversely to Mr Nodder's businesslike style, which she was not used to.
- [96] Mr Norton's submission has merit. The Authority must consider whether on judging Mr Nodder's behaviours in the workplace "*reasonably and sensibly*" it can be said that Ms Briggs should not put up with it. Ms Briggs accepted that she had a good relationship with Mr Whiting and that she trusted him. In answer to questions at the investigation meeting Ms Briggs could not tell me why she did not approach Mr Whiting and tell him about the difficulties she was having.

- [97] The letter from Ms Briggs then representative (not Ms Wright) outlined the 24 September 2003 incident and the “*square peg in a round hole*” comment. That letter also gave every indication that the employment relationship was still on foot.
- [98] The parties attempt at mediation was not successful, as it did not result in Ms Briggs return to work. On 16 December 2003 Ms Briggs took on new employment. At that date, the respondent in this matter was still of the opinion that Ms Briggs continued to be in their employ.
- [99] On 16 February 2004 NZGTC wrote to Ms Briggs. This letter supports my conclusion that the respondent still considered Ms Briggs to be in their employ at the time Ms Briggs took up alternative employment. This letter states that Ms Briggs was paid holiday pay on 24 December 2003 and that there was still some holiday pay due to be paid. Ms Briggs was still on the employer’s records as being an employee as at 16 February 2003.
- [100] The day I spent in the investigation of this matter with both Ms Briggs and Mr Nodder has enabled me to make some observations about them.
- [101] Ms Briggs is, in my considered view, a sensitive person who took offence at behaviours which fall within the normal range of what can be expected in the workplace. Her reaction to Mr Nodder’s attempts to counsel her about her behaviours was, in my view extreme.
- [102] I do accept, because I observed it at the investigation meeting, that Mr Nodder’s manner could be very brusque. However, this is not a matter of sufficient seriousness that it could be considered to have destroyed the trust and confidence in the relationship. It was not reasonably foreseeable (on 24 September 2003) that Ms Briggs would not return to the workplace.
- [103] While I understand and accept that there were a couple of specific incidents that caused Ms Briggs some unhappiness or resentment, I do not find that there was any conduct on the part of the employer that was of such a nature that could reasonably be seen to convert the ending of Ms Briggs employment relationship into a constructive dismissal.

Disadvantage Grievance

- [104] Prior to the investigation meeting Ms Briggs filed an amended statement of problem which included a claim for disadvantage. No particulars have been provided regarding the disadvantage claim. I have however, given consideration to whether Ms Briggs might have a disadvantage grievance arising out of Mr Nodder’s conduct.
- [105] For the same reasons I found Mr Nodder’s conduct does not give rise to a constructive dismissal, it does not give rise to a disadvantage grievance either.
- [106] It follows that I find that Ms Briggs does not have a personal grievance and hence the remedies she seeks are not available to her.

Penalty Action

- [107] NZGTC admitted that they had failed to provide a written employment agreement to Ms Briggs. Mr Whiting told me at the investigation meeting that this has now been rectified and no further breaches of the act will occur.

- [108] Mr Norton on behalf of the respondent made several submissions to me in relation to the claim for a penalty. It is worthwhile taking the time to address each of his submissions so that the parties are clear for my reasons in ordering a penalty against NZGTC.
- [109] Mr Norton submitted that the application for a penalty was out of time as Ms Briggs employment commenced in February 2002 and the claim was made more than 2 years later. He referred me to *Kelly v List* AA371/03 to support his contention. I have reviewed that determination and find that Mr Norton's submission is ill-founded. In that case Mr Kelly, while employed in May 2002, was dismissed in August 2002. Mr Kelly did not make application for the penalty against his former employer until September 2003. Under those circumstances, the Authority Member, rightly in my view, held that the application was outside the 12 month statutory limitation and therefore could not succeed.
- [110] Mr Norton then referred me to *Simms v Santos Mount Eden* AA 254/03 to support his submission that Ms Briggs had suffered no disadvantage in not having a written agreement as she had, at all times, received her agreed entitlements. In that case the respondent was found to have no assets and was no longer trading. The Authority member held that it would have been futile to impose a penalty in those circumstances.
- [111] The final submission made on behalf of the respondent was that the company had admitted its failure to provide a written agreement and has rectified the situation. In support of this submission Mr Norton referred me to *Postelwaite v Gas Company Ltd* CA 84/03. The *Postelwaite* determination can be distinguished from the matter now being determined as the respondent in that case did provide a written agreement to Mr Postelwaite although it did not strictly comply with the requirements of the Employment Relations Act 2000.
- [112] More than three years have elapsed since the passing of the Employment Relations Act 2000. Employers have very clear obligations under that Act to provide written employment agreements for all employees. I find NZGTC has breached s 64(2) and a penalty is therefore payable.

I order NZGTC to pay to the Crown the sum of \$1000.

Costs

Costs are reserved and I would request that the parties attempt to resolve that issue themselves if they can, taking into account the usual awards of costs issued by the Authority in similar circumstances. In the event that a resolution is not possible, Mr Norton is invited to file submissions with the Authority and copy to Ms Wright, within 28 days of the date of this determination. Ms Wright will have a further 14 days to respond to the Authority and copy to Mr Norton.

Vicki Campbell
Member of Employment Relations Authority