

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Linda Ponsonby (Applicant)
AND Torlesse Wines Limited (Respondent)
REPRESENTATIVES Tim McGinn, Counsel for Applicant
John Shingleton, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 30 May 2006
SUBMISSIONS RECEIVED 8 June 2006
9 June 2006
DATE OF DETERMINATION 2 August 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Linda Ponsonby, commenced employment with the respondent company, Torlesse Wines Limited, on 5 January 2004 as a sales representative.

[2] Torlesse Wines Limited (“Torlesse”) is a duly incorporated company and carries on the business of a wine producer and distributor in Christchurch and North Canterbury.

[3] Ms Ponsonby says that she was subjected from 24 January 2005 through to 18 February 2005 to a course of conduct by her employer that breached her employer’s duty to provide her with fair and reasonable treatment and a safe workplace. Ms Ponsonby said that she resigned from her employment in circumstances that amount to an unjustified constructive dismissal.

[4] Torlesse deny that Ms Ponsonby was unjustifiably constructively dismissed and say that Ms Ponsonby resigned of her own accord following reasonable performance management in terms of her sales level. They say that her resignation surprised them and they expected a meeting to have taken place to discuss issues on 21 February 2005 but instead were advised that Ms Ponsonby had resigned.

[5] Ms Ponsonby seeks recovery of lost wages and commission, compensation for humiliation, loss of dignity and injury to feelings, compensation for loss of a motor vehicle and costs.

The Employment Agreement

[6] Ms Ponsonby signed an individual employment agreement (“the agreement”) on 8 December 2003 prior to commencing employment with Torlesse.

[7] The remuneration for the position was set out in clause 4 of the agreement. Clause 4 can be summarised as follows:

- There was an annual salary of \$35,000.00 payable weekly in arrears.
- Sales commission of 3% of sales excluding GST and after discounts of credits and customer stock returns was applied.
- Reimbursement was made for all actual and reasonable expenses approved by Torlesse.
- Ms Ponsonby was to maintain a mobile telephone for use on company business and have her rental and company related charges reimbursed.
- There was provision of a motor vehicle for use on company business. Ms Ponsonby’s use of the company supplied vehicle in practice extended to private usage and she eventually sold her private vehicle in or about April 2004.

[8] Ms Ponsonby agreed in clause one of the agreement, amongst other matters, to discharge the duties of her position as set out in the first schedule attached to the agreement. She also agreed to carry out and comply with all reasonable and lawful directions given by the employer or any other person authorised by the employer.

The employment relationship to January 2005

[9] It is necessary to have an understanding of the employment relationship up to January 2005 against which to consider the events between 24 January and 21 February 2005.

[10] Until early 2005 Ms Ponsonby worked for Torlesse using her home as a base. She used her own computer and cell phone and was reimbursed at the end of each month for cell phone expenses. Ms Ponsonby had had other business experience.

[11] Ms Ponsonby checked her emails first thing in the morning and then would be out of the house on the road for the rest of the day attending to sales. She would return home between 4.30pm and 8.00pm and return telephone calls and check emails again.

[12] In the course of her employment Ms Ponsonby had contact with Andrew Tomlin, a director and part owner of the respondent. Mr Tomlin mainly dealt with administration matters as they concerned the company. He provided Ms Ponsonby with support in terms of the reporting of sales activity and other matters.

[13] Ms Ponsonby had contact with Kym Rayner who is a director and shareholder of Torlesse and a wine maker at Torlesse.

[14] Ms Ponsonby was provided with financial reports related to her sales and strategies on targeting key customers by Peter Parish who was, at that time, involved with Torlesse as a consultant. Mr Parish set the 2004 budget for Ms Ponsonby.

[15] Until May 2004 there was no particular concern expressed to Ms Ponsonby about her sales. Torlesse appreciated that Ms Ponsonby was in a new role as previously there had only been a part-time sales person and another employee who mainly dealt with export sales, Angela.

[16] There were sales meetings held from time to time to discuss sales. The meeting notes dated 11 June 2004 reflect concern about sales for the month of May 2004 and the actions required of, amongst others, Ms Ponsonby.

[17] Some months during 2004 Ms Ponsonby was able to achieve budget but other months she fell short of budget.

[18] Emails and other reports reflect that Torlesse had concerns about whether Ms Ponsonby was spending her time effectively in the sales role. It is also evident from the documentation that there was a concern from Torlesse about Ms Ponsonby reporting her sales calls. Mr Tomlin felt that the sales information was in an unhelpful format. Mr Tomlin also wanted sales calls to be imputed against the client so that Torlesse could ascertain when the client had last been called upon.

[19] Ms Ponsonby did not accept that she provided inadequate information about her calls and sales. She felt that she was doing her best but that there were challenges to selling the wine which were out of her control.

[20] Ms Ponsonby took two weeks leave without pay in July 2004 to take an expenses paid trip overseas. Through no fault of her own she was paid for the period she was away overseas. Torlesse did not realise this until in or about January 2005. Ms Ponsonby felt that this was possibly the catalyst for what occurred between late January 2005 and 21 February 2005.

[21] The November and December 2004 figures for sale of wine were disappointing. When the December 2004 figures became available to Mr Parish, Mr Tomlin and Mr Rayner they knew that the company was in a cash flow crisis and that there would have to be some changes. Mr Rayner said that the directors realised that the existing strategies with respect to wine sales were failing.

[22] It became clear to me at the investigation meeting that it was this financial situation and not Ms Ponsonby's leave that was the catalyst for the events of January and February 2005.

[23] When the December figures became available Ms Ponsonby was on annual leave. She was away from 30 December 2004 until 25 January 2005 requiring a few extra days because of a back injury sustained in a boating accident.

[24] Whilst on leave Ms Ponsonby noticed a position for selling wine which she understood would have been a good job and a step up. Ms Ponsonby applied for the position and had an interview on 25 January 2005 during her lunch break at Torlesse. She was not however offered the position and therefore I do not consider the application for the position relevant to this matter.

The Issues

[25] Ms Ponsonby relies on the third category of constructive dismissal cases referred to by the Court of Appeal in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] ERNZ Sel Cases 136; [1985] 2 NZLR 372 where that there has been a breach of duty by her employer.

[26] The categories are not distinct in nature and some of Ms Ponsonby's evidence that she thought Torlesse was trying to replace her requires consideration of the second category referred to in *Auckland etc Shop Employees etc IUOW* and whether Torlesse followed a course of conduct with the dominant purpose of coercing Ms Ponsonby to resign.

[27] Mr McGinn also said in his submissions that it is theoretically open to the Authority to conclude that there are not sufficient grounds for a finding of unjustified dismissal based on

constructive dismissal and instead by virtue of section 122 of the Employment Relations Act 2000 to conclude that the applicant has suffered unjustified disadvantage in the alternative.

[28] There was no further submission lodged by the respondent in response to the possibility of an alternative finding although the right to lodge a further submission was timetabled.

[29] The issues to be determined are:

- Was Ms Ponsonby's resignation caused by anything that Torlesse did?
- Did Torlesse follow a course of conduct with the dominant purpose of coercing Ms Ponsonby to resign?
- Were there breaches of duty by Torlesse to provide Ms Ponsonby with a safe workplace and to treat her fairly and reasonably and not in a manner calculated or likely to destroy or seriously damage the relationship of trust, confidence and fair dealing?
- If there were breaches of duty then were they of sufficient seriousness to make it foreseeable that Ms Ponsonby would not be prepared to work under the conditions prevailing at the time she resigned on 21 February 2005?
- In the alternative was Ms Ponsonby's employment or one or more conditions thereof affected to her disadvantage by an unjustified action of Torlesse.

Was Ms Ponsonby's resignation caused by anything that Torlesse did?

[30] Ms Ponsonby resigned because she felt that Torlesse had subjected her to pressure in terms of her role and that under the circumstances continued employment would not be good for her health. She felt that the relationship between her and Torlesse had been damaged and felt Torlesse had not listened or responded adequately to her concerns and that they would not be amenable to further time off for stress leave. Ms Ponsonby knew that there would be a much greater emphasis by Torlesse on meeting budget and that as a result she would be subjected to more pressure in her work than had been the situation the previous year.

[31] I am satisfied that Ms Ponsonby's resignation was attributable to the actions of Torlesse rather than some other reason. When Ms Ponsonby resigned she did not have another job.

[32] I now turn to consider whether there was a course of conduct with the dominant purpose of coercing Ms Ponsonby to resign or whether there were actions that amounted to breaches of contract.

Was there a course of conduct with the dominant purpose of coercing Ms Ponsonby to resign or a breach of the employer's duty?

[33] Although Torlesse had some concerns during 2004 there is no evidence that these were put to Ms Ponsonby in any particularly firm manner.

[34] All this changed however in early 2005. The directors got a *fright* when they saw the December figures for the sale of wine. As Mr Rayner put it, there was no money and a sense of real urgency in January 2005. The focus was then on Ms Ponsonby as the only full time sales person. The directors agreed that Ms Ponsonby should be written to about a number of immediate changes to where and how she worked and to arrange a meeting to review her performance. Mr Tomlin

wrote a letter largely focused on changes. Mr Rayner wrote another letter to ask Ms Ponsonby to attend an annual performance review on 2 February 2005.

[35] Ms Ponsonby took the correspondence and the changes that Torlesse wanted from 24 January onward as implying that the directors no longer had trust in her to perform her work. She had just returned to work from a holiday and was being asked, amongst other changes, to work from the warehouse rather than her home base and purchase on behalf of the company a cell phone. The changes were to be immediate. She said that she felt *bombarded* with letters and instructions throughout the process.

[36] There was no mention in Ms Ponsonby's employment agreement of her working from home. She had been doing so using her home as an office base and receiving and sending emails from her own computer for a year with the agreement of Torlesse. She had also shortly prior to the letter from Mr Tomlin just purchased a new cell phone although had asked for financial assistance in doing so from the company.

[37] The directors wanted synergy in the sales activity between Ms Ponsonby and Angela. They wanted to know what Ms Ponsonby had been doing each day and Mr Tomlin wanted Ms Ponsonby to have a cell phone dedicated to Torlesse business. Ms Ponsonby said in an email dated 14 February 2005 to Mr Rayner that it was not the changes themselves that were stressful but the manner in which they were undertaken. There were in my view some good reasons for the changes particularly in terms of storage of data on Torlesse's computer.

[38] Changes to the previous way that Ms Ponsonby had been working should have been the subject of consultation rather than presented as a *fait accompli* to be immediate. There should have been a face to face discussion with Ms Ponsonby about these changes rather than Ms Ponsonby simply receiving a letter. Ms Ponsonby would then have understood why the changes were being proposed and that it was not because Torlesse did not trust her. The performance review meeting would have been a more appropriate time to discuss the changes.

[39] It is unfortunate that another person's application and curriculum vitae for a position at Torlesse was attached to Ms Ponsonby's letter for her performance review. I heard a lot of evidence about this and I find it was entirely probable that the attachment of the letter was accidental rather than intentional. It was obviously upsetting for Ms Ponsonby to have such an attachment to her letter.

[40] Ms Ponsonby wrote a response to Mr Tomlin on 28 January 2005. She clarified her leave situation, queried the benefit of change in terms of conducting her sales activity from the Stevens Street warehouse and voiced her objection to the purchase of a cell phone. She also mentioned the attachment to the application. Ms Ponsonby did not get a response to the letter because, as I understand it, Mr Tomlin thought the issue would be discussed at the annual review meeting on 2 February 2005. As it happened Mr Tomlin did not attend the meeting.

[41] Mr Tomlin did not talk directly to Ms Ponsonby about the placement of a newspaper advertisement for an additional salesperson at Torlesse which Ms Ponsonby saw on 29 January 2005. The evidence supports that whether there should be an additional salesperson had been discussed earlier – see bundle of documents pages 38, 39 and 86. It was Mr Tomlin who wanted more sales penetration for Torlesse and it is clear from the evidence that Mr Tomlin organised the placement of the advertisement.

[42] Ms Ponsonby questioned Mr Rayner and Mr Parish about the advertisement at the meeting on 2 February 2005. Mr Rayner advised Ms Ponsonby that he did not think that the company had

taken steps in that regard. Mr Tomlin said that he thought he had informed Mr Rayner and Mr Parish before the advertisement was placed. It is difficult though to see any benefit for Mr Rayner in the making of such a statement if he was in fact aware of the advertisement unless Torlesse was seeking a replacement for Ms Ponsonby.

[43] Some support for a conclusion that neither Mr Rayner nor Mr Parish were aware of the placement of the advertisement is found in the transcript of the conversation Ms Ponsonby had with another employee, Angela, and taped. Mr Tomlin no doubt would have been able to advise Ms Ponsonby about the advertisement if he had also been at the meeting.

[44] I do not conclude though on the balance of probabilities that there was any deliberate attempt to mislead Ms Ponsonby about the advertisement or that the additional salesperson that was sought was intended to replace Ms Ponsonby. Rather Mr Tomlin intended a salesperson additional to Ms Ponsonby. The emails between Mr Rayner and Ms Ponsonby support that there had been a decision to change Ms Ponsonby's method of operation but not the fact that she was to continue her employment.

[45] Torlesse were entitled to raise their performance concerns with Ms Ponsonby and could advise her that they wanted improvement in her work and changes in her strategies. The meeting on 2 February 2005 did not proceed exactly on that basis.

[46] Instead Mr Parish and Mr Rayner were looking for Ms Ponsonby to acknowledge that her previous strategies had not worked and to quickly come on board with a new direction and focus in 2005. I believe that they thought she had not responded to their suggestions for changes to her methods of selling the previous year and felt that they had to deliver new strategies in terms of sales somewhat more forcefully. I didn't see the meeting in the nature of a disciplinary meeting as submitted by Mr McGinn. There was more a real sense of urgency due to the poor financial position of Torlesse that Ms Ponsonby had to change how she was doing things immediately and in order to do so had to accept that she had been doing things incorrectly the previous year.

[47] Mr Rayner and Mr Parish could have listened to Ms Ponsonby's explanations and advised her that they were unhappy with her performance and expected the budget to be met in the future. They could have told her that they would monitor her performance and offered assistance to change her methods. They may well have felt that that was what they were doing but I find because of the real urgency of the situation they put forward too many demands and changes and Ms Ponsonby felt overwhelmed.

[48] Ms Ponsonby, in my view quite reasonably given the correspondence setting up the performance review meeting, thought that she was required to answer concerns about her performance and had prepared accordingly. I find that Ms Ponsonby's explanations about the previous year's sales were cut short by Mr Parish and Mr Rayner because Mr Parish and Mr Rayner felt that Ms Ponsonby was not comparing *apples with apples* and that her figures and graphs bore no resemblance to the real picture. They said Ms Ponsonby was comparing her sales with the previous part-time sales person. Mr Parish put it to me that what Ms Ponsonby presented was *rebuttal and she did not move forward*. Mr Rayner said that Ms Ponsonby did not appear to understand and take on board the serious financial difficulties the company was in.

[49] There was discussion about a large number of issues including Ms Ponsonby's leave, conducting sales activity from the Stevens Street warehouse, the purchase of a cell phone and needing to move particular wines. There was also discussion about having a local agent do sales in Nelson at least in the interim. Ms Ponsonby was told to work on a new budget. There was probably a comment to the effect that if she didn't do it high enough then Torlesse could not afford

to continue employing her. Ms Ponsonby's evidence was that she was given 24 hours to prepare a budget but I prefer the evidence of Mr Rayner that he could not recall any particular time frame and later email exchanges make no mention of a 24 hour time frame. It would be difficult to see why such a tight timeframe would be required for a budget to take effect on 1 April 2005.

[50] Ms Ponsonby said that the meeting was the most traumatic and upsetting meeting she had ever attended. She said that it was worse than her Family Court experiences. The meeting took place over three hours on a particularly hot day and there were no breaks or refreshments. A failure to offer refreshments would certainly have made the meeting much more difficult.

[51] At the end of the meeting Mr Rayner then made an inappropriate comment to Ms Ponsonby when the two of them were standing next to a lawn sprinkler that *A wet tee shirt might help*. Ms Ponsonby took this to refer to what could be done to boost sales and found it offensive. Ms Ponsonby said that she felt unwell at the end of the meeting and was upset and distracted. Ms Ponsonby referred to two other comments during her employment from Mr Rayner that she felt were offensive. At the investigation meeting Mr Rayner said that any comments were said by way of *banter*. He apologised to Ms Ponsonby and said that he *felt bad*. Ms Ponsonby said that the comments themselves were not the reason for her resignation but part of the overall picture.

[52] The performance meeting was less than ideal. I think there was too much change proposed at one time. I accept that it was probably not intentional but the way the meeting was conducted and what was said made Ms Ponsonby feel that she was responsible for the financial difficulties the company was in.

[53] Mr Rayner in my view was probably blunt and fairly insensitive during the meeting. His behaviour and manner was also in my view inconsistent. For example after the meeting he emailed Ms Ponsonby on 3 February 2005 congratulating her on her engagement and advising that he would arrange for a bottle of bubbles to get to the warehouse in due course to help her celebrate.

[54] Performance meetings are often very difficult for employee and employers. It is difficult to advise someone that they are not performing and it is often difficult for an employee to accept that they are not performing to the standard required and expected by the employer. Fairness requires that such advice be clear. This meeting was conducted in circumstances at a time when Torlesse was in considerable financial difficulty which would have added to the pressure.

[55] I believe Mr Rayner wanted Ms Ponsonby to continue with Torlesse and that the meeting was not an attack on Ms Ponsonby personally but rather on her sales methods. Ms Ponsonby understood that she was to have some input into the budget for 2005. The budget would have taken effect from 1 April 2005 so that must have been an indication to her that Torlesse wanted her to stay.

[56] Although I accept that the meeting was not conducted in an ideal manner I am not satisfied from the evidence that the meeting itself was abusive or so unreasonable to conclude that it was conducted in a dismissive or repudiatory manner.

[57] There was some further correspondence after the meeting of 2 February about sales method and Ms Ponsonby's performance.

[58] A letter Mr Rayner wrote on 7 February 2005 is quite insensitive. Although it is written to summarise the outcomes of the meeting on 2 February 2005 it is critical of Ms Ponsonby's performance without being particularly clear about what she is to do.

[59] I do not find that Mr Rayner wrote this letter intending that it cause Ms Ponsonby distress. It seemed to me though that he allowed his frustration about how he saw the meeting on 2 February and his view that Ms Ponsonby had not appreciated the financial position of the company to influence what he wrote. Ms Ponsonby was also advised that she was not allowed to make out of town trips unless they were authorised. She had to cancel some out of town planned trips in her call cycle. It was unnecessary for Mr Rayner to write the letter in the way that he did which was almost an attack. Ms Ponsonby was an intelligent employee who was, after the meeting on 2 February 2005, well aware of what was expected and that was increased sales. I would have thought a letter recording the outcomes from the meeting would have sufficed.

[60] On 10 February 2005 Ms Ponsonby went to see her doctor as she was not eating or sleeping properly and was physically sick and had headaches. Ms Ponsonby described the previous two weeks at work. Doctor Millichip felt that Ms Ponsonby presented with symptoms of an acute stress reaction and certified her unfit for work for a period from 10 February 2005 until 20 February 2005. Ms Ponsonby supplied a medical certificate to the company.

[61] I do not conclude, as Mr McGinn submits I should, that Mr Rayner's communications after Ms Ponsonby went on stress leave are a blanket disregard to Torlesse's obligation to provide Ms Ponsonby with a safe working environment.

[62] One email on 12 February 2005 from Mr Rayner was a request to Ms Ponsonby for the use of the company vehicle to enable other staff to conduct sales in Ms Ponsonby's absence. Although somewhat clumsily written Mr Rayner acknowledges and expresses sympathy for Ms Ponsonby's stress. He also says *While all these changes may appear to be aimed at you, the reality is: Methods used in 2004 did not work for the company and some new tactics are obviously required for all of us at Torlesse in 2005.* The email also advises of a meeting to take place on 21 February 2004.

[63] Another email from Mr Rayner is in response to Ms Ponsonby's request for information about an agenda for the 21 February 2005 and another confirms that the meeting date is still 21 February 2005. The main thrust of the meeting on 21 February was expressed to be to set *a realistic and achievable budget in discussion with you.* I do accept though it is concerning Mr Rayner referred in the agenda to Ms Ponsonby's sales performance during January and February 2005 when she had only worked for a few days during that period. It was foreseeable that would increase Ms Ponsonby's stress as she could do nothing about the sales whilst unwell.

[64] On 14 February 2005 Ms Ponsonby emailed Mr Rayner and amongst other matters said *I would like to point out it is not the changes that have stressed me but the manner in which these changes have been undertaken.* Ms Ponsonby said that it would be inconvenient to be without her car when she had medical appointments to attend. She questioned whether a return of the company car could be enforced. As it turned out the car was not removed from Ms Ponsonby during this period.

[65] On 18 February 2005 Ms Ponsonby emailed Mr Rayner and said that at the meeting on Monday she wanted what she referred to as *major concerns* about what has been happening in the employment relationship to be addressed. Ms Ponsonby said that she had had to take sick leave which culminated from the following:

1. *As a salaried employee I have been instructed that I need to provide timesheets, without any explanation and implying some sort of trust issue;*
2. *As of 24 January you have unilaterally changed my conditions of work by requiring me to no longer work from my home office utilising my computer and telecommunication facilities,*

- and requiring me to purchase a cell phone immediately with my own funds to be reimbursed in due course by the company;*
3. *I received a letter advising me to attend a meeting to discuss performance concerns with an application for employment from a third party enclosed, seemingly as a threat that you would have someone waiting in the wings if I didn't measure up.*
 4. *On 4 February I was advised that I was no longer to leave town on sales trips without prior authorisation, which resulted me [sic] in having to cancel a sales trip to Nelson at short notice.*
 5. *On 8 February I learned that the Nelson area of my sales territory was being taken off me without consultation and I understand that this may have been planned for some time;*
 6. *Your letter of 7 February 2005 received 8 February summarising conclusions from the performance meeting referring to the "probability of a new salesperson" again implying that there could be a replacement contemplated for my position.*
 7. *In the course of my work related stress leave I have received 5 emails and 4 phone calls requiring me to address various issue prior to the scheduled meeting which has inhibited my recovery and exacerbated my condition prior to a return to work.*

[66] I do not consider it unreasonable that Mr Rayner did not in his email of the same date make reference to concerns but rather expected them to be discussed at the meeting on 21 February 2005.

[67] It was after that email but before the meeting on 21 February 2005 that Ms Ponsonby decided to resign.

[68] Mr Parish attended the meeting on 21 February 2005 with Mr Rayner. Ms Ponsonby was present at the meeting with Mr McGinn.

[69] There was no written account of the meeting. I accept that Mr McGinn referred to a further medical certificate that Ms Ponsonby had received. Mr McGinn was critical of Mr Rayner's behaviour and probably used the words *bullying* and *sexist* to describe it. Mr McGinn told Mr Rayner that Ms Ponsonby had been constructively dismissed.

[70] There was no discussion about any of the items on the Torlesse agenda including the budget and there was no discussion about the issues Ms Ponsonby had raised in her email of 18 February 2005 or Torlesse's view of further stress leave. Mr Rayner had brought a bottle of bubbly as promised to the meeting for Ms Ponsonby. He gave that to her at the end of the meeting.

[71] I find that Mr Rayner was surprised at her resignation as he had expected there to have been some discussion. Mr Rayner said that he thought Mr McGinn had come along for a fair input into the procedure and that there would be some concrete outcomes.

Conclusions

[72] I do not find that there was a course of conduct by Torlesse with the dominant purpose of coercing Ms Ponsonby to resign.

[73] There were actions though in my view that could be complained of.

[74] Torlesse imposed changes to Ms Ponsonby's working conditions in terms where her sales activity would be based and cell phone without consultation which led Ms Ponsonby to believe that there was an absence of trust in her. The reasons for the changes is touched on in Mr Tomlin's letter but there still should have been a face to face meeting about them before the letter was sent.

[75] Whilst there had been some discussion about a local agent picking up sales in Nelson on an interim basis during the meeting on 2 February 2005 any decision to extend that to a permanent arrangement should have also been the subject of consultation. That issue though was to be discussed on 21 February 2005. In terms of seriousness of that matter I have particular regard to the fact that Mr Rayner thought that Ms Ponsonby wanted to spend more time in Christchurch. That may simply have been a misunderstanding which could have been cleared up on 21 February 2005.

[76] The letter of 7 February 2005 which in my view was quite insensitive and the reference to Ms Ponsonby's sales in January and February 2005 after she had gone on stress leave as part of the agenda for 21 February 2005 were not the actions of a fair and reasonable employer. During the January/February 2005 period Ms Ponsonby had essentially been either on leave or stress and there was little purpose in my view on placing such an item on an agenda. Ms Ponsonby clearly had an explanation for her performance during that period but that was one Mr Rayner should have already known.

[77] What I now need to turn to is whether these were serious enough breaches by Torlesse to make a substantial risk of resignation reasonably foreseeable.

[78] There were some serious issues to be discussed and resolved from both perspectives at the meeting on 21 February 2005. There is no doubt in my mind that the parties had to meet to move forward. Ms Ponsonby had identified some major concerns in the employment relationship that required discussion. Torlesse needed to set a budget for 2005. They wanted Ms Ponsonby's input.

[79] Ms Ponsonby then decided to resign after writing her email on 18 February 2005 setting out concerns to be discussed but before the meeting on 21 February 2005. There had been an email from Mr Rayner on 18 February 2005 which did not acknowledge her concerns but simply confirmed the meeting date. That of itself is not sufficient to amount to repudiatory conduct on the part of Torlesse.

[80] I do not find that the actions identified above were sufficiently serious breaches to make a substantial risk of resignation reasonably foreseeable prior to the meeting on 21 February 2005 in light of Ms Ponsonby's email of 18 February 2005. I am of the view that Ms Ponsonby's resignation was premature.

[81] The meeting may well have been able to address her concerns and/or at least resolve some of the misunderstandings about the advertisement for an additional salesperson and the attachment of the curriculum vitae to her performance review letter. I accept Mr Shingleton's submission that Ms Ponsonby resigned before it was foreseeable to Torlesse that she would do so.

Determination

[82] I do not find that Ms Ponsonby has a personal grievance that she was unjustifiably constructively dismissed. I do however find that there was an employment relationship problem between Ms Ponsonby and Torlesse that I need to resolve.

[83] I find under section 122 of the Employment Relations Act 2000 that Ms Ponsonby does have a personal grievance that her employment or one or more of her conditions of employment were affected to her disadvantage by the unjustified actions of Torlesse.

[84] Some of Ms Ponsonby's conditions of employment were changed without consultation. The request to change immediately from home base to the warehouse and purchase a further cell phone disadvantaged Ms Ponsonby. In fairness she needed time to change her previous arrangements.

The requests made her believe that she was no longer trusted and influenced the way she viewed other actions by Torlesse such as the attachment of a curriculum vitae and the advertisement for an additional salesperson. Consultation would have prevented these concerns.

[85] I also find that the tone of the letter from Mr Rayner on 7 February 2005 and the agenda item about Ms Ponsonby's January and February sales for discussion on 21 February 2005 received whilst Ms Ponsonby was on stress leave were not the actions of a fair and reasonable employer and were unjustified. An employee should not be pressured whilst on sick leave about work performance.

[86] I find that Ms Ponsonby was humiliated, hurt and confused by these unjustified actions.

[87] I am of the view that a suitable award for compensation would be the sum of \$6500.00.

[88] I order Torlesse Wines Limited to pay to Linda Ponsonby the sum of \$6500.00 without deduction under section 123 (c)(i) of the Employment Relations Act 2000.

Costs

[89] I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority