

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI A TARA**

[2025] NZERA 350  
3296039

BETWEEN                      NATHAN PETRIE  
Applicant  
  
AND                              ALPHERO LIMITED  
Respondent

Member of Authority:      Davinnia Tan  
  
Representatives:            Barbara Buckett and Lucy Fisher, counsel for the  
Applicant  
Guido Ballara, counsel for the Respondent  
  
Investigation Meeting:      2-3 April 2025 in Wellington  
  
Submissions received:      At the investigation meeting from the Applicant  
At the investigation meeting from the Respondent  
  
Determination:              18 June 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

*Summary*

[1] Mr Petrie has brought a personal grievance against his former employer, Alphero Ltd (Alphero), alleging that he was constructively dismissed, unjustifiably disadvantaged, and that Alphero breached its obligations of good faith.

[2] Mr Petrie contends that he had an existing arrangement with Alphero where he worked four days from home and one in the office (“4:1” arrangement). He says that following a request to work fully remotely which was declined as a permanent arrangement, Alphero “rescinded” the existing “4:1” arrangement. Mr Petrie claims that Alphero gave him an ultimatum to attend the office three days per week by April

2024 or face termination of his employment. Mr Petrie submits that this change was a breach of good faith and constituted an unjustified disadvantage by unilaterally varying his terms and conditions of employment which left him with no reasonable option but to resign. Alphero denies there was an existing arrangement in place and submits that Mr Petrie was not unjustifiably disadvantaged or dismissed.

### *Background*

[3] Mr Petrie commenced employment as a Senior Developer with Alphero on 13 December 2021. He resigned on 1 March 2024.

[4] The basis of Mr Petrie's claims is that he had a verbal agreement with Alphero in 2022 which included a flexible working arrangement, specifically allowing him to work from home four days a week ("4:1" arrangement).

[5] According to Mr Petrie, this arrangement was in effect from late January 2022. Following his request of December 2023 to work fully remotely, Alphero not only declined the request but also required him to work in the office three days a week from April 2024. Alphero denies that any such agreement or arrangement formed part of the terms of employment.

[6] During the interview process in or around November 2021, Mr Petrie queried whether the role could be undertaken remotely. Manager Nic Waight who was on the interview panel, stated that while remote work was not typical, there were projects that could support flexible work that were more generous than Alphero's flexible working policy which required employees to be in the office three times a week.

[7] Mr Waight stated during the interview, that the "TVNZ project" was an example where employees could work remotely or more flexibly, as that had some unique characteristics and involved working with TVNZ's fully remote in-house team. Mr Waight mentioned a few examples of other employees on flexible arrangements during the interview. Mr Petrie said he understood, from the interview, that a "4:1" arrangement would be contingent on him being put on the TVNZ project. This was also confirmed in the evidence given by Alphero's Chief Executive Caroline Dewe that the "4:1" or any flexible arrangement was client specific, and not a guaranteed entitlement at Alphero.

[8] During the first two weeks of commencing employment in December 2021, Mr Petrie worked in the office every weekday for two weeks for the purposes of onboarding and orientation arrangements. From 18 January 2022, Mr Petrie worked one day from home and his work consisted of various projects and a range of different clients.

#### *Remote working in 2022*

[9] On 24 January 2022, Ms Dewe advised all staff that due to Covid-19 concerns, they could fully work from home for a period if they wished to. On 25 January 2022, Mr Petrie advised Mr Waight, that he would be working remotely from the following day.

[10] On 28 January 2022, a contractor based in Christchurch who worked on the TVNZ project ended his contract with Alphero. Mr Petrie was then placed on the TVNZ project which became his sole project.

[11] It is an undisputed fact that all employees working on the TVNZ project were already working remotely or on a “4:1” basis prior to Ms Dewe’s communication to staff on 24 January 2022. Employees on the TVNZ project did not require a separate written agreement to do so, as it was understood the arrangement was client specific or specific to the TVNZ project. This was an exception because there were unique characteristics about working with TVNZ that allowed for greater flexibility, such as TVNZ being a remote client, TVNZ staff working on the project worked remotely, and the project was limited to development work with Alphero.

[12] As context, it is also important to note that when Mr Petrie joined Alphero, many employees had, due to the post-Covid-19 environment, existing flexible working arrangements which were more generous than Alphero’s flexible working policy (which required employees to work three days per week in the office). However no evidence was provided to the Authority that confirmed whether these arrangements were incorporated into employees’ written employment agreements.

#### *Alphero’s roll-back of Covid-related flexibility except for ‘Team TVNZ’*

[13] On 28 September 2022 during Alphero’s monthly meeting with all staff, Ms Dewe advised that Alphero would be reverting to its pre-Covid-19 flexible working arrangements, requiring staff to be in the office three days a week by the following week. Ms Dewe stated that employees who were on the TVNZ project were able to

work from home for longer “but not forever”, and that they could ask to work up to four days a week from home with Mondays in the office, while working on the TVNZ project. Ms Dewe explained that this would only apply while it was effective and convenient for Alphero and/or the client, and that should the situation with TVNZ change or employees were needed back in the office, Alphero would require those on the TVNZ project to return to working in the office in line with the rest of the business. A slide used as part of that meeting set out the following:

**Covid restrictions have been lifted!**

With Covid restrictions lifted, we’d like to see people back in the office from next week.

Everyone can do 1-2 days a week WFH on Tuesday to Thursdays.

Should your project be in peak discovery or release stages of the lifecycle you may be asked to work from the office 4 days a week.

As always, there will be some specific exceptions based on individual circumstances.

*Salary increase – amendment to employment agreement*

[14] On or around 1 October 2023, following a salary increase, Mr Petrie re-signed schedule 1 of his employment agreement which amended his annual salary to \$130,000.00. There was no amendment to the location of work which was Alphero’s offices in Wellington. There were no provisions relating to working from home, nor was it discussed or sought as a formal amendment to the employment agreement.

*Mr Petrie’s “4:1” arrangement – 3 October 2022*

[15] Following Ms Dewe’s September 2022 instruction, Ms Petrie began working from home four days a week from 3 October 2022 with the agreement of Mr Waight. He continued to work exclusively on the TVNZ project.

[16] Around this period, Alphero had updated its flexible working policy. The updated policy dated October 2022 stated that “where an existing agreement is in place about your hours or the days you WFH, this does not need to be re-negotiated.”

*Mr Petrie’s Wellington houseboat inhabitable*

[17] On 29 November 2023, Mr Petrie experienced an unforeseen personal crisis when his houseboat in Wellington was no longer habitable. As a result, he was required to find alternative accommodation. Around this time, his manager Mr Waight also moved to a new role within Alphero.

### *New Manager*

[18] Mr Petrie's new manager, Kieron Norfield began employment in December 2023.

[19] When Mr Norfield commenced his employment with Alphero, he had a discussion with Ms Dewe about Alphero's intention to have more staff working in its offices which included being able to move staff between different client projects and which required Alphero to roll back the prior "increased but temporary flexibility" that had been in place. Mr Norfield stated that his plan was to have one-on-one discussions about this with individual staff who reported to him over the coming weeks while he settled into his new role.

[20] Between 29 November 2023 and 11 December 2023, Mr Petrie found and purchased a home in Whanganui with his partner. Following the purchase, Mr Petrie requested to meet with his new manager Mr Norfield.

### *First meeting with Mr Norfield*

[21] On 11 December 2023 Mr Petrie met with Mr Norfield and requested a fully remote working arrangement. This was their first one-on-one meeting together. Mr Norfield had only been in the new role for under two weeks. Mr Petrie explained that he had purchased a home in Whanganui due to his houseboat no longer being habitable. During the meeting, Mr Petrie advised that his offer on the house was accepted. Mr Norfield advised that he did not think he could support Mr Petrie going fully remote due to the impact on the team and the business but suggested looking into any other support. Mr Norfield did not advise Mr Petrie about Alphero's intention to have more staff in the office and to roll back the prior "increased but temporary flexibility" that had been in place. There was also no mention of moving Mr Petrie from the TVNZ project to other project(s).

[22] Mr Norfield stated that his understanding of the 11 December 2023 meeting was that Mr Petrie was going to resign if Alphero declined his request. After the 11 December 2023 meeting with Mr Petrie, Mr Norfield then met with Ms Dewe and Alphero's Human Resource Manager Lisa McLennan to discuss how Alphero could support Mr Petrie in light of his request to work fully remotely.

[23] The evidence provided to the Authority was clear that Alphero was disappointed Mr Petrie did not mention he was considering purchasing a house in

Whanganui prior to entering into an agreement to do so. Ms Dewe considered that it was likely a matter one would raise with their employer prior to purchasing a home in a different town.

*Temporary fully remote work arrangement*

[24] On 20 December 2023, Mr Petrie and Mr Norfield had a virtual meeting in which Mr Norfield reiterated that Alphero could not support Mr Petrie to work fully remotely as a permanent work arrangement. However Mr Norfield advised that following his discussion with Ms Dewe and Ms McLennan, Alphero could provide a period of fully remote work to support Mr Petrie settling into his new home. As settlement of Mr Petrie's house in Whanganui was scheduled for February 2024, Mr Norfield offered a fully remote working arrangement until the end of March 2024. Mr Norfield's evidence was that during the meeting Mr Petrie stated he could look for other roles that would allow fully remote work; and Mr Norfield offered support if Mr Petrie needed a reference or similar.

[25] That day, Mr Norfield emailed a summary of what was discussed in the meeting with Mr Petrie which provided:

[...] Thanks for your time early to run through everything in regards to your request to move to a fully remote contract. Below are a few notes from our catch up please shout out if anything is incorrect.

We very much value you as part of the team ... but cannot support a fully remote contract, in the main due to the impacts to both the wider team and the business...I have suggested we support your transition to your new home by supporting a short period of time working remotely, with my suggestion being until the end of March. This hopefully allows you to plan and execute your move and allows us to plan for project deliverables.

Also as mentioned on the call if there is any other support... in regards to moving to a new role please let me know...I've copied Lisa into this email to help us both with next steps and to get agreement on the date. I also forgot to ask about communications and how we want to inform the teams, if you have any thoughts on this let me know.

Anything I missed please shout and always if there are any questions please let me know.

[26] Mr Petrie replied that it "looks like an accurate representation of what we discussed."

[27] On 9 January 2024, there was an exchange on Slack<sup>1</sup> where Mr Norfield stated he wanted to run “some comms” past Mr Petrie for the purposes of informing the team about the move to Whanganui and put the following draft to Mr Petrie:

I wanted to share with you all that after over two years with Alphero Nate has decided to move out of Wellington to start a new adventure, including buying a house, but fear not he’s not leaving us yet. The plan is for Nate to stay with us until the end of March (29<sup>th</sup>) both supporting him through his move and also with us with commitments to our clients. Nate will be working remotely for the majority of this time but will obviously remain part of the team through all the normal channels. We will be working on a handover for the TVNZ work during the next couple of months but in the meantime any questions...let me know.

*Clarification sought by Mr Petrie*

[28] Mr Petrie initially responded to say the draft “sounds good” and asked about communicating the news to the client, but later sent a message as follows:

So I just want to clarify something with all of this. That message makes it look like I’ve resigned. Just to be clear. I’ve not actually resigned yet. If we get to March, and I haven’t found something, I assume so long as I can get to the office 1 day week (current arrangement) I’ll still have a job, yes? Obviously, I’m going to try my best because commuting would suck, but I’m just making sure I’m not going to have the rug pulled out from under me.

[29] Mr Norfield acknowledged the message and responded:

[...] Certainly not trying to pull the rug out from under you and want to make sure you are supported as well as making sure to limit the impact to the rest of the team...

[30] Mr Petrie replied “I mean like I say, it’s not my preference, and it would only be as a last resort, if I’m unable to find something by March but there are definitely ways I could make it work”.

*Further clarification sought on “4:1” arrangement*

[31] On 9 January 2024, Mr Petrie emailed Mr Norfield:

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<sup>1</sup> Slack is a business messaging app designed to facilitate team communication.

... could you clarify what you mean when you say a “fully remote contract” in this context? I’m currently a full-time employee...not a 3<sup>rd</sup> party contractor... I’m asking for my existing arrangement of 4 days working off-site to be extended to 5 days.

Secondly, I would like clarification on exactly what is meant by “the impacts to both the wider team and the business.” There is someone who is my direct teammate who already works fully remotely, and as far as I can tell, is part of the same ceremonies etc that I am. What extra impacts would there be in supporting me, over what is already imposed by that arrangement?

Thirdly, I’d like to know exactly what is expected of me at the end of March...if I cannot secure other employment by the end of March, I assumed that we would revert to the current 4 days remote, and I would have to find some way to get into the office on a Monday. Is this accurate?

Just to reiterate again, I have NOT resigned from my position, and the March 29<sup>th</sup> date in your message is not something I’ve agreed to.

[32] On 10 January 2024, Mr Norfield advised he would get back to Mr Petrie.

[33] On 12 January 2024, Mr Norfield arranged a meeting together with Ms Dewe, Ms McLennan, and Mr Petrie. Mr Petrie asked for confirmation that he still had a job, and expressed his concern that a “3-on-1 with my manager, HR, and the CEO strikes me as a pretty unbalanced and stressful situation” and advised he would hire a lawyer to attend the meeting with him.

[34] On 23 January 2024, the parties met together with Mr Petrie’s lawyer at the time to discuss Mr Petrie’s request for remote work. There were no notes taken at the meeting by either party.

[35] On 25 January 2024, Mr Petrie emailed Mr Norfield to advise he was commencing the remote work arrangement having taken possession of the house in Whanganui. Mr Petrie then stated, “if I’m required to come into the office for any reason, just let me know, and I’ll make myself available.”

[36] That morning, Mr Petrie also called Ms McLennan. What was discussed during this call is disputed and reflected in the emails that followed the call.

*Emails of 25 January 2024*

[37] Ms McLennan’s email to Mr Petrie following the call stated:

Thank you for your email this morning letting us know that you will start working remotely from now. During our phone call this afternoon, you let me know that you intend to be in the office three days a week beginning in April (As we offered you until the end of March to make arrangements to be in the office).

To summarise our discussion on the 23rd, we did state that we could not accommodate your work-from-home request, and Caroline provided the reasons why. I need to reiterate and formalise that we are, (and after March, we will continue to be) unable to accommodate your request for full-time remote work.

We offered you until the end of March as a gesture of good faith and to support you when you needed to relocate. Offering you this time is not a reflection of us being able to support remote work more broadly. In the current market, fully remote work significantly impacts our ability to meet client needs efficiently. It also necessitates substantial reorganization in areas such as learning and development, which are integral to Alphero's success and growth.

As discussed, we do need you to maintain a physical presence in the office for a minimum of three days per week starting in April. To facilitate this transition, we are willing to provide you until the end of March to make the necessary arrangements.

It is important to note that if these arrangements cannot be made, we will have to consider the termination of your employment. This decision would be based on the grounds of operational requirements and the inability to meet the mutually agreed-upon terms of employment in your IEA.

[38] Mr Petrie responded later that day:

Thanks for that, I just want to clear up a misconception.

My intention was only to accept your offer of support up to the end of March. I agreed to nothing more on the phone, and the matter of what happens after the three months is, in my mind, still undecided.

In the meeting, Alphero did not state that I would be required to start working 3 days a week in [the] office, but rather that a "decision would need to be made". So I have been treating the two issues as separate.

[39] Ms McLennan followed up with another email, copying Mr Norfield and Ms Dewe:

As discussed... we offered you increased flexibility...until the end of March. This flexibility was provided to support you while you relocated.

To be clear, from the beginning of April, you will be required to start working three days a week back in the Wellington office. As Caroline has communicated at team briefings and during our weekly Monday meetings, she has needed to increase the presence of all team members as we readjust after needing to be flexible during COVID restrictions...

[...] It is important to note that if these arrangements cannot be made, we may have to consider ending your employment. We would not make this decision lightly, and we are committed to checking in with you regularly throughout March to see how you are doing...

#### *Resignation 1 March 2024*

[40] Mr Petrie did not respond to Ms McLennan's email. On 1 March 2024, Mr Petrie resigned.

Hi Kieron

Please take this as formal notice of my resignation from my position as an Android developer for Alphero.

My notice period is 1 month, making my last day Monday the 1<sup>st</sup> of April, but as it's Easter weekend, my effective last day will be Thursday 28<sup>th</sup> of March.

[41] The resignation was accepted later that day by Ms McLennan.

#### *Personal grievance raised 7 March 2024*

[42] On 7 March 2024, Mr Petrie raised a personal grievance with Alphero for an unjustified (constructive) dismissal and an unjustified disadvantage.

#### *Alphero's offer for Mr Petrie to withdraw resignation*

[43] On 22 March 2024, Alphero wrote to Mr Petrie via counsel:

[...] we...note Nathan's resignation dated 1 March 2024, which he said was effective 1 April 2024, and Alphero's acknowledgement of that. Alphero notes it did not seek out or wish for the same, and that Nathan is welcome to change his mind and stay on the basis of the accommodations discussed with him until April, and from then, for the reasons already put to Nathan for his response, but subject to any further feedback he may have, on the basis of 3 days each week in the office.

[44] Mr Petrie did not respond to Alphero's offer to withdraw its acceptance of the resignation. His last day of employment was on 1 April 2024.

## **The Authority's investigation**

[45] For the Authority's investigation written witness statements were provided by Mr Petrie, his partner Caitriona Conefrey and his mother Natalie Frauenstein, Alphero's Chief Executive Caroline Dewe, Nic Waight, Kieron Norfield and Lisa McLennan. Mrs Frauenstein was not asked any questions at the investigation meeting.

[46] Except for Mrs Frauenstein, all witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[47] All material from the parties was fully considered. However as permitted by s 174E the Act, this determination has not recorded all evidence and submissions received.

## **Non-publication application**

[48] Mr Petrie made an application for non-publication of his name which was opposed.

[49] Pursuant to clause 10 schedule 2 of the Act, the Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[50] The starting point is that of open justice in the Authority, including the names of parties. Although non-publication may be granted in exceptional circumstances, none of those circumstances apply.

[51] In *MW v Spiga Ltd (Spiga)*<sup>2</sup>, the majority set out a two part test when considering whether to grant non-publication:

- (1) Firstly, there must be "reason to believe that the specific adverse consequences could reasonably be expected to occur";
- (2) Secondly, the "Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case".

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<sup>2</sup> *MW v Spiga Ltd* [2024] NZEmpC 147.

[52] The Court said this part is a weighing exercise and that equity and good conscience may be involved.

[53] Counsel for Mr Petrie submitted that publication would likely result in adverse consequences, such as reputational harm and client relationships. However, based on the evidence before the Authority, since leaving Alphero, Mr Petrie has obtained full time employment, doing fully remote work. I was also not persuaded that there were any intensely personal details put before the Authority. There was no evidence that publication would cause Mr Petrie specific adverse consequences that were sufficient to justify an exemption to the fundamental rule of open justice.

[54] Mr Petrie's application for non-publication is declined.

### **The issues**

[55] The issues requiring investigation and determination were:

- [1] Whether Mr Petrie has been unjustifiably disadvantaged and/or unjustifiably (constructive) dismissed by Alphero;
- [2] If so (by disadvantaging and/or dismissing Mr Petrie), what remedies should be awarded, considering:
  - (i) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
  - (ii) Compensation under s123(1)(c)(i) of the Act.
- [3] If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Petrie that contributed to the situation giving rise to his grievance?
- [4] Has there been a breach of good faith by Alphero; and if so, should penalties be awarded or is Mr Petrie statutorily barred for not raising his claim for penalty within time?
- [5] Should either party contribute to the costs of representation of the other party?

### **Unjustified disadvantage**

[56] An unjustified disadvantage is defined in s 103(1) of the Act as a claim that the employee's employment, or a condition of that employment, has been affected to the employee's disadvantage, by some unjustified action of the employer.

[57] For Mr Petrie’s disadvantage claim to succeed, he must establish that one or more conditions of his employment was affected to her disadvantage by an unjustified action by Alphero.<sup>3</sup>

[58] This means I need to determine whether Mr Petrie suffered a disadvantage in his employment, and – if so – whether this was caused by an action by Alphero and whether that action was unjustified.

[59] Alphero’s actions are assessed in light of the test under s 103A of the Act and in particular, whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[60] It is undisputed that the “4:1” arrangement was not a written term or condition of Mr Petrie’s employment agreement with Alphero. This is not determinative as aspects of an employment relationship not captured in writing may constitute implied terms of an agreement, reflecting the true nature and reality of the employment relationship.

[61] Mr Petrie’s position is clear; he had an agreement to work from home four days a week on the basis he was on the TVNZ project. In his view this was a longstanding practice which Alphero supported until he asked to work fully remotely. I accept that Mr Petrie had, whether rightly or wrongly, a genuine expectation and belief that the “4:1” arrangement was an “existing agreement” that did not require re-negotiation, as per Alphero’s updated flexible policy at the time. Although he was working remotely from late January 2022, I find that initial period of working remotely was due to Covid restrictions, and that the “4:1” arrangement actually commenced from 3 October 2022 after Ms Dewe’s monthly meeting instruction that employees on ‘Team TVNZ’ could request to work four days a week from home (which Mr Petrie did and was approved).

[62] Alphero’s position is that there was never a specific prior arrangement that the increased flexibility would be permanent. The “4:1” arrangement was client specific to TVNZ. In Ms Dewe’s evidence, she confirmed that during the September 2022 monthly meeting, she emphasised that employees on the TVNZ project were an exception to the request for employees to return to the office three days a week but emphasised it was not a permanent exception but a temporary one. Further, Ms Dewe

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<sup>3</sup> *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC).

stated that such flexibility was only afforded until it no longer suited the client *or* Alphero's needs. Ms Dewe emphasised that Alphero's operational needs were changing and the roll back of the prior increased temporary flexibility was part of the changes to support its operations. At the time when Mr Norfield commenced employment as a manager, these needs were communicated to him.

[63] At the time Alphero advised Mr Petrie it required him to return to the office three days a week, Mr Petrie remained on the TVNZ project. At the investigation meeting, Mr Norfield and Ms Dewe accepted that there were no plans to change this immediately. Mr Norfield had not had a prior discussion with Mr Petrie or other staff about Alphero's intention to have more flexibility to allocate staff between projects prior to its letter to Mr Petrie advising of the requirement to work in the office three days a week. Mr Norfield's evidence was that he had only commenced employment and had begun to have one-on-one discussions with staff who reported to him about this, but never got the opportunity to meet with Mr Petrie prior to the discussion they had on 11 December 2023 when Mr Petrie told him he had bought a house in Whanganui. It was only following his exchanges with Mr Petrie about the remote working request, that Alphero advised Mr Petrie it intended to roll back the increased flexibility generally, to require staff to work in the office three times a week in line with its flexible working policy.

[64] Having reviewed and weighed the evidence, I find that the "4:1" arrangement was, as both parties acknowledged, a client-specific but temporary arrangement that was in place prior to Mr Petrie's request to work fully remotely. Although it was a temporary arrangement that was in place following Alphero's approval in October, the conditions of that flexibility were contingent not just on what Mr Petrie was working on, but contingent on Alphero's need as was expressly communicated by Ms Dewe.

[65] I acknowledge that the timing of Mr Petrie's new house purchase and Alphero's planned changes to its flexible working arrangements, coupled with Mr Petrie's new manager commencing employment during these changes, was unfortunate and likely contributed to the challenges surrounding the issues.

[66] On one hand, I find that there was a temporary flexible arrangement in place that was client-specific and provided for Mr Petrie to work four days remotely. At first glance, because this temporary arrangement had been in place for a moderate length

of time and Mr Petrie continued to work exclusively on the TVNZ project, the “4:1” client-specific arrangement appeared to have been rescinded without cause in response to Mr Petrie’s house purchase. Alphero did not hide the fact it was disappointed Mr Petrie did not discuss this with them prior to purchasing the house. Notwithstanding that it was not an agreed term or condition of Mr Petrie’s individual employment agreement, the 4:1 arrangement was still a working arrangement, albeit a temporary exception to typical working arrangements at Alphero.

[67] However, upon closer review of all the evidence, it was clear from Ms Dewe’s evidence that she specified the temporary nature of what became known as the exception for “team TVNZ”, and also communicated to staff that when such arrangements no longer worked for the client or Alphero, the arrangement would cease or be amended. The “or Alphero” is important. This indicated that any exceptions to Alphero’s working arrangements, provided they were not part of one’s employment agreement, were essentially at Alphero’s discretion. In fact, the evidence showed that the policy had been subject to amendment at least once since Mr Petrie commenced employment, but the temporary increased flexibility was offered informally during Ms Dewe’s communications at her monthly meetings and emails, and never set out as a written exception to its flexible working policy. Stepping back, I find it more likely that any additional flexibility Alphero afforded was therefore intended to be fluid in nature to accommodate changing circumstances and therefore subject to change at Alphero’s discretion.

[68] Alphero’s discretion needed to be exercised at the end of 2023 when Alphero decided it required more flexibility to move staff more readily between projects and considered it was challenging to do that with a subset of staff performing the majority of its work from home. Ms Dewe expressed concerns in her witness statement about media clients being “highly volatile” and could “ramp [Alphero’s] teams up or down at no notice based on peaks and troughs”. These characteristics of the work necessitated the “4:1” arrangement being temporary in nature.

[69] As Alphero’s chief executive, Ms Dewe believed a roll back of all existing temporary increased flexibility was necessary to manage such strategic risks, and she directed managers, including Mr Norfield, to operationalise those changes. Unless a specific agreed term was provided for in one’s employment agreement, Ms Dewe considered it was Alphero’s prerogative to amend its policies based on Alphero’s evolving operational changes and strategic direction.

[70] Mr Petrie considered Alphero was obliged to maintain the “4:1” client-specific arrangement. However, it was never intended to be a permanent arrangement and the evidence supports that this fact had been communicated openly and transparently; nor was the temporary arrangement arbitrarily removed as a response to Mr Petrie purchasing his house. There was no arbitrary or unfair action taken by Alphero. Instead Alphero responded to Mr Petrie’s request to work fully remotely by extending a temporary fully remote working arrangement to Mr Petrie for three months so that Mr Petrie could settle into his new home and make arrangements to be in the office three days of the working week from April. It was not obliged to do so.

[71] Mr Petrie’s claim for unjustifiable disadvantage has not been made out.

### **Constructive Dismissal**

#### *Relevant law*

[72] A resignation may amount to a dismissal in some circumstances.<sup>4</sup>

[73] The Court of Appeal in *Auckland Shop Employers Union v Woolworths (NZ) Limited* has listed three non-exhaustive situations where a constructive dismissal may occur.<sup>5</sup>

[74] One of these is where a breach of duty by the employer results in an employee resigning. That is the ground on which Mr Petrie relies.

[75] The correct approach<sup>6</sup> in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer. In determining that matter all the circumstances of the resignation must be examined and not simply the communication of the resignation.<sup>7</sup> The breach must be repudiatory as opposed to merely inconsiderate or causing unhappiness<sup>8</sup> and there must be a causal link between it and the tendering of the resignation.<sup>9</sup> The Authority needs to assess whether the breach of duty by the

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<sup>4</sup> *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (CA) at 975.

<sup>5</sup> *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

<sup>6</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Offices’ Industrial Union of Worker Inc (IUOW Inc)* [1994] 1 NZLR 415 (CA).

<sup>7</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Offices’ Industrial Union of Worker Inc (IUOW Inc)* [1994] 1 NZLR 415 (CA).

<sup>8</sup> *Wellington etc Clerical Workers etc IUOW v Greenwich* [1982] ACJ 965 at 975.

<sup>9</sup> *Z v A* [1993] 2 ERNZ 469.

employer (if one is found), was of sufficient seriousness to make resignation reasonably foreseeable.

[76] Mr Petrie has the burden of establishing that the resignation was a dismissal.

#### *Reasons for resignation*

[77] Mr Petrie resigned because he believed Alphero required him to travel from Whanganui to Wellington at least three times a week as of April 2024 and he believed this requirement was in breach of a prior arrangement he had with Alphero where he worked from home four days a week.

#### *Was there a breach of duty?*

[78] In order to find a breach of duty, I must find that there was a duty to begin with. In other words, I must find that Alphero breached its prior agreement providing for Mr Petrie to work from home four days a week.

[79] As set out above, I have found there was no existing permanent “4:1” arrangement. There was therefore no duty owed to Mr Petrie to continue that arrangement.

[80] As I have found there has not been a breach of duty by Alphero, Mr Petrie’s claim for unjustifiable (constructive) dismissal must also fail.

#### **Penalty**

[81] Counsel for Mr Petrie sought penalties for a breach of good faith and breach of contract at the investigation meeting.

[82] As more than 12 months has passed since Mr Petrie’s employment with Alphero ended, Mr Petrie’s claim for penalties is time barred under s135(5) of the Act.

[83] In any case, his claim for penalties would not have been successful as there has not been a breach of the employment agreement nor a breach of good faith by Alphero.

#### **Orders**

[84] No orders are made.

## Costs

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

[86] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Alphero may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Petrie will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[87] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>10</sup>

Davinnia Tan  
Member of the Employment Relations Authority

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<sup>10</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)