

to advise the Authority in order that a telephone conference can be arranged to organise a date for another investigation.

E. Costs are reserved with a timetable set for memoranda if an Authority determination of costs is required.

Employment Relationship Problem

[1] Rotorua Hockey Association (RHA) is a not for profit sports organisation. Its objectives are to develop and promote hockey in the Rotorua area. The RHA is governed by a management committee consisting of nine volunteers.

[2] Mrs Macpherson was employed by RHA as its facilitator. This was for a fixed duration of 12 months commencing on 10 October 2016. During her employment Mrs Macpherson alleges RHA failed to act in good faith. She further alleges that she suffered various unjustified disadvantages to her employment. These include bullying, failure to investigate concerns raised, being locked out of the workplace and unjustified disciplinary investigation. She claims these disadvantages resulted in her workplace becoming unsafe and her suffering stress. After a period of time on sick leave she resigned. She claims lost wages and compensation for humiliation, injury to feelings and anxiety.

[3] The RHA denies that it failed to act in good faith towards Mrs Macpherson. It also denies that she suffered any unjustified disadvantages to her employment.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Preliminary Matter

[5] Having heard the evidence of the parties, I indicated to the parties that I was considering, pursuant to my powers under s 160(3) of the Act, treating Mrs Macpherson's claim as one of unjustified constructive dismissal instead of unjustified disadvantage. I asked the parties to address this in their closing submissions.

[6] Mrs Macpherson agreed that this course of action was appropriate. The RHA submitted that, as it was not able to test the evidence as to constructive dismissal during the investigation meeting; it will suffer prejudice if the Authority were to consider a claim of constructive dismissal. I disagree with the Respondent.

[7] Whilst the Statement of Problem did not specifically plead constructive dismissal, the claim of constructive dismissal relies on the same sequence of events as that relied upon by Mrs Macpherson to establish her various disadvantage claims. In addition, the facts pleaded in the Statement of Problem, and Mrs Macpherson's written statement, clearly identify that she resigned from her role as a result of the stress placed on her by RHA and, what she perceived as, breaches of good faith and a failure to resolve the issues and concerns she had raised with them. It was open to the Respondent to test this evidence if it chose.

[8] In *NZ Van Lines Limited v Gray* the Court of Appeal considered s 34 of the Employment Contracts Act 1991 which contained similar wording to that of s 160 of the Act.¹

Mr Ellis contends the Tribunal erred in law in seeking submissions on the use of this power and then using it in respect of a disadvantage which was not pleaded or argued... This appears to us to be exactly the kind of situation for which s 34 was designed if a just result were to be reached, provided that the parties were given a fair opportunity to address the issues as the Tribunal identified them. We can see no error of law in the actions the Tribunal took. It was not a substitution of a new personal grievance for the grievance complained of. It relied on the same sequence of events and in respect of those events found a different type of grievance (disadvantage) from what had been asserted (dismissal). Further, it seems to us that the procedure was fair and just to the parties, appropriately informal (in not requiring for instance any amendments of the pleadings when the issues were clear) and speedy.

[9] I am satisfied it is appropriate to treat Mrs Macpherson's claim as that of constructive dismissal rather than unjustified disadvantage.

[10] For completeness, I also note that in the course of the investigation meeting an issue arose over the admissibility of evidence contained in committee minutes. These minutes were said to contain privileged discussions. Without sighting the minutes in question, I arranged for them to be examined by another Member. Parts of those minutes were redacted as they were subject to litigation privilege. The remainder of the minutes were released to Mrs Macpherson's solicitor and to me. The documents

¹ 1 ERNZ 85 at page 96 (CA).

consisted of a typed note of an “in committee” meeting on 14 April 2017 and two draft minutes of “in committee” meetings held on 1 May 2017 and 11 May 2017.

The issues

[11] The issues requiring investigation and determination were:

- a) Was Mrs Macpherson constructively dismissed?
- b) If Mrs Macpherson was dismissed, was this justified?
- c) If not, what remedies should be awarded?
- d) If any remedies are awarded, should they be reduced for blameworthy conduct by Mrs Macpherson that contributed to the situation giving rise to her grievance?

Background against which issues are to be determined

[12] Prior to Mrs Macpherson being appointed to the role of Hockey Facilitator she had been involved with the Rotorua hockey community for over 35 years. This was as a player, coach, umpire and, at times, committee member. During this period she had gotten offside with some RHA members. These included Fiona McGregor, the RHA Administrator, and two other RHA members. As the RHA administrator did not give evidence I shall refer to him as Mr A. I shall refer to the two RHA members as Ms B and Mr C. Mrs Macpherson raised concerns about their conduct with the RHA at the time which was addressed.

[13] When Mrs Macpherson applied for appointment as RHA’s Hockey Facilitator, Ms McGregor and Mr C, both committee members at the time, opposed her appointment. I understand Ms B, who was also a committee member, was not present at the meeting so did not vote but was also opposed to the appointment. The majority vote was that Mrs Macpherson be appointed to the role. The appointment did not sit well with Ms McGregor, Ms B and Mr C.

[14] On 3 October 2016 Mr McKay, RHA’s then Chairperson, met with Mrs Macpherson to discuss her role and the committee’s expectations. Mr McKay gave

evidence at the investigation meeting. The following matters were discussed and agreed:

- a. Mrs Macpherson was to initially concentrate on sourcing sponsorship, creating new hockey competitions, upgrading the RHA's facilities and grounds; and organising development programmes.
- b. The timesheet template provided in the job description attached to the individual employment agreement (IEA) was only to be utilised while Mrs Macpherson was in schools.
- c. Mrs Macpherson was not required to provide timesheets during the months of October 2016 through to January 2017 as she would not be working in schools.
- d. During the period October 2016 through to January 2017, Mrs Macpherson was expected to orally report back to the committee regarding the tasks she had completed and provide an update on the projects she was working on.

[15] In line with these expectations Mrs Macpherson provided her first verbal report to the committee in October 2016. The matters she addressed were recorded in a committee meeting minute which I have viewed. These minutes record the committee, primarily Ms McGregor, Ms B and Mr C, disagreeing with a large number of Mrs Macpherson's ideas. The October minutes recording in respect of one idea that "Committee shot this down".

[16] Mrs Macpherson also began sourcing sponsorship. However, the sponsorship she arranged was not viewed positively by Ms McGregor, Ms B and Mr C. This led to Mrs Macpherson expressing her disappointment at their negative reaction to Mr McKay in person and to the other committee members by email.

[17] It was around this time that the November 2016 committee meeting was held. Mrs Macpherson did not attend this meeting but Mr McKay said he provided a report on her behalf. During this meeting Mr McKay said Ms McGregor was continually making negative comments about Mrs Macpherson. He said he confronted her about this. Ms McGregor agreed that Mr McKay said she had a personal problem with Mrs Macpherson. She says she denied this and told him that she had a problem with him.

Particularly she said she told him she was annoyed about his failure to follow process and his taking direction from Mrs Macpherson, rather than the other way round.

[18] On 13 December 2016, an AGM was held and Barbara Northey was elected as the new Chairperson of the committee and Mr McKay as the Deputy Chairperson. The majority of the committee members remained the same.

[19] Following Ms Northey's appointment, she was approached by Ms McGregor. Ms McGregor complained that Mr McKay was not "on to it" in terms of requiring paperwork from Mrs Macpherson, planning and accountability, and in terms of timesheets. Ms B also met with Ms Northey and voiced her similar concerns. After speaking with them both, Ms Northey decided to have a meeting with Mrs Macpherson. This meeting took place on 11 January 2017.

11 January 2017: First Meeting where Mrs Macpherson raises concerns

[20] The matters that were discussed by Ms Northey and Mrs Macpherson at this meeting are in part disputed. No notes were taken during this meeting, although Mrs Macpherson did make diary notes shortly thereafter, which I viewed. Having heard from Ms Northey and Mrs Macpherson I am satisfied the following matters were discussed:

- a. Ms Northey told Mrs Macpherson that it was in her "best interests" to prepare timesheets as it would be "good for her personal development". Ms Northey said there was no expectation at that time that she must do so.
- b. Mrs Macpherson told Ms Northey:
 - i. That some committee members were deliberately undermining her role by not advertising new competitions, development programmes and free turf time. Mrs Macpherson explained during the investigation meeting that she did not have access to the advertising platforms used by the RHA, such as their website, Facebook page and contacts to the various schools. She said she had to rely on the RHA Administrator, Mr A, and Ms McGregor to send her information out to schools, clubs and communities.

- ii. Committee members did not support particular sponsors that Mrs Macpherson had engaged with and were deliberately undermining her in front of these sponsors. As a result she had lost sponsorship opportunities. Ms Northey said Mrs Macpherson provided her with several examples. These included sponsorship relating to computers, carpet, guttering and painting. The painting example concerned an altercation with Ms B just prior to Christmas 2016 where Ms B had embarrassed and undermined Mrs Macpherson in front of a potential painting sponsor. When Mrs Macpherson arrived at her workplace to meet with the painter, Ms B was already there. Ms B asked Mrs Macpherson “*what the hell are they doing here?*”. She then proceeded to yell at Mrs Macpherson, telling her that she had no authority to organise the painters, and where did she think the money would come from to pay for their services. At that point Mrs Macpherson asked Ms B to come downstairs. She said she told Ms B that her behaviour was very rude and unprofessional and that she was undermining her. She also told her that they may have potentially lost the sponsor. She said she found Ms B’s behaviour to be intimidating.
- iii. She had presented her reports to the committee with a strategic plan in October 2016 and had not received feedback. Mrs Macpherson explained during the investigation meeting that the strategic plan was important as it provided a guideline for her development of the RHA. Without an approved strategic plan she had to obtain the committee’s approval each time she wanted to do something. This then resulted in objections from Ms McGregor, Ms B and Mr C. She said this prevented her from carrying out her day to day role such as organising teams, players, advertising and sponsorship. She said it was very frustrating and resulted in delays and missed opportunities.
- iv. She was feeling alienated in her work area, isolated and ignored. She described committee members walking past her and ignoring her, unfriendly facial expressions and terse language being used towards her.

- v. She expressed to Ms Northey that she did not have the right tools to carry out parts of her role and was reliant on the office equipment which was used by the Administrator during the day. As a result of this she explained that she had to wait for the RHA Administrator to finish his working hours before she was able to access the tools she needed.

[21] Mrs Macpherson said that at the end of this meeting Ms Northey told her she would “get it sorted” by calling a meeting with the committee to explain to them that the negative behaviour she was experiencing was unacceptable. Ms Northey said she did speak with the committee at a committee meeting on 23 January 2017. However, during the investigation meeting, she said this was limited to a comment that the committee needed to support Mrs Macpherson. She said she didn’t provide the examples given by Mrs Macpherson to the committee as she felt she didn’t have enough information. Anna Rossi, a committee member who was present at the January 2017 meeting, said she was not made aware of any issues Mrs Macpherson had until late March 2017.

[22] Following the 11 January meeting, the parties met again on 19 January 2017. At this meeting Ms Northey provided Mrs Macpherson with a suggested template to use for her timesheets. Mrs Macpherson’s concerns were not addressed at this meeting.

23 January 2017: Committee meeting

[23] On 23 January 2017 a committee meeting was convened. The committee minutes record the following relevant matters, inter alia, were resolved:

- a. Mrs Macpherson was to complete timesheets on a weekly basis on the form provided by Ms Northey.
- b. Two laptops would be provided. One of these laptops was for Mrs Macpherson’s use.
- c. All emails were to be replied to within 48 hours. Mrs Macpherson’s emails were to go to the office for issue.

9 February 2017: Second Meeting where Mrs Macpherson raises concerns

[24] On 9 February 2017, Mrs Macpherson emailed Ms Northey and Mr McKay to request an urgent meeting with them both. This was to discuss her employment with the RHA as well as clarifying aspects of her job description. She said she was anxious that she had not received any feedback about the concerns that she had raised on 11 January 2017 in regard to the negative treatment she was receiving from some committee members and Mr A.

[25] At this meeting the parties agree Mrs Macpherson reiterated the concerns she had raised at the meeting on 11 January 2017. In addition she expressed the following additional concerns:

- a. She was starting to feel stressed in her role as a result of the unresolved issues she had raised with Ms Northey and the lack of any feedback.
- b. She was being undermined in her role by having barriers put in front of her which stopped her from doing her job effectively.
- c. Anything positive that she had done was being scrutinised by the committee members and she had received negative comments.
- d. She was still not being supported by Mr A in the sending out of advertising emails. This was causing tension with her and the hockey community because matters were not being completed by him in a timely manner.

14 February 2017: The altercation with Ms B

[26] On 14 February 2017 an incident took place at the RHA office. Mrs Macpherson was working on her reports in the office. Several young hockey players were with her. Mrs Macpherson said they had come into the office asking her questions about how to register for an upcoming event. Two of these students were also umpires and had some questions around the rules and certification requirements. Ms B came into the office. Mrs Macpherson's undisputed evidence was that Ms B behaved rudely in front of her, using terse language and using actions that demonstrated that she was angry. Mrs Macpherson's son, who was present at the time, demonstrated how Ms B slammed books and papers down onto a desk.

15 February 2017: The lock out

[27] On 15 February 2017, whilst Ms Northey was visiting Ms McGregor, Ms McGregor received a phone call from Ms B. Ms B recounted her version of the events of 14 February to Ms Northey. Ms Northey said, following her discussion with Ms B, she made the decision that no-one would be allowed access to the office other than Mr A. She said she phoned Mr A to advise him of this.

[28] Following this call, Mrs Macpherson attended the office to carry out her work duties. When she arrived, she said she asked Mr A if he could leave the computer on and the office unlocked as she had left her keys at home. Mr A told her that he could not. When she enquired why, Mr A told her that Ms Northey had called him and told him not to allow her access to the office. He said he didn't know why that was the case.

[29] Mrs Macpherson said she was upset. She accordingly emailed Ms Northey and Mr McKay, asking for an urgent meeting. In this email she set out what had been discussed by them at the meeting on 9 February 2017 and that the situation had not changed and had worsened. She provided another example of a lack of communication in regards to the hockey community receiving information and recounted what had happened on 14 February. She told Ms Northey that she felt RHA's actions were preventing her from carrying out her work to the best of her ability. She considered she was being bullied and RHA had created an unsafe workplace for her to work in.

[30] Dialogue then took place between Ms Northey and Mrs Macpherson to organise a time to meet.

[31] On 20 February 2017, Ms Northey emailed Mrs Macpherson asking her to provide her with a report to present to the committee that evening. Mrs Macpherson responded, advising that she was unable to do so at that stage as she did not have the resources to do so, having been locked out of the office. Ms Northey's response was "*Fine*". Ms Northey said she then spoke at the meeting that evening about what Mrs Macpherson had been doing.

26 February 2017: Third Meeting where Mrs Macpherson raises concerns

[32] On 26 February 2017 a meeting was convened to discuss Mrs Macpherson's concerns. Present at this meeting were Ms Northey, Mr McKay, Mrs Macpherson and

her two brothers, Boni Tukiwho and Tainui Tukiwho. The discussions which took place between the parties are in part disputed.

[33] I pause here to note that I found Mr McKay and Mrs Macpherson's brothers to be reliable and credible witnesses. On the other hand I found, at times during the investigation, that Ms Northey's evidence did not ring true. This was particularly so where it conflicted with the evidence given by RHA's other witnesses or the documents produced to me. Having heard from the witnesses who attended this meeting I am satisfied the relevant matters discussed were these:

- a. Mrs Macpherson expressed the following concerns:
 - i. She was feeling stressed. This was because the concerns she had raised at the meetings on 11 January and 9 February 2017 had still not been addressed and she had now been excluded from the workplace.
 - ii. She felt bullied and unsafe in the workplace and was still experiencing negative behaviour from the committee. Examples provided included her feeling ostracised by the committee, noticing sidelong looks and conversations between others about her which were being fed back to her by third parties.
 - iii. Her ability to do her job was being hindered. Examples provided included advertising and sending out of emails and notices not being undertaken by Mr A and Ms McGregor not putting her notices on Facebook. She said Ms McGregor was putting up notices on Facebook for other events, but not her notices, making it appear that she was not doing so for personal reasons. She was not getting traction with sponsorship because the committee would not agree.
- b. Ms Northey explained the reasons why she told Mr Donovan not to allow Mrs Macpherson access to the office. Namely; due to security concerns as there was confidential information in the office. Mrs Macpherson explained the reasons why the students were in the office and Ms Northey agreed to provide her with a written apology.

[34] Following this meeting Ms Northey sent a memo to the committee members asking them to ensure all communication and matters associated with Mrs Macpherson were directed to herself and Mr McKay. Ms Northey also provided a personal apology letter to Ms Macpherson for being locked out of the office. No other steps were taken by Ms Northey or the RHA to address Mrs Macpherson's concerns.

7 March 2017 – Fourth Meeting where Mrs Macpherson raises concerns

[35] On 7 March 2017, another meeting was convened. Present at this meeting were Ms Northey, Mr McKay and Mrs Macpherson. The discussions which took place between the parties are again in part disputed. Having heard from the witnesses I am satisfied the relevant matters discussed were these:

- a. Ms Northey considered the format of the timesheets being provided by Mrs Macpherson was unsatisfactory. This was discussed and it was agreed that the format on Mrs Macpherson's job description would be used when she started working in schools. In regard to the other work she was undertaking, it was agreed that Ms Northey would provide Mrs Macpherson with a new template to complete these.
- b. Ms Northey said she agreed at this meeting that Mrs Macpherson did not need to provide timesheets. During evidence she said this only applied for the period Mrs Macpherson was locked out. However, she acknowledged she did not tell Mrs Macpherson this. Mrs Macpherson and Mr McKay understood that timesheets were not required to be provided for the period from when Mrs Macpherson was locked out until the new timesheet template was provided.
- c. It was agreed that Mrs Macpherson would be supported in any correspondence or advertising via the RHA platforms in the timeframes she required.
- d. Mrs Macpherson would be supported in her role without further interference from committee members.

14 March 2017 – Written notification of on-going concerns

[36] On 14 March 2017, Mrs Macpherson wrote to the RHA referring to the meeting between the parties on 26 February and Ms Northey's agreement to address the issues and concerns she had raised within 10 working days. Whilst she now had a laptop to complete her work, had received an apology for being locked out of the office, and the issue of communication with committee members had been resolved, she said the main issue of not being provided with a safe working environment had not been addressed. Mrs Macpherson pointed out:

There have been ongoing blockages and interferences from committee and staff members and resolving these issues we hope will help to wean out personal agendas. All of this results in uncommunicative and unsafe work space.

[37] Mrs Macpherson asked for a response within three working days.

[38] The RHA responded on 16 March 2017. Ms Northey acknowledged in this letter that there had been discussion around some of these issues, but said it was difficult to resolve the issues as they were not specific. She asked Mrs Macpherson to provide "Evidence of instances you refer to that you indicate have occurred since our meeting on February 26 and the meeting with Andrew and I on Tuesday 7 March". The letter went on to state:

Your request that these matters are resolved within three days is unreasonable. Given the nature of your letter, I am obligated to present it, along with all other relevant information, at the next RHA committee meeting on 27 March, 2017. The committee will then establish how they wish to move forward regarding your issues and your employment, and I will notify you of the outcome within five business days of that meeting.

...

Referring to "Up until this point Marley has still diligently been building and facilitating new relationships for Rotorua Hockey has been going above and beyond what is expected of her". I remind you that your timesheets and your February report are overdue.

[39] Mrs Macpherson did not provide the evidence sought. She said she considered the detail provided to Ms Northey during the meetings on 11 January, 9 February, 26 February and 7 March 2017 sufficiently outlined her concerns. During questioning, Ms Northey acknowledged that during these meetings she understood what the concerns were and did not ask for any additional details.

[40] It was about this time that Mr McKay resigned from the committee and as deputy chairperson. He said the processes which had been agreed to be put in place for Mrs Macpherson had not been actioned by Ms Northey. He said he was extremely concerned about how the committee members and Ms Northey were treating Mrs Macpherson and didn't agree with the actions they were taking.

[41] On 27 March 2017 Mrs Macpherson emailed the committee:

I am writing this email to inform the committee that I will not be attending the committee meeting tonight.

....

I await with high hopes that the issues I have put before the committee are resolved during this meeting, as per the letter I received, and a safe working environment can be established to ensure a positive future working relationship between myself and the committee.

27 March 2017- Committee meeting

[42] On 27 March 2017 an "in committee" meeting was convened to discuss Mrs Macpherson. I have reviewed the committee meeting minutes which in summary record the committee discussing the following:

- a. Mrs Macpherson had been denied access to the office.
- b. Meetings took place with Mrs Macpherson on 26 February and 7 March 2017.
- c. At the meeting on 26 February Mrs Macpherson asked for clarification around communication with the committee and Ms Northey had sent a draft to her.
- d. At the meeting on 7 March 2017 they had met with Mrs Macpherson to "unpack" her job description.
- e. Mrs Macpherson's email of 17 February 2017 was read out.
- f. The committee asked for specifics in relation to Mrs Macpherson's statement of feeling unsafe. Ms Northey responded that she had asked for specifics. In response to a query as to how the committee had squashed Mrs Macpherson's ideas, Ms Northey advised that there had been discussions around the Super 8 rules and there had been a breakdown of communication on two days.

- g. The meeting then turned to a discussion over how Mrs Macpherson obtained the job with Ms McGregor; inter alia, stating “We didn’t want to employ her”.
- h. The discussion then turned to performance concerns and the ability of the RHA to monitor Mrs Macpherson through timesheets.

The raising of performance concerns by RHA

[43] The following day Mrs Macpherson emailed the committee. She asked for confirmation that they would reimburse her for costs associated with a sausage sizzle she had organised at the end of a tournament. The committee denied her request. Mrs Macpherson said she felt embarrassed in this regard as the community had already been informed that the sausage sizzle would be provided at no cost. She said this followed an earlier indication from the committee that this was okay. She accordingly told Ms Northey that she would fund the sausage sizzle from her own money.

[44] In response Ms Northey sent a warning letter to Mrs Macpherson on 30 March 2017. This letter stated that the RHA was not in a position to fund unnecessary expenses due to its current financial situation. It went on to say:

I sense by the tone of your text you are not happy with the decision re the sausage sizzle. I would like to remind you of your obligations as an employee of RHA.

Any attempt to publicly tarnish the reputation of Rotorua Hockey Association whether explicitly or implied, will bring RHA and the committee into disrepute by any means will be seen as a breach of your contract and will be dealt with accordingly.

[45] Mrs Macpherson immediately replied

My apologies. There had obviously been a miscommunication. I obviously need to be more clearer.

Judging by the threatening tone of your letter you are assuming I am going to do something unbecoming. When I said I would let the community know that I had paid for the sausage sizzle.

What I meant by that was that if anyone asked me directly I wouldn’t lie. I am sure RHA wouldn’t put me in that position.

I hope that’s clear and there is no concern of me putting RHA into any disrepute.

[46] On 3 April 2017 RHA wrote to Mrs Macpherson reminding her of her obligations to provide weekly timesheets. The letter also referred to the committee

not receiving reports or information regarding her activities or achievements since 27 January 2017. To keep the RHA committee informed, Mrs Macpherson was asked to provide these reports, or a report covering the time between 20 January and 27 March 2017. Lastly, the letter referred to Mrs Macpherson's entitlement to a safe working environment, and asked her to be more specific as to how, in her opinion, that requirement was not being met. A demand for the timesheets and reports were sought by 10 April 2017.

[47] Following receipt of this letter Mrs Macpherson wrote to Ms Northey on 8 April 2017. She noted that she was currently on annual leave and would address Ms Northey's requests upon her return. In the meantime, she reminded Ms Northey that it was agreed at their last meeting that the RHA were to provide her with a new template to follow for her timesheets. As this template had not been received, she asked how she should complete the timesheets.

11 April 2017 – The raising of a personal grievance

[48] By 11 April 2017 Mrs Macpherson's concerns remained unaddressed. She had also received no response to her query as to how she was to complete her timesheets. That day her lawyer wrote to the RHA raising a personal grievance for unjustified disadvantage. The letter reiterated the concerns Mrs Macpherson had raised at the meetings on 11 January, 9 February, 26 February and 7 March 2017 which remained unresolved. She asked to meet again with the RHA to try and resolve her grievances failing which she would seek mediation.

[49] That same day RHA wrote to Mrs Macpherson regarding the provision of her timesheets. Ms Northey denied there was any mention of a new template being provided. Ms Northey set out in her correspondence a copy of the timesheet entry which was to be used as per Mrs Macpherson's job description. The letter demanded the timesheets and reports to be provided to Mr Donovan by 12 noon on 19 April 2017.

[50] On 14 April 2017 an "in committee" meeting was held to discuss the personal grievance raised by Mrs Macpherson. I have reviewed typed notes taken at that meeting. I was told by the RHA that it did not have a minute or the original handwritten notes of this meeting. What is clear from the notes provided is that the matters which were addressed were not the grievances raised in Mrs Macpherson's

personal grievance correspondence. Rather, the conversation was dominated by performance and other concerns which the committee had. The committee resolved to address the following matters:

- Whether the failure to supply timesheets for such an extended period could be considered abandonment of employment, since she has not accounted for these hours.
- Whether refusal to come to her place of work as per her employment agreement constitutes abandonment of employment.
- Whether RHA can demand access to her work emails. She created this email without prior knowledge or permission from the committee. Concerns were raised about this in previous minutes. The committee needs access to ensure the integrity of RHA is maintained.
- Can we seek reimbursement for wages paid and not accounted for?
- Damages for RHA reputation and the impact on our future ability to obtain funding.
- Whether the contract allows us to terminate her employment without reason.

[51] On 1 May 2017 a further “in committee” meeting was held. I have reviewed the redacted draft minute of this meeting. This records, inter alia, the committee setting tasks for Mrs Macpherson. These included a requirement for her to organise a “fun sticks” programme and to coordinate and allocate umpires for all secondary and intermediate hockey for 2017 with the games at Rotorua starting the following week. The minutes record:

Committee to have a plan B for Saturday morning as it is likely Marley will refuse these directions ... Emma and Alan volunteer to organise the fun sticks should this occur. To meet at 5pm Thursday to check the gear.

[52] On 2 May 2017 Ms Northey sent an email to Mrs Macpherson setting out the tasks discussed by the committee. In terms of the “fun sticks” requirements, she required Mrs Macpherson to provide a planned programme by 3pm on 4 May. In terms of the coordination and allocation of umpires, Mrs Macpherson was to provide the umpire placements by 2pm on 5 May 2017.

[53] Mrs Macpherson replied to Ms Northey that same day. She pointed out that the deadlines proposed by RHA were unreasonable. In terms of the “fun sticks” programme, she asked for this to start on 27 May to enable sufficient time to organise what was required. In terms of the coordinating and allocation of umpires, she referred to this not being part of her role. She advised this would involve a

considerable amount of time to organise, but indicated she was willing to facilitate this in the second round of the competitions.

[54] The RHA did not respond to Mrs Macpherson's email. The running of the fun sticks programme was thereafter implemented by other committee members in line with the committee's "Plan B". Ms McGregor took over organising the coordination and allocation of umpires for secondary and intermediate hockey for 2017. This remained incomplete as at the time of the "in committee" meeting on 11 May 2017.

[55] On 2 May and 4 May 2017 Mrs Macpherson's solicitor wrote to the RHA's solicitor asking for a response to Mrs Macpherson's personal grievance letter of 11 April 2017. The letter of 4 May 2017 records:

Further to my phone call yesterday, I note that your client has failed to respond to my client's letter dated 11 April 2017.

Since then, rather than responding to my client's grievances, your client has set out an extensive list of tasks that require addressing. Furthermore, my client has advised she is experiencing isolation in the workplace. Attempts to ascertain your client's position has been fruitless and as a result, my client feels that the current circumstances are untenable and considers the workplace environment too oppressive to return at this point.

Please find attached a medical certificate for Mrs Marley Macpherson. Mrs Macpherson will be on stress leave until this matter is resolved. My client now raises a further personal grievance to the way in which the employer has failed to resolve the grievances raised on the 11th April 2017. The situation may arise where my client is forced to resign in circumstances which she could claim constructive dismissal.

My client feels that your client's refusal to respond requires intervention of the Employment Relations Authority. As a result, my client will be filing a statement of problem with the Authority today seeking an urgent direction to attend mediation.

4 May 2017 - The RHA's response to the personal grievance and subsequent events

[56] A letter of the same date was then received from RHA's solicitors. The letter focussed on RHA's concerns regarding Mrs Macpherson's performance. In particular, her failure to comply with its requests for timesheets and reports. The only reference in the correspondence to Mrs Macpherson's personal grievance were two paragraphs which stated:

Our client was not surprised to receive a notice of personal grievance on 11 April 2017 from your client raising scrutiny for "non-performance" and "being undermined in her role by having unreasonable barriers in place".

...

Again, our client was not surprised to receive your email of 4 May 2017 threatening a claim for constructive dismissal.

Unjustified disadvantage does not exist when an employee is asked to do their job and comply with their employment obligations. Our client considers your client does not have a personal grievance for unjustified disadvantage and that it is being used as a mechanism to avoid the committee's clearly foreshadowed employment concerns.

With this in mind the RHA committee will require Mrs Macpherson to attend an investigation meeting in relation to her failure to comply with the essential terms of her employment. Details will be provided in due course.

[57] This correspondence was followed by a request by the RHA for the return of its property on 12 May 2017, and on 16 May 2017, and a request for Mrs Macpherson to attend an investigation meeting. The letter pointed out that the committee had formed an initial view that her alleged behaviour in failing to provide timesheets and a February report may amount to serious misconduct. She was invited to attend a meeting on Tuesday, 23 May 2017.

[58] On 22 May 2017 Mrs Macpherson's solicitor responded on her behalf. She reminded the RHA that Mrs Macpherson was on sick leave so she would not be attending the proposed investigation meeting. She pointed out that, in the circumstances, Mrs Macpherson considered their request to be unreasonable and unfair. The letter attached timesheets and reports for Mrs Macpherson.

[59] On 12 June 2017, following an unsuccessful mediation, Mrs Macpherson tendered her resignation with RHA. Her last day of employment was 23 June 2017, although she was not required to work out this notice period and was paid in lieu.

Overview of applicable law

[60] The legal principles relating to constructive dismissal are well established and are not in dispute. Constructive dismissal includes, but is not limited to, cases where:²

- a. An employer gives the employee the choice of resignation or dismissal;
- b. An employer follows a course of conduct with the 'deliberate and dominant purpose' of coercing an employee to resign;

² *Auckland Etc Shop Employees Etc IUOW v Woolworths (NZ) Limited (NZ) Ltd* [1985] 2 NZLR 372.

c. A breach of duty by the employer leads an employee to resign.

[61] The present case concerns the third of these categories.

[62] In reference to the third category of case, the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* stated:³

In such a case as this we consider that the first relevant question is whether the resignation has been caused by 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.

[63] If, after applying the above principles, the Authority concludes that there has been a constructive dismissal, it must then determine objectively whether it was justifiable in terms of the statutory test of justification under s 103A of the Act. To this end, the RHA must satisfy the Authority that its actions were what a fair and reasonable employer could have done in all the circumstances at the time.

Issue One: Was Mrs Macpherson Constructively dismissed?

[64] Against the foregoing legal background, I turn to consider the first question posed by the Court of Appeal in *Auckland Electric Power Board*. Whether it can be said, after examining all the circumstances that Mrs Macpherson's resignation was caused by a breach of duty on the part of the RHA. Namely, a breach of its duty of good faith and/or its implied and contractual duties to provide a safe workplace.

[65] In reference to the concept of breach of duty, the Employment Court affirmed, in *Rodkiss v Carter Holt Harvey Limited*, the application of the implied term that "employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."⁴

³ [1994] 1 ERNZ 168 (CA).

⁴ *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 34 at [89]

[66] In *Hamon v Coromandel Independent Living Trust* Judge Perkins confirmed that the duty of trust and confidence the Court of Appeal referred to in *Auckland Electric Power Board* is now encapsulated in s 4(1)(a) of the Act which requires the parties to an employment relationship to deal with each other in good faith.⁵

[67] Section 4(1A)(a) specifically provides that such a duty “is wider in scope than the implied mutual obligations of trust and confidence”. Section 4(1A)(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[68] For the reasons that shall follow, I conclude that the RHA breached not only the implied obligations of trust and confidence but its statutory duty of good faith.

Mrs Macpherson had genuine concerns

[69] It is clear that Ms McGregor, Ms B and Mr C had personal issues with Mrs Macpherson. These issues arose prior to her employment. Ms McGregor said they didn’t want Mrs Macpherson to be employed by the RHA. It is apparent that when they were outvoted by the other committee members, Ms McGregor, Ms B and Mr C followed a course of conduct which led to Mrs Macpherson feeling bullied, alienated, unsupported and ultimately resulting in her suffering stress and anxiety. They opposed her ideas, undermined her in her role with sponsors, and challenged her authority in front of others.

[70] After Mr McKay left, Ms McGregor and Ms B took the opportunity to speak with the new chairperson, Ms Northey. From that point it is clear that Ms Northey accepted what they said without challenge or verification. Indeed, having heard from Ms Northey I am of the view that the decisions she made were largely influenced by Ms McGregor and Ms B. It was after speaking to these ladies that she decided to require Ms Macpherson to provide timesheets. It was also after speaking with them that she decided to lock Ms Macpherson out of the office. She could easily have contacted her deputy chairperson, Mr McKay, to obtain his input or assistance but she did not. Instead turning to Mr A to advise Mrs Macpherson she was not allowed access to the office.

[71] Ms McGregor and Ms B’s conduct continued throughout the employment relationship. Ms B had altercations with Mrs Macpherson in December 2016 and again on 14 February 2017. The “in committee” meeting minutes of 27 March 2017 record Ms

⁵ [2014] NZEmpC 54 at [49]

McGregor telling the committee that “we didn’t want to employ her”. She also spoke of carpet sponsorship organised by Mrs Macpherson which she said was not free as “she has spoken with the person regarding the carpet”.

[72] In the April 2017 “in committee” notes Ms McGregor is noted as raising a concern about Mrs Macpherson putting RHA photos and information on her private Facebook page. She also complained about her using this forum to correspond with the public about the RHA and using a Gmail account for email correspondence. Ms Northey did not tell the committee the reason why Mrs Macpherson felt she had to do this i.e. that the RHA Chairperson was not sending out her emails, and Ms McGregor was not advertising her programmes on Facebook.

[73] Mr McKay said he viewed the committee members acting disrespectfully towards Mrs Macpherson. He described how there were “clicks” in the committee who had personal issues with Mrs Macpherson. He said it was obvious that Ms McGregor had a personal issue with Mrs Macpherson which is why he addressed this with her at the committee meeting in November 2016. He said he had seen Mr C turning his back on Ms Macpherson and had viewed other negative body language from other members of the committee. He said he had also seen committee members not acknowledging Mrs Macpherson and not talking to her. This behaviour was also witnessed by Mrs Macpherson’s son. Ms B’s behaviour towards Mrs Macpherson was not challenged by the RHA. Ms Northey said she didn’t doubt Ms B had spoken to Mrs Macpherson as alleged. She said Ms B “can be foreboding and we have all had our run-ins with her” but “that was just how she is”.

Mrs Macpherson raised her concerns with the RHA

[74] Mrs Macpherson clearly, and unambiguously, raised her concerns with the RHA. This included that she felt she was being alienated, isolated, unsupported and bullied. She expressly told Ms Northey that she was experiencing work place stress. Her concerns were disclosed during the meetings with Ms Northey on 11 January, 9 February, 26 February and 7 March 2017. The concerns were raised again in her letter of 17 February and her personal grievance letter of 11 April 2017. This letter expressly stated Mrs Macpherson was feeling stressed due to a lack of support from the RHA and provided examples. It went on to record Mrs Macpherson’s concerns that she was being undermined in her role, that she was being continually scrutinized by the RHA and that she was dealing with direct and indirect negative comments by

the RHA. It referred to the RHA's failure to address her concerns. In a further letter of 4 May 2017 her lawyer advised the RHA that she was taking stress leave and summarised the reasons why.

The RHA failed to investigate or take any steps to intervene and address the concerns raised by Mrs Macpherson

[75] In *Clear v Waikato District Health Board* the Court confirmed the obligations on an employer who receives a complaint from an employee about bullying behaviour.⁶ First, it must undertake a full and fair investigation into that complaint. Secondly, the complainant must be told the outcome of the investigation. Third, if the employer is satisfied that the alleged behaviour took place it must advise the complainant what steps the employer has taken or proposes to take to prevent a repetition of the behaviour.

[76] The RHA did not meet any of these obligations. It also failed to put processes in place to address the situation as required by the IEA. Clause 9.8 of the IEA required the RHA to "intervene as soon as possible if work place stress and fatigue is identified and follow the appropriate process to address the situation and support the employee".

[77] For completeness I record that I did consider, but reject, the RHA's submission that it had no obligation to investigate the concerns raised about Ms B. It submitted this was because firstly, Ms Northey was not the chairperson at the time the first incident with Ms B took place in December 2016 and therefore it was not her responsibility. Secondly, the committee were not informed of the second incident on 14 February 2017 and therefore was not under obligation to address it. Neither of these excuses justifies a failure to investigate. They also do not explain why the RHA did not investigate, and take steps to avoid, the other behaviour highlighted by Mrs Macpherson.

[78] I also do not accept the submission that the RHA was justified in delaying any investigation until it had received a response to its letter of 3 April 2017 asking for specific examples as to how it had failed to provide a safe workplace. During Ms Northey's evidence she said she was satisfied, during the meetings with Mrs Macpherson, that she had sufficient information. She provided details of what was discussed at these

⁶ (2008) 6 NZELR 163 at [12]

meetings and the examples of conduct which was provided by Mrs Macpherson. It does not ring true that she would therefore need to write to Ms Macpherson asking for more specifics of her allegations before she and the committee could investigate. On balance I find it more likely that Ms Northey wrote to Mrs Macpherson to cover her and the RHA's earlier failure to investigate.

[79] Added to the foregoing, the RHA:

- a. Locked Mrs Macpherson out of the office between 15 February 2017 and 26 February 2017. In doing so it failed to comply with any of the mandatory requirements set out in s103 of the Act. Its decision had significant ramifications for Mrs Macpherson, not only in terms of the additional stress it caused her during this period but also in that it prevented Mrs Macpherson from performing her duties. This ultimately led to performance issues being raised.
- b. Sought to have an investigation meeting while Mrs Macpherson was on stress leave. There was no urgency or reason why the meeting could not wait a further week until Mrs Macpherson was scheduled to return to work.
- c. Advised that the committee had "formed an initial view that your alleged behaviour may amount to serious misconduct" in circumstances where, on the evidence, a fair and reasonable employer could not have reached such a conclusion. In particular:
 - i. The misconduct alleged was a failure to follow a reasonable instruction namely the instructions provided in the RHA's letters of 16 March 2017 and 3 April 2017.
 - ii. The letter of 16 March 2017 stated "I remind you that your timesheets and your February report are overdue".
 - iii. The letter of 3 April 2017 stated:

The committee has also not had reports or information regarding your activities or achievements since the 20th of January, 2017.

To keep the RHA committee informed and up to date we require these reports or a report covering the time between the 20th January and 27th March, 2017.

iv. At the time these letters were written the evidence is:

- Mrs Macpherson had provided timesheets from when she was requested to do so in January 2017 until she was locked out.
 - The parties had agreed that Mrs Macpherson would not be required to provide timesheets for the period from when she was locked out (15 February 2017) until she was provided with a template. The template was posted by Ms Northey on Tuesday 11 April 2017, after Mrs Macpherson had raised a personal grievance. Mrs Macpherson received this on or about Friday 14 April 2017.
 - On 4 May 2017 Mrs Macpherson went on sick leave. At that time, based on the agreement reached by the parties, there was only two weeks' timesheets outstanding.
 - There was no requirement for Mrs Macpherson to provide a written monthly report. The practice was that she was required to orally report to the committee regarding tasks she had completed and provide an update on the projects she was working on. She was not in a position to do this in February due to being locked out of the office. The update was undertaken with Ms Northey on 7 March 2017.
- d. Did not respond promptly to the personal grievance raised by Mrs Macpherson. A committee meeting was convened on 14 April 2017 to discuss Mrs Macpherson's personal grievance yet no response was provided until 4 May 2017, after she went on stress leave. This letter did not attempt to resolve any of Mrs Macpherson's concerns but instead focussed on the RHA's performance concerns.
- e. Placed unreasonable expectations on Mrs Macpherson which they knew she would be unable to meet.

It was reasonably foreseeable Mrs Macpherson would resign

[80] I am satisfied that it was reasonably foreseeable that Mrs Macpherson would not be prepared to work under the prevailing conditions. Indeed, this was exactly what Mrs Macpherson's solicitor told the RHA when she wrote to it on 4 May 2017.

[81] Taking into account all of the circumstances, Mrs Macpherson's resignation was not genuine. I find Mrs Macpherson's resignation was caused by the RHA breaching its duty of good faith.

[82] For completeness, I record that I am also satisfied that Mrs Macpherson's resignation was caused by the RHA breaching its contractual and implied duties to provide a safe workplace. It is well established that there is an implied duty on an employer to take reasonable steps to avoid causing injury to an employee's physical or mental health.⁷ For the reasons already outlined I am satisfied that the RHA knew about the circumstances giving rise to the risk of harm to Mrs Macpherson. It failed to take reasonable steps to investigate, to intervene, or to address that risk. As a consequence Mrs Macpherson's mental health was affected leading to her resignation.

Issue 2: Was the dismissal justified?

[83] Having concluded that Mrs Macpherson was constructively dismissed, it is necessary to now consider whether the dismissal was justifiable.

[84] Whether a dismissal is justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of the RHA, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[85] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, the RHA sufficiently investigated the allegations, raised the concerns with Mrs Macpherson, gave Mrs Macpherson a reasonable opportunity to respond, and genuinely considered her explanation prior to dismissal.

⁷ [2002] 1 ERNZ 1 at para 83

[86] I conclude that the test of justification has not been satisfied. A fair and reasonable employer could not have dismissed Mrs Macpherson in the circumstances. I find RHA's failure was not minor and did result in Mrs Macpherson being treated unfairly. The fact that the RHA is a not for profit sports organisation does not relieve it of the duties and obligations imposed under the Act. These obligations remain constant and apply to all employers and employees alike.⁸

[87] A decision to dismiss in all the circumstances known at the time was not one that a fair and reasonable employer could have made. Mrs Macpherson was unjustifiably dismissed from her employment with the RHA and is entitled to remedies.

Issue 3: Remedies

Section 123(1)(c)(i) Compensation

[88] Mrs Macpherson claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i).

[89] Mrs Macpherson gave evidence of the effects that the dismissal had on her. She explained during the investigation meeting how Rotorua Hockey had always been a safe haven for her. Her children have grown up in the hockey community. It was this passion that led to her applying for the role of the RHA facilitator. When she started to experience difficulties with the committee members she struggled to solve these. She explained how the pressure mounted after Mr McKay resigned as she felt she had no one she could turn to for support.

[90] Mrs Macpherson said she became very sick. She suffered rashes to her body, which still exist, and she couldn't sleep. She said the events which transpired played a large toll on her and still do. She explained that she loved being at the hockey grounds but could no longer stand to go there. She said she no longer coaches, umpires or plays at the Rotorua Hockey grounds.

⁸ *Banks v Hockey Manawatu Incorporated* [2016] NZEmpC 23 at [1]

[91] Mrs Macpherson's physician, Dr Grant, gave evidence. He said prior to Mrs Macpherson commencing work with the RHA she was a well person with no known mental health history. He explained that when he saw her in early May 2017 she was different. He viewed her struggling physically and she had elements of depression. He said he spoke to her again in June and she exhibited the same symptoms.

[92] Mrs Macpherson was described by her son and her brothers as a normally staunch woman. This came across in her evidence. However, her son told me how he would wake in the early hours of the morning and see her still awake. He explained how he had never seen her cry before the issues with the RHA unfolded. Her brothers expanded on this. They told me how they had to remove Mrs Macpherson from the family home for approximately 6 weeks for her well-being. Her family had to adjust their work commitments during this time to help with the care of her children. Her brothers explained that Mrs Macpherson had still not fully recovered from the stress she had endured.

[93] I am satisfied Mrs Macpherson suffered humiliation, loss of dignity and injury to her feelings. I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$20,000. When setting the sum payable I have been mindful of the need not to keep compensatory payments artificially low. Recent cases reflect a discernible upswing in the quantum of awards for compensation under s 123(1)(c)(i).⁹

[94] RHA is ordered to make payment to Mrs Macpherson the sum of \$20,000 pursuant to s 123(1)(c)(i). Payment must be made within 28 days of the date of this determination.

Lost wages

[95] Section 123(1)(b) of the Act provides for the reimbursement by RHA of the whole or any part of wages lost by Mrs Macpherson as a result of her grievance. Section 128(2) provides that I must order RHA to pay Mrs Macpherson the lesser of a sum equal to her lost remuneration or to three months' ordinary time remuneration.

⁹ *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [112].

However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.¹⁰

[96] Mrs Macpherson's closing submissions claim reimbursement for lost wages for a period of 11 weeks. Details of the calculations made and other evidence is set out therein. However, this evidence comes from the bar and not from Mrs Macpherson. It would not accord with the principals of natural justice for me to accept this evidence without giving the RHA an opportunity to test this evidence.

[97] For this reason, if the parties are unable to resolve the issue of wages between themselves, I intend to hold another investigation meeting for the purposes of testing Mrs Macpherson's evidence.

[98] Mrs Macpherson is directed to advise the Authority, within 14 days of the date of issue of the written determination in this matter, whether the quantum of lost wages has been resolved. If it has not then the parties are to advise the Authority in order that a telephone conference can be arranged to organise a date for another investigation. It is likely that an investigation meeting date in March 2018 will be able to be accommodated.

Issue four: Contribution

[99] 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. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.¹¹

[100] I am satisfied that Mrs Macpherson did not contribute to her personal grievance and for this reason I make no deduction to the remedies I have awarded.

Costs

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

¹⁰ S 128(3).

¹¹ s 124.

[102] If they are not able to do so and an Authority determination on costs is needed Mrs Macpherson may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the RHA will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[103] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹²

Jenni-Maree Trotman

Member of the Employment Relations Authority

¹² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].