



- C. Alice Townsend failed to have an employment agreement for Glenda Feisst and must pay a penalty of \$1,500.00. This is to be paid to Ms Feisst.**
- D. I reserve costs with a timetable set for submissions if required.**

### **Employment relationship problem**

[1] Glenda Feisst worked at Alice In Wanaka, a gift and clothing store in Wanaka. Ms Feisst resigned after a series of incidents that occurred between 12 February 2017 and 3 March 2017. Ms Feisst says those actions, carried out by her employer, were responses to her objecting to a new roster being imposed. She says these were deliberate actions designed to make her resign.

[2] Ms Feisst says she resigned because of this course of action and as a result, her resignation amounts to an unjustified dismissal for which she seeks remedies including reimbursement of lost remuneration and compensation for injury to feelings.

[3] Ms Feisst also complains that she did not have an employment agreement and that she was not given the opportunity to take breaks when she was working. Ms Feisst seeks to have penalties imposed against her employer for these failures.

[4] The third aspect of Ms Feisst's claim is that she says her employer is not only Alice Townsend, the owner of Alice In Wanaka but also Ms Townsend's husband, Toby Donnelly. So her two claims – unjustified dismissal and penalties for breaches of minimum standards – are brought against both Ms Townsend and Mr Donnelly.

[5] Ms Townsend and Mr Donnelly deny all of these matters.

### **Credibility and conflicts of evidence**

[6] The advocate for Ms Feisst, Mr Guest, submits that Ms Townsend and Mr Donnelly were not credible witnesses. He alleges that they fabricated their evidence and deliberately misled me, under oath, in my investigation. These are serious allegations and I have

considered very carefully Mr Guest's submissions and the response from counsel for Ms Townsend and Mr Donnelly, Ms Diedrichs.

[7] There are four main points that Mr Guest makes:

- (a) Mr Donnelly and Ms Townsend's continued denial that Mr Donnelly was an owner of Alice in Wanaka is inconsistent with Mr Donnelly's Facebook profile, which records him as being "Owner at Alice in Wanaka" and their inability to explain why his profile states this and their denial of any knowledge of it, let alone conceding that Mr Donnelly was responsible for the entry, simply lacks any credibility.
- (b) Both Mr Donnelly and Ms Townsend responded to questions, under oath, where they denied having any knowledge of, or even receiving, a copy of a letter that Ms Feisst had received from Central Otago Health Services Limited notifying her of an appointment. Yet the contemporaneous text correspondence between Ms Townsend and Ms Feisst clearly referred to this letter having been sent to Mr Donnelly by Ms Feisst.
- (c) Ms Townsend recorded in her written brief that she had spoken to Ms Feisst about breaks when she was applying for the job yet Ms Townsend was not involved in Ms Feisst's recruitment as she was out of the country during this time.
- (d) Ms Townsend's evidence was that she asked Ms Feisst for her key to the shop on 12 February 2017 because she had realised that morning that she had lost her key. However, in her brief of evidence she said "shortly after 12 February 2017 I misplaced my keys."

## *Facebook*

[8] Mr Guest's submission is that neither Mr Donnelly nor Ms Townsend were able to adequately explain the reference on Facebook to Mr Donnelly being an owner of Alice in Wanaka. Therefore, I must conclude that the flawed attempts to deny any knowledge of the reference or explain how it came to be on Facebook were "specious" and that both are misleading the Authority. Mr Guest also makes a number of submissions about the layout and operation of Facebook to support his allegation. He asserts that because of their use of Facebook, Ms Townsend and Mr Donnelly must have known he was described as the Owner at Alice in Wanaka and, that it is inconceivable that the reference would appear on Mr Donnelly's profile without him having inserted it.

[9] The simple point is I cannot accept Mr Guest's submission and form such an adverse view when Ms Feisst only notified both witnesses that she would be relying on the Facebook references at the commencement of the Investigation Meeting and they only received copies of the Facebook entries when each was cross-examined. This was despite Ms Feisst being aware of the entries and presumably, that she would rely on them, in May 2017, approximately four months before the Investigation Meeting<sup>1</sup>.

[10] Neither Mr Donnelly nor Ms Townsend had an opportunity to properly consider the relevance of the Facebook references, how they may have come to be on Facebook and whether they were aware of them.

[11] To be critical of the answers Mr Donnelly and Ms Townsend did try to give because they did not provide a complete explanation or because the explanations were at odds with how Mr Guest assumes they used Facebook is inappropriate. To suggest further that they were deliberately misleading me for these reasons is improper.

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<sup>1</sup> The Authority's process in an investigatory one, not adversarial and it would have been helpful to me and my enquiries, as well as the witnesses, to receive this information much earlier so properly informed enquiries could have been undertaken.

[12] The reality is I can give little weight to this evidence as there was no clear evidence of how the references came to be on Mr Donnelly's profile and he had not had an opportunity to look into why this may have occurred. Further, there was no clear evidence about how prominent the references were on Facebook and whether Mr Donnelly or Ms Townsend must have been aware of the references, despite their denials, because the references would have been apparent to them from their regular use of Facebook (whatever that regular use might be).

#### *Appointment letter*

[13] I do not accept Mr Guest's categorisation and summary of the evidence from Ms Townsend and Mr Donnelly regarding the hospital appointment letter. I do not accept that there was a clear answer to Mr Guest's questions about the letter, by either witness, that was contrary to the earlier contemporaneous text message.

#### *Discussing breaks*

[14] I accept that Ms Townsend's written evidence on discussing breaks with Ms Feisst was wholly at odds with the events that occurred around Ms Feisst's recruitment. It was not possible for her to have discussed breaks with Ms Feisst when Ms Feisst applied for the job because Ms Townsend was away and her mother, Margo Townsend, was involved in recruiting Ms Feisst.

[15] When I questioned Ms Townsend on this inconsistent statement in her evidence, she immediately acknowledged the mistake. She said she believed Mrs Townsend had discussed it with Ms Feisst when she recruiting her but she definitely discussed breaks with Ms Feisst once Ms Feisst had started work.

[16] Based on this response I believe Ms Townsend's written brief was simply a mistake. It was not an attempt to mislead me nor was it an attempt to lead deliberately false information to create a better picture for Ms Townsend's response to the claim. Ms

Townsend's evidence was meant to convey that breaks would have been discussed with Ms Feisst during the course of her recruitment and in any event, she did discuss breaks with Ms Feisst shortly after Ms Feisst started work.

[17] The mistake does influence the credibility of this evidence – a matter I will consider when I look at the breaks issues – but it does not, in my view, impact on the credibility of Ms Townsend's evidence generally.

*Taking the shop key*

[18] The oral evidence on this issue was inconsistent with the written evidence. But when I look at the timeline of the events, the answers to the questions asked around the relevant events and generally how the evidence of Ms Townsend "hung together" on this issue, I believe the error in her written brief was nothing more than that, a date error that arose out of confusion over the timing or even simply a typing error.

[19] Ms Townsend's oral evidence on this issue was clear: she was aware prior to 12 February 2017 that she had misplaced her key; she had discussed the missing key with Mr Donnelly on the morning of 12 February 2017; and it was on the afternoon of 12 February 2017 that she asked Ms Feisst to give her the key she had. By that point, she knew she was not going to find the missing key that day or very soon after, so she took Ms Feisst's key to use herself as Ms Feisst could use the spare key kept at the salon next door.

[20] The inconsistency in the brief arises simply because 12 February 2017 should have been 10 or 11 February and Ms Townsend was confused about the date when she drafted her brief, or rather than saying "shortly after 12 February 2017" her brief should have said "shortly before 12 February 2017".

[21] Again, I do not find that this simple mistake affects Ms Townsend's credibility nor does it cause me to believe she was misleading me with her evidence.

### *Conflicts of evidence*

[22] One or two errors in a written brief, particularly when those errors are conceded by the witnesses and then corrected, and there is a credible explanation for them, are not decisive of credibility overall. I note that Ms Feisst's evidence also contains mistakes – particularly her evidence that she spoke to Mr Donnelly about the roster change on two occasions, when Mr Donnelly's evidence shows he was overseas on both occasions and could not have spoken to her.

[23] It remains the case however that there are points of conflict in the evidence given by Ms Feisst, Ms Townsend and Mr Donnelly and I cannot simply dismiss them. I have considered the conflicts as they arise in my assessment of the evidence and in the course of making my determination. I have applied the tests set out in *R v Biddle*<sup>2</sup> rather than rely simply on the assertions made by Mr Guest.

### **Employer**

[24] The first issue I will consider is, was Mr Donnelly also Ms Feisst's employer?

[25] The starting point for the answer to this question is that Ms Townsend says Alice in Wanaka is a business owned and operated by her. The lease for the premises the business operates from is in Ms Townsend's name and the financial accounts are in her name, indicating she has sole responsibility for its financial position and, in particular, any losses or liabilities.

[26] Ms Townsend has owned and operated this business since 2003 and for the first nine years of operation she did not even know Mr Donnelly. Mr Donnelly has only become involved in the business recently to support Ms Townsend after the birth of their first child. Mr Donnelly was also involved in other businesses including his own business that he had prior to meeting Ms Townsend.

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<sup>2</sup> [2015] NZDC 8992

[27] From the time that they started a relationship, including after they got married Ms Townsend and Mr Donnelly have kept their ownership of their individual business interests separate and they only share an interest in a business, Hair on Helwick, which they started together and are joint owners of through a company.

[28] All of this evidence indicates that Mr Donnelly was not an owner of the business.

[29] In contrast, Ms Feisst says this evidence is wrong. She says Mr Donnelly was, and still is, an owner of the business. The evidence she relies on for this is that she says Mr Donnelly described himself as a co-owner to suppliers, and he often talked about the business as if he owned it using word such as “we” to describe what he and Ms Townsend would be doing in regard to the business. Ms Feisst also relies on Mr Donnelly’s Facebook profile, which describes him as “Owner at Alice in Wanaka”. Ms Feisst also says Mr Donnelly’s involvement in the day-to-day running of the business was consistent with ownership.

[30] I do not accept that separately nor cumulatively, that these factors prove that Mr Donnelly was an owner of the business:

- (a) Mr Donnelly became involved in day-to day running of business from late 2016. The evidence clearly shows he undertook day-to-day administrative tasks to help manage the business for Ms Townsend. And his explanation for doing so was credible. I conclude that this involvement does not equate to Mr Donnelly becoming an owner of the business, nor does it equate with him becoming the employer of the employees of the business. It is simply evidence that he became involved in the management of the business in order to help out Ms Townsend.
- (b) I accept that Mr Donnelly’s involvement in the business meant he described himself in terms jointly with Ms Townsend when describing actions that would be undertaken for or by the business. I do not accept that this is evidence of ownership.

- (c) I am not satisfied that Mr Donnelly described himself as a “co-owner” of the business to suppliers. There is insufficient evidence to support this and it was denied by Mr Donnelly.
- (d) There is insufficient evidence about the Facebook listing for me to conclude that Mr Donnelly chose to describe himself as “Owner at Alice in Wanaka”. Mr Donnelly’s evidence is that he was not aware of these listings or entries and he did not know how he came to be described on Facebook in this way. Ms Townsend’s evidence was consistent with this. That there may have been some inadvertent or even deliberate listing on Facebook describing Mr Donnelly as an owner of the business is not enough for me to be satisfied that Mr Donnelly was in fact an owner when the documentary evidence and sworn evidence of two witnesses is contrary to this.

[31] In all the circumstances, I conclude that Mr Donnelly was not Ms Feisst’s employer and all of the claims against him are dismissed.

### **Constructive dismissal**

[32] In order to succeed with her claim for constructive dismissal Ms Feisst must first establish that her resignation amounts to a dismissal by Ms Townsend.

[33] A resignation can amount to a dismissal in certain circumstances: Ms Feisst alleges that the dismissal occurred because she resigned in response to Ms Townsend’s actions, this includes actions undertaken by people instructed to act on her behalf such as her lawyer or Mr Donnelly, and this is a constructive dismissal.

[34] In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*<sup>3</sup> the Court of Appeal set out three non-exhaustive categories of constructive dismissal:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign;
- (c) Where a breach of duty by the employer leads an employee to resign.

[35] Ms Feisst relies on the second limb in *Woolworths*. So, I must consider:

- (a) Whether the actions by Ms Townsend amounted to a course of conduct that had a deliberate and dominant purpose of causing Ms Feisst to resign; and
- (b) If so, did Ms Feisst resign in response to this course of conduct?

### *Complaints*

[36] Ms Feisst complains of a number of actions by Ms Townsend and Mr Donnelly. In fact, she lists 23 complaints in her evidence, which she says she raised in the course of correspondence with Ms Townsend.

[37] I will not outline and address all of these complaints. The Employment Relations Act 2000 makes it clear that I am not required to do so. And, in the circumstances, I do not think it is necessary for me to set out a detailed analysis of each complaint in order to explain my determination nor would it be productive for the parties and others involved in this matter, given the small community they live in and the possibility of adverse publicity for them.

[38] My analysis of Ms Feisst's claim and the evidence indicates there are five areas of complaint from Ms Feisst, although not all of these give rise to the constructive dismissal claim:

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<sup>3</sup> [1985] 2 NZLR 372 (CA) at 374-375

- (a) A failure to provide an employment agreement and a failure to provide facilities for, or enable, Ms Feisst to take breaks.
- (b) Attempts to impose a new roster that would disadvantage Ms Feisst.
- (c) Events that occurred on 12 February 2017 in connection with Ms Feisst's objection to the new roster and her request for sick leave.
- (d) Micromanagement and unnecessary or unwarranted criticism of Ms Feisst's work after 12 February 2017.
- (e) Unnecessary and unwarranted accusations about Ms Feisst's behaviour in a letter of 3 March 2017.

*Employment agreement and breaks*

[39] Ms Townsend failed to provide an employment agreement to Ms Feisst. This was a continued failure in the face of requests from Ms Feisst.

[40] Ms Feisst concedes that this failure is not part of the matrix of events she relies on for her constructive dismissal claim but she says it does provide background and insight into Ms Townsend's attitude as an employer.

[41] I think there is some merit in this – I think the failure to provide an employment agreement shows that Ms Townsend was not properly engaged with her business over a reasonable period of time. This is supported by other events – during this time Ms Townsend and Mr Donnelly got married and had their first child, which was a difficult pregnancy, and for periods of this time Ms Townsend seemed to rely on Mrs Townsend and then Mr Donnelly to manage and run aspects of the business.

[42] That does not excuse the failing, it simply puts it in context and is instructive on the other issues.

[43] The failure to have an employment agreement also impacted on Ms Feisst's understanding of her ability to take breaks. It seems clear to me that taking breaks in the shop was also going to be problematic when Ms Feisst (or any employee for that matter) was working alone and effectively in sole charge of the premises. The effect of this was that Ms Feisst found it difficult to take breaks or felt guilty about taking breaks if there was time.

[44] My review of the evidence indicates that Ms Feisst did not take all of her regular breaks. I believe she did take some breaks and I believe she would have been able to take more but she chose not to because of the timing of customers or feeling guilty about closing the shop.

[45] On balance, I think Ms Townsend could have done more to facilitate breaks for Ms Feisst – such as having an employment agreement that stipulated what breaks she was entitled to, checking that Ms Feisst had taken breaks, providing cover on a more regular basis so Ms Feisst could take breaks at a regular time, etc.

[46] Again, this conduct or failing by Ms Townsend does not form part of the matrix of events for Ms Feisst's constructive dismissal claim but it does inform some of the other events that occurred and, I think is instructive on Ms Feisst's attitude and thinking during the key period of events. It appears to me from the evidence that by February 2017 the lack of support for taking breaks became an issue for Ms Feisst and something she resented or at least felt aggrieved about.

[47] I will deal with the issue of whether these failings vis-à-vis the employment agreement and facilitating breaks give rise to penalties separately.

#### *New roster*

[48] In late 2016 and early 2017 Mr Donnelly tried to create and implement a new roster for the employees working at Alice in Wanaka. The detail of this is not material, suffice to say that Ms Feisst was not happy with the proposed changes as they adversely impacted on her. Ms Feisst tried to discuss the proposed changes with Mr Donnelly but was not successful. It is difficult for

me to establish who was at fault in this – it actually appears to me to be a situation where there was miscommunication and misunderstanding where both Ms Feisst and Mr Donnelly could have done more and neither did enough.

[49] The key point about the roster change is that Ms Feisst believed Mr Donnelly was going to unilaterally impose the changes so she sought legal advice from Mr Guest. Mr Guest wrote a letter to Ms Townsend and Mr Donnelly, which they received on 12 February 2017.

[50] The end result is Ms Townsend and Mr Donnelly immediately abandoned any proposed new roster and agreed to retain the existing roster. Ms Feisst accepted this and she does not complain about the roster change as part of her grievance rather, Ms Feisst says that once she got advice and Mr Guest became involved Ms Townsend's and Mr Donnelly's attitude to her changed. This was immediately apparent in their behaviour on 12 February 2017 when they confronted her about Mr Guest's letter and continued on from then through unnecessary and unwarranted criticism and close scrutiny of her work.

*12 February 2017*

[51] I will not outline the detail of the allegations of the events of 12 February 2017. Ms Feisst says that when Ms Townsend and Mr Donnelly received Mr Guest's letter Ms Townsend called her and then both of them came to the shop to confront her over it. There are various allegations of yelling, threats, ultimatums over sick leave, Ms Feisst being reduced to tears and then the confiscation of keys (Ms Feisst says in retribution for her actions).

[52] Both Ms Townsend and Mr Donnelly deny the various allegations made by Ms Feisst. They accept that Ms Townsend called Ms Feisst and they then went to the shop to speak to her about her concerns, which they discussed rationally and resolved with Ms Feisst by agreeing to stick to the old roster and allowing her to take the time necessary for her hospital appointment.

[53] I have considered the evidence I heard on this matter from the three witnesses. I have looked at various documents including a contemporaneous email, Ms Feisst's notes, an email

exchange between Ms Feisst and Mr Guest and Mr Guest's subsequent correspondence. I have also considered the overall demeanour of the witnesses, including any consistencies or inconsistencies in their evidence and any concessions they have made. I have considered how well each witness' version of events stacks up and overall how likely it seems.

[54] On balance, I prefer the evidence of Ms Townsend and Mr Donnelly. I do not believe they yelled at Ms Feisst nor confronted her with threats or ultimatums. I believe they attended at the shop and had a frank conversation with Ms Feisst that resolved the issue of the rosters and the misunderstanding over taking sick leave. They were upset by the letter from Mr Guest but responded within reason especially considering this letter made threats of significant financial penalties being imposed against them.

[55] My assessment of both Mr Donnelly and Ms Townsend is that the behaviour alleged of them was unlikely, particularly Ms Townsend who, in the course of answering my questions, appeared genuinely concerned about people's feelings and presented as someone who avoided conflict in order to maintain some harmony in the workplace.

[56] I also find the email from Ms Feisst to Ms Townsend and Mr Donnelly sent immediately after their visit to the shop to be particularly instructive. In that email Ms Feisst thanked them both for continuing the normal roster, apologised for upsetting them and said she looked forward to putting this behind them. This response seems largely inconsistent with the allegations Ms Feisst has made, particularly in light of her many emails and texts where she has been forthright and stood up for herself.

[57] I think Ms Feisst's evidence and to a certain extent her instructions to Mr Guest on the evening of 12 February 2017 are a product of confirmation bias, subsequent insecurity about her job, her defensive nature and Mr Guest's strong advice.

[58] As I have concluded that, the events of 12 February 2017 did not occur as Ms Feisst alleges, these events cannot give rise to a constructive dismissal claim. I am left with considering the complaints about the conduct of Mr Donnelly and Ms Townsend after 12 February 2017 and the allegations set out in a letter of 3 March 2017.

*Micromanagement and criticism of work*

[59] Again, it is not necessary for me to traverse the detail of what Ms Feisst alleges. In essence Ms Feisst says that after 12 February 2017 up until 28 February 2017 Ms Townsend and Mr Donnelly went out of their way to make her work environment very stressful, unpleasant and impossible for her to work for them anymore. This was through a course of micromanagement with unrealistic expectations such as demanding that she not move stock around, unnecessary criticism of her work such as criticising her for allowing lay-by on an item for a short period of time and unacceptable demands such as telling her not to use the salon toilet.

[60] My review of the evidence indicates that there was close management of Ms Feisst by both Ms Townsend and Mr Donnelly from 12 February 2017 which led to some criticism of her work and some restrictions being imposed on what she could do. However, I cannot say if this was an increase based on prior management of Ms Feisst, as there was little evidence about what occurred in terms of management of Ms Feisst prior to February 2017.

[61] What I can say from review is that the management was not problematic – much of it appeared to be a manager simply running a shop (I note here that Ms Townsend, Mr Donnelly and Mrs Townsend all were involved in this in their varying responsibilities within the shop). I also note that Ms Townsend's increased involvement in the shop may have contributed to this, this increased involvement being purely a product of timing in terms of advice she had received from her accountant, plans she and Mr Donnelly had made previously for the shop and changes in her own personal circumstances.

[62] Nor was this conduct unjustified – so, for example, to ask Ms Feisst questions about why she had put an item on lay-by contrary to the policy is perfectly acceptable and I find Mr Donnelly’s handling of this issue to be appropriate.

[63] And, it follows I cannot conclude that the conduct gives rise to a constructive dismissal claim – it was not designed to cause Ms Feisst to resign.

#### *Accusations*

[64] On 28 February 2017 Ms Feisst sent an email to Ms Townsend and Mr Donnelly that said:

I am hereby resigning.

As since your plans of a new roster and the fact that I have kept my original rostered days, you have gone out of your way to make my working environment VERY STRESSFUL, UNPLEASANT and IMPOSSIBLE for me too (sic) work for you any more.

[65] Ms Townsend and Mr Donnelly responded by email the following day, saying:

We were very surprised to receive your email below. It is certainly concerning that you are feeling stressed and think the work environment is unpleasant and impossible. We were not aware you were thinking like that, and don’t know what you mean. We would like to discuss this with you to understand what you are talking about.

We note that your email says you are resigning however given your other comments it appears to be a kneejerk response to something you are unhappy about. Let’s have a talk about all this and work out where to from here.

[66] The end result of this exchange was that Ms Townsend, Mr Donnelly, Ms Feisst and Mr Guest arranged to meet on 3 March 2017. Unfortunately this meeting was not productive. At the start of the meeting Mr Guest produced a set of notes drafted by Ms Feisst setting out the numerous complaints she had about her work and the way she said she had been treated. Ms Townsend and Mr Donnelly were not aware of these complaints before the meeting and wanted to take some time to read the notes before they responded. They left the meeting to do

this. There was some confusion about this, Mr Guest and Ms Feisst believed they were returning whereas Ms Townsend and Mr Donnelly believed the meeting was at an end and they would respond later once they had considered the notes. Mr Guest and Ms Feisst ended up waiting a long period for Ms Townsend and Mr Donnelly to return and eventually left frustrated and angry about what had occurred.

[67] Mr Guest then wrote to Ms Townsend and Mr Donnelly on 4 March 2017, raising a personal grievance on Ms Feisst's behalf. In this letter, after setting out or referring to, the complaints Ms Feisst had, Mr Guest stated:

[Ms Feisst] resigned and clearly signalled that she treated that resignation as a constructive dismissal.

You wrote a brief letter that you did not understand the reasons for her resignation and suggested a meeting. She took that on face value as being a genuine attempt to resolve the issue of the resignation and that is why she attended with my support at the meeting at *Relishes restaurant*. Your failure to engage adequately at that meeting and the discourtesy of leaving us in the restaurant and then not responding to my email of 1:33 pm compels [Ms Feisst] now to pursue a personal grievance against you. You had not contacted either of us by Saturday morning.

[68] So, the grievance raised was for unjustified dismissal based on Ms Feisst's various complaints which led up to her notice of resignation and then the further alleged failing by Ms Townsend and Mr Donnelly to engage in the meeting and immediately after it. Ms Feisst sought, amongst other things, lost remuneration and compensation for injury to feelings.

[69] It turns out that having considered the notes written by Ms Feisst, Ms Townsend and Mr Donnelly decided to obtain legal advice and they went and saw a lawyer (at Aspiring Law) about the various allegations. That lawyer drafted a letter to Mr Guest that responded to the various allegation. The letter was dated 3 March 2017 but it appears that Mr Guest had not received it, or considered it with Ms Feisst, prior to writing his letter. Or, if they had seen it and considered it, it was not referred to in the personal grievance as being a reason for Ms Feisst resigning.

[70] Ms Feisst now says the 3 March letter from Aspiring Law was the last straw and that caused her to resign. In her written evidence Ms Feisst says:

I resigned at the end of February 2017. The first e mailed written resignation dated 28 February was held in abeyance for 3 days for a reconciliation meeting held of Friday 3 March. The long letter I received from the employer's lawyer dated 3 March after the meeting, but received on Saturday, finally broke my goodwill to consider remaining in employment for the full reasons below. My representative in his letter, and in a personal email from myself, I made the resignation formal on Monday 6 March.

[71] This stated position is not consistent with the contemporaneous correspondence. Ms Feisst's confirmation of resignation sent on 6 March 2017 does not refer to the 3 March letter from Aspiring Law. Mr Guest's letter of 6 March does refer to that letter and does complain of "incorrect allegations scattered throughout your letter". However his earlier personal grievance letter of 3 March 2017 had already confirmed Ms Feisst's resignation based upon actions up to that point – those actions did not include the various allegations in the Aspiring Law letter of 3 March.

[72] The Aspiring law letter of 3 March, may not have been the most tactful way to address the issues between the parties. It did make some strong denials and various allegations about Ms Feisst that had not been raised with her previously, but I do not accept that it was a basis for constructive dismissal either as a stand-alone breach of duty or as part of a wider matrix of events that are part of the alleged course of conduct. The response is aggressive but in the context of responding to the various allegations in Ms Feisst's notes and Mr Guest's various correspondence up to that point, it is understandable and not blameworthy.

[73] In any event, as I have outlined above, I am not satisfied that, at the time, Ms Feisst confirmed her resignation she did so in response to the letter, so it cannot be a basis for the constructive dismissal claim.

## *Summary*

[74] I have considered all of the complaints in light of the evidence and the law relating to constructive dismissal and I am not satisfied that the events complained of either occurred as alleged or were designed to have the effect alleged if they did occur.

[75] I believe Ms Feisst's subjective recollection and interpretation of events was coloured by factors, which were not the responsibility of Ms Townsend. Counsel for Ms Townsend captured this in her submissions and I accept her summary, with some minor amendments:

13. The picture that Ms Feisst's complaints paint, however, is not supported by the evidence. Rather, it is submitted the complaints subject of this proceeding are the result of Ms Feisst's:

- (a) Insecurity about her job generally;
- (b) Dissatisfaction with the roster change;
- (c) Personality, which is:
  - (i) Confrontational;
  - (ii) Defensive; and
  - (iii) ...; and
- (d) The ... advice of her advocate.

[76] In total, the events that did occur did not amount to a course of conduct designed to cause Ms Feisst to resign. Ms Feisst may think they do but I do not find in fact and law that this is so. In particular Ms Townsend's response to Ms Feisst's resignation on 28 February 2017 is not consistent with this.

[77] In conclusion, the claim for constructive dismissal has not been established by Ms Feisst and is dismissed.

## **Penalties**

[78] I am satisfied that there was a failing by Ms Townsend to provide an employment agreement to Ms Feisst and this failing warrants a penalty being imposed. This was an ongoing breach<sup>4</sup> and was aggravated by the failure to provide an employment agreement when Ms Feisst requested one. I am also of the view that the failure to have an employment agreement impacted on Ms Feisst in connection with her understanding of her right to take breaks.

[79] I have considered these factors, the explanation provided by Ms Townsend for not having an agreement and the factors as set out in *Borsboom v Preet PVT Limited*<sup>5</sup>. I conclude that an appropriate penalty in this case is \$1,500.00 and all of this should be paid to Ms Feisst to compensate her for the impact this failure had on her and her ongoing employment.

[80] I am not satisfied that Ms Townsend failed to provide rest and meal breaks for Ms Feisst and I do not impose a penalty.

## **Determination**

[81] This determination, reserved at the conclusion of a one day Investigation Meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Employment Relations Act 2000 to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Employment Relations Act.

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<sup>4</sup> I note here that the claim for a penalty was lodged within 12 months of Ms Feisst's resignation and I treat the failure to have an employment agreement as an ongoing breach up to the resignation, so there is no limitation issue in awarding a penalty as Ms Diedrichs suggested.

<sup>5</sup> [2016] NZEmpC 143

[82] Mr Donnelly was not Ms Feisst's employer and all claims raised against him are dismissed.

[83] Ms Townsend did not constructively dismiss Ms Feisst. Ms Feisst's claim for constructive dismissal is dismissed.

[84] Ms Townsend failed to have an employment agreement for Ms Feisst and must pay a penalty of \$1,500.00. This is to be paid to Ms Feisst.

### **Costs**

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

[86] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

**Peter van Keulen**  
**Member of the Employment Relations Authority**