

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 91
5324337

BETWEEN	DAWN CHALMERS Applicant
AND	PHYSICAL THERAPY NELSON LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Graeme Downing, Counsel for Applicant John Levenbach, Counsel for Respondent
Investigation Meeting:	19 and 20 April 2012
Submissions received:	30 April 2012 from the Applicant 10 May 2012 from the Respondent
Determination:	16 May 2012

THIRD DETERMINATION OF THE AUTHORITY

[1] During the investigation meeting Physical Therapy Nelson Limited provided two sheets with information regarding fees income. Counsel was also provided with company accounts for the March 2010 and March 2011 years. By consent I made an order prohibiting the publication of any of that evidence except to the extent necessary for me to refer to in this determination.

[2] On 29 February 2012, with the parties' agreement, I made a temporary order prohibiting the publication of the letters dated 30 September 2010 and 13 October 2010 concerning Mrs Chalmers from Dr McKenzie-Pollock. I am asked by counsel for Mrs Chalmers to order non-publication more generally about medical matters. I do not think there are sufficient grounds to prohibit the publication of any of the medical matters referred to in this determination but I will continue the order in

respect of the two letters for a period of 28 days from the date of this determination to allow any challenge to this conclusion. I further prohibit from publication, again for only 28 days to allow for any challenge, the evidence and references to a breakdown, an anxiety disorder, steroid use and the use of masking agents. The practical implication is that this determination must not be circulated to anyone other than counsel and the parties until 28 days have elapsed.

Employment Relationship Problem

[3] Physical Therapy Nelson Limited (the company or Physical Therapy) is a registered company whose principals are Alan Donovan and Candace Donovan. Mr & Mrs Donovan personally owned and operated a physiotherapy business in Nelson. Dawn Chalmers was employed in this business as a physiotherapist from July 2007. Later, the business was transferred to the company. Mrs Chalmers' employment continued until she resigned without notice on 7 October 2010. Until this problem arose Mrs Chalmers was highly regarded as a senior employee of the business.

[4] The employment relationship problem involves each party making several claims against the other.

[5] Mrs Chalmers says that the circumstances of her resignation are such as to give rise to a personal grievance of constructive dismissal. There are claims for substantial compensation to remedy the grievance. However, the company says that it was a true resignation. To resolve that aspect of the problem I must explain the context of the resignation and apply the law on constructive dismissal to those circumstances.

[6] One of the circumstances is that Mrs Chalmers was absent on leave at an international sporting event for some weeks prior to the resignation. The first part of the absence was covered by annual leave which was paid at the time. Mrs Chalmers says that there was an agreement (the sponsorship agreement) that she would be paid extra leave for the balance of this absence, but she was not. Mrs Chalmers is seeking payment of salary to cover the extra leave. The company says that Mrs Chalmers did not meet the conditions attached to the offer of extra leave. Mrs Chalmers was

advised during her absence overseas that the company would not pay her the extra leave. I will need to make findings about what the arrangement was.

[7] Mrs Chalmers was due to return to work after her leave at 8.30am on 29 September 2010. When Mrs Chalmers arrived at work then she was sent away by Mr Donovan. Mrs Chalmers did not know but the company had written to her solicitor seeking a meeting with her over various matters before her return to work. There was correspondence between the solicitors from 29 September 2010. Matters were not resolved and Mrs Chalmers resigned on 7 October 2010. During the correspondence the company told Mrs Chalmers that she was still on unpaid leave. Mrs Chalmers was not paid despite her attempt to return to work and she is claiming salary for this period of time. There is also a claim for a penalty for the alleged breach of contract arising from the company not paying Mrs Chalmers' salary. I will need to consider whether the company had a legal right not to pay Mrs Chalmers' salary despite her availability for work. The legitimacy of the company's requirements, the lawfulness of the non-payment and the exchanges between the solicitors are also part of the constructive dismissal claim.

[8] Mrs Chalmers became involved as a shareholder and director and as an employed physiotherapist of a new business initially set up in premises near the company's business. The original employment agreement entered into between Mrs Chalmers and Mr & Mrs Donovan included restraint of trade provisions and a requirement for four weeks notice of resignation. The company seeks damages and penalties because it says that Mrs Chalmers breached the contract by not giving four weeks notice of resignation and by becoming involved in the competing business. The notice issue turns on the outcome of the constructive dismissal claim. I will then need to determine whether the restraint of trade provisions in the written terms entered into between Mrs Chalmers and Mr & Mrs Donovan became part of the employment agreement between Mrs Chalmers and the company. If they did I may need to consider the effect of various statutes such as the Illegal Contracts Act 1970.

[9] It is convenient to start with the sponsorship issue.

Sponsorship

[10] Mrs Chalmers has regularly been the top New Zealand woman boxer. She was selected to represent New Zealand at the World Championships held in Barbados in August 2010. Her coach and trainer (and now husband) was Alan Dickey. There were some discussions variously involving Mrs Chalmers, Mr Dickey and Mr & Mrs Donovan about the extent to which the company could support and/or sponsor Mrs Chalmers in this competition.

[11] These discussions were in the context of a significant reduction in income for Physical Therapy caused by changes introduced to ACC's funding for physiotherapy. Mrs Chalmers was the company's only employed physiotherapist. Others were engaged as contractors. Mrs Chalmers' written employment agreement included provisions about patient numbers, the times of appointments and the total number of appointment hours. The company was keen to increase Mrs Chalmers' billable hours as a way of ensuring it derived maximum income from her services. The other part of the context is that Mrs Chalmers had discussed a salary increase with Mr Donovan several times over the previous year or so without any result.

[12] There was a meeting on 24 June 2010 involving Mrs Chalmers, Mr Dickey and Mr & Mrs Donovan. By that time it had become apparent that the company and others would not be able to raise \$20,000 which was the original sponsorship goal. Instead there was discussion about the company sponsoring Mrs Chalmers by granting her additional paid leave to cover her forthcoming absence at the World Championships and Mrs Chalmers increasing her billable hours to 35 per week.

[13] The day after the meeting Mrs Chalmers sent an email to Mr & Mrs Donovan and received a response as follows:

Hi Candace and Alan

Thanks for the meeting last night, it was helpful in clarifying things for us regarding options.

Thanks you for the offer of the paid leave, I will work hard to increase my ACC billing to make this happen.

I look forward to getting my weekly break-down of my ACC statistics.

Dawn Chalmers

Dawn,

Thank you for that Dawn. We felt that we might have upset you a little bit last night and we apologise for this as it wasn't our intent. We really do

value everything that you do and want to reward you for all your hard work as best we can.

We look forward to doing whatever we can to help you achieve those targets as well as helping you with your leave.

Thanks for taking the time to let us explain things

Candace and Alan.

[14] Starting on 25 June 2010, at the end of each week Mrs Chalmers received a printed breakdown on her daily hours billed against her daily available hours. These were given to Mrs Chalmers by the office manager Margreet Hofman. However, Mrs Hofman told me that she was not party to the sponsorship arrangement.

[15] Mrs Chalmers wrote a letter dated 30 June 2010 setting out more fully her views about the 24 June 2010 meeting and the issues discussed. The letter expresses her disappointment in that she thought the meeting might have been to discuss her most recent request for a pay rise but instead involved Mr & Mrs Donovan raising issues about her profitability for the business which Mrs Chalmers took to be a suggestion of dissatisfaction with her work performance. In the letter Mrs Chalmers makes a number of points about why she thought a target of 35 billable hours was not achievable. The letter ends with Mrs Chalmers mentioning her previous commitment and work for the business and raising the possibility of her looking at other options. As to the sponsorship issue, that letter says:

With regards to your sponsorship offer, we thought a possible alternative could have been for you to support me during my time away from work by covering time off, rather than me taking "leave without pay". As the time might not be right for you and other interested parties, perhaps we should shelf the idea of sponsorship and focus solely on reviewing my remuneration

...

[16] Mr Donovan sent a substantive response by email on 7 July 2010. Much of it concerns his response to the points made by Mrs Chalmers about the billable hours target but it ends with:

If you think that a pay rise is in your best interest at the moment we are happy to put the sponsorship aside. I still think I can manage \$3-5000 pay rise depending on what hours we mutually agree on as being achievable.

[17] Next, there was a discussion between Mr Donovan and Mrs Chalmers. Mr Dickey may have been present. The discussion is undocumented. It must have been sometime after the 7 July 2010 email. Despite Mr Donovan's prepared statement of evidence running to 185 paragraphs over 50 pages the first mention of this meeting was in response to my questions about what had preceded an email

exchange dated 29 July 2010. As to the content of the undocumented discussion Mr Donovan specifically told me:

We discussed that 35 hours was not realistic but that 30 hours was and that it would try to be achieved. It was agreed between us that this was a realistic target.

[18] I accept this evidence as reliable. That conclusion is based on the circumstances in which the evidence emerged but also on something that Mr Donovan later wrote, as explained shortly.

[19] On 29 July 2010 Mr Donovan sent Mrs Chalmers an email saying he would like to catch up with her and Mr Dickey over a proposal regarding a related business. Mrs Chalmers responded a little later the same day. Her response must reflect what had been discussed in the undocumented discussion mentioned above:

*Hi Alan
Thanks for your e-mail and your amazing offer regarding working to own the City Fitness Clinic.
At this stage, I would like to continue with the original agreement of a \$3-5000 dollar increase on returning after the World Champs and to cover my Holiday Leave after my incurred hours are used.
Kind regards and much thanks
Dawn Chalmers*

[20] Notably, Mr Donovan did not reply disputing this account of their agreement. There is no evidence of any further discussion about the sponsorship arrangements, except as described below.

[21] Mrs Chalmers was due to finish work on Thursday 19 August 2010 before departing New Zealand the next day for the competition. At some point in the lead up to Mrs Chalmers' departure Mr & Mrs Donovan decided not to pay her the additional leave that was the subject of the sponsorship arrangement. At late notice Mr Donovan arranged a meeting with Mrs Donovan which occurred from about 6.00pm on the Thursday evening. The events of the meeting are hotly disputed but that is immaterial for present purposes. Before going to the meeting Mr Donovan dictated and Mrs Donovan typed out a memo to give to Mrs Chalmers at the meeting. There are now three memos in evidence, two dated *19 August 2010* (documents 4 and 5) and one dated *19/08/10*. Documents 4 and 5 are signed by Alan Donovan. The presently relevant part of document 4 is the first paragraph which reads (with my emphasis):

Dawn

I am sorry to have to advise you that, partially as a result of your not meeting your obligations to provide your target number of billable hours and obtain payment, I have had to reconsider my initial offer of sponsorship to continue paying your salary for the period when you are overseas at the Boxing World Championships.

[22] In the second to last paragraph this memo refers to events said to have happened during the Thursday evening meeting so logically document 4 could not have been printed and signed in preparation for the meeting. Mrs Donovan gave evidence before Mr Donovan. When questioned about that logic, Mrs Donovan told me that the version of document 4 which she typed and printed and which Mr Donovan signed and took to the 19 August 2010 meeting did not include the last two paragraphs. Later, Mr Donovan gave evidence that document 4 was actually drafted by his lawyer sometime after 19 August 2010. The questions of Mrs Donovan led to Mr Donovan finding amongst his papers a previously undisclosed document, the unsigned memo dated 19/08/10. I accept that Mr Donovan probably took this memo with him to the 19 August 2010 meeting. It reads (with my emphasis):

Dawn,

I am sorry but at this point, with the cash restraints on the business, I have had to reconsider my offer to pay your leave (above and beyond that rightly owed to you) as a sponsorship, especially in light of your only achieving 28.43 hours billable a week from 25/6/10 to 18/8/10 (prorated around leave and sick time).

Alan Donovan –

Managing Director

Sports Therapy – PHYSIOTHERAPISTS, Nelson

[23] Mrs Donovan's evidence is that in her discussions with Mr Donovan she argued for Mrs Chalmers to be given the sponsorship regardless. Mr Donovan also told me that he wanted to give Mrs Chalmers the sponsorship. However, he also said that 10 days or so earlier, in a discussion about Mrs Chalmers' targets with Mrs Hofman, she had told him that one of the problems in the business was that they paid out anyway and that people were not accountable. At some point Mr & Mrs Donovan decided not to give Mrs Chalmers the sponsorship, a decision that Mr Donovan in evidence describes as *pre-determined* in advance of the 19 August 2010 evening meeting.

[24] Mr Donovan was asked to comment on the point that use of the word *reconsider* in the 19/08/10 memo indicates backing out of an arrangement whereas (on the respondent's case) he was really confirming the arrangement by advising

Mrs Chalmers that she had not met her side of the agreement. Mr Donovan told me that it was because of the stress of the situation that the words used did not convey his true meaning. To the contrary, I find that the words used at the time indicates what had been agreed with Mrs Chalmers. I further note that the company's solicitor's letter of 6 September 2010 also uses the word *reconsidered* to describe the company's position. One would expect a solicitor to be able to convey the client's true meaning, as I find the correspondence did.

[25] Mrs Chalmers' evidence is that the sponsorship arrangement was that in return for the offer of extra paid leave she would attempt to achieve 30 billable hours, not that she would only get the extra leave if she achieved 30 billable hours. That is consistent with Mr Donovan's unscripted evidence of the final discussion with Mrs Chalmers. It is consistent with the whole 19/08/10 memo dictated by Mr Donovan and typed by Mrs Donovan. It is I find what had been agreed with Mrs Chalmers by the end July 2010.

[26] It follows that the company reneged on its promise to pay extra leave and must now pay Mrs Chalmers the extra 2½ weeks salary.

[27] There is evidence for the company, disputed by Mrs Chalmers, that she avoided meeting with Mrs Hofman and/or Mr Donovan in the last week or so before her departure. On Mr Donovan's account that is why he had to meet with Mrs Chalmers at 6.00pm on the day before her departure. In light of the finding about the nature of the sponsorship it is not necessary currently to resolve these differences.

[28] The failure to pay the extra leave is a significant factor in Mrs Chalmers' constructive dismissal claim, to which I now turn.

The Thursday 19 August 2010 meeting

[29] It is common ground that Mrs Chalmers exhibited signs of being *very stressed* and *emotional* in the week or so before her departure. That is how Mrs Chalmers describes her state in an email dated Tuesday 17 August 2010 to the company management team. The email was an attempt to explain her behaviour which Mrs Chalmers put down to an allergic reaction to prescription medication. In the

email Mrs Chalmers says that her last pill was on Monday so she expected to start feeling better *today or tomorrow*. There is a request to take Wednesday as a sick day allowing her to complete some paperwork. The company agreed to the request although the leave may have been taken on the Thursday.

[30] On the Thursday Mrs Chalmers was either on leave or had finished work for the day. She received a phone call from Mr Donovan requiring her to attend a meeting at 6.00pm at work. It is common ground that Mr Donovan would not tell her what the meeting was for. Mrs Chalmers and Mr Dickey arrived first and Mrs Chalmers went inside. Outside, there was an exchange between Mr Dickey and Mr Donovan. Lionel Padial is a business coach. Mr Donovan had asked him to attend the meeting as his witness. Mr Padial arrived and joined the exchange between Mr Dickey and Mr Donovan shortly after it had started. During the exchange Mr Donovan had to take a phone call so there was a period when only Mr Dickey and Mr Padial were involved. There are significant differences between Mr Dickey on the one hand and Mr Donovan and Mr Padial on the other as to what Mr Dickey said. It is not necessary to canvass that at present. It is common ground that Mrs Chalmers was not part of these exchanges and that Mr Dickey was not told of the company's decision to withdraw the sponsorship or given the *19/08/10* memo, even though that was apparently Mr Donovan's purpose in requiring the meeting. Eventually the men went inside to join Mrs Chalmers. It is common ground that she was not told about the exchanges between the men.

[31] Mr Donovan was too emotional to lead the discussion so he left it to Mr Padial. There is some disagreement about precisely what was said in front of Mrs Chalmers but it is common ground that she was neither given the *19/08/10* memo nor told of its contents. For present purposes, the only thing of substance that occurred was that Mr Padial proposed that Mrs Chalmers authorise Mr Dickey to represent her to discuss her *work related matters* in her absence. Mr Padial provided the words and Mrs Chalmers typed the two line authority which both she and Mr Padial signed. Mr Padial's evidence is that he explained that Mr Donovan was under immense pressure to get all aspects of his business from top to bottom in the best shape possible and wanted her to sign an agreement allowing Mr Dickey to negotiate employment matters in her absence. Mr Dickey's evidence is that Mr Padial told them they wanted to talk about new targets. Mrs Chalmers' evidence is that

Mr Donovan had said they wanted to discuss increasing her work hours and new work targets. Mr Donovan's evidence is that he referred only to *employment matters*. It seems that Mr Donovan had with him the second of the signed 19 August 2010 memos (document 5) dealing with work practice and profitability issues. It is common ground that he did not give Mrs Chalmers this memo or refer specifically to its contents. It is sufficient for present purposes to conclude that there might have been some reference to the company's need to discuss work targets but nothing more specific than that was said.

[32] In his prepared evidence Mr Padiál is very critical of Mrs Chalmers' conduct at the meeting saying things like: *aggressive actions and demeanour, aggressively ... questioning, became very argumentative, became very aggressive evidenced by her body language and piercing eye contact*. When questioned, Mr Padiál said that Mrs Chalmers was not physically threatening to him or to Mr Donovan but she was verbally aggressive. When pressed by counsel he went on to say *It was a demeanour thing. It was the manner, the intensity*. Mr Padiál impressed me as a partisan witness unable to convincingly back up all his strong statements when pressed.

[33] Part of the case for Mrs Chalmers is that the company decided to withdraw the extra leave after the 19 August 2010 meeting perhaps in a response to the events of that evening. However, the earlier finding about the 19/08/10 memo discounts this theory. In any event, it is common ground that when she departed New Zealand the day after the meeting Mrs Chalmers did not know about the company's extra leave decision, nor did she know any of the details that the company needed her to agree to and adhere to on her return (as per document 5). If she knew anything of the exchanges involving the men outside it would have been Mr Dickey's version. Mrs Chalmers signed the authority form as requested and left matters in the hands of Mr Dickey. As events transpired the company took no steps to communicate further with Mr Dickey.

Disciplinary issues raised

[34] The company instructed its solicitor to communicate with Mrs Chalmers while she was overseas. There is an email dated 31 August 2010 that the solicitor sent to Mrs Chalmers and which she accessed via webmail while in Barbados. The email

included three attachments which Mrs Chalmers was unable to open. I have already mentioned documents 4 and 5. The third attachment was the solicitor's letter dated 30 August 2010 raising detailed allegations of serious misconduct to be discussed at a meeting following Mrs Chalmers' return. The email itself refers to threats allegedly made by Mr Dickey that *you would contact clients of Physical Therapy Nelson Limited, and "bad mouth" the company* and an issue about contacting Mrs Hofman. The email cautions Mrs Chalmers that these things must not happen or they will be regarded as serious misconduct and/or defamation. It concludes *I look forward to hearing from you or your Personal Representative to arrange the meeting following your return to Nelson.*

[35] Mr Dickey's evidence is that he left New Zealand to join Mrs Chalmers about 2½ weeks after her. Mrs Chalmers forwarded the 31 August 2010 email and attachments to him while he was still in New Zealand. Mr Dickey sought legal advice from Nigel McFadden, a partner in a Nelson firm. Mr McFadden wrote to the company's solicitor on 2 September 2010. After expressing surprise at the communication to Mrs Chalmers given her absence from New Zealand, the letter goes on to say:

We do not accept the approach taken by your client in his letter to Dawn of 19 August. Your client made an offer of sponsorship, that offer was accepted and we expect your client to honour his obligation in that regard.

The matters which you allege as "serious misconduct" are denied and we are happy to meet with you (in the company of Dawn) upon her return.

As you know our client is engaged in international competition. Please do us the courtesy of ensuring all correspondence and contact is made through us and not direct to our client.

[36] The letter drew a response dated 6 September 2010. For present purposes I only need to mention that the company's solicitor advised that he would not communicate with Mrs Chalmers but would direct future communications to her lawyer.

[37] It is useful to summarise to this point. Physical Therapy had reconsidered and withdrawn its sponsorship (document 4). Physical Therapy had a number of work practice issues that it needed Mrs Chalmers on her return to agree with and adhere to (document 5). Physical Therapy had the following concerns (amounting to serious

misconduct) regarding which there needed to be a meeting upon Mrs Chalmers' return to Nelson but not necessarily prior to her recommencing work:

1. *Not complying with your obligations to accept full bookings;*
2. *Not carrying out your administrative duties in a timely manner despite many requests to do so;*
3. *Being unnecessarily and unreasonably aggressive to Alan Donovan in the meeting held on Thursday 19 August last; and*
4. *Through your Representative, threatening to cause serious harm to Physical Therapy Nelson Limited's reputation should it take any disciplinary action against you or in fact do anything which you did not agree with.*

Health Practitioners Competence Assurance Act issue

[38] Mrs Donovan told me that a number of staff approached her in the week or so before Mrs Chalmers departed New Zealand to complain about Mrs Chalmers' erratic and emotional behaviour about the clinic however Mrs Donovan *shrugged it off* as the effect of stress prior to international competition. Mrs Donovan used the italicised words in evidence. Next Mr & Mrs Donovan received the 17 August 2010 email from Mrs Chalmers referred to above. Mrs Donovan saw the email that evening. In her prepared statement Mrs Donovan says that she was immediately concerned as to the appropriateness of Mrs Chalmers continuing to make vital decisions and the possible consequences of her treating injuries especially of the vertebral column. If that is so, Mrs Donovan did nothing about her immediate concern.

[39] Mrs Donovan's evidence is that Mr Padial described Mrs Chalmers' behaviour as like a steroidal rage. It is unclear exactly when Mr Padial reached that view or communicated it to Mrs Donovan but presumably it was sometime shortly after the 19 August 2010 meeting.

[40] Mr & Mrs Donovan were aware that in March 2010 the Sports Tribunal had imposed a 5 month ban on Mrs Chalmers for use of Furosemide which can be used to mask the use of steroids. The Sports Tribunal decision found that Mrs Chalmers had used Furosemide as prescribed by her doctor in 2009 for therapeutic purposes and not for the purpose of enhancing performance, bringing her within a weight class or masking the use of any other prohibited substance. Mrs Donovan had provided a very favourable reference dated 6 January 2010 for the purposes of that hearing to the effect that (in her view) Mrs Chalmers would never use performance enhancing drugs.

Despite expressing those views in early 2010 Mrs Donovan came to be concerned about the possibility of the use of steroids as an explanation for Mrs Chalmers' behaviour prior to departing New Zealand. That remarkable change in view is probably explained by Mr Padiar's role as a trusted business coach for Mr & Mrs Donovan.

[41] The other factor to mention in this context is something apparently said by Mr Dickey in his exchanges with Mr Donovan and Mr Padiar on 19 August 2010. On Sunday 15 August 2010 Mrs Chalmers (with Mr Dickey) saw her doctor concerning her state of health. The doctor noted Mrs Chalmers to be stressed and anxious about the upcoming competition and not sleeping. He prescribed her an anxiety reducing medication (12 tablets) to be used on an as needed basis. His evidence is that it was a relatively acute but not long lasting situation. Against that background Mr Dickey is alleged to have told either or both Mr Donovan and Mr Padiar on 19 August 2010 that Mrs Chalmers had had a *breakdown* on the previous Sunday. In a 14 September 2010 email communication to his lawyer Mr Donovan mentions this disclosure. There was no other way for Mr Donovan to know about this at that time so I accept the evidence that Mr Dickey referred to it in the exchanges before the 19 August 2010 meeting. Mrs Donovan came to learn of it from Mr Donovan later on 19 August 2010.

[42] At some point a decision was made for Mr & Mrs Donovan to contact the Physiotherapy Board of New Zealand to get advice. Mr Donovan received an email on 14 September 2010 from the Chief Executive of the Board who refers to sections of the Health Practitioners Competence Assurance Act 2003 in particular s.46 which provides that a person who is contemplating giving formal advice to the Board under s.45 may seek medical advice to help form their opinion for the purposes of s.45. The Chief Executive's email refers to the employee's partner disclosing that the employee had suffered a *mental break down*. That must be how Mr Donovan described it to the Chief Executive.

[43] On or around 14 September 2010 Mrs Donovan went to see Mrs Chalmers' doctor without an appointment. The doctor is also Mrs Donovan's doctor but her purpose was to seek information about Mrs Chalmers, particularly the possibility of steroid use. Mrs Donovan's notes made before the discussion refer to *steroid rage*, which description Mr Padiar had given to her. While the doctor agreed that the

symptoms described by Mrs Donovan were consistent with steroid use he told her that he could put his hand on his heart and say that he did not believe it to be the case with Mrs Chalmers.

[44] On 24 September 2010 the company's lawyer wrote to Mrs Chalmers' lawyer enclosing a copy of the Physiotherapy Board of New Zealand email, referring to advice from medical practitioners that Mrs Chalmers' conduct may have been caused by the use of steroids or other prohibited substances such as masking agents and asking for advise whether Mrs Chalmers had been using such substances over the previous six months and a letter from her doctor confirming that point and confirming that *any mental issues* have been resolved. The letter asks for the information well prior to a meeting which the company thought was very important to take place prior to Mrs Chalmers' return to work.

Mrs Chalmers' attempted return to work

[45] Unbeknownst to the company or its lawyer, Mrs Chalmers' lawyer was overseas at the time that this letter was received in his office. It was not forwarded to Mrs Chalmers and she was not made aware of it. Mr Donovan and the company lawyer appear to have thought that Mrs Donovan would return to work on Tuesday 28 September 2010 judging by their 14 September 2010 email mentioned above. Mr Donovan's evidence is that he received advice from his solicitor on or about Tuesday 28 September 2010 about what to do if Mrs Chalmers' reported to work without complying with the requests set out in the 24 September 2010 correspondence. When Mrs Chalmers' reported to work on Wednesday 29 September 2010 at 8.30am she was sent away by Mr Donovan. Mrs Chalmers' evidence is that she was told to contact the company's solicitor but Mr Donovan's evidence is that he told her to contact her own solicitor. The point is not material.

[46] Mrs Chalmers contacted her own solicitor's office. Because her solicitor was still overseas she saw another partner in the firm who sent a fax on 29 September 2010 to the company's lawyer saying that Mrs Chalmers had been told that she could not work when she reported for work, asking for clarification of Mrs Chalmers' work status, explaining that Mrs Chalmers' solicitor was overseas and offering to meet during the next two days.

[47] That drew a response the same day asking for a letter from Mrs Chalmers' medical practitioner as requested in the 24 September 2010 correspondence and suggesting a meeting during the following week, partly because of availability and partly to allow time for the receipt of the information in advance of the meeting. The response states that the lawyer has no instructions on Mrs Chalmers' work status meantime.

[48] Mrs Chalmers' solicitor responded the next morning (30 September 2010). That fax criticises the response as unacceptable, presses for a response about Mrs Chalmers' work status, conveys the solicitor's advice to Mrs Chalmers to report for work each morning until matters are clarified, describes the 24 September 2010 allegations as scandalous and defamatory and demands details of who the company has discussed the matter with and what has been said to staff and clients about Mrs Chalmers' absence from work.

[49] Next, at 11.52am on 1 October 2010, Mrs Chalmers' lawyer forwarded a copy of a letter from her doctor expressing his lack of knowledge or belief about Mrs Chalmers using steroids or masking agents during the period identified for his comment.

[50] At 1.22pm on 1 October 2010 the company's lawyer sent by fax a reply to the 30 September 2010 fax from Mrs Chalmers' lawyer. The letter takes issue with a number of points made in the previous correspondence, not all of which need be mentioned presently. It states that the company had required Mrs Chalmers to provide a letter from her doctor and that she had been told not to report to work until she had done so. The letter says that Mrs Chalmers has not been dismissed and is still on unpaid leave. There is a refusal to answer the questions about the company's discussions over the steroid allegation but a denial that anything had been said to other staff. Mrs Chalmers is again asked to advise whether she had been using steroids or masking agents. Concern is expressed over Mrs Chalmers reporting to work and harassing other staff in light of her being instructed (in the correspondence to her solicitor) not to report to work until she had provided the information requested in the 24 September 2010 correspondence. That conduct is said to give further concern as to Mrs Chalmers' mental stability. The letter includes *a formal written*

warning not to report for work or contact Mr & Mrs Donovan or any of the company's staff or contractors until after the provision of the information required and a meeting and *a decision made and arrangements are agreed as to Dawn Chalmers' return to work*. Mrs Chalmers is cautioned that breach of this warning might result in dismissal.

[51] Mrs Chalmers' lawyer responded by fax at 4.10pm on 1 October 2010. That fax says that Mrs Chalmers does not accept the proposition that she is still on unpaid leave and asks for urgent advice as to the legal grounds for the employer's position. It repeats Mrs Chalmers denial of the 24 September 2010 allegations – specifically that she did not have a *mental breakdown* and did not take steroids or masking agents. It states that the lawyer will advise Mrs Chalmers not to continue reporting to work meantime and asks for urgent advice as to a meeting. The fax characterises the employer's actions as *grossly unfair, in breach of ...good faith, and without any substantive justification whatsoever*.

[52] The company's solicitor responded by fax at 2.22pm on 6 October 2010. I will set out this correspondence is full:

Dear Partners

Re: Physical Therapy Nelson Limited and Dawn Chalmers

I refer to your facsimile received late last Friday afternoon.

My apologies for the delay in replying, but I have been out of the office, and out of Nelson, from mid afternoon Friday, returning yesterday.

I comment on the numbered points:

1. *Physical Therapy Nelson Limited has not "unilaterally prevented" Dawn Chalmers from returning to work from Wednesday morning 29 September.*

We faxed you at 2.15pm on Friday 24 September 2010 with Physical Therapy Nelson Limited's concerns and requests as to information which must be provided to enable it to be satisfied that Dawn Chalmers' return to work will not prejudice the safety of clients, its employees and other contractors, or the Company's reputation.

Dawn Chalmers has still not provided all the information requested.

2. *If Dawn Chalmers did not have a mental breakdown, nor use steroids or other prohibited substances or agents to mask the use of steroids or other prohibited substances prior to her departing for the World Championships, then her actions, and the actions of her Representative to or against the Employer are inexcusable, and those actions and her subsequent actions following her return to Nelson give her Employer grounds to terminate her employment for "Serious Misconduct" under clause 4.2 of the Employment Agreement dated 5 July 2007 namely:*

- "(iii) harassment of a work colleague or customer;*
- (iii) serious or repeated failure to follow a reasonable instruction, and*
- (vi) actions which seriously damage the employer's reputation."*

I would appreciate your comments on those concerns.

3. *There were no "mixed messages" given by the Employer.*

What part of our facsimile to you of 24 September 2010 contains any “mixed messages”?

What subsequent communications from Physical Therapy Nelson Limited to Dawn Chalmers, constitute any “mixed message”?

4. *It appears to us that either Dawn Chalmers has deliberately disregarded the clear instructions of the Employer given in our facsimile to you of 24 September 2010 by turning up to work every day, and harassing staff and Alan Donovan, or alternatively your firm is remiss by not having advised Dawn Chalmers as to the contents of our facsimile of 24 September 2010, in sufficient time for her to appreciate that she must not turn up for work until the information requested has been provided, **and** the appropriate meeting has been held, **and** Physical Therapy Nelson Limited is assured that it, its staff and contractors and clients are at no risk of experiencing similar issues with Dawn Chalmers as occurred prior to her recent departure from New Zealand.*

Dawn Chalmers’ actions in turning up for work each day, having been told that she must not do so are not the actions of someone acting “completely rationally”.

If Dawn Chalmers had sought legal advice, and had been told that she must turn up to work, despite your firm having received our facsimile of 24 September 2010, then, with respect, she must seriously consider the competence of the legal advice provided.

Presumably, your statements that “The actions of the employer have been grossly unfair, in breach of the employer’s obligations of good faith, and without any substantive justification whatsoever” also reflect the competence of the legal advice provided.

5. *For a meeting to take place, all information required as a prerequisite for that meeting, and the parties attending the meeting, and their Counsel or Employment Representatives, must be available.*

6. *Dawn Chalmers’ actions prior to her departure from New Zealand, and following her return to Nelson appear to be irrational, threatening, and her threats, supported by her apparent irrational actions (without the benefit of any excuse or reason on the basis of the information which you have just provided to us) make the Employer very concerned that Dawn Chalmers’ return to work may cause danger to clients, employers, contractors, and possibly herself.*

There has been no “refusal” to pay Dawn Chalmers. Rather that is a decision that has not been made at this stage.

At this stage I must place on record that the extremely aggressive and confrontational approach taken by Dawn Chalmers against her Employer, through yourselves, is a cause of serious concern to the Directors of Physical Therapy Nelson Limited.

In simple terms the Directors of Physical Therapy Nelson Limited consider that the most aggressive and antagonistic approach taken indicates that Dawn Chalmers has already decided that she will not return to work as an employee for Physical Therapy Nelson Limited, and is merely doing whatever she can to manoeuvre herself into a position of being able to pursue a Personal Grievance Claim against Physical Therapy Nelson Limited.

I have been provided with further items of concern by Physical Therapy Nelson Limited, as to Dawn Chalmers’ mental stability, and danger to herself and others, and which indicate that Dawn Chalmers is not complying

with her earlier employment arrangements with Physical Therapy Nelson Limited.

Those further items are:

1. *Shortly before Dawn Chalmers left for the World Boxing Champs she turned up to a prearranged appointment with a Physical Therapy Nelson Limited Physiotherapist. The Directors of Physical Therapy Nelson Limited understand that the Physiotherapist was not able to treat her as she was incoherent,t and could not give him instructions.*

Dawn Chalmers wrote to the Physiotherapist subsequently:

“Andy you will know this from me acting very weird when I wanted to be treated with you and forgetting what I wanted to say to you when I was handing over my patients to you on Friday.”

Dawn Chalmers did subsequently arrange for a Physiotherapist treatment schedule about one and a half hours later!

2. *Dawn Chalmers told Alan and Candace Donovan at their Collingwood premises that Mark McLaughlin, a specialist working for Nelson Nursing Services, wished to practice from Physical Therapy Nelson Limited’s premises at Nelson as Nelson Nursing Services no longer wanted him to treat patients from their premises.*

Dawn Chalmers asked Alan and Candace Donovan whether they would provide a room for Mark McLaughlin to treat patients from, and whether they would “fund a transport for him”.

Mark McLaughlin started practising from Physical Therapy Nelson Limited’s premises.

After Dawn Chalmers left for the World Championships, without advising Alan and/or Candace Donovan what was happening in relation to Mark McLaughlin, Alan Donovan visited Nelson Nursing Services and discussed with the Practise Manager what was happening with Mark McLaughlin. The Practise Manager informed Alan Donovan that she had only been told a few days earlier that Mark McLaughlin was treating patients out of Physical Therapy Nelson Limited’s clinic, that they had no problem with Physical Therapy Nelson Limited patients being treated from the Nelson Nursing Services premises despite what Dawn Chalmers had specifically told Alan and Candace Donovan.

3. *When Dawn Chalmers turned up at Physical Therapy Nelson Limited’s premises last Thursday she amended her schedule including a three hour “in service” meeting.*

Dawn Chalmers did this without discussing the same with Alan or Candace Donovan, or anyone else.

Dawn Chalmers is well aware that any such “in service” meeting is only arranged and confirmed and scheduled by the Employer.

Presumably, Dawn Chalmers’ inclusion of such an “in service” meeting without first discussing the same and obtaining approval from Alan and/or Candace Donovan is part of her strategy to create issues for her

employer, and, misguide and attempt to “position herself” to lodge a Personal Grievance Claim.

4. *Prior to Dawn Chalmers’ departure from Nelson for the World Championships, she agreed with Alan Donovan that she would have no further contact or communication with clients until after her return, and should any client contact her, she would immediately refer them back to Physical Therapy Nelson Limited to arrange an appointment.*

Physical Therapy Nelson Limited is aware that Dawn Chalmers has not been honouring that obligation on a number of occasions, and certainly has not been referring those clients back to Physical Therapy Nelson Limited to arrange an appointment, but has basically been telling those clients her employment is “up in the air” at the present time.

This is unacceptable.

I look forward to hearing back from you.

[Signed]

Yours faithfully

J.A. Levenbach B.A., LL.B.

[53] Mrs Chalmers responded to this correspondence by resigning as set out in her email to Mr Donovan:

Dear Alan

Your actions over the last month and in particular the last week have left me no choice but to resign.

My resignation takes effect immediately.

Where would you like me to deliver the keys and uniform and when can I pick up my personal belongings, eg: textbooks, models, calendar and personal effects from the two premises?

Dawn Chalmers

[54] Mr Donovan forwarded that email to his solicitor almost immediately. The next day, 8 October 2010, the company’s solicitor wrote to Mrs Chalmers’ solicitor referring to the restraint of trade provisions in the 5 July 2007 employment agreement and asking for confirmation that Mrs Chalmers would honour those obligations. That drew a response from the solicitors on the same day. That fax describes the restraint of trade provisions as unlawful and unenforceable. It alerts the company to Mrs Chalmers’ intention to bring a constructive dismissal personal grievance claim. It also includes the following:

Your clients’ actions have amounted to a repudiation of the Employment Agreement, resulting in a forced resignation of Dawn Chalmers, which has

cancelled the Agreement. As the Agreement has been cancelled, our client is no longer bound by the provisions of the Agreement.

[55] There was further correspondence, but it is not necessary at present to set out those details.

[56] The only other matter that needs to be mentioned at this point is a letter dated 13 October 2010 which Mrs Chalmers' solicitor copied to the company's solicitor on 2 November 2010. The letter confirms Mrs Chalmers' doctor's view that Mrs Chalmers' anxiety and sleep loss prior to the World Championships was attributable to a very busy and hectic schedule leading up to the trip and that on her return she did not show any signs of mental illness.

Resignation or Dismissal?

[57] 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. Principally the third category is in issue here although it is suggested that the company followed a course of conduct intending to induce a resignation. However, there is little evidence of intention so I will focus on the third category.

[58] 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.

[59] In her emailed resignation Mrs Chalmers identified Mr Donovan's actions over the last month and particularly during the last week as the reason for her resignation. Referring to the reasons for her resignation, Mrs Chalmers' evidence is that the letter of 6 October 2010 was the last straw. Her evidence is that the letter states that, if not explained by steroid use and/or mental breakdown, her actions were serious misconduct. The letter also accuses her of aggressive confrontational behaviour. Mrs Chalmers says that, as soon as she dealt with their unreasonable demands and allegations, her employer changed the goal posts. She says that they were not acting in good faith and she could no longer trust them. Mrs Chalmers says that she was treated appallingly and that the Donovans had gone behind her back while she was on leave. They made up the very serious allegation about steroid use and about her having a mental breakdown, both claims without foundation. The Donovans published their allegations to the Physiotherapy Board and had been talking to other staff at Physical Therapy about the allegations. The Donovans reneged on the agreement about extra leave. Through all this they never met with her personally but engaged a lawyer to run the attacks on Mrs Chalmers.

[60] I accept that Mrs Chalmers genuinely held these views about her employer's actions at the time and that her resignation was in response to her perception of her employer's actions as just summarised. There was no other reason for Mrs Chalmers' resignation.

Breach of duty

[61] Mrs Chalmers' views, paraphrased above, are not wholly accurate. I will mention two examples.

[62] The evidence from Mr & Mrs Donovan is that they did not name Mrs Chalmers in their exchanges with the Physiotherapy Board. Mrs Chalmers thought that she had been identified by name. In the facsimile of 30 September 2010 Mrs Chalmers' lawyer asked for details of Mr & Mrs Donovan's discussions with the Physiotherapy Board but the company declined to provide any further details.

[63] The basis of Physical Therapy's allegation about a *mental breakdown* came from what Mr Dickey had told Mr Padiar and Mr Donovan. For the reasons explained

above, I accept that Mr Dickey told Mr Padial that Mrs Chalmers had suffered *some sort of a breakdown* and that he told Mr Donovan that Mrs Chalmers had suffered a *breakdown* on the previous Sunday. That is how the men's notes record the disclosure. When first made the allegation was that Mr Dickey had told Mr Donovan not to cause Mrs Chalmers stress for fear that she would have a *breakdown*. Mr Donovan used the word *breakdown* in his 14 September 2010 email to his solicitor describing the disclosure. However he told the Physiotherapy Board Chief Executive that a staff member had suffered a *mental breakdown* and the 24 September 2010 letter (which included a copy of that communication) asked for medical comment about Mrs Chalmers' *mental issues*. The episode was described as a *mental breakdown* in the 6 October 2010 letter immediately prior to Mrs Chalmers' resignation. Putting aside the pejorative language, Physical Therapy had some basis for inquiry.

[64] Despite Mrs Chalmers' inaccurate views on some points, I find that there were a number of breaches of duty by Physical Therapy.

[65] First, I have already found that Physical Therapy promised to pay Mrs Chalmers extra leave to cover the entire absence during the World Championships. The failure to honour this promise constitutes a breach of duty.

[66] Apart from that specific breach, the situation was badly handled by the company. As noted above the company says that Mrs Chalmers avoided meeting with Mrs Hofman and/or Mr Donovan in the week or so before she left. Mrs Hofman in her statement says it was hard to get Mrs Chalmers to discuss matters but she gives no details of any attempts. Mrs Hofman's additional oral evidence is that she had been asked by Mr Donovan to have a *catch up* with Mrs Chalmers about billable hours to tell her she was not quite achieving 30 billable hours and she had to work on that. However Mrs Hofman also told me *I wasn't any part of the sponsorship arrangements*. In light of that evidence I do not accept that even if Mrs Chalmers avoided meeting Mrs Hofman, it would have made any difference to the sponsorship issue. That notwithstanding, I doubt that Mrs Chalmers did actually avoid meeting Mrs Hofman as alleged. During the investigation meeting I was given a print out of an electronic message from Mrs Hofman to Mrs Chalmers sent via Physical Therapy's computer network. Dated 11 August 2010 it reads *Hi Busy woman, just blocked off*

10.45 for a catch up. Flat white? Apparently Mrs Chalmers was seeing a client immediately before 10.45 and the treatment ran on. Mrs Chalmers must have seen the message at some point but there is no evidence that she saw it before 10.45 and kept treating the patient in order to avoid the meeting. Indeed Mrs Hofman's evidence when questioned is that she did have a *catch up* with Mrs Chalmers and it might have been on 11 August 2010.

[67] Mrs Donovan's statement is that Mrs Hofman and Mr Donovan were to have a face to face meeting with Mrs Chalmers in the lead up to her departure to tell her about her not meeting the sponsorship terms and conditions but that *each meeting scheduled ...was cancelled or re-scheduled only to be again later cancelled by Dawn Chalmers herself*. That conflicts with Mrs Hofman's evidence about not being part of the sponsorship arrangement. Mrs Donovan did not refer to any dates or details. Mr Donovan did not give any details of attempts to meet with Mrs Chalmers prior to 19 August 2010 which she cancelled or avoided. I note that none of the three memos dated 19 August 2010 refer to cancelled or avoided meetings. On balance I prefer Mrs Chalmers' evidence that Mr Donovan had not been trying to meet with her all week.

[68] The company's position is that it was Mr Dickey's conduct on 19 August 2010 that meant that Mrs Chalmers was not advised of the sponsorship decision prior to her departure for the World Championships. I do not accept that position. If, as claimed, Mr & Mrs Donovan had decided prior to her departure that Mrs Chalmers had not met her sponsorship targets and would not receive the extra leave, they either delayed making the decision until it was too late to properly communicate it to Mrs Chalmers; or they made it earlier and delayed advising Mrs Chalmers. Accepting that the decision was made prior to rather than because of the events of 19 August 2010 it seems more likely that Mr & Mrs Donovan left it until the last minute to decide and then needed to meet after Mrs Chalmers had finished work and on the eve of her departure. Mr Dickey may have overreacted because of concern for Mrs Chalmers but the company's approach in leaving the matter to the last minute contributed to the problem. Having decided not to tell Mrs Chalmers that evening, the company could have personally through Mr Donovan or through its lawyer met with Mr Dickey after Mrs Chalmers' departure to discuss the sponsorship issue, especially in light of Mr Dickey's close involvement in the sponsorship arrangements. Instructing a

solicitor to communicate the message at the same time as raising allegations of serious misconduct which could lead to dismissal, all the while with Mrs Chalmers overseas on leave, was insensitive at best. Understandably Mrs Chalmers' trust in her employer was undermined as a result.

[69] The company's position about Mrs Chalmers' work status following her attempted return to work represents a significant breach of duty.

[70] The solicitor's email of 31 August 2010 and letter of 30 August 2010 said (respectively):

I look forward to hearing from you or your Personal Representative to arrange the meeting following your return to Nelson.

I am therefore giving you Notice on behalf of Physical Therapy Nelson Limited that Physical Therapy Nelson Limited wishes to have a meeting with you to discuss the matters raised in this letter in more detail, and to ascertain your view as to those issues, and what is outlined in this letter.

...
I suggest that the meeting be scheduled following your return to Nelson, and if you wish, you or your Representative may communicate through myself with a time for that meeting which is likely to be suitable to you following your return.

...
I look forward to hearing from you or your Lawyer or Personal Representative.

[71] None of this indicated that Mrs Chalmers was suspended or that there needed to be a meeting prior to her returning to work. Mrs Chalmers' lawyer's letter in reply simply recorded *we are happy to meet with you (in the company of Dawn) upon her return*. That drew a response on 6 September 2010 but the response made no mention of suspension or the requirement for a meeting prior to any return to duty.

[72] The company's solicitor's letter of 24 September 2010 says for the first time that the company considers that there should be a meeting prior to Mrs Chalmers returning to work but again there is no mention of suspension or a direction not to report to work. The letter does not say that arrangements had been made for another physiotherapist to cover Mrs Chalmers' patients, although that is Mr Donovan's evidence. The letter should have addressed those matters.

[73] When Mrs Chalmers was sent away on 29 September 2010 her solicitor naturally against this background stated *Presumably she is suspended on full pay*. The initial response about lack of instructions was inadequate. Mrs Chalmers was entitled to a proper answer and that reflects the tone of her solicitor's fax the next day and the advice given to her to report to work until the matter was clarified. Next, the following day, Mrs Chalmers was told she was *still on unpaid leave*. Physical Therapy had no legal right to do this. That breach was significant and the way it occurred made it worse. The later assertion, on 6 October 2010, that *There has been no "refusal" to pay Dawn Chalmers. Rather that is a decision that has not been made at this stage* did not remedy or ameliorate the breach.

[74] Ordinarily an employee who resigns in the face of allegations rather than answering them might not succeed with a constructive dismissal claim based on an alleged breach of duty because allegations are no more than that until the employer has accepted or acted on them. In the present case part of Mrs Chalmers' reason for resigning was her view about the changing goal posts in response to her answering allegations. That requires a careful assessment of the way matters unfolded.

[75] The email of 31 August 2010 refers to threats apparently made by Mr Dickey (as Mrs Chalmers' representative) that Mrs Chalmers would *bad mouth* the company. This is mentioned in the letter as *Your threats to Alan Donovan, representing the Employer, made by your Representative - Alan Dickey on your behalf*. Later the letter refers to:

Your threats, through Alan Dickey, your Representative, who made it quite clear to Alan Donovan that he (or the employer) must not do anything or say anything which could upset you, and if he did do anything or say anything which upset you, then you (and Alan Dickey) would "bad mouth" the Sports Therapy Business with clients "around Town". Similar threats were also made by Alan Dickey to Lionel Padiel.

...

Through your Representative, threatening to cause serious harm to Physical Therapy Nelson Limited's reputation should it take any disciplinary action against you or in fact do anything which you did not agree with.

[76] These references are to the meeting on 19 August 2010. As Mr Donovan knew full well, Mrs Chalmers was not present for any of these supposed threats. If threats of any kind were made it happened before the men went inside. None of those exchanges could be attributed to Mrs Chalmers because she did not know anything about them and they occurred before Mrs Chalmers, at the company's insistence,

authorised Mr Dickey to discuss work related matters with Mr Donovan during her absence.

[77] The allegation also misrepresents what Mr Donovan and Mr Padiál had recorded at the time.

[78] Mr Donovan's notes, as related to Mrs Donovan later that evening, record Mr Dickey telling him (my underlining):

...he was afraid if I told her anything stressful + upset her he was worried that she would go home [unreadable] they had 15 or so patients of ours coming over to farewell her. He was worried that she would be ranting + raving + swearing + bad mouthing us to those people.

[79] Mr Dickey was expressing his own concerns, not making any threat on behalf of Mrs Chalmers.

[80] Mr Donovan's notes also record that Mr Padiál told Mr Donovan after the meeting (my underlining):

...he told me he thought our business was over because Dawn was going to take it down + everyone with it. He then told me that while I was on the phone ...that Alan Dickey said to him that if we Did anything to harm Dawn or fire her that they would bad-mouth the business like you would never believe possible all over town

[81] However, Mr Padiál's notes which he apparently typed up later on 19 August 2010 say (my underlining):

...Mr Dickey expressed great concern over our proposed meeting.....he suggested that we should be very careful about what we said in the meeting as Dawn was very stressed and had suffered some sort of breakdown on the previous Sunday – he didn't know what she might do if she didn't like what we were asking/suggesting. At one point in this discussion whilst Alan walked away to take a phone call Mr Dickey told me he would be "slagging the clinic off all over town" if we were to upset Dawn.

[82] Accepting at face value these records of the exchanges, there was no threat in the terms alleged. What appears to have happened is that Mr Padiál in speaking to Mr Donovan wrongly reported a threat that Mr Dickey would do something as a threat that Mrs Chalmers would do something. In addition, Mr Dickey's mention of a concern about Mrs Chalmers' possible reaction later that evening has been turned into an allegation of a threat by Mr Dickey and Mrs Chalmers.

[83] In summary, there were no threats by or properly attributable to Mrs Chalmers. Physical Therapy was careless in the way these exaggerated allegations accompanied by the caution about dismissal were made. Mrs Chalmers was entitled to expect better treatment from her employer.

[84] Matters got worse, and as Mrs Chalmers described it, the goal posts changed.

[85] By reference to Mr Donovan's and Mr Padial's notes, what Mr Dickey apparently said on 19 August 2010 to the two men at various times was:

On Sunday upon returning from CHCH he took her to the Doctors who said she had a breakdown.

Dawn had pleaded to the Doctor + him not to let her employer know of the breakdown

Dawn ...had suffered some sort of breakdown on the previous Sunday

[86] There was no mention of this matter in the August correspondence.

[87] I have already mentioned that these comments evolved into the assertion about a *mental breakdown*. When the matter was raised in the 24 September 2010 correspondence it was accompanied with the very serious allegation of the use of steroids, masking agents or other prohibited substances, said to be a possible explanation for her *uncontrollable mood swings, outbursts to staff and what appears to have been irrational behaviour prior to her recent departure...*

[88] The basis for the allegation about steroid or other prohibited drug use was flimsy at best and was promptly rebutted. Mrs Donovan knew that Mrs Chalmers had been exonerated from any non-therapeutic use of a masking agent (Furosemide) as a result of the Sports Tribunal proceedings. Mrs Donovan knew about the therapeutic reason for Mrs Chalmers using Furosemide. Mrs Donovan knew that during the Sports Tribunal process it had never been suggested that Mrs Chalmers had actually taken steroids. Indeed, Mrs Donovan had expressed her certainty that Mrs Chalmers would not take or condone performance enhancing drugs. The starting point for the allegation was Mr Padial's comment to Mrs Donovan after the 19 August 2010 meeting that there was *such aggression in [the] meeting that it was like a steroid rage by someone involved in cycling all [their] life*. However, Mrs Donovan was assured by Mrs Chalmers' doctor (as best he could without any improper disclosure) that Mrs Chalmers had not used steroids. By 11.52am on 1 October 2010 the solicitor had

provided to Physical Therapy's lawyer a copy of the doctor's letter confirming his view that neither steroids nor masking agents had been used by Mrs Chalmers.

[89] Although not in response to that advice, Physical Therapy then raised Mr Donovan's concern that Mrs Chalmers' actions in turning up for work and harassing other staff *actually amounts to harassment* and her actions give rise to further concern as to her *present mental instability and risk should she recommence work*. That was accompanied by a warning of dismissal for any repetition. Before then Physical Therapy knew that Mrs Chalmers had reported for work on the first day because she was unaware of the 24 September 2010 correspondence and reported to work once or twice thereafter because of her solicitor's advice. The evidence is that Mrs Chalmers was hugged by other staff when she arrived at the work premises. That either was or should have been known by Mr & Mrs Donovan. There was simply no basis for the allegation of harassment or the comment about her present mental instability. In this same correspondence Physical Therapy gave Mrs Chalmers a *formal written warning* about reporting for work, contacting Mr & Mrs Donovan approaching company staff and contractors. Although a minor point, formally warning Mrs Chalmers in this manner was a breach of duty.

[90] The point made by Mrs Chalmers about changing goalposts is based on the company's response as reflected in the 6 October 2010 letter. By that time Mrs Chalmers had denied the allegation about a *mental breakdown* and provided the required information about her not using steroids or masking agents. Her reporting to work upon her return from overseas had also been explained.

[91] In its 6 October 2010 correspondence Physical Therapy introduced further allegations instead of acknowledging these explanations. Her alleged behaviour, if not explicable by reason of *mental breakdown* or *use [of] steroids or other prohibited substances*, was said to be *inexcusable* and *grounds to terminate her employment for "Serious Misconduct"*. Her conduct before departing and since returning to Nelson was described as *appear[ing] to be irrational, threatening and apparent irrational actions (without the benefit of any excuse or reason ...)*. Mrs Chalmers was accused of taking an *extremely aggressive and confrontational* and *most aggressive and antagonistic* approach and manoeuvring herself so as to pursue a personal grievance. Four further matters are mentioned as giving cause for concern about Mrs Chalmers'

mental stability. For example, Mrs Chalmers was accused of being incoherent when seeking treatment herself from a physiotherapist. I will put aside the comments about the quality of her legal advice. The comments about Mrs Chalmers were gratuitous and insulting in light of the explanations that had been provided to date. What the correspondence did not do was progress meeting arrangements.

[92] I find that the way Physical Therapy responded gave Mrs Chalmers every reason to conclude that her employer was not acting in good faith and that the situation would not improve.

[93] The breaches described above, viewed objectively, gave rise to a foreseeable risk that Mrs Chalmers might resign. The risk was also actually foreseen.

[94] Mrs Chalmers has established that she was dismissed. There was no attempt to justify a dismissal. Accordingly I find that Mrs Chalmers has a personal grievance of unjustified dismissal. It is therefore not necessary to consider the alternative argument about unjustified disadvantage.

Remedies

[95] Having established that Mrs Chalmers has a personal grievance I must assess the extent to which Mrs Chalmers' actions contributed in a blameworthy way to the situation giving rise to the grievance: see s.124 of the Employment Relations Act 2000. Counsel for Physical Therapy makes submissions about contributory negligence but I assume that he is referring to this statutory requirement to reduce remedies to reflect an employee's contributory behaviour.

[96] For convenience I will divide matters into conduct before and after the World Championship competition. Upon her return, Mrs Chalmers did nothing blameworthy by way of contributing to the situation. Mrs Chalmers' reported for work and was sent away. It is unfortunate that she had not received Physical Therapy's letter of 24 September 2010 but Mrs Chalmers was not to blame. Once the circumstances had been explained to Physical Therapy that should have been the end of any concern about the discharge by Mrs Chalmers of her responsibilities to her employer. There is no evidence to support the allegations about her harassing staff and contractors upon

her return. I do not accept that there was anything improper about the communications on Mrs Chalmers' behalf in response to Physical Therapy's various letters.

[97] Turning to conduct before the departure, I heard some direct evidence from Mrs Hofman about her exchanges with Mrs Chalmers. In addition there is Mrs Chalmers' email of 17 August 2010 in which she explained to Physical Therapy's management team her recent emotional outbursts. While blameworthy, I find that Mrs Chalmers conduct contributed very little to the eventual grievance so that it should not result in any reduction. Mrs Donovan's evidence about shrugging off the complaints when she first heard about them reflects their level of seriousness at the time. Much has been made of the alleged threats by and for Mrs Chalmers on 19 August 2010. However, the evidence (even for Physical Therapy) is that there were no threats by Mrs Chalmers. Whatever had been said by Mr Dickey was without Mrs Chalmers' knowledge or authority and cannot be attributed to her.

[98] Mr Padiar in his notes has Mrs Chalmers aggressively questioning him after he commented on her being stressed; saying *YOU Alan Donovan*; being difficult to deal with by being argumentative and accusing Mr Donovan of not trying to discuss matters earlier; and having piercing eye contact and body language making Mr Padiar feel uncomfortable. Mr Donovan's notes record her becoming extremely aggravated when she was not told in detail why they wanted her to sign an authority form for discussions with Mr Dickey in her absence. In his note (as in his evidence) Mr Donovan states that he felt that he might have been beaten up or come to some physical harm if he had been there by himself. However, there is no credible evidence that Mrs Chalmers did or said anything to give Mr Donovan any genuine cause for concern. That the meeting was tension filled is largely attributable to Mr Donovan requiring it at short notice after Mrs Chalmers had finished work, just prior to her departure overseas and without foreshadowing its purpose. Accordingly I do not accept that there was any blameworthy conduct by Mrs Chalmers so as for it to be just to reduce remedies for the established grievance.

[99] I accept Mrs Chalmers' evidence that she found the way she was treated to be humiliating, hurtful and difficult for her to cope with. Her position as an employee and a professional was undermined. The distress was apparent during the

investigation meeting. The claim is for compensation of \$30,000.00 however, the evidence does not support such a substantial award. I assess \$10,000.00 as the proper measure to compensate Mrs Chalmers for proven distress.

[100] There is a claim for lost remuneration for the six months following the termination of the employment. Initially Mrs Chalmers obtained casual work as a factory hand. From 13 December 2010 she was employed as a physiotherapist. I accept that Mrs Chalmers mitigated her loss and that her actual loss of remuneration resulted from her personal grievance.

[101] Mrs Chalmers' monthly salary was \$5,416.67. Her salary for the first three months following the grievance would have been \$16,250.01. During that time Mrs Chalmers received \$5,382.00 in alternative earnings. Her loss was therefore \$10,868.01. Pursuant to s.128(2) of the Employment Relations Act 2000 Physical Therapy must per her that sum in compensation.

[102] From 8 January 2011 until 7 April 2011 Mrs Chalmers would have earned a further \$16,250.01 but received \$12,363.00 from her alternative employment. Her loss is therefore \$3,887.01. There is a submission that no further compensation should be ordered. However, this is a proven loss and I can see no reason why Mrs Chalmers should not be able to recover compensation for that loss. Pursuant to s.128(3) of the Act I will order Physical Therapy to pay a further \$3,887.01 in compensation.

Arrears of salary

[103] I have already found that Mrs Chalmers should have been paid for the additional time overseas not covered by her annual leave because of the agreement about sponsorship.

[104] Pursuant to s.160(3) of the Employment Relations Act 2000 the matter is properly seen as the recovery of arrears under s.131 of the Act. The amount owing is \$3,125.00.

[105] I have already found that Physical Therapy had no lawful right to place Mrs Chalmers' on unpaid leave from the date she attempted to return to work up to the date of her resignation. This too should be seen as the recovery of arrears. Physical Therapy must pay Mrs Chalmers \$1,250.00 to cover this period of time.

[106] These two figures total \$4,375.00.

[107] There is a claim for a penalty for Physical Therapy's failure to pay salary when due. While a breach of contract, in large measure the consequences of the breach are dealt with in the personal grievance findings. The one aspect that remains to be reflected in a remedy is that Mrs Chalmers should have been paid the arrears in September and October 2010. That is best addressed by an order for interest which I will make instead of imposing a penalty.

Physical Therapy's claims - Contributory negligence

[108] Physical Therapy makes much of the fact that Mrs Chalmers' lawyer did not alert her to the 24 September 2010 correspondence before her return to work on 29 September 2010. Counsel makes the point that the company was bound to communicate through Mrs Chalmers' lawyer once aware that she had instructed her solicitor and when specifically asked to do so in the correspondence dated 2 September 2010. There is a complaint that Mrs Chalmers kept reporting to work.

[109] Originally, Physical Therapy expected Mrs Chalmers back at work on either 28 or 29 September 2010. The first exchange of correspondence was to the effect that Physical Therapy required a meeting with Mrs Chalmers to be scheduled following her return to Nelson. There was no suggestion that the meeting was a precondition to Mrs Chalmers' resuming work. The 24 September 2010 letter stated the company's new view that it considered *it is very important that it have a meeting ...prior to her returning to work* and that *The information requested would be very much appreciated well prior to having the meeting*. Physical Therapy either knew or should have known that Mrs Chalmers' would be unable to meet these requests before her expected return to work on either 28 or 29 September 2010. Despite that, the 24 September 2010 letter did not communicate anything to Mrs Chalmers about her

work status in the meantime. That point was not clarified until 1 October 2010 at which point Mrs Chalmers stopped reporting for work.

[110] The fact that Mrs Chalmers' lawyer had not communicated with her prior to 29 September 2010 was the starting point but not the most significant part of what became a major point of tension between the parties.

[111] There is no basis for the Authority to make any finding of contributory negligence. The sequence of events formed part of the context for Mrs Chalmers' resignation. It is relevant and has already been considered for that purpose.

Penalty and damages claims

[112] There is a claim by Physical Therapy for a penalty and damages against Mrs Chalmers for the attempted theft of the company's intellectual property.

[113] The company's computer network includes a folder for each employee to save files to. The evidence is that Physical Therapy became aware on 13 October 2010 that Mrs Chalmers' folder had been copied sometime that day. One of Mrs Chalmers' colleagues when questioned apparently admitted copying the information in the folder onto a memory stick at Mrs Chalmers' request. The colleague gave the memory stick to Physical Therapy so it never found its way back to Mrs Chalmers. This evidence was given by Mr Donovan so is hearsay as to Mrs Chalmers' request. The position for Mrs Chalmers is that she requested the colleague just to copy her personal information. Mr Donovan in response says that he does not accept this.

[114] The employment institutions have always regarded penalty claims as quasi-criminal requiring a high standard of proof. On the evidence before the Authority I am not able to make any finding that Mrs Chalmers attempted to take the company's property and as explained Mrs Chalmers actually took nothing. In those circumstances the penalty claim must be dismissed and there must be a finding that the company suffered no damage.

Restraint of trade

[115] The July 2007 written employment agreement between Mr & Mrs Donovan in partnership and Mrs Chalmers includes two restraint of trade provisions: one attempting to restrict the employee from working as a physiotherapist within a 20 kilometre radius for 6 months after termination of the *current contract* unless with the consent of the partnership (clause 9(a)); and the other attempting to prohibit solicitation during the term of the agreement and for six months after the termination of the agreement (clause 9(b)).

[116] The reference in clause 9(a) to the *current contract* is unusual.

[117] Mr & Mrs Donovan transferred the operation of the business to a limited liability company in October 2007 but did not take any steps to obtain Mrs Chalmers' agreement to employment with the company on the terms and conditions expressed in the July 2007 employment agreement. In law however, the July 2007 contract ended and a new employment agreement arose between the company and Mrs Chalmers. I find, for the purposes of clause 9(a), that the currency of the July 2007 contract ended in October 2007.

[118] In principal the same analysis can be applied to clause 9(b). There are additional problems given the muddled drafting. Clause 9(b) as expressed appears to prevent the employee during the employment from *serve or act for, in any respect, any work* performed by the partnership. It seems to read as a prohibition during the employment of doing any work for the partnership. Even more problematic, the post termination element is expressed to restrict soliciting and canvassing of those who have been clients of the partnership during the 6 months *immediately preceding the termination of the contractor*. Mrs Chalmers was never a contractor so I would have to go beyond the express words of clause 9(b) to identify who Mrs Chalmers was prohibited from soliciting or canvassing. Finally, and fatally, it is those who have been clients etc of *the partnership/Sports Therapy* within a time period that cannot be ascertained who may not be solicited etc for the six months after termination of the agreement. The partnership ceased to have clients in October 2007.

[119] An attempt to rectify the problems in applying clause 9 to Mrs Chalmers' employment with the company would involve the Authority fixing new terms and conditions, something that is outside jurisdiction: see s.161(2)(b) of the Employment Relations Act 2000. If the company wanted to have enforceable restraint provisions applicable during and after Mrs Chalmers' employment with the company it should have negotiated those with Mrs Chalmers.

[120] These clauses having no effect for the reasons explained above, Physical Therapy's claims based on alleged breaches must fail.

Summary and orders

[121] Mrs Chalmers has a personal grievance of unjustified dismissal.

[122] To remedy the grievance, Physical Therapy Nelson Limited must pay Mrs Chalmers compensation of:

- a. \$10,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.
- b. \$14,755.02 pursuant to s.123(1)(b) and s.128 of the Employment Relations Act 2000.

[123] Physical Therapy Nelson Limited must pay Mrs Chalmers \$4,375.00 as arrears pursuant to s.131 of the Employment Relations Act 2000. Physical Therapy Nelson Limited must pay interest on these arrears at the rate of 5% per annum starting on 1 October 2010 until paid in full.

[124] Physical Therapy Nelson Limited's claims against Mrs Chalmers are all dismissed.

[125] Costs are reserved. There have been three investigation meetings to get to this point and costs were reserved with respect to those earlier matters. All reserved cost matters should now be dealt with. Provisionally my thinking is that costs on the first investigation meeting might lie where they fall because Physical Therapy Nelson Limited bore responsibility for the absence of a written employment agreement between Mrs Chalmers and the company. Costs on the added parties and the

substantive matters might fall in favour of Mrs Chalmers as the winner. I say this to give some guidance to the parties in any effort to resolve the question of costs. However, a claim for costs by any party must be made in writing by lodging and serving a memorandum within 28 days. The other party may have 14 days within which to respond.

Philip Cheyne
Member of the Employment Relations Authority