

Attention is drawn to paragraph 77 prohibiting publication of certain information contained in this determination

Determination Number: CA 27/07
File Number: 5023527
File Number: 5049845
File Number: 5050136
File Number: 5050137
File Number: 5051532

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Janine Tuari, applicant in 5023527 and 5050137, respondent in 5049845

Tui Tuari, applicant in 5051532, and 5050136, respondent in 5049845

AND Sims Pacific Metals Ltd, respondent in 5023527, 5050136, 5050137 and 5051532 and applicant in 5049845

Martin Ripley & Charlie Carlyon, respondents in 5050136

Martin Ripley, Charlie Carlyon and Robert Pape respondents in 5050137

REPRESENTATIVES Peter Redpath, counsel for Janine Tuari
Mary-Jane Thomas, counsel for Tui Tuari
Hugh Fulton, counsel for Sims Pacific Metals Ltd, Martin Ripley
Charlie Carlyon and Robert Pape

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING Invercargill, Tuesday 3 October 2006
Invercargill, Wednesday 20 December 2006
Invercargill, Thursday 21 December 2006

DATE OF DETERMINATION 23 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sims Pacific Metals Limited (SPM) is a recycling business with depots throughout New Zealand, including Invercargill. SPM employed Tui Tuari initially elsewhere then in Invercargill in the yard and subsequently as its Invercargill Branch Manager. Mr Tuari's wife, Janine Tuari, was also employed. Mr Tuari's employment ended in early September 2005 following a meeting in Christchurch on Thursday, 8 September when he signed an agreement that included a termination provision. He returned to Invercargill that afternoon and went to the yard with Mrs Tuari. While they were at the yard, files were deleted from the SPM computer and a memory stick was broken. Next morning, Mrs Tuari reported to work but was sent

home. She subsequently met with SPM managers on Wednesday, 14 September. Following that, on 16 September 2005, Mrs Tuari's solicitor sent a fax announcing her resignation and raising a personal grievance.

[2] Mrs Tuari's personal grievance claim is that she was constructively dismissed (or alternatively, disadvantaged unjustifiably) as a result of assertions by SPM about the nature of her employment agreement, what happened at the 14 September meeting, what happened on 9 September meeting when she was sent home and a background of allegations that her and her husband were stealing from SPM. In its reply (as amended), SPM denies any grievance and claims special and general damages against Mrs Tuari arising from the deletion of the files and destruction of the memory stick. There is also a claim for penalties for breaches of various implied duties arising from the same conduct. These issues arise in file No 5023527.

[3] Part of SPM's response to Mrs Tuari's grievance was to initiate proceedings against Mr Tuari and Mrs Tuari for penalties for breaches of their employment agreements. Five different implied terms are alleged to have been breached. The claims are made against them both as principals and separately as an aider and abetter of breaches committed by the other. In that way, a total of \$50,000.00 in penalties is claimed against each respondent. These issues arise in file No 5049845.

[4] Mrs Tuari then lodged a claim for penalties to be imposed on SPM and three of its managers for breaching implied and incorporated terms of her employment agreement. In large measure the factual basis for this claim overlaps with her personal grievance claim. SPM says that the penalty claim is chimerical retribution for its counterclaim and should be struck out as an abuse of process. These issues arise in file No 5050137.

[5] At the same time as Mrs Tuari commenced 5050137, Mr Tuari lodged a claim for penalties for breaches of implied and incorporated terms of his employment agreement. This claim is against SPM and two of its managers (both also respondents in 5050137). The relevant events are those which preceded the settlement agreement signed on 8 September 2005. SPM says that this claim too is chimerical retribution for its claims against Mr Tuari and an abuse. It also says that Mr Tuari fully and finally settled any claim by the written agreement dated 8 September 2005. These matters arise in file No 5050136.

[6] The last of the proceedings dealt with in this determination is file No 5051532. As amended, Mr Tuari seeks leave to raise a late grievance arising from the termination of his agreement and/or an order determining that the bargaining for the record of settlement dated 8 September 2005 was unfair. He seeks compensation for the unfair bargaining. If leave is granted for him to raise a grievance there will need to be a further investigation meeting.

[7] These matters were not able to be resolved despite mediation.

The people involved

[8] At the time of the relevant events, Mr and Mrs Tuari were living together. However, they have subsequently separated. Makere Solomon is a friend of Mrs Tuari. She accompanied and supported Mrs Tuari at the meeting with SPM on 14 September 2005. Winnifred Totorewa is Mrs Tuari's mother. She gave evidence of having been told that Mrs Tuari no longer worked at SPM even though Mrs Tuari's employment had not been terminated at that stage.

[9] Martin Ripley is SPM's Operations Manager and was the senior manager involved. Charles Carlyon is SPM's South Island Manager. He and Mr Ripley met with Mr Tuari on 8 September 2005 and he also had some limited involvement in matters to do with Mrs Tuari. Robert Pape is SPM's Dunedin Branch Manager and also had some responsibility for oversight of the Invercargill branch. He assisted in Invercargill at the end of August to load out materials onto a ship for export, he was present in Invercargill on 9 September when Mrs Tuari was sent home from work and he was present at Mr Ripley's meeting with Mrs Tuari held on 14 September. Paul McMurdo worked for SPM at the relevant time. He initially worked in

Invercargill but was transferred to Dunedin in early 2005 after a dispute with another employee. He was transferred back to the Invercargill branch and Mrs Tuari says he was given her job. This is part of the constructive dismissal argument. Susan Olive and Nita Jattan work for SPM in Auckland. Ms Olive is an accounts administrator and Ms Jattan is an assistant accountant.

Mrs Tuari commences work

[10] When Mr McMurdo transferred to Dunedin at the beginning of March 2005, arrangements had to be made for someone to work as an administration/office assistant to help Mr Tuari. Mrs Tuari had been helping out so she stepped into Mr McMurdo's role on a more regular basis. Ms Olive was asked by SPM's financial controller to complete employment details and records for Mrs Tuari and give her some training, so she went to Invercargill on 17 and 18 March 2005. The arrangement was for Mrs Tuari to work part-time to accommodate both her study at SIT and family commitments. Ms Olive's evidence is that she gave Mrs Tuari a draft employment agreement for her to consider and return signed if acceptable. Mrs Tuari is unsure whether Ms Olive left behind the agreement she had with her, but it is common ground that there is no signed employment agreement to be found. Nonetheless, there is no difference of any significance between Ms Olive and Mrs Tuari over what was agreed for her terms of employment. In particular, the arrangement was for part-time permanent, not casual employment.

[11] Mrs Tuari worked for some months getting office and administrative systems in order and also took over cleaning duties replacing the previous contractors. After some time, she decided she did not want to work long term at the same workplace as her husband and she told Mr Tuari that she would look for other work and would resign from SPM when she had found the right job. There was no secret about this. During a meeting between Mr Pape and Mr Tuari on 8 August 2005 there was a discussion between Mrs Tuari and Mr Pape to the effect that she was looking for other work and would need to be involved with training her successor. I accept Mr Pape's evidence that he did not tell Mrs Tuari she would have to find her own replacement. From late July or early August 2005, it was clear to SPM that there would be a need in due course to replace Mrs Tuari.

Work issues for Mr Tuari

[12] Mr Tuari was promoted to Invercargill yard manager around October 2004. There had been a history of stock losses before then, but there is no suggestion that Mr Tuari had anything to do with that. In March 2005, an SPM manager conducted the annual occupational safety and health audit at Invercargill which showed a deterioration from the previous year. That was followed by Mr Ripley visiting the Invercargill branch in early May 2005. Mr Ripley then wrote to Mr Tuari pointing out several matters that required immediate attention. Mr Ripley had travelled to Invercargill because the April 2005 monthly reconciliation of stock showed a significant discrepancy. He was not able to resolve that discrepancy. In addition, there is an annual stock take at each branch at the end of the financial year. Mr Carlyon and Mr Pape travelled to Invercargill to assist with that stock take in early July 2005. On that occasion, Mr Carlyon challenged Mr Tuari on the extent to which there had been compliance with SPM's directions for dealing with stock. Mr Tuari at first claimed to have complied with the requirements but later admitted that he had not complied. Next, Mr Ripley visited Invercargill again to discuss these performance issues with Mr Tuari. There followed a letter dated 18 July 2006 from Mr Ripley to Mr Tuari documenting concerns about unsatisfactory performance. A second letter was also sent setting out a task list for completion prior to the next visit. SPM was expecting an export load out from Invercargill at the end of August and wanted performance issues remedied beforehand. Shipping costs are a major determinant of business profitability so it was important for the load out exercise to be managed efficiently and for the ship to be loaded as quickly as possible.

Mr McMurdo returns to Invercargill

[13] On 8 August, Mr Pape spoke to Mr Tuari about the possibility of Mr McMurdo being transferred from Dunedin back to Invercargill. Mr Tuari said that it would not be welcomed by the Invercargill staff. The next day, Mr Carlyon phoned Mr Tuari and confirmed that Mr McMurdo would be returning to Invercargill and was to be instructed by Mrs Tuari to learn her role with a view to replacing her. There was a phone discussion between Mr Carlyon and Mrs Tuari about the status of her employment. Mr Carlyon said he understood her position to be temporary but Mrs Tuari disputed this. Mr Carlyon was left to make inquiries but told Mrs Tuari she had to train Mr McMurdo even if it took a month. The impending return of Mr McMurdo was a matter of concern to both Mr and Mrs Tuari.

[14] On 9 August 2005, Mrs Tuari sent an email to Mr Carlyon. That email records her concerns about the instruction for her to train Mr McMurdo with a view to him replacing her. In particular, Mrs Tuari made it clear that her employment relationship could not be ended unless she gave notice or SPM had a genuine reason for terminating her employment following a proper investigation.

[15] In a conversation with Mr Pape on Friday, 12 August, Mrs Tuari further indicated her knowledge about her employment rights by referring to the personal grievance process. Shortly before this, Mr Tuari had told Mrs Tuari that he had been instructed to re-engage contract cleaners. Mrs Tuari's evidence is that she felt this was a signal that SPM wanted to be rid of her. However, it must be remembered that Mrs Tuari initiated the thinking that her employment might end.

[16] Mr McMurdo resumed work at the Invercargill yard on Monday, 15 August. The same day, Mrs Tuari rang Susan Olive. Ms Olive confirmed that Mr Carlyon had spoken to her about Mrs Tuari's terms of engagement. Mrs Tuari's evidence is that Ms Olive told her that Mr Carlyon had said *I will have to find another way* confirming his intention to be rid of Mrs Tuari. Ms Olive denies being told this or reporting it to Mrs Tuari. Mr Carlyon denies saying it to Ms Olive. I prefer the evidence of Ms Olive and Mr Carlyon on the point. In any event, there was no disagreement between Mrs Tuari and Ms Olive about the permanent nature of Mrs Tuari's employment and Mrs Tuari learned that Mr Carlyon had been told that.

[17] Mr McMurdo's evidence is that there was some tension towards him from Mrs Tuari upon his return to the Invercargill yard. That no doubt resulted from Mrs Tuari wanting to think that SPM was orchestrating her departure from the work place and that Mr McMurdo had a part to play in that. It probably also reflects the falling out there had been between Mr Tuari and Mr McMurdo and the general view shared by Mr and Mrs Tuari about Mr McMurdo's poor administration skills. However, it should also be understood that Mr McMurdo and his wife were renting a property from Mr and Mrs Tuari, that the two men had previously been good friends and that the two women were still friends.

Export load out

[18] The load out was scheduled to start on Saturday, 20 August 2005. Mr Ripley was present in Invercargill as were Mr Carlyon and Mr Pape. Mr Ripley was critical of Mr Tuari for not having complied with instructions about preparation for the load out. He also learned that Mr Tuari intended to play rugby that afternoon rather than assist with the load out. During the load out, Mr Ripley made inquiries of a number of staff about rumours that Mr and Mrs Tuari had paid for houses owned by them from SPM's stock. Mr McMurdo knew that the Tuaris had made a profit from selling their house in Christchurch and told Mr Ripley that when asked. I find that Mr Ripley initiated his inquiries to find out if there was any truth to the rumours to the effect that Mr & Mrs Tuari were taking stock. Inevitably, it was reported back to Mr Tuari that questions were being asked. Mr Tuari told Mrs Tuari about these rumours and Mr Ripley's inquiries. The evidence before the Authority clearly establishes that Mr and Mrs Tuari had funds from an earlier property sale and loan advances to purchase their various properties. Despite their knowledge that they had sourced the funds for their property investments from

legitimate channels, Mr and Mrs Tuari were no doubt upset to learn of the rumours and Mr Ripley's inquiries.

[19] By Monday, 22 August the rumours included the notion that Mr Carlyon had transferred Mr McMurdo back to the Invercargill branch as a spy to find reasons to dismiss Mr Tuari. Mrs Tuari's evidence was that she put this rumour to Mr McMurdo who simply laughed, making it clear from his demeanour and response that the rumour was true. Mr McMurdo denies being transferred back to Invercargill as a spy and Mr Carlyon also denies that arrangement. I find that the reasons for Mr McMurdo's return to Invercargill lay in the desire of his family to return there having not settled in Dunedin and SPM's need to plan a replacement for Mrs Tuari, she having indicated her intention to leave in due course. Mr Carlyon may well have asked Mr McMurdo to keep an eye out for anything untoward regarding transactions but that was not the purpose of his placement back in Invercargill.

[20] Mr Ripley never approached Mr or Mrs Tuari directly about the rumours or his inquiries and I am satisfied that he decided there was no substance to the rumours.

[21] The load out finished around midday on 22 August. Mr Ripley and Mr Pape travelled to Dunedin, the ship's next port of call.

Termination of Mr Tuari's employment

[22] Mr Tuari suffered a breakdown late on 22 August 2005. He saw his doctor on 23 August 2005 who certified him unfit for work for seven days. Mr Tuari was then away from Invercargill for several days during the course of which he called into SPM's Christchurch branch.

[23] In the meantime, an email dated 23 August 2005 was sent to Mr Ripley from Mr Tuari. It complains that Mr Tuari does not have a manager's contract despite being in that role since October. It states that it is not acceptable and asks for that to be urgently sorted out or otherwise it will have to be pursued through the Employment Relations Authority. There is no mention of the breakdown or sick leave. There is a second email from Mr Tuari to Mr Ripley sent about an hour later. It canvases why Mr McMurdo was initially transferred to Dunedin, his return to Invercargill and the complaints about his conduct since then. The email says that Mr Tuari will have no choice but to take Mr McMurdo off administration and put him on gas cutting if he is forced to retain him. Again there is no mention of the breakdown or sick leave. Both these emails were typed for Mr Tuari by Mrs Tuari.

[24] On or about 24 August 2005, Mrs Tuari sent a fax to Mr Ripley and Mr Pape advising them that Mr Tuari would be off work until 31 August while she too would be off work because her son had contracted chicken pox.

[25] During his sick leave, Mr Tuari visited Christchurch and spoke with Mr Carlyon at the Christchurch office. Mr Tuari's evidence, which I accept, is that Mr Carlyon told him to forget about the rumours and they joked about Mr Tuari's denial of having stolen any money. Mr Tuari says that the discussion with Mr Carlyon put his mind at ease and he thought the matter had been *put to bed* so he could get on with his life and career at SPM.

[26] Mr Tuari returned to work in early September. He received a call from Mr Ripley requiring him to attend a meeting in Christchurch. Both Mr Tuari and Mr Ripley say that Mr Tuari was told that the meeting was to investigate whether his stress was work-related and needed to be reported to OSH. Obviously by that stage SPM knew that Mr Tuari's condition was stress related. Mr Tuari attended the meeting on his own with Mr Ripley and Mr Carlyon in Christchurch on 8 September 2005. It started about 10am. There is some disagreement in the evidence about what happened in the first part of the meeting but it is not necessary to resolve that. However, it was clear to SPM that Mr Tuari's breakdown was mainly due to non-work issues although the rumours about his properties, the difficulties with Mr McMurdo, the unsatisfactory performance letter and the load out pressure had contributed to the situation.

Mr Tuari was asked what SPM could do about the stress and replied *nothing*. The meeting was then adjourned for about half an hour and it resumed about 11am.

[27] The second part of this meeting was of a different character. Mr Ripley told Mr Tuari that they were sympathetic to his illness but that there were inconsistencies in his story. Mr Tuari was told that his work preparing for and during the export load out was unsatisfactory. In particular Mr Ripley said he would have dismissed Mr Tuari if he had played rugby rather than helping with the load out during the Saturday afternoon. Reference was made to him having lied earlier when questioned about work. Mr Tuari was told that there would be a formal disciplinary process later that day to address these matters and that he could have a support person present. Mr Ripley also told Mr Tuari that he had lost trust and confidence in Mr Tuari's ability to manage the Invercargill branch satisfactorily.

[28] There is a dispute in the evidence over whether Mr Tuari was first to say that he would resign if a settlement could be reached or if the suggestion of a settlement including Mr Tuari's resignation was first raised by Mr Ripley. Mr Tuari's evidence is that on the way to the meeting, he decided he would just resign. He was not intending to negotiate any settlement. If Mr Tuari had initiated the discussion, a simple resignation would probably have resulted rather than the settlement arrangements that were entered into. On balance, I prefer Mr Tuari's evidence that Mr Ripley first referred to resignation. Mr Tuari was told there were two options: either he could go through a disciplinary process or he could take a package to leave. There was an initial proposal. Mr Tuari made a counter offer. Mr Ripley replied *only if you take Janine with you* and Mr Tuari agreed. In evidence, Mr Tuari attempted to qualify that agreement but I do not accept the qualification. He agreed to his wife resigning but had not spoken to her about that.

[29] I accept Mr Ripley's evidence that he told Mr Tuari to confirm this arrangement with Mrs Tuari. There was then an adjournment while Mr Tuari called Mrs Tuari and Mr Ripley prepared a written settlement agreement. Mr Tuari rang Mrs Tuari but had to leave a message. She called back and he told her of the discussion about the two options, the settlement proposal and his agreement for her to resign as part of his settlement. Mr Tuari also told Mrs Tuari that he had been asked to phone her to get her agreement to the arrangement and that he was going to tell them that she had agreed. Mrs Tuari did not dispute this course of action.

[30] When the meeting between Mr Ripley, Mr Carlyon and Mr Tuari reconvened, Mr Ripley had a settlement document for Mr Tuari to sign and another settlement document for him to take back for Mrs Tuari to sign. Mr Tuari confirmed that he had spoken to Mrs Tuari and that she had agreed to the arrangement. He signed his own settlement agreement. It says that it *fully and finally settles all matters relating to the employment of Tui Tuari by Sims Pacific Metals Limited* and records the resignation as effective from 8 September 2005. Provision is also made for the payment to be made within 10 days. Not recorded, but orally agreed between Mr Ripley and Mr Tuari was an arrangement for Mr Tuari to attend the Invercargill yard the next morning to hand over to Mr Pape, return any property and announce the resignation to the staff. Mr Ripley took Mr Tuari to the airport Koru lounge before they both went their separate ways. The evidence of both sides is that these arrangements were concluded in a cordial manner once agreement was reached. Indeed, Mr Tuari told Mr Ripley that his intention had been to resign so that could have happened without any settlement.

Events at the Invercargill yard on 8 September

[31] Mr Tuari arrived at home in Invercargill about 4.30pm. He had earlier called Mrs Tuari before departing for Christchurch airport so she knew that an agreement had been signed. Mr Tuari had with him Mrs Tuari's settlement document already signed by Mr Ripley. Mrs Tuari said that she would not be signing it. Mr Tuari said that he was going to go into work then rather than the next morning to tell the staff of his resignation. Mrs Tuari's evidence is that Mr Tuari asked her to come in with him and delete the spreadsheets off the work computer. They both went to the Invercargill yard.

[32] There is some dispute about the sequence of events at the yard but it is unimportant for present circumstances. Mrs Tuari deleted all the data files such as spreadsheets, Word documents and emails from the hard drive of the computer. Soon after, Mr Tuari asked if it had been done and Mrs Tuari said *yes*. Mr Tuari said *everything* and Mrs Tuari held up the memory stick which Mr Tuari broke. The memory stick had been used by Mrs Tuari to store data files such as spreadsheets until the time of the export load out. Thereafter, Mrs Tuari had saved such files to the computer hard drive. Mrs Tuari left the yard and went home. Mr Tuari left the yard some time later.

[33] Mr McMurdo's evidence is that Mr Tuari said to the staff assembled in the non-ferrous shed that he had resigned and that SPM had asked Mrs Tuari also to resign. His evidence is also that Mrs Tuari said *I should turn up in the morning as usual* and that Mr Tuari said she should do this. In evidence, Mrs Tuari accepted that this may well have been said by her. Accordingly, I accept Mr McMurdo's evidence on this point.

The termination of Mrs Tuari's employment

Mr Pape was told that both Mr and Mrs Tuari had resigned. He arrived at the Invercargill yard at about 8am on 9 September 2005 expecting to meet Mr Tuari for him to complete a hand over and return any company property. Mr McMurdo was already there. He told Mr Pape that he could not get into the computer files, pointed out the broken memory stick and reported that Mr and Mrs Tuari had been there the day before. Mr Pape rang and relayed this information to Mr Ripley.

[34] Mrs Tuari arrived at work a little after 9am. In evidence Mrs Tuari said that Mr Pape was *obviously not happy* to see her. Mr Pape says that he was astonished to see her. His reaction is hardly surprising since he had been told of her resignation, was expecting to see Mr Tuari and had learnt of the computer problems possibly connected with the unexpected presence of Mr & Mrs Tuari on the previous afternoon. There is a dispute about whether Mrs Tuari explained her lateness by reference to seeing a lawyer or to being caught in traffic but that need not be resolved. She went to the computer but was told by either Mr Pape or Mr McMurdo that it was broken. Mrs Tuari made a comment about Mr Tuari having been told that his system of recording stock *sucked*. She got the ledger book and said to Mr McMurdo that he would have to train her.

[35] Mr Pape phoned Mr Ripley who asked to speak with Mrs Tuari. He asked her *what games are you trying to play?* Mrs Tuari said she was not playing any game. She said (referring to her resignation) that her husband could not make any decisions for her, that Mr Tuari was untrustworthy and that SPM knew that so why should he be believed about her resignation. Mrs Tuari was distancing herself from the resignation arrangements. She did not let on that she had been aware of them the day before. Mr Ripley said that he would be in Invercargill on Monday, 12 September at 10.30am and that Mrs Tuari was to stand down until then. Mrs Tuari asked for that in writing. Mr Ripley then spoke to Mr Pape who wrote out:

There is no work for Janine Tuari today in the Invercargill branch as such. She will be stood down on normal pay until 10.30am on Monday 12 September.

Mr Pape gave the note to Mrs Tuari and she left. There was work available for Mrs Tuari but she did not argue that point, or the stand down, at the time.

[36] Later on 9 September, Mrs Tuari's mother (Winnifred Totorewa) rang SPM to speak with Mrs Tuari, not knowing of these events. She was told by Mr McMurdo that *she doesn't work here any more*. Mrs Totorewa rang and told her daughter of this. Mr McMurdo apparently gave a similar message to a colleague of Mrs Tuari's brother when that colleague called SPM on 12 September to speak to Mrs Tuari. That too was reported to Mrs Tuari.

[37] The meeting with Mr Ripley and Mrs Tuari did not happen until Wednesday, 14 September because another meeting arose that Mr Ripley needed to attend. That was explained to Mrs Tuari and she was told that she remained *stood down, on pay, from work* until then.

[38] At the meeting on 14 September, Mrs Tuari was accompanied by a friend, Makere Solomon. Mr Pape was present when they arrived but Mr Ripley was not present. Mrs Tuari and Mrs Solomon departed for a short while. The meeting started a while later after they returned. Mrs Solomon had a dictaphone and asked if it was acceptable to record the meeting but Mr Ripley refused. I am left with notes made by Mr Pape and Mrs Solomon together with the different accounts. It is not necessary to canvass in fine detail what happened at the meeting. Mrs Solomon says that the meeting was not a disciplinary meeting, that it was a difficult situation for everyone and a tense meeting but that everyone behaved reasonably.

[39] In general, Mr Ripley asserted that there had been a valid resignation arranged through Mr Tuari while Mrs Tuari disputed that there could be a valid resignation in those circumstances. Mr Ripley also referred to it being not good practice for a husband and wife to be employed in the same office. Mrs Tuari portrayed herself as being unaware of the resignation until Mr Tuari's return home on 8 September. Mr Ripley eventually conceded that the company could not hold Mrs Tuari to the resignation. Mrs Tuari describes that as a *half hearted apology*. Mr Ripley also said that they were checking the computer damage and he questioned Mrs Tuari's trust-worthiness. Mr Ripley and Mrs Tuari agreed about Mr Tuari's untrustworthiness. Mrs Tuari attributed the computer damage to Mr Tuari. There was discussion about Mr Carlyon's assertion as to the status of Mrs Tuari's employment. Mr Ripley did not concede that Mrs Tuari was a permanent employee, instead suggesting that her hours of work were irregular. Mrs Tuari asked about Mr Ripley's investigation into the rumours and Mr Ripley said that he was satisfied that they were not true. Mr Ripley told Mrs Tuari that she could return to work but Mrs Tuari questioned who would be her manager. Mr Ripley said that Mr Pape would be manager, with Mr McMurdo responsible for the office and another employee looking after the yard. After some time, Mrs Tuari asked for an adjournment and Mr Ripley asked if Mrs Tuari was going to resume work or was standing herself down. Mrs Tuari said she was sick and Mr Ripley said that if she was not back at work within three days a medical certificate would be required. Mr Ripley also said that he would write to Mrs Tuari proposing a time for a further meeting. The meeting then ended and Mrs Tuari and her friend left the premises.

[40] Mrs Tuari's solicitor wrote to SPM on 16 September 2005 conveying her resignation and raising a personal grievance based on *a recent history of allegations and a campaign to have her leave from the workplace*. Complaint is made about the assertion of casual employment, the stand-down on 9 September, the advice on 14 September about *allegations of corruption from staff, allegations about [Mrs Tuari's] husband* and the requirement for her to report to Mr McMurdo.

Constructive dismissal

[41] Mrs Tuari's claim is advanced in reliance on the second and third categories of constructive dismissal identified in *Auckland Shop Employees IUOW v Woolworths NZ* [1985] ACJ 963: a course of conduct with the deliberate and dominant purpose of coercing an employee to resign and a breach of duty leading the employee to resign.

[42] I do not accept that SPM embarked on a course of conduct with the deliberate and dominant purpose of coercing Mrs Tuari's resignation. In the first place, Mrs Tuari had made it clear that she intended to resign in due course. If SPM wanted her to leave (as I accept they did) they only needed to wait for her to resign. Mr McMurdo was not returned to Invercargill as part of a plan to coerce Mrs Tuari's resignation. He was returned to Invercargill because Mrs Tuari had signalled her intention to resign. It is submitted that Mrs Tuari was required to train, work with and report to Mr McMurdo because SPM knew or should have known of her objection to that state of affairs. It is correct that Mrs Tuari had a poor view of Mr McMurdo's work abilities. However she indicated when she attended work on 9 September that she was prepared to work with Mr McMurdo. It is not that uncommon for an employee to have a

negative perception of their supervisor but a requirement for the employee to work with that supervisor hardly amounts to cogent evidence that the employer intends to coerce the employee's resignation.

[43] The only evidence seriously pointing to the possibility of SPM acting with the deliberate and dominant purpose of coercing Mrs Tuari's resignation relates to its dealings over Mrs Tuari's resignation