

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Clinton Brian Farley (Applicant) (Respondent)
AND Nugget Point Resort Limited (Respondent) (Applicant)
REPRESENTATIVES Sonia Vidal and Laurie Murdoch, counsel for the applicant
Glenys Steel, counsel for the respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING Queenstown -7 July and 7 August 2006
TELEPHONE CALL Ivon Durlou on 22 August 2006
SUBMISSIONS 19 September 2006 and 17 October 2006 from the applicant
3 October 2006 from the respondent
DATE OF DETERMINATION 20 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Clinton Farley, was employed by the respondent as a front-of-house and marketing manager. He commenced his employment on 11 October 2004.

[2] Mr Farley moved from Auckland to Queenstown to take up his position with the respondent. He was party to an individual employment agreement which was signed on 26 September 2004.

[3] Nugget Point Limited is a duly incorporated company which owns and operates a boutique luxury hotel in Queenstown known as Nugget Point Resort ("Nugget Point"). The two directors of Nugget Point are Barry Walters and Selina Walters.

[4] Mr Farley says that he was unjustifiably constructively dismissed from his employment with Nugget Point when he resigned on 10 January 2005. He says that prior to his resignation his employers embarked on a course of conduct with the deliberate and dominant purpose of coercing him to resign. Further, he says that his employer breached an express term of his employment agreement when it stopped paying him whilst he was on stress leave and that there were breaches by his employer of the duty it owed to him of trust and confidence.

[5] Mr Farley seeks reimbursement of one month's loss of wages, \$15,000 compensation, payment for 1½ lieu days and 1 sick day, and costs. Mr Farley also wanted an apology by way of remedy but that is not one of the remedies the Authority may provide under s.123(1) of the

Employment Relations Act 2000. Mr Farley had claimed unpaid wages and holiday pay but confirmed that he received payment of those amounts before the investigation meeting.

[6] Nugget Point does not accept that Mr Farley was unjustifiably constructively dismissed and says that he does not have a personal grievance and is not entitled to any remedies.

[7] By way of counterclaim, Nugget Point says that Mr Farley removed its database and used information from the database to send an email without authorisation to Nugget Point clients on 10 January 2006. Nugget Point says that Mr Farley went into and viewed files from Mr Walters' computer folders which he was not authorised to access and which were confidential. Nugget Point claims that during his employment Mr Farley ordered, without authorisation, business cards which had a different title for his position at Nugget Point to that which he was employed to undertake.

[8] Nugget Point seeks the following remedies:

- (i) Cost of the computer specialist who carried out forensic work on the computers at Nugget Point in the sum of \$5,832;
- (ii) Legal costs for mediation and the Police with respect to database recovery in the sum of \$3,722.40;
- (iii) Damage resulting from the removal of the database in the sum of \$20,000;
- (iv) The costs of the business cards that Mr Farley ordered whilst employed.

[9] Mr Farley says that he sent an email to people he dealt with to say goodbye and obtained the email addresses from business cards he took from his employment with him. He says that the subsequent Police investigation, which included seizure of his home computer, did not discover a database from Nugget Point. Mr Farley says that he did not breach his contractual obligations by removing or using the Nugget Point database and that there is accordingly no damage to Nugget Point for which he can be liable.

[10] Mr Farley accepts that he did, whilst employed at Nugget Point, access some documents in Mr Walters' folder. He says that the files were accessed in Mr Walters' folder but that they were not protected and the folder was not marked private.

The issues

[11] The following issues require determination in terms of Mr Farley's claim that he was constructively dismissed and Nugget Point's counterclaim.

- Did Mr and Mrs Walters follow a course of conduct with the deliberate and dominant purpose of coercing Mr Farley to resign and were there breaches of duty by Nugget Point which caused Mr Farley to resign?
- If there were breaches of duty on the part of Nugget Point, then were they of sufficient seriousness to make it reasonably foreseeable by Nugget Point that Mr Farley would no longer be prepared to work under the conditions prevailing?
- If there was such conduct or breaches of duty, was it justifiable?

- If Mr Farley was unjustifiably constructively dismissed, then is there any issue of contribution which should reduce any remedies that Mr Farley should receive?
- Did Mr Farley access documents from Mr Walters's folder which he was not authorised to access and breach of his obligations as an employee?
- If the answer to that question is yes, then was there measurable damage suffered by Nugget Point as a result of Mr Farley accessing the documents and, if so, how is that damage to be quantified?
- Did Mr Farley remove and use the database from Nugget Point in breach of his contractual obligations to Nugget Point?
- If Mr Farley did remove and use the database, then was there damage suffered by Nugget Point as a result and, if so, how is that damage to be quantified?
- Should Nugget Point be reimbursed for the cost of the business cards?

Mr Farley's resignation

[12] Mr Farley resigned from his employment in writing on 10 January 2006. His letter provided:

Dear Barry,

I am claiming to have been unjustifiably constructively dismissed. A meeting was called on Thursday 5 January 2006 at 15:30 with Sally Marriage (my support person), Yourself, Selina Walters and Myself. As a result of both the conduct at this meeting, which I found extremely stressful, and the procedural impropriety, I feel I have no other option but to resign.

As you are aware the Employment Relations Authority is currently investigation several personal grievances as raised with them under s.103A of the Employment Relations Act 2000.

I would like to note, that I am not seeking reinstatement, however am seeking reimbursement of unpaid wages, holiday pay and compensation for undue stress caused by the grievances raised.

I hope to resolve this matter amicably and look forward to your responses in seven working days.

*Yours sincerely,
Clinton Farley*

[13] Mr Farley said he resigned because of the way he was treated at work and that his working environment became hard to cope with. He said that the work environment was fairly satisfactory up to mid-November 2005 and that the disciplinary meeting held on 5 January 2006 was a significant factor in his decision to resign. This was, he said, because of Mr Walters's demeanour at the meeting and that nothing was resolved at the meeting.

[14] I am satisfied that Mr Farley's resignation was attributable to the actions of his employer rather than some other reason. When Mr Farley resigned, he did not have another position to go to.

[15] I now turn to consider whether there was a course of conduct with the dominant purpose of coercing Mr Farley to resign or whether there were actions that amounted to breaches of contract.

Change of work environment

[16] Mr Farley felt that the work environment became unpleasant for him from about mid-November 2005. Mr Farley said that rather than eating lunch with the other staff at the resort, his lunch was brought to his office. He referred to a staff member watching him in his office through a gap by the side of the safe. He said that he was informed staff members had been told not to talk to him and felt that Mr Walters was monitoring him in terms of his computer work.

[17] The fact that there was a change in attitude towards Mr Farley, monitoring of his activities or a change of lunch arrangements was strongly denied by Mr and Mrs Walters and the other staff who gave evidence at the investigation meeting.

[18] I am not satisfied from the evidence that there was some sort of intentional monitoring of Mr Farley taking place or that Mr Farley was isolated from the other staff because they were instructed not to communicate with him and/or by the change in the way lunch was served. I accept though that Mr Farley did become unhappy with his work environment from about mid November 2005.

[19] An objective analysis of actions, communications and meetings from 12 December 2005 strongly supports that the directors of Nugget Point had some existing concerns and trust issues with respect to Mr Farley. In my view, this may well explain why Mr Farley felt there was a change in the work environment or viewed certain actions the way he did. I do not believe that Mr Farley understood the nature of the concerns and the reason there was some change in the relationship he had with his employers.

The events of 9-12 December 2005

[20] On Friday 9 December 2005, Mr Farley had an appointment with his dentist in Auckland. He spent the weekend in Auckland and flew back to Queenstown on Monday morning. His partner, Vijay Naiker, telephoned and spoke to Helen Qin at Nugget Point. He told Ms Qin that Mr Farley was unwell and vomiting and would not be attending work on Monday 12 December 2005. Ms Qin is in charge of the hotel running and management when Mr and Mrs Walters are not present and has a permanent role in charge of housekeeping.

[21] These events are at the centre of what was to follow leading to the eventual breakdown of the relationship between the parties.

[22] Mr and Mrs Walters were away in Australia from 3 December until 10 December 2005. It had been agreed between Mrs Walters and Mr Farley that he could take one day in lieu on Monday, 5 December 2005 as he had spent time unloading a container prior to this time. There is a dispute as to how much time he had spent unloading containers.

[23] During the week when the Walters were away, Mr Farley approached Ms Qin to say that he was going to take time off for the appointment with his dentist. There is a dispute as to when Mr Farley approached Ms Qin about having time off on 9 December 2005. Mr Farley says that he did so on Wednesday, 7 December but Ms Qin says that Mr Farley told her about the dentist appointment on Thursday, 8 December. In any event, I do not consider it necessary to make a finding on that matter for the purposes of this determination.

[24] When Ms Qin gave evidence at the investigation meeting, she said that Mr Farley advised her that he was only going to take one or two hours off on the Friday and that there was no mention of a day in lieu being taken.

[25] I have relied on the letter Mr Walters wrote to Mr Farley on 21 December 2005 asking him to attend a disciplinary meeting. The letter sets out the purpose of the disciplinary meeting which was to offer an explanation to two allegations of misuse and dishonesty.

[26] The first allegation in that letter is that Mr Farley deliberately misused the company leave scheme by claiming an unauthorised day in lieu for 9 December 2005. That allegation has been expanded on. The last sentence in terms of that allegation provides:

That without our authorisation, during our absence you approached Helen informing Helen to record another lieu day for container unloading, the day off being Friday, 9 December 2005. You said you were going to use this day to visit your dentist in Queenstown.

[27] I think it unlikely that Mr Walters would have omitted to set out an allegation that Mr Farley advised Ms Qin he would only be absent for two or so hours and that he was instead gone for the whole day. I also find it unlikely that Mr Walters would have made reference to a lieu day being recorded for the absence if there had been no mention of the same to Ms Qin. I accept Ms Qin was surprised that Mr Farley required a full day off to go to the dentist, and she may well have commented on that to Mr Farley.

[28] I prefer Mr Farley's evidence that he did advise Ms Qin he was taking the full day off in lieu day. The disciplinary meeting on 5 January 2006 proceeded on the basis of that allegation.

[29] Mr Farley said he did not tell Ms Qin where his dentist was based. The Walters say that he lied to Ms Qin and told her that his dentist was in Queenstown. After the investigation meeting, and with the agreement of both counsel, I wrote to the dentist Mr Farley said he attended in Auckland on 9 December 2005, Arthur L Greensmith. Mr Greensmith confirmed in writing that Mr Farley had attended his practice in Takapuna on 9 December 2005 for completion of a course of dental treatment.

[30] The second allegation was that Mr Farley deliberately misused the company leave form by claiming one day's sick leave on Monday, 12 December when he was not sick.

[31] Mr Farley was obliged under clause 6.3.6 of his employment agreement to notify his employer that he would be unable to attend work due to sickness as early as possible prior to his usual start time. He was not required because it was only one days sick leave to notify his employer of the expected date of his return to work or produce a medical certificate – clauses 6.3.7 and 6.3.8 of the employment agreement.

[32] Ms Qin spoke to Mrs Walters on 12 December 2005 about Mr Farley taking that day as a sick day. Mrs Walters attempted to telephone Mr Farley at home several times unsuccessfully. Mr Walters then tried to telephone Mr Naiker at his place of work and was told that Mr Naiker was having a few days off in Auckland and would be returning to work the next day. There was also a visit to Mr Farley's flat by his employer because it was noted his car was absent and the flat locked up.

