

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 272
3092692

BETWEEN HANNAH SAMUELS
 Applicant

AND SAMBA HOSPITALITY LIMITED
 Respondent

3121733

AND SAMBA HOSPITALITY LIMITED
 Applicant

AND HANNAH SAMUELS
 Respondent

Member of Authority: Helen Doyle

Representatives: Jessica Prebble, counsel for Hannah Samuels
 Duncan Anderson, counsel for Samba Hospitality Limited

Investigation Meeting: 24 and 25 February 2021 at Queenstown
Memorandum received: 4 March 2021 from Mr Anderson

Submissions Received: 11 March and 31 March 2021 from Hannah Samuels
 26 March 2021 from Samba Hospitality Limited

Date of Determination: 25 June 2021

DETERMINATION OF THE AUTHORITY

- A Hannah Samuels was an employee at all times when she undertook work for Samba Hospitality Limited.**
- B Ms Samuels resigned from her employment but has not established that the resignation was in the nature of a constructive dismissal.**

- C There is no basis for the orders sought by Samba Hospitality Limited and that claim is dismissed.**
- D Ms Samuels is not owed further payment for the period from 30 September to 7 October 2019.**
- E Ms Samuels is owed additional holiday pay to that paid to her representative shortly after the investigation meeting in the sum of \$240.**
- F The Authority has awarded interest on the holiday pay that is and/or was owed.**
- G The penalty claim was not commenced within the statutory time frame.**
- H Costs are reserved and failing agreement a timetable has been set.**

Employment Relationship Problem

Hannah Samuels

[1] Hannah Samuels was party to an individual employment agreement (the employment agreement) with Samba Hospitality Limited (Samba) dated 2 July 2019 which described her role as that of general manager.

[2] The schedule attached to the employment agreement provided that the commencement date of employment was 12 July 2019 and that Ms Samuels' salary was \$52,000 per annum. In signing the agreement at clause 2.3, Ms Samuels agreed amongst other matters that she was legally entitled to work in New Zealand and agreed to produce the appropriate documentation when requested by the employer.

[3] Samba carries on the business of a restaurant in Queenstown called Fogo Restaurant.

[4] Ms Samuels resigned from her employment by letter dated 30 September 2019 giving one week's notice. The letter was sent to one of the directors of Samba, John Jones. It provided as follows:

Dear John

This is formal notice of my resignation.

I am giving one week of notice. I will be taking the week of notice as paid days off, inclusive of 17.5 hours of official leave. Due to the fact that I have

had only 5 days off since my employment commenced, including 2 days of sickness.

My resignation is unavoidable due to unsatisfactory work circumstances. I have attempted to bring these issues to your attention on more than one occasion; to no resolve.

Regards
Hannah Samuels

[5] Ms Samuels says that her resignation was in the nature of a constructive dismissal and that her dismissal was unjustified.

[6] She says that she suffered an unjustified disadvantage because her final pay and holiday pay have not been paid.

[7] Ms Samuels seeks compensation for humiliation and loss of dignity in the sum of \$40,000, reimbursement of three months lost wages, payment of outstanding final pay and holiday pay, interest and costs. Remedies in final submissions included a penalty claim.

[8] Samba does not accept that Ms Samuels was unjustifiably dismissed or disadvantaged. It does not accept that it breached the employment agreement and/or employment standards and denies responsibility for any stress or anxiety that Ms Samuels suffered. It says that it took remedial action with respect to Ms Samuels' employment and that she was not constructively dismissed. It denies any liability for remedies and says that the penalty action was commenced outside of the statutory timeframe.

Samba

[9] Samba in its statement of problem says that it wants to stop Ms Samuels' use and future use of work created or developed by her in the course of her employment under clause 17 of the employment agreement and/or because of intellectual property rights generally. It seeks orders prohibiting Ms Samuels from publishing material of the nature as set out below:

Restaurant and hospitality-related information sourced by the Respondent from the Applicant including Fogo Restaurant commercial logos and images, Fogo Restaurant marketing information, Fogo Restaurant food menus and drinks lists, Fogo Restaurant food and sauce recipes and Fogo Restaurant cocktail recipes.

[10] It also seeks orders prohibiting Ms Samuels from disclosing that material to any third party in the future and causing any other person or entity to disclose material to any third party. Costs are sought on the application.

[11] Ms Samuels says that there is no evidence to support the orders sought. Further, that when it became apparent that Samba was concerned about material from a website that displayed her curriculum vitae she removed it. Although she says she advised Samba's representative about this it nevertheless went ahead and lodged the proceeding.

The legal approach to a constructive dismissal

[12] In some circumstances a resignation may amount to a dismissal. As was stated in the Court of Appeal judgment in *Wellington Clerical Union v Greenwich* by Judge Williamson:¹

There is no substantial difference between the case of an employer who, intending to terminate the employment, dismisses the employee, and the case of the employer who, by conduct, compels the employee to leave the employment.

[13] There were three situations listed by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:²

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads a worker to resign.

[14] It was stated by the Court of Appeal that the conduct complained of must amount to a repudiation of the contract rather than just be unreasonable. Conduct can also be a breach of an express or an implied term not to act in a manner calculated to destroy or damage the relationship of trust and confidence between an employer and employee.

[15] Ms Samuels relies on the second and third situation as described by the Court of Appeal in *Woolworths*.³

[16] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* held that the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975

² *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374

³ Above n 2.

been caused by a breach of duty on the part of the employer.⁴ In determining that matter, all of the circumstances of the resignation have to be examined, not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.

[17] Ms Samuels has the burden of establishing that the resignation was actually a dismissal.

The issues

[18] The Authority needs to resolve the following issues in this case:

- (a) The start of Ms Samuels' employment with Samba?
- (b) What are the material provisions of the employment agreement?
- (c) Was Ms Samuels an employee before August 2019?
- (d) What are the reasons for Ms Samuels' resignation?
- (e) Was the resignation caused by breaches of duty to Ms Samuels?
- (f) If there were breaches by Samba, were they of a serious nature that would mean it was reasonably foreseeable that Ms Samuels would not be prepared to work for Samba?
- (g) Alternatively was there a course of conduct with the deliberate and dominant purpose of coercing Ms Samuels to resign?
- (h) If there was a constructive dismissal then was it justified?
- (i) Is there money owing for final pay and/or holiday pay?
- (j) Was the failure to pay holiday pay a disadvantage?
- (k) Was a penalty commenced within the statutory timeframe and if so should one be awarded?
- (l) Was there a breach of the employment agreement with respect to intellectual property for which orders sought by Samba should be made?

⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

The start of Ms Samuels' employment

[19] Mr Jones was in the process of organising the renovation and fit out for the opening of Fogo Restaurant in Queenstown. He met Ms Samuels in or about the beginning of June 2019 with a view to assessing her suitability for a general manger position. Interviews took place including one with the operations manager of Samba, Richard Peterson. It was agreed Samba would offer Ms Samuels a position of general manager.

[20] Ms Samuels confirmed in her evidence that she had not obtained a variation to her work visa to work at Fogo Restaurant as at the date of 12 July 2019. Her evidence was that she obtained a variation to the work visa on 8 August 2019; however she said she regarded herself prior to that date as an employee.

What are the material provisions of the employment agreement?

[21] The employment agreement entered into between Ms Samuels and Samba was signed on 2 July 2019 and contained a trial period. The trial period was expressed to commence on the date in the schedule to the employment agreement which was 12 July 2019. The hours of work were identified in the schedule as Monday to Sunday 11am to 2am. Clause 9.2 provided that Ms Samuels would be required to work a minimum of 30 hours and a maximum of 40 hours per week, plus any additional hours reasonably necessary to fulfil the requirements of her duties or as reasonably required by the employer. Clause 17 of the employment agreement concerned copyright and intellectual property and provided that intellectual property arising from any works created or developed in the course of employment would belong to the employer.

Was Ms Samuels an employee when she first commenced working for Samba?

[22] The reason that status assumes some importance is for the assessment of any calculation of holiday pay. Mr Jones in his evidence says that there was an agreement that Ms Samuels would be a contractor until she obtained the variation to her work visa to work for Samba.

[23] The Authority has a record that shows three payments of \$1,000 in cash were made to Ms Samuels before subsequent payments from which PAYE was deducted were paid from late August 2019. These three initial payments were treated as self-employed income for tax purposes as reflected in the Inland Revenue Department (IRD) record of Ms Samuels'

earnings. Ms Samuels did not accept Mr Jones' evidence that he asked her to provide invoices for this earlier period.

[24] There is no dispute that Ms Samuels undertook work from in or about July 2019 for Samba. It was work that could have been undertaken by an employee and was work under the direction of and/or with an element of supervision from Mr Jones.

[25] Whilst for a period Ms Samuels was taxed as a self-employed person the amount that she was paid of \$1000 a week is consistent with the salary in the employment agreement. I record an element of uncertainty from the evidence about the exact date of commencement of employment. There was evidence of some work undertaken in early July before 12 July. Sometimes assistance can be gained by the date of payments made but in this matter the first recorded payment of \$1000 was made on 29 July 2019.

[26] The Employment Court decided a similar issue about work performed before the approval of a work visa and stated that little turned on the visa status because the issue was not the lawfulness of the work but whether the plaintiff actually worked as an employee.⁵

[27] I conclude that the relationship between Ms Samuels was from the outset one of employment. The result of that is that income during that period is to be included in calculating holiday pay.

What are the reasons Ms Samuels' resigned?

[28] Ms Samuels resigned after a comparatively short period of employment. Her letter of resignation referred to unsatisfactory work circumstances and the raising of issues without resolution. The Authority questioned Ms Samuels at the investigation meeting about why she had resigned from her employment with Samba. She referred to feeling that she could not be there any longer, feeling trapped with no way of moving forward and that no-one was listening to her concerns. Her evidence was that there was a lack of support and she felt pressured and bullied in her role and that there were difficulties in communicating with Mr Jones. Ms Samuels said that she suffered extreme stress, anxiety and was hospitalised during her employment.

⁵ *Talbot Agricultural Limited v Wate* [2019] NZEmpC 31 at [36].

[29] A letter dated 16 December 2019 was sent to Mr Jones raising a grievance of constructive dismissal from Ms Samuels then solicitor with reference to breaches of duties and a course of conduct designed to coerce Ms Samuels to resign.⁶ It states that the three requirements of the role as general and restaurant manager, human resources and marketing manager were impossible. The letter referred to extreme stress and anxiety suffered by Ms Samuels and that she raised the issues but no remedial action was undertaken about the “impossibility of her assigned tasks.” There was reference to raising the issues on 13 September 2019 with Mr Jones but not feeling listened to. The letter also recorded being required to attend a meeting on 30 September to discuss performance and misconduct as a “final straw” and this led to the resignation. These matters were also set out in the statement of problem.

[30] After the employment relationship ended there were a series of strongly worded exchanges from Mr Jones to Ms Samuels and her then representative about whether she was in possession of Samba’s property or had breached her employment agreement. These were described in the letter raising the grievance and the statement of problem as Mr Jones engaging in a “vindictive course of conduct that intimidated and harassed [Ms Samuels].” It was set out that these were a sustained campaign of bullying and that it was designed to cause maximum hurt and humiliation to Ms Samuels and included threats to report her to immigration and the police.

[31] Except to the extent it may inform similar conduct during the employment relationship if that conduct was causative of the resignation the Authority is not relying on those post resignation matters.

[32] In written and oral evidence Ms Samuels made comments about Mr Jones’ behaviour during the relationship. The content of the letter raising the grievance and the statement of problem read with the resignation letter supported that concerns with Mr Jones’ conduct were about communication difficulties. The concerns in the written and oral evidence about Mr Jones’ behaviour were not specifically set out in communications at the time of resignation as causative of the resignation. I am unable to safely conclude they are. I accept that Ms Samuels found it difficult to communicate with Mr Jones and that was known about and I part of the reason for resignation.

⁶ Bundle of documents at Y.

Was the resignation caused by breaches of duty by Samba?*Hours of work and workload*

[33] Ms Samuels was concerned about what she considered to be an excessive work load and hours of work. She said that she had worked virtually every day throughout the short period of employment.

[34] Mr Jones denied that Ms Samuels was overwhelmed by the volume of work she was required to do. He said that she produced “little if any productive work” and that Ms Samuels was able to delegate work to other staff who had been employed to assist with the tasks required.

[35] There was significant dispute in the evidence about performance issues, whether delegation of tasks was possible or helpful, and whether Ms Samuels worked the hours that she said she did and produced what could be expected.

[36] Senior employees before the restaurant building was in a state that enabled it to be worked in undertook preparatory duties for the restaurant opening at home or at cafes. Ms Samuels agreed that she effectively set hours that she worked but felt that the tasks were overwhelming necessitating long hours of work every day. There was no recording of hours worked by Ms Samuels.

[37] I have considered whether the evidence supports Mr Jones would have understood the tasks assigned were overwhelming for Ms Samuels before September 2019. The main tasks in the early stages of employment that the Authority heard evidence about were that Ms Samuels was to prepare a Fogo logo for signage and restaurant literature, interview and appoint restaurant staff and write and action a marketing plan. As the restaurant opening approached more tasks were required.

The logo

[38] After Ms Samuels started her employment in July she undertook some design work on a logo that Mr Jones said was very good and he said he signed off on it. There was then disputed evidence about what occurred with the logo. Whatever happened resulted in the signage not being ready for the opening of the restaurant. Ms Samuels says that the delay was because Mrs Jones wanted changes to the logo that resulted in the sign firm being unable

to complete the sign in time for the restaurant opening. Mrs Jones said that it was Ms Samuels who had failed to finalise the sign. Any dispute as to what occurred remained unresolved as at the time of resignation. There was no evidence that this task occupied a great deal of time.

Staff interviews and recruitment

[39] Mr Jones said that Ms Samuels employed 42 staff for the restaurant. It was only after Ms Samuels was no longer an employee that he appeared to be concerned that she had hired too many staff or that she had made unauthorised promises to some of sponsorship, promotion and pay rises. It was never a matter raised with her. Ms Samuels said that Mr Jones signed off on the employment agreements and offers and told her to offer sponsorship and in some cases offered pay rises.

[40] Recruitment, interviewing and follow up would have been quite time consuming.

Marketing plan

[41] Ms Samuels said that she was too busy to complete the marketing plan.

Samba's knowledge before September 2019 about Ms Samuels' hours and work load

[42] There was some knowledge on the part of Mr Jones before September 2019 that Ms Samuels was busy.

[43] I have considered whether sufficient steps were taken before September with respect to that knowledge.

[44] Other staff were employed to carry out tasks before the restaurant opened. I heard from three of these staff. The Authority heard from an employee who I shall refer to as Briony. Briony commenced her employment in or about 14 August 2019. Her evidence was that she understood she was employed to assist Ms Samuels by freeing her up from some of her tasks. One of Briony's responsibilities was to develop an in-house training programme and train the staff in food and beverage service. She said she also assisted Ms Samuels in some recruitment of staff. Ms Samuels disputed the benefit to her of that recruitment work although she accepted Briony undertook some recruitment work.

[45] Although Ms Samuels' position description was not exhaustive one of the responsibilities in it was to train new and current employees on proper customer practices. Assistance with that by Briony would have overlapped part of that responsibility and taken some pressure off Ms Samuels. I accept that Ms Samuels as general manager would have still had overall responsibility for signing off and oversight of training.

[46] I also heard from Jamie C who was employed as an executive chef from 8 August 2019. Jamie C transcribed all ingredients, formulated menus, worked out costing for all menus and put together a food safety policy. Ms Samuels denied that Jamie C was employed to assist her specifically. Whilst that may be true one of Ms Samuels' tasks was to ensure compliance with sanitation and safety regulations. Another task was controlling operational costs and measures to cut waste and implementing policies and protocols to maintain future restaurant operations. Jamie C's work on the food safety policy and menu costing would have assisted.

[47] A head and sous chef were also employed and they set up the kitchen recipes, a system for stock orders and transcribing recipes for the head chef.

[48] I heard from Camilla who was employed as a restaurant supervisor from in or about 12 August 2019. Ms Samuels said that Camilla was employed to take over her restaurant manager role and enable her to focus on marketing. Ms Samuels delegated to Camilla social media marketing tasks on Instagram, Facebook and videos because she was too busy. Camilla assisted with the rosters.

[49] I heard evidence from Mr Jones about another employee Jamie O who provided some assistance. Mr Jones said that she was employed from another of his businesses to assist with setting up standard operating procedures and training schedules. Ms Samuels regarded her as not experienced enough to work autonomously and said that Jamie O had to carry out tasks under her supervision.

[50] Mrs Jones did the payroll and there was also a book keeper who dealt with accounting aspects and codes.

[51] Mr Peterson had been involved in interviewing Ms Samuels in June 2019 however he had then travelled to the United Kingdom as his father was unwell and he did not return until

5 September 2019. He was after that date involved in the restaurant and present at times in the restaurant. Mr Jones asked Mr Peterson to commence the alcohol licencing application.

[52] It was known that Ms Samuels was busy particularly as the restaurant opening drew near and that she needed some assistance. There were other staff employed before the restaurant opened who could be delegated some tasks by Ms Samuels' and some had duties that overlapped with those of Ms Samuels. Although Ms Samuels did not accept that additional staff were employed specifically to assist her they would have eased her workload or some tasks could have been delegated to them. I do not conclude it was clearly evident before September 2019 that Ms Samuels was working excessive hours. Her work was often undertaken off site. I conclude steps taken with the knowledge that Ms Samuels was busy before September to employ other staff were reasonable.

Management meetings

[53] There was an issue about whether there were regular management meetings with senior staff held on Monday. Samba's witnesses all said that these were held on a Monday and that when Ms Samuels was asked about where she was at with tasks the response was that they were partially or almost completed.

[54] Ms Samuels was adamant that there were no management meetings and she denied that she would say her tasks were partially or almost completed.

[55] The lack of agreement about management meetings was unusual in circumstances where Ms Samuels held a position of general manager. Upon ascertaining there were some minutes the Authority requested copies of these. Minutes were provided for four meetings held in October but they did not establish the meetings were on a Monday or that they had been held prior to October. I am unable to conclude that management meetings were scheduled regularly for each Monday before October.

[56] Some of the evidence from employees at Samba was that Ms Samuels did not often attend at the restaurant to enable such discussion to take place and preferred to work away at home or elsewhere. Ms Samuels did not accept that. I do find it more likely than not that there was some sort of discussion between senior employees in the restaurant about who was doing what and some discussion about task completion. I am strengthened in that view that Ms Samuels must have advised Mr Jones that she had not completed tasks by her oral

evidence about what he said at a meeting on 13 September 2019. Ms Samuels said that Mr Jones told her he “did not understand why she had not finished things.”

Criticism of Mr Jones’ behaviour and conduct

[57] Mr Jones did not accept criticism of his behaviour in the evidence of Ms Samuels was justified. He referred to the environment and a robust management style but denied that his actions were rude or overbearing. He said that he would put his hand up in order to talk or respond when communicating as he was very busy but denied any intention to be rude as suggested by Ms Samuels. He also said that he preferred to talk in person as he was so busy and could overlook emails.

Opening of the restaurant on 16 and 17 September preceded by a very busy period

[58] The evidence supported that the period to the soft and full openings of the restaurant was a busy stressful period for Ms Samuels as well as other staff.

[59] Mr Jones said that he became concerned in September that Ms Samuels was focussing on the wrong things in her work and not coping. He considered that she was out of her depth and not producing work. He had concerns about her lack of involvement and interest in a training exercise carried out on 12 September.

[60] During the exercise the staff were split into two teams A and B and changed over from service to customer. As customers staff ate and drank everything on the menu and provided feedback from a customer’s perspective. Some of the staff were new and Mr Jones and Mr Peterson felt that Ms Samuels should be participating and interacting with them. Instead there was a view she was disinterested.

[61] He discussed a path forward with Mr Peterson and it was agreed that he should speak to Ms Samuels. He initiated the first of the exchanges with Ms Samuels. Ms Samuels said that she lacked confidence to approach Mr Jones earlier herself because she found him overbearing.

13 September 2019

[62] The discussion on 13 September 2019 took place on the stair area at the restaurant.⁷ The nature of what was discussed is not really in dispute. As well as the oral and written evidence from Ms Samuels and Mr Jones about that discussion the Authority has had regard to a text message sent by Ms Samuels to Mr Jones.

[63] From the evidence and the text exchanges Mr Jones asked Ms Samuels along the lines whether she was out of her depth and not coping in her role. The evidence supports that Ms Samuels did not accept that she was not coping. That is consistent with her subsequent text message. Mr Jones raised concerns that Ms Samuels was not completing tasks, was dealing with multiple tasks at one time, and was not involved and appeared disinterested in training the previous night. Ms Samuels agreed that she had sat with her laptop rather than participating as other staff had done on the training. She disagreed that she was not observing staff and circulating after the exercise had been undertaken.

[64] Mr Jones said that he insisted when Ms Samuels said how busy she was that she get help from the team and delegate more of her duties to other people. Mr Jones said that she responded “No.” Ms Samuels denied that she said no. I accept that the suggestion to delegate work was made.

[65] Ms Samuels said that she did not feel heard and felt barely able to respond at the meeting to the concerns. She said that she explained that she had not had a day off in weeks and Mr Jones said she should take the evening off with her partner and come back the next day. Ms Samuels said that the following day was her day off but she was “too scared” to advise Mr Jones about that.

[66] In a text message to Mr Jones at 6.11pm on 13 September 2019 Ms Samuels stated that there were a couple of points she wanted to get across to move forward from their conversation earlier that day. She set out her views about various matters that Mr Jones had raised with her. She wrote amongst other matters that:

Yes I work too hard and had had 1.4 days off in the last 4 weeks. But this is how I show dedication and commitment.

⁷ Mr Jones put the date of the discussion as 15 September in his written evidence however the text messages at [B] in the bundle support it was in fact 13 September.

[67] She asked Mr Jones to read the email list that she had sent that morning about tasks to do. Mr Jones responded that he would read the text the next day and suggested that Ms Samuels relax that evening.

[68] Objectively the text message from Ms Samuels was defensive of her performance. That is understandable because she had a different view of her performance and didn't feel an opportunity had presented earlier to explain that to Mr Jones. It did however send a somewhat mixed message about the work she was undertaking. On one hand she said that she was working too hard but on the other stated that was how she showed dedication and commitment. She wrote that she carried out "need to know" work under the radar and that she got work done and did not require praise.

[69] It was unfortunate that Mr Jones did not talk further to Ms Samuels after 13 September about the text. That said the text message did not go so far as to suggest Ms Samuels was not coping or was unwell. If an employee feels that work is impacting on health and they are not coping then it needs to be said very clearly. The evidence supported that Mr Jones continued to be concerned about Ms Samuels' performance from that point although knew she felt she was too busy.

Mr Peterson keeps an eye on things

[70] Mr Jones said that he asked Mr Peterson to monitor Ms Samuels after the meeting on 13 September and assist where required. Mr Peterson said that he spoke with Ms Samuels informally and offered assistance but that she declined it. Ms Samuels said that she did ask Mr Peterson for assistance in setting up the PC, working in the restaurant, EFTPOS set up and leading health and safety because Briony did not want to do that.

[71] Objectively it is likely Mr Peterson did offer to assist Ms Samuels after 13 September and in all likelihood undertook some tasks in circumstances where some tasks just needed to be completed so that the restaurant could open.

14 September 2019

[72] Mr Jones confirmed in a text dated 14 September that he had read Ms Samuels message and that there were a couple of things that need saying to her to emphasis what "we are doing."

[73] Ms Samuels went to hospital that day with a severe allergic reaction and advised Mr Jones she would not be attending work. To the extent that Mr Jones referred to knowledge about this hospital visit at the time he talked to Ms Samuels on the stairwell he is mistaken.

15 September 2019

[74] On 15 September 2019 Ms Samuels attended at work and suggested to Mr Jones by text that they meet and discuss matters but that did not occur although needs to be seen in the context as set out in paragraph [69]. Perhaps inconsiderate but I do not find it crosses a line.

[75] Ms Samuels said that when she came into the restaurant on 15 September 2019 and removed her sunglasses Mr Jones said that he was expecting to see “elephant man.” Ms Samuels said that senior staff were present at the time of this comment.

[76] The reference to expecting the “elephant man” at the meeting was unfortunate and undermining as it was in front of other staff. Mr Jones said it had to be seen in the context of Ms Samuels advising him her face was swollen and he not observing that swelling to be as significant as he thought it would be. Ms Samuels under questioning agreed she referred to her face as swollen. It was not a comment mentioned in the letter raising the grievance or the statement of problem and I could not conclude that this was causative of the resignation. For completeness whilst it was inconsiderate and caused unhappiness it could not be said to have crossed a line so as to be repudiatory.

16 September 2019

[77] The “soft opening of the restaurant” was on 16 September 2019. Ms Samuels advised Mr Jones at the end of the opening that the evening was a success and she was proud of the team. Mr Jones expressed unhappiness with the fact there was insufficient information about the takings and \$300 missing from the float.

[78] Mr Jones was entitled to raise the concerns related to takings and the float on opening night even if it caused unhappiness and could be seen to be somewhat deflating given Ms Samuels’ very positive view of the night.

Health issues

[79] Ms Samuels said that the stress she was under exacerbated an existing health condition she had that resulted in two visits to the hospital emergency room. Clinical notes for the 14 September visit did indicate stress as a contributing factor although it was not in the notes for the second visit on 22 September. There was awareness by Mr Jones and Mr Peterson about the visits to the hospital although Mr Peterson said that he thought it was primarily an allergic reaction caused by diet. There was no evidence of provision of medical certificates with only a day of sick leave taken each time.

Announcement of resignation

24 September 2019

[80] Ms Samuels was advised of a management meeting to take place on 24 September. She was unaware of an earlier scheduled meeting that was meant to have occurred on 23 September but was rescheduled to 24 September 2019 as only three people attended. Ms Samuels said that when she arrived at the meeting she was singled out by Mr Jones for criticism about her non-attendance at the earlier meeting. Ms Samuels said that when she tried to explain that others were also unaware of the scheduled meeting Mr Jones spoke over her. Mr Jones then asked her about the marketing plan and wanted to know why she had not started work on it. Ms Samuels said that she concluded Mr Jones had not listened to her on 13 September when she said that she had a heavy workload and was concerned about the discussion being in front of others. She said that at this point she made a decision to resign and announced that she would hand her notice in.

[81] Ms Samuels left the meeting in tears. Some of those present at the meeting gave evidence that they considered Ms Samuels was resigning for personal health reasons. Mr Peterson met later that day with Ms Samuels to discuss what her concerns were and I place more weight on that discussion. Mr Peterson in his oral evidence said that he met with Ms Samuels because he was uncomfortable in accepting a verbal resignation. There was evidence of shock at Ms Samuels' resignation from those who were present and gave evidence.

The meeting with Mr Peterson later on 24 September 2019

[82] Ms Samuels and Mr Peterson met at another restaurant. In his oral evidence Mr Peterson said that he asked Ms Samuels to take some time to think about her resignation. He said that they discussed workload and pressure that Ms Samuels was feeling. Ms Samuels talked about the hours she was working. Mr Peterson made an offer to cover at least the shift Ms Samuels was rostered to undertake that evening at the restaurant.⁸ Ms Samuels advised that she was able to work that evening shift. Ms Samuels spoke to Mr Peterson of being stressed and under pressure with much to do.

[83] Ms Samuels raised her concerns about her relationship with Mr Johns. Mr Peterson in answer to a question from Mr Anderson said from memory Ms Samuels said she could not approach Mr Jones and could not get answers from him. She felt that he could be overbearing and he said possibly she used the word “intimidated” to describe her feelings about the relationship. That evidence accords with Ms Samuels’ views and what she says she raised by way of concern. Mr Peterson said he would try to act as a buffer between Ms Samuels and Mr Jones.

[84] Mr Peterson agreed that he would discuss with Mr Jones the possibility of Ms Samuels transferring to a marketing manager role with her duty manager shifts. There had been discussion of her moving to such a role at her interview. Mr Peterson said that he would try to get back to Ms Samuels by the end of the week. Ms Samuels’ evidence was that Mr Peterson agreed to get back to her by Saturday 21 September 2019.

[85] Ms Samuels undertook the shift that evening at the restaurant.

[86] Mr Peterson took appropriate steps in discussing what was behind the verbal resignation with Ms Samuels because it was unexpected and Ms Samuels had appeared distressed. His presence could have assisted in her difficulties communicating with Mr Jones.

[87] I have considered whether there was evidence that the post resignation conduct of Mr Jones was how he behaved towards Ms Samuels during her employment.

⁸ Mr Peterson said that he offered to do the next two shifts for Ms Samuels.

[88] There is a text exchange between Mr Jones and Ms Samuels on 22 September 2019 in the bundle. This is shortly before Ms Samuels tendered her verbal resignation. Ms Samuels advised Mr Jones that her face is swollen again and she was going to the emergency room. She asks if he could be “back up” in the restaurant. Mr Jones responds that he is in for dinner with his wife and children so he can help out if necessary.⁹ He does not ask her about her health and that could be seen as inconsiderate but not crossing a line. He answered her immediate request for back up appropriately. I also observed that whilst he felt very strongly that Ms Samuels was disinterested at the training on 12 September 2019 and did not conduct herself as a general manager should he raised that privately with her the following day.

[89] From my observation Mr Jones has a strong personality and a robust style. Ms Samuels found him overbearing. There are text messages from Ms Samuels to other staff about how she felt about Mr Jones.¹⁰ Other staff said in evidence they did not have that view of him. Ms Samuels said she could not always get answers from Mr Jones to undertake her role and at times felt excluded from what was occurring. I accept that there were communication issues that needed addressing. Overall the evidence did not enable me to conclude that there was conduct of the type exhibited by Mr Jones after the resignation during employment.

Resignation on hold

25 September 2019

[90] Mr Peterson asked Ms Samuels as she was starting her evening shift on 25 September to transfer all the work files she had to the restaurant computer by 5pm the following day. He advised that the instruction to do so had come from Mr Jones. An issue arose as to whether Ms Samuels had been singled out for that instruction.

[91] Having heard from other employees who said they were also asked to transfer their work from their own computers to the work computer I could not be satisfied that Ms Samuels was singled out to transfer files across. Even if Ms Samuels had been the only one asked as she suspected then it was not a breach of duty for such a request to be made. It could have enabled work on unfinished matters to be delegated to other employees and provided a clearer picture of where Ms Samuels was at with her work. Prior to the purchase

⁹ Bundle of documents at AU.

¹⁰ Bundle of documents AG, AM, AR and AV.

of a work computer in or about September for the restaurant opening employees had undertaken work on personal computers.

26 September 2019

[92] On 26 September Ms Samuels collated her work related files from her personal computers and memory sticks to organise into folders for transfer. As there was a lot of work involved she sent a text message to Mr Peterson asking if he could cover her service shift that evening. She noted in her text message that she was meant to have had that day which was Thursday and the following day Friday off. She wrote that she would be working on menus and “Xmas shout” the following day that she had planned on doing that day and would have Sunday off.¹¹ Ms Samuels attended at the restaurant at 5pm that day to transfer the files she had collated. Mr Peterson agreed to and did undertake her evening shift.

27 September 2019

[93] Mr Peterson sent Ms Samuels a text message checking if Ms Samuels had any more work to load on the work computer. He also asked if she had a proof of a menu. Ms Samuels responded that she still had to upload that but provided her information to Mr Peterson by email. She noted that she had not done the drinks menu and was finishing a flyer.

[94] Ms Samuels said that she started to feel pressured from Mr Peterson. The Court of Appeal in *Attorney-General v Gilbert* stated that an employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety and health of the employee.¹² Whether stress is unreasonable depends on the facts. Ms Samuels had been relieved of her shift duty and whilst I accept that there was a lot of work involved I could not conclude it was an unreasonable request.

[95] Mr Jones looked at the work Ms Samuels had loaded to the computer. He was concerned that there appeared to be little work there. Whilst acknowledging that concern I record there could however have been a range of reasons for this including that not all of the tasks that Ms Samuels undertook may have resulted in a record to be uploaded. Part of Ms Samuels’ work was oversight of work undertaken by other employees and delegation of work. Her work around recruitment may have been on the files of those employees she

¹¹ Bundle of documents AZ.

¹² *Attorney-General v Gilbert* [2002] 1 ERNZ p 31 at [83]

recruited. I was not satisfied from the evidence that the work uploaded was the sole reflection of what Ms Samuels did and it is unfair to base her work simply on that. Mr Jones said that he showed some other senior employees what Ms Samuels had loaded as well although I am not satisfied that Ms Samuels was aware of that when she was an employee.

28 September 2019

[96] Ms Samuels sent a text message to Mr Peterson on 28 September 2019 asking if he had discussed her position with Mr Jones. She wrote that she wanted some feedback so that she could move forward. Ms Samuels also advised that she had emailed him and Mr Jones with a flyer that she wanted feedback on.

[97] Mr Peterson responded that he was away that day and the next but would catch up with her on Monday. He advised her that he had emailed about the Christmas flyer.

[98] Mr Peterson did not get back to Ms Samuels about the marketing role within the time frame she expected. Mr Jones said in his evidence that he was not particularly happy when raised by Ms Peterson about Ms Samuels moving to a marketing role because he had not seen the plan but he would think about it. The delay in getting back to Ms Samuels about a possible change in role could not be said to be a breach because it was comparatively brief.

Ms Samuels is unwell

[99] Mr Peterson said that he visited the restaurant on his way out of town and was told by Camilla that Ms Samuels was unwell and could not work her shift that evening.

[100] Ms Samuels said that she was on her way into town and that she had become very ill and did not feel she could drive. She went then to see her partner Mark who was working in town so that he could drive her home.

[101] Mr Peterson said that he ended up covering for Ms Samuels after a conversation with Mark in which it was confirmed that Ms Samuels was unwell. Mr Peterson felt that Ms Samuels should have talked to a senior manager such as himself when there was an absence and a need for cover. Ms Samuels had a different view about that. Mr Peterson spoke to Mr Jones about his concerns and Mr Jones said that he had seen Ms Samuels working that day on Mark's stall. Ms Samuels said that she sat in the car as she was so unwell.

Final straw with letter dated 29 September 2019

[102] Mr Jones asked that Mr Peterson provide Ms Samuels with a letter setting out that he wanted to meet with Ms Samuels to discuss employment matters and in particular concerns about performance and attendance. The meeting was scheduled to take place at the restaurant on 30 September 2019 at 11am. Mr Peterson and Mr Jones were to be present at the meeting. The letter referred to the seriousness of the matter and a possibility that if proven it may amount to misconduct or serious misconduct and lead to dismissal. The letter set out that they wanted to hear Ms Samuels' views and give her an opportunity to respond. There was a possibility mentioned of further investigation. Ms Samuels was advised that she was entitled to bring a legal or union representative or a support person such as a family member or a friend. She was asked to confirm by email that she was able to attend the meeting by 6pm. Ms Samuels did not send any email or have any other communication with Mr Jones or Mr Peterson.

[103] Ms Samuels describes that letter as "the last straw." Ms Prebble correctly submits the letter did not set out what the performance and attendance concerns were or the nature of any misconduct. Further there was very short notice of the meeting for the arrangement of a representative. Ms Prebble submits that those matters are a breach of the duty of good faith. I accept those matters could have resulted in procedural unfairness if not addressed. Ms Samuels was concerned the letter arrived on her day off. I do not find even if inconsiderate that crossed a line.

[104] I have considered whether the letter advising of performance and misconduct concerns was an action calculated or likely to destroy trust and confidence. Ms Prebble submits it was intended to be bullying and intimidate and there were no genuine concerns to discuss. She submits that Mr Peterson and Mr Jones confirmed in their evidence that no issue had been raised with Ms Samuels about performance.

[105] I accept no formal performance concerns had been raised in this same manner previously but there had been discussion initiated by Mr Jones because of his concerns at Ms Samuels' performance at the 13 September meeting. There is no dispute about that. The evidence supports that Mr Jones continued to be concerned about Ms Samuels' performance and he felt she was not coping in her role.

[106] Mr Jones said in his evidence that he was concerned at the small amount of work loaded onto the work computer by Ms Samuels on 26 September. He said that he had seen Ms Samuels working at her partner's stall on 28 September when she had advised she was unwell and he was concerned about that. Mr Peterson had raised concerns with Mr Jones about how Ms Samuels organised a replacement when she was unwell on 28 September.

[107] In a letter dated 2 October sent to Ms Samuels by Mr Jones in which amongst other matters he accepts her resignation he refers to another concern, that Ms Samuels had advised a supplier she was resigning and that she had discussed with a shareholder that she could not work with him. He set out that this was a breach of clause 6.2 of the employment agreement and had the meeting taken place then he had decided to bring this to her attention but disregard it.

[108] I cannot conclude there was no basis for raising concerns and that the letter was simply sent to bully and harass Ms Samuels and coerce her to leave. I do not agree that the evidence supports there were no performance concerns.

[109] The timing of the letter was unfortunate but an employer is entitled to raise concerns it has with an employee. Ms Samuels may have been able to answer them in their entirety and establish the concerns were baseless. There were some options for Ms Samuels on receipt of the letter of 29 September. She could have asked by email that same day for an adjournment of the meeting and further information about concerns in the letter. She could have asked whether there would be discussion about her moving to a marketing role.

[110] Matters had reached a point where there needed to be further communication. Ms Samuels was concerned that Mr Jones did not talk to her after 24 September. Mr Jones said in answer to a question from the Authority that he did not consider after 24 September that Ms Samuels was capable of performing her role. Further that she was away a lot and he did not have anything to say to her. I did note a text message dated 25 September from him to Ms Samuels asking her to get someone to undertake some cleaning.¹³ Given Mr Jones' views about Ms Samuels' performance there was a need to raise performance concerns more formally so that she could properly respond and a path forward could be discussed.

¹³ Bundle of documents AU.

[111] Ms Samuels attended at the restaurant on 30 September 2019 shortly after 11 am and handed her letter of resignation to Mr Jones and Mr Peterson. Objectively this could be seen premature particularly where there had been no answer on a changed role.

[112] There is guidance from case law about the legal position with reliance on a “final straw” action or omission.¹⁴ A final straw can be something less than what has been relied on cumulatively as breaches of duty. If a breach is found to be causative of the resignation then some assessment of its nature may be required. The Court of Appeal has referred to the employer’s conduct needing to cross the borderline from inconsiderate conduct to dismissive or repudiatory conduct.¹⁵ There was some attempt to assist Ms Samuels with her tasks after 24 September. Mr Peterson offered to work the evening shift on 24 September but that was declined. He did when asked work her shift on 26 September to enable her to undertake the upload of her work. He also offered some assistance with tasks after 13 September. I do not conclude it was a situation where no support whatsoever was offered or available.

Conclusion on constructive dismissal

[113] I do not find that individually or cumulatively there was a breach of duty by Samba that crossed the line from inconsiderate to dismissive and repudiatory conduct so that the letter of 29 September could be the last straw and the basis for a constructive dismissal.

[114] The evidence does not support a course of conduct with the deliberate and dominant purpose to coerce Ms Samuels to resign. Indeed a factor pointing away from that is Mr Peterson’s meeting with Ms Samuels on 24 September after her verbal resignation and his suggestion that she take some time to reconsider her resignation which had come as a surprise. Further he had some discussion with Mr Jones about the possibility of moving to an alternative role.

[115] In terms of foreseeability I do not conclude that Ms Samuels’ verbal resignation was foreseeable on 24 September. That came as a shock to those present. I accept that Ms Samuels’ resignation on 30 September was more foreseeable. Mr Jones said that he was a “bit disappointed” but not surprised when she presented the letter. He said that he did not read the letter although Mr Peterson did. An employee is entitled to resign and some make that decision because they are unhappy in their work as Ms Samuels was. Additionally

¹⁴ *Pivott v Southern Adult Literacy Inc* [2013] NZEmpC 236.

¹⁵ *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cases

Ms Samuels felt that the pressure of work was impacting on her health. I do not find however that she has established that her resignation was a dismissal.

Final Pay and Holiday pay

[116] Both of these claims were raised and advanced as disadvantage claims. I consider they are more appropriately treated and resolved as recovery of money claims.

Final pay

[117] Ms Samuels claims payment for the notice period because she asked for paid days off from 30 September to 7 October 2019. The employment agreement provided for payment in lieu of notice in clause 21.5 however that was at the discretion of the employer.

[118] I do not find that Ms Samuels is entitled to payment for notice that she decided would not be worked. There was no agreement or direction to that effect by Samba as anticipated in the employment agreement.

Holiday pay

[119] A cheque for holiday pay in the sum of \$480 was provided to Ms Prebble on behalf of Ms Samuels on 19 March 2021.

[120] Holiday pay was only calculated on payments made to Ms Samuels from late August 2019. The Authority has found Ms Samuels was an employee at all times and holiday pay should be calculated on the gross earnings from the start of employment. Holiday pay will need to be calculated on gross earnings since the commencement of employment under s 23 of the Holidays Act 2003. There was no evidence of any annual leave taken. The calculation therefore is 8% of gross earnings. The total gross earnings from the commencement of employment are \$9000. 8% of \$9000 is \$720 gross. That is the holiday pay owing. \$480 has been paid and \$240 is still required to be paid.

[121] Ms Samuels seeks interest on that amount. I agree in the exercise of my discretion that interest should be payable under clause 11 of the second schedule of the Employment Relations Act 2000 calculated in accordance with the Interest on Money Claims Act 2016 from 3 October 2019 until 19 March 2021 for the sum of \$480. That is the sum of \$16.38. I

have then calculated interest from 3 October 2019 until 25 June 2021 for the sum of \$240. That is the sum of \$8.85.

Penalty

[122] In final submissions Ms Prebble asked for a penalty for the failure to pay holiday pay. There was no claim for a penalty in the statement of problem. Section 135(5) of the Act requires that an action for the recovery of a penalty must be commenced within 12 months after the date when the cause of action first became known to the person bringing the action or when it should reasonably have become known to the person. There was knowledge from October 2019 that holiday pay had not been paid.

[123] The commencement of an action is by way of lodgement of the statement of problem. The action for a penalty was not commenced within the statutory time frame.

Claim by Samba

[124] Samba seeks orders under clause 17 of the employment agreement about intellectual property.

[125] The basis for these orders appears to be that Ms Samuels used images that she created and that she says were publically available whilst in her employment in her curriculum vitae accessible on her website. These images have now been removed and such removal was notified before the claim was lodged. The Authority is not satisfied from the evidence considered as a whole that any orders are necessary.

[126] This claim is dismissed.

Costs

[127] I reserve the issue of costs. Each party has had a measure of success in defending the others claim although Ms Samuels has had an award made in her favour for holiday pay and interest. There may be able to be some agreement as to costs reached. Failing that Ms Prebble has until 9 July 2021 to lodge and serve submissions as to costs and Mr Anderson has until 23 July 2021 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority