

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 33
5349951

BETWEEN PORSE EDUCATION AND
 TRAINING LIMITED
 Applicant

AND AMY ROYDHOUSE
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Libby Inger, Counsel for Applicant
 Matthew Lawson & Rachael Balasingam, Counsel for
 Respondent

Investigation Meeting: 11-13 November 2014 at Hastings

Submissions Received: 13 November 2014, from the Applicant
 13 November 2014, from the Respondent

Determination: 31 March 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] PORSE Education and Training (NZ) Limited (PORSE) claims Amy Roydhouse breached her employment agreement by failing to provide four weeks' notice when she resigned on 21 March 2014. It also claims she breached her statutory and implied duty of good faith; her implied duty of fidelity; and that she misappropriated money belonging to PORSE.

[2] PORSE seeks damages and the imposition of a penalty against Ms Roydhouse. It seeks a raft of other monetary remedies including reimbursement of Polytechnic course fees, and costs.

[3] Ms Roydhouse says she had a partnership arrangement with PORSE, through her company REINS NZ Limited (REINS) which formed the context for the employment agreement between the parties. She denies all claims made against her by PORSE and says that she is owed holiday pay by her former employer.

[4] She counterclaims against PORSE, for breaching its obligations of good faith, trust and confidence to her through the behaviour of its Managing Director, Jenny Yule. She seeks remedies for that breach, and other financial remedies including costs.

Relevant background and the parties' evidence about their relationship

[5] PORSE Education and Training Limited has been a licenced private training company since 1999. It is approved to design programmes and deliver and assess National Unit Standards. It operates a tertiary training programme, which is established across New Zealand, working in approximately 300 secondary schools, with over 2,000 students, annually.

[6] Ms Roydhouse is an accomplished Equestrian rider. She is a competitive show jumper who, in 2010, established her equine training company, REINS, of which she is the sole director. REINS is an acronym for Rider Education in National Standards. Through REINS, Ms Roydhouse offered private equestrian services such as show jumping lessons, school holiday programmes, training of young horses and buying and selling of horses on behalf of clients.

[7] Several years ago Ms Roydhouse conceived the idea of developing NZQA approved equine unit standards that could be delivered by equine trainers in New Zealand. She believed she could develop that idea through REINS. Ms Roydhouse enrolled in courses at the Eastern Institute of Technology (EIT) to obtain unit standard knowledge for the purpose of progressing the concept.

[8] In 2010 Ms Yule and Ms Roydhouse met through their common interest in horses. Ms Yule is the founder and Managing Director of PORSE Education and Training Limited and other companies within the wider PORSE group. When Ms Roydhouse raised her idea of developing equine unit standards for secondary school students Ms Yule expressed interest in it.

[9] Ms Roydhouse's evidence is that her discussions with Ms Yule were, from the outset, about how REINS would work with PORSE to deliver the equine unit standards. She says that at a formal meeting in 2011 or 2012 attended by Ms Roydhouse and her partner, Clint Roebuck, Ms Yule proposed a structure to make Ms Roydhouse's idea a reality. This entailed PORSE working with REINS to develop the unit standards which REINS would then deliver to the market. REINS would subcontract, lead and manage delivery of the unit standards to equine coaches around New Zealand.

[10] Ms Yule recollected that meeting differently. She said it was an informal discussion, over a cup of coffee, during which Ms Roydhouse shared her goals for REINS in relation to unit standards. Ms Yule rejects the notion that any partnership agreement resulted from the meeting.

[11] In October 2012, PORSE and Ms Roydhouse signed an individual employment agreement in which Ms Roydhouse was described as "*Equine Coach*". Employment was stated to commence on 8 October 2012. Ms Roydhouse says she signed the employment agreement because it referred to the partnership between PORSE and REINS and made the partnership and her employment dependent and inseparable.

[12] PORSE formed a new company, PORSE Equine Education Limited, which traded as PEEL, shortly after Ms Roydhouse had commenced working at the Arena. PEEL had five directors including both Ms and Mr Yule. It was Ms Yule's evidence that this company was set up to introduce the brand name for marketing the delivery of PORSE equine training as distinct from the early childhood education for which PORSE is more widely known.

[13] PORSE says its relationship with Ms Roydhouse was solely one of employment. It says there was never an intention that Ms Roydhouse would be a partner with PORSE in terms of the Partnership Act 1908. It says no proposal for consideration for the sale/purchase of PORSE/PEEL shares was ever put to, or voted on by, the PORSE Board.

[14] Ms Yule's evidence was that, although the term "*Business Partner*" was used in documentation for unit standards accreditation, it did not denote an actual partnership relationship. In evidence she referred to REINS being PORSE's "*business*

delivery partner" as distinct from being a legal partner. She says the unit standard idea was fully developed by PORSE/PEEL and marketed to PORSE/PEEL STAR/Gateway client schools in Hawkes Bay.

