

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 175
5370320

BETWEEN

REUBEN MILLER
Applicant

A N D

SPRINGFREE NEW ZEALAND
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Glenn Cooper and Sam Hutchings, Counsel for Applicant
Paul Cowey and Christy Corlett, Counsel for Respondent

Investigation Meeting: 9 and 10 April 2013 in Christchurch

Submissions Received: 15 and 29 April 2013 from Applicant
22 April 2013 from Respondent

Date of Determination: 28 August 2013

DETERMINATION OF THE AUTHORITY

- A. Mr Miller was unjustifiably disadvantaged in his employment when Springfree failed to consult him on a change to his role.**
- B. Springfree is ordered to pay to Reuben Miller the sum of \$5000 compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000 without deduction.**
- C. The other claims of unjustified action causing disadvantage are dismissed.**
- D. Mr Miller was not unjustifiably constructively dismissed.**

- E. The Authority did not find the parties entered into a binding unconditioned agreement to pay to Mr Miller his annual hardship allowance and end of term contract bonus.**
- F. The Authority has not found the hardship allowance otherwise payable.**
- G. The claims for penalty were commenced outside of the 12 month period.**
- H. The issue of costs are reserved and a timetable set for an exchange of submissions.**

Employment relationship problem

[1] The Authority found that the applicant was jointly employed by Springfree New Zealand Limited (Springfree) and Dongguan Sheng Hui Fitness Equipment Co. Limited (DGSH) in its preliminary determination; [2012] NZERA Christchurch 204. It found the Authority did not have jurisdiction to hear a claim against DGSH, a Chinese registered company and the statement of problem was amended to reflect the claim was only against Springfree.

[2] Reuben Miller has several employment relationship problems that he wishes the Authority to resolve. The first is that he says that he was unjustifiably disadvantaged in his employment. The second is that Mr Miller says his resignation tendered on 9 November 2011 was in the nature of an unjustified constructive dismissal. He says that there were breaches of duty on the part of Springfree and further that Springfree's course of conduct was designed to bring about his resignation and that he suffered stress and depression as a direct consequence of the actions of Springfree. The effective date of termination of the employment relationship with Springfree was 31 December 2011.

[3] Thirdly Mr Miller says that on 15 November 2011 after he had given notice of his resignation an agreement was reached with Springfree to pro rata his end of term bonus and hardship allowance to 31 December 2011 on the condition that he complete a handover of his function to Hamish McIntyre, the engineering manager of Springfree. He says that he completed the handover but the payments for his end of term bonus and hardship allowance were never made in breach of that agreement.

Alternatively, Mr Miller says that because of the conduct of Springfree he was forced to resign and unable to work to achieve his end of term bonus, hardship allowance and annual performance bonuses. In either event Mr Miller says that he is owed his hardship allowance as it was to cover student loan and other centric expenses.

[4] The fourth employment relationship problem is that Mr Miller seeks penalties of \$5000 for Springfree failing to provide a written individual employment agreement and \$5000 for failing to keep proper wage and time records.

[5] Springfree says that the disadvantage claims are either time barred, show no disadvantage or that its actions were justified. Springfree does not accept that the acts complained of constitute breaches of duty and says that there is no causal connection between the acts and the resignation. Springfree says that the bonuses claimed were agreed to be only payable to Mr Miller on signing a written agreement with respect to various confidentiality and restrictive covenants. It says that he failed to do that and is therefore not entitled to payment. It says both penalty actions were commenced outside of the 12 month period.

[6] Mr Miller says that he would like the problem resolved in the following way:

- (a) compensation in the sum of \$25,000;
- (b) a penalty of \$5,000 for failing to provide an individual employment agreement;
- (c) a penalty of \$5,000 for failing to keep proper wage and leave records;
- (d) payment of amounts due to Mr Miller as agreed or, alternatively, in terms of s 123(1)(c)(ii) of the Employment Relations Act 2000 as below:
 - i. annual hardship allowance on a pro rata basis as at 31 December 2011 of NZ\$3,534.25 and
 - ii. end of term of contract bonus on a pro rata basis as at 31 December 2011 of NZ\$25,489.36;

- (e) payment of the applicant's annual performance bonus on a pro rata basis as at 31 December 2011 of NZ\$6,287.67;
- (f) a claim in final submissions for interest on the amounts due and owing as at 31 December 2011; and
- (g) costs.

Holiday pay was also claimed but that matter was able to be settled on the first day of the investigation meeting between the parties and I do not need to address it further. For completeness I do not award any interest in these circumstances.

Issues

[7] The issues for the Authority to determine are as follows:

- (a) Were personal grievances for the alleged unjustified actions raised within 90 days from when the action alleged to amount to a personal grievance occurred or came to the notice of Mr Miller?
- (b) If they were raised within the statutory timeframe then was Mr Miller's employment or one or more conditions of his employer affected to his disadvantage by unjustified actions of Springfree – the actions complained of occurred after the new test of justification in s103A of the Employment Relations Act 2000 was substituted on 1 April 2011.
- (c) Were there breaches of duty, or a course of conduct embarked on with the dominant and deliberate purpose of coercing Mr Miller to resign?
- (d) If there were breaches of duty then were they of sufficient seriousness to make it reasonably foreseeable that Mr Miller would resign.
- (e) If Mr Miller was found to have been unjustifiably constructively dismissed or unjustified actions causing disadvantage are established what remedies is he entitled to.
- (f) Was there a binding unconditional agreement reached after Mr Miller tendered his resignation that Mr Miller would be paid his annual hardship allowance on a pro rata basis and his end of term contract bonus and performance bonus.

- (g) Should there be a penalty awarded for failing to provide an employment agreement and keep wage and time records including whether the actions for the recovery of penalties were commenced within 12 months of when the action first became known; or from when the cause of action should reasonably have become known to Mr Miller.

Background

[8] Mr Miller was involved since 2004 with Springfree Trampolines as an engineer although, as set out in the preliminary determination, there was some confusion about the entity which employed or engaged Mr Miller between 2004 and 2008.

[9] The confusion ended after Springfree was incorporated on 6 May 2008 and Mr Miller then became an employee of that company. Ralph Douglas Hill (Douglas) is a director of both Springfree and DGSH. From 2004 Mr Miller made regular trips to China from New Zealand to provide engineering services for Springfree Trampolines. From 2008 he undertook such visits on behalf of Springfree.

[10] In late April 2009, Mr Miller relocated to China and went to work as an engineer at DGSH, a wholly owned subsidiary of Springfree. Mr Miller reported to Mr Hill who is New Zealand based and also to Steven Holmes who is based in Canada and a first cousin of Mr Hill. Mr Holmes is the President and Chief Executive Officer of Canadian company, Springfree Trampolines Inc (SFT).

[11] Mr Miller resigned from both Springfree and DGSH on 9 November 2011 with an effective termination date of 31 December 2011.

Alleged unjustified actions causing disadvantage

Failure to provide an employment agreement

[12] Section 114 of the Employment Relations Act 2000 requires that every employee who wishes to raise a personal grievance must raise that with the employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee. In this case there was no suggestion that Springfree consented to any late submission and

there was no application for leave to raise any grievance outside of the statutory time frame.

[13] The requirements for raising a personal grievance are set out in *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36]:

It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates. [emphasis added]

[14] I find, contrary to Mr Cooper's submission, that the omission to provide an employment agreement was first raised as a personal grievance in Mr Cooper's letter of 22 December 2011 to Springfree. The earlier exchanges from Mr Miller to Mr Hill relied on in Mr Cooper's submissions as raising a personal grievance do not meet the requirements in *Creedy*. Notwithstanding that, the failure to provide a written employment agreement was on-going for the duration of the employment relationship which ended on 31 December 2011. I am satisfied therefore that a personal grievance was raised within 90 days of the omission for that reason.

[15] There are several elements required for a personal grievance to be established under s 103(1)(b) of the Act. One or more conditions of employment must have been affected to the employee's disadvantage and the resulting disadvantage must have been caused by an unjustifiable action of the employer. An intended employment agreement is required to be provided under s 63(a) of the Employment Relations Act 2000 and as from 1 July 2011 a copy of the individual employment agreement or individual terms and conditions of employment are to be retained under s 64 of the Act. That said, not every omission to provide an employment agreement will result in the establishment of a personal grievance of unjustified disadvantage.

[16] For the material time the Authority is considering when Mr Miller worked at DGSB he was not without any documentation about his employment. There was an agreed written overview of Mr Miller's compensation plan for relocating and working at DGSB dated 25 February 2009. It set out the place of work, hours of work and leave details and also the quite detailed compensation package. The terms of employment were renegotiated in August 2010 by Mr Miller, Mr Hill and Mr Holmes and set out in a memorandum headed compensation and annual leave entitlement from 1 August 2010 to 31 July 2012.

[17] Mr Miller was seemingly content to rely on these documents until in or about June 2011 when the lack of a written employment agreement was raised with Mr Hill. I did not read Mr Miller's email at that time as a clear request for a written employment agreement; more a statement that he did not have *a contract* and was unsure about his sick leave. This email was sent at a time in the employment relationship when Mr Miller had become unhappy and was feeling less secure in his role. He had in fact started to look for employment elsewhere from in or about May 2011.

[18] Mr Hill responded to Mr Miller on 7 June 2011 by email and agreed there was no employment contract *in the traditional sense of the word* but said that there was a contractual arrangement (the August memorandum). Mr Hill did say amongst other matters that he would provide a standard agreement the following day to Mr Miller. This was overlooked by Mr Hill. A standard agreement was not provided by Mr Hill until Mr Miller made a request of Mr Hill for one in an email dated 13 September 2011 in which he said amongst other matters:

You mentioned a few months ago that you would send me a "standard" employment agreement after some discussion regarding confusion over sick leave. I think that a standard employment agreement would probably need to be significantly altered to cover my situation working here. I think that I need to have an Employment agreement so that we are both clear on issues such as reporting, leave, termination etc and all the current confusion can be removed. Are you able to have this drafted for me to review?

[19] Mr Hill responded to that email by email dated 23 September 2011 and attached to his email an employment agreement which was blank but was expressed to be between Springfree New Zealand Limited and an employee with the name yet to be inserted. Mr Miller emailed Mr Hill on 18 October 2011 and advised that he had

read through the agreement and noted that it was for a New Zealand based engineer. He included in his email a list of changes that he saw were required to be made. Mr Hill also raised some issues at this time including whether Mr Miller in fact wanted a structured legal contract and advised that there was a jurisdiction issue that needed to be sorted out because Mr Miller was no longer an NZ tax resident.

[20] On 27 October 2011 Mr Miller advised Mr Hill that he had taken some advice on the issue of tax and he said he was likely to still be covered by New Zealand employment law. He advised that there were many unclear issues which he thought needed to be recorded in a formal written employment agreement and asked that Mr Hill go ahead and arrange this.

[21] Mr Hill responded by email dated 28 October 2011 and suggested that Mr Miller, Mr Holmes and Mr Hill deal with this matter when they would be together in a *couple of weeks*. Mr Hill suggested that rather than go over these details by way of email that they *plan on getting the major issues worked out around the table*. Matters were then overtaken by Mr Miller's taking of sick leave and the tendering of Mr Miller's resignation on 9 November 2011.

[22] I turn now to whether Mr Miller suffered disadvantage from the absence of a written employment agreement. Mr Cooper submits that Mr Miller was disadvantaged by not having a written employment agreement because he suffered uncertainty, stress and frustration. The reason for requesting a written employment agreement was originally the issue of sick leave. Mr Miller not unreasonably wanted clarification of the process of reporting leave and sickness for the future. Mr Cooper has referred to other matters that he says Mr Miller was unclear about and therefore disadvantaged about by virtue of not having an employment agreement. I accept as a matter of common sense that if not all terms of employment are written there will be a degree of uncertainty as a result.

[23] I am not satisfied however in circumstances where there were earlier written negotiated documents that dealt with salary and leave, email discussion with some resolution about unclear terms and where the parties were working towards negotiating and agreeing a written employment agreement there was disadvantage. I do not find it unreasonable that Mr Hill wanted Mr Miller to be clear about issues relating to tax and jurisdiction given the payment structure. I will though consider justification.

[24] The test of justification in s 103A requires the Authority to objectively determine whether the failure to provide an employment agreement and how Springfree acted were what a fair and reasonable employer could have done in all the circumstances. There was some complexity around the issue of who Mr Miller was employed by. Reliance was placed by Mr Hill on Mr Miller filing an IR886 with the Inland Revenue Department when he departed for China to work for DGSB which contained a question *Are you still employed by a New Zealand employer?* Mr Miller accepted in evidence he had answered no to this question. Mr Hill has always maintained that Mr Miller was employed by DGSB from the time he went to China. Salary and leave had been negotiated and agreed with Mr Miller in 2009 and 2010 and set out in writing. At the time of renegotiating his remuneration package in August 2010 Mr Miller had not requested a full written employment agreement rather than the memorandum provided at that time. When asked for a written employment agreement Mr Hill provided a draft albeit after a delay and was prepared to negotiate matters. I find that the failure to provide a written employment agreement to Mr Miller, and how Springfree acted when asked for a written agreement was what a fair and reasonable employer could have done in all the circumstances at the time the omission occurred.

[25] I do not find that there is a personal grievance of unjustified action causing disadvantage resulting from the failure to provide a written employment agreement.

Failure to pay amounts owing to Mr Miller on time or at all

[26] I shall firstly consider each alleged action for failure to pay amounts owing to Mr Miller and determine whether a personal grievance was raised within 90 days.

[27] The first allegation is that the hardship allowance of NZ \$5,000 required to be paid on or before 15 May 2011 was not paid until 16 May 2011 and not received until 17 May 2011. I am not satisfied there was a grievance raised before Mr Cooper's 22 December 2011 letter and therefore this matter is out of time and cannot proceed. It is however clear from page 37 of the common bundle that Mr Hill asked his office administrator, Kim on Friday 13 May 2011 to make the payment into Mr Miller's account on Monday 16 May 2011. It was undesirable that payment was late but it was clearly intended that it always would be paid. Kim advised Mr Miller by email on 16 May 2011 that the payment had been processed and he should see the money the next day.

[28] The second allegation was that the salary payment expected on 1 July 2011 was not paid until 8 July 2011. I am not satisfied that a personal grievance was raised until 22 December 2011 and that grievance is out of time.

[29] The third allegation is that whilst the bonus was required to be paid on or before 30 August 2011 payment was not received until 7 September 2011. I have carefully read the pages Mr Cooper referred to as raising a grievance but I am not satisfied that this late payment was raised with as a personal grievance until 22 December 2011 which is outside of the statutory timeframe.

[30] The fourth allegation was about the length of time that Mr Cooper was required to wait until he was reimbursed for an iPad that he purchased in August 2011 and Mr Hill agreed to treat as a business expense. Payment was made on 28 October 2011 and a grievance was raised on 22 December albeit in a fairly general way about frequently failing to pay Mr Miller his salary and other amounts owing to him on time. There was an issue as to whether an invoice was provided, as requested in August 2011, to Mr Hill.

[31] Reimbursement appeared to have been overlooked by Mr Hill, or, as Mr Miller in his evidence said, Mr Hill advised him that he did not have the funds in August. The failure to reimburse was on going until October 2011 and a personal grievance was raised on 22 December 2011 within the statutory timeframe. Payment was by way of reimbursement and was not a regular contractual payment. There was no time frame for reimbursement but a term could be implied that there would be reimbursement within a reasonable time. There would have been some disadvantage to Mr Miller who was without the funds for a period of about two months but there was no evidence to support what actual loss was suffered.

[32] Not every omission or difficulty in an employment relationship, even if it causes some disadvantage, amounts to an unjustified action. In this case payment was either overlooked, or as Mr Miller believed, there was an issue with payment immediately. A fair and reasonable employer in either of those circumstances could, and indeed should have, when reminded about the fact payment had not been made, attended to it. There was no issue about Mr Hill renegeing on his advice that he would pay. Mr Miller did not raise a complaint between first requesting payment in August 2011 and then sending a reminder email in October 2011. It goes too far I find to say that the omission to reimburse Mr Miller from August 2011 until Mr Hill was

reminded again on 26 October 2011 is an unjustified action. I do not find a grievance is made out for the omission to immediately reimburse Mr Miller for the iPad.

[33] I will deal with the issue about payment of the hardship allowance and end of contract bonus at a later time in the determination when I come to the matter of whether a binding agreement was reached. This will include an assessment as to whether, regardless of any findings made about what was agreed, a pro rata of the hardship allowance is due and owing as given as it was to deal with centric expenses; interest on student loan.

Failure to consult on proposed change to role

[34] Mr Miller says that he was disadvantaged because he was not properly consulted about an intention to change his role by removing quality control from it. A personal grievance was raised within the statutory timeframe about this issue.

[35] Mr Hill says that it had been discussed at an early stage with Mr Miller that Mr O'Hara would become part of the management team at DGSH and one of the potential areas where he could undertake work would be in the area of quality control. Mr Hill says that the consultation about that was in all the circumstances adequate and still on-going at the time Mr Miller tendered his resignation. Mr Hill's evidence was that the quality control and assurance aspect of Mr Miller's role was about 10% of his overall workload.

[36] I accept it was more likely than not that there was some discussion about Mr O'Hara and quality control during the regular telephone conferences with the senior management team which included Mr Miller and Mr Hill and Mr Holmes. I conclude though that the discussion was likely to have been of a general nature because it is clear from the reaction by Mr Miller in his email dated 2 November 2011 that it came as a surprise to him that he was losing the quality control responsibility.

[37] The evidence supported there were three aspects of quality control at the DGSH factory. Incoming components are subject to quality control, parts are subject to quality control during the manufacture process and then there is the final quality control of the product before it leaves the factory. Mr Hill's evidence was that it was proposed that Mr O'Hara have responsibility for the final product check (FPC). In final submissions Mr Cooper disputes that was ever the intention.

[38] Mr O'Hara had gone to the DGSH factory in mid-October 2011 and talked to key people including the two senior managers, Mr Miller and Scarlett Liang about his transition to DGSH and the type of duties he could undertake. To the extent that this was argued, I do not find that discussion was consultation. Mr O'Hara reported his discussions back to Mr Hill and Mr Holmes in an email dated 20 October 2011. Relevant to current matters Mr O'Hara set out in his email that Mr Miller did not like the idea of him overseeing quality control because he was inexperienced and lacked the technical understanding to adequately review the standards and quality control procedure. He set out that Mr Miller thought it might be good if Mr O'Hara was involved with FPC to check final product going out but that manufacturing should ultimately run quality control.

[39] The next communication about the issue of quality control that I heard evidence about was an email from Mr Hill to Mr Miller dated 31 October 2011 that referred to working out a performance metrics for the management team and applying thinking as to how to modify the organisational structure with the insertion of Mr O'Hara. Mr Hill said the following in his email; *We've identified QA and purchasing as some candidate areas that he [Mr O'Hara] has some senior responsibility for and we need to advance these discussions during our time together.*

[40] Mr Miller responded to this and other matters in an email to Mr Hill and Mr Holmes dated 2 November 2011 saying that this was the first he had heard that he was losing his responsibility for quality control and he also said that other staff have already heard that he is losing quality control and it had caused him to *lose* face in the eyes of others.

[41] Mr Hill responded by email also dated 2 November 2011. Mr Hill's usual method of responding to emails from Mr Miller was to go through and respond to each paragraph. Mr Miller had indicated at an early point in his email that he was, after reading the 31 October 2011 email from Mr Hill feeling *even more disheartened and stressed than I have been previously.* Mr Hill responded to this and amongst other comments wrote that this *means we need to work hard at trying to find some kind of shared/agreed base point from which we build going forward.* He also said in relation to other people becoming aware of the quality control issues that he had only raised the potential to put quality control in *Norm's bin* with Mr Miller, Scarlett and Norm. He was not sure how it had become more widely dispersed. He explained his

thinking on the quality control and said that he did not see it as a completely *black box* where Mr Miller is not involved and quality control is in Mr O'Hara's patch. He said that there would be a very close partnership between manufacturing and product management and that *instead of manufacturing making it and then deciding if what they made was OK ... I think it is more logical to segment the responsibilities of making it and then measuring it.* Mr Hill said that implementation needed to be discussed and would be part of the discussion the week after the following week when he would be in China with Mr Holmes. That discussion never took place because by that time Mr Miller had tendered his resignation.

[42] Mr Cooper sets out the fundamental elements of consultation from the Employment Court judgment in *Simpsons Farms v Aberhart* [2006] ERNZ 825 at [62]:

- *Consultation requires more than a mere prior notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.*
- *If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their view.*
- *Sufficient precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.*
- *Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done.*
- *The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.*

[43] I have then considered Mr Cooper's submission that the decision had been made at that point that all aspects of quality control would be transferred to Mr O'Hara together with the submission for the respondent that consultation was ongoing and no decision had been made. Mr Hill accepted under cross examination that in his mind at the time he thought that this was the right decision. It is a fundamental element of consultation that a proposal must not be acted on until after consultation. It is also fundamental that an employee knows what is proposed before they can be expected to give their view.

[44] Mr Cooper submits that Mr Hill had made a firm unmovable decision that Mr O'Hara would be responsible for quality control. I find that it was quite unclear as at 2 November 2011 what decision had actually been made in terms of what aspects of quality control Mr O'Hara would pick up and what impact any removal of quality control would have on Mr Miller's role. There can only be speculation about that. Mr Miller required sufficient information about the proposal so that he could properly respond to it. Mr Hill's written response to Mr Miller's concern seemed to support that it may only be the FPC that was proposed to be transferred to Mr O'Hara because the focus for Mr Hill was post manufacture. Mr Miller though did not know exactly what was proposed and he could not properly be expected to make any comment on it until he did know.

[45] Good faith consultation had not, I find, as at 2 November 2011 taken place about removing any aspect of quality control from Mr Miller. Mr Hill in his email of 31 October 2011 had stated as a fait accompli that quality assurance was one of some candidate areas that Mr O'Hara has some senior responsibility for. There was some softening of the absoluteness of that in the 2 November 2011 email response from Mr Hill but I find that the proposed meeting face to face in China would have been an opportunity for the commencement of the process of consultation rather than a continuation of it.

[46] A fair and reasonable employer could not just advise Mr Miller as had occurred in the email of 31 October 2011 that it had made a decision to remove part of his role without proper consultation. The decision itself may be the right one to make but it is the process in this case that has been called into question. It caused Mr Miller disadvantage, not because there was an immediate change to his role; that was not going to occur for a few months but because it made him feel, as he expressed in his email of 2 November 2011, that his responsibilities were being reduced and this made him feel insecure in his role.

[47] I find that Mr Miller has established a personal grievance that he was unjustifiably disadvantaged in his employment by a failure to consult about a change to his role. I will consider remedies at a later point in the determination.

Failure to investigate Mr Miller's complaints

[48] There is a preliminary issue as to whether various allegations about the failure to investigate complaints and concerns were raised as personal grievances of unjustified actions causing disadvantage within the statutory timeframe. The documents in the common bundle that are relied on by Mr Cooper in final submissions as raising a grievance that there was a failure to investigate complaints are at pages 32, 33, 113 and 150. The first of these is a series of three emails commencing with an email from Mr Miller to Mr Hill/Mr Holmes dated 7 April 2011, the second is an email from Mr Miller tendering his resignation dated 9 November 2011 and the third is the letter raising a personal grievance with Springfree dated 22 December 2011 which states in relation to this matter *You failed to investigate allegations which our client raised about other staff members conduct, which undermined his position with [DGSH]*.

[49] I accept Mr Cowey/Ms Corlett's submission that there is no evidence to support a personal grievance causing disadvantage was raised about Mr Hill's response to, or failure to respond to, the matters in the April email within 90 days. Concerns were set out in the letter of 9 November 2011 tendering the resignation as follows – *I told you concerns about the running of the factory here and the corruption back in April/May. Nothing has been done and I can not continue to work in a factory where so much of my job is cost reduction and manufacturing efficiency, yet all around me I see corruption, dishonesty and incompetency*. I do not find a personal grievance was raised about the issues in April/May until November 2011, outside the statutory timeframe. Mr Miller says that the concerns about other employees' competence and corruption were on going and I find therefore a personal grievance was raised for the three months immediately preceding 9 November 2011.

[50] To put subsequent issues into perspective and measure the appropriateness of investigation and other steps taken I will set out relevant earlier events. In 2010 Mr Hill investigated the behaviour of the then Chinese general manager of DGSH including dishonesty concerns. These concerns were raised by Mr Miller. The general manager resigned. Mr Hill tried to deal with kickbacks with a review of the purchasing department and policies and procedures that same year.

[51] Mr Miller's proposal in 2010 that he become general manager was not accepted and Mr Miller and Ms Liang were appointed as senior managers with each having three clear areas where they had final authority. There was some overlap with

the remaining areas. Mr Miller had final authority for engineering, manufacturing and quality control and Ms Liang for finance, human resources and administration and logistics. In a memorandum dated 13 December 2010 Mr Hill set out the clear delegations and a process with six steps to work through where there was a conflict in each other's point of view.

[52] In March 2011 Mr Miller raised concerns in a lengthy email to Mr Hill about Ms Liang. He described the concerns on their own as trivial but said when they are all considered together and occur on a daily basis it affects his ability to do his job and his overall satisfaction with the situation at DGSB. He also set out a concern that he was finding the managerial sharing role with Ms Liang increasingly difficult. He set out that he felt that he did not have the support of Mr Hill and Mr Holmes in the way that Ms Liang had the support of Mr Holmes and that he believed that Ms Liang was out of her depth in managing human resources, administration and finance. He wrote that he could just continue with what he was able to and not worry about other issues but he wanted to continue to extend himself and grow and could not do that in the current environment.

[53] Mr Hill responded to this email in two ways. He wrote a general email dated 25 March 2011 (at page 14 of the common bundle) and also he wrote a response under each item complained of by Mr Miller. In the 25 March 2011 email Mr Hill reassured Mr Miller that there were no favourites and that there was the common goal to succeed in growing the business and sharing the rewards of success fairly. He said *To that end, I remain convinced that all of us, so long as we are located and operating in China, will need to operate in a tension.* Mr Hill also said that following *My sense (and I am open to being wrong) is that as a western mind, based on logic, you are continuing to assume that problems should be described, analysed and resolved via that method (which has by the way proven itself the best problem solving method). Scarlett does not work that way with her Chinese hat on. So, just because you do does not mean she either will, can, or will want to- just because the facts run through a set of logic gates suggest a specific outcome.* I have set that out because the tension between the cultural values was at the heart of responses to Mr Miller throughout the employment relationship.

[54] As at March 2011 Mr Hill had tried to improve the working relationship between Mr Miller and Ms Liang. He had provided a decision making matrix in

December 2010. In his March 2011 email Mr Miller, whilst saying there were still many difficulties in communicating with Ms Liang and setting out a considerable number of concerns, did acknowledge that aspects of communication had improved.

[55] Mr Miller said that while Mr Hill did respond to the issues in writing there was no follow through by him and no making sure that Ms Liang followed through with her tasks. Mr Hill said that he did investigate the issues and that he did *keep on Ms Liang's back about recruiting* as an example. Mr Hill said some of the issues like pest control and toilet cleanliness were as a result of the different views of Ms Liang and Mr Miller on their importance. He saw that as a cultural issue. One of the issues raised by Mr Miller was about the quality of the food provided to the employees at the factory. Mr Hill said the issue was looked into and the food budget increased. He said he never heard a single complaint, aside from that raised by Mr Miller about food. Mr Hill said that whilst Ms Liang was not perfect he regarded her as talented and competent. In short he did not accept Mr Miller's view of Ms Liang. I was satisfied that there was some investigation into the issues. That there was no corresponding action evident though was unsatisfactory to Mr Miller.

[56] Mr Miller, obviously unhappy with matters, then sent an email dated 7 April 2011 to Mr Hill and Mr Holmes – pages 30 - 33 of the bundle are relevant putting what he describes as a *potential solution* to Mr Hill and Mr Holmes. The potential solution was employee Jeff (a friend of Ms Liang's) employment contract be terminated and another employee Joel moved into purchasing. Further Mr Miller asked that his areas of responsibility be increased (including assuming responsibility for many of Ms Liang's responsibilities) and that he have access to all relevant Financials. Mr Miller said in his email that this needs to be addressed *assertively and within the next four weeks*.

[57] Mr Hill responded on 20 April 2011 as recorded in a document on page 35 of the common bundle described as *observations and instructions to Management Team*. Mr Hill said that the decision was that Jeff stayed in his position and that his performance would be reviewed. Mr Hill then confirmed that it was not the intention of him or Mr Holmes to appoint either Mr Miller or Ms Liang to the unilateral role of General Manager. The areas of responsibility were set out by Mr Hill and Mr Miller's did not increase as he had asked them to. There was a process set out for the two senior managers to follow where there was conflict including where it was

unresolved. Mr Hill had reached a point though by April where he was not prepared to act on complaints made by Mr Miller about Ms Liang privately and he said in his 20 April 2011 memorandum that *engaging on that basis has been a mistake*. He wrote that *it is not possible to fairly gauge a complex issue causing conflict from a distance* and suggested the issues would be best dealt with on a physical visit to China. I find that is not an unreasonable view in circumstances where Mr Hill had provided a process to be undertaken where conflict arose.

[58] There are dangers in responding to one manager about concerns about another manager where that manager's views are not first sought. For example initially on the basis of what Mr Miller had written about Ms Liang Mr Hill formed a reasonably firm view that facilities management should be passed to Mr Miller. He relayed that to Mr Miller. Then after talking to Ms Liang Mr Hill changed his mind for a variety of reasons and returned facilities management to her, a situation I imagine not satisfactory for either Mr Miller or Ms Liang.

[59] Mr Miller said that he became increasingly unhappy and in May 2011 commenced looking elsewhere for a position. From his perspective the working relationship remained stressful and difficult.

[60] Mr Miller says that he was disadvantaged by Springfree's failure to investigate complaints he had about the competency of others he worked with including his co-manager Ms Liang. He also had issues about kickbacks and bribery. He said in evidence that both these matters disadvantaged him in that they affected his ability to do his job properly and produce product to standard which caused him stress.

[61] I am satisfied that there was some investigation by Mr Hill into complaints about Ms Liang. The approach taken though was much gentler than what Mr Miller wanted and did not involve simply removing Ms Liang's responsibilities and giving them to Mr Miller. It was also an approach that took into account the different cultural values and Mr Hill and Mr Holmes were always clear that they did not want to run a western style factory in China. I have taken from Mr Hill's evidence it was his view that Springfree going into China would have to adapt to the Chinese way of doing things rather than impose its own values, at least in an abrupt and dramatic way.

[62] Mr Hill was not required to agree to terminate Jeff's employment and put another employee Joel into the role just because Mr Miller suggested this. He

explained in evidence why he did not make the decision Mr Miller wanted him to make and that was a decision within his management prerogative. It included his view that Joel could not fill out in written Mandarin the purchasing orders. My assessment was that Mr Hill did not perhaps always return to Mr Miller with the thinking behind his decisions, particularly those involving Joel and Jeff, rather than simply the outcome. That would have been helpful but would not have changed matters I find from Mr Miller's perspective as his views on Ms Liang's and Jeff's competence were absolutely firm.

[63] I am not satisfied that Mr Miller's complaints about kickbacks were simply ignored but there was a reluctance on the part of the company to make dramatic rather than gradual changes about that problem. Mr Holmes in an email he sent to Mr Miller in 2010 states in about kickbacks/bribery *I am always scared of using one's own perception of a good culture when challenging someone else's culture*. Mr Hill said in his evidence that bribery and kickbacks are a common part of Chinese culture and he did not condone this but *staff need to recognise that it was a problem that would not go away overnight*. There was a restructure of the purchasing department undertaken in or about late 2010 and a review of its policies and procedures after there were concerns about the purchasing officer obtaining kickbacks. Mr Hill described the corruption at DGSB as *100% better now than what it was*.

[64] I accept that there was frustration for Mr Miller in his employment because he believed the other senior manager Ms Liang and some others at the factory to be incompetent and that there was corruption. As to any corresponding disadvantage for continuing to work in that environment beyond frustration and stress Mr Miller's performance bonuses were always paid at a very high level and never at below the 80% of the full possible bonus amount. Mr Hill's evidence was that the product got out notwithstanding the issues and concerns. I was not presented with any evidence that Mr Miller's work was regarded as unacceptable because of the conduct of other employees or Ms Liang. To the contrary Mr Miller and his engineering skills were very highly regarded. I am not satisfied that Mr Miller has been able to establish that there was simply no investigation into his complaints and/or corresponding disadvantage. The decisions were made on the basis that the same conclusion Mr Miller had reached as to overall competence was not arrived at by Mr Hill or Mr Holmes so as to support removal of duties or termination. Further that the

proposals put forward by Mr Miller were not in line with company values or what Mr Hill and Mr Holmes thought was the appropriate course of action.

[65] I am not satisfied that Mr Miller has established a personal grievance that there was a failure to investigate his complaints and concerns and that he was unjustifiably disadvantaged. The conclusions reached about various issues were not unjustified as they were decisions that fall within management prerogative.

Failure to allow Mr Miller his leave entitlements.

[66] Although Mr Cooper in his submission had set out broad concerns about leave under this allegation the evidence supported that the issue probably was restricted to one issue about leave that occurred in August 2011. There were some general concerns for Mr Miller about missing leave records in Christchurch but these matters were either resolved or being worked through with Mr Hill. There was no evidence to support leave was denied to Mr Miller so that he could establish disadvantage in that respect.

[67] I turn then to the email exchange commencing on 28 August 2011, a Sunday. Mr Miller advised Mr Hill that he would be absent on the Monday. Mr Hill by email the same date does not refuse the leave request but says he will need to discuss on the Tuesday with Mr Miller the system of taking leave. I take from his email a concern about the short notice. On 29 August 2011 Mr Miller thanks Mr Hill in an email saying that he understands and is happy that Mr Hill is now putting in *policies for this type of thing*.

[68] There was an issue about disparity of treatment in not dissimilar circumstances with Ms Liang. Ms Liang asked Mr Holmes and Mr Hill for a day off on Monday 13 June to attend to a passport renewal application to Guangzhou for another person. The day off was the Wednesday. The concern was that Mr Hill did not query it in the same way that he did with Mr Miller. Mr Hill said in his evidence that Ms Liang only very rarely took leave. I am not satisfied that there was a grievance raised about this issue specifically within the statutory timeframe and therefore it cannot be pursued.

[69] Any general leave problems were the subject of discussion between Mr Hill and Mr Miller rather than allegations raised as personal grievances until 22 December 2011. There was some confusion about how many leave days Mr Miller had carried over but Mr Hill did accept at a point in the communications what Mr Miller said the

number of leave days owing was and that issue was then at an end – see email from Mr Hill dated 23 September 2011. Although confusion which was understandably concerning to Mr Miller I am not satisfied given Mr Hill's agreement that there were seven days annual leave owing there was any corresponding disadvantage. Mr Hill candidly accepted in the same email that the *ball got dropped* at the New Zealand end and *the system did not manage things like sick leave or other time off very well at a distance*. He therefore wanted to put systems in place to deal with that and those matters were to be progressed although I accept there was no clear advice ever given to Mr Miller about the protocol for applying for leave. Mr Miller accepted that leave applications were ultimately accepted but that he felt embarrassed and offended by the attitude towards his leave. Another email from Mr Hill dated 7 September is relied on. Mr Hill in that email puts responsibility on himself for the obligation to clarify the protocol about leave and I am not satisfied that Mr Miller could have suffered disadvantage from his response on that occasion.

[70] I do not find that personal grievance established as set out in Mr Cooper's letter of 22 December 2011. Some issues now complained about were also raised outside the 90 days' time frame. In any event there was no evidence of actual disadvantage or unjustified actions around leave entitlements.

Accusations of racial prejudice

[71] An email dated 26 August 2011 sent by Mr Hill to Mr Miller is relied on by Mr Miller as containing accusations of racial prejudice. There is no evidence that the comment in the email, viewed by Mr Miller as accusations of racial prejudice, was raised as a personal grievance until 22 December 2011. That falls outside of the statutory timeframe.

Conclusion on allegations of unjustified action causing disadvantage

[72] I have only found one allegation of unjustified action causing disadvantage has been established. That is the failure to consult. The other allegations were either not raised within time or not established. These findings do not deprive Mr Miller of relying on these issues for his claim of unjustified constructive dismissal- *Meyer v Ports of Auckland Ltd* EmpC Auckland AC41/04 28 July 2004 [23].

Unjustified constructive dismissal

[73] Mr Miller relies on two of the non-exhaustive categories of case of constructive dismissal that may amount to a constructive dismissal referred to in the Court of Appeal judgment in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA). He alleges that Springfree followed a course of conduct with the deliberate and dominant purpose of coercing him to resign and that there were breaches of duty that caused him to resign. He also alleges that he suffered stress and depression as a consequence of Springfree's actions.

[74] Both counsel relied on *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415, [1994] 1 ERNZ 168 where the Court of Appeal stated about breaches of duty that the first relevant question was whether the resignation was caused by a breach of duty on the part of the employer requiring all the circumstances of the resignation to be considered not merely the letter of resignation. If the 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 that the employee would not be prepared to continue to work under the prevailing conditions.

[75] Mr Cooper submits that given the breaches it was either the intention of Springfree to push Mr Miller out of his role or it was contemplated by Springfree that he would resign. He submits correctly that cases of constructive dismissal often involve a series of events over a period of time.

Resignation letter and reason for resignation

[76] Mr Miller resigned in an email dated 9 November 2011 to Mr Hill and Mr Holmes. It is quite a lengthy email and I do not intend to set it out in full because the reason for the resignation is contained in the first paragraph which provides as follows:

This week [Mr Miller having been on sick leave] has given me some time to think about how to improve my current situation. I have come to a decision that I can no longer work for Springfree. This is not actually the result of one week's thoughts, but an accumulation of events over the past 6 months. I told you my concerns about the running of the factory here and the corruption back in April/May. Nothing has been done and I can not continue to work in a factory where so much of my job is cost reduction and manufacturing efficiency, yet all around me I see corruption, dishonesty and incompetency.

[77] In his evidence at the Authority investigation meeting Mr Miller said that the reasons for his resignation were contained in his letter of resignation but expanded on that to say it was all the things he had been raising with Mr Hill over the previous six months. I find that the main reason for resignation was Mr Miller's view that Ms Liang and others were incompetent and that there was corruption at the factory that impacted on his ability to perform his role and his enjoyment of his role.

Breaches of duty

[78] One of the breaches alleged by Mr Miller is that Springfree failed to provide a healthy and safe workplace and that as a result he became unwell and suffered from stress and depression. Mr Miller advised Mr Holmes, Mr Hill and Ms Liang in an email dated 7 November 2011 that he had been under considerable stress at work for the past 6 months, had had sleeping difficulties for the last few weeks and had been to the doctor and been advised to take 7 days leave.

[79] Mr Holmes in an email of the same date to Mr Miller acknowledged the letter and expressed a hope that Mr Miller would be able to rest properly. He asked for a doctor's note that outlined *the suggested course of action and the return date to work*. He explained the return date to work was critical given Mr Holmes and Mr Hill would be in China in six days' time. Mr Miller provided a supporting medical certificate to Springfree/DGSH which set out the diagnosis as acute bronchitis, sleep disorders and depression.

[80] Additionally for the purpose of the Authority investigation Mr Miller provided a copy of Dr Natalia Fernandez's notes who he consulted on 7 November 2011 together with a covering letter from her setting out her qualifications and experience. The word depression in Dr Fernandez's notes is followed by two question marks and then the words *anxiety, stress at work*. Mr Miller, it is recorded in the notes, was having difficulty sleeping, cried frequently and was having too much stress at work. In her covering letter Ms Fernandez says that she advised Mr Miller if he was very unhappy and the symptoms continued then he should consider changing jobs and that Mr Miller advised that he had been looking for a new job for six months.

[81] Counsel agree that there is an obligation on an employer to take all practicable steps to ensure the safety of employee while at work - s. 6 of the Health and Safety in Employment Act 1992. Counsel refer to the Court of Appeal judgment in *Attorney-*

General v Gilbert [2002] 1 ERNZ 31 and the nature of the duty described in that case to provide a safe and healthy workplace.

[82] Springfree was required to take reasonable steps to safeguard Mr Miller's health at work proportionate to known and avoidable risks. The reasonableness of any steps taken have to be assessed against what is known of the risk. Mr Hill knew that Mr Miller suffered from depression from in or about 2007 although did not know that he had stopped taking medication. Mr Miller did refer to feeling stressed in some emails including an email of 2 November 2011 to Mr Hill in response to the removal of quality control in which he said *I feel that you are pushing me out of my role and reducing my responsibilities. This is very stressful for me especially being in a foreign country with no support. I have no one to discuss my concerns about the direction of DGSH as you have made it clear that you do not want to hear or mediate the concerns.* Mr Hill did respond to the concerns in that email in a reassuring way. I accept that Mr Hill had not said that he would not hear concerns but that matters should be raised openly with both managers or when Mr Hill was present in DGSH.

[83] It was known to Springfree that Mr Miller was disenchanted and unhappy and that there had been reference to feeling stressed. It was not known that Mr Miller had commenced looking for another position in or about May 2011 but I find that he had made it reasonably clear that if there were not changes he may not be able to continue at Springfree. I am satisfied that Mr Hill or Mr Holmes were not aware that Mr Miller had suffered a recent depressive condition until he advised the company of this on 7 November 2011. Appropriately Mr Holmes and Mr Hill spoke with Mr Miller at a face to face meeting on 15 November 2011 about working out his notice from home so he would not be exposed to further stress. Mr Miller when advised by Mr Holmes that he was unaware of depression at the meeting said *It's more stress turning into that.*

[84] I am not satisfied that Mr Miller has established that Springfree breached its obligation to provide him with a safe and healthy workplace and therefore I do not need to consider in further detail issues of causation.

[85] The other matters relied on as breaches have been dealt with in some detail when considered under alleged actions causing disadvantage. I accept as submitted by Mr Cowey/Ms Corlett that there is a lack of any clear causal connection between the failure to provide an individual employment agreement, late payments and leave

issues and the resignation. I have not found a breach about a failure to investigate. Rather I have found it was a failure to resolve to Mr Miller's satisfaction issues he had about other employees, which fell within management prerogative.

[86] I have found a breach of the good faith obligation to consult with respect to removing quality control from Mr Miller but I am not satisfied that it was reasonably foreseeable that Mr Miller would no longer be prepared to work in circumstances where there was to shortly be further discussion about that matter and where Mr O'Hara was not to be assuming any aspect of quality control until January 2012. I have dealt with the allegation of racial prejudice in looking at whether there was a course of conduct with the deliberate purpose to coerce Mr Miller to leave. For completeness even if Mr Miller was offended by the content of the email of 26 August 2011 objectively assessed I do not find that it was a breach of duty, rather Mr Hill was stating his views. I am not satisfied that there were any breaches of duty on the part of Springfree that made Mr Miller's resignation reasonably foreseeable.

Course of conduct with deliberate purpose to coerce Mr Miller to leave

[87] Mr Cooper in final submissions relies on emails from Mr Hill to Mr Miller together with other conduct to support that Mr Hill was acting with deliberate purpose to coerce Mr Miller to leave.

[88] The first email relied on is dated 11 May 2011 and is from Mr Hill to Mr Miller. Before I turn to examine its contents I will refer to some background to put the email into context. Mr Miller had earlier proposed that he be appointed as General Manager of DGSB in 2010 in an email to Mr Holmes and Mr Hill in which he set out concerns about the then General Manager's competence and honesty. Mr Hill confirmed in 2010 to Mr Miller that he did not want a *white man* running the factory. This decision was again revisited and confirmed in April 2011. It was clear by the end of April 2011 that Mr Miller was expected to continue to work with the other senior manager Ms Liang. Mr Miller did not regard Ms Liang as competent and believed her to be out of her depth in managing Human Resources, Administration and Finance – see email dated 28 March 2011. Mr Miller also felt that Mr Holmes supported Ms Liang more than Mr Hill/Mr Holmes supported him. Mr Hill reassured him that they did not *play favourites* – page 25 of the bundle. Mr Hill did not accept that Ms Liang was incompetent and that the issues raised and the difficulties in the

relationship were of a cultural nature. Mr Hill did not want the factory run like a western factory and wanted the senior management team to work co-operatively.

[89] Mr Hill sets out in the 11 May 2011 email his feelings after a visit to China. He states that Mr Miller is a *committed, hard working and passionate team member, appreciated and respected by all*. He goes on to set out that his *thoughts and judgements on the circumstances we have had on the table are totally different than yours. I've had to make a call that is consistent with my beliefs*. Objectively assessed that is all fair comment. Mr Hill and Mr Holmes are entitled to make decisions about the running of the Chinese factory. They were entitled to run the factory according to their values.

[90] Mr Cooper relies on the scenario put by Mr Hill in the email where neither Mr Miller nor Mr Hill change their view. Mr Hill states that if that happens then one of them, at this time Mr Miller would have *to live with a heavy burden of living and working each day under the shadow of things, feeling like they are really being done very wrong. I know that feeling and I know you can't work under it for long. It wears you down*. I find inconsistent with an attempt to coerce Mr Miller to leave at the end of the email Mr Hill suggests that Mr Miller see Pat English, the New Zealand Trade Commissioner in Guangzhou and *walk him through your issues and concerns*. He ends the email by saying that if Mr English was to give him a really strong steer away from the position and approach he is taking then he would be open to changing his position. Mr Cooper submits that the email suggests that Mr Miller either change his views to those held by Mr Hill or become worn down. I think in the event that there is no movement from either side that is a view that could be reached. Mr Hill is pointing out the situation as he sees it but I do not find when read as a whole this email supports it was written with the dominant purpose of coercing Mr Miller to resign.

[91] The next email relied on is dated 9 June 2011 from Mr Hill to Mr Miller. I have also read Mr Holmes' email of the same date to Mr Miller and copied to Mr Hill as in that email Mr Holmes refers in more detail as to what concerns were actually discussed. I find his email puts Mr Hill's email into context and means the Authority is not required to make findings about the content of the email in a vacuum. It is clear from the emails from both Mr Hill and Mr Holmes that Mr Miller has had a discussion with them about his concerns the previous evening. I want to refer to the

first two sentences in Mr Holmes' email as they seem to set out at least from his perspective the issue he sees as below: *Reuben, Ever since our discussion of last evening, I have struggled and wrestled with what is the right thing to do and communicate. I have not been able to sleep as I have tried to work through the question in my mind "what can I do to change Reuben's heart and attitude towards others in the organization".* Mr Holmes also in his email sets out different definitions of a collaborating individual and a competing individual. He reviews a particular issue which was complained about in his email involving three employees Kevin, Joel and Jeff. Mr Holmes says that Jeff, who from my reading of the situation Mr Miller was concerned about, did not contradict what Mr Miller said and agreed Mr Miller may be right. Mr Holmes sets out that Mr Miller's approach in that situation was more competitive than co-operative. It is clear further down in the email that Mr Miller talked with Mr Holmes and Mr Hill again about terminating Jeff's contract immediately and replacing him with Joel. Mr Holmes set out *I think you made it clear yesterday that Joel has added value in your experience because of the cultural differences that exist between you and your other colleagues and I agree this must be difficult.* Mr Holmes goes onto say that he is hopeful that the permanent arrival of Norm [O'Hara], a westerner, will bring *additional balance to your cultural challenges.*

[92] I now turn to Mr Hill's email of 9 June 2011. There is a dispute about who Mr Hill is actually referring to in the last sentence where he refers to alternative views. I will set out the first paragraph containing the relevant part:

I ditto Steve's closing comments. I'll close by saying as I have before, that our work and inter-relationships in China puzzle, confuse, frustrate, and conflict me. And from the keyhole through which I view life and our business and factory, I feel like I've given you everything you have ever asked for – authority to run manufacturing and engineering, financial compensation outside of company norms, freedom to operate pretty much as you wish. And now, as I try and balance a whole number of alternative views, we seem to have somehow arrived at an "us and them", and a "black and white" place where someone has to win it all and someone has to lose it all.

[93] Mr Cooper submits that the only logical interpretation of the email is that there is now an impasse between Mr Miller and Mr Hill and from this point on Mr Miller's employment is in jeopardy because Mr Hill is suggesting he will *lose it all* which will require resolution. Mr Hill in his evidence said that he was referring to the on-going issues and conflict between Mr Miller and Ms Liang not between

Mr Hill and Mr Miller. When I consider the exchanges at that time in their entirety I accept Mr Hill's evidence as inherently more likely. I do not find that he is talking about Mr Miller's relationship with Springfree or DGSH. Mr Hill again in a way which is inconsistent with the finding of an attempt to coerce Mr Miller to resign sets out in the email that one of the company weaknesses had been not calibrating its circumstances against others experience. He asks that Mr Miller remake a meeting with Pat English before Mr Hill is next in China on 20 June. Mr Hill also says that he remains open to [Pat English's thinking]. I am not satisfied that the comments in this email were designed to coerce Mr Miller to leave.

[94] The next email relied on by Mr Cooper is one referred to earlier in the determination that Mr Miller alleges contains allegations that Mr Miller was racially prejudiced. It is from Mr Hill to Mr Miller and is dated 26 August 2011. It follows a trip at Mr Miller's request to another wholly owned foreign enterprise (WOFE) managed by an American called Jim in China. In his email Mr Hill sets out that it struck him that *Jim* likes China which shows through because he liked spending time with his employees. He set out that he felt this was in contrast to how Mr Miller felt about China and its people. He set out some reasons for his concluding that.

[95] Mr Cooper said that the email accused Mr Miller of racial prejudice and was designed to upset and unsettle Mr Miller. I find that Mr Hill as he did often was putting down his thoughts in writing. He accepted in the last sentence of the email that he may have got it wrong but he wanted to discuss it further with Mr Miller. Mr Miller said in his evidence that Mr Hill was wrong. Mr Hill though was able to put his thoughts to Mr Miller even in a challenging way. That is the essence of communication. I do not conclude that the intention was to accuse Mr Miller of racial prejudice. It was to try to understand the reason for the success of a WOFE with a westerner solely managing the company in China and contrast that with the DGSH factory. I accept that the email was sent at a time when Mr Miller was unhappy but I do not find that it was intended to upset him, rather to form the basis of further discussion.

[96] Mr Cooper relies on further matters as part of the course of conduct. There are two comments in an email at page 94 of the bundle from Mr Hill to Mr Miller. The first is that Mr Hill says that an objective as discussed is to build a team of operational executives that have the skills, expertise and experience to provide

leadership at DGSB and particularly the comment. *We hope that RJM (Mr Miller) fits into that vision* and the second was a comment that *yes we are planning and hoping that we can workout a go forward agreement with you.*

[97] Both those comments could be taken, as Mr Cooper submits, negatively, but I am not satisfied when the overall context of the email is considered that they were designed to upset. They were further discussion about matters including a long term vision for DGSB management following a question from Mr Miller about his future after the three year period of employment had ended and the other some thinking about bonus metrics in the event that Mr Miller stayed on.

[98] I do not accept there was any significant *dragging of heels* on the written employment agreement. It was sensible in my view that there be discussion about that in person as it was scheduled there would be. I do not find that the late payments were designed to coerce Mr Miller to leave. One of the issues raised was that Mr Miller's bonus, described as a potential bonus for the period 1 August 2010 to 31 July 2011, was reduced by \$1000 to \$14,000 in August 2011 on the basis that Mr Hill believed there was a lot more that could be done to improve the management team interface. When Mr Miller complained \$500 was added back. Objectively assessed that would have been less likely if the reduction of the bonus was for the purpose of coercing Mr Miller to resign.

[99] In conclusion I am not satisfied that Springfree followed a course of conduct with the deliberate and dominant purpose of coercing Mr Miller to resign.

Conclusion on unjustified constructive dismissal

[100] I do not find that Mr Miller was unjustifiably constructively dismissed.

Remedies

[101] I have found one personal grievance made out that Mr Miller was disadvantaged in his employment by an unjustified action of Springfree about the failure to consult about the removal of part of his role. I accept that Mr Miller was concerned and upset that a decision had been made to remove part of his role from him. Mr Hill did not reassure Mr Miller in his response that there was no decision arrived at rather he spoke of talking to him about the implementation. I was not satisfied that Mr Hill had spoken to any other staff than those he acknowledged

speaking to about his decision however I accept that it had come to be known by others in the factory. In all the circumstances I find that there should be a compensatory award of \$5000. I do not find any issue of contribution.

[102] I order Springfree New Zealand Limited to pay to Reuben Miller the sum of \$5000 under s 123 (1) (c) (i) of the Employment Relations Act 2000.

Was there a binding unconditional agreement reached after Mr Miller tendered his resignation that he would be paid his bonuses.

[103] In the email tendering his resignation dated 9 November 2011 Mr Miller proposed on a without prejudice basis, amongst other matters, that he be paid on a pro rata basis the sum of \$5,000 towards student loan interest write off benefits due to be paid on 15 May 2012 and, in addition, he wanted payment on a pro rata basis of his terminal contract bonus of \$30,000 due to be paid on 31 July 2012. He also wanted to return to work on 15 November 2011 and continue until 31 December 2011. He wanted his salary payments made into various accounts and payment towards his rental and continued use of the factory vehicle. The arrangement proposed in the letter was stated by Mr Miller to be *on the basis that it is a final settlement and no further grievances will be instigated by either of us.*

[104] A meeting was held on 15 November 2011 in China and it was recorded. Mr Miller attended at the meeting together with his wife. Mr Hill attended with Mr Holmes. The Authority was provided with a transcript from that meeting and the audio clip. Following the meeting Mr Hill sent an email to Mr Miller on the same day setting out what he described as *an overview* on what they had both signed off on. He also indicated that he had forwarded a similar description to lawyers in Guangzhou and Christchurch and they will be proceeding *based on the below* unless he gets back to them with changes.

[105] The email of 15 November 2011 referred to responsibilities and obligations on both parties going forward. The first part of the email deal with restraints to not compete or solicit employees and regarding confidentiality. The second part of the email deals with Mr Miller's obligations and materially stated the following:

3) on the basis of Reuben completing the "transition information" handover to Hamish McIntyre's satisfaction (Hamish will be the arbiter as to Reuben's performance and sign off that this has been satisfactory completed), then on or before

December 31 2011, the payments requested by Reuben in his resignation email dated November 9th 2011 will be made into the bank account(s) he directs.

[106] Mr Miller was not happy with the two agreements provided to him under cover of letter from Mr Hill dated 16 November 2011 and expressed to be effective both in China and New Zealand from Mr Hill. He involved Mr Cooper thereafter in the matter. Importantly for current purposes Mr Miller says that the payment to him of the bonuses requested in his email of 9 November 2011 were never conditional on him signing a restraint or any documentation. He says that the only obligation he had was to complete the transition information handover to Mr McIntyre which he did.

[107] Mr Cooper submits that the documentation that Mr Miller was led to believe would be sent was simply those obligations implied in an employment agreement. He submits that Springfree unlawfully resiled from the agreement and he relies on Springfree performing part of the agreement by paying salary and other entitlements with the exception of holiday pay.

[108] Mr Cowley and Ms Corlett submit that it was clear from the transcript of the meeting on 15 November 2011 that the payment requested for bonuses were conditional on Mr Miller signing agreements about non solicitation, non-competition and confidentiality. They rely on various passages from the transcript. For example on page two of the transcript Mr Hill says *I would suggest we put some kind of documentation together, because you're asking for some things that are a bit different than what we'd agreed on but we're ok with that.* Later on that same page he refers to *non-solicitation, non-compete and confidentiality* clauses. Following on from that Mr Hill says on page three *You have offered us a lot and we want to represent that in our response so basically hey that's where we through[sic] it on the table and say that's what we're probably looking for and on that basis we're probably happy to give you what you asked for. So.*

[109] It is also clear there was discussion about the type of documentation that would have to be prepared as shown in the transcript. It was stated by Mr Hill to be a *one or two pager* for Springfree covering those 4 issues. A *one or two pager* from Wang Jin for DGSB covering those issues and a *one or two pager* between Mr Miller and Mr McIntyre. I accept that the signing of the agreements was important to Springfree.

[110] Paragraph or point 3 of the email of 15 November 2011 read in isolation may support that all Mr Miller was required to do was to complete a handover in order to be paid his bonuses. I do not find that reflects what was actually agreed when the email is read as a whole together with the transcript of the previous meeting. I am satisfied from the evidence, both oral and the relevant documents, that it was agreed the settlement reached included the signing documents about return of company assets, non-solicitation, non-competition and confidentiality and that payment of the amounts referred to by Mr Miller in his email of 9 November 2011 was conditional on the documentation being signed. I find that Mr Miller understood that he was required to sign some documentation in return for payment of the amounts he had asked for in the letter tendering his resignation (see for example page 142 of the common bundle). He was though surprised by the nature of the agreements he received and did not want to sign the various agreements in the form they appeared. Springfree did not suggest he was nevertheless bound.

[111] There may well have been issues about the enforceability of the restricted covenants contained in the documents that Mr Miller was being asked to sign but that does not itself have any bearing on whether or not there was a binding unconditional agreement entered into for payment of the bonuses. There may also have been issues about the certainty of any agreement reached.

[112] I am not persuaded by the argument about part performance. I find that the payments made to Mr Miller were simply his contractual entitlements to salary under his employment agreement. I do not find in those circumstances that they prove the existence of a further agreement in the absence of any signed documentation that Mr Miller be paid bonuses to which he was not yet entitled.

[113] In conclusion I do not find a binding unconditional agreement was reached that Mr Miller would be paid his hardship and termination bonus on a pro rate basis.

Was the Hardship Allowance otherwise payable

[114] Mr Cooper submits that the Hardship Allowance was payable notwithstanding any determination about the agreement. The agreement reached about the hardship allowance was contained in the 3 August memorandum which provided; *NZD \$5000 per annum to compensate for loss of student loan interest write off benefits. To be paid into RJM Hong Kong account on or before 15 May 2011 and 15 May 2012.*

[115] I do not accept that it was part of the employment agreement with Mr Miller that he would receive payment of that sum on a pro rata basis if he left his employment before 15 May 2012.

[116] In the absence of an agreement for payment I do not find that the hardship allowance is otherwise payable.

After resignation conduct

[117] For completeness I will deal with some additional issues raised as actions causing disadvantage about events after the resignation was tendered. There is an issue raised as to whether Mr Hill and Mr Holmes made an announcement to staff about Mr Miller's resignation which was contrary to that agreed with Mr Miller. Mr Miller was not happy with what was said to staff about his departure. Having heard the evidence however I am not satisfied that this was intentional or that Mr Hill and Mr Holmes did it with the purpose of causing difficulties to Mr Miller. I am not satisfied that Mr Hill and Mr Holmes actions in that regard were unjustified.

[118] There was also an issue that Mr Miller did not have an opportunity to farewell his co-workers and perhaps have a meal with the co-workers. I am not satisfied that there were unjustified actions on the part of Springfree about that matter.

Penalties sought

[119] I accept the submission of Mr Cowey/Ms Corlett that the penalty sought for failing to keep proper wage and leave records was commenced 12 months after the employment relationship ended for the first time in an amended statement of problem lodged 5 April 2013. That claim is therefore out of time and cannot be considered by the Authority. Mr Cooper submits that the second claim for a penalty for failing to provide an employment agreement was commenced within 12 months of the first time Mr Miller asked for an employment agreement in June 2011. Mr Miller had been without an employment agreement for two years prior to that date. I find that under s.135(5)(a) and (b) the cause of action, being the failure to provide an employment agreement, first became known to Mr Miller more than 12 months before the penalty action was commenced or should reasonably have become known because of further negotiations and discussion that took place in August 2010 about compensation and annual leave entitlements. I find that Mr Miller is outside of the time period for commencing a penalty action. Even if I am incorrect about that matter given the

issues between the parties about jurisdiction and tax implication then I would not have awarded a penalty for this breach.

Costs

[120] I reserve the issues of costs. Both parties have had a measure of success and both may feel entitled to an award of costs. There should be an attempt to resolve the issue of costs failing which cost submissions from both parties are to be lodged and served by 25 September 2013 with both parties to respond by 9 October 2013.

Helen Doyle
Member of the Employment Relations Authority