IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 233
5358461

	BETWEEN	KEN MCNAUGHT Applicant
	A N D	PRIME RANGE MEATS LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Damien Pine, Counsel for Applicant Rex Chapman, Counsel for Respondent
Investigation meeting:	11 and 12 September 2012 at Invercargill
Submissions Received	19 September 2012, from Applicant 21 September 2012, from Respondent
Date of Determination:	26 October 2012

DETERMINATION OF THE AUTHORITY

A. Prime Range Meats Ltd did not constructively dismiss Ken McNaught.

B. Prime Range Meats Ltd unjustifiably disadvantaged Ken McNaught in his employment by wrongly including historical matters in the written warning.

C. Prime Range Meats Ltd is to pay Ken McNaught $1,250.00 compensation.

Employment relationship problem

[1] Ken McNaught was employed at Prime Range Meats Limited (Prime) as a labourer. He claims that Prime's decision to transfer him from the Tripe Room to the

Chillers amounted to constructive dismissal. Alternatively, he claims that he was unjustifiably disadvantaged in his employment by Prime's decision to relocate him, and by issuing him a warning that included reference to historic matters and disparity of treatment between him and Lyall Spencer.

[2] The remedies he seeks are:

- An apology from Prime;
- Reimbursement of 2 weeks lost wages until he began his new job;
- Compensation of $5,000.00 for humiliation, loss of dignity and injury to feelings;
- Legal costs of $3,000.00 plus GST.

[3] Prime considers that it was justified in its actions which did not disadvantage Mr McNaught and that he abandoned his employment.

[4] The issues for investigation and determination by the Authority are:

a. Whether one or more of Mr McNaught's conditions of employment were affected to his disadvantage by an unjustifiable action by Prime;

b. This includes an inquiry into whether Prime's actions were what a fair and reasonable employer could have done in all the circumstances at the time; and

c. Whether Mr McNaught was constructively dismissed;

d. If Mr McNaught's claims are proved what remedies he should be awarded; and

e. Whether any remedies awarded to him should be reduced for blameworthy conduct by him contributing to the situation giving rise to his grievance.

Background facts

[5] On 12 February 2008 Mr McNaught was employed at Prime as a labourer, or *roustabout* to use his term for his role. He initially worked in the Chillers.

[6] Mr McNaught told me that when the Tripe Room was being set up and he was first assigned to it he resisted the move. He requested and received additional hours of work in the Chillers. However, he worked in the Tripe Room primarily from the time it was set up in late 2009 until his special leave in May 2011.

[7] Three staff usually worked in the Tripe Room. Lyall Spencer worked there. On 10 May 2011 Mr McNaught and Mr Spencer were involved in an altercation. There was a verbal argument between them and then a physical altercation.

[8] Mr Spencer made a complaint about Mr McNaught's behaviour. Prime started an investigation into the incident.

[9] On 10 May 2011 Mr McNaught met with Trevor Hourston, the Production Manager, Shane Jones, the Foreman, Tim Garrett, the Slaughterboard Supervisor and Terry Cope, the Leading Hand. Mr McNaught gave his explanation and view of the incident between him and Mr Spencer. Mr McNaught was told that the management of Prime viewed the incident as severe. The meeting was adjourned to consider Mr McNaught's explanations.

[10] On 10 May 2011 the same members of Prime's management team also met with Mr Spencer to hear his view of the incidents. The notes of that meeting record *Lyall said he was sick of the constant personal attacks and will refuse to work with him again*.

[11] On 11 May 2011 Mr McNaught met again with Mr Hourston, Mr Jones, Mr Garrett and Mr Cope. Mr Hourston told Mr McNaught that aggression or violence in the workplace was unacceptable and that he could suspend Mr McNaught but he would not do so. Mr McNaught offered to resign. However, Prime did not accept his resignation. Instead Mr Hourston opted to issue Mr McNaught with a final written warning. Mr McNaught accepted that that a final written warning was an appropriate outcome. Mr McNaught was told that *we would adjourn meeting with him and get him back later to discuss the issuing of the final warning*.

[12] However, there was no further meeting and he did not receive the written warning before he finished work on 17 May 2011; the day before he went to Australia for a period of two months pre-arranged special unpaid leave. I note that the warning letter later received is dated 12 May 2011. However, Mr Hourston said that would

have been the date he drafted it but he did not get it back until sometime later when he signed it.

[13] Also on 11 May 2011 Prime held a further meeting with Mr Spencer. Mr Spencer was told that Prime considered that both he and Mr McNaught were in the wrong. Prime explained to Mr Spencer that it considered that the incidents were very severe. Prime told Mr Spencer it did not accept his report of what had happened. The meeting was adjourned.

[14] The investigation also consisted of seeking statements from two witnesses, Kathleen Taukiri and Marie Shepherd. Ms Shepherd was unable to assist because she did not see any physical altercation, although she said she heard Mr Spencer and Mr McNaught *arguing at the smoko room.* Ms Taukiri reported *when Ken was heading back to the tripe room Lyall came running at him and pushed up against him. After a small altercation they went toward the tripe room …* [she] *could hear them arguing inside the tripe room.*

[15] The notes on the interviews with Ms Taukiri and Ms Shepherd are not dated but are located between the notes on the 11 May 2011 meetings and the *Continuation of meeting 19th May 2011* with Mr Spencer. The notes on that meeting record *Trevor read a witness statement which Lyall disagreed with*.

[16] In the immediate aftermath of the altercation between Mr McNaught and Mr Spencer on 10 May, Mr Spencer was removed from his duties in the Tripe Room and Mr McNaught returned to work in the Tripe Room. In the period between 10 May and 17 May 2011 Mr McNaught worked in the Tripe Room while Mr Spencer did not.

[17] On 19 May 2011, the day after Mr McNaught went to Australia, a further disciplinary meeting was held with Mr Spencer. Prime was represented at the meeting by Mr Hourston, Mr Garrett and Mr Cope. The Incident Report recorded by Mr Garrett as including minutes of that meeting concludes with the following:

> *Lyall asked when enough would be enough when it came to disciplinary action toward Ken.*
>
> *Trevor explained that we could only deal with matter at hand.*
>
> *Trevor asked Lyall if he had anything further to say over the matter.*

> *Lyall said he just wanted it to be done with and to give him a warning if this was going to happen.*
>
> *Trevor explained we would be adjourning meeting again to process all information and would get him back for the disciplinary part of the proceedings.*
>
> *Meeting adjourned.*

[18] I understand that Mr Spencer was given a written warning but if there was a further meeting or meetings with him no minutes are available. At some stage after Mr McNaught left work on 17 May 2011 Mr Spencer was put back on duties in the Tripe Room where he generally remained working while Mr McNaught was away.

[19] On 18 July 2011 Mr McNaught was back in Invercargill and telephoned Mr Hourston. He and Mr Hourston have different recollections of what was said but it was common ground that they agreed that Mr McNaught was to report for work again the following day on 19 July 2011 at 7 a.m. Mr McNaught said that Mr Hourston did not tell him he wanted to see him before he started work. Mr Hourston said that he asked Mr McNaught to come and see him in his office before he started work.

[20] On the evening of 18 July Mr Cope, the leading hand in the Chillers, and another Prime employee called Pete came to Mr McNaught's house to collect goods he brought back from Australia for them. Neither of them told Mr McNaught he would not be working in the Tripe Room the next day. Mr Hourston's evidence was that he approached Mr Cope on 18 July 2011 to ask if he needed labour in the Chillers and when he said that he did Mr Houston told him Mr McNaught would be sent to work there. Mr Cope's memory was that he was not told until the morning of 19 July 2011 that Mr McNaught was coming to work in the Chillers.

[21] Mr McNaught reported for work at 7 a.m. at the Tripe Room on 19 July 2011. He was informed that he needed to meet with Mr Hourston. At about 7.30 a.m. they had a meeting in his office. Mr Hourston handed Mr McNaught a letter entitled Notice of Final Warning, which was dated 12 May 2011. It read:

> *This is notice of a Final Written Warning for gross misconduct in the workplace on Tuesday 10th May 2011.*
>
> *Investigations following a complaint reveal that your behaviour towards another employee was verbally abusive and physically threatening and cannot be tolerated in the workplace.*

> *Further investigations reveal that you have demonstrated a history of harassment and intimidating behaviour towards other employees and this must cease.*
>
> *Any further incidents of misconduct could result in dismissal.*

The letter was signed by Mr Hourston in his capacity as Production Manager.

[22] It is common ground that Mr Hourston told Mr McNaught that he was going to be working in the Chillers. However, at this stage Mr Hourston and Mr McNaught's evidence is at odds. Mr McNaught said that Mr Hourston told him that his move to the Chillers was because of the incident between him and Lyall in May 2011. Mr Hourston denies telling him that.

[23] Mr McNaught said that Mr Hourston left him in his office for a while telling him he had to go and find Neil Anderson, who Mr McNaught understood to be the boning room supervisor. On his return Mr Hourston told him he was going to be working for Neil Anderson. Mr McNaught believed that meant he would be working in the boning room. He had not worked there before, although it is in the Chillers.

[24] They both agree that Mr McNaught asked for some time to consider the fact that he was being asked to work in the Chillers rather than the Tripe Room. Mr McNaught told me that he understood Mr Hourston to have said that if he didn't accept the work in the Chillers and turn up for work at 7 a.m. the following day to work in the Chillers then Prime could offer him no more work.

[25] Mr Hourston denied telling Mr McNaught that if he didn't take the Chiller job there was no work for him. Mr Hourston's evidence was that Mr McNaught told him that he would take the rest of the day off to think about it and would return at 7 a.m. the next day for work.

[26] Mr McNaught failed to attend work on 20 July 2011 and subsequently. He considers that he had been constructively dismissed by Prime allocating him to duties in the Chillers instead of the Tripe Room. He considers that in moving him from the Tripe Room Prime breached its implied duty of trust and confidence, in particular its duty to be fair and reasonable.

Determination

Was the allocation of Mr McNaught to work in the Chillers an action that was unjustified and did it affect his employment to his disadvantage?

[27] To be successful in a claim for unjustifiable disadvantage, pursuant to s.103(1)(b) of the Act, an employee must show:

> *That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment) is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.*

[28] There are two limbs to the test for unjustifiable disadvantage as set out in s.103(1)(b): firstly there must be an unjustifiable action by the employer, and secondly that action must have caused disadvantage to the employee.

[29] Clause 7 of the most recent version of Mr McNaught's Individual Employment Agreement (IEA), dated 4 November 2009, states:

> *From time to time the Employee may be required to change duties to meet the operational requirement of the Employer.*

[30] Clause 5.1 of the IEA states:

> *The hours of work are to consist (sic) with the factory's operations. This is influenced by seasonal fluctuations and daily work schedules.*

I assume that this means the hours of work would be *consistent* with the factory's operations.

[31] Section 103A of the Employment Relations Act 2000 (the Act) sets out the tests by which I need to decide whether an action affecting the employee is justifiable:

> *(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
>
> (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[32] In *Angus and McKean v Ports of Auckland Ltd*[1] the Full Court of the Employment Court set out the effect of the then newly enacted section 103A test:

> *The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in all the circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified. So to use the present tense of "would" and "could", it is no longer what a fair and reasonable employer will do in all the circumstances but what can be done.*

[33] In applying the justification test, the Authority must consider the four tests of procedural standards set out in section 103A(3) of the Act, which include whether the employer:

- Sufficiently investigated the allegations, having regard to available resources;
- Raised its concerns with the employee before dismissal;
- Gave the employee a reasonable opportunity to respond to the employer's concerns before dismissal or taking action; and
- Genuinely considered the employee's explanation before dismissal or taking action against the employee

[34] Mr McNaught understood that following the two meetings on 10 May 2011 and 11 May 2011 the disciplinary process was completed. He was told that he would be getting a final written warning for the incident. He accepted that. He had the impression that *that was that*. He remembered Trevor Hourston using those words or saying *it was finished* and that both he and Mr Spencer were getting a written warning.

[35] Mr McNaught also said that Mr Hourston told him on 11 May 2011 at the second meeting that when he came back from his leave he would need to be back to *do the calves*. From that he understood that he would be working back in the Tripe Room.

[1] [2011] NZEmpCa 160, at paragraph 23.

Did Prime undertake any unjustified action by including in the final warning historic matters that had not been previously raised with Mr McNaught?

[36] The Applicant submitted that a disadvantage need not be a material one. The wrongful issuing of a warning has been held to constitute a disadvantage in *Alliance Freezing Co (Southland) Ltd v New Zealand Amalgamated Engineering Workers Union*[2] because it renders an employee's employment less secure.

[37] Mr McNaught was handed the written warning which included the historical reference to incidents other than that on 10 May 2011 at the same time as he was told that he was going to work in the Chillers and not the Tripe Room. It is understandable that he believed that the May 2011 incident had a bearing on the decision to put him to work in the Chillers, rather than the Tripe Room.

[38] The evidence on the reasons why Mr McNaught was allocated duties in the Chillers is varied. Mr Forde said that the decision was based on a range of factors:

- *he had previously worked in the chillers and we had a need for labour in that area*
- *Ken had a history of poor relationships with fellow staff and supervision in the Chillers was more effective*
- *Employees in the Tripe Room worked with minimal supervision*
- *Productivity in the Tripe Room had increased markedly since Ken left and staff were working well*
- *There was no need for additional labour in the Tripe Room when Ken returned and no one was added to the Department after Ken returned.*

[39] Mr Hourston said his decision not to put Mr McNaught back in the Tripe Room was based on two factors. The first was that he did not want to *disrupt the smooth running of the Tripe Room*. The second factor was that he did not want to put Mr McNaught and Mr Spencer together without supervision. He made the decision to put Mr McNaught to work in the Chillers on 18 July 2011; the day before Mr McNaught came back. He made his decision in consultation with Mr Forde.

[40] I accept that Prime was entitled, from a purely operational point of view, to allocate labour to different parts of the plant as needed and that Mr McNaught's contract supports that. However, there were clearly other factors taken into account including the reasonable consideration that Mr Spencer and Mr McNaught should not

[2] [1990] 1 NZLR 533

work together again at close quarters without supervision. In addition, Mr Forde at least, took into consideration Mr McNaught's *history of poor relationships with other staff*.

[41] That echoes the paragraph in the warning letter that Mr McNaught had *a history of harassment and intimidating behaviour towards other employees and this must cease*.

[42] Mr McNaught did not give evidence disputing that there had been other incidents between him and other staff. However, it appears that while Mr Forde may have spoken to Mr McNaught about an incident with Peter Colvin in 2008 no formal warning was given either verbally or in writing. That is, I understand it is not recorded on Mr McNaught's personal file.

[43] A verbal warning is recorded as having been given on 10 March 2011 partly in relation to Mr McNaught's *abusive attitude to Wayne Murchland*. Mr McNaught was told by Mr Hourston that his *abusive attitude was totally unacceptable.* That verbal warning also included a warning that the clean-up standard of the Tripe Room needed to improve.

[44] Mr McNaught was not made aware at either of the meetings on 10 or 11 May 2011 that earlier incidents, not just the one between him and Mr Spencer, were being considered by Prime and would be contained in a final written warning. Therefore, Mr McNaught accepted that he would receive a final written warning for the incident between him and Mr Spencer alone. The fact that he did not receive the letter before he went on leave meant he did not know that earlier incidents would form part of the warning.

[45] In including the historic incidents in the warning letter Prime failed to meet two of the standards of procedural fairness set out in section 103A(3). It failed to raise its concerns about Mr McNaught's prior history with him. Therefore, it failed to give him a reasonable opportunity to respond to Prime's concerns about his prior history. I do not consider that those defects were minor and consider that they resulted in Mr McNaught being treated unfairly in that it rendered his employment less secure in the future.

Did Prime need to consult with Mr McNaught before it made the decision that he should work in the Chillers?

[46] I do not accept the applicant's submission that as a general rule Prime must consult with its labourers before allocating them to duties around the plant as operationally necessary. There was sufficient evidence from Mr Forde, Mr Hourston and Mr Cope that the need for labour in different parts of the plant varies from day to day and also within a work day. It is not practical and is not a breach of Prime's duty to consult every employed labourer before it makes a decision to reassign him or her to other duties.

Could a fair and reasonable employer have assigned Mr McNaught to work in the Chillers in all the circumstances?

[47] Mr McNaught submitted that Prime's reasons for not putting him back in the Tripe Room were partly performance related because of Mr Forde's evidence about the productivity in the Tripe Room having *increased markedly* in Mr McNaught's absence. Mr McNaught submitted that Prime needed to consult with him and give him an opportunity to improve instead of transferring his duties.

[48] However, I do not accept that in May 2011 Prime had real concerns about Mr McNaught's performance in the Tripe Room. Mr Forde and Mr Hourston impressed me as being fairly robust managers. If Prime truly had concerns about Mr McNaught's performance in the Tripe Room before his leave I am certain that it would have moved him to another part of the plant before the incident with Mr Spencer. I have been assured that there is always a need for labour in the Chillers and no doubt Prime could have assigned him there earlier if they were unhappy with how the Tripe Room operated with Mr McNaught in it.

[49] Mr McNaught's absence for two months special leave from the Tripe Room may have changed the operational dynamics and demand for labour in the Tripe Room, or it may have been that the running of the Room would have improved even if Mr McNaught had not gone on leave. It has not been helpful for Prime to include in these proceedings allegations about Mr McNaught's work in the Tripe Room which were not raised at the time of his employment and which lack any verifiable evidence that improvement in performance was solely due to Mr McNaught's absence.

[50] I accept that Mr Hourston consulted Mr Forde about his decision to assign Mr McNaught work in the Chillers on his return. Mr Forde may have had in his mind

earlier incidents with Mr McNaught as part of his decision to agree with Mr Hourston's decision. However, I find that the real reasons for his assignment to the Chillers were the two factors outlined by Mr Hourston. I consider the fact that there had been a physical altercation between Mr McNaught and Mr Spencer and a desire not to have them working together again unsupervised in close quarters was a relevant operational consideration.

[51] Prime considered the Tripe Room was running well. It had a complete complement of staff. Prime did not want Mr Spencer and Mr McNaught to work together with minimal supervision. Those were reasonable considerations. Prime was entitled under Mr McNaught's contract terms to reassign him to areas of need within the plant. Prime was not bound to reassign Mr McNaught to the Tripe Room.

[52] In all the circumstances that applied at the time, including what I accept as operational considerations, I consider that a fair and reasonable employer could have made the decision to allocate Mr McNaught to work in the Chillers.

Was Mr McNaught actually disadvantaged?

[53] In case I am wrong that the assignment to work in the Chillers was justifiable I consider whether the move would have actually disadvantaged Mr McNaught.

[54] Any disadvantage from the actual allocation of Mr McNaught to duties in the Chillers is not easy to substantiate. Mr McNaught feared that he would get fewer hours of work in the Chillers and that his workmates would see his assignment to the Chillers as a demotion and assume that he was more to blame than Mr Spencer for the 10 May 2011 incident. I note that he did not raise these concerns with Mr Hourston at the time he was told of the allocation of duties. Mr McNaught also said that if he had known before his leave that he was coming back to work in the Chillers he was *about 60% sure* [he] *would have stayed on with his son for another 3-4 months.*

[55] The Tripe Room operation is dependant on the killing floor alone. Mr Forde and Mr Hourston said that there is work in the Chillers both before and after the killing is done and the Chillers also service the boning room. At the relevant time only sheep and not beef were processed in the Tripe Room. Also at that time there was cleaning and maintenance being done in the Chillers under Mr Anderson's supervision and Mr Hourston intended Mr McNaught to assist with that. Mr Forde and Mr Hourston both said that at the time it was likely that Mr McNaught would

have had more hours of work available to him in the Chillers. Mr Forde said that it would be hard to predict the number of hours work that would have been available but that there would not have been fewer hours than were available in the Tripe Room. I accept that evidence.

[56] At the hearing Mr McNaught said that he *would have been a lot happier with that* [being involved in maintenance in the Chillers] *and it would've looked like a promotion* and he *wouldn't have lost mana in front of my workmates*.

[57] The applicant submitted that the Employment Court case of *Walls v Commissioner of Police*[3] is able to be applied to Mr McNaught's situation to conclude that the transfer of duties itself amounted to a material disadvantage. I do not agree. The process followed in that case was clearly because of Constable Walls' misconduct and not for any objective administrative requirements and was found by the Chief Judge to be an unjustifiable disadvantage.

[58] The difference between being a police recruit trainer and a constable on general operational duties was significant. The police recruit training position had obvious benefits over the operational position, not least of which was the hours which were worked during Monday to Friday and did not include evening or night work. However, I am satisfied that Mr McNaught's pay rate, general hours of work and availability of hours in the Chillers would not have been less than in the Tripe Room and the available hours may have been greater.

[59] Mr McNaught's evidence was that he had the value of the clean up job in the Tripe Room at $30.00 per day and that he would not have that in the Chillers which would be a disadvantage. However, Mr McNaught also gave evidence that before he went on leave he had been paying another employee to do the Tripe Room clean up and was likely to have continued to do that. I do not consider that the loss of the clean up in the Tripe Room was a real disadvantage to him because by his own evidence he was not likely to have continued undertaking the clean up even if he had gone back to work in the Tripe Room.

[60] Mr Hourston's evidence was that his discussion with Mr McNaught on 19 July 2011 was *very short* once he told Mr McNaught he was going to work in the Chillers

[3] [1998] 1 ERNZ 224

that day. Mr McNaught then said he was not sure he wanted to do that and wanted to go home and think about it. Mr McNaught then left.

[61] Mr McNaught did not ask any questions of Mr Hourston about what duties he was being assigned to or how many hours would be available to him. He did not raise as a concern the issue of others thinking that he was more at fault than Mr Spencer for the May 2011 altercation. Mr McNaught's view expressed at the investigation meeting was that if he worked on maintenance in the Chillers it would have been like a promotion and therefore not to his disadvantage. I consider that Mr McNaught acted too hastily in rejecting the proposed move to the Chillers without checking exactly what he would be doing.

[62] Mr McNaught's proposed transfer from duties in the Tripe Room to duties in the Chillers did not materially or in any other way disadvantage Mr McNaught. However, I consider that the inclusion of the consideration of historical matters in the warning letter amounted to a disadvantage to Mr McNaught's employment in that it rendered his employment less secure in the event of any other incident between him and another staff member.

Was there any disparity of treatment in the way Mr Spencer and Mr McNaught were treated?

[63] The legal test in assessing whether an employer has subjected an employee to disparity of treatment so as to render a dismissal unjustified is set out in the Court of Appeal case of *Chief Executive Officer v Buchanan (No 2)*[4] The Authority must consider whether:

(a) There was a disparity of treatment;

(b) If so, whether there is an adequate explanation for the disparity; and

(c) If not, is the dismissal justified despite the existence of disparity?

[64] It is sensible to apply the same tests to a question of whether there was disparity of treatment so as to render an employer's action unjustified.

[65] I do not consider that Mr McNaught was treated with any disparity in comparison to Mr Spencer due to their May altercation. Mr Spencer was the one

[4] [2005] ERNZ 767

immediately transferred out of the Tripe Room. Had it not been for Mr McNaught's absence of two months things may have turned out differently. However, I do not find that Mr Hourston told Mr McNaught he would retain his duties in the Tripe Room on his return from leave. Mr McNaught assumed that, partly because Mr Spencer and not him, had initially been moved from the Tripe Room.

[66] Even if I am wrong and there was disparity of treatment I consider that there was an adequate explanation for the disparity, in that Prime had a genuine reason to keep Mr Spencer and Mr McNaught working apart and also that there was no need at the time Mr McNaught returned from leave for additional labour in the Tripe Room.

Was Mr McNaught constructively dismissed?

[67] 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. In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*[5] the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

> *(i) An employer gives an employee a choice between resigning or being dismissed;*
>
> *(ii) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;*
>
> *(iii) A breach of duty by the employer causes an employee to resign.*

[68] The applicant submits that Prime's conduct falls into the third category.

[69] In *Wellington etc Clerical Workers etc IUOW v Greenwich*[6] the Court stated that for a dismissal to be constructive:

> *It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct. causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.*

[5] [1985] 2 NZLR 372
[6] (1983) ERNZ Sel Cas 95; [1983] ACJ 965

[70] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Incorporated*[7] regarding the correct approach to constructive dismissal the Court of Appeal said:

> *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*[8].

[71] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- First, has there been a breach of duty on the part of the employer which has caused the resignation;

- 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.

Was there a breach of Prime's duty as an employer?

[72] Having found that Prime was entitled to assign Mr McNaught to duties in the Chillers I confirm that I do not consider that in doing so Prime breached its duty as an employer. However, I do consider that the inclusion of historical matters in the final warning letter was a breach of Prime's duty to act fairly and reasonably towards Mr McNaught.

Was Prime's breach sufficiently serious to make it reasonably foreseeable that there was a substantial risk of Mr McNaught resigning?

[73] I do not find that Prime's breach of its duty to treat Mr McNaught fairly by including the earlier matters in the warning letter was such a serious breach that it was reasonably foreseeable to Prime that there was a substantial risk of Mr McNaught

[7] [1994] 1 ERNZ 168
[8] Ibid at p 172

resigning. It is possible that the issue could have been addressed adequately by Mr McNaught raising the issue while he was still employed.

[74] It follows that I do not consider that Mr McNaught was constructively dismissed.

Remedies

[75] I am unable to order Prime to apologise to Mr McNaught.

[76] Since I have not found that Mr McNaught was unjustifiably dismissed I do not award the lost wages claimed or compensation arising out of constructive dismissal. However, I do consider that Mr McNaught has a personal grievance for unjustified disadvantage.

[77] Mr McNaught suffered some humiliation, loss of dignity and hurt feelings because of the content of the written warning which was to his disadvantage but the evidence supports that his real concern was the allocation of duties in the Chillers. Because I have found that Prime was justified in that action I do not award any compensation for that. Instead, I consider that Mr McNaught is entitled to $1,250.00 compensation.

[78] However, I need to also consider the extent to which Mr McNaught's behaviour contributed towards the situation that gave rise to the personal grievance. Mr McNaught agreed that he had acted inappropriately with Mr Spencer and accepted that a final written warning was appropriate. However, I do not consider that to be the situation that gave rise to the personal grievance. Rather, the situation that gave rise to the personal grievance was Prime's decision to include in the written warning matters that it had not raised with Mr McNaught and had not given him any opportunity to respond to. That was a clear breach of long established standards of fairness and natural justice. I do not consider that Mr McNaught contributed to that breach at all. Therefore, Prime must pay Mr McNaught $1,250.00 compensation.

Costs

[79] Costs are reserved. The parties are invited to agree on the matter. If they are unable to do so the party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other

party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply. No application for costs will be considered outside this time frame without prior leave.

Christine Hickey
Member of the Employment Relations Authority