[15] After signing an employment agreement with PORSE Ms Roydhouse was based at an equestrian arena on Ormond Road, Hastings that Ms Yule and her husband, David, had developed on their family property. While Ms Roydhouse was based there, the arena was referred to in marketing material as "*REINS on Ormond*".

[16] Ms Roydhouse provided equestrian services which were marketed through REINS. She managed the Arena and provided agistment services at the facility. Fees collected from equine and agistment services were deposited into a PORSE/PEEL bank account.

[17] She was helped in the day to day running of the Arena and agistment services by Ms Yule and her husband, PORSE staff, and other tenants on the Yule property. PORSE supplied Ms Roydhouse with a laptop, printer, i-Pad, fuel card, unlimited agistment for her personal horses, and free use of barn facilities for personal truck and horses. She was supplied with equipment to manage the property and had use of both a vehicle for towing and a horse float.

[18] Ms Roydhouse also was part of a project team set up by Ms Yule to develop the model for the delivery of Equine Education and for development of the documentation required in order to obtain NZQA accreditation for the programme. PORSE reimbursed Ms Roydhouse for the \$650 cost of her fees for completing her unit standards courses at EIT.

[19] The project team was headed by a PORSE manager, Michelle Martin. The team developed the learning materials and documentation needed before NZQA accreditation could be sought. A researcher and writer was contracted to develop learning and assessment materials. Ms Roydhouse contributed her subject matter expertise as part of the team. Unit standard accreditation and approval for the trialling of equine courses in 2014 was obtained in the latter part of 2013.

[20] Ms Roydhouse says that during 2013 she was becoming increasingly concerned over generating enough income for REINS and spoke with both Ms Yule and Ms Martin about this. She was spending an increasing amount of time on assisting with the unit standards work which impinged on her ability to generate

income through work at the Arena. Ms Roydhouse says she was reassured by Ms Martin and Ms Yule and was told to prioritise the unit standard work. Ms Yule's evidence on this matter differs and, in her recollection, Ms Roydhouse was told to prioritise the equestrian work at the Arena.

[21] From mid-year 2013 Ms Roydhouse says she was given a new Equine Coach job description and in December 2013 was given a further new job description as National Equine Coach. Business cards with that title were also supplied to her. Emails between Ms Martin and Ms Yule that were provided to the Authority support Ms Roydhouse's evidence. She says she was trying to fulfil the duties of all three job descriptions and was having to work long hours to accommodate the heavy workload.

[22] From mid-January 2014 Ms Roydhouse says it was becoming increasingly clear to her that PORSE was taking control of all unit standards development and delivery. She became concerned about the future place of REINS in this mode of operation and about being shut out of the partnership she believed she had with PORSE.

[23] On 5 February 2014 a meeting took place between Ms Roydhouse, Ms Yule, Michael Batey, and Donna Braddock. Mr Batey is the PORSE Chief Financial Officer and Ms Braddock is Financial Manager for one of the PORSE group of companies and a member of the Finance team that has responsibilities across the group. Its purpose was to review 2013 and to examine the projections for 2014. Ms Roydhouse raised concerns over the long hours she was working and the level of her remuneration.

[24] Another meeting took place between Mr Batey and Ms Roydhouse two days later in which Ms Roydhouse's concerns were explored in more detail. Mr Batey asked Ms Roydhouse to put her proposals for improving her situation on paper.

[25] A third meeting, attended by Ms Roydhouse, Mr Batey, Ms Yule, Ms Braddock and Ms Martin took place on 7 March 2014. At that meeting Mr Batey noted that the January to February 2014 financial results were well behind the forecasts. He expressed his view that Ms Roydhouse needed to focus on high revenue-generating equestrian services.

[26] Ms Roydhouse says she did not feel that her concerns were being addressed and, from that date, she says she started to understand that the partnership

arrangement she thought existed was not actually happening or intended to happen by PORSE. There were discussions with Ms Yule over her becoming a contractor rather than an employee and on 10 March 2014 Ms Yule produced a draft Memorandum of Understanding for discussion between the parties.

[27] Tension developed in the relationship between Ms Yule and Ms Roydhouse in the following days in which a significant volume of email correspondence was generated between them. Ms Yule requested a work plan and time recording in one email. Ms Roydhouse stated her view in another email dated 17 March 2014 that Ms Yule was positioning herself for a constructive dismissal or trying to make Ms Roydhouse's position untenable for her to continue.

[28] Ms Yule arranged urgent mediation as a result of these exchanges and informed Ms Roydhouse by email on the morning of 20 March that mediation was set down for Thursday 27 March 2014.

[29] On Friday 21 March 2014 Ms Roydhouse left a one-line letter of resignation on the Yule's kitchen bench, with the resignation to take immediate effect. Her evidence is that she felt as though she was being pushed out and that PORSE did not want her as an employee or a partner. She said she had been bombarded by emails from Ms Yule in the last week of her employment and had lost trust in PORSE to the extent she could remain there no longer.