[33] These actions support my earlier view that Mr and Mrs Walters already had some trust issues with Mr Farley. This would appear to be the first personal sick day Mr Farley had taken since commencing his employment at Nugget Point. I am not of the view that the actions can be explained by Mr and Mrs Walters being concerned for Mr Farley's wellbeing. It is the sort of

reaction that one may expect if Mr Farley simply failed to attend work but not in circumstances where his partner had advised of his no attendance on the basis of sickness.

[34] On 13 December 2005, Mr Farley returned to work. Mr Walters asked Mr Farley about his health. Mr Farley responded along the lines that he was okay to work.

[35] On 14 December 2005, there was a staff meeting held involving Mrs Walters, Mr Farley, Ms Qin and two other staff members. Mr Farley said that with all staff present there was a discussion about advice Mr Farley had given a guest with respect to GST. There was also a discussion about other staff matters. Mr Farley said that he found the meeting difficult and felt under personal attack although I accept that there was some general discussion about staff matters and Mr Farley was not the sole focus of the meeting. After general discussion, the two staff members left the meeting and Ms Qin, Mr Farley and Mrs Walters remained.

[36] Mrs Walters advised Mr Farley that she wanted to discuss the events of 9 and 12 December 2005. Mrs Walters asked Mr Farley if he visited the dentist in Queenstown and if his partner was with him whilst he was sick. Mr Farley answered yes to those questions. Mrs Walters then advised Mr Farley that Mr Walters had telephoned Mr Naiker at work and was told that he was in Auckland for a few days. Mr Farley started to cry and said that he had been in Auckland to visit the dentist. This reaction by Mr Farley indicated to me that he did feel under some pressure as a result of the meeting. Mr Farley also said that he felt guilty that he had not disclosed his dentist was in Auckland.

[37] There is no dispute that Mrs Walters advised Mr Farley after the meeting that she considered the matter to be over and to move on. There are two factual disputes that need to be resolved about that meeting. The first is what wrongdoing Mr Farley admitted to and the second is whether Mrs Walters advised that it would be formally recorded on his record.

[38] I find that the extent to which Mr Farley made any admission was to the effect that he had spent time during the days in question in Auckland and had not been forthcoming about his whereabouts, or the whereabouts of his dentist to Ms Qin and then to Mrs Walters.

[39] I do not find that Mr Farley accepted or made an admission to Mrs Walters that he was not sick on 12 December 2005. Mrs Walters probably concluded, although there is no evidence to satisfy me that a question of that nature was actually put to Mr Farley, that he spent most of 12 December 2005 in Auckland with his partner. On that basis, she may have also concluded that he was not sick. I am strengthened in my view of this by the letter of 21 December 2005 inviting Mr Farley to attend a disciplinary meeting. In that letter Mr Walters states about the sick day, *on Wednesday 14 December 2005, during a conversation you confessed to Selina that you went to Auckland on Thursday afternoon 8 December 2005 and returned to Queenstown late on Monday afternoon, 12 December 2005.*

[40] In fact, it was incorrect that Mr Farley spent the day in Auckland on 12 December 2005. Mr Farley, as verified by his frequent flyer activity statement, flew to Queenstown from Auckland on 12 December 2005 on Qantas flight 4103. This flight left Auckland at 7.10am and arrived in Queenstown at 9.50am. Mr Naiker, as verified by his frequent flyer activity statement, flew to Christchurch from Auckland on Qantas flight 4117. This flight departed at 12.30pm from Auckland. Mr Naiker then flew from Christchurch to Queenstown on Qantas flight 4183 which arrived in Queenstown at 4.40pm.

[41] Mr Farley said that there was no mention by Mrs Walters of the matter being formally recorded on his file. I find it more probable than not that it was not until Mrs Walters talked to Mr Walters about her discussion with Mr Farley that it was decided to put something in writing on

Mr Farley's file. I have reached this conclusion taking the first paragraph of the draft letter Mr Walters sent to John Wilkinson, Group Manager, on 16 December 2005 which he intended, subject to advice, to give to Mr Farley. In the first paragraph of that letter, Mr Walters says:

I write to you further to your meeting with Selina on Wednesday afternoon and refer to matters discussed. It is our wish that the various matters discussed us all are recorded in your employment file.

[42] There is no reference in that letter to any understanding Mr Farley may have that there was to be on his employment file something recorded with respect to the discussion that took place on 14 December 2005. I prefer Mr Farley's evidence that there was no discussion between him and Mrs Walters about that matter.

[43] Mr Farley read the draft letter on 16 December 2005. It is likely in my view that he accessed Mr Walters's personal folder to do so from his own work computer. I shall refer in more depth to that matter at a later stage of this determination. The draft letter noted, amongst other matters, that:

To us as owners, it is clear that you deliberately deceived Helen, Selina and myself by your planned deception. Regardless of any other matters of concern we find this planned deception by you has caused us to reconsider your long term position here.

...

There have been several other matters of recent times that lead us to the conclusion of mistrust in your overall delivery of competence. We have no faith that you will deliver fair and sound judgment in all your dealing as a manager and senior employee of Nugget Point. Your comment to Selina that Helen or other staff are "stabbing you in the back" is completely without foundation, furthermore it is refuted completely. We would prefer that you seek employment in the longer term with another employer. We will stand by you and continue to support you in your present role here, but clearly on the understanding that you refer all matters of critical importance to either Selina. You are not allowed to make major decisions affecting the Hotel operations in future. In future during periods of absence by Selina and myself, Helen will be placed in charge of the Hotel.

[44] Mr Farley worked out the day on 12 December 2005. He said that reading the draft letter added to the stress in an environment that he already found hostile.

Period on stress leave from 18 December 2005 to 4 January 2006

[45] Mr Farley went to see a doctor to see about his work situation and how that was impacting on him after work on 16 December 2005. He also telephoned the Labour Department 0800 assistance line and was advised that mediation may be suitable in the circumstances. Mr Farley provided Nugget Point with a copy of a medical certificate from the doctor dated 16 December 2005. The medical certificate provided that Mr Farley was seen by the doctor on 16 December and was unfit for work from 18 December 2005 and should be fit to resume work on 1 January 2006.

