

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 130/08
5099444

BETWEEN CHANTELLE COUP
 Applicant

AND MPA INVESTMENTS
 LIMITED t/a McDONALDS
 KAIAPOI
 Respondent

Member of Authority: Philip Cheyne

Representatives: Peter Cranney, Counsel for Applicant
 Eska Hartdegen, Counsel for Respondent

Investigation Meeting: 12 and 13 June 2008 at Christchurch

Determination: 29 August 2008

DETERMINATION OF THE AUTHORITY

Introduction

[1] Two different but related statements of problem were lodged with the Authority in October 2007. In both the respondent was initially identified as *Pat Cornish McDonalds Kaiapoi*. The respondent lodged statements in reply and raised its own claim against one of the applicants. By consent, the name of the respondent was amended to reflect the employer's legal entity, MPA Investments Limited. That company operates the business called McDonalds Kaiapoi. Its directors and principal shareholders are Patrick and Ann Cornish. For convenience, I will generally refer to the employer as McDonalds Kaiapoi.

[2] By agreement, there was one consolidated investigation meeting during which we canvassed the evidence and submissions for Chantelle Coup's and Unite Union's

claims against McDonalds Kaiapoi and McDonalds Kaiapoi's claims against Unite Union.

[3] To assist me to focus on the issues particularly relevant to the separate problems, I have decided to issue two determinations. To some extent it is artificial to separate the problems in this way, and a fuller understanding of the context of this determination can be had by referring to the other determination.

Ms Coup's employment relationship problem

[4] Ms Coup worked for McDonalds Kaiapoi from December 2006 until her resignation in August 2007. Ms Coup was born in August 1989 so she was nearly 18 when relevant events happened. In June 2007, a number of other employees (including Ms Coup) joined Unite. In July 2007, Ms Coup saw a memo asking Unite members to see the trainee restaurant manager *about resigning from the Union*. There is significant contest about the meaning of the memo and in general McDonalds Kaiapoi's attitude and response to the sudden unionisation of the workplace. Ms Coup's position is that the memo and McDonalds Kaiapoi's negative disposition to the Union impacted on her employment and how she was viewed by management.

[5] In July 2007 Ms Coup worked fewer hours than previously. She came to think this related to her joining the Union. Then on 1 August 2007, there occurred an incident between Ms Coup and the trainee restaurant manager. Unite took up Ms Coup's concerns about that incident and generally with Mr and Mrs Cornish. Matters were not resolved and on Ms Coup's account got worse during a meeting on 15 August 2007. Shortly after this, Ms Coup resigned. Ms Coup says that McDonalds Kaiapoi exerted undue influence on her in connection with her union membership and breached s.11 of the Employment Relations Act 2000, unjustifiably disadvantaged her in her employment and unjustifiably dismissed her by way of a constructive dismissal.

[6] The first step in determining Ms Coup's problem is to resolve the evidential disputes about what happened.

The people involved

[7] I should say a little more about the main people involved in Ms Coup's problem.

[8] Mr and Mrs Cornish took over the McDonalds Kaiapoi business in about February 2006, having been McDonalds' franchisees elsewhere before then. They see their employees as an extended family and provide support and advice particularly to the many young staff who are employed in the business. Mr Cornish has more to do with the day-to-day management of the business, but neither of them physically works at the restaurant on a regular daily basis. Matt Hall is their trainee restaurant manager, having been in that position for about a year as at the date of the investigation meeting. The 1 August 2007 incident mentioned above was between Mr Hall and Ms Coup. Esther Bishop is a supervisor at McDonalds Kaiapoi.

[9] Caroline Hearst was employed by Unite for several months to recruit union members. Joe Davies is an experienced union organiser employed by Unite.

Union recruitment

[10] In mid-June 2007, Ms Hearst visited McDonalds Kaiapoi to recruit union members for Unite. By this time, she had been working on a recruitment programme for several months and had relevant resources and a well-rehearsed approach to this task. It is said that Ms Hearst pressured at least some staff, gave misleading information, did not properly explain membership benefits and did not give members the Union's contact details. None of these criticisms were supported by Ms Coup so it is not necessary to take them any further for present purposes.

[11] Ms Coup joined the Union by completing an application form dated 15 June 2007. On 29 June 2007, Unite faxed the deduction authorisation for Ms Coup and other new Union members to McDonalds Kaiapoi. McDonalds Kaiapoi already knew by that time that a number of staff had joined the Union because Ms Hearst sought and obtained McDonalds Kaiapoi's consent to her recruitment activities and there was plenty of discussion in the workplace about the recruitment campaign.

Ms Coup's work hours

[12] When employed, Ms Coup indicated her preference to work between 30 and 40 hours per week and her availability to work any day during McDonalds Kaiapoi's opening hours. Mention was made on the form that she might enrol in a course in 2007 that would restrict her availability. The records indicate that from about February 2007 Ms Coup was rostered for and worked about 18 hours per week. It is clear that there was an understanding between Ms Coup and McDonalds Kaiapoi that

her availability to work was limited from February 2007. There is an argument about whether Ms Coup resigned and was rehired at this time but it is not necessary to resolve that point.

[13] Mr Hall is responsible for preparation of rosters. The roster for the next week is posted in the restaurant and staff are required to sign to accept their rostered shifts before the week starts. That requirement is set out clearly in a *wages contract* signed by Ms Coup. If an employee does not sign, they are contacted by Mr Hall or a supervisor to ensure that they know they are rostered and will actually report to work. That policy is obviously advantageous for both McDonalds Kaiapoi and the employee but it does not obviate the signing requirement. Not reporting for a rostered shift is regarded by McDonalds Kaiapoi as a *no show* even if the staff member had not been contacted about the roster. Mr Hall told me that a *no show* may result in that person being rostered for fewer shifts during the next period. In addition, employees may be sent home if they report for work without having signed for the shift. Mr Hall told me that sending home is used to reinforce the policy of the signing requirement. Several of the other McDonalds Kaiapoi employees gave evidence consistent with Mr Hall's evidence about the policy. Mr Cornish claimed that staff are never sent home, but are offered the opportunity to leave early. I prefer Mr Hall's evidence about the point.

[14] There is conflict and some confusion about Ms Coup's rostered and actual working hours for the weeks ending Sunday 8 July and Sunday 15 July 2007. Ms Coup did not work at all during the week ending Sunday 22 July 2007. Ms Coup says that her hours were reduced after she joined the Union. McDonalds Kaiapoi says that Ms Coup's hours fluctuated throughout her employment and any reduction in hours in July specifically related to Ms Coup's *no shows* and illness. During the investigation meeting, it became apparent that McDonalds Kaiapoi had more documents that had not been previously disclosed to Ms Coup or the Authority. Some of these documents have helped to resolve the conflict and confusion.

[15] There is a report called *weekly time card report* which shows scheduled and actual hours of work. The report for the week ending 8 July shows Ms Coup scheduled to work 2, 3, 6 and 7 July. The report for the week ending 15 July shows Ms Coup scheduled to work 13 and 14 July. The report for the week ending 22 July shows Ms Coup was not scheduled to work at all. The scheduled hours must reflect

the roster information Mr Hall says was normally posted on the Monday, Tuesday or Wednesday prior to the start of the roster week Monday to Sunday.

[16] The record of time worked shows Ms Coup did not work on 2 and 7 July but did work on 3 and 6 July. McDonalds Kaiapoi says that Ms Coup did not sign for the 2 July shift. However, it seems that Ms Coup was aware of the week's roster because she did report for work on 3 and 6 July. In response to questions, Ms Coup said that there were several days when she was sent home despite reporting for work. I find that Ms Coup did report for work on Tuesday 2 July but was sent home because she had not signed for the shift. Not only was Ms Coup sent home, but she was only rostered for two shifts the following week as well. Ms Coup was sick on 7 July and did not work. There is a complaint about how she notified McDonalds Kaiapoi of her illness but it is not disputed as the reason for her non-attendance that day. More needs to be said about the roster for the week ending 15 July 2007.

[17] Previously undisclosed documents called *Period staff schedule (assigned shifts)* printouts for Tuesday 10 and Thursday 12 July 2007 include handwritten shifts for Ms Coup on both days. Information and evidence initially provided by McDonalds Kaiapoi is to the effect that Ms Coup was given two extra shifts during the week ending Sunday 22 July 2007 but she failed to report for work on these occasions. However, it is now clear from these documents that the extra shifts relate to the week ending 15 July 2007.

[18] During the week ending 8 July, seeing the roster for the following week giving her only two days' work, Ms Coup spoke to Mr Hall about wanting more hours. Up to that point, Ms Coup had typically been rostered for about 18 hours (four shifts) per week. Ms Coup's evidence is that she was not rostered at all for this week but she is mistaken on that point. It cannot be that Mr Hall responded to Ms Coup's approach immediately by adding her name to the roster for work on 10 and 12 July, because it is common ground that Ms Coup did not report for work on Tuesday 10 July 2007. If Ms Coup had known that her name had been added to the roster for these two days, she would have turned up to work since she had requested extra shifts. It follows that Mr Hall added the two extra shifts by hand to the already published roster, perhaps expecting that Ms Coup would check the roster again.

[19] Ms Coup's evidence is that she was not told of these extra shifts, that she did not check again and that she was phoned to ask why she was not at work when she did

not show on the Tuesday. At that point, she did not have access to a car and so could not get to work. Ms Coup says that when she next reported for work, she was sent home. That must relate to Thursday 12 July. Documents provided during the investigation meeting show another employee working in place of Ms Coup on that day. This is therefore an example of the sending home policy referred to in evidence by Mr Hall.

[20] From this it follows that Ms Coup saw the first version of the roster for the week ending 15 July rostering her on 13 and 14 July; asked for extra hours; was not told of the addition of her name to work on Tuesday and Thursday; did not report on the Tuesday because she did not know she was expected; was phoned and then learned of the Thursday roster; and reported for work on the Thursday but was sent home because a replacement had been organised on the basis that she was a *no show* for the Tuesday. It is common ground that Ms Coup worked on Friday, 13 July in accordance with the original roster. She did not work on 14 July, apparently on the basis that this too was an unsigned shift covered by a replacement employee.

[21] As mentioned, Ms Coup was not rostered at all for the week ending 22 July 2007, her next working day being Tuesday, 24 July 2007. Mr Hall's evidence is that Ms Coup was excluded from the roster for this week because of earlier *no shows*.

The first notice

[22] The circumstances in which the first notice was created and posted on the notice board are analysed in the other determination. When Ms Coup arrived at work on 24 July 2007, she saw the following notice on McDonalds Kaiapoi letterhead:

To all Unite members

Can all of you please see me about resigning from the union as I need you to fill out a piece of paper saying you wish for no payment to come out of your wages.

You are also required to send a letter informing the union that you wish to resign from Unite Union.

Their address is as follows:

*Unite House
300 Queen Street
P O Box 7175
Wellesley St
Auckland 1141*

This needs to be done before the wages are completed this week or your deduction will start.

*Thanks
Matt*

[23] That evening, Ms Coup spoke to a Union official and was asked to get a copy of the notice. Next morning, Ms Coup took a photo of the notice. But for that there would not have been a record of the first notice.

[24] During her shifts on 24 and 25 July 2007, Ms Coup learned from other employees that many of the people who had joined the Union in June were quitting. Esther Bishop is a shift manager for McDonalds Kaiapoi. Ms Coup's evidence is that she was told by Ms Bishop that if someone was in the Union and did not resign, that person would not get pay rises or promotions. On Ms Coup's account, Ms Bishop claimed to have been told that by Mr Cornish. Ms Bishop's evidence is that she did not recall having a discussion with Ms Coup about the Union and she denies being told by Mr Cornish that Union members would not get pay increases or promotions. However, Ms Bishop also said in evidence that there was talk in the restaurant about whether people would get pay rises if they stayed in the Union and that she told people that the Union could not force Mr Cornish to give pay rises. Caution is required in assessing Ms Bishop's evidence because she is partisan towards Mr and Mrs Cornish. I prefer Ms Coup's evidence about what was said to her by Ms Bishop. That does not necessarily mean that Mr Cornish actually told Ms Bishop what Ms Bishop claimed to have been told. Ms Bishop's statement reflected rumours circulating in the workplace.

[25] Later on 25 July, Ms Coup was approached by Mr Hall to talk about the Union. That much is not disputed and the approach resulted in a discussion between them in the office. No one else was present. Mr Hall had a number of conversations with other staff as well, before and after his conversation with Ms Coup. He made no notes of what he intended to say, or what he actually said, and his evidence is to the effect that he does not recall several of the specific claims made by Ms Coup about their conversation. However, Mr Hall denies telling Ms Coup that he wanted her to resign; he denies telling Ms Coup that he wanted her to write out a resignation letter; he denies telling Ms Coup that if she was in the Union she did not trust him or Mr Cornish; and he denies telling Ms Coup that she would be paying Union fees for nothing. Mr Hall says that (other) staff had approached him and Mr Cornish giving

rise to a *common issue* that things about the Union had not been properly or fully explained to the staff who joined and they had not been given contact information for the Union. He says that a lot of staff felt pushed into joining. Mr Hall also says that he wanted to assure Ms Coup that she could still talk to him or Mr Cornish about any issue, even though she had joined the Union.

[26] Ms Coup's evidence is that Mr Hall told her he needed her to write a letter resigning from the Union but she told him that she did not want to resign. Mr Hall asked why she had joined and Ms Coup said that her partner thought it was a good idea. Mr Hall then said that the lady recruiting union members was lying and they were just trying to get money from Ms Coup. Ms Coup then put to Mr Hall what Ms Bishop had reported Mr Cornish as saying about pay rises and promotions. Mr Hall denied that but Ms Coup was not convinced by his denial. Mr Hall went on to say *well if you're in the union it's just proving to both me and Pat that you don't trust us*. The exchange was then interrupted by someone coming into the office.

[27] There are a number of reasons to prefer Ms Coup's account of the exchange. It reflects the text of the notice. Ms Coup made notes of the conversation some time afterwards. Ms Coup supported rather than undermined her account when questioned during the investigation meeting. By comparison, Mr Hall partly conceded or could not recall when questioned about some of Ms Coup's account but had sufficient recall to deny only the most damning parts. Both Mr Hall and Mr Cornish had formed the view that Ms Hearst had pressured and misled staff and they saw the sudden rush of union memberships as a vote of no confidence. Accordingly, to the extent that there is a conflict, I prefer Ms Coup's evidence of her exchange with Mr Hall on 25 July 2007.

[28] By 27 July 2007, the original notice had been replaced by another notice which Ms Coup saw when she got to work on the Thursday. The second notice reads:

To all Unite members

If you are wishing to resign from the union

Their address is as follows:

*Unite House
300 Queen Street
P O Box 7175
Wellesley St
Auckland 1141*

This needs to be done before the wages are completed this week or the deductions will start.

You are not required to leave the union.

*Thanks,
Matt*

[29] The interactions between the Union and McDonalds Kaiapoi about the notice are dealt with in the other determination.

The water incident

[30] On 1 August 2007, there occurred an incident between Ms Coup and Mr Hall. Ms Coup asked Ms Bishop if she could get a drink of water to have with a Panadol. Ms Bishop said that was okay so Ms Coup went to the drink machine and got some water. Mr Hall came out of a storeroom, saw Ms Coup and stopped her drinking it. There is some controversy about what exactly happened.

[31] The incident was captured on McDonalds Kaiapoi's video recording system. Several McDonalds Kaiapoi people later saw the recording and some images from the same day were printed and are part of the evidence. None of the images of the incident itself were printed. I am told that the recording of the incident was overwritten some weeks later before being saved to a disc or otherwise preserved. It is a digital recording system that continuously overwrites earlier data as new data is saved. There is a window of some weeks to view and/or save current data before it is overwritten. Given that the incident quickly became an issue between Ms Coup and McDonalds Kaiapoi, it is most unfortunate that Mr Cornish did not ensure that the best evidence of what happened was preserved. His failure to do so represents surprising carelessness, at best. I am left to assess the accounts of Ms Coup and Mr Hall about the incident as well as the recollections of those who saw the recording.

[32] In his statement of evidence, Mr Hall says: *I simply tipped the cup of water into the bin next to which she was standing.* The context of his action according to Mr Hall was Ms Coup's habit of often having a drink without permission and her *standing chatting, having a social time which was not what she was supposed to be doing.* He did not pause to ask whether she had permission.

[33] Ms Bishop apparently did not see the incident but saw the recording later. In her statement of evidence, she limited herself to saying: *I looked at the camera*

footage later and she never did have the Panadol. However, when questioned by Ms Coup's counsel, Ms Bishop said of the recording: *I seen him knock the drink out of her hand, I seen his hand go up, the cup went into the bin. She was possibly in the process of taking a drink. It was whacked out of her hand into the bin.* As she gave this evidence, Ms Bishop demonstrated how Mr Hall had whacked the cup out of her hand. This involved the cup sailing upwards before falling into the bin. This evidence from Ms Bishop is similar to Ms Coup's description of the incident.

[34] Ms Coup says: *As I placed the Panadol in my mouth and went to take a drink of water, Matt came up from behind me and hit the side of the cup that I was holding. When he did this the cup flew out of my hand and landed in the bin in front of me.* In notes made some time after the incident, Ms Coup says Mr Hall ... *smacked the cup ... from my hand*

[35] In a letter dated 2 August 2007, the incident is described on Ms Coup's behalf as follows:

Mr Hall knocked the drink from Ms Coup's hand into a rubbish tin.

[36] Mr Cornish did not see the incident but did see the recording. In his statement of evidence he describes it as: *Matt's tipping of the cup into the bin.* When questioned, he characterised the incident as a *storm in a teacup* and *it was something he did a little bit harder than he should have.* This concession falls well short of the description given by Ms Bishop and Ms Coup.

[37] Mr Hall also saw the video. He was questioned closely about the incident during the investigation meeting. His evidence is that he grabbed the cup, put it in the bin and that his actions were completely controlled. He disputes Ms Bishop's account and her expressive demonstration. In evidence, Mr Hall also sought to distance himself from his own email dated 7 August 2007 which refers to the incident as *when I knocked the cup out of her hand* In evidence, he specifically denies knocking the cup out of Ms Coup's hand. He also denies any contact with Ms Coup's hand as part of this action.

[38] The most compelling evidence about the character of the incident is Ms Bishop's account when questioned, which aligns reasonably closely with Ms Coup's account and the shorthand description in Mr Hall's email. I reject

Mr Cornish's minimising of the incident and Mr Hall's attempt in evidence to distance himself from the earlier description.

[39] There is also a dispute about Ms Coup's reaction to Mr Hall's physical intervention and what was said between them at the time. Mr Hall's evidence is to the effect that Ms Coup was untroubled by his actions. He says that she laughed, started to move away and said she had permission, to which he replied that it did not matter, that she was always drinking and it was only a 3½ hour shift. Ms Coup's evidence is that she was stunned, that she asked Mr Hall what he did that for and he said *you are not meant to be drinking as we are not paying you to drink. You are standing around doing nothing*. Ms Coup said that she had Ms Bishop's permission and Mr Hall said *I don't care what Esther said* and that he had more authority than Ms Bishop. It is more likely than not that Ms Coup was *stunned* by Mr Hall's abrupt and unexpected action. The differences between Ms Coup and Mr Hall about the words used are minor although I prefer Ms Coup's evidence to the extent of that difference.

[40] Both Ms Bishop and Ms Coup say they had a brief exchange shortly after the incident and Ms Coup told Ms Bishop about Mr Hall knocking the cup out of her hand. Ms Bishop's evidence is that she saw that Ms Coup's uniform was wet. Next, there was a discussion between Ms Bishop and Mr Hall where Ms Bishop confirmed that she had given permission for Ms Coup to have the drink. Ms Bishop says in evidence that Mr Hall then said to Ms Coup that he was sorry but Mr Hall does not make that claim and Ms Coup disagrees with that evidence. Ms Bishop must be mistaken on that point. I also accept Ms Coup's evidence to the effect that Ms Bishop made light of the situation.

[41] Less than an hour after this incident, Ms Coup went into the office to use the phone. Mr Hall was working there. Prints from the video recording show Ms Coup by the phone at 10.01.09am and a person sitting on the desk in front of the phone just over one minute later. Ms Coup does not accept that the person sitting on the desk is her. It is difficult to tell for sure whether the person in the first print (Ms Coup) has the same hairclips as the person in the second print. Believing it to be the same person, McDonalds Kaiapoi says that Ms Coup's willingness to remain in the office with Mr Hall shows that she was not as upset about the incident as is claimed. I do not accept this argument. Ms Coup needed to use the phone. There is no reason to doubt her evidence that she did not know before going into the office that Mr Hall

was in there. The second print shows a third person in the office so Ms Coup did not linger there alone with Mr Hall. The second print does not show any communication between the person seated and Mr Hall and there is no suggestion in Mr Hall's evidence that there was any dialogue between them. If the person in the second print is Ms Coup, it does not show anything that undermines the credibility of her evidence about how she felt as a result of the earlier incident.

Unite takes up Ms Coup's complaint

[42] After work on 1 August 2007, Ms Coup phoned Mr Davies, told him about the incident earlier that day and asked him to take up the matter with Mr Cornish. Mr Davies wrote to Mr Cornish on 2 August 2007 as follows:

*The Manager
McDonalds Kaiapoi
Fax No 03 327 0283*

2 August 2007

Dear Pat,

Since we spoke on the phone, some disturbing events at McDonalds in Kaiapoi have been brought to my attention. As a result of these events, I am writing to raise an employment relationship problem under the Employment Relations Act on behalf of our member Chantelle Coup, on the basis of two facts.

Firstly, yesterday Chantelle was assaulted at work by the manager, Matt. Suffering from a headache, Chantelle had sought permission from her supervisor to go out to the back and have a drink with a Panadol. She was standing with the drink in her hand when Matt walked up to her and knocked the drink from her hand into the rubbish bin. He told her she was not allowed to have a drink. Chantelle told him that she had her supervisor's permission to have the drink, but Matt told her he didn't care what her supervisor had said, she was not allowed the drink. Several other employees witnessed this treatment of our member and were evidently shocked by what they saw.

Secondly, Chantelle tells me that since she joined the union, her hours have been cut dramatically. She is now employed for 10 hours or fewer a week, when she used to have 18 hours. At the same time, we note that McDonalds Kaiapoi is advertising for staff to work at times she has let the management know she is available to work. Please advise the reason that Chantelle has not been offered these hours as required under the agreement.

We would like an explanation of this behaviour as soon as possible please.

As remedies, we request:

1. *That Chantelle's regular hours be restored and that she be paid compensation for the average number of hours lost over the weeks she has had her hours reduced and*
2. *That the behaviour should be immediately and urgently investigated. If he has done what Chantelle says he has done, then he should apologise to Chantelle for treating her in that manner, and appropriate disciplinary action against Matt should be instigated.*
3. *Chantelle should be compensated \$2,000 for hurt and humiliation.*

We await your response at your earliest convenience.

*Yours sincerely,
(signed)
Joe Davies
Union Organiser*

[43] Mr Cornish did some investigation into Ms Coup's complaint. His investigation notes dated 3 August 2007 were not disclosed until during the investigation meeting. The notes record several staff saying that nothing happened to their knowledge; Ms Bishop giving a first-hand account even though her evidence to the Authority is that she had not actually seen the incident; Ms Bishop reporting Ms Coup as describing Mr Hall in a sarcastic manner as a bully; Mr Hall saying that he took the cup off Ms Coup and threw it in the bin; and Mr Hall saying that Ms Coup was *maybe just a little annoyed*.

[44] As mentioned, the video recording of the incident existed at the time. There is evidence about who reviewed the video and when they did so. Mr Cornish said that he asked Mr Hall to look at it. Mr Hall said that he looked at the recording once by himself and then later with both Ms Bishop and Mr Cornish present. Ms Bishop said that she looked at the recording once only with Mr Hall and Mr Cornish within several days of the incident. Both Mr Hall and Ms Bishop say that no prints were made while they were watching the recording. From this it is clear that Mr Cornish must have seen the recording of the incident within several days.

[45] Others also saw the recording but nothing extra can be gained from canvassing that evidence.

[46] On 7 August 2007, Mr Hall asked to speak to Ms Coup in the office. There is further controversy about what was said. Mr Hall's evidence is that he said he wanted to apologise, that Ms Coup said it was embarrassing and that she was sorry, and that it was the Union that called her asking questions and wanting to make an issue about it.

Ms Coup's evidence is that Mr Hall apologised, that she did not want to be in the office with him, so she said fine in order to get away as quickly as possible. Ms Coup denies apologising to Mr Hall and says that the matter was a huge deal for her. It is probable that Ms Coup downplayed the significance of the matter and distanced herself from its escalation in this unexpected exchange with Mr Hall. Mr Hall then reported his account of this exchange to Mr Cornish by email as mentioned above.

[47] Having done some investigation Mr Cornish arranged to meet with Unite and Ms Coup.

15 August meeting

[48] The meeting was held on 15 August 2007 from about 4.30pm until 5.10pm. Present were Mr Davies, Ms Coup, Mr Cornish and Mrs Cornish. There are notes made by Mr Cornish, Mrs Cornish and Mr Davies during the meeting. All the participants gave evidence and there are some conflicts that need to be resolved. By this time, there had developed some disagreements between Mr Cornish and Mr Davies over the wider issue of union membership, details of which are canvassed elsewhere, so theirs was already a difficult relationship. In her evidence, Mrs Cornish initially said that Mr Davies was aggressive but then said *to be honest, we were all aggressive in the meeting*. The concession more accurately reflects the tenor of the meeting.

[49] Mr Davies says that Mr Cornish opened the meeting and proceeded to vigorously and unfairly criticise Ms Coup for not having spoken first with him before approaching the Union. Mr Cornish holds the view that Ms Coup should have first spoken with him and it is likely that he voiced it. In the context of the difficult relationship between the Union and Mr Cornish, it is not surprising that Mr Cornish's opening was seen by Mr Davies and Ms Coup as a criticism. Next, Mr Cornish asked Ms Coup to say what had happened. Notes record Ms Coup saying what happened, how she felt about it and the response that she got from Ms Bishop at the time.

[50] Mr Cornish questioned Ms Coup about the statement in the 2 August 2007 letter that *several other employees witnessed this treatment ... and were evidently shocked by what they saw*. In response to Mr Cornish's question, Ms Coup said that there were about seven other employees who saw the incident. Mr Cornish challenged Ms Coup about the accuracy of the statement in the letter. Mr Cornish

referred to several staff telling him that they had seen no altercation and he voiced his own view that there was nothing to the incident. There was mention by Ms Coup of several other staff who she thought were present and Mr Cornish confirmed that he had not spoken to them but would. At some point in this exchange, there was discussion about the existence of the video recording. Mr Davies asked to see the recording and Mr Cornish agreed that he could.

[51] There was discussion during the meeting about the reduction in Ms Coup's hours of work, allegedly as a result of her joining the Union. By this time, Mr Cornish had been advised by Mr Hall that Ms Coup's initial engagement indicated an *any time* work availability; that she then came to him wanting to limit her hours to 18 per week because of her course; that Mr Hall agreed to give her as close to 18 hours as possible and that she started doing a 6am to 11am shift; that a few weeks later Ms Coup advised him that she needed to finish by 10am for her course; that Mr Hall then told Ms Coup that her availability change would affect her hours because she could not complete the 6am to 11am set up role; and that Mr Hall had endeavoured to give her the hours possible but her availability within McDonalds Kaiapoi's current staffing was not needed. Mr Cornish was also aware of Mr Hall's account of the roster and *no show* issues for the weeks ending 8, 15 and 22 July 2007. Accordingly, during the meeting Mr Cornish rejected the claim that Ms Coup's reduced hours of work related to her joining the Union and attributed it to her changed availability and her no shows.

[52] At some point during this meeting, Ms Coup began crying. Mrs Cornish, in evidence, says that Ms Coup probably cried because Mr Cornish was trying to understand who were the others who had seen the water incident. Mrs Cornish's evidence is also that it was a difficult meeting and everyone was under pressure. Ms Coup's evidence is that Mr Davies intervened and ended the meeting at the point she was in tears. They left with Mr Davies making it clear that the matter would be taken further. It is likely that an experienced Union official would either adjourn or end a meeting at the point that a young member such as Ms Coup started crying. Notes indicate that Mr Cornish was talking about the hours of work issue, Ms Coup's restricted availability and her no shows at the point that the meeting ended.

[53] Ms Coup says that she looked back as she left the building and saw Mr Cornish *high fiving* some of the other managers in the work area. Ms Coup says

his actions seemed to be connected with the meeting that had just ended. Mr Cornish denies *high fiving* other managers. Even if Ms Coup's evidence was preferred about Mr Cornish's gesture, there is no substantive reason to link it with the meeting.

Events following the meeting

[54] The next day, Ms Coup went to see her doctor. The medical notes record her telling the doctor *works at McDonalds – lots of stress happening – being verbally attacked – has been unwell for the last month – tearful ++ - irritable – not coping at work – not sleeping – waking frequently through the night – crying all the time – not looking forward to anything*. The doctor diagnosed *likely depression*, prescribed anti-depressant and sleeping medication and certified Ms Coup as unfit for work. Ms Coup's description to the doctor of *being verbally attacked* is a fair reflection of Mr Cornish's attitude and behaviour towards her in the 15 August 2007 meeting.

[55] Ms Coup took the medical certificate into McDonalds Kaiapoi on 16 August 2007. Mr and Mrs Cornish happened to be present. Ms Coup's evidence is that Mr Cornish asked her what she had in her hand, she said it was a medical certificate, Mr Cornish asked what for and Ms Coup said her doctor said she needed a few days off. Mr Cornish then said sarcastically to Mrs Cornish *look at this, Chantelle's sick* and Mrs Cornish responded sarcastically *oh imagine that, good timing*. Ms Coup said that it related to some personal issues, Mr Cornish asked if it was stress and Ms Coup confirmed that it was. Mr Cornish then said that Ms Coup had taken the matter too far, that they were going through stress but had to keep working so what made Ms Coup so different. Ms Coup said *so you're turning this around on me once again* and walked away. As Ms Coup was leaving, Mrs Cornish called after her *you're putting words into other people's mouths*.

[56] In response to this evidence, Mr Cornish says that his words were *it doesn't have to be this way* being an attempt to talk to Ms Coup off-the-record to try and sort out whatever the problem was. Mrs Cornish was also questioned about this exchange during the investigation meeting. Her evidence largely agrees with Ms Coup's evidence about the exchange, but Mrs Cornish denies that they were sarcastic. Mrs Cornish acknowledges yelling after Ms Coup but says that she was not yelling at the top of her lungs. Mrs Cornish also says that it was probably not appropriate for her to call after Ms Coup.

[57] Given the evidence of Mrs Cornish, I accept that notes made by Ms Coup shortly after the exchange represent an accurate account of what happened on 16 August 2007. I accept Ms Coup's evidence that both Mr and Mrs Cornish were sarcastic and that Mr Cornish told her she had taken matters too far. Mr Cornish was not trying to sort out the problem. He was trying to demean Ms Coup and press her into not taking the grievance any further.

[58] Ms Coup saw her doctor again on 20 August 2007. The notes report:

*Imovane – didn't help at all.
Start fluox four days ago – feels that it has helped mood still having trouble with work mates and managers – getting hard time about things – really needs to leave this job.*

[59] A further medical certificate was provided. Ms Coup's partner delivered this certificate to Mr Hall at McDonalds Kaiapoi.

[60] Ms Coup saw her doctor again on 7 September 2007. The notes read:

*When walking to work this morning twisted knee and became very painful. Went to work and they didn't provide her with any Panadol and then insisted that she went home.
Is feeling a lot better moodwise as she has found another job and starts tomorrow.*

[61] A medical certificate issued by the doctor dated 7 September 2007 was provided to McDonalds Kaiapoi.

[62] Subsequently, Ms Coup handed in a written resignation to Mr Hall at McDonalds Kaiapoi. Ms Coup told Mr Hall that she was resigning due to stress. Their exchange at that time was perfectly cordial.

Personal grievance?

[63] As described in the statement of problem, Ms Coup's claims include unjustified disadvantage and constructive dismissal personal grievances. It is convenient first to address the constructive dismissal claim. Only if there is no constructive dismissal will it be necessary to review whether other individual grievances are established.

[64] In *Auckland etc Shop Employees' etc IUOW v. Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases where the employer gives the employee a choice between resigning or being fired, or the

employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or a breach of duty by the employer leads the employee to resign. It is the third category in issue here.

[65] First, it is said that McDonalds Kaiapoi breached ss.7 and 11 of the Employment Relations Act 2000. Section 11 is the operative provision. The relevant part reads:

- (1) *A person must not exert undue influence, directly or indirectly, on another person with the intention of inducing the other person –*
- (a) ...
 - (b) *To cease to be a member of a union or a particular union; ...*

[66] In *Ekotone v. Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783, the Court of Appeal said the following:

Undue influence is a concept well known in the law, somewhat flexible of meaning according to the context. It aptly focuses upon improper exploitation of inequality between people in their dealings which equity and conscience will not condone. I see no reason to give it any different meaning in the Employment Contracts Act.

It cannot be doubted that certain employees are vulnerable to influence from strong employers and might readily submit to influence exerted directly or in subtle ways. It is important to ensure that in such cases their freedom to choose is assured and is not interfered with by undue influence. That is best done by dealing with particular circumstances as they arise when the true nature of the relationship can be assessed in conjunction with particular conduct said to deny the freedom to choose. That is a more sensitive instrument for achieving a proper balance between the competing rights in the imposition of a legal presumption of undue influence in all cases.

[67] McDonalds Kaiapoi must be regarded as a *strong employer* and Ms Coup as vulnerable to its influence. In particular, Ms Coup's rostered hours of work and her income depended on Mr Hall's and McDonalds Kaiapoi's willingness to include her in the roster, the employment agreement making it clear that Ms Coup was not guaranteed a fixed number of hours or shifts. The rostering issues leading up to 24 July 2007 demonstrate exactly that point, regardless of whether the reduced hours resulted from Ms Coup's union membership, her restricted availability or her failure to sign for shifts and her *no shows*.

[68] This relationship was such that not much would be required to amount to *...improper exploitation of inequality*. However, Mr Hall's actions would amount to *improper exploitation* even of a much less vulnerable employee. The circumstances of the creation of the first notice are canvassed elsewhere, but Ms Coup knew nothing of that. She simply saw Mr Hall's memo on the company letterhead. Anyone reading the notice would take it as an instruction from Mr Hall to resign from the Union. I accept Ms Coup's evidence about her supervisor (Ms Bishop) telling her that a person who did not resign from the Union would not get pay rises or promotion. I also accept Ms Coup's evidence about Mr Hall's approach following up on the memo. These last two mentioned aspects exacerbate the breach of s.11 arising from the display of the memo but are also separately breaches of s.11.

[69] Mr Hall's evidence is to the effect that he did not intend to induce any resignations from the Union but I do not accept his evidence. As explained elsewhere, both he and Mr Cornish saw themselves as redressing the pressure to join the Union allegedly exerted on staff by Ms Hearst which resulted in the dramatic unionisation. They very much intended to induce resignations by their actions and Ms Coup felt improperly and strongly pressured to resign from the union or the employment. What occurred here was a very serious interference of Ms Coup's freedom of choice about union membership in breach of s.11 of the Employment Relations Act 2000.

[70] McDonalds Kaiapoi's actions in response to the union membership of Ms Coup and others are also a breach of good faith and a personal grievance of duress. Section 4(1A)(1)(b) of the Act requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. As more fully explained in the other determination, McDonalds Kaiapoi's actions were destructive of its relationship with Unite and Ms Coup as one of the union's members. Under s.110 of the Act it is duress if the employer exerts undue influence or threatens to withhold any incentive or advantage with intent to induce the employee to cease to be a member of a union. There are findings above and in the other determination about Mr Cornish's and Mr Hall's intentions.

[71] It is claimed that the rostering issues in July resulted from Ms Coup joining the union. There is not sufficient evidence to support that conclusion. Rather, the

rostering issues were caused because Ms Coup did not sign for her shift on 2 July and did not report for work on 10 July. There is a measure of unfairness in what happened for the reasons explained earlier but there is not sufficient evidence to link it with Ms Coup's union membership.

[72] It is said that Mr Hall assaulted Ms Coup on 1 August 2007. That perhaps exaggerates what happened somewhat because of the serious connotations of an assault. At best from McDonalds Kaiapoi's perspective, what occurred was an intentional rude and unwarranted physical rebuke of Ms Coup. Mr Hall thought that Ms Coup stopped too frequently to drink water and he physically intervened to prevent her from continuing to drink on this occasion. His actions spilt water on her and took her by surprise. He was unrepentant when told that Ms Coup had permission and remained so until 7 August 2007. Mr Hall's conduct amounts to a breach of McDonalds Kaiapoi's duty to treat Ms Coup in a fair and reasonable manner.

[73] Mr Cornish badly handled the meeting of 15 August 2007. His approach to Ms Coup's complaints was improperly influenced by the growing dispute between him, the Union and in particular Mr Davies. Mr Cornish knew that Mr Hall had knocked the cup from Ms Coup's hand because he had seen the recording and had been told that by Mr Hall. Mr Cornish knew that Ms Coup had asked permission before getting the drink. Instead of showing the recording and/or apologising or arranging for an apology, he questioned Ms Coup about witnesses in a way that conveyed the message that he disbelieved her version of events. He also blamed Ms Coup for the reduction in her hours of work. An unresolved point is the extent to which Mr Cornish was critical of other aspects of Ms Coup's work. More must be said now about the last two mentioned points.

[74] What happened regarding the rosters during July 2007 is set out above. To some extent, Ms Coup was badly treated by Mr Hall because she could hardly be left off the roster or sent home for a *no show* when she had not known of her late inclusion on the roster in the first place. At the 15 August 2007 meeting, Mr Cornish was wrong to attribute the non-rostering to Ms Coup's restricted availability and to convey the view that she was completely at fault due to *no shows*. A more balanced approach should have been adopted by him. Unsurprisingly, Ms Coup saw this as further blame being unfairly pointed at her.

[75] Both Mr Davies and Ms Coup say that during the meeting Mr Cornish was critical of her work in general. Mr and Mrs Cornish deny this. The contemporaneous notes support Mr and Mrs Cornish, at least by not referring to this aspect of the discussion. However, some of the previously undisclosed material provided during the investigation meeting establishes that Mr Cornish had scrutinised the available recordings and noted various faults in Ms Coup's work on 1 August at least. Some of these issues must have been identified by Mr Cornish before the 15 August meeting given Ms Bishop's evidence about when she saw the recording with Mr Cornish making notes at the same time. However, the prints recording these faults were apparently printed on 15 and 16 August, after the meeting. It is unlikely that Mr Cornish would not have referred to Ms Coup's faults known to him by the time of the 15 August 2007 meeting. Accordingly, I accept Mr Davies' and Ms Coup's evidence that there was this wider criticism of her work. This meeting was not the occasion to raise these relatively minor issues and Mr Cornish, in doing so, contributed to the difficulties of the meeting and its poor outcome.

[76] McDonalds Kaiapoi attributes the difficulties of the meeting to Mr Davies' aggressiveness. Mr Cornish accepts no responsibility for how the meeting went but Mrs Cornish allows for some contribution from her husband while maintaining that Mr Davies was the principal cause. I do not accept McDonalds Kaiapoi's position on this. On my assessment, Mr Davies conducted himself in a professional manner and protectively of Ms Coup who he rightly assessed as being under attack from Mr Cornish during the meeting.

[77] Assessed overall, McDonalds Kaiapoi's conduct during the 15 August meeting amounts to a breach of its duty to behave in a fair and reasonable manner towards Ms Coup. I make the same finding in respect of the exchange between Ms Coup and Mr and Mrs Cornish on 16 August 2007.

[78] Not every breach of duty is sufficiently serious to give rise to a personal grievance of constructive dismissal. In *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers' IUOW Inc* [1994] 1 ERNZ 168, the Court of Appeal said:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of

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

[79] I will come to causation shortly. Meantime, I find that the combined effect of the identified breaches did make it reasonably foreseeable that Ms Coup would resign. The last two breaches are of lesser seriousness but their effect must be assessed against the context of the earlier breaches. Section 11 is a fundamental part of the law of employment. McDonalds Kaiapoi's breach was egregious. It is hardly surprising that an employee in Ms Coup's position would no longer have trust in her employer as a result.

[80] There was an attempt to ameliorate this breach of trust. McDonalds Kaiapoi displayed a replacement notice and Mr Cornish facilitated a union meeting. Ms Coup was understandably cynical about both actions. Similarly, Mr Hall's apology did not repair the harm caused by his conduct on 1 August 2007.

[81] It is apparent from the doctor's note that Ms Coup had other work arranged before resigning from McDonalds Kaiapoi. That was casual rather than the steady work that Ms Coup had been getting from McDonald's Kaiapoi. It was McDonalds Kaiapoi's conduct relating to Ms Coup's Union membership, the 1 August 2007 incident and McDonalds Kaiapoi's response that caused Ms Coup to seek some other work and resign. In other words, McDonalds Kaiapoi's breaches of duties caused Ms Coup's resignation.

[82] From this I conclude that Ms Coup was unjustifiably constructively dismissed.

Remedies

[83] As part of determining the nature and extent of remedies it is necessary to consider the extent to which Ms Coup contributed in a blameworthy manner to the situation giving rise to the grievance of constructive dismissal. McDonalds Kaiapoi is wholly responsible for the breach of s.11 of the Employment Relations Act 2000 which is a significant part of the grievance. Of somewhat lesser significance is the 1 August 2007 incident. McDonalds Kaiapoi says that Ms Coup took frequent breaks for water despite working only short shifts. It is also said that Ms Coup lied about

wanting to take Panadol. I am not prepared to disbelieve Ms Coup about wanting to take a panadol when McDonalds Kaiapoi's carelessness means that I do not have the video recording. In any event, whether or not Ms Coup actually took a panadol was irrelevant to Mr Hall's conduct. He knew nothing of this until afterwards. Ms Coup was entitled to drink water during the course of her work. Ms Coup and Mr Davies were not responsible for Mr Cornish's aggression on 15 August and Ms Coup acted properly on 16 August 2007. From this I conclude that Ms Coup did not contribute in a blameworthy way to the circumstances giving rise to the grievance.

[84] There is an argument for McDonalds Kaiapoi that Ms Coup's reported distress related to her falling behind in her course rather than anything done by her employer. I do not accept that argument. There is no reason to doubt Ms Coup's and her partner's evidence that she was largely keeping up with her course requirements until the events of late July and August 2007 described above.

[85] The effect of the various breaches and the resulting constructive dismissal on Ms Coup was very significant. The medical evidence has already been mentioned. Mr Davies, Ms Coup and her partner all gave compelling evidence which I accept. The distress was more keenly felt because of Ms Coup's age and vulnerability. An appropriate award to remedy these effects is \$15,000.00. While it might be possible to assess each breach as a separate grievance I have arrived at this figure as a global award.

[86] It is likely that Ms Coup has lost some remuneration as a result of her grievance but it is difficult to establish what amount. There were no guaranteed hours for her and her availability was even more limited from about late June when she had to finish shifts by 10.00 am. There is also a measure of uncertainty about Ms Coup's post termination earnings. The actual loss may be relatively minor and bearing in mind the award of non-pecuniary loss I will not make any further award.

[87] The claims in the statement of problem of a claim for exemplary and punitive damages were discontinued in light of *Prins v Tirohanga Group Ltd (formerly Tirohanga Rural Estates Ltd)* [2006] ERNZ 321 which cites *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) to the effect that these remedies for breach of contract are not available in New Zealand. I was not asked to treat the claims as amounting to claims for statutory penalties.

Summary

[88] Ms Coup has a personal grievance against MPA Investments Limited.

[89] MPA Investments Limited is to pay Ms Coup compensation of \$15,000.00 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

[90] Costs are reserved. Any claim for costs should be lodged and served within 14 days and the other party may have 14 days to lodge and serve a reply before the Authority fixes what, if any, costs award should follow.

Philip Cheyne
Member of the Employment Relations Authority