

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2023] NZERA 208
3154023

BETWEEN	PHILIPPA JOHNSON Applicant
AND	CERVIN MEDIA LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Ashleigh Fechny, advocate for the Applicant Margaret Robins, counsel for the Respondent
Investigation Meeting:	7 September 2022
Submissions Received:	9 and 20 September 2022 from the Applicant 16 September 2022 from the Respondent
Date of Determination:	26 April 2023

DETERMINATION OF THE AUTHORITY

What is the Employment Relationship Problem?

[1] Philippa (Pippa) Johnson was a senior account manager at Cervin Media Limited (Cervin Media or the company). Cervin Media is a small business established some decades ago by Anne-Marie Cervin.

[2] Ms Johnson resigned from Cervin Media on 21 April 2021 but claims she was constructively dismissed. Cervin Media's perspective is that Mr Johnson calmly and deliberately resigned after having ample opportunity to consider her options.

How did the Authority investigate?

[3] An investigation meeting was held on 7 September 2022 and evidence heard from Ms Johnson and Cervin Media's Anne-Marie Cervin (managing director, referred to as Ms

Cervin), her daughter Carmel Cervin (general manager, referred to as Ms C Cervin) and Komal Mather (sales and marketing manager). The parties subsequently provided written submissions.

[4] This determination has been issued more than three months after the date on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C (4) of the Employment Relations Act 2000 (the Act) was applicable.

[5] All material from the parties was fully considered. However, as permitted by s 174E of the Act, this determination has not recorded everything received from the parties but has stated findings of fact and law and expressed conclusions.

What are the issues?

[6] The issues investigated are:

- Was Ms Johnson constructively dismissed and if so, was that dismissal unjustified?
- Alternatively, was Ms Johnson disadvantaged by unjustified actions of Cervin Media?
- If a grievance is established, what remedies (if any) should Ms Johnson receive?

What was Ms Johnson's background?

[7] Ms Johnson describes herself as having a long and successful career in advertising sales in New Zealand and the United Kingdom. However, recent years have brought some difficulties. In 2017 Ms Johnson was dismissed from her job with National Business Review (NBR) publisher Fourth Estate Holdings (2012) Limited with issues regarding confidential information pursued by her employer in the High Court. Media coverage and a claim in the Authority, decided by a different Member, followed. The Authority found that Ms Johnson was unjustifiably dismissed but had to pay a penalty regarding confidential information.¹ Ms Johnson's subsequent employment had been terminated during a trial

¹ *Johnson v Fourth Estate Holdings (2012) Limited* [2018] NZERA Auckland 341.

period due in part to her misrepresentation of the reasons her NBR employment came to an end.²

What is Cervin Media's background?

[8] Ms Cervin set up the business about 35 years ago when she was at home looking after small children. Adopting an idea her husband had, the business developed the New Zealand Medical Specialist Directory. Over time this moved from a print service to an online one including electronic referrals to specialists, covering New Zealand and Australia.

[9] Ms Cervin represents the company as having a strong set of aspirational values set out in its Values Statement. The key message is that everyone is straightforward and respectful of each other, working through issues as they arise. There are a number of very long serving staff.

What were the circumstances of Ms Johnson's appointment?

[10] Ms Johnson describes Cervin Media's sales role being her dream job as her father had been a medical specialist and her mother and sister were nurses.

[11] When Ms Johnson applied for the role, she disclosed that she was in the middle of a bitter legal battle with NBR. Ms Cervin felt reassured by Ms Johnson's indication that the accusations being made were not true and the documents were taken with permission. A warning against Ms Johnson was communicated to Ms Cervin. However, for reasons which I need not go into, she decided to give Ms Johnson the benefit of the doubt and a chance.

[12] In March 2018 Ms Johnson was employed by Cervin Media. She was based in the Auckland office but responsible for Australian clients. The determination in the NBR case came out later that year. Cervin Media took advice but decided not to take any steps against Ms Johnson, who continued in employment.

² Above, at n 2 at [64].

What happened in Ms Johnson's first years with Cervin Media?

[13] Generally, Ms Johnson's time with the company went well.

[14] Cervin Media considers that it was generous in its support of Ms Johnson on occasions when she had difficult personal situations to deal with. She acknowledged her gratitude at the time for being allowed holiday at short notice at the closing stage of the project she was working on. The company also indicated in writing to Ms Johnson that she was a highly valued team member.

What about conflicting evidence?

[15] Regarding 2021 events, the evidence of Ms Cervin and her managers conflicted on occasion with that of Ms Johnson. Ms Cervin's evidence was not undermined by cross examination and Ms Mathur and Ms C Cervin were not cross examined. Ms Johnson had more difficulty. I accept the submissions for Cervin Media that there were evasive, inconsistent, or implausible elements of Ms Johnson's evidence. One important area was the question of whether, during the investigation/disciplinary process, Ms Johnson had a sense that the situation was serious, and her employment was at risk. Her contemporaneous email stated that she did, her witness statement suggested otherwise, and her oral evidence went both ways.

[16] Where the witnesses differ, I prefer the evidence of Ms Cervin, Ms Mathur and Ms C Cervin.

What were the first steps on the path to Ms Johnson's resignation?

[17] On 10 March 2021 Ms Johnson asked Ms Cervin and her direct manager Ms Mathur by email if she could (regularly) work remotely from her partner's house in the Bay of Islands. Ms Johnson was commuting about four hours from there to Auckland on Monday mornings, returning Friday evenings. She understood her new sales colleague was to be working from the Coromandel. They both covered Australian clients. Work had been conducted from home during the Covid-19 lockdowns and at other times some staff did days from home.

[18] The employment agreement identified work was to occur from the company's office but permitted the employer to specify other places.

[19] On 15 March, Ms Cervin met with Ms Johnson. Discussion occurred about the proposal. Ms Johnson was told the proposal was unacceptable to Cervin Media as they were trying to build up the nucleus in the Auckland office. Ms Cervin's impression was that Ms Johnson accepted the reason offered and Ms Johnson agrees that she accepted the decision without a fuss.

[20] She did however talk about it to staff. Her representation of this to the Authority was thinking other people, who were interested in working from home, should know what was going on. Therefore, she passed on the company's rejection of her bid to work remotely.

[21] In her statement of problem, Ms Johnson refers to expressing her disappointment to staff albeit ultimately conceding it was a good idea to strengthen the office's nucleus. Under cross examination Ms Johnson initially said she could not remember expressing disappointment and then, that she did not do it. Further questioning lead to a point where she could not remember about disappointment but stipulated that she had not said anything bad. I find it more likely than not that Ms Johnson did mention her dissatisfaction to staff, rather than just using a light 'just so you know' approach she suggests.

[22] A staff member then reported to Ms Cervin that Ms Johnson was expressing her unhappiness about the proposal rejection. Ms Cervin was concerned about Ms Johnson giving the appearance of acceptance at their meeting but then telling others that she was disappointed without approaching Ms Cervin.

What happened on 19 March 2021?

[23] Ms Cervin phoned to let Ms Johnson know she had heard the other was unhappy and they should talk when both in the office.

[24] Ms Johnson's evidence was that Ms Cervin had yelled at her very aggressively, accusing her of talking about Ms Cervin to staff. Ms Cervin was shocked to see the witness statement reference to yelling as she had never in the history of the company yelled or screamed at any staff. This was supported by Ms Mathur who, in her almost 20 years with the company, had never come across Ms Cervin speaking disrespectfully to an employee or others. I reject the suggestion of yelling or aggression.

What happened at the 6 April 2021 meeting?

[25] With Ms Cervin away then Easter occurring, the meeting was not held until 6 April. In Ms Mathur's absence, Ms C Cervin attended with her mother.

[26] Ms Cervin outlined what she understood may have occurred, with Ms Johnson being unhappy about a company decision and raising it with staff. She stated her expectation that if Ms Johnson had an issue, she should raise it directly with Ms Cervin.

[27] Ms Johnson told the Authority that this was a "very nice meeting". She was aware of which discussion Ms Cervin wanted to talk about and was very careful in her response. From this point she was worried about her job.

[28] Ms Johnson's response to the concern was:

- She was not unhappy with the decision
- She had not told staff she was unhappy with it
- The only reason she talked to colleagues about the decision was because they asked her whether her application had been approved

[29] Ms Johnson said she would "never back stab" Ms Cervin after the company had done so much for her.

[30] Ms Cervin started typing notes in a document after this meeting which she continued after subsequent discussions.

How did Ms Cervin follow up?

[31] Ms Cervin spoke to staff to clarify the conversations.

[32] Staff member D reported she had not known about Ms Johnson's request to work from home and thus did not ask about reasons for rejection. Rather D's friendly query to Ms Johnson of "How are you?" resulted in Ms Johnson saying she was not happy because her request had been declined. D also reported that a new staff member C had expressed to D how uncomfortable she was about conversations Ms Johnson had with her at the end of the day when the two were alone in the office dealing with Australian clients in different

time zones. By contrast, Ms Johnson described to the Authority her and C bonding immediately.

[33] Ms Cervin saw it as a red flag for a very new staff member (C) to have raised her worries about Ms Johnson with another staff member.

[34] Ms Cervin met with C. Ms Johnson had told C she was unhappy with company's decision. C also described Ms Johnson as making inappropriate negative comments about several other staff.

[35] Two other colleagues also confirmed that Ms Johnson had told them about her declined request, at least one involving a negative element.

[36] What had started as a check at the 6 April meeting on whether Ms Johnson was unhappy with her employer's decision morphed to Ms Cervin wondering if Ms Johnson had misled or even lied to Cervin Media.

[37] Another problem had also emerged. C told Ms Cervin that Ms Johnson requested C place sales leads under Ms Johnson's name. Ms Cervin saw any such action as a breach of trust as all staff were "crystal clear" that leads were to be allocated by the sales manager, Ms Mathur. This was a significant issue in sales and Ms Johnson did not dispute that being company's position on leads.

[38] Ms Cervin updated her notes document straight after each discussion, as was her practice.

What did the 19 April letter say?

[39] Ms Cervin decided to detail her concerns to Ms Johnson in writing. In light of arguments about whether Ms Johnson was sufficiently informed, the letter's contents are described in some detail. It records:

- company principles of integrity, transparency, and respect in interactions, with Ms Johnson expressing her acceptance of the decision at the meeting then reportedly telling staff about her unhappiness
- Ms Johnson's reply on 6 April that she was not unhappy, had not told anyone that and was simply responding to staff questions

- An outline of responses from staff - not being aware of the working from home request, Ms Johnson being the one who told them and her saying she was unhappy with the decision
- “The issue I have now is that you appear to have misrepresented to me how these conversations occurred. While you may have been answering questions these arose from you telling staff about your unhappiness with your declined request”
- Specific concern about the sales lead conversations with C with Ms Johnson being aware that was not the procedure. This “appears to me seriously dishonest and bad faith behaviour”
- Ms Johnson’s conversations with C expressing her views on her sales manager and others appearing to fall seriously short of a key company value of transparent, respectful, and straightforward communication

[40] Cervin Media finishes by inviting Ms Johnson to a 21 April meeting to provide explanations, noting that if those are not satisfactory it is likely to consider a written warning or potentially dismissal. A suggestion of a support person or lawyer is made plus an offer to arrange an alternative meeting time if needed.

What happened when the letter was handed over?

[41] On 19 April Ms Cervin met with Ms Johnson. Ms Cervin describes the meeting as short, at about five or ten minutes. She indicated there was new information which conflicted with the facts Ms Johnson had provided at the last meeting and passed over the letter.

[42] Ms Johnson questioned whether it was the same incident, reiterating that she had not referred to being unhappy. She expressed some apology, but Ms Cervin instructed her to read the letter and then they would meet.

[43] At the Authority’s meeting Ms Johnson said she thought Ms Cervin brought up the leads discussion with C and she responded that it was a mistake and apologised straight away.

[44] Later that day the proposed meeting date was accepted by Ms Johnson, with her email concluding “I am happy to come to the meeting alone, however, I appreciate the offer to bring a support person and recognise the seriousness of the situation”.

What occurred at the 21 April meeting?

[45] Ms Cervin, Ms Mathur and Ms Johnson met at around 10.30 or 10.40am.

[46] Ms Johnson describes going into the meeting still not knowing exactly what she had done wrong and not taking a support person as she had not done anything wrong.

[47] The first part of the meeting involved going through the points in the letter and allowing Ms Johnson to respond on each point. This included Ms Cervin asking about her agreeing to C putting sales leads in her name. Ms Johnson admitted that was a mistake.

[48] Ms Johnson describes finding the meeting very difficult as she was not getting any clarification or being told exactly what she had said or done. However, I do not accept this. She acknowledges mention of her misrepresenting the facts at the last meeting and to accepting she had made a mistake in telling C to put sales leads in her name.

[49] There were no raised voices. Ms Cervin describes getting to the point where Ms Johnson “basically acknowledged that what she had done was wrong”. She describes Ms Johnson stating this several times in different ways. Ms Mathur saw the apologies as covering all the issues Cervin Media was investigating. Ms Johnson indicated that she had issues which she needed to work on herself.

[50] In terms of emotionality, Ms Mathur’s description is of Ms Johnson being calm and composed at the meeting in the same way she usually was, not agitated or particularly emotional. Ms Johnson describes herself as “sobbing exhausted” whereas Ms Cervin’s view is that she was slightly teary but in a quiet contrite way. I accept Ms Cervin’s evidence.

[51] Ms Johnson put her hand on Ms Mathur’s knee, thanking her for all the support. Gratitude was also expressed for all Ms Cervin had done.

[52] Having discussed the concerns and heard the apologies, Ms Cervin told Ms Johnson that she had not acted in good faith, and she would have to think seriously about whether there was a way forward from here.

[53] Ms Johnson said she would resign and wanted to go with quietly with no fuss. She indicated she just wanted to leave, and Ms Cervin should tell the staff she had resigned as she wanted a job where she could work from home.

[54] Ms Cervin accepted at face value Ms Johnson's expression of remorse and acknowledgement that she had behaved badly and let herself down. She believed that the level of remorse shown was probably partly at least because Ms Johnson recognised Cervin Media had been very supportive of her through difficult times, including giving her chance by employing her to start with.

[55] As the meeting was drawing to a close, Ms Cervin asked Ms Johnson as she was leaving the room if she wanted to put her resignation in writing before leaving then they could discuss the final details. I accept Ms Cervin's evidence that this was not put as a demand or expectation, rather a suggestion. I reject Ms Johnson's evidence that she was told a resignation from home that night would be refused, and it had to be provided now.

[56] Ms Johnson's grievance letter, statement of problem and first witness statement make no mention of Ms Mathur accompanying her as she left Ms Cervin's office. In her witness statement in reply, she mentions for the first time being "marched back" by Ms Mathur who "stood over" her while she was crying and writing her resignation letter. Ms Johnson's explanation for not including this previously, namely that she did not think it relevant, is not compelling. Ms Mathur said she left Ms Cervin's office and went to her own space which is not near Ms Johnson's desk. Ms Cervin could see through her glass wall Ms Mathur going elsewhere having left at a different time to Ms Johnson. I accept Ms Mathur and Ms Cervin's evidence.

[57] The meeting finished sometime after 11am. About 15 minutes after leaving Ms Johnson completed and provided her resignation email:

It is with great sadness in my heart that I tender my resignation to you at Cervin Media Ltd effective immediately.

I want to thank all of the Cervins and of course Komal for all the support and guidance I have received that has enabled me to meet my goals.

I leave because I need to find a role where I can work remotely from home.

I wish you, Komal; and the Cervin family all the best with your successes in the future.

With much gratitude and good will.

Kindest regards

Pippa

[58] Ms Cervin found this entirely consistent with Ms Johnson's approach at their meeting.

[59] The email referred to resignation "effective immediately". Having read it, Ms Cervin asked Ms Johnson to come back into her room. Ms Cervin acknowledged the resignation, saying notwithstanding it being effective immediately the company would pay her four weeks' notice. She also offered to provide a verbal reference regarding sales ability. Her practice was not to provide written references.

[60] Ms Johnson was offered the rest of the day off. She spent about half an hour tidying up her desk, then left about noon.

[61] Staff present were told in a group, as agreed, that she had resigned. Ms Cervin describes going further in her message than she normally might, being concerned that C might see herself as responsible for someone's departure. Ms Cervin said that everyone makes mistakes, we work them out and move on but sometimes things go beyond that.

When did Ms Johnson attempt to retract her resignation?

[62] Ms Johnson was aware in the late morning of the plan to tell staff of her resignation. Despite her evidence that "as soon as" she left the office she reflected on events and realised what had happened, she did not act immediately.

[63] In mid afternoon Ms Cervin emailed thanking her for "the respectful way we have concluded this" and confirming the arrangements.

[64] After talking to her family, Ms Johnson emailed at 8.07pm that night referring to being bewildered by events of the past week or so:

I resigned in haste to appease you and Komal as I felt intimidated and under pressure at our meeting and I now regret that decision as I am at home facing the cold reality that I have a family to support ...

Is there any way that I could come back to work tomorrow? ...

... I retract my letter of resignation written in haste in the office today as I really want my job back.

As I didn't manage to say goodbye to any of the staff, nobody needs ever know.

[65] Ms Cervin responded that evening indicating her surprise at receiving the message and her intention to be in touch.

[66] Ms Cervin gave the retraction question careful consideration but ultimately concluded that there was nothing that left her with uncertainty or disquiet about the genuineness of the process or Ms Johnson's resignation. I note that she had already spoken to staff, making Ms Johnson proposal that nobody would ever need to know untenable.

[67] An email was sent the following morning outlining that the resignation was:

accepted ...after fulsome discussion. I consider you had plenty of opportunity to consider it. You are not able to retract it. I have already acted on it and your employment has finished as per your resignation.

[68] Ms Johnson attempted to plead her case again, but Cervin Media stood firm. Her representative raised a grievance a couple of days later.

Was there an unjustified action by Cervin Media?

[69] I now consider whether there was a part of the process which could be seen as unjustified on Cervin Media's part, causing a disadvantage to Ms Johnson. This also provides a background to the consideration of constructive dismissal below. I leave questions about a possible cooling off period and the request to retract the resignation for separate discussion below.

[70] The first discussions in the process were informal with Ms Cervin trying to get a sense of whether there was anything which needed to become the subject of an

investigation and possible disciplinary action. Once she decided there was sufficient basis to proceed, she conveyed her concerns in writing.

[71] The issues being examined did expand in the course of the process. Initially it was just whether Ms Johnson had told staff about her unhappiness at the denial of her request and not approaching Ms Cervin. When Ms Johnson denied to Ms Cervin having said that to staff, but others confirmed it, the honesty of her response to Ms Cervin came into question. There was then the serious issue of asking C to put new leads in her name.

[72] Even if the initial issue did not seem like a major point, what developed were questions about whether Ms Johnson had lied to her employer and tried to inappropriately seize sales leads.

[73] Ms Johnson expressed concern that Ms Cervin was not there when her conversations with staff occurred so was relying on hearsay evidence. It is not unusual for managers to investigate events which they did not directly witness and in fact when they have personal involvement that is sometimes criticised as meaning they lack sufficient independence. Ms Cervin did speak witnesses present during the discussions she was investigating.

[74] I was not convinced by the frequent assertions in Ms Johnson's written and oral evidence that she was confused and did not know what was going on. The 19 April letter identifies the events being investigated and why they are seen as concerning. Ms Johnson knew what the issues were, she just could not accept that she had done anything particularly bad.

[75] Similarly, submissions for Ms Johnson argued that Cervin Media failed to put the allegations to her. However, the 19 April letter does that. Over two single-spaced pages it sets out what people have told Ms Cervin, what appears to have occurred and why that can be seen as problematic. Ms Johnson did not ask for additional information.

[76] A submission was made that Ms Cervin's concerns about a "larger context" were not put to Ms Johnson. The 19 April letter did however state "in our workplace everyone could expect their dealings with the company to be handled with integrity, transparency and respect and...equally an expectation of how dealings should be between us". The

involvement of several staff in the investigation and the concern about Ms Johnson expressing views to C about various staff members were evident to her.

[77] The movement from focus on the working from home discussions to other concerns made this not as simple as some investigations. However, the letter provided guidance including references such as “the issue is now that you appear to have misrepresented to me how these conversations occurred” and “I also am now aware of conversations ...”. C’s involvement and the issues regards their communications are specified.

[78] Paragraph numbers or headings may have made for easier readability, but their absence is not fatal to effective communication of the issues being examined. The recipient must also be considered. Ms Johnson has worked in publishing for over 30 years.

[79] In conclusion I do not accept that there was an inadequacy in the conveyance to Ms Johnson of what Cervin Media saw the issues with her behaviour as being. What Ms Johnson may not have been willing to recognise was that her explanations were either not accepted or not seen as sufficient to make the problem disappear.

[80] At points of her evidence Ms Johnson expressed uncertainty about whether she knew that she would potentially be warned or dismissed as an outcome. That approach was contradictory to her evidence that she was worried about her job at the first meeting with Ms Cervin and her email response to the 19 April letter where she wrote that she recognised the seriousness of the situation. Her attempts at explaining these inconsistencies essentially involved her referring to not having done anything wrong so thinking the whole thing was a misunderstanding.

[81] Submissions for Ms Johnson point to predetermination. I do not agree. I see Cervin Media appropriately balancing its duties to ensure Ms Johnson was aware that it regarded the allegations as serious and to give her an informed opportunity to respond to those allegations. This included in the 19 April letter and at the 21 April meeting.

[82] At that meeting the conclusion that Ms Cervin would have to seriously think whether there was a way forward was only mentioned after Ms Johnson had taken the opportunity to provide her responses to the allegations. She chose to do so by apologising and taking responsibility for her actions. It was not unreasonable of Ms Cervin to then move to an indication of the next step.

[83] For the sake of completeness, I reject the argument that Cervin Media breached its duty of good faith.

What about a cooling down period or allowing a retraction?

[84] Recently it was emphasised in *Mikes Transport Warehouse Limited v Vermuelen and Urban Décor Limited v Yu and Jin* that resignation is a unilateral act which does not require the employer's agreement to be effective.³ The Employment Court found that there is therefore no legal obligation to hold off on recognising a resignation but concerns about whether the resignation arose from an employer's misconduct or breach can be considered under a constructive dismissal claim.⁴

[85] That suggests that an employer's response to a retraction request is not the issue, at least where the resignation has come into effect, for example because it is stated to be effectively immediately. However, submissions for Ms Johnson argue that, as at the time of the attempted retraction, her employment was not yet terminated because of agreement that her notice to be paid in lieu.⁵

[86] Whether a cooling off period in or after meetings involving serious decisions being made and the employee becoming emotional may be considered (at least) in relation to unjustifiable disadvantage.⁶

[87] Given the above points I look at the possible need for a cooling off period and the retraction issue.

[88] Was this a 'heat of the moment' resignation in response to which Cervin Media should have proposed a cooling off period? Ms Johnson mentioned resignation during an investigation/disciplinary meeting and provided a written resignation shortly thereafter.

[89] However, looking at the timeline and associated points I struggle to see this as a spur of the moment decision by her made suddenly due to her emotional state:

- 19 March 2021 - Ms Johnson first notified her employer wanted to talk

³ *Mikes Transport Warehouse Limited v Vermuelen* [2021] NZEmpC 197 and *Urban Décor Limited v Yu and Jin* [2022] NZEmpC 56.

⁴ *Urban Décor Limited v Yu and Jin* [2022] NZEmpC 56 [63].

⁵ *Poverty Bay Electrical Power Board v Atkinson* [1992] 3 ERNZ 413.

⁶ *Mikes Transport Warehouse Limited v Vermuelen* [2021] NZEmpC 197 at [47].

- Over two weeks before the meeting could be held on 6 April
- Ms Johnson described the 6 April meeting as very nice although also feeling worried about her job
- 19 April letter - described the development of concerns and identified that a warning or dismissal as possible. Although not all the concerns might be seen as serious misconduct there were elements of dishonesty and potential (financial) impropriety regarding sales leads. Support or representation for the meeting raised.
- 19 April meeting - Ms Cervin indicated it was a very serious matter
- Ms Johnson may have found the 21 April meeting difficult, but it was not evident that she was overwhelmed by events
- Ms Cervin's statement at the 21 March meeting about needing to consider whether there was a way forward, indicates a decision was not being made at that meeting
- Ms Johnson gave her verbal resignation to Ms Cervin and then took some 15 minutes to write her resignation
- The resignation contained effusive thanks to Ms Cervin, Ms Mathur and others, concluding with wishes of gratitude and goodwill
- There was discussion of arrangements, with Ms Johnson specifying what she wanted staff to be told
- Finally, she spent half an hour tidying up her desk before leaving

[90] Ms Johnson was not ambushed nor in the middle of a heated argument when she resigned. This was not a 'heat of the moment' flare up, emotional reaction or outburst of frustration.⁷ To summarise, Ms Johnson had been aware of the allegations for some time, recognised that the situation was seriousness, had had some opportunity to put her side of

⁷ *Boobyer v Good Health Wanganui Limited*, unreported, Employment Court, Wellington, WEC 3/94, Goddard CJ, p 3.

the story earlier, faced some serious allegations and had apologised earlier, knowing from the first meeting that her job was on the line. At the final meeting she again admitted fault, apologised, and resigned, then expressing gratitude verbally and in writing to Cervin Media. The company was entitled to proceed with the resignation rather than suggesting a cooling off period.

[91] Regarding the retraction request, an employer should be entitled to take into account the repeated acceptances of wrongdoing by an employee when considering such a request. Ms Johnson had acknowledged that in several situations she had done wrong.

[92] Ms Johnson now attempts to create a different picture, but the impression created at the time was that she resigned as she sincerely recognised that she had back stabbed Ms Cervin (to use her words) and then lied about it, as well as encouraged a new staff member to (improperly) send leads to her. She had decided to leave. Staff had been informed. In those circumstances the failure to agree to a retraction of resignation was not unfair or unreasonable.

Was Ms Johnson constructively dismissed?

[93] In addition to the discussion above, I look further at constructive dismissal. Was Cervin Media the real source of the initiative for termination.⁸ The non-exhaustive categories of constructive dismissal are often identified from the *Auckland Shop Employees Union v Woolworths* as situations where:

- An employer gives an employee a choice between resigning or being dismissed
- An employer has followed a course of conduct with a deliberate and dominant purpose of coercing the employee to resign
- A breach of a duty by an employer causes an employee to resign.⁹

⁸ *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* 91983) ERNZ Sel Cas 95.

⁹ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372.

[94] Ms Johnson's representative described this as a situation of an employee feeling there was no other choice, with it inferred that her employment would be terminated. This is seen as satisfying the first and/or second test in the *Auckland Shop Employees* case.

[95] The prospect of this being a situation in the third category is negated by the finding above that there was no unjustified action of Cervin Media to Ms Johnson's disadvantage.

Was Ms Johnson given a choice between resignation and dismissal?

[96] Ms Johnson may have felt that she had no other choice, but I do not accept that Cervin Media unfairly put her in this position. Legitimate concerns were being investigated. Cervin Media had put those concerns to its employee, properly indicating the possible outcomes. Neither Ms Cervin or Ms Mathur gave Ms Johnson a choice between resigning or being dismissed.

[97] I do not accept the submission that Ms Johnson's reference to wanting to go quietly without fuss means that the resignation was tendered following "a threat of termination". Dismissal had been indicated as a possibility and having received acceptances and apologies; the parties were heading closer to an outcome but that is not the same as the employer making a threat of dismissal.

[98] Ms Cervin's reluctance to discuss administrative details flowing from resignation until the resignation was in writing does not support her having created an ultimatum situation.

[99] The proposition that had Ms Johnson been free from the pressure of a disciplinary meeting she would not have resigned is not sufficient of itself to establish a constructive dismissal.

Did Cervin Media follow a course of conduct to coerce resignation?

[100] I do not accept that the company deliberately acted in such a way as to put pressure on its employee to resign. Its motive was to investigate the matters being raised by staff and go through a process allowing Ms Johnson to comment. Ms Johnson would have preferred the whole thing to go away but there was no surreptitious plan to make life difficult for her and push her to the point of resignation.

Does Ms Johnson have a grievance?

[101] Ms Johnson has not established that she was disadvantaged by any unjustified action of Cervin Media or was constructively dismissed.

Costs

[102] Costs are reserved.

[103] The parties are encouraged to resolve any issue of costs between themselves.

[104] If Cervin Media wishes to seek costs it should lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Ms Johnson would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[105] The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would also be considered.¹⁰

Nicola Craig
Member of the Employment Relations Authority

¹⁰ See www.era.govt.nz/determinations/awarding-costs-remedies.