

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 163  
3019011

BETWEEN                      BRAD PURCELL  
   Applicant  
  
AND                              NEW ZEALAND ECO BEES  
   LIMITED  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:              Beverley Edwards, Counsel for the Applicant  
   Laurence McLean, Advocate for the Respondent  
  
Investigation Meeting:      8 & 9 March 2018 in Tauranga  
  
Determination:                18 May 2018

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**DETERMINATION OF THE AUTHORITY**

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- A. The employment of Brad Purcell by New Zealand Eco Bees Limited ended by unjustified constructive dismissal.**
- B. In settlement of his personal grievance for unjustified dismissal, and within 28 days of the date of this determination, New Zealand Eco Bees Limited must pay Mr Purcell the following sums, which have been reduced by ten per cent due to actions by him that contributed to the situation giving rise to his personal grievance:**
- (i) \$23,483 in reimbursement of wages lost; and**
  - (ii) \$13,500 as compensation for humiliation, loss of dignity and injury to his feelings.**
- C. Costs are reserved. A timetable has been set for memoranda to be lodged and served if the Authority must determine costs.**

## **Employment Relationship Problem**

[1] NZ Eco Bees Limited operates a honey producing business in the Bay of Plenty. It employed Brad Purcell as its hives manager on 5 December 2016. He resigned on 13 April 2017, with immediate effect. Mr Purcell then raised a personal grievance claiming his employment ended by constructive dismissal. He said he resigned because of physical and verbal threats made by Tim Ponder, one of Eco Bees' two directors. Those threats were said to be made because Mr Ponder and his mother and Eco Bees' other director, Nicola Ponder, suspected Mr Purcell and another worker were stealing hives and honey from the business.

[2] The business operated from a shed on the Ponders' rural property at Te Puna, near Tauranga. Mr Ponder lived in a self-contained flat on the property. His flat was near the shed used for honey processing. Workers employed by Eco Bees used the living room of Mr Ponder's flat as their smoko room.

[3] Mr Purcell said he and another worker, Joel Norris, were subject to a surprise interview during a tea break in that room on 20 March 2017. He said Mr Ponder, accompanied by three other men, closed the door and curtains and then showed him and Mr Norris a loaded crossbow and a baseball bat before asking them both questions. Mr Purcell said Mr Ponder and one of the other men present, Basil Tai, physically and verbally threatened him during a 45-minute period that ended when Mr Purcell said he managed to convince Mr Ponder he had not stolen any hives or honey.

[4] Mr Purcell said when he and Mr Norris were allowed to leave the room Mrs Ponder was outside and must have heard or known what had happened. Mr Purcell was then told to accompany Mrs Ponder on a helicopter flight to check the location and number of Eco Bees hives in Eastern Bay of Plenty sites. On return from the two-hour flight Mr Purcell was told to leave his work-supplied vehicle, a 'ute', and to walk home from the rural property.

[5] The following day Mr Purcell and Mr Norris went to the Tauranga Police Station. A written statement was taken from each man. Those statements complained about Mr Ponder's conduct towards them the day before.

[6] Mr Purcell then went to the Ponders' property to retrieve some personal items. His parents and partner accompanied him. He spoke with Mrs Ponder there. He asked for his pay. Mr Purcell and Mrs Ponder differed in their later accounts over whether Mr Purcell also said he was resigning. Mrs Ponder insisted he did say so. But Mr Purcell insisted he had said only that he would have to resign if she could not guarantee his safety from Mr Ponder. Both agree however that Mr Purcell did tell Mrs Ponder he believed aggressive conduct by Mr Ponder was caused by the use of "P", referring to the Class A illegal drug methamphetamine. This was a topic Mr Purcell had also raised around one month beforehand when he complained to Mrs Ponder about what he called "renegade" behaviour and unsafe driving by Mr Ponder. It was a subject of concern to Mrs Ponder as she said Mr Ponder had "a P problem" in 2013 but she understood he had succeeded in stopping use of it.

[7] This allegation about Mr Ponder was the reason for some of what Mrs Ponder said in a text she sent Mr Purcell later on 21 March:

Ok I've done the 59 hours. I need to ring smartpayroll in the morning and ask them how to do the holiday pay. I'll go thru the receipts in the morning if that's ok as I really need to go to bed. I think I got 1 or 2 hours sleep last night. I would also really like to apologise for my sons actions and I personally would like to pay you some reparation for the trauma you've both been thru, although I'll have to talk to [my husband] Tony [Ponder] when he gets home 2mrw. But I'll let you know on that one. Can I ask that you don't spread the story around as I'm so ashamed of what my son has done. Tony and I are going to have to pick up the pieces and try and make this business work or with the way I'm feeling right now I'm tempted to sell all the assets and hives and Tim can go and get a job. Or maybe he needs to go to a drug rehab clinic for a while. But I've got no idea how to go about doing something like that. How are we going to force Tim to do anything is beyond me. I'm really at a loss to know what to do.

[8] On 22 March Mrs Ponder sent Mr Purcell this text: "Hi Brad, can you please give me your resignation in writing please dated today or yesterday whatever you like". He replied: "No im seeking legal advice". Mrs Ponder responded: "Does that mean you're not resigning now? Because if you are – legally you have to have that in writing." By letter on 24 March Mrs Ponder asked Mr Purcell to return company property and to provide her with a register of the number and physical location of hives and contact details for the landowners of those hive sites. Her letter also advised that his verbal resignation would be accepted if the company had not heard from him by 26 March. That day Mr Purcell's lawyer wrote to an advocate acting for Eco Bees. The letter raised a personal grievance for unjustified disadvantage but also

stated Mr Purcell intended to continue the employment relationship. He sought an urgent meeting with Mrs Ponder to discuss his safety at work. He also offered to work, provided he was not managed or supervised by Mr Ponder, but said he would need to take sick leave for treatment for trauma resulting from Mr Ponder's conduct on 20 March. He later provided a medical certificate, dated 27 March, stating he was suffering an "acute reaction to stress". The certificate stated he had no current capacity to work and his capacity should be reviewed on 27 April 2017.

[9] The next formal communication on Eco Bees' behalf was a letter of 4 April calling Mr Purcell to a disciplinary meeting to answer two allegations of serious misconduct. The letter said a "routine clean" of his work vehicle on 1 April had located "a box containing a pipe used for smoking methamphetamine". It also said a GoPro camera mounted on the vehicle's dashboard was checked on 28 March. A video file on the camera showed Mr Purcell was driving the work vehicle on 2 February while he and Mr Norris were "smoking marijuana using drug paraphernalia". A full copy of that GoPro footage was sent to Mr Purcell's lawyers on 13 April.

[10] In its response to Mr Purcell's grievance Eco Bees denied his employment ended by constructive dismissal. It said he remained its employee following the 20 March incident and he had only formally resigned on 13 April once he was sent the footage showing him smoking marijuana in the company vehicle. Eco Bees said discrepancies in hive numbers reported by Mr Purcell in early March 2017 raised serious concerns. It denied he was disadvantaged by "the investigation into the possibility of the stolen hives" carried out by Mr Ponder and Mrs Ponder on 20 March. And, even if his personal grievance claims were successful, the company said Mr Purcell's "action in relation to the missing hives and drug use while driving" should result in a 100 per cent reduction of any remedies granted.

### **The Authority's investigation**

[11] Mr Purcell, his partner Cherryn Ashby, Mr Norris, Mr Ponder, Mrs Ponder and Mr Tai each gave written and oral evidence for the Authority's investigation of Mr Purcell's grievance application. Under oath or affirmation they answered questions from the parties' representatives and me. The representatives also provided oral closing submissions on the issues for determination.

[12] Relevant documents among the evidence included written and signed statements Mr Purcell and Mr Norris made to the Police on 21 March and a transcript of a Police interview of Mr Ponder on 20 April 2017. Police interviewed Mr Ponder after executing a search warrant at the Ponders' property that day. The search located a rifle and ammunition under Mr Ponder's bed as well as the crossbow and baseball bat mentioned in the statements of Mr Purcell and Mr Norris. Mr Ponder was subsequently convicted of possession of a firearm without a licence. In June 2017 Mr Ponder was also charged with assaulting Mr Norris in a separate later incident. He was sentenced to community work.

[13] The March statements to Police and the transcript of the Police interview in April were of particular interest for the Authority investigation because those documents recorded each man's account much closer in time to the relevant events. The statements of Mr Purcell and Mr Norris included a statutory declaration confirming their statements were true and they were aware making a knowingly false statement was an offence. What Mr Ponder had said in his recorded interview with Police on 20 April was given under caution as to his rights. During the Authority investigation meeting, at a time when they were under oath, each of the three men confirmed they had told the truth to the Police.

[14] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. One point should be made, however, about mutual allegations Mr Ponder and Mr Purcell made, each accusing the other man of being a user of P at the times relevant to the Authority's investigation of the actions of Eco Bees and Mr Purcell as its employee. Mrs Ponder also made the same allegation about Mr Purcell. There was no evidence available to the Authority investigation sufficient to reach any safe conclusion on the likely truth, or otherwise, of those allegations. In particular, and for reasons explained later, no reliable finding could be made about who was responsible for or the user of a P pipe Mr Ponder said he found on 1 April in the work vehicle usually driven by Mr Purcell.

## **Issues**

[15] At the start of the investigation meeting the parties confirmed an issue over arrears of wages and holiday pay had been resolved. The issues remaining for determination were:

- (i) Whether concerns about Mr Purcell's conduct were fully and fairly investigated by Eco Bees (including whether any unjustified disadvantage or breach of Mr Purcell's terms of employment arose during the company's investigation of those concerns)?
- (ii) In light of whatever conclusions are reached regarding issue (i), was Mr Purcell's resignation a constructive dismissal (that is being caused by the company's conduct or a serious breach of the term of his employment, such that it was reasonably foreseeable he would resign in those circumstances)?
- (iii) If Eco Bees actions were not justified, what remedies should be awarded, considering:
  - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
  - (b) Compensation under s123(1)(c)(i) of the Act?
- (iv) Should any remedies awarded be reduced (under s124 of the Act) for any blameworthy conduct by Mr Purcell that contributed to the situation giving rise to his grievance?
- (v) Should either party contribute to the costs of representation of the other party?

## **NZEBL's concerns and its actions to investigate them**

[16] Mr Purcell and Mr Ponder, both aged 27, had first met when they worked at another honey business. Mr Ponder left that job to work on building up his own business and later approached Mr Purcell to come to work for Eco Bees. The role Mr Purcell accepted as hives manager included finding suitable locations for the hives. Such locations are often remote in order to ensure proximity to the preferred vegetation, particularly Manuka, for the bees to forage. Distance from public roads also helps avoid attracting attention from people who might steal hives or honey. Such thefts have been a particular problem in regions such as the Bay of Plenty. Media stories in 2017 reported Police and apiculture sources saying the high value of Manuka honey had resulted in more thefts, probably carried out by organised gangs.

[17] In March 2017 Mr Ponder began developing suspicions about whether Mr Purcell was reporting the true number of Eco Bees' hives and their locations. When Mr Ponder and Mr Purcell visited one remote site of Eco Bees' hives Mr Ponder noticed what he believed was another site but Mr Purcell had told him those hives belonged to a different beekeeper. Mr Ponder said he later returned to that other site and found Eco Bees' logo on some of those hive boxes.

[18] Mr Ponder visited another farmer who allowed Eco Bees to place hives on his farm property but Mr Ponder could not find the hives where he believed they should have been located. He said the farmer told him that a fencing contractor had reported seeing an Eco Bees truck up there a week earlier moving hives. Mr Ponder hired a helicopter to look for those hives. When he flew over the area he believed they were located he said he could see marks in the grass where hives had sat. The following day he hired the helicopter again and found two sites with hives that had Eco Bees logo on some of the boxes. He took photographs of those sites.

[19] The farmer also showed Mr Ponder a card Mr Purcell had given him. It was Mr Ponder's business card. It bore the Eco Bees logo but the part showing Mr Ponder's name and mobile phone number was torn off. Mr Purcell had written his own mobile phone number on the back. Mr Ponder considered it suspicious that Mr Purcell wanted the farmer to have his own number and not that of Mr Ponder.

[20] Mr Ponder also had a report from Mr Tai that Mr Purcell and Mr Norris had made two recent visits to Eco Bees hives on the Tai family farm. As well as allowing those hives to be located on the farm, Mr Tai also did some casual work for Eco Bees from time to time.

[21] He called Mr Ponder to ask why Mr Purcell and Mr Norris had come to the farm twice because Mr Tai believed they should have completed honey collection on the first visit. In his evidence to the Authority Mr Tai said he watched Mr Purcell and Mr Norris from a distance and believed they were removing brood frames. Those frames contain bee eggs, larvae and pupae that can be used to start new hives.

[22] A further element of the suspicions Mr Ponder and Mrs Ponder came to hold arose on 14 March. Mrs Ponder, with her husband Tony Ponder, met with their bank manager that day. The manager asked for information about Eco Bees hive numbers and locations. Mrs Ponder telephoned Mr Purcell and asked him to provide those numbers. By text message he sent her a photograph of a handwritten page tallying hives at different locations. His count totalled 709 hives. Mrs Ponder's evidence was that, although she did not say so to Mr Purcell at the time, she believed the tally for hives owned by Eco Bees should have been almost 300 higher. Her count was 998, including 180 "splits" made between November 2016 and early March 2017. The splits involve a special process to divide a hive in order to establish additional hives that then have a purchased queen added or hatch their own queen.

[23] By 18 March, according to Mrs Ponder's written witness statement, she and Mr Ponder had decided they had "good proof" that Mr Purcell "had stolen hives and honey from us". She said an older son spoke to a Police officer he knew and told her that officer recommended retrieving the hives that the Ponders believed had been stolen and doing more to gather "hard evidence".

[24] Her statement gave this account of what happened next:

Tim comes to me and tells me that he had decided that he wanted to confront Brad and Joel on Monday [20 March] because he couldn't go another week pretending that everything is alright. He decides to get some of his friends there as witnesses in case he could get them to confess. I told Tim that I thought it was probably best to get the police involved but Tim had made up his mind that he could deal with it himself so we agreed.

[25] In her oral evidence Mrs Ponder said she had also tried to get Mr Ponder to install some secret cameras at hive sites in order to gather better evidence about whatever might be happening. However she said he did not agree to that idea because he "could not go another week pretending everything was ok".

[26] In his Police interview Mr Ponder said he decided to have "a bit of a meeting" with Mr Purcell and Mr Norris on 20 March because he had "hard evidence" they were stealing from him. He arranged for Mr Tai, one other worker and a neighbour to also be present because he "wanted to have more of my friends there ... than there was of them". He said he shut the door and closed the curtains because he did not want Mr Purcell and Mr Norris to run away. He denied showing them the crossbow

or baseball bat. He said the crossbow was already on his kitchen bench and the bat was in front of them on the floor where they “could obviously see it”. He said he waved his fist at Mr Purcell’s face “a couple of times”. He said he had “just started talking and quite calmly to start with and then yeah probably got a bit heated and started yelling”. He denied threatening to hit Mr Purcell but said he “was probably intimidating him, as such ... to try and get the truth out of him”. He told the Police interviewer he was trying to “find out how much they’ve actually stolen from me so I don’t have to waste my time trying to find out myself”.

[27] Mr Ponder told the Police interviewer that what Mr Purcell and Mr Norris had said in reply to his questions “pretty much made me believe sort of that they hadn’t been” stealing from him. However, after talking to his mother who had heard some of the exchange from where she was sitting outside the room, he decided he did not believe them. They then arranged for Mr Purcell to accompany Mrs Ponder on the helicopter flight to look at Eco Bee hive locations.

[28] During the flight Mrs Ponder saw a truck and ute carrying a large load of honey boxes driving away from some hives in a paddock. She believed those hives were painted in the colours used by Eco Bees. She said she was suspicious when Mr Purcell denied they were Eco Bees hives and “talked us into flying on to the next site”. The following day she arranged a further helicopter flight to return to the area where she believed she had seen Eco Bee hives. Using a contact number provided to her by local police Mrs Ponder got the landowner’s permission to land at that site. She said she walked over to the hives and, although almost an identical colour, she could quickly see they had the name of another business on them and were not Eco Bees hives.

### **Were Eco Bees’ actions fair?**

[29] An employer with reasonable suspicions of dishonest behaviour by a worker is entitled to put those concerns to the worker for answer. Long standing case law states the employer must have more than mere suspicion but need not have proof beyond reasonable doubt of an actual offence by the worker. In reaching conclusions on what has happened the employer must have either clear evidence on which any reasonable employer could safely rely or have carried out reasonable enquiries that left her or him on the balance of probabilities believing the worker was at fault. An employer

has not made reasonable enquiries if the worker has not had a sufficient opportunity to answer the employer's complaint.<sup>1</sup>

[30] The Employment Court has accepted as applicable in New Zealand the following explanation, given by an eminent British judge, for the principle behind this requirement:<sup>2</sup>

It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start'. Those who take this view do not, I think, do themselves justice. As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

[31] Eco Bees' closing submissions suggested Mr Ponder's actions on 20 March were only preliminary inquiries and no action was taken to discipline or dismiss Mr Purcell. However Mr Ponder's own evidence established he had already reached a clear conclusion when he confronted Mr Purcell that day. He did so by surprise in a closed room where he had arranged for Mr Purcell to be outnumbered and to be aware Mr Ponder had weapons to hand. On his own evidence to the Police Mr Ponder intended, at the very least, for Mr Purcell to be intimidated into what Mr Ponder expected would be a confession. His actions failed to meet the standard of a fair and reasonable employer keeping a sufficiently open mind to enable genuine consideration of any answers given and remaining amenable to persuasion.<sup>3</sup>

[32] Mr Ponder gave contradictory evidence about whether he was or was not persuaded by what Mr Purcell said in response to questions put to him in the room, or whether Mr Ponder had only pretended to be. Whatever Mr Ponder's actual state of mind, it was clear that before the meeting and, at the very least, immediately after it

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<sup>1</sup> *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA) at 556; (1990) ERNZ Sel Cas 985 (CA) at 992-993.

<sup>2</sup> See *Allen v Transpacific Industries Group Ltd (t/a Medismart Ltd)* (2009) 6 NZELR 530 at [48] citing Megarry J in *John v Rees* [1970] Ch 345, 402.

<sup>3</sup> *Ritchies Transport Holdings Limited v Merennage* [2015] NZEmpC 198 at [59].

and having talked again to Mrs Ponder, he had a firm and fixed belief that Mr Purcell had stolen hives and honey from the business. However Mr Ponder's evidence also established he had not fairly put to Mr Purcell all the information, documents and records on which he had come to hold that view. Among material Mr Ponder had that he considered supported his suspicions were a recording he had made of a discussion with a farming couple from one of the properties where hives were located, a video he had taken during a helicopter flight, and photographs he had taken of hives at some sites. Some of those photographs were of what Mr Ponder believed was a hidden site of secretly relocated Eco Bees hives. Mr Ponder said he did show Mr Purcell a map of one of the farms with a site that was no longer there but did not give or show him that other material. The result was that Mr Purcell was not given a fair opportunity to comment on or give any explanation on material that formed the basis of Mr Ponder's concerns. That failure alone breached the statutory obligation of Eco Bees to give an employee a reasonable opportunity to respond to the employer's concerns before taking any action against the employee.<sup>4</sup> Given the seriousness of the allegations which Mr Ponder said he was investigating, the failure was made worse by not according Mr Purcell the minimum requirements of a fair process: reasonable notice of the allegations, an opportunity to take advice, and the opportunity to have a support person or representative attend the discussion.

[33] In closing submissions Eco Bees suggested its actions on 20 March were the preliminary steps "to get answers" and not subject to the same standards as for a formal disciplinary process where a warning or dismissal was proposed. Even if that were a reasonable characterisation of what Mr Ponder was doing that day, Mr Purcell was still entitled to be treated fairly and have a genuine opportunity to comment on all the material on what Mr Purcell, as his manager, was relying. He did not. A further instance of acting on the conclusions he had unfairly reached at that early stage was Mr Ponder's action in having Mrs Ponder tell Mr Purcell to leave the work ute at the Ponder property that night. Use of a work vehicle, usually the ute, to drive to and from work each day was one of the terms of Mr Purcell's employment.

[34] The described defects in Eco Bees actions were more than minor and resulted in Mr Purcell being treated unfairly. On those grounds alone he had established a personal grievance for unjustified disadvantage.

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<sup>4</sup> Employment Relations Act 2000, s 103A(3)(c).

[35] However the weight given to procedural flaws in Eco Bees' actions could have been different if Mr Ponder and Mrs Ponder had provided more compelling evidence about the substance of their concerns and suspicions. Although they had several months to prepare for the Authority investigation, Eco Bees did not lodge a copy of the recording that Mr Ponder said he had made of an interview with a farming couple that supported his suspicions. Neither had he provided the photographs he said were of a 'hidden site' on one farm. While answering questions at the Authority investigation meeting he said he had those photographs with him on his mobile phone and sought to produce them then. Timetable directions issued for the Authority's investigation required production of relevant documents or records some weeks earlier.

[36] Those omissions in providing supporting evidence were surprising given Mr Ponder and Mrs Ponder both referred to plans they had to pursue civil proceedings against Mr Purcell. They intended to do so because, according to Mrs Ponder's witness statement, the Police had told them their evidence was not sufficient for criminal proceedings.

### **Was Mr Purcell's resignation on 13 April 2017 really a constructive dismissal?**

[37] A resignation may be held to amount to a constructive dismissal where an employer's breach of duty or a term of employment has caused the worker to resign and the breach was serious enough to make it reasonably foreseeable that the worker would resign rather than put up with that situation. In this way what appears to be the worker's act of resigning is deemed in law to really be the result of what the employer did, so is held to be a dismissal.<sup>5</sup>

[38] In this case Eco Bees submitted the real reason Mr Purcell resigned on 13 April was because he was confronted with its evidence about him smoking marijuana in a work vehicle, not what had happened on 20 March. Its submission was too narrow a description of the circumstances that led to Mr Purcell's written resignation.

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<sup>5</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 at 172.

[39] The actions of Mr Ponder on 20 March clearly breached an implied term of Mr Purcell's employment that his employer Eco Bees ought not, without reasonable and proper cause, conduct itself in a manner likely to seriously damage the relationship of trust and confidence. Mr Purcell was absent from work from 21 March, had provided a medical certificate and, through his advocate, had sought assurances about his personal safety on his return to work. He had also made offers to provide information so other staff could properly service Eco Bee hives at various locations until his situation was sorted out. He had resisted requests from Mrs Ponder on 21 and 24 March to provide written notice of resignation and, through counsel on 26 March, had raised a personal grievance of unjustified disadvantage. Eco Bees made no substantive response to that grievance before, through its advocate on 4 April, initiating a disciplinary inquiry about smoking marijuana in a work vehicle and the alleged discovery of "drug paraphernalia" in the vehicle on 1 April. Given the background of events to that date, it was not surprising Mr Purcell had no confidence Eco Bees would conduct such an inquiry fairly. While seeing the content of the GoPro footage may have been a factor in the timing of Mr Purcell's resignation, the weight of the earlier circumstances of how he had been treated on 20 March and subsequently by Eco Bees was clearly the primary cause of that resignation. It was reasonably foreseeable that a worker would resign rather than put up with that situation. As a result the resignation was deemed, in law, to be a constructive dismissal. How Eco Bees had treated Mr Purcell, in seeking answers to its concerns, was not what a fair and reasonable employer could have done in all the circumstances so that constructive dismissal was unjustified. Mr Purcell had established he had a grievance for which remedies should be considered.

## **Remedies**

### *Lost wages*

[40] Mr Purcell was without work and wages from 1 April until he found a new job, as a contract labourer, from 1 June. He sought an order for reimbursement of lost wages for this two-month period and then, for a further seven months, for the difference between his pay at the Eco Bees job and what he got in the labouring job.

[41] Using IRD information Mr Purcell calculated his monthly gross pay at Eco Bees averaged \$6690, so the claim for two months totalled \$13,380. The same source gave a monthly average of \$3512 in his labouring job, so his claim for the difference

between that amount and what he might otherwise have earned at Eco Bees, amounted to \$22,246 over a seven month period.

[42] A medical certificate established Mr Purcell's health was compromised to some extent over the initial two-month period. He clearly made some efforts to get a new job as he had work from 1 June. This was sufficient to support the lost wages claim for the first two months. However it did not support making an order for all of the subsequent seven-month period in which he received lower wages than he did at Eco Bees. This would have required some better evidence about attempts he made to mitigate that loss by seeking better paid work during the period. Instead, an order for reimbursement of \$12,712, being the loss during four of those months, was appropriate to the circumstances and the evidence.

[43] Combining those elements, the total value of the reimbursement remedy under s 123(1)(b) and s128(2) and (3) of the Act was \$26,092.

*Compensation for humiliation, loss of dignity and injury to feelings*

[44] Mr Purcell sought an order for \$20,000 as compensation for humiliation, loss of dignity and injury to feelings resulting from how he was treated by Eco Bees before he resigned. In support of that claim he said he suffered "extreme stress and PTSD" as a result of the conduct and threats made by Mr Ponder on 20 March. This included what Mr Purcell said was a threat that Mr Ponder made that day to pay \$15,000 for a "hit" on him if he or Mr Norris told anyone about what happened. Mr Purcell said he and his partner had soon after moved house with their two young children because he was afraid as a result of that threat.

[45] The medical certificate issued to Mr Purcell on 27 March 2017 said he was suffering an acute reaction to stress at that time and his capacity to work was to be reviewed from 27 April. The only other medical information was a note from a GP dated 31 January 2018 stating that doctor had met Mr Purcell for the first time that day. The note recorded Mr Purcell had reported symptoms of "insomnia and nocturnal paranoia". It suggested this "could certainly be consistent with PTSD although this is only our first meeting together". This appropriately careful and conditional comment from the GP meant there was not sufficient evidence to accept, for the purpose of assessing a compensation award, this aspect of Mr Purcell's own

description of the effect on him of what had happened on 20 March. His partner's evidence confirmed Mr Purcell was a regular cannabis user. Well-known side effects of regular use of that substance could not be discounted as contributing to his reported symptoms of sleeplessness and paranoia.<sup>6</sup>

[46] However the evidence of Mr Purcell and his partner did establish he was deeply distressed by the implied or actual physical and verbal threats made in the surprise meeting on 20 March 2017. On the facts of what happened in this particular case, and considering the general range of awards, an order for the payment of \$15,000 was appropriate to compensate Mr Purcell for resulting injury to his feelings.

*Compensation for other loss*

[47] No order is made for compensation of other losses Mr Purcell said he suffered. This comprised around \$200 he said he was not reimbursed for expenses incurred on a work trip before his employment ended and around \$600 for the value of some equipment he had given to Eco Bees. There was insufficient evidence about the circumstances or value of those claims.

*Reduction for contributing behaviour by the employee*

[48] Where the Authority determines an employee has a personal grievance, s 124 of the Act requires the Authority to consider the extent to which any actions of the employee contributed to the situation that gave rise to her or his grievance. Then, if those actions so require, the Authority must reduce the remedies that would otherwise have been awarded.

[49] Eco Bees said any remedies awarded to Mr Purcell should be reduced by 100 per cent because of blameworthy conduct by him "in relation to missing hives" and "drug use while driving".

[50] For reasons that follow I concluded a ten per cent reduction of remedies awarded to Mr Purcell was required due to one established and admitted instance of drug use while driving. Two other elements of supposed contributory conduct – the alleged involvement in missing hives and honey and alleged ownership of a P pipe

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<sup>6</sup> DSM-5.

said to be found in a work vehicle – were not established to the required evidential standard of likelihood.

*(i) allegations regarding missing hives and honey*

[51] Eco Bees' evidence fell far short of establishing Mr Purcell was responsible for what Mr Ponder and Mrs Ponder said were missing hives and honey. No reduction of remedies awarded to Mr Purcell could be made on that count.

[52] The standard by which the Authority must assess evidence and reach conclusions is the same as applied in other civil proceedings, that is on the balance of probabilities. This standard considers what is more likely than not to have happened.

[53] It was possible the allegations Mr Ponder and Mrs Ponder made about Mr Purcell taking hives and honey were true. However other explanations could also be speculated on as being possible, that is capable of having happened. Mr Ponder could have other reasons for accusing Mr Purcell. Eco Bees could have overestimated or overstated the number of hives it had, either mistakenly or deliberately. Other people, possibly operating in organised gangs as had happened elsewhere around this time, could have stolen hives and honey from the remote farm locations.

[54] However speculation about mere possibilities was not enough. In relation to the allegations about Mr Purcell, Eco Bees needed to establish that such seriously wrong conduct was more likely than not to have happened or, on the same standard, that Mr Ponder and Mrs Ponder had conducted inquiries sufficient to have reasonably reached such a conclusion. The evidence Eco Bees provided the Authority investigation in support of that proposition failed to do so, despite Mr Ponder and Mrs Ponder saying they were preparing for further civil proceedings because they had "very good evidence".

[55] Among the troubling shortcomings in their evidence were the following.

[56] Firstly, it was not established in any sufficiently reliable way that Eco Bees had as many live hives as Mr and Mrs Ponder claimed. They blamed Mr Purcell for not keeping an accurate record. Mr Ponder said the asserted total of 998 came from a tally kept on a whiteboard in Eco Bees' shed and on its computer system. Mrs Ponder

said she knew the business initially had 200 hives and she had receipts for another 618 hives purchased before Mr Purcell was employed. The remainder to reach the total of 998 was said to be the result of “about 200 splits”. However Mr Purcell’s evidence cast doubt on the assumptions made in those tallies about other factors affecting the viability and survival of hives and splits. He admitted hive numbers were not accurately counted on all sites but said Mr Ponder and other staff had also moved hives at various locations without telling him. It was an issue over which, he said, he and Mr Ponder “would butt heads” because Mr Purcell considered the location of hives was his responsibility as hive manager. In her oral evidence to the Authority investigation Mrs Ponder, very reluctantly, disclosed that the business had also succeeded in getting an insurance payment of “about \$100 and something thousand” for what were said to be hives missing due to action by Mr Purcell. If there was more evidence that satisfied Eco Bees’ insurer about the basis of that claim, it was not before the Authority.

[57] Secondly, one of the allegations about Mr Purcell relied on a report that Mr Tai gave to Mr Ponder about unexpectedly seeing Mr Purcell and Mr Norris at a hive location on the Tai family farm. Mr Tai’s evidence at the Authority investigation established that he was a volatile and unreliable witness. Mr Tai denied playing any role in the meeting Mr Ponder held in his flat with Mr Purcell and Mr Norris on 20 March. However Mr Ponder, to his credit, conceded that was not correct. And, despite having denied he was even in the room during any significant part of the conversation with Mr Purcell, Mr Tai contradicted himself when answering questions about what he heard Mr Purcell say. Mr Tai said he could not really recall what was said but described Mr Purcell as having “the gift of the gab” and “saying the right words”. He was disappointed on 20 March when Mr Ponder appeared to be convinced by what Mr Purcell said and that there were no immediate and physical consequences for Mr Purcell. In answer to a question at the Authority investigation Mr Tai said: “He didn’t even get a hiding and I would have been the one to give it to him and I should have done”.

[58] Thirdly, some of Mrs Ponder’s evidence described Mr Purcell’s behaviour in ways that her own evidence contradicted. One example was her observation that Mr Purcell “raised suspicion” during the 20 March helicopter trip when he told her that hives they looked at from the air at one location, which were the same colour as Eco

Bees' boxes, were not theirs. However her own return trip to that site, which involved landing and looking at the boxes, revealed he was correct. Despite that conflict between her earlier speculation and her own later observation, she continued to rely on what he had said about those hive boxes on 20 March as an instance of suspicious behaviour by him.

[59] Mr Purcell also gave explanations, either at the time or in evidence for the Authority investigation, that were no less probable than Eco Bees' allegations about what he had done. He did not accept the tally of hive numbers made by Mrs Ponder was correct. He said supposedly suspicious visits to hive locations on the two farms referred to by Mr Ponder were made to carry out ordinary Eco Bees work. He denied stealing honey. He said the honey Mr Ponder believed was missing was still on pallets in Eco Bees' cool store. He accepted he had torn off Mr Ponder's number from the Eco Bees business card and given landowners his own mobile number. He said this because he was "having problems with Tim" and did not want that to affect dealings on behalf of the business with those landowners.

*(ii) Allegations about P pipe found in work vehicle*

[60] There were multiple problems with the integrity of the evidence in support of Eco Bees' allegation that Mr Purcell was responsible for a P pipe said to have been found in a small box under the driver's seat of the work ute he used. The first problem concerned how the box was said to have been found – by Mr Ponder, who said he was on his own when he did so. The second problem concerned the timing of that supposed discovery by him. According to Eco Bees' letter of 4 April (calling Mr Purcell to a disciplinary meeting) the box was found on 1 April. It was at least 12 days after Mr Purcell was told to leave the vehicle on 20 March and had last visited the Ponders property on 21 March. 1 April also happened to be six days after Mr Purcell, through his lawyer, had raised a personal grievance for unjustified disadvantage and said he intended to continue the employment relationship. The third problem concerned who had access to the vehicle, both before 20 March and since then. While working Mr Purcell had driven himself and other workers in that vehicle so he or any of those others could have been responsible for putting the box under the seat, if that was where it was found. After 20 March and before 1 April, other workers and Mr Ponder had access to the vehicle. Mr Purcell denied any knowledge of the box or its contents, describing it as "news to me". He also said that he did not

have exclusive use of the ute during his employment. Mr Ponder used it some days and Mr Purcell took another vehicle home. In short there were too many other possibilities about who might have put such a box under the driver's seat and to whom its contents might belong. Those doubts, on the balance of probabilities, meant no finding that this involved any blameworthy conduct by Mr Purcell could be made.

*(iii) Smoking cannabis while driving*

[61] There was no doubt that smoking cannabis while driving was blameworthy conduct. The Go Pro footage showed Mr Purcell, Mr Norris and another worker in the vehicle did so one day in early February. Mr Purcell and Mr Norris, in answer to questions, confirmed they had deliberately turned on the GoPro camera mounted on the vehicle's dashboard to film themselves but forgot to delete the file afterwards.

[62] Mr Purcell's behaviour that day was dangerous and illegal. He was driving on a public road in a populated area. The footage showed the vehicle was moving past houses. Mr Norris held the steering wheel while Mr Purcell, in the driver's seat, used a lighter and inhaled from a bong he was holding. Mr Norris and the other worker each had a bong and were smoking.

[63] On any measure Mr Purcell's behaviour in that instance was serious misconduct. However considering what consequence it should have as contributory conduct in this case was, for two reasons, not as straightforward as it might initially have appeared.

[64] Firstly, the evidence of Mr Purcell, Mr Norris, Ms Ashby, Mr Ponder and Mrs Ponder established that use of cannabis was tolerated in the Eco Bees work environment, either in its shed or in Mr Ponder's flat. Mrs Ponder accepted she was aware Mr Ponder, Mr Purcell and some workers smoked cannabis together and had done so on her property but she insisted this was only done outside work hours and was a social situation over which she had no control. Mr Ponder also accepted he had smoked cannabis with Mr Purcell and other workers but said this happened outside work hours, either on the property or in hotel rooms while away on work trips to the East Coast. Mr Norris said he had smoked cannabis with Mr Ponder in a work vehicle, including on one occasion while on the Tai property.

[65] Secondly, the other worker seen smoking cannabis in the moving vehicle that day had remained employed after the discovery of the GoPro footage. Mr Ponder said that worker was given a verbal warning.

[66] However there were two important distinctions about Mr Purcell's behaviour and role that day. Firstly, he was both manager and driver, responsible for the conduct and safety of the two workers in the vehicle. Secondly, he was smoking from a bong while driving. Even if cannabis use had been tolerated in the work environment, either out of hours or during work time, the evidence had not gone as far as showing this was or would be accepted in the inherently dangerous circumstance of doing so while driving a moving vehicle on a public road. Even by the apparently relaxed standard of Eco Bees, Mr Purcell's conduct that day was blameworthy.

[67] The next point for consideration under s 124 of the Act was whether his blameworthy conduct contributed to the situation that gave rise to his grievance. This required a broad assessment of what happened and what effect it had. Mr Purcell said his resignation, which amounted to a constructive dismissal, was caused by the earlier events of 20 March and not just by finding out on 4 April about the disciplinary inquiry over allegations that included the incident shown in the February Go Pro footage. However, while not necessarily the primary cause, he also said he had resigned because he knew that Eco Bees' inquiry "was never going to be fair or unbiased". In that way the conduct disclosed by the footage was part of the situation that gave rise to his grievance.

[68] The remedies awarded for reimbursement and compensation totalled \$41,092. Applying a 10 per cent reduction to that sum for blameworthy conduct reduced the total by \$4,109. This is a substantial reduction but, as a crosscheck, is also broadly consistent with penalties that may be imposed for driving while drug impaired. The maximum fine for a first or second offence on such a charge is \$4,500.<sup>7</sup> The reduction of Mr Purcell's remedies in this case seeks to balance his right to redress of wrongs committed in an employment relationship with some sense of community responsibility and public safety. Whatever social toleration there may be for private, personal (albeit illegal) use of cannabis cannot be taken to extend, without

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<sup>7</sup> Land Transport Act 1998 s 57A(2).

consequence, to Mr Purcell doing so while driving, with hands off the wheel, on a public road during work time in a work vehicle.

[69] As a result of the reduction applied to those remedies, Eco Bees must pay Mr Purcell \$23,483 in reimbursement of lost wages and \$13,500 as compensation for injury to his feelings.

### **Costs**

[70] The parties are encouraged to resolve any issue of costs between themselves. If they cannot and a determination of the Authority is needed, Mr Purcell should lodge and serve a memorandum within 28 days of the date of this determination. Eco Bees would then have 14 days to lodge and serve its memorandum in reply. No application for costs will be considered outside this timetable unless prior leave has been sought and granted.

[71] This case required a two-day investigation meeting. If required to determine costs, the Authority's assessment would usually start from its daily tariff of \$4500 for the first day and \$3500 for the second day. Adjustments, upwards or downwards, may be made for particular factors, such as whether any without prejudice offers to settle were made for amounts superior to the outcome reached in this determination.

Robin Arthur  
Member of the Employment Relations Authority