[46] The letter, that I have referred to earlier in this determination dated 21 December 2005 and inviting Mr Farley to a disciplinary meeting, was hand delivered to his home address by a porter from Nugget Point. The date and time of the disciplinary meeting was specified in the letter to be Friday, 23 December 2005 at 2pm. It was to be a disciplinary meeting to talk about the events of 9 and 12 December 2005.

[47] Mr Farley emailed Mr Walters on 21 December 2005 and advised that he would not be able to attend the disciplinary meeting as he was on stress leave but would attend after 4 January 2006, taking public holidays into account. Mr Farley suggested that Mr Walters reschedule the meeting to an alternative date in the New Year.

[48] This email was the start of an email exchange between Mr Walters and Mr Farley. Ms Steel, in her submissions on behalf of the respondent, said that Mr Walters in his email was trying to be responsive and communicative to Mr Farley. She put in the parts of the emails into her submissions where Mr Walters had suggested to Mr Farley that they meet and have coffee and amicable discussion. She submits that Mr Walters was seeking to maintain a productive working relationship.

[49] I accept that there were invitations to coffee and discussions within the emails from Mr Walters. When the emails are read in their entirety they are not communications designed to maintain a productive working relationship. I think it unlikely that Mr Farley would have been encouraged to meet with Mr Walters.

[50] Mr Walters emailed Mr Farley back on 22 December in relation to rescheduling the disciplinary meeting. He advises that he had investigated Mr Farley's visit to his doctor, Dr Sparrow. Mr Walters said that he personally talked to Mr Farley's doctor. He noted that *this is a separate matter and process of further investigation by a higher authority and cannot be commented on at this time*. Mr Walters said that according to the Employment Relations Authority and advice he had had, Mr Farley was fit to attend the meeting for two hours with his representative on 23 December 2005.

[51] Mr Walters, in an email dated 23 December 2005 in response to an email from Mr Farley requesting his recent payslips, suggested matters that Mr Farley may like to raise with his [Mr Farley's] legal adviser. These included the following:

- Mr Farley's doctor had advised him to attend the meeting at Nugget Point but he chose to ignore the advice.
- Mr Farley had been hacking into Mr Walters's private computer files.
- Mr Farley was aware from the email Mr Walters had sent to Mr Wilkinson dated 16 December 2005 that Mr Farley's working computer had been sealed and removed under investigation and that the Queenstown Police are *helping us with our inquiries*.
- Mr Farley's stress was of his [Mr Farley's] own making.

[52] Finally, Mr Walters noted in the email that the documents requested were available for Mr Farley to collect at Nugget Point and further that *we are readily available to resolve the matter amicably*.

[53] Mr Farley said in an email sent on 23 December 2005 that he had not ignored his doctor's advice and was taking stress leave as she had instructed. He said he would prefer Mr Walters not to contact him regarding work-related issues during his stress leave as he was aggravating the stress.

[54] Mr Walters promptly emailed back and said that Mr Farley's deliberate denial was against the instruction of his GP. He also said in the same email that *we are in the process of requesting further information on your visit to QT medical centre – after leaving a party at Nugget Point where you were happy and smiling. It did not go unnoticed that you removed all of your personal possessions*

from your office earlier on Friday afternoon. Mr Walters then suggested in the same email that Mr Farley consider the bigger picture and come to see him for a coffee and chat.

[55] On 21 December 2005, Mr Farley lodged an employment relationship problem with the Employment Relations Authority. One of the problems Mr Farley said he had in his application was that he was constructively dismissed and did not seek reinstatement. Mr Walters says that the statement of problem contained allegations that had not been put to him and that were not accepted. Ms Steel said in her submissions *the applicant did not like being questioned about his absence from work and chose to retaliate in a nasty manner with unfounded accusations against the respondent on matters, which he had never raised as issues or sought to resolve in any manner.* I do accept that Mr Farley's statement of problem was confusing to Mr Walters. Mr Farley wrote it himself. The way forward in my view, particularly when it was clear that regardless as to what was in the statement of problem, Mr Farley still considered himself an employee, was to meet and discuss the issues. It is only after such a meeting that a conclusion could be reached as to whether the issues were genuine and required resolution or not.

[56] I do not find that the statement of problems could justify the failure by Nugget Point to pay Mr Farley his salary from the time he commenced stress leave on 18 December 2005. The emails between Mr Farley and Mr Walters make it quite plain that Mr Farley considered he was still an employee and Nugget Point made arrangements for Mr Farley to attend a disciplinary meeting. There is no suggestion that the disciplinary meeting be cancelled. I note further that Mr Farley was not paid for the period of time prior to service on Nugget Point of his statement of problem. On that basis I do not accept Ms Steel's submission that there was a belief that Mr Farley left his employment on 16 December 2005 and did not intend to return.

[57] Mr Farley questioned Mr Walters in two emails of 29 December 2005 about the reason he had not been paid. In the second of those emails, Mr Farley advises that he will not be returning to work until 4 January 2006 in accordance with the medical certificate from his doctor. Mr Farley says in his email that his doctor had advised that Mr Walters has harassed her for information, however, the information was confidential.

[58] Mr Walters, in an email dated 29 December 2005 to Mr Farley, refers to investigation *via the Medical Council continuing and investigations via the Police Department.* With respect to pay, Mr Walters advises in the same email that unfortunately he is not in a position to offer any advice on pay. He offers no explanation or reason as to why Mr Farley has not been paid.

[59] Mr Farley returned to work at Nugget Point on 4 January 2006. He had a brief meeting with Mr Walters on that day and was advised that Mr Walters did not require Mr Farley to work. Mr Farley returned home and attended an arranged disciplinary meeting the following day on 5 January 2006 with his support person, Sally Marriage.

[60] The meeting was recorded. I was provided with a recording of that meeting together with a full transcript. Mr Farley wrote a letter of response to the allegations he was facing about his absences on 9 and 12 December 2005 and read that out. There was no significant discussion about other employment relationship issues. Mr Walters did mention the statement of problem.

[61] I found Ms Marriage to be a straightforward witness with a commonsense approach to matters. At one point during the meeting on 5 January 2006, Ms Marriage suggested that it might be a good opportunity [with everyone there] to find out perhaps why all this had come about. Mr Walters said the main problem for him was that he had a statement of problem which he was previously unaware of. He referred to parts of the statement of problem where Mr Farley had said he was frightened of Mr Walters, did not want to be reinstated and had referred to constructive dismissal. There was also reference to the fact that Mr Farley said mediation would be a nightmare

because he was scared of his boss and that he was unable to sleep properly at night. Mr Walters said at the meeting on 5 January that he did not know where to go and had to get some advice.

[62] After the meeting, Mr Farley emailed Mr Walters on 5 January 2006. He noted amongst other matters in his email that he had not received his weekly wage for the last few weeks and that a suspension should be on pay in accordance with clause 7.4.2 of his employment agreement. There was no response to that letter before Mr Farley sent his resignation letter on 10 January 2006. Mr Walters said at the Authority's investigation meeting that he had decided to dismiss Mr Farley after the 5 January 2006 meeting and had written a letter to Mr Farley summarily dismissing him from his employment for actions both deceptive and dishonest. A copy of that letter was attached to the statement in reply. Mr Farley's letter of resignation was received before Mr Walters could send the letter of dismissal.

Conclusions

[63] The categories of constructive dismissal referred to by the Court of Appeal in *Auckland etc Shop Employees' IUOW v. Woolworths* [1985] ERNZ Sel Cas 136, are not absolutely distinct in nature. I find that the conduct by the employer complained of is capable of falling into both the second and third categories of cases referred to by the Court of Appeal.

[64] It is clear from the emails that Mr Walters sent to Mr Farley that he did not trust Mr Farley to tell the truth to his doctor about his state of health or the reasons for his stress. Mr Walters said in one email that Mr Farley's doctor was not his normal doctor and that it was the first time Mr Farley had had any contact with her. Mr Walters says in the emails that he intends communicating with Mr Farley's doctor or with a higher authority. Mr Walters believes the stress Mr Farley had to be of his own making. There must in an employment relationship be a proper basis for such a conclusion that stress or sick leave is not genuine. There must be a proper process for such a conclusion is reached. I find that there was considerable resentment and anger toward Mr Farley about a number of matters including matters referred to the police. These matters were not put to Mr Farley as part of a fair and proper process. It was inappropriate for Mr Walters to simply conclude that Mr Farley was not stressed or unwell and on that basis investigate, or at least say that investigations with Mr Farley's doctor had taken place.

[65] In my view, the emails are not only unfair in terms of process but demonstrate a lack of understanding of the boundaries of an employment relationship and Mr Farley's right to privacy. Mr Farley was a young employee and the emails in my view were designed to cause him concern and worry. It was not made clear to him why the Police were involved in terms of his work computer even after he queried in an email why they would be interested in a dispute about stress leave. This behaviour, in my view, is capable of seriously damaging Mr Farley's relationship with Nugget Point. There was also the potential for Mr Farley's relationship with his doctor to be seriously undermined by Mr Walters's actions. The emails required Mr Farley to respond and defend himself to Mr Walters on several occasions.

[66] I find stopping Mr Farley's pay from the time he went on stress leave on 18 December 2005 to be a breach of an express term of Mr Farley's employment agreement. I find that the failure to explain the reason for this when directly asked to be a breach of the duty of good faith in s.4(1A)(b) of the Employment Relations Act 2000 for the parties to an employment relationship to be responsive and communicative. I note that Mr Farley drew Mr Walters' attention again to the fact that he had not been paid on 5 January 2006. There was no response to that email prior to Mr Farley resigning. Mr Farley was not paid his wages and holiday pay until after he had lodged his statements of evidence to the Authority's investigation meeting.

[67] I do not find a fair and reasonable employer would have held a disciplinary meeting to discuss issues that Mr Farley had been told were over with on 14 December 2005. If something was to be formally recorded on Mr Farley's record about the events of 9 and 12 December, then the nature of the record to be placed on Mr Farley's file should have been discussed.

[68] It was not fair, however, for the matter to be reopened by way of a disciplinary meeting on 5 January 2006. The failure to continue payment of Mr Farley's wages and the nature of communications to Mr Farley from 18 December 2005 suggest to me that there may well have been an element of predetermination as to any disciplinary outcome before the disciplinary meeting.

[69] The meeting was not used as an opportunity to discuss the problems between the parties which a fair and reasonable employer would have realised, at least from the statement of problem lodged with the Employment Relations Authority, required discussion. Instead there was a focus on this earlier issue.

[70] I conclude that the emails from Mr Walters can be seen as having the deliberate and dominant purpose of attempting to coerce Mr Farley to resign during a period when he was on stress leave by putting him under pressure.

[71] The actions of Mr Farley's employer during his stress leave breached the obligations it had not to conduct itself in a manner likely to destroy the trust and confidence between them. There was also a breach of contract by Nugget Point in that it failed to pay Mr Farley whilst he was on stress leave and yet expected him to attend a disciplinary meeting on 5 January 2006 and await for an outcome from that meeting. There was also a breach of the duty of good faith under s.4 of the Employment Relations Act 2000 by the failure of Nugget Point to provide reasons why payment was not made despite a direct question being put to Mr Walters whilst Mr Farley was on stress leave.

[72] In my view, the breaches were serious and so undermining of the employment relationship so as to entitle Mr Farley to treat the contract as repudiated by Nugget Point. They were breaches of duty that were of sufficient serious to make it reasonably foreseeable to Nugget Point that Mr Farley would not be prepared to continue to work in the circumstances that existed at the time he resigned.

If there was such conduct or breaches of duty, then was it justifiable?

[73] Nugget Point say that they were justified because of Mr Farley's actions in acting the way they did. I do not accept that. I have not found that the conduct toward Mr Farley whilst he was on stress leave and the failure to pay Mr Farley for that period or after the stress leave ended or to provide sufficient explanation as to why payment was not to be made, to be justifiable.

[74] I have also considered the allegations that Mr Farley was asked to answer at a disciplinary meeting on 5 January 2006 and whether they would have justified dismissal. I have already found that a fair and reasonable employer would not have held a disciplinary meeting to discuss matters which had previously been discussed with Mr Farley and he had been advised that they were at an end.

[75] Part of the unfairness in re-opening the issue was that the exchange from the earlier informal meeting was used to allege inconsistencies between what was said at the earlier meeting and what Mr Farley put forward at the disciplinary meeting. That is apparent from the transcript of the meeting on 5 January 2006. It was put to Mr Farley on 5 January 2006 that he apologised on 14 December 2005 for not being sick. Mr Farley said in response that he was not apologising on 14

December 2005 for not being sick but for not advising Ms Qin that his dentist was in Auckland. Mr Walters then says to Mr Farley: *Clinton don't keep telling stories that are untrue.*

[76] I have considered the substance of the allegations. Ms Qin knew Mr Farley was to be away at the dentist on 9 December 2005. He did in fact attend a dentist, but in Auckland, not Queenstown. Mr and Mrs Walters confirmed that Ms Qin was in charge in their absence. I do not see the allegation can be one of unauthorised leave. That leaves therefore the allegations that Mr and Mrs Walters were looking to Mr Farley to run the hotel during their absence, that Mr Farley was not honest with Ms Qin about the whereabouts of his dentist, and that he did not have a lieu day to take.

[77] There was also an allegation that Mr Farley was not sick on 12 December 2005. He said that he was. The flight details support his explanation that he was intending to return to work on 12 December 2005. His partner returned from Auckland at a different time. Mr Farley had not previously had personal sick days. There was no issue about repeated absenteeism.

[78] I do not find that these matters were of sufficient seriousness to justify summary dismissal. There is a process in Mr Farley's employment agreement, clause 7.3, where the matters causing concern are not serious enough to warrant summary dismissal. If Mr and Mrs Walters felt Mr Farley's actions were of concern, then in my view a fair and reasonable employer would have considered a warning. I do not conclude a fair and reasonable employer would have dismissed Mr Farley for the events of 9 and 12 December 2005.

[79] I find that Mr Farley was unjustifiably constructively dismissed and he is entitled to remedies.

Remedies

Contribution

[80] I am required under s.124 of the Employment Relations Act 2000 to consider if Mr Farley's actions contributed toward the situation that gave rise to personal grievance. If I consider they did, then I am required to reduce the remedies that I would otherwise have awarded. This was a personal grievance where Mr Farley was constructively dismissed. I have considered carefully his conduct.

[81] Mr Farley's absence on 9 and 12 December 2005 was the subject of concern to Mr and Mrs Walters. They felt he had been dishonest about his whereabouts and sickness. I am not satisfied that these actions could be seen as contributing towards the course of conduct then undertaken by Nugget Point whilst Mr Farley was on stress leave.

[82] The allegations about the accessing of Mr Walters' computer folder and the documents therein were never put to Mr Farley for explanation during his employment. They were the subject of a Police interview. These actions have some bearing on the level of compensation that Mr Farley is entitled to in terms of stress suffered because of the seizure by the Police of his and his partner's computer and the subsequent interview with the Police.

[83] I do not find though that Mr Farley's actions contributed towards the situation that gave rise to the personal grievance that he was unjustifiably constructively dismissed.

Reimbursement of lost wages

[84] I think it is unlikely that this employment relationship could have continued for any length of time. I have had regard in assessing the lost wages claim for the period of notice in clause 7.2 of the employment agreement which is four weeks. I conclude that Mr Farley is entitled to be paid lost wages from 10 January to 13 February 2006. I am satisfied that during this period Mr Farley looked

for other employment. I order the parties to calculate the lost wages taking into account any earnings during this period. I reserve leave for either party to return to the Authority if there are difficulties in the calculations of lost wages.

Lieu days

[85] Mr Farley claims that he is owed payment for 1½ lieu days. There was considerable dispute about this matter and there were no records kept. On that basis I have relied on the evidence of Mrs Walters that Mr Farley was owed 1½ lieu days. Mr Farley took one day as a lieu day on Monday, 5 December 2005 and is owed payment for half a lieu day. I so order.

Sick day 12 December 2005

[86] The evidence in my view did not establish on the balance of probabilities that Mr Farley was not sick on 12 December 2005. Mr Farley said that he was sick in bed at the time of a visit to his property and series of telephone calls.

[87] I find that Mr Farley is entitled to a payment for a sick day on 12 December 2005 and I so order.

Overtime

[88] For completeness and because it was not clear whether Mr Farley was still pursuing this matter, I find he was paid a salary which was to compensate him for all hours worked unless clearly agreed to the contrary. Mr Farley is not owed any money in terms of overtime.

Compensation

[89] Mr Farley enjoyed his job at Nugget Point until about mid-November 2005. Whilst at Nugget Point Mr Farley was a finalist in the Hotel & Catering International Management Association's Young Hotel Manager of the Year 2005 award.

[90] The compensation figure should properly reflect the conduct of Nugget Point and the breaches of contractual duty. Mr Farley was treated, I find, particularly badly by his employer. I accept his evidence that the conduct by Nugget Point during his stress leave affected his sleep, made him feel nauseated and caused anxiety about his future. This was exacerbated during this time by the hand delivery of a disciplinary letter, the delivering of a letter to Mr Farley's partner at his work to be given to Mr Farley, the contact with Mr Farley's doctor and the tone of the emails which were destructive of the relationship. Mr Farley attempted to raise issues when he lodged the statement of problem with the Employment Relations Authority and, in my view, cannot be criticised in the circumstances of this case for raising them in such a manner.

[91] Mr Farley also suffered financial pressure because there was no payment of his wages for several weeks, including over the Christmas period. He had to borrow money from his parents for living and legal costs.

[92] Mr Farley spoke of humiliation when the Police searched his apartment after he resigned and when he was taken to the Police station for questioning. The laptop he shared with his partner was also removed by the Police. In my view, Mr Farley, although he had access to all folders, knew that he should not open documents in Mr Walters's folder. He probably did, as he advised the Police in his interview, look at the documents to try and understand why there was some hostility toward him. There was no evidence that he had disclosed the contents of the documents to anyone else. It was those actions while looking at the documents that were confidential to Mr Walters which led to the

Police becoming involved and Mr Farley must bear some responsibility for that, even though ultimately he was not charged.

[93] I am not of the view that Mr Farley should be compensated therefore for the Police involvement. I also take into account that the letter Mr Farley accessed and read on 16 December 2005 was a draft letter and that Mr Walters intended to seek advice on it. Mr Farley should not have read that. He is not entitled to compensation for any humiliation that stems from that.

[94] Even taking these two matters into account, I find that Mr Farley suffered considerable humiliation and loss of dignity as a result of the actions of his employer. An appropriate amount in the circumstances, in my view, is \$10,000.

[95] I order Nugget Point Limited to pay to Clinton Farley under s.123(1)(c)(i) of the Employment Relations Act 2000 compensation in the sum of \$10,000 without deduction.

Costs

[96] I reserve the issue of costs on the personal grievance.

COUNTERCLAIM

Did Mr Farley access documents from Mr Walters' folder which he was not authorised to access, and if so was this in breach of his obligations as an employee?

[97] Mr Farley accessed three main documents from Mr Walters' folder that caused concern. They were an information memorandum, group direction for 2006 and the warning letter of 16 December 2005. Mr Farley said that his computer at Nugget Point was set up with administrator rights enabling him to access the folder of all files on the shared drive without a password or prior authorisation. Mr Farley said he did not request those rights but they were on his computer when he commenced employment. Nugget Point says that Mr Farley was not given administrator rights. Having heard the evidence, I find that it is more likely that Mr Farley, perhaps unintentionally, was given these rights by virtue of the set up of his work computer.

[98] I find that Mr Farley knew that, although he could access any documents, he should not be searching out and looking at documents of a confidential nature in Mr Walters' folder.

[99] Mr Farley had a duty to act with good faith toward Nugget Point and not to do anything intended to injure its business.

[100] I do not find any evidence that Mr Farley intended to, or in fact did, disclose information in the accessed documents to anyone else. There is no evidence that he intended to use the documents to advance some interest of his own. The evidence supports that Mr Farley looked at the documents because he thought there could be something relevant to him as an employee within them.

[101] I find that Nugget Point was entitled to place trust in Mr Farley that he would not deliberately access documents in Mr Walters' folder without authorisation. Mr Farley, having accessed the documents on limited occasions, I find breached his obligations of trust and confidence towards Nugget Point.

Was there measurable damage suffered by Nugget Point as a result of Mr Farley accessing the documents and, if so, how is that damage to be quantified?

[102] Mr Walters contacted a computer engineer to examine Mr Farley's work computer as a result of his initial suspicions that Mr Farley had seen a draft letter he had written on 16 December 2005.

[103] The computer engineer, Ivon Duurloo, flew from Auckland and conducted an investigation of the computer system at Nugget Point. He charged Nugget Point \$5,832. This is a loss that Nugget Point say that it suffered as a result of Mr Farley's breach of contract when he accessed the documents from Mr Walters' folder.

[104] Damage for a breach of contract has to be within the reasonable contemplation of the parties to the employment agreement when it is made as the probable result of the breach of the agreement.

[105] The allegations about accessing confidential documents could have been put to Mr Farley by Mr Walters. Mr Farley, as he did when interviewed by the Police, may well have admitted to accessing the documents and that would have made Mr Duurloo's attendance at Nugget Point unnecessary.

[106] Mr Duurloo's attendance was for the purpose of giving specialist advice to Nugget Point about the extent to which Mr Farley had accessed documents in Mr Walters' folder and the security of its system. His findings were then made known to the Police. I do not find that this sort of specialist advice would have been something the parties contemplated as the probable result of a breach when they made the employment agreement. On that basis, I do not find that Nugget Point is entitled to succeed in its claim for damages for \$5,832.

Did Mr Farley remove and use the database from Nugget Point in breach of his contractual obligations?

[107] On 10 January 2006, Mr Farley sent an email from his home laptop to contacts and customers from Nugget Point advising that 10 January was his last day of employment and wishing everyone the best for 2006. In the email, Mr Farley advised that there was currently no replacement for him but that inquiries could be sent to Mr Walters or bookings to another employee. Mr Farley also gave the reservation email address for Nugget Point.

[108] Mr Farley then gave his new contact details as Clinton Farley, Business Development Manager, QNZ Marketing Limited, Queenstown. He ended the email by thanking the individuals for their support and saying that he looked forward to staying in touch with *many of you*, in any new hospitality role he may embark on in the near future.

[109] The email template said at the bottom *you have been sent this email from Nugget Point as you are currently an agent or industry partner on our database*. Mr Walters was alerted to this email because he received a number of auto replies as a result of it being sent. Mr Farley wrote to Mr Walters after legal involvement by letter dated 22 March 2006. He said in that letter:

Dear Barry,

As per findings of the New Zealand Police after a complete search, interrogation and seizure of personal belongings and property I confirm that I do not have a computerised database file or any other such property of Nugget Point Ltd.

Many of the personal industry contacts I do have were made during my previous employment prior to Nugget Point and I further advise that I used business cards that I have to obtain email addresses and not a Nugget Point database.

In addition the Nugget Point email template was one, which I had personally created for Nugget Point in approximately May 2004 and had used for the benefit of Nugget Point during my employment there. I can confirm that I have not used this template since 10 January 2005 and have deleted it from my computer and can assure you that it will therefore never be used again.

I have personally returned items which were gifted to me by Selina as per your request via Berry & Co solicitors and confirm that I do not have any further property belonging to Nugget Point Ltd. I trust that this answers any queries you may have.

[110] Mr Farley explained to me that QNZ Marketing Limited was a company essentially operated by his partner which delivered marketing to clients. The clients of QNZ Marketing Limited came from a website known as gaypages.co.nz which provides a directory on the internet of gay and lesbian friendly travel, accommodation, transport and visitor information. It is understandable why the directors of Nugget Point became concerned about the emails when the directors began to receive auto replies. I have considered the evidence in support of the claim that Mr Farley removed the database. The evidence does establish that Mr Farley had email addresses of customers and other contacts of Nugget Point. Mr Farley says that he got the email addresses from business cards. I do not accept that the evidence goes to establish, as Ms Steel submits, that the database was used to generate the email of 10 January 2006.

[111] It certainly establishes that Mr Farley had the template email document on his home computer, but there was no evidence to support that the database had been used in the sending of the template email document. The wording on the template email does not establish that. Mr Farley says that he prepared the template email document at home whilst employed by Nugget Point and after sending the email deleted it from his computer.

[112] The Police seized Mr Farley's computer after he sent the email on 10 January 2006. No information or documents relating to Nugget Point were found to be downloaded or held on Mr Farley's home computer. Mr Walters says that if the database was removed it would now be on a disk. Presumably the Police considered that when they entered Mr Farley's home with a search warrant. I also note there was no evidence of any financial loss provided by Nugget Point at the investigation meeting in relation to the allegation of removal and use of its database.

[113] I think it likely that Mr Farley sent the email because he wanted to have some control over how people were advised of his departure, given the issues between him and his employer. Consistent with this, he also had a small article published in the local newspaper advising that he had resigned from his position at Nugget Point. I believe that Mr Farley thought that the directors of Nugget Point may make negative comments about him and he wanted to get in first. Mr Farley's description of himself in the email as business development manager of QNZ Marketing is in my view part of his attempt to have others view him in a better light. He was, I am satisfied, at the time he sent that email unemployed. I find Mr Farley's actions in sending the email somewhat naïve and irresponsible, but I do not consider that the evidence establishes any motive beyond that set out above in sending the email.

[114] The evidence does not establish on the balance of probability that Mr Farley removed and/or used the database of Nugget Point when he sent the email. I do not find a breach of Mr Farley's obligations to Nugget Point with respect to the database and do not therefore need to consider the issue of damages that Nugget Point claims in terms of removal of its database.

Should Nugget Point be reimbursed for the cost of the business cards?

[115] Mr Farley ordered the business cards with a new title for himself as Executive Assistant Manager. He said he ordered them whilst still employed at the same time he ordered cards for other employees because a telephone number had changed.

[116] Mr Farley said he felt he was expected to do the duties of an Executive Assistant Manager and therefore ordered cards for himself in that title. The evidence supports the cards were ordered in or about late November or early December 2005.

[117] It was inappropriate for Mr Farley to unilaterally change his title in this manner and order business cards accordingly without discussion and authorisation. If that is to be considered as a breach of Mr Farley's contractual obligations, then I am not satisfied that Nugget Point has suffered any financial loss which it would not have suffered if Mr Farley had ordered new business cards with his correct title. That is because Mr Farley did not return to work at Nugget Point after the new business cards were printed and sent to the company. The cards, regardless of the position title, would still not have been able to be used by anyone else.

[118] In the circumstances, I do not find that Nugget Point should be reimbursed for the cost of the cards.

Costs

[119] I reserve the issue of costs on the counterclaim. Mr Farley has succeeded to the extent that there has been no award of damages against him. I have still found a breach of obligation of trust and confidence by Mr Farley when he accessed documents from Mr Walters' folder. In the circumstances, it may be that the parties should meet their own costs on the counterclaim. I would encourage the parties to, in the first instance, attempt to reach agreement about costs in terms of both the personal grievance and the counterclaim.

Summary of orders and findings

- I have found that Mr Farley was unjustifiably constructively dismissed.
- I have not found that Mr Farley's actions contributed toward the situation that gave rise to his personal grievance.
- I have ordered Nugget Point Limited to pay lost wages from 10 January to 13 February 2006. The parties are to calculate the lost wages, taking into account any earnings during this period. I have reserved leave for the parties to return to the Authority if there are any difficulties in such calculation.
- I have found that Mr Farley is entitled to payment for half a lieu day and I have ordered payment be made.
- I have ordered Nugget Point Limited to pay to Mr Farley for one sick day on 12 December 2005.
- I have not found Mr Farley is owed any money in terms of any overtime he may have performed.
- I have ordered Nugget Point Limited to pay to Mr Farley the sum of \$10,000 without deduction, for compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.
- I have found that Mr Farley breached his obligation of trust and confidence toward Nugget Point when he deliberately accessed documents in Mr Walters' folder without authorisation.

- I have not found the costs of engaging Mr Duurloo to have been damage which the parties contemplated as the probable result of a breach when they made the employment agreement.
- I have not found, on the balance of probabilities, that Mr Farley removed and used the database from Nugget Point in breach of his contractual obligations to Nugget Point and have not therefore considered the issue of damages in terms of the alleged removal of the database.
- I have not found that Nugget Point should be reimbursed for the cost of the business cards.
- I have reserved the issue of costs on the personal grievance and the counterclaim. I encourage the parties to, in the first instance, attempt to reach agreement about costs.

Helen Doyle
Member of Employment Relations Authority