



**Employment relationship problem**

[1] Ms King claims that she was unjustifiably constructively dismissed from her employment as head chef at Café Allwood Limited and that she suffered an unjustified disadvantage in her employment by being suspended from her work and by having the entirety of the balance of an advance leave payment/loan<sup>1</sup> deducted from her pay, without her consent.

[2] The respondent denies that Ms King was unjustifiably constructively dismissed and that she suffered unjustified disadvantage in her employment. It asserts that there were reasonable concerns about Ms King's performance which it wished to communicate with Ms King about. The respondent also counterclaims against Ms King in respect of items of food that were taken by Ms King from the café and in respect of food wastage and cleaning costs incurred by Ms King's alleged negligence. It also seeks the imposition of a penalty upon Ms King.

**Brief account of events leading to the termination of employment**

[3] Ms King was employed by the respondent company as its head chef pursuant to an individual employment agreement which was signed by Ms King on 28 September 2016. When Ms King started at Café Allwood, she was working with a former colleague, Krystina Kappely (who also worked in the kitchen) and Ms Kappely's husband, Jeremy Kappely, who was her manager. Ms King says that she started working full time from 1 November 2016.

[4] Café Allwood is owned by Mark and Helen Hutching. Just before Christmas 2016 Ms King approached Mr and Mrs Hutching about getting an advance of wages over the Christmas shut down period and an agreement was drawn up in accordance with which Ms King would be advanced the sum of \$1,000 which was to be paid back, interest free, at \$60 each pay period. As the terms of the agreement are material to the matter before the Authority, I set out its terms in full below:

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<sup>1</sup> The parties disagree whether the \$1,000 was a loan, as asserted by the respondent, or an advance of holiday pay. As there is no allegation of a breach of the Holidays Act 2003 by Ms King, it is immaterial for the purposes of this determination which is correct.

17 January 2017

**Loan Agreement between Keryn King and Café Allwood Limited**

Café Allwood agrees to advance Keryn King (Café Allwood Employee) by way of a personal loan the sum of \$1,000.00 (One Thousand Dollars only) as at 18 January 2017 and Keryn King agrees to repay the personal loan by instalments of \$60.00 (Sixty Dollars only) each fortnight by way of a deduction from her pay.

The loan is provided at no interest.

Loan repayments are to commence on Wednesday 25 January 2017.

Keryn agrees that in the event she leaves the employ of Café Allwood any balance of the loan will be repaid in full at that time and if required repayment can be undertaken by deductions from any and all wages due to Keryn King (Holiday pay normal wages).

Agreed and signed, 17 January 2017

Keryn King

Café Allwood Limited.

[5] Ms King says that, just before Christmas 2016, Mrs Hutching agreed that Ms King could order some Danish pastries for herself through one of their suppliers. Ms King says that she told Ms Kappely and that, when the pastries were delivered, she circled them on the packing slip so that Mrs Hutching would remember that they were for her personal use. Ms King says that, on her last day of work before the Christmas closedown, she packed the Danish pastries and some bags of cranberries and blueberries in a cardboard box and showed them to Ms Kappely before she left, so that she would tell Mrs Hutching. Ms King says that she subsequently forgot that she had not paid for these items and that they were only raised with her after she had resigned. She says she has since offered to pay for them but the respondent has not replied to the offer.

[6] Mrs Hutching says that she had no knowledge of Ms King taking supplies from the café and only found out after Ms King's resignation when Ms Kappely asked her if Ms King had ever paid for the goods.

[7] Ms Kappely also denies that Ms King spoke to her about ordering Danish pastries for personal consumption. She says that she had noticed Ms King with a box in the corner of the kitchen and had asked Ms King whether Mrs Hutching knew she had the items and Ms King had said that she did. Ms Kappely says that she noticed

Danish pastries, berries, cranberries and other produce in the box. Ms Kappely says that Ms King is lying about circling the invoices as she (Ms Kappely) did that when she was investigating invoices for the purposes of making the counterclaim against Ms King.

[8] The parties produced to the Authority a significant amount of evidence about the hours of work that Ms King was doing, as well as whether or not she got sufficient breaks. However, Ms Gordon has confirmed that Ms King has raised these issues as background only, and that they do not constitute claims of unjustified action by the respondent. There was also evidence given about a note left for Ms King by Mr Kappely that she took offence to and in response of which she sent a curt text but, again, this is not an allegation of an unjustified action, and I treat it as background evidence.

[9] On 6 April 2017 Ms King and Mr Kappely had a meeting and were talking about ways they could improve the café. Ms King says that, during the meeting, Mr Kappely told Ms King that he was supposed to give her a warning about the text she had sent him. Ms King says that she found that “hard to take” and said to Mr Kappely something along the lines of “perhaps I am not the chef for you”. Ms King says that she was very tired and stressed because she had been working on her own a lot (Ms Kappely having by now stopped work to go on maternity leave) and felt that she was working very hard with no help or support.

[10] Ms King says that she did not say that she was intending to resign or had handed in her notice but said to Mr Kappely that she was going to actively seek another form of employment. She says that she told Mr Kappely not to worry about buying a chef’s uniform for her as she was going to start actively looking for another job. Ms King says that Mr Kappely asked her when she was leaving and that she replied that she did not know, and that it could be in six weeks or six months. She told him that she was just giving him a “heads up”.

[11] On 10 April 2017 Ms King received a text from Mr Kappely asking her to bring in her ‘resignation’ and to start wearing her chef’s uniform; (Ms King said that she had occasionally worn her husband’s chef uniform in the past but did not own her own). Ms King says that, later that day, Mr Kappely brought in a three month roster while she was working, counted out six weeks, pointed to a date and said “that’s six

weeks right?”. Ms King says that she said “I guess so”. Nothing else was said about that.

[12] Ms King says that the next time she saw Mr Kappely he again asked her to put her resignation in writing. She says that she told Mr Kappely that she had not resigned but he replied that he wanted something on paper for Mr and Mrs Hutching. Ms King says that, around this time, Mr and Mrs Hutching were behaving oddly towards her and had stopped saying hello to her. They deny this. Ms King attributes this change of behaviour to Mr Kappely having told them that she was going to look for new employment.

[13] Ms King says, about a week later, Mr Kappely asked for her resignation again and said that he needed something on paper saying when she was going to leave. Ms King says that she did not have another job and was not prepared to resign before she had somewhere else to go. She said that she was looking for jobs that were not chef positions as she had lost confidence in her abilities and did not want to be a chef anymore.

[14] Ms King said that she was “really annoyed” that she was being pressured to resign when she did not have a job to go to and was only trying to give Mr Kappely a “heads up” that she was looking for a new job. She therefore wrote a letter to Mr and Mrs Hutching on 21 April 2017 that she hoped would clarify her position. This letter read as follows:

21-4-2017

Letter to Mark Hutching, Helen Hutching

Hi Mark. I would just like to write this letter to you to clarify a few things.

No I have not resigned.

I have not given any formal notice in writing and I will not be giving any formal notice in writing until such date that I know myself when I am going to leave.

I am guessing a message has not been relayed to you accurately.

I have told Jeremy [Kappely] that I am seeking other employment opportunities at this stage just to let him know my intentions but as nothing is set in stone I do not feel comfortable with the nagging that I need to give you something in writing at all. You will receive my formal resignation when I have found other employment. But this letter is not it.

Thank you.

Keryn King.

[15] Ms King says that, on 27 April, she and Mr Hutching had a meeting about a mouse problem they were having, and they then discussed her letter. Ms King says that Mr Hutching was very supportive. Ms King says in her written evidence that, once she had told Mr Kappely that she was going to be looking for a new job, she felt that her performance “lifted significantly” as she had been under stress, and it had been affecting her performance. She says that she put a lot more effort into getting things done right, the place was tidy and she was thinking that, if the respondent did hire someone before she left, she wanted to leave a good impression when she trained them.

[16] On 3 May 2017 Ms King worked as usual but, upon getting home, found that her back had become very painful. She saw her doctor the following day and she was given an ACC injury claim form as well. This had been completed by her doctor which stated that the date of accident was 3 May 2017, and stated:

Lifting heavy 25kg bags of flour at work – pain left side of neck and shoulder.

[17] Ms King says that she was told by her doctor that she had a “pinched nerve” which could take a few hours to manifest symptoms. She says that it was not a work injury and that she never claimed that it was. She says that she did not get ACC compensation (although had her physiotherapy sessions paid for) and the claim was eventually declined as she had a pre-existing condition. However the decision to decline her ACC occurred after she had stopped working for the respondent.

[18] Ms King was advised by her doctor that her injury meant that she would have to do light duties for a while as she was restricted from lifting, and repetitive movements.

[19] During text messages between her and Mr Kappely about her injury, Mr Kappely said that he wanted a medical certificate to be brought in the following day (6 May) and that “when you are back at work we will have a meeting”. Ms King texted back three times asking what the meeting was about before she was told “meeting is no longer happening Keryn”.

[20] On 7 May 2017 Ms King, who was still off work with her injury, received a letter in her home post box from Mr Hutchings headed up “sick leave/ACC claim”. The letter from Mr Hutching to Ms King dated 6 May 2017 is relatively lengthy and falls into two main parts. The first part questioned Ms King seemingly attributing her back injury to lifting a 25kg bag of flour when no injury at work had been reported. Mr Hutching raised several points in relation to his doubts that a workplace injury had occurred and also stated that lifting and repeated tasks were essentially what she was tasked to do as chef. He stated that he wished to meet with Ms King to discuss the ACC claim and her return to work and stated that he was not able to accommodate the possibility of light duties or to employ additional staff to cover light duties.

[21] The remainder of the letter referred to concerns about Ms King’s performance as a chef. As these concerns are directly relevant to how events unfolded, and Ms King’s eventual resignation, I shall set out the remainder of Mr Hutching’s letter in full:

When you are able to meet with me I would like to discuss with you your performance as Chef at Café Allwood once you are able to commence work again. In particular I would like discussion and resolution of the following:

- Undertaking all responsibilities as chef. This includes all facets of preparation of food at Café Allwood. In particular baked goods.
- Managing the minimisation of wastage. I have several instances where food has been prepared for future use but inappropriately stored and has had to be thrown out as wastage.
- Organising the efficient ordering and storage of food at Café Allwood. This has been discussed in the past, however it would appear that the ordering programme has not been improved.
- Ensuring the kitchen is kept clean at all times.

Your role as Chef at Café Allwood was one where you are responsible for all facets of the kitchen, however from evidence provided it would appear some of these responsibilities are not being undertaken to the level expected. In some aspects of your work, your performance is excellent and that is appreciated, however we require someone to undertake all the required work needed to make the Café Allwood kitchen perform to the required levels.

On your return to work I would like to see improvement in your performance of contracted duties to the required level. I would expect improvements to occur within a two week period with a review at that point.

While you have indicated that you are seeking other employment our expectation is that you will perform all of your duties at the required level until such time as you leave Café Allwood's employment.

Finally, there is the loan amount of \$520.00 still owing to Café Allwood from yourself as at 03 May 2017 and I am now proposing that this sum be repaid in full from your next pay to negate any issues of loan repayment when you do leave Café Allwood employment. While this is slightly different from the original loan arrangements your indication that you are seeking other employment places a responsibility to repay the loan. Given your holiday pay and other entitlements do not cover the outstanding loan balance it is appropriate to organise full payment of the outstanding loan.

Please let me know by email [email address redacted] when you are able to meet with me to discuss the above.

Yours faithfully  
Mark Hutching  
Managing Director Café Allwood.

[22] The respondent says that the reason Mr Hutching wrote this letter is because, on 4 May 2017, the first day of Ms King's sick leave, Kobus Stander, the stand in chef who had been working on Sundays, and occasionally on other days to support Ms King after Ms Kappely went on maternity leave, came into the kitchen and found it in a state which he believed was unacceptable. Mr Stander said in evidence that it was in a mess and dirty, with undated and unlabelled food left around. Therefore Mr and Ms Kappely and he worked to clean the kitchen that day and for the rest of the week. Mr Kappely and Ms Kappely gave similar evidence. Ms Kappely said that mouse droppings were found, as well as mice (or a mouse, it was not clear) hiding in tea towels. It was accepted by all of the respondent's witnesses that, on 4 May, Ms Kappely took photos of food items which were stored incorrectly. I refer to these later.

[23] Ms King replied to Mr Hutching's letter of 6 May by email on 10 May 2017 and addressed the several points made by Mr Hutching about the injury. Ms King's email also explained that her physiotherapist had suggested another week off work and that she had further appointments with her doctor and her physiotherapist in two days' time. Ms King agreed that the restriction on heavy lifting and repetitive movements would impact her tasks at work. She also requested that her past five days off work would be covered by her sick leave entitlement.

[24] With respect to the performance issues raised by Mr Hutching, she requested that she could bring along a support person to the meeting that Mr Hutching had signalled, and that it occur when she was able to return to her full duties.

[25] Finally, with respect to the repayment of the \$520, she stated “also regarding our agreement to my advance in holiday pay. I would rather if we will carry on with our initial contract, thank you.”

[26] Ms King and Mr Hutching then exchanged emails over the following two days. In an email sent on 10 May Mr Hutching stated:

Until such time as your ACC - sick leave is sorted we are not prepared to continue the current loan arrangements. Any pay and leave entitlements (sick, holiday) you have as of the date of this email only now covers the outstanding balance of the loan.

Ms King replied:

I would rather not change our initial agreement with the loan.

[27] Ms King and Mr Hutching agreed that they would meet on Thursday 18th May 2017. At the meeting Ms King attended with her cousin as a support person. At the meeting she was handed a letter from Mr Hutching dated 15 May 2017. This is a five page letter headed “work performance” which contained three photographs of incorrectly stored food. As this letter plays a significant role in Ms King’s decision to resign, I shall set out its contents in full:

Dear Keryn,  
**Re: Work performance**

Irrespective of our discussion held on Tuesday 27 April when you indicated that you are seeking employment options and at some point in the near future when you have secured a new job you will be leaving the employment of Café Allwood there are several matters related to your position as Chef that require attention and this letter is designed to clarify these issues and to seek resolution of these matters.

The following points are relevant and require resolution:

- Undertaking all responsibilities as Chef. This includes all facets of preparation of food at Café Allwood. In particular baked goods and ensuring the highest quality and consistent food production.

I have now put in place the process whereby Kristyna is to undertake the role of adviser to the café and in conjunction with whoever is the Chef will assist with ensuring all matters related to

the role of Chef are attended to. There will be an emphasis on consistent recipes for all menu items and cabinet food. We have had comments from regular customers that it would appear the taste of certain items has changed when in reality the recipe should have been consistent. An example of this is sausage rolls.

Kristyna will take on this employed role once her maternity leave finishes however in the meantime she is undertaking this role on a voluntary basis at no cost to Café Allwood.

While you have indicated that your time is limited when preparing food, given that Tuesday, Wednesday and Thursday are not busy and, Kobus is able to undertake all the responsibilities of Chef it seems that you need to be better organised and more appropriately allocate your time during the day to achieve the food preparation goals so that the cabinet has the right combination of baked and other food on display and food preparation for future days is completed.

- Managing the minimisation of waste. I have several instances where food has been prepared for future use but inappropriately stored and has had to be thrown out as wastage. Attached are a number of photo's that illustrate that management of food storage is not up to acceptable standards and this must be managed to a higher and accepted degree. This also includes cross-contamination and storage.

These are listed as follows:

[There then appears a photograph of food items wrapped in clear plastic, one in a small tub]

Food unlabelled in Freezer. We could not tell when this prepared food had been placed in the freezer, therefore it could not be used.

In addition to this, there was food in the freezer, specifically burger patties that had been in the freezer for such a period that it had freezer burn and could not be used.

[There then appears a photograph of a slice in a paper bag]

Baked goods in paper bag. In chiller and had to be thrown out. No explanation is available as to why baked goods would be in a paper bag and then stored in the Chiller.

[There then appears a photograph of uncooked fatty bacon and another meat next to each other in a small plastic tub]

According to standard food storage protocols storage of the two meats (bacon and burger pattie) in the same container is not recommended or permitted.

- Organising the efficient ordering of food at Café Allwood. This has been discussed in the past, however it would appear that the ordering programme did not improve while it was under your control. Ordering is to be undertaken at the start of the week and smaller quantities in smaller containers are to be ordered, more

frequently if necessary. Ordering is deemed to be part of the Chef's role.

Ensuring the kitchen is kept clean at all times. Again, you have indicated that there does not appear to be enough time to undertake this, however (a.) it is a specific requirement that cleaning be undertaken so the café meets the required statutory hygienic standards and (b.) cleaning is currently being undertaken and managed by Kobus as part of his role and he does this efficiently and effectively. This indicates that cleaning can be managed within the role of Chef and within the day's activities.

- Uniform. At all times while working at Café Allwood we require you to wear the appropriate Chef's uniform and apron. There has been an inconsistent use of the uniform in the past however this is now a requirement to ensure all staff are neat and tidy.

Your role as Chef at Café Allwood was one where you are responsible for all facets of the kitchen, however from evidence provided some of these responsibilities are not being undertaken to the level expected. In some aspects of your work, your performance is excellent and that is appreciated. However we require someone to undertake all the required work needed to make the Café Allwood kitchen perform to the required levels and at this stage your overall performance is deemed to be unsatisfactory and not at the required performance level.

Café Allwood is a new business and at present requires consistently high standards of food preparation and service.

On your return to work I would like to see improvement in your performance of contracted duties to the required level. I would expect improvements to occur within a two week period and during this time we would expect and require you to liaise with Kristyna and Jeremy to ensure improvements are achieved. This letter is provided as a written warning that if improvements in job performance is not achieved further steps will need to be taken to remediate this situation.

While you have indicated that you are seeking other employment our expectation is that you will perform all of your duties at the required level at all times while employed by Café Allwood.

A review of performance and standards will be undertaken immediately after two weeks of your commencement back at work after your sick leave.

Yours faithfully  
Mark Hutching  
Managing Director  
Café Allwood

[28] Ms King says that, once she had read the letter at the meeting her support person saw that she had been issued with a warning in the letter and said that they

needed to cancel the meeting and reconvene after 48 hours so they could go through things in the letter.

[29] Ms King said that the photograph of the two types of meat together was “clearly a set up”, as they had not served meat patties in that way for months and she would never have had them sitting in the fridge like that as all of her meat was clearly labelled and stored in clear containers. She said that she knew from the photograph that they were trying to get rid of her. Ms King said that she was also upset that the remainder of the advance of pay had also been taken and she concluded that the only reason to take the loan was because the Hutchings did not think she would be working there anymore and that that was their only chance to take the money.

[30] On 18 May, after the meeting, Mr Hutching emailed Ms King to say that he and his wife were only available to meet the following day or the following Monday but if that was not possible the meeting would have to be deferred until at least 31 May. This was because they were both unavailable during the period 23 to 30 May. This email then stated the following:

If you cannot meet on either of those days we are not able to accept your return to work until the issues listed in my letter to you (dated 15 May) are addressed to the satisfaction of both parties.

Please ensure your support person is aware of the meeting criteria and let me know as soon as possible when you would like the next meeting to be scheduled.

[31] Ms King replied that same afternoon that she needed to obtain legal advice and that neither of those meeting dates were suitable and that she would contact him on Tuesday 23 May after she had met with her representative.

[32] Mr Hutching replied to that email on the same day in the following terms:

Hello Keryn,

Thank you for the update. Your support person indicated that a meeting was required within 48 hours and we have indicated we are able to meet that requirement however it looks like you have missed the point that Helen and I will not be available to meet during the period 23 May to 31 May. We are away during that period and not available to meet.

On the basis you wish to seek legal advice and you are now aware that Helen and I are only available to meet tomorrow and Monday you therefore agree it is a requirement that, before your commencement back to work after your injury leave a resolution of matters listed in my letter dated 15 May is achieved. You were due to

commence work on 25 May however you have not confirmed that you have clearance to commence work again.

Given you would not expect to meet until Helen and I are available after 31 May please confirm that you are not expected to return to work on 25 May and that you will either continue on unpaid sick leave or unpaid holiday leave. All of your sick pay and holiday pay due has been paid to you.

Please confirm a date for the required meeting.

Yours faithfully  
Mark Hutching  
Café Allwood.

[33] On Tuesday 23 May Ms King replied to Mr Hutching by sending him an email to which was attached a letter. This letter was Ms King's resignation and was worded as follows:

Dear Mark & Helen,

I am very disappointed and upset by your attitude towards me since I injured myself at work.

Firstly, you appeared angry and defensive about my injury being work related. I told you that I was cleared to return to work on Thursday 25 May but you won't let me come back until you return from holiday on 31 May. Since I am not allowed to return to work until then, I have no money because you have said that I won't be paid for this. I think this is incredibly unfair.

Secondly, I know you had heard that I was looking for another job and then tried to force me to put in my resignation. I received texts from Jeremy harassing me to resign to the point where I had to send you a formal letter asking for the harassing to stop and confirm that I was not resigning.

Thirdly, you made a list of alleged performance issues with my work and said you would expect improvements to occur within 2 weeks of my return to work and then review it. You then organised a meeting to discuss the issues while I was still off on sick leave.

You then gave me a letter dated 15 May 2017 with attached photos apparently showing that I had put unlabelled food in the Freezer, left baked goods in the chiller and stored two meats in the same container. I don't even know why you think it was me that did that. The letter then said that my overall performance was unsatisfactory and not at the required performance level and gave me a written warning.

You then took the rest of my advanced leave payment out of my pay without checking with me first and giving me an opportunity to respond or rearrange my finances to account for the large amount being taken. This is unfair and caused issues for me. It was upsetting to not get paid what I expected to receive.

It is obvious to me that I am no longer wanted at Café Allwood and I can't tolerate the ongoing harassment and mistreatment. I feel I have no option but to resign.

Please take this letter as my written resignation effective immediately.

[34] Ms King says in her written evidence that when she received the email saying that she was being stood down without pay “this really cemented it for me”. She said that they did not want her there and knew that without money she was “screwed” and would have no option but to go elsewhere to work. She says that she really felt like there was no way she could go back to work. She says that she did not have another job to go to.

[35] A letter raising a personal grievance was sent to Café Allwood by Ms Gordon on 9 June 2017.

### **The issues**

[36] The following issues are to be determined by the Authority:

- (i) Was Ms King unjustifiably constructively dismissed by the respondent?
- (ii) Was Ms King unjustifiably disadvantaged in her employment?
- (iii) Does the counterclaim against Ms King by the respondents succeed?

### **Was Ms King unjustifiably constructively dismissed by the respondent?**

[37] There are three potential categories of action by an employer that may give rise to a constructive dismissal, and these were described by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited*<sup>2</sup>. These three categories are as follows:

- (i) The employee was given a choice of resignation or dismissal;
- (ii) The employer followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign;
- (iii) A breach of duty by the employer led the worker to resign.

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<sup>2</sup> [1985] 2 NZLR 372 (CA) at 347 – 375.

[38] Ms King alleges that the second and third of these categories applied and that relevant events amounting to breaches accumulated over time. She also submits that there was a final straw element to her resignation.

[39] Where a breach of duty by an employer is alleged the correct approach was encapsulated in the following passage from the Court of Appeal’s judgment in *Auckland Electric Power Board v Auckland Provincial District Local Authority’s Officers IUOW (Inc)*<sup>3</sup>:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[40] The Court emphasised in this passage that it is necessary to consider all of the circumstances of the resignation.

[41] The evaluation of a breach of duty and its seriousness, is a question of fact and degree. In *Wellington Clerical IUOW v Greenwich*<sup>4</sup> the Court stated that it needed to be satisfied that the employer’s conduct had “fairly and clearly be said to have crossed the border line which separates inconsiderate conduct...from dismissive or repudiatory conduct...”.

[42] I understand from the comments of Ms King about being stood down without pay “cementing it” for her to be an indication, that that decision by Mr Hutching was what is often called “the final straw” which precipitated the resignation. In the Employment Court case of *Pivott v Southern Adult Literacy Inc*<sup>5</sup> Judge Ford said the following at paragraphs [61] and [62] (case references omitted):

[61] The legal position regarding “final straw” cases, as they are often referred to, was considered by the English Employment Appeal Tribunal in *Triggs v GAB Robins (UK) Ltd*. There, the

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<sup>3</sup> [1994] 2 NZLR 415 (CA) at 419.

<sup>4</sup> [1986] ERNZ SelCasual 95 at 104.

<sup>5</sup> [2013] NZEmpC 236, [2013] ERNZ 377.

Tribunal provided a concise restatement of the principles first enunciated by the Court of Appeal of England and Wales in *Omilaju v Waltham Forest London Borough Council*. The Tribunal outlined these principles as follows:

[32] We derive the following principles from *Omilaju*. (1) the final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial. (2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous. (3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the “final straw” consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test. (4) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer’s act as destructive of the necessary trust and confidence.

[62] Although overseas authorities need to be approached with a degree of caution, I do not see any reason why the statements of principle in *Triggs* should not have equal application to constructive dismissal cases in this jurisdiction.

[43] Finally, s 103A of the Act sets out the test for justification, as follows:

**Section 103A Test of justification**

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

### *Discussion*

[44] Ms King said in her oral evidence that it was not at the meeting that she had decided to resign, but later that day, when she had received the email from Mr Hutching saying that if she could not attend a meeting with 48 hours, she would have to remain away from work without pay until the Hutchings returned from their holiday on 31 May.

[45] Ms King also said that she then opened her payslip a little while later the same day and noted that the whole of the remaining advance of salary/loan had been taken from her pay, and her final holiday pay paid to her without her having requested that. She says that she sought advice, in case she was overreacting (“not being crazy” as she put it), and then wrote her letter of resignation.

[46] When asked why he had not let Ms King return to work while he and Mrs Hutching were on holiday, Mr Hutching said it was because he did not wish “to put the café in jeopardy” and because the issues that had been found by Mr Stander on 4 May were “exceedingly serious”. On the other hand, Mr Hutching was also adamant in his evidence that he was not looking at the matter as a disciplinary issue. Mr King conceded that Mr Kappely or Mr Stander could have supervised Ms King while he was away, but that he did not suggest that.

[47] Mr Hutching also said that he was not convinced that Ms King would be fit to return to work after 25 May, the final date that her medical certificate stated she would be unfit, and that he expected to see a certificate from a doctor declaring her to be fit to work again. He did not ask her for one, he says, because he expected ACC to confirm she was fit for work.

[48] Mrs Hutching, who does the payroll for the business, gave oral evidence to the Authority to say that she and her husband had decided not to pay Ms King during the period between 25 May and their return from holiday on 31 May because Ms King had run out of sick pay, and because they had understood she was in receipt of ACC compensation. Mr Hutching, who had not heard Mrs Hutching's evidence, said that Ms King was not to be paid "because she was not working".

[49] Mrs Hutching had also said in her oral evidence that she had decided to pay the whole of Ms King's holiday pay because Ms King had asked for this to occur twice in the past. She had assumed that Ms King would want to be able to take her holiday pay while she was away sick as she had run out of sick pay. Mrs Hutching acknowledged that Ms King had not asked her to do this on that occasion, and she had not asked Ms King if she wanted her to do this.

[50] Mrs Hutching said that she and her husband had taken the balance of the loan/advance of holiday pay because they had not been sure how long Ms King would be away on ACC, and because she knew that they did not have access to the ACC compensation (although Ms King was ultimately not in receipt of ACC compensation). Mrs Hutching accepted in cross examination that they had not had the right to take the balance of the payment under the terms of the loan agreement. Mr Hutching also conceded reluctantly that he and Mrs Hutching may have made a mistake in deducting the balance of the loan monies.

[51] Was Ms King justified in treating herself as constructively dismissed by the actions of the employer, and resigning? I find that there were a number of material contributing factors, and flaws in the process that the respondent followed in the way it dealt with Ms King. These were as follows:

- a. Mr Kappely asked Ms King several times for a definite date for her resignation, even though she had told him she was looking for alternative employment and had not yet found it;
- b. Mr Hutching wrote a letter to Ms King on 6 May setting out performance concerns, but not giving any specific examples, even though it had possession of the photographs of the poorly stored food by that date;

- c. The letter of 6 May referred to Mr Hutching wanting to see an improvement in Ms King's performance, expecting that improvement within a two week period, even though he had not yet discussed the contents of the letter with her;
- d. The letter of 6 May required resolution on, inter alia, organising the efficient ordering of food even though Mr Kappely had taken that duty from Ms King at least a month before;
- e. Mr Hutching changed his mind about not having the meeting before Ms King was fit to return to work, even though Ms King had asked for the meeting to wait until she was able to return to work at full duties;
- f. Mr Hutching wrote a letter to Ms King setting out more details of his concerns on 15 May, but did not give it to Ms King and her support person until the start of the meeting on 17 May;
- g. The letter of 15 May contained photographs of items of food causing concern to the respondent, but did not identify when the photographs had been taken;
- h. The letter of 15 May stated that Ms King's overall performance was "deemed to be unsatisfactory and not at the required performance level" even though Mr Hutching had still not met with Ms King to get her explanation when he wrote that letter;
- i. The letter of 15 May stated "this letter is provided as a written warning that if improvements in job performance is [sic] not achieved further steps will need to be taken to remediate this situation" even though Mr Hutching had still not met with Ms King to get her explanation when he wrote the letter;
- j. The entire balance of the advance of holiday pay/loan was taken from Ms King's pay in breach of the terms of the loan agreement and her employment agreement, even though she expressly asked for it not to be;

- k. Ms King's holiday pay was paid to her without any explanation being given to her for such a payment;
- l. Ms King was expressly forbidden to attend work after the period when her sick leave expired, despite there being no express right to suspend her in the employment agreement;
- m. The respondent did not give any thought to finding alternative ways to mitigate the risk it perceived would eventuate if Ms King did work during the Hutchings' holiday, such as asking Mr Kappely to supervise Ms King;
- n. The respondent signalled that Ms King would not be paid during her enforced suspension.

[52] For the avoidance of doubt, I do not believe that the respondent was wrong to question what appeared to be a claimed injury at work in the absence of an injury report by Ms King. The respondent also dropped this aspect of their concerns once Mr Hutching understood that Ms King was not claiming that she had had a workplace injury.

[53] Ms King has said in her evidence that she was not thinking of resigning until after she had received the emails from Mr Hutching forbidding her from attending work, and saying she would not be paid, and upon seeing that her pay had had the advance of holiday pay/loan deducted and the accrued holiday leave paid out. I accept her evidence that she did not see the email advising her of the deduction until the day after the 17 May meeting. If she had, I strongly suspect she would have responded that day. Her past conduct shows that she tended to reply to emails sent quickly.

[54] Whilst the issuing of a warning prior to the meeting with Ms King was a serious flaw, at that point Ms King had not treated that as a repudiation of the contract between her and the respondent as she had reserved her right to seek legal advice. However, against the background described in [51] (a) to (i), the events described in [51] (j) to (n) were, in my firm view, sufficient to entitle Ms King to treat her contract as having been repudiated. It is not in the least surprising that Ms King concluded

that these actions described in [51] (j) to (n) indicated that the respondent no longer wanted Ms King to continue to work for it.

[55] Given that the terms of the loan agreement only permitted deduction of the balance of the advance of holiday pay/loan in the event Ms King left the employment of the respondent, that deduction against her protests could clearly lead a reasonable person to conclude that her employment was being ended or was soon to be ended. This is compounded by the fact that her holiday pay was paid out without explanation.

[56] Even if Ms King's perception was not reasonable, objectively speaking, the actions described in [51] (j) to (n) above were sufficient together to constitute a fundamental, repudiatory breach of the contract between Ms King and the respondent. Indeed, the action at [51] (n) alone was arguably sufficient.

[57] Furthermore, I am fully satisfied that a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of cumulative breaches. I also do find that Ms King did not affirm the contract despite the potential breaches set out in [51] (f) to (n) as Ms King was trying to obtain legal advice about the contents of the letter of 15 May when the 'last straw' events at [51] (j) to (n) occurred.

[58] I do not accept the submission that Ms King's resignation was premature. The letter of 15 May had issued her with a written warning which, contrary to Mr Shingleton's submissions, was of a disciplinary nature as it could be relied upon to dismiss Ms King later down the track. The loan/advance of holiday pay was then deducted despite Ms King's objections, and she was then told that she was not allowed to return to work after she was fit to work until Mr Hutching was back in Christchurch after 31 May. Finally, she was told she was not to be paid for that period of suspension. Even if suspension was warranted, there was absolutely no justification for not paying Ms King after she was fit to work again. It is hard to imagine what else needed to have occurred before the contract could be seen to have been repudiated. I am of the firm view that point had already been reached.

[59] Does it matter that Ms King had earlier signalled her intention of leaving the employment of the respondent? It does not, because an employee is entitled to consider leaving an employer without having her or his contractual and statutory rights infringed. The company had chosen to specify a period of notice in the employment agreement which it deemed to be sufficient to protect itself and give it a

chance to find a replacement. If it had needed more time, it should have specified a longer period of notice.

[60] My conclusion is that Ms King was constructively dismissed by the actions of the respondent. I do not find sufficiently cogent evidence to conclude that the respondent followed a course of conduct with a deliberate and dominant purpose of coercing Ms King to resign, but I do find that the respondent, by a series of actions, fundamentally breached Ms King's employment agreement so as to entitle her to treat her contract as having been repudiated, and thereby entitling her to resign in response.

[61] I am also satisfied that the resultant constructive dismissal was unjustified, as no fair and reasonable employer could have taken the actions that the respondent did, which led to the resignation, in all the circumstances.

### **Did Ms King suffer an unjustified disadvantage in her employment?**

[62] The alleged actions giving rise to this allegation are the decision by Mr Hutching not to allow Ms King back to work whilst he and his wife were on holiday and the decision to deduct the remainder of the advance of holiday pay in one go. I have already referred to these as actions that significantly contributed to the constructive dismissal. I am satisfied that both actions disadvantaged Ms King in her employment, and that the actions were not justified.

### **Remedies**

[63] Section 103 of the Act materially provides as follows:

#### **123 Remedies**

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:

[64] Section 128 provides:

**128 Reimbursement**

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[65] Ms King claims lost wages of \$6,400 gross, being the amount Ms King lost during the time it took her to find new employment. Ms King was paid \$20 an hour and worked 40 hours a week. The period between the resignation and her commencing new work was seven weeks and five days. This equates to a gross loss of wages of \$6,171.43.

[66] Mr Shingleton submits that Ms King failed to mitigate her loss by applying for jobs which were not chef jobs, and for which she was not qualified. The Authority saw examples of the wide range of jobs in Christchurch Ms King applied for after her resignation, including labouring jobs, customer service jobs, retail assistant jobs, recruitment consultant jobs and administration jobs. Ms King did eventually apply for, and accept an offer for a cheffing job when she was having no success in finding non cheffing jobs.

[67] The principles of the duty to mitigate loss were examined by a full court of the Employment Court in *Xtreme Dining Limited trading as Think Steel v Leighton Dewar*<sup>6</sup>, at [93] et seq. Whilst much of the Court's judgement on mitigation examines where the onus lies (the 'wrongdoer'), at paragraphs [103] and [104] the Court stated the following (citations omitted):

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<sup>6</sup> [2016] NZEmpC 136

[103] But when considering all the evidence, this issue of fact must be assessed on the basis that the employee is the victim of a wrong. The Authority or Court cannot be too stringent in its expectations of a dismissed employee. Further, what has to be proved – by the employer – is that the employee acted unreasonably; the employee does not have to show that what he did was reasonable.

[104] In summary, where the employer puts mitigation in issue, the employee must provide relevant information as to the steps he took to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

[68] In *Iona Wikaira v The Chief Executive of the Department of Corrections*<sup>7</sup> the then Chief Judge Colgan cited with approval Sedley LJ in the UK Court of Appeal case of *Wilding v British Telecommunications PLC*<sup>8</sup> at [55] who stated:

... it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed.

[69] Did Ms King act unreasonably in not seeking chef jobs immediately? Her decision was not made on a whim, but because the actions of the employer in May 2017 had led her to totally lose the confidence she had had in her abilities to be a chef. Whilst Ms King had begun to lose confidence back in April, and I do not believe that the respondent did anything wrong which led to that initial erosion of confidence, she was still looking for chefing jobs at that point. It was only when the events occurred which directly led to her resigning that she decided to eschew chefing jobs altogether.

[70] Furthermore, Ms King was not seeking jobs which she was clearly incapable of doing. She is an articulate and intelligent woman who, I believe, would have been capable of learning a range of new non specialist jobs, if she had been given the chance.

[71] Under those circumstances, I do not believe that Ms King acted unreasonably in trying to find non chefing jobs. I therefore do not find it would be just to reduce the award of lost wages because of Ms King's decision to get out of chefing. She did

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<sup>7</sup> [2016] NZEmpC 175

<sup>8</sup> [2002] EWCA Civ 349, [2002] ICR 1079

not take an inordinate length of time finding new work, and when her finances required it, she went back to seeking cheffing jobs.

[72] I therefore award Ms King lost wages in the gross sum of \$6,171.43, subject to the assessment of contribution below.

[73] Ms King asked for an order that the respondent reimburse her a sum equal to the whole of the wages and arrears and other monies lost as a result of the grievance. That will include holiday pay on the lost wages. That amounts to \$493.71 gross, subject to the assessment of contribution below.

[74] Turning to compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act, Ms King says that her confidence was destroyed and she could not face working in a kitchen again. She said she started to have nightmares, panic attacks, bouts of crying and felt useless. She says she was ‘really depressed’ and struggled to get out of bed, which affected being able to look after her children. She says she did not see a doctor but struggled through. Ms King’s partner, Mr Hahn, also gave evidence which corroborated this evidence.

[75] As I have explored above, Ms King also said that her confidence as a chef was completely lost in May 2017, as a result of the actions of the respondent leading to her resignation.

[76] In *Waikato District Health Board v Kathleen Ann Archibald*<sup>9</sup> Her Honour Chief Judge Inglis referred<sup>10</sup> to assessing compensation in terms of a broad analytical framework of three bands, as follows:

- a. Band 1 involving low level loss/damage;
- b. Band 2 involving mid-range loss/damage; and
- c. Band 3 involving high level loss/damage.

[77] Chief Judge Inglis designated her award of \$20,000 in *Waikato District Health Board*<sup>11</sup> as falling “around the middle of band 2”, which suggests that she theoretically envisages the three bands as justifying awards of between \$1 to \$13,333

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<sup>9</sup> [2017] NZEmpC 132

<sup>10</sup> at [62]

<sup>11</sup> at [63],

for Band 1, \$13,334 to \$26,666 for Band 2, and \$26,667 to \$40,000 for Band 3. Presumably, a more approximate approach would need to be adopted for practical purposes.

[78] In Ms King's case, I am mindful of the fact that the evidence of the respondent about Ms King's performance was, on the whole, consistent and credible. Although Mr Kappely did not refer to the messy kitchen in his text to Ms King early on 4 May, I am satisfied that there were genuine concerns about Ms King's work. This finding is not only relevant for contribution, which I address below, but also because I believe that Ms King's confidence as a chef had been knocked because of the respondent addressing its concerns with her, which it was entitled to do. The effect on Ms King of it doing so must therefore be discounted and separated from the effect on her of the unjustified actions I have found. Of course, it is impossible to do this scientifically, as one cannot look into Ms King's mind during the period between 6 May and her resignation. I can only take a best estimate.

[79] I am convinced that Ms King did suffer reasonably serious effects as a result of her overall experience that would put her in the middle to upper range of band 2. However, I am equally convinced that a significant amount of that effect resulted from being told, lawfully, that her work was not up to scratch. If I were to attribute the starting point of compensation at \$20,000, it is appropriate to halve this sum to take into account the effect which resulted from being told, lawfully, that her work was not up to scratch. This therefore results in a compensatory award of \$10,000.

[80] Although I have found that Ms King suffered an unjustified disadvantage in her employment, that finding relates to the same actions taken by the respondent that led to her constructive dismissal. I therefore do not award any further remedies.

[81] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[82] I accept that the respondent had genuine concerns about Ms King's performance. Whilst I cannot make findings about the details of the problems found

by the respondent, I accept that, on 4 May, the kitchen was not in a state that was acceptable to the respondent. Therefore, Ms King's actions did contribute to the situation that led to the personal grievance. I therefore accept that it is appropriate to reduce the remedies.

[83] The concerns of the respondent were grave enough for it to take photographs and spend a considerable time remediating the issues. I accept that some of the issues, had they not been remediated, could have caused health and safety breaches. The issues were therefore reasonably serious. For that reason, I believe that a reduction in remedies of 20% is justified.

**Does the respondent have a counterclaim against Ms King?**

[84] The counterclaim consists of various elements as follows:

- (i) the value of items allegedly taken by Ms King in the sum of \$164.66 (excluding GST);
- (ii) wastage of food caused by Ms King's alleged negligence in the sum of \$529.08; and
- (iii) additional cleaning costs caused by Ms King's alleged negligence in the sum of \$528.75.

[85] Additional claims for "executive time" and "additional staff costs" originally claimed have now been dropped by the respondent.

[86] I accept that money is owed to the respondent by Ms King in respect of Danish pastries, cranberries and blueberries as she admits taking these items, albeit with permission. She does not admit taking chocolate, butter or raspberries. The problem the respondent faces is that it cannot prove that it was Ms King who took the latter three items. It infers that she did, because they could not find the items. Ms Kappely's evidence of what she saw in Ms King's box on 22 December was not wholly consistent. However, Ms King denies it, and gave plausible evidence about what she asked to take.

[87] The respondent has tried to call into question Ms King's credibility due to her previous convictions. However, the offences in question were committed between 7

and 11 years ago and were all pleaded guilty to, and sentence served. I do not accept that the mere fact of previous criminal convictions mean that the perpetrator is forever more branded a liar. In addition, it is not likely or credible that Ms King would have sought to have taken food items without authorisation by keeping them in a box in full view of Ms Kappely.

[88] Therefore, on balance, I am not satisfied that Ms King is responsible for the missing chocolate, butter and raspberries. Therefore, Ms King owes the respondent the sum of \$58.73.

[89] The issue of whether an employer can counterclaim against an employee for costs incurred through alleged negligence has been considered by the Employment Court in two relatively recent cases: *George v Auckland Council*<sup>12</sup> and *Rainbow Falls Organic Farm Limited v Rockall*<sup>13</sup>. It is worth replicating the relevant paragraphs from these two cases in full. The Court in *George* said (case reference omitted):

[146] An elderly House of Lords judgment, *Lister v Romford Ice & Cold Storage Co Ltd*, has generally been thrown up to ward off arguments aimed at limiting an employer's ability to recover against an employee for damage caused by them in the course of their duties. The House of Lords found that the employee owed his employer an implied duty to exercise skill and care in the performance of his duties and that there was no implied term in the employment contract precluding the employer from seeking indemnity from the employee where the employer had been found vicariously liable for the employee's negligence.

[147] I have reservations about whether *Lister* remains the stumbling block that it has previously been perceived to be. Rather it is strongly arguable that in the modern context of employment relationships in New Zealand, and in light of the mutual obligations conferred on the parties under the Act, an employer may not seek to recover damages from an employee arising from acts of negligence committed during the course of their duties. If it were otherwise it would likely have a chilling effect on the way in which employees undertake their duties, could lead to reactive claims or threats of claims against those taking personal grievances which would undermine the statutory framework for resolving employment relationship issues, and expose employees to significant potential financial liability for a breach even in circumstances that could never justify a dismissal. It also raises policy concerns about the fair allocation of risk and which party is best placed to mitigate potential liability.

[Emphasis added]

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<sup>12</sup> [2013] NZEmpC 179 at paragraphs [146] and [147].

<sup>13</sup> [2014] NZEmpC 136 at paragraphs [57] and [58].

[90] The Court in *Rainbow Falls* said the following:

[57] Mr Quarrie submitted that there was no term, express or implied, in the employment agreement between the parties allowing the plaintiff to hold Mr Rockell liable in contract for claimed loss as a result of poor performance. There is some attraction to his argument that if a reasonable bystander had asked the parties at the outset of their employment relationship: “What happens if the employee does not perform his/her duties to a satisfactory standard?” the answer would be: “disciplinary action which could result in dismissal”, rather than “the employer could undertake disciplinary action which could result in dismissal and also sue the employee for damages for the losses associated with the poor performance”.

[58] The “double-whammy” effect of dismissal plus a damages claim, both arising out of the same poor performance committed during the course of the employment relationship, sits uncomfortably with the statutory mechanisms for resolving employment relationship issues and may well have a chilling effect on employees considering a personal grievance, concerned not to prompt a retaliatory damages claim in response. Mr Quarrie drew a distinction between those in an employment relationship and independent contractors, where an action for breach of contract for alleged poor performance giving rise to losses may be appropriate. The point advanced by Mr Quarrie in the present case may find support in the terms of the agreement that Mr McKenzie relied on, which details a procedure for the settlement of “all employment relationship problems” and includes no reference to the resolution of any such problems via a claim for breach of contract. Rather, the identified mechanisms are restricted to the personal grievance procedures referred to.

[91] I accept Mr Shingleton’s submission that the Court did not completely preclude the right to claim damages from an employee who has committed negligent acts causing damage. However, whilst the facts of *Rainbow* were different from the current case, I do not believe that they render the general principles of *Rainbow* as cited above inapplicable to the current case.

[92] In the current case, whilst the claims were quantified by the respondent after legal proceedings had been put on foot, the respondent had started a process in respect of the performance concerns in early May 2017 and, had it not breached Ms King’s employment agreement leading her to resign, and had the respondent followed a fair process, the respondent could have addressed the ‘negligence’ they are now accusing Ms King of. Therefore, it would have availed itself of the employment problem resolution processes open to all fair and reasonable employers. That almost certainly

would not have entailed charging Ms King for the cost of rectifying the issues they found.

[93] For this reason, and following the obiter comments of the Employment Court referred to above, I do not believe that it is appropriate to enable the respondent to recover the costs it now seeks. In any event, there was no objective, and independent evidence adduced which showed which items had been wasted through Ms King's actions, or negligence, nor of how long it took the other staff to rectify the issues they found. Mr Stander says he cleaned every day he worked anyway, and I am not satisfied that the claim for his cleaning costs was solely to rectify problems created by Ms King.

[94] I therefore reject the remainder of the counter claim.

### **Penalty**

[95] The respondent also seeks that a penalty of \$8,000 be imposed upon Ms King for breaches of her employment agreement. What I have found occurred is that Ms King forgot to pay for some items of food which were taken by her just before Christmas, and that she did not keep her kitchen to an acceptable standard for a limited period of time. I am not satisfied that these were deliberate breaches of Ms King's employment agreement to the extent that a penalty is warranted.

### **Orders**

[96] I order the respondent to pay to Ms King the following sums within 14 days of the date of this determination:

- a. The gross sum of \$4,937.14 in respect of lost wages;
- b. The gross sum of \$394.97 in respect of holiday pay; and
- c. The sum of \$8,000 pursuant to s 123(1)(c)(i) of the Act.

[97] I order Ms King to pay to the respondent the sum of \$58.73 within 14 days of the date of this determination.

**Costs**

[98] I reserve costs. The parties are to seek to agree how costs are to be dealt with, but if they cannot agree within 14 days of the date of this determination, then Ms King's representatives may serve and lodge a memorandum setting out what contribution towards her costs she seeks, and the basis of that. The respondent shall then have a further 14 days within which to serve and lodge a response.

David Appleton  
Member of the Employment Relations Authority