[30] Evidence from Ms Yule is that Ms Roydhouse's resignation from PORSE was not something it sought or welcomed and that her abrupt departure caused significant problems and losses for PORSE.

Issues

[31] The issues for the Authority to determine are:

- a. What the nature of the relationship was between Ms Roydhouse and PORSE.
- b. If Ms Roydhouse was an employee:
 - i. whether she breached her employment agreement in failing to give four weeks' notice; and, if so
 - ii. whether damages should be awarded against her for losses PORSE incurred as a consequence; and/or

- iii. whether a penalty should be imposed on her.
- c. Whether PORSE breached its obligations of good faith towards Ms Roydhouse; and, if so
 - a. What remedies are appropriate.
- d. Whether holiday pay is owing to Ms Roydhouse.

What was the nature of the relationship between the parties?

[32] To determine the real nature of the relationship between PORSE and Ms Roydhouse the Authority:

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship¹.

[33] In *Bryson v Three Foot Six Ltd (No 2)*² the Supreme Court held (at page 386) that *all relevant matters* included the written and oral terms of the contract between the parties and the way it operated in practice. It required the court or Authority to *have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test).*

Intention of the parties

[34] The evidence of the parties differs on their intentions at the time of entering into an employment agreement. Ms Yule's evidence was that she liked supporting people and, by offering employment to Ms Roydhouse, she was giving her the opportunity to make a living from her passion for horses and riding. She noted that previously Ms Roydhouse had to work part-time in order to supplement her income from her equine activities.

[35] Ms Yule denied having any intention of entering into a partnership arrangement with Ms Roydhouse. She said she envisaged PORSE developing the unit standards and the business model for implementing their delivery. She foresaw Ms

¹ Section 6(3) Employment Relations Act 2000

² [2005] ERNZ (SC) 372

Roydhouse taking on the position of National Equine Coach once the project had obtained NZQA accreditation and was established.

[36] She acknowledged that the documentation compiled to obtain unit standard accreditation contained numerous references to a partnership with REINS as did the marketing material for the Arena. In Ms Yule's view this was a version of "partnership" that was common in the education industry and did not connote a business arrangement.

[37] Ms Yule is a successful business owner and I doubt she was motivated solely by altruism in offering employment to Ms Roydhouse. I find it more likely Ms Yule intended the relationship with Ms Roydhouse to be one of employment because it was a convenient and mutually beneficial arrangement. It would allow her to develop business from the Arena, and ensure Ms Roydhouse would contribute her subject matter expertise to the unit standard development work while giving Ms Roydhouse an established base for her equestrian activities.

[38] I also find it likely that Ms Yule did not ever have the intention of entering into a "partnership" with REINS that would entail sharing all the profits and losses, responsibilities and liabilities of the activities on which they jointly embarked. That may not have been communicated clearly to Ms Roydhouse.

[39] Ms Roydhouse's evidence was that, although she had signed an employment agreement in October 2012, she had never considered herself to be an employee. Her understanding was that Ms Yule, through PORSE, was financing REINS so she and Ms Roydhouse could work together to develop the unit standards and the business model for introducing them and rolling them out. The employment was the mechanism for achieving this. I accept this was a factor in Ms Roydhouse agreeing to an employment relationship with PORSE.

[40] However, I do not accept it was the only reason. The security of a salaried position while she further developed her equine activities from a permanent base would also have been an incentive to accept employment. Additionally Ms Roydhouse received the other entitlements of an employment relationship such as holiday and sick leave. Since leaving employment with PORSE she has claimed payment for untaken holidays.

[41] These factors lead me to believe she saw the employment relationship as more than a convenient vehicle for achieving her dream of equestrian unit standards. I note also that under cross examination Ms Roydhouse accepted that she was an employee by the time she received business cards as National Equine Coach, and believed herself to be fulfilling the duties of that role.

[42] I find the parties did have a common intention to enter an employment relationship in October 2012. However, they did not have a common intention about what would happen once accreditation had been achieved and the unit standards had been successfully trialled.

The employment agreement

[43] The written employment agreement is relevant to an investigation into the real nature of the relationship between the parties, but is not determinative of the matter.

[44] Under the terms of the agreement Ms Roydhouse was to be paid \$50,000 per annum and would work 40 hours per week. The hours were flexible, to enable delivery of services over seven days.

[45] The provisions in the main part of the employment agreement are unexceptional and indicate a conventional employment relationship. These include clauses covering a trial period, hours of work, remuneration, holidays, and a process for the resolution of employment relationship problems.

[46] The unusual feature of the employment agreement lies in the attached schedules which contain the following:

(a) ***Special Conditions*** included in *Schedule 1*:

Promotion of Porse Equine Unit Standards on REINS website.

Full IT support for REINS website and development as and when required.

Fuel card for car/truck petrol expenses to deliver REINS services.

(b) The ***Job Description*** for Ms Roydhouse's position as *Equine Coach* in *Schedule 2* includes:

Responsible for the successful growth and management of REINS "connecting riders with horses".

Role Definition

- *Oversee the day to day operations of REINS as smoothly and effectively as possible.*
- *Includes the development, design, marking and assessment of NZQA Equine Unit Standards, offered by PORSE Education and Training (NZ) Limited.*

.....
Responsible for:

1. *Day to day management, development and delivery of REINS.*
2. *2013 trial of PORSE Equine Education NZ QA Unit Standards.*
3. *Management and marketing of Arena, Barn and Grazing on ORMOND.*

[47] The content of the schedules changes what would otherwise be an ordinary employment relationship into one that contains commercial elements. Schedule 1 requires PORSE Equine Unit Standards to be promoted on the REINS website. That website is Ms Roydhouse's vehicle for promoting her own equestrian business. Schedule 1 also provides that PORSE will provide full IT support for the REINS website and its development as and when required, as well as paying for petrol expenses incurred by Ms Roydhouse while delivering REINS services. These are not features of a normal employment relationship.

[48] Schedule 2's Job Description specifies that Ms Roydhouse is to manage and grow REINS and be responsible for its day to day operation. She is also required to develop, design, mark and assess NZQA Equine Unit Standards offered by PORSE and manage and market the arena and agistment services offered. It is unusual for an employee's job description to require her to manage the business of her own registered company. However the requirements relating to equine unit standards and marketing the arena services are features that could form part of a conventional job description.

[49] I find there are features of the schedules to the employment agreement that indicate the real relationship was a business arrangement between two companies. Under that scenario, the employment agreement was a convenient mechanism during the development phase of the equine unit standards. However, on the basis of the employment agreement alone I am unable to make a definitive finding on this.

Control test

[50] A significant part of Ms Roydhouse's duties was to grow and manage REINS on a daily basis. Additionally she was to be responsible for trialling the new equine education NZQA standards, and for managing and marketing the Arena, Barn and Grazing on the Ormond property.

[51] The unit standards did not receive NZQA accreditation until late in 2013, and the main activity relating to them that year was the preparation of documentation leading to accreditation. As already noted, Ms Roydhouse was part of a team led by Ms Martin to accomplish this. From the evidence before me this part of Ms Roydhouse's work represented her main interaction with other PORSE employees, apart from Ms Yule and her husband, with whom she had informal contact on a more frequent basis at the Arena.

[52] The evidence does not suggest any direct control of Ms Roydhouse's activities by PORSE. How she conducted herself in running REINS was a matter for her to determine. While Ms Martin was the project manager and driving force behind the team tasked with developing unit standards, she was not in a supervisory role over Ms Roydhouse.

[53] I find PORSE exercised minimal control over the way Ms Roydhouse conducted her work. This test alone is inconclusive in determining the real nature of the relationship although it favours a relationship other than one of employment.

Integration test

[54] PORSE provided the location for Ms Roydhouse's equine operations and many of the tools of trade she required. She was based at the company's Arena premises and was not responsible for payment of her own taxes. Her initial job title was that of Equine Coach, with the prospect of becoming the National Equine Coach after unit standard accreditation had been achieved. The evidence shows that in late 2013 Ms Roydhouse was provided by PORSE with business cards for the National Equine Coach position.

[55] This was an important role in the development of the equine education PORSE intended, through PEEL, to roll out following accreditation and the successful trial of the unit standards. I find that Ms Roydhouse was an integral part of business.

Fundamental test

[56] The essential question here is whether Ms Roydhouse was in business on her own account. There are conflicting factors at work. While a large part of her job description required her to run her own business REINS, all the fees she collected from doing that were destined for the PORSE/PEEL coffers, rather than those of her own business. Her remuneration remained static regardless of the numbers of clients she attracted to the Arena for tuition or agistment.

[57] It was Ms Roydhouse's growing unhappiness with the way the relationship was working in practice, and a dawning understanding that her employer had a different view of how the relationship would work in the future, that led to tension in the relationship and ultimately to her resignation.

[58] Ms Roydhouse's evidence was that she had gradually realised PORSE had taken her idea and turned it into a business opportunity for itself. It was only in the last months of her employment that she fully realised how little she would benefit from the idea she had conceived and in which she saw the future of REINS. That is not a matter on which it is necessary for me to comment in determining the nature of her relationship with PORSE.

[59] I find that, despite some of the unusual features of her written employment agreement involving the relationship between PORSE and REINS, Ms Roydhouse was not in business on her own account regardless of her wish to be.

Conclusion

[60] I have considered the intention of the parties regarding the nature of the relationship, applied the usual tests, and have looked objectively at how the relationship worked in practice. I have concluded that the evidence points to the reality of the relationship being one of employment between PORSE and Ms Roydhouse.

[61] This is not to deny there may also have been another type of relationship between the parties. The High Court discussed coexisting relationships in *Ryan v Mason*³, an interlocutory matter to determine whether the court had jurisdiction to hear the substantive proceedings. These involved a restraint of trade asserted by Mr

³ [2011] 2 NZLR 791 (HC)

Ryan to pertain to Mr Mason following his resignation from both his salaried partnership and his employment with the law firm of which Mr Ryan was Managing Partner.

[62] The Court stated that:

What the case demonstrates is that an employment relationship can coexist with another relationship and that other relationship may attract equitable obligations and remedies which might not be appropriately resolved by the narrower remedies available to the Employment Authority.⁴

[63] In discussing the difficulties for each party in establishing precisely what the relevant relationship was the Court said:

I do not see this as an "either/or" situation. It may well be, after scrutiny and assessment of the parties' evidence, that the relationship between Messrs Ryan and Mason is a hybrid one, some parts of which are a partnership relationship and other parts of which are an employment relationship.⁵

[64] I take this point no further other than to say that some of the claims and counterclaims in the current matter may be able to be addressed in a different forum.

Did Ms Roydhouse breach her employment agreement in failing to give four weeks' notice?

[65] The employment agreement contains the following termination provisions:

Termination of Employment

9.1 *A minimum of four (4) weeks' notice in writing is required from either party to the other to terminate this Agreement. The Employee's failure to provide and work out completely such adequate notice may result in the forfeiture of salary in lieu. The Employer may in any case pay salary in lieu of notice.*

9.2 *The Employer reserves the right to deduct from final salary payment, any monies owing to the Employer.*

[66] Ms Roydhouse gave notice, effective immediately, on 21 March 2014. She did not give the four weeks' notice required by clause 9.1 of her employment agreement and therefore did breach the terms of that agreement.

⁴ Ibid at [33]

⁵ Ibid at [40]

Should damages be awarded to PORSE and/or a penalty be imposed on Ms Roydhouse arising from that breach?

[67] PORSE says it suffered losses and inconvenience as a result of Ms Roydhouse's failure to give the notice required under her employment agreement. It claims damages and a penalty for breaching the statutory duty of good faith against Ms Roydhouse. These claims are dealt with below.

Damages

[68] The Applicant claims \$3,840 gross for Ms Roydhouse's failure to give four weeks' notice of the termination of her employment. The amount sought represents four weeks' salary.

[69] Counsel for Ms Roydhouse, Mr Lawson, submitted that the employment agreement provides Ms Roydhouse would not receive salary for the four weeks of the notice period she should have provided. In his view it does not provide that the employer is entitled to claim, as damages, salary for that four week period from the employee.

[70] I agree with Mr Lawson. The clause does not allow the employer to claim four weeks' salary in the event the employee did not provide, and work, that amount of notice. It provides that the employee's failure to give the requisite notice "*may result in the forfeiture of salary in lieu*" and then refers to the employer's ability to "*pay salary in lieu of notice*".

[71] My interpretation of the provision is that if the employee does not give four weeks' notice, then payment for the notice period is at the discretion of the employer. I do not interpret the provision to mean that Ms Roydhouse may be required to pay her employer four weeks' salary because she failed to give four weeks' notice.

[72] PORSE is claiming the four weeks' salary as damages, rather than as a contractual entitlement. However, where the contract provides a discretionary sanction of not paying salary for the required period of notice when such notice is not given, I do not find it appropriate to award the sum sought as damages and I decline to do so.

[73] PORSE says Ms Roydhouse's failure to give four weeks' notice of resignation left PEEL in a state of disarray in relation to students who had pre-paid riding lessons, and owners of horses who were agisted on the Yule's property. PORSE /PEEL was unable to make bookings for the Arena as all bookings were made through the REINS website.

[74] It claims \$2,000 damages for three months' lost income from Arena. The loss was incurred as a result of Arena bookings being made through the REINS website. After her resignation Ms Roydhouse put notices on that website conveying the information that the bookings could no longer be made through the website.

[75] This raises the question of why Arena bookings were made through the REINS website. Ms Yule, when asked about PORSE's partnership arrangement with Ms Roydhouse and REINS, said that REINS was the model on which unit standard accreditation was sought: it was the industry partner brand name to begin with. That is consistent with the special condition in Ms Roydhouse's employment agreement that she would be provided with "*Full IT support for REINS website and development of the REINS as and when required*".

[76] It was a PORSE decision to use the REINS website for all Arena bookings, as well as tuition and other equestrian services. The promotion of PORSE/PEEL business at the Arena through REINS was to PORSE's advantage during Ms Roydhouse's employment but it created difficulties upon her resignation.

[77] Once Ms Roydhouse resigned it was no longer appropriate for PORSE bookings to be made through her company's website. I accept it was necessary for her to reclaim her website for her own equestrian business. I find any loss of bookings sustained by PORSE arose from its decision to use the REINS website for Arena business. It would be unjust to inflict those losses upon Ms Roydhouse and I decline to do so. This claim is dismissed.

[78] PORSE claims damages of \$7,200 for three months of lost income for cancelled equine tuition. I dismiss this claim for the same reason as given for the Arena bookings claim. It was PORSE's decision to use Ms Roydhouse's REINS website to promote its equestrian services. Any lost income following her resignation was a direct result of the linkage PORSE chose to create between the REINS website and its bookings. It would be unjust to attribute the losses to Ms Roydhouse.

[79] The next claim is for damages of \$3,600 representing three months' loss of income from three client agistment horses. Ms Yule gave evidence of her understanding that on 21 March 2014 Ms Roydhouse informed the two clients who owned the three horses that she was not giving lessons or working at the Arena again. This resulted in the clients removing the horses from the property with the subsequent loss in agistment fees.

[80] Ms Roydhouse's evidence was that she took the steps she needed to take to separate REINS from PORSE and PEEL to ensure she could not be accused of giving clients, or potential clients, the impression that she was still operating through, or with, those companies. I accept Ms Roydhouse's reason for informing clients she would no longer be working at the Arena. There is no evidence that she asked the owners of the three horses in question to remove them from the property and I find she is not responsible for the monetary loss suffered by PORSE by the owners' decisions to do that.

[81] I apply the same reasoning in dismissing PORSE's next claim for damages in the sum of \$3,600 for three months' loss of rider income for three rental ponies and related agistment.

[82] PORSE claims \$400 for agistment fees related to another pony (Squirt) to 20 April 2014 and \$25 for his farrier costs incurred during that period. I was provided insufficient evidence for this claim to be substantiated and dismiss it.

[83] A further claim is advanced for damages of \$1,748 for the cost of having to develop a new Arena booking function on a new URL. As I have already found it was a PORSE decision to use the REINS website for Arena bookings, it follows that any costs incurred in establishing a new website for making those bookings is a PORSE expense and not one that Ms Roydhouse should bear. The claim is dismissed.

[84] PORSE claims damages of \$100 per day from 23 March 2014 until the date the Applicant's intellectual property is removed from the new REINS website. I understand this relates to material that is, or was, placed on the REINS website by PORSE during Ms Roydhouse's employment.

[85] Ms Roydhouse's evidence is that she removed material that identified REINS with PORSE or PEEL. I accept that evidence and find it reasonable that she did so. Any development of the REINS website by PORSE during Ms Roydhouse's

employment was undertaken as a special condition of her employment agreement. There was no provision that any resulting enhancements to the website were required to be removed once the employment ended and I find no basis for this claim by PORSE.

[86] The Applicant's next claim is for \$5,000 for damage to PORSE's reputation by including the "*red, blue and green notices*" on the REINS website. These relate to the steps Ms Roydhouse took to separate matters such as Arena and riding lesson bookings from PORSE. The material was factual and contained nothing derogatory or damaging to PORSE. I dismiss the claim.

[87] PORSE claims \$2,000 in damages for misappropriation of its property including promotional material, pamphlets, brochures, posters, forms, branded stationery, completed rider indemnity forms, noticeboard, and rider information. As a separate claim it seeks damages in the sum of \$319. It says this was the shortfall shown by a reconciliation of Arena bookings and monies banked by Ms Roydhouse during her employment.

[88] Some of the promotional material referred to consists of photographs commissioned by PORSE for the REINS website. As I have already noted, PORSE made enhancements to the REINS website with no provision for the return of material following the resignation of Ms Roydhouse or the breakdown in the relationship with REINS.

[89] Other material to which I was referred bore the Reins branding and in Mr Lawson's submission relates to the partnership arrangement between the parties. In any event insufficient evidence was provided to me regarding such other material that PORSE claims has been misappropriated. Nor was any conclusive evidence produced in support of the claim relating to a \$319 shortfall in Arena fees banked. I dismiss all the claims for misappropriation made by PORSE.

[90] PORSE also claims as damages the \$650 it reimbursed Ms Roydhouse for the EIT unit standards course she had completed. I was presented with no evidence to suggest that the reimbursement came with conditions and find no basis to the claim.

[91] The final damages claim is for \$10,000 for an alleged breach of the implied duty of good faith and for Ms Roydhouse's undermining fundamental trust and confidence as required in the employment relationship.

[92] This claim appears to be linked to the unsuccessful damages claims referred to above and was not supported by submissions that would persuade me to give further consideration to it. I decline to make the award sought.

Penalty

[93] PORSE seeks the imposition of a \$5,000 penalty against Ms Roydhouse under s4A of the Act, with the full amount being paid to the Applicant. S. 4A provides that:

A party to an employment relationship who fails to comply with the duty of good faith in 4(1) of the Act is liable to a penalty.. if –

(a) the failure was deliberate, serious, and sustained; or

(b) the failure was intended to undermine-

(i) n/a; or

(ii) an individual employment agreement or (n/a); or

(iii) an employment relationship;

(c) n/a

[94] In support of this claim PORSE, through its counsel, Ms Inger, submits that Ms Roydhouse's behaviour during her last month of employment failed to abide by her good faith obligations under the Act and was intended to undermine the employment agreement.

[95] PORSE submits that Ms Roydhouse failed to be active and constructive, responsive and communicative in maintaining a productive employment relationship. As evidence Ms Inger refers to Ms Roydhouse's failure to meet Ms Yule despite saying she was prepared to do so, and to take up the offer of mediation made by Ms Yule on 18 March 2014.

[96] Counsel has also referred to actions of Ms Roydhouse relating to private arrangements between Ms Yule and Ms Roydhouse over particular horses as evidence of misleading and deceptive behaviour. I consider those matters fall outside the employment relationship and will not consider them further.

[97] It was in the last month of her employment that, by her evidence, Ms Roydhouse said she was feeling her needs were not being addressed and her concerns over PORSE's intention for the partnership were growing. Ms Yule's suggestion of a contracting arrangement, rather than one of employment, followed by her formulating

a draft Memorandum of Understanding that would give Ms Roydhouse no security beyond nine months, and no involvement in the trialling or assessment of unit standards also occurred in that time frame.

[98] A significant amount of email and text correspondence passed between Ms Yule and Ms Roydhouse in the last 5 days leading up to Ms Roydhouse's resignation. I am satisfied from examining those communications that Ms Roydhouse was communicative and responsive during this period. I accept her evidence of feeling bombarded by requests relating to matters that had not until then been queried.

[99] These include her hours of work, and how she managed her work, as evidenced by Ms Yule's insistence at this time that she supply a weekly work plan and record her hours noting the time she had allocated to each task. Ms Yule emailed Ms Roydhouse on 17 March at 4.18 p.m. stating that she could not approve Ms Roydhouse's attendance at the Horse of the Year (HoY) show unless they met to talk through Ms Roydhouse's work plan first.

[100] Ms Roydhouse had responded to an earlier email from Ms Yule that day in which she (Ms Roydhouse) referred to her plan to promote REINS and PEEL at the HoY, which she described as being "*the most important show of the season*" and "*the largest Sport and Pleasure Horse event in NZ*". The indication from Ms Yule that her attendance at the show, which was to start the following day, was uncertain would have added to the pressure on Ms Roydhouse in the days leading up to her resignation. Ms Roydhouse sought a meeting with Ms Yule, suggesting it take place early on the morning of 18 March but Ms Yule was unavailable.

[101] The email and text correspondence shows that Ms Roydhouse actively sought a meeting with Ms Yule on at least three occasions during this period. She had apologised for not being able to meet on Friday 14 March as she had been unable to talk with her advisors about the Memorandum of Understanding Ms Yule had proposed and none of her advisors was available that day. Following that, Ms Roydhouse requested a pre-breakfast meeting on 18 March which Ms Yule was unable to attend. She then asked twice on 18 March when they could meet.

[102] By this stage the communications had reflected a rising tension, including mention of "*good faith*" and "*constructive dismissal*" by, respectively, Ms Yule and Ms Roydhouse. It was at this point that Ms Yule raised the issue of mediation. She

confirmed in an email dated 20 March that mediation had been scheduled to take place on 27 March 2014.

[103] Ms Inger submits there is evidence Ms Roydhouse misled her employer by informing her in an email of 17 March 2014 that there was "*no need to worry jenny there is nothing to worry about.*". She says this is inconsistent with Ms Roydhouse's claim in evidence to have been stressed to the point where she could no longer work in the work environment.

[104] I disagree with that submission and find that, in the context in which it was written, the email was not referring to Ms Roydhouse's state of mind. Ms Yule had expressed concern on the morning of Monday 17 March that she had not seen Ms Roydhouse at the Ormond Road property since Friday 14 March. She had also made specific inquiry about the absence of a student Ms Roydhouse had informed her by text was at school and not at REINS that day.

[105] I understand Ms Roydhouse's response, in which she told Ms Yule not to worry, and that there was nothing to worry about, related to the information she was conveying that she had been at work on the Friday, Saturday, Sunday and again on that Monday morning of 17 March. It also related to the information about the student whose non-attendance that morning Ms Yule had noted. I did not understand Ms Roydhouse's response to convey that everything in the employment relationship was fine and that there was no need to worry about it. Clearly, there were issues, or Ms Yule would not have suggested mediation in an email sent the following day.

[106] While it would have been preferable for Ms Roydhouse to remain in her employment until the scheduled mediation, in the circumstances I have referred to I am unwilling to find that she breached good faith in resigning when she did. I decline the penalty sought.

Did PORSE breach its obligations of good faith to Ms Roydhouse and, if so, are remedies appropriate?

[107] Ms Roydhouse claims the actions of her employer during March 2014, specifically through its Managing Director, cumulatively breached her employment agreement sufficient to amount to "*repudiatory breaches*". She seeks damages in the sum of \$10,000. The behaviour and actions submitted by Mr Lawson are:

- a. Ms Yule's request for a summary of time spent on each task between 10 and 15 March and her requirement of 17 March for a work plan for 17 to 21 March;
- b. Her refusal to meet Ms Roydhouse except in mediation on or after 17 March;
- c. The concerns she raised on 17 March over Ms Roydhouse's attendance at HoY;
- d. Tasks normally performed by Ms Roydhouse were already completed on her arrival at work on 18 March;
- e. Pressure applied by Ms Yule on Ms Roydhouse between 7 and 21 March to make a decision over leaving her employment and becoming a contractor;
- f. The organising of a replacement equine coach on 19 March without consultation with Ms Roydhouse.

[108] Mr Lawson also noted the employment agreement contained a process for dealing with any perceived performance shortcomings and that this was not utilised before Ms Yule questioned Ms Roydhouse's attendance at HoY and required timesheets and work plans. He referred to the "*terse*" communications over this period from Ms Yule to Ms Roydhouse.

[109] I have considered the claims, and the evidence and submissions relating to them. I have also considered the context in which the actions occurred or were alleged to occur.

[110] Ms Yule's requests and requirements over timesheets and workplans were made after Ms Roydhouse had complained about the long hours she was working. It was reasonable for PORSE to take steps to monitor Ms Roydhouse's work and ensure she was not working excessive hours.

[111] I have already discussed the attempts made by both Ms Yule and Ms Roydhouse to meet on and around 17 March and will not repeat the communications between them on the matter. I find there was a willingness to meet by both parties and that their failure to do so cannot be blamed on either. By 18 March it had become clear to Ms Yule that matters had reached the stage where mediation was appropriate. I make no criticism of her for wanting to meet in that forum rather than risking a further deterioration in the tense relationship by a meeting without such independent assistance.

[112] I regard the pressure applied to Ms Roydhouse to change to a contracting basis as unhelpful. It was a proposal put forward by Ms Yule in, or after, the 7 March 2014 meeting and one she appeared to wish to act on very quickly. She produced a Memorandum of Understanding on 10 March, and sought a meeting to discuss it with Ms Roydhouse on 14 March. She proposed that the change in the basis of the relationship, which would remove from Ms Roydhouse any association with the equine unit standards work, would commence from 1 April 2014.

[113] Ms Yule seemed annoyed when Ms Roydhouse made her apologies for that meeting on the basis that she had not been able to discuss the document with her advisers, who were unavailable for the meeting. Her text to Ms Roydhouse on 17 March asking if she was at work that day "*as an employee or self-employed*" could be seen as further pressure.

[114] There was conflicting evidence over the organisation for a replacement equine coach on 19 March and I am unable to reach a conclusion on that matter. Overall, while I find Ms Yule's communications and approach to be less than helpful during March I find the conduct of PORSE to fall short of breaching the duty of trust and confidence owed to Ms Roydhouse. I decline the claim for damages.

[115] Ms Roydhouse also seeks damages of \$100 per day since 27 March 2014 until such time as PORSE removes all references to REINS from any learning and marketing materials and any links to REINS from its website. As this is a matter pertaining to the partnership element of the relationship, rather than from the employment relationship, I decline the claim.

Is Ms Roydhouse owed holiday pay?

[116] Ms Roydhouse's employment agreement provided for an annual holiday entitlement of five weeks. She says her employer's records of annual and sick leave she took overstate the amount of leave she actually took.

[117] PORSE says it asked Ms Roydhouse to apply for leave but she did not do so. As she worked on her own at the Arena, it was not able to determine when she was on leave other than by reference to the closedown of the business over the period around Christmas/New Year, and the calendar kept by Ms Roydhouse.

[118] By PORSE's calculations, Ms Roydhouse took 48 days annual leave during her employment, leaving her in deficit by 12 days. Ms Roydhouse has not quantified the leave she claims to be due to her but, during the investigation, submitted some photocopies of diary entries from 27 December 2012 to 21 February 2014. I am unable to determine from those entries what type of leave was taken on all of the days where absence from the workplace was noted.

[119] I am unable on the basis of the evidence provided to me to make a determination of whether holiday pay is owing and if so how much. Nor is this a situation where I am able to make a finding under s. 83 of the Holidays Act 2003 as Ms Roydhouse has provided insufficient information.

[120] I therefore reserve my decision on holiday pay and invite the parties to provide further evidence and submissions on that matter.

Determination

[121] For the reasons given above I have dismissed all claims by PORSE against Ms Roydhouse. I have also dismissed all counterclaims by Ms Roydhouse against PORSE with the exception of holiday pay.

Costs

[122] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority