

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 347
5390047**

BETWEEN STACEY LARNACH
 Applicant

AND GIPSY LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Warwick Reid, Advocate for Applicant
 Sarah O'Brien, Counsel for Respondent

Investigation Meeting: 11 April & 17 July 2013 at Tauranga

Submissions received: 17 July 2013 from Applicant and from Respondent

Determination: 8 August 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Stacey Larnach, who resigned from her employment at Wickham Preschool (Wickham) on 7 June 2012, claims that she has been unjustifiably constructively dismissed by the Respondent, Gipsy Limited (Gipsy).

[2] Specifically Ms Larnach claims that she resigned as a result of a serious breach of duty on the part of Gipsy, this being as a result of Gipsy undertaking a disciplinary process with her in relation to 17 parent accounts without having provided her with advance notification of the relevant accounts.

[3] Ms Larnach further claims non-payment of performance bonuses in the sum of \$1,310.00.

[4] Gipsy denies that Ms Larnach was unjustifiably constructively dismissed and claims that she resigned during the course of a disciplinary meeting in respect of allegations of serious misconduct.

Issue

[5] The issues for determination are whether Ms Larnach:

- was unjustifiably constructively dismissed as a result of a serious breach of duty on the part of Gipsy in respect of the disciplinary process undertaken into the accounting discrepancies.
- is entitled to non-payment of bonus monies in the sum of \$1,310.00.

Background Facts

[6] Wickham is an early learning centre operated by the directors of Gipsy, Mr Symon Armstrong and Ms Gillian Palmer. Ms Larnach was appointed as the Centre Manager at Wickham and, together with Mr Armstrong and Ms Palmer, formed the management team. In addition there were a further ten teaching staff and approximately 50 children at the time of Ms Larnach's resignation.

[7] Mr Armstrong is also a director of two other companies, Maria Holdings Limited which owns and operates two Montessori Preschools, a preschool in Rotorua, and Syro Directions Limited, a service company which supports all four preschools.

[8] Ms Larnach, who had 12 years previous experience of teaching including supervisory positions, said she had applied for the Centre Manager position at Wickham and had been interviewed by Mr Armstrong and Ms Palmer.

[9] Ms Palmer said that she and Mr Armstrong had advertised for someone with centre management experience for the Wickham Centre Manager position. A fundamental part of the Centre Manager's role was using the APT system, which was the Wickham funding accounting system, which was also used in the other preschools.

[10] Ms Larnach said that during the interview with Mr Armstrong and Ms Palmer she had been asked if she knew how to use APT system, and she had explained that she had only a small degree of familiarity with it, but that she was a fast learner.

[11] Mr Armstrong said Ms Larnach had presented well at the interview, had spoken with great confidence about preschool education, and had expressed an ability to deal with computer programmes.

[12] Ms Palmer said that Ms Larnach had told her and Mr Armstrong that she had had similar roles to that of Centre Manager at other preschools, and her CV, the interview, and reference checks all indicated to them that she had the requisite skills to undertake the position.

[13] In particular Ms Palmer said that Ms Larnach, who had completed a one year course in business computing, had told her and Mr Armstrong that she was competent with the APT system during the interview.

[14] Ms Larnach said that following the interview and prior to commencing employment, she had collected an individual employment agreement (the Employment Agreement) and the Centre Manager job description from Mr Armstrong.

[15] The comprehensive job description set out Gipsy's expectation of the Wickham Centre Manager including relevant previous experience, accuracy with figures, practical administration and financial experience, management and leadership experience.

[16] Ms Larnach was offered and accepted the Wickham Centre Manager position, and commenced employment on 26 July 2010. In addition to a base salary, Ms Larnach also participated in a 4 monthly bonus scheme which was payable on the achievement of certain KPIs, which included the number of enrolments, debtors being kept under a certain level, and the level of total outstanding debt.

[17] Schedule 4 of the Employment Agreement which set out the provisions regarding the Wickham Centre Manager's bonus scheme stated: "*Any such payments would be made entirely at the discretion of the Directors*".

[18] Ms Larnach said Mr Armstrong had not been present at Wickham to train her during her first few weeks of employment, and Ms Palmer had been unavailable to provide induction training during the first week, and had only been available for a limited time during the second week.

[19] Ms Palmer, who was the director responsible for financial management, said that she had attended Wickham during Ms Larnach's first few weeks of employment, and Ms Larnach had been given an induction process in which she had provided training in the APT system in addition to covering the funding handbook and WINZ requirements and rules.

[20] Ms Palmer said Ms Larnach had had no difficulty in loading invoices on to the APT system, and had not voiced any concerns about the duties she was expected to undertake in the Centre Manager position. Ms Palmer said that Ms Larnach had appeared to be competent

and experienced in these areas and had given her no indication that she had been struggling with the systems.

Training and support: APT system

[21] Ms Larnach said that although she had taught herself to use the APT system she had asked for training in the APT system and for fake audits, as she knew there were areas of the job with which she required help.

[22] Mr Armstrong said he had not been aware that Ms Larnach had any problems using the APT system, and if she had had a query he would have directed her to make use of the APT system helpline as he had little experience of the system himself.

[23] Ms Palmer said that she had not been aware of Ms Larnach having any difficulties using the APT system, and stated that it would have been obvious if she had been, and that she did not recall Ms Larnach requesting fake audits

[24] Mr Armstrong explained that Ms Larnach compiled reports based on the accounts for calculating her bonus against the KPIs and this task had required her to be competent on the APT system.

[25] Ms Palmer said she had completed an audit after Ms Larnach had left Wickham, and had not found any errors in respect of the invoicing of accounts during the first year of Ms Larnach's employment, which she considered could not have occurred unless Ms Larnach had been competent in using the APT system.

Training: Administrator's Big Day Out

[26] Ms Palmer said Gipsy had paid for Ms Larnach to attend the 'Administrator's Big Day Out', an Early Childhood Administrator's Conference held in September 2011, which included training and funding rules and claims, fees, payroll, assistance management and time management.

[27] Ms Larnach agreed that she had attended the Administrator's Big Day Out, but said that she had not found it to be helpful.

[28] Mr Armstrong said he had also attended the Administrator's Big Day Out and stated that he had considered it to have been very comprehensive, covering all aspects of an Early Childhood Administrator's role.

Training and support: professional support

[29] Ms Palmer said that Gipsy had provided Ms Larnach with professional support from Ms Angela Kitchener, a Professional Support Facilitator from Waikato University and also

through a professional development programme lead by Ms Jenny Gray of The Team Building Company, who provided Ms Larnach with leadership and management training and support.

[30] Ms Palmer explained that this support had arisen as a result of an Education Review Office (ERO) report visit in mid 2011 which had identified a number of areas for improvement. Ms Palmer explained that as a result of the areas identified in the ERO report:

- a. Ms Kitchener had been engaged to work alongside the Wickham management team in respect of programme planning and transitional processes; and
- b. Ms Gray had been engaged to work with the Wickham leadership and management team to develop their leadership skills and capability.

[31] Ms Gray said that she had been requested to work with the Wickham leadership and management team in mid-2011 by Ms Palmer and Mr Armstrong, and her role was to provide a three month mentoring course in professional development to Ms Larnach and her two Team Leaders, primarily in developing their leadership skills and capability.

[32] Ms Gray said that initially her work with Ms Larnach had gone well, and that she had been keen to learn as were the two Team Leaders.

[33] Ms Gray said her main concern in relation to Ms Larnach had been her inability to separate workplace relationships from friendship and she had advised Ms Larnach that this was not professional in her role as Centre Manager.

[34] Ms Larnach said initially she had found Ms Kitchener's assistance to have been helpful; however she had not liked Ms Gray's mentoring to make her into "*tough Stacey*" and she had not wanted the mentoring with Ms Gray to continue.

[35] Ms Palmer confirmed that Ms Larnach had not completed the mentoring programme and had refused to work with Ms Gray, about whom she had made unprofessional comments. Ms Palmer said that this also had the effect of ending the mentoring for Wickham's two Team Leaders.

[36] In December 2011 Ms Palmer said she and Mr Armstrong had developed an action plan to address the concerns which they had about Ms Larnach's professionalism, communication and documentation.

[37] Mr Armstrong said he had discussed this with Ms Larnach, and she had signed the action plan on 5 December 2011. Ms Gray said she had contacted Ms Larnach to ask if she could help her with the areas identified on the action plan, however she had had no response until she received an email from Mr Armstrong advising her that Ms Larnach no longer wanted to work with her.

[38] Ms Gray said she had been contacted by Ms Palmer and Mr Armstrong and asked to coach Ms Larnach with the staff appraisal system which she had developed. Ms Gray said that although this had been done, she had not been satisfied with Ms Larnach's progress in this area.

Training and support: staff assistance

[39] Ms Palmer said in February 2012 Ms Larnach had informed her that she had felt the teachers were placing too many demands on her time, and they had discussed coping strategies for that, which included delegation of her duties to the two Team Leaders.

[40] Ms Palmer said she had also offered to employ an administrative assistant to relieve Ms Larnach of some of her duties; however Ms Larnach had refused this.

[41] Ms Larnach said that she had refused this assistance on the basis that: "*they were going to take more hours off me*". Ms Palmer denied that this had been the case, and confirmed that any administrative assistance would have been in addition to Ms Larnach's hours and to supplement her role.

Training and support: staff assistance

[42] Ms Palmer said that Mr Armstrong had employed Ms Katrina Armstrong on or about January 2012 to work with Wickham and the other three preschool centres as a support person for the Centre Managers.

[43] Ms Palmer explained that Ms Armstrong's role had been to oversee any projects that would alleviate the Centre Manager workloads such as playground and building maintenance projects, advertising and promotion, and any other projects requiring attention, quotes or supervision.

[44] Ms Palmer said that Ms Larnach had rejected any help offered by Ms Armstrong, and had been so rude to her that Ms Armstrong had told Ms Palmer that she had felt unable to work with Ms Larnach.

[45] Ms Larnach confirmed that she had not found Ms Armstrong's assistance to be helpful, and that she regarded her in light of: "*too many people to answer to*".

[46] Ms Larnach said that she had experienced problems about the amount of work expected of her because Mr Armstrong and Ms Palmer had wanted her to cut down on the general teaching hours to save costs, but at the same time they had wanted her to be teaching more herself.

[47] Ms Larnach said she had difficulty coping with the amount of work expected of her, and that she felt overloaded given that she had to combine administrative duties, teacher's duties, and management duties within her working day.

[48] Ms Larnach said she had become aware that since she had left Wickham, Mr Armstrong and Ms Palmer had replaced her position with two staff members.

[49] Ms Palmer confirmed that Ms Larnach's position as Centre Manager had been replaced; however the incumbent had teaching responsibilities, which Ms Larnach had not had during the period of her employment at Wickham, in addition to administrative and managerial responsibilities.

Events between October 2011 and prior to March 2012

[50] Mr Armstrong said that a number of staff functions took place in a barn on his property. During 2011 there were two functions, one in early 2011 and one in October 2011.

[51] Mr Armstrong said that the early 2011 function had been characterised by drunken behaviour, some of which involved Ms Larnach and her family and the friends she had invited, and that he had spoken to Ms Larnach about her inappropriate behaviour on that occasion.

[52] Consequently, following a function on 16 December and prior to the December 2011 function, Mr Armstrong had issued a notice to all the Wickham employees about inappropriate behaviour. The notice which was dated 19 December 2011 had stated:

You will be aware of inappropriate behaviours displayed by staff members at the Wickham Staff function on Friday 16th December.

... I would like all staff to review the list of unacceptable behaviours at the back of the Wickham staff employment contracts (as attached to this memo). Please note that some of the behaviours that occurred on Friday night were in line with serious misconduct and as such could be grounds for instant dismissal. This has not been the consequence on this occasion but it is very likely to be the outcome of any future similar behaviour that could damage Wickham's reputation.

[53] Mr Armstrong said that on or about this date Ms Moyrah Lewis had spoken to him about an incident which had taken place in the town centre the previous evening.

[54] Ms Lewis said that Ms Larnach, who had appeared to be intoxicated, had approached her and abused her, however when she had spoken to Ms Larnach the following morning about what had occurred the previous evening, Ms Larnach had had no recollection of the incident. Ms Larnach confirmed that she had no recollection of the incident involving Ms Lewis, and as a result she had asked Mr Armstrong for counselling.

[55] Mr Armstrong confirmed he had spoken to Ms Larnach, and after discussing the matter with Ms Palmer, they had decided to offer and pay for Ms Larnach to attend counselling sessions to assist her address her alcohol issues.

[56] In December 2011 Mr Armstrong said he and Ms Larnach had reviewed the action plan and stated that he and Ms Palmer had been pleased with Ms Larnach's progress in addressing the concerns they had about her performance, although they recognised that this had been challenging for her.

[57] In recognition of the effort she had made, Mr Armstrong said he and Ms Palmer had agreed to pay for Ms Larnach and her partner, Mr Nicholas Ririnui, to go on holiday to Fiji which trip was booked to take place in March 2012.

Disciplinary action in respect of the Pak'n'Save Issue

[58] In December 2011, following the resignation of the Wickham school lunches cook, Ms Larnach and her partner Mr Ririnui took on responsibility for the school lunch catering.

[59] In lieu of a salary payment to Mr Ririnui, Mr Armstrong said it had been agreed that Ms Larnach and Mr Ririnui could purchase \$150.00 worth of personal groceries each week in addition to \$300.00 for Wickham catering purchases, and charge these to the Wickham Pak'n'Save business account.

[60] Ms Lewis explained that when she had first assumed responsibility for the Wickham business accounts, Ms Palmer had explained that Ms Larnach was allowed to purchase personal grocery items on the Pak'n'Save business account in relation to which she would supply receipts, and asked her to check that there were no alcohol or cigarettes purchases included.

[61] Ms Larnach confirmed that she had understood that the personal grocery purchases were not to include alcohol or cigarettes and she had informed Mr Ririnui of this.

[62] Ms Lewis said she had become aware that alcohol and cigarettes were being purchased by Ms Larnach and Mr Ririnui on the Wickham Pak'n'Save account and she had made Mr Armstrong aware of this.

[63] Mr Armstrong said he had been made aware that Ms Larnach and Mr Ririnui were purchasing alcohol and cigarettes, and in addition to the difficulty Ms Lewis had been experiencing in obtaining receipts from Ms Larnach, he had decided that the system for paying Mr Ririnui for his catering services should be restructured and formalised.

[64] Following some discussion the arrangement had been confirmed in an email to Ms Larnach dated 8 December 2011 which set out the new catering system. The email stated:

Hi Stacey,

This is a note to confirm our understanding as discussed yesterday.

... As from Monday 5th December Ririnui Catering will provide all lunches for the children at Wickham Preschool in return for a weekly per child fee. This includes all necessary purchasing of food etc supplies, preparation of meals and freezing them in the Wickham freezers so they can be used as required by Wickham staff for the children's lunches.

... On 7th December \$450.00 was paid to Ririnui Catering for the week beginning 5th December and the same amount will now be paid by automatic payment each Monday or if a Monday is a Statutory Holiday the payment will go on the last business day prior to the Monday. This means each payment applies to the purchasing and food preparation done that week for meals the following week.

[65] Ms Larnach said she had continued to use the Wickham Pak'n'Save business account after 7 December 2011, intending to cease using the account in February 2012. Ms Larnach said Mr Armstrong had not raised this as an issue with her.

[66] During March 2012 when Ms Larnach and Mr Ririnui were in Fiji, Mr Armstrong said he had been shocked to discover that Ms Larnach and Mr Ririnui had continued to use the Pak'n'Save business account.

[67] Mr Armstrong said he had been made aware of this after being informed by one of the Wickham Team Leaders that Pak'n'Save were threatening to close the Wickham business account unless payment was made that day, 9 March 2012. Mr Armstrong said he had asked Ms Lewis to telephone Pak'n'Save to ascertain the facts.

[68] Ms Lewis said she had telephoned Pak'n'Save and spoken to a Pak'n'Save representative who had advised her that there had been several conversations with Ms Larnach about the outstanding payment, and that she had been telephoned three times requesting payment.

[69] Ms Lewis said she had been advised by Pak'n'Save that Ms Larnach had made a commitment to pay the account by 7 March 2012, however she had also been informed that the Wickham business account would be closed unless payment was received that day .

[70] Mr Armstrong said he had telephoned Ms Larnach who had advised him that she had paid the account the previous day. However he had checked at 3 p.m. on 9 March 2012 and as the Pak'n'Save business account had not been paid, he had instructed Ms Lewis to make the payment, which was for an amount of \$1,300.00, on 7 March 2012.

[71] Ms Larnach said it had been her intention to pay the Pak'n'Save overdue amount by setting up an auto payment from her bank account to be made on the day she returned from Fiji as she had expected payment of her quarterly bonus to have been made by that date.

[72] Mr Armstrong said that Ms Larnach's bonus had been payable by 20 March 2012 on completion of her KPIs, however as Wickham was experiencing invoicing issues it had been difficult to work out the level of outstanding debt. Specifically Mr Armstrong said that the outstanding debt had not been confirmed and the enrolled children numbers had not been achieved, although Ms Larnach had achieved the other KPIs set.

[73] As a consequence, Mr Armstrong said he had authorised two-thirds of Ms Larnach's bonus as payable, and he had instructed Ms Lewis to pay \$2,000.00 of the potential discretionary \$3,000.00 bonus (less tax) into Ms Larnach's bank account on 7 March 2013.

[74] Ms Larnach said that because the bonus payment had not actually been made until 9 March 2012, she had reset the auto payment date in respect of the Pak'n'Save business account to that date, but because Mr Armstrong had already authorised Ms Lewis to make payment to Pak'n'Save, the Wickham business account had been paid twice.

[75] Mr Armstrong said that on 9 March 2012 he had emailed Ms Larnach setting out a proposed investigation process and providing notice of the termination of the catering arrangement with Ririnui Catering.

[76] Ms Larnach attended the disciplinary meeting held on 23 March 2012 accompanied by Mr Ririnui as her support person, and was subsequently issued with a final written warning on the basis of: *“the serious nature of this concern”*

[77] Ms Larnach said she had not accepted the warning, but that she had been told that she had to accept it, and had signed the written warning letter on 10 April 2012.

[78] Ms Palmer said that she and Mr Armstrong had met with Ms Larnach following the issuing of the final written warning to formalise a plan for a positive way forward in the working relationship.

[79] Ms Palmer said it had been at this time that she had again offered to employ an administrator to assist Ms Larnach in her role, and when this suggestion had been rejected by Ms Larnach, had enquired as to whether Wickham could provide any alternative form of support, however Ms Larnach had responded that she could manage with the assistance of one of the two Team Leaders.

Incident involving Ms Larnach’s brother

[80] Mr Armstrong said that there had been a staff function held on 19 May 2012 for all four of the preschools to which Ms Larnach had brought her brother as a guest.

[81] Mr Armstrong said that during the course of the evening, Ms Larnach’s brother had become intoxicated and behaved in a sexually inappropriate manner. Mr Armstrong said he had avoided Ms Larnach’s brother after having informed him on at least two occasions that he had had too much to drink.

[82] Ms Larnach said Mr Armstrong had not alerted her to her brother’s behaviour during the evening, or she would have taken some action. Mr Armstrong confirmed at the Investigation Meeting that he had not spoken to Ms Larnach about her brother’s behaviour during the function, nor had he asked Ms Larnach’s brother to leave the function.

[83] Mr Armstrong said he and Ms Palmer had subsequently conducted an investigation by speaking to those who had been present at the function, following which Ms Larnach was sent an email inviting her to attend a disciplinary meeting on 31 May 2012.

Accounting discrepancies

[84] Ms Palmer said that during the same period of time that the investigation into Ms Larnach's brother's behaviour had been taking place, she had completed an audit of the Wickham parent accounts for the period from 1 January to 7 May 2012 prior to a planned Ministry of Education Funding audit.

[85] Ms Palmer said that two of the accounts audited had been of major concern. The first of these accounts had become overdue by \$664.00 in January 2012 and Ms Larnach had ceased invoicing the parents at that date.

[86] The second account had been overdue by to the sum of \$500.00 and Ms Larnach had ceased invoicing in March 2012. There had also been a note on this file indicating that Ms Larnach had credited the account \$20.00 per week, thereby reducing the debt.

[87] Ms Larnach confirmed at the Investigation Meeting that prior to the informal meeting held with her on 17 May 2012 Ms Palmer had supplied her with a list entitled "*Concerns*" which itemised concerns to be discussed at the meeting. The concerns listed included discounts, debt write-offs, invoicing errors, credits given to off-set debt and incorrect credit balances.

[88] The list provided also outlined the details of the families which were to be discussed at the meeting on 17 May 2012.

[89] Ms Palmer said that during an informal meeting with Ms Larnach held on 17 May 2012 she had questioned Ms Larnach about the cessation of invoicing the parents whose accounts were overdue, and Ms Larnach's response had been that: "*because the debt had got out of control*".

[90] Following the meeting on 17 May 2012 Ms Palmer said that she had examined the parents' accounts more closely and had discovered that approximately 19 out of 40 accounts parent files were incorrect. As a meeting to discuss Ms Larnach's brother's behaviour had already been arranged, Ms Palmer said she had advised Ms Larnach that she had concerns in respect of the invoicing of parent accounts, and that these issues would also be discussed at the meeting on 31 May 2012.

[91] At the Investigation Meeting Ms Larnach confirmed that she had received a letter from Gipsy dated 29 May 2012 which had set out the allegations to be discussed at the meeting on 31 May 2013 and which invited her to bring a support person to the meeting stating that: "*.... The invoicing errors are very serious and depending on the result of the investigation, may constitute serious misconduct*".

Meeting 31 May 2012

[92] During the meeting on 31 May 2012 which had been of approximately two hours duration, Ms Palmer said that the incident with Ms Larnach's brother and the accounting issues had both been discussed at length. In particular Ms Palmer said that she had gone through 17 of the parent accounts and Ms Larnach had been given the opportunity to provide clarification and an explanation.

[93] Following the meeting Ms Palmer said she and Mr Armstrong had considered Ms Larnach's explanations and had set out their preliminary findings in a letter dated 4 June 2012.

[94] In relation to the incident regarding Ms Larnach's brother the letter stated Gipsy considered Ms Larnach had failed in her responsibility as Centre Manager to assist Ms Palmer and Mr Armstrong in upholding their attitude to excessive alcohol consumption and the preschool's reputation.

[95] The letter noted that Ms Larnach was in receipt of a final written warning in relation to the Pak'n'Save matter, but stated that: *"even without that background and the final written warning, the accounting issues addressed in our meeting are serious enough to be considered serious misconduct by themselves"*.

[96] In relation to the invoicing issues the letter stated:

In relation to the invoicing and accounting inaccuracies, we find that your actions are unacceptable and your explanation as to how this situation has arisen is unsatisfactory. You do not seem to acknowledge the seriousness of the issues here.

We find that your actions have led to the parent invoices being in a state of disarray. There has been minimal attempt by you to look behind the discrepancies for the cause, and you have not shown us any concern. There was no attempt by you to fix the errors.

There are serious compliance issues with the incomplete enrolment forms, attestation forms and children's change of hours forms.

These areas are fundamental to your job as manager, and we find that your failure to attend to them constitutes serious misconduct.

[97] The letter concluded that Mr Armstrong and Ms Palmer had reached a preliminary decision to terminate Ms Larnach's employment on the basis of serious misconduct, and invited Ms Larnach, together with her representative, to a further meeting to be held on 6 June 2012 to discuss her response to the preliminary decision.

[98] Ms Larnach said she had been suspended from her duties on 5 June 2012; however Ms Palmer said that Ms Larnach was not suspended, but had been offered paid leave in order that she could adequately prepare for the meeting to be held on 6 June 2012.

[99] Ms Palmer said that she and Mr Armstrong met with Ms Larnach and her representative on 6 June 2012, and that during that meeting Ms Larnach had resigned from her employment.

[100] Ms Larnach said she had resigned from her employment at Wickham because she had considered that she was being 'targeted' by Mr Armstrong for trivial matters and because she feared that the matter would impact on her teacher's registration.

[101] Ms Palmer said that following the termination of Ms Larnach's employment she had continued investigating the accountancy discrepancies, and had reached the conclusion that the total loss of income to Wickham was in excess of \$20,000.00, and this figure did not include the value of bonuses which should not have been payable to Ms Larnach.

[102] Ms Palmer said that of more concern had been the discovery of three instances of false declarations which had been made to WINZ by Ms Larnach.

Determination

Was Ms Larnach unjustifiably constructively dismissed by Gipsy?

[103] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[104] In the Court of Appeal case *Auckland Shop Employees Union v Woolworths (NZ) Ltd*¹ Cooke J listed three situations in which a constructive dismissal might occur, although noted that these were not exhaustive. The three situations were:

1. Where the employees is given a choice of resignation or dismissal;

¹ [1985] 2 NZLR 372

2. Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
3. Where a breach of duty leads a worker to resign.

[105] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*² the Court of Appeal said regarding the correct approach to constructive dismissal:³

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 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.

[106] Therefore in examining whether a constructive dismissal has occurred the two relevant questions are:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation. To determine that question all the circumstances of the resignation have to be examined, not merely the terms of the notice or other communication whereby the employee has tendered the resignation, and
- ii. secondly if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[107] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*⁴ observed in describing this type of constructive dismissal:⁵

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from

² [1994] 1 ERNZ 168

³ Ibid At p 172

⁴ [1983] ACJ 965

⁵ at [975]

dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

Was there a breach of the duty owed to Ms Larnach by Gipsy?

[108] Gipsy considered that the accounting errors were: “*very serious and depending on the result of the investigation, may constitute serious misconduct*”. The decision to regard the issues as constituting serious misconduct was a matter for Gipsy as the employer as noted in *Northern Distribution Union v BP Oil*⁶ in which the Court of Appeal held that the employer is: “*.. in reality the best and in law the only judge*”.

[109] However an employer is nonetheless expected to follow a fair and reasonable process when undertaking a disciplinary process with an employee. A process fundamentally and palpably unfair will have the effect of rendering a disciplinary action unjustifiable

[110] There are three major principles applicable to the disciplinary process: a duty to inform the employee of the allegations, an informed opportunity for the employee to respond, and a decision that is free from bias and pre-determination. Additionally the fair and reasonable employer will inform an employee of their entitlement to have a representation at a meeting of a disciplinary nature.

[111] Mr Reid, advocate for Ms Larnach, submitted that by inviting Ms Larnach to a disciplinary meeting on 31 May 2012 and, without any advance notification, confronting her with 17 parent accounts in respect of which she was to provide an explanation, Gipsy breached the duty to provide Ms Larnach with a fair and reasonable opportunity to address the issues raised in relation to these accounts which were said to evidence serious misconduct.

[112] Mr Reid submitted that the situation was analogous to that faced by the Applicant in *Donaldson and Youngman (t/a Law Courts Hotel) v Dickson*⁷ in respect of which the then Chief Judge Goddard commented:⁸

I reject the submission that Mr Donaldson was behaving like a reasonable employer. If he had a list extending to two pages of matters causing dissatisfaction those concerns could not all have arisen at the same time. He must obviously have had many opportunities to raise these matters singularly or in pairs, as and when they cropped up. To store them up and then to smite the employee with

⁶ (1992) 3 ERNZ 483

⁷ (1994) 4 NZELC 98

⁸ Ibid at pg 2

them, hip and thigh, in one giant instalment, is about as great a breach of the duty of trust and confidence inherent in every employment contract as can be imagined.

[113] Having given this submission due consideration, I do not find that the situation is analogous to the present case on the basis that I find Ms Larnach had not only had advance notification of the invoicing issues prior to the meeting on 31 May 2012, she also had the opportunity to discuss the issues with Ms Palmer at the meeting on 17 May 2012.

[114] In addition, she had received the letter dated 29 May 2012 setting out the allegations to be discussed at the meeting on 31 May 2012, and significantly, she had full access in her capacity as Centre Manager to all the parent accounts which would have enabled her to make full preparation for the meetings on 31 May 2012 and 6 June 2012.

[115] I have considered whether or not the reason for the errors and discrepancies on the parent accounts was due to Gipsy having failed in its duty towards Ms Larnach due to the lack of adequate training, the nature and volume of her work, and the fact that she had been subjected to several disciplinary processes.

Lack of adequate training

[116] Ms Larnach had been provided with the Employment Agreement and the Centre Manager job description prior to commencing employment at Wickham. As previously observed the job description was comprehensive and clearly set out Gipsy's expectations that the Centre Manager would have attributes including previous relevant experience, accuracy with figures, practical administration and financial administration in addition to management and leadership experiences.

[117] Both Mr Armstrong and Ms Palmer stated that Ms Larnach had presented as capable during the interview and that she had had previous relevant experience.

[118] Whilst Gipsy had confirmed that it had observed Ms Larnach to have had difficulties in her role, these had been related to her leadership and professional conduct, and not to accountancy errors. On the contrary during her first year of employment Ms Palmer said that there had been no issues regarding the parent accounts maintained by Ms Larnach.

[119] I conclude that had Ms Larnach been experiencing problems with the APT system, these would have been apparent during the first year of employment.

[120] I also note that Gipsy had sent Ms Larnach to the Administrator's Big Day Out in September 2011 which had covered the administrative functions of a Centre Manager, and which Mr Armstrong had described as very comprehensive.

[121] Moreover Gipsy had been fully supportive in providing Ms Larnach with professional support in relation to the perceived shortfalls in her leadership and management competencies, and I consider it reasonable to conclude that had there been a similar perceived deficit in her financial management skills this would also have been addressed at an early stage and the necessary support provided; however Ms Palmer's evidence was that no such deficit had been perceived.

[122] I do not find a breach of duty in respect to a lack of adequate training on the part of Gipsy.

Nature and Volume of Work

[123] Ms Larnach had been asked on two occasions, in February and March 2012, by Ms Palmer if she would like to have administrative assistance and on both occasions the offer had been rejected.

[124] Ms Larnach had also been offered support in her role by the offer of assistance by Ms Armstrong; this offer had been rejected.

[125] Ms Larnach had been assisted in her role of Centre Manager by 2 Team Leaders and it had been suggested by Ms Palmer that Ms Larnach could delegate to the Team Leaders, an area which had also been addressed by Ms Gray as part of the professional development support provided to Ms Larnach.

[126] I do not find a breach of duty in respect to the nature and volume of Ms Larnach's role as Centre Manager on the part of Gipsy.

Disciplinary Processes

[127] Ms Larnach had been subjected to a disciplinary process in March 2012 in respect of the Pak'n'Save account issue, and in May 2012 in relation to her brother's unacceptable behaviour at a work function and the accounting issues.

[128] An employer is entitled to carry out a disciplinary process into reasonable concerns over the conduct of an employee, and is not a breach of duty *per se*.

[129] In respect of the Pak'n'Save issue, the matter had been investigated and a warning issued. There is no evidence that Ms Larnach challenged that outcome on either substantive or procedural grounds.

[130] In respect of Ms Larnach's brother's behaviour at the staff function on 19 May 2012, no disciplinary action had been taken and Gipsy had not taken that matter into account in reaching the preliminary decision to dismiss Ms Larnach which I find to have been solely based on the accounting discrepancies.

[131] I do not find that the fact that Ms Larnach had been subjected to two disciplinary processes to have been a breach of duty on the part of Gipsy.

[132] I find that there had been no breach of duty by Gipsy which caused the resignation. I determine that Ms Larnach has not been unjustifiably constructively dismissed by Gipsy.

Is Ms Larnach entitled to non-payment of performance bonus monies in the sum of \$1,310.00?

[133] Ms Larnach claim of non-payment of performance bonus was unsupported by evidence.

[134] As set out in schedule 4 of the Employment Agreement Ms Larnach's bonus payments were made entirely at the discretion of Mr Armstrong and Ms Palmer.

[135] On 7 March 2012 Ms Larnach had been paid \$2,000.00 of the \$3,000.00 bonus due to be paid on 20 March 2012. The bonus payment had been made at a time when Mr Armstrong said that both he and Ms Palmer were trying to work out the outstanding parent debt level which was proving to be a difficult task because of the invoicing issues.

[136] I accept that the level of outstanding parent debt had not been confirmed by Gipsy and in addition, the enrolled children numbers had not been achieved, which aspects represented \$750.00 and \$250.00 of Ms Larnach's maximum performance bonus of \$3,000.00.

[137] Given the discretionary nature of the bonus entitlement, the fact that the parameters leading to payment of the bonus could not be confirmed and the fact that two-thirds of it had been paid to Ms Larnach on 7 March 2012, I determine that Ms Larnach is not entitled to her claim for non-payment of bonus monies in the sum of \$1,310.00.

Costs

[138] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions by the Applicant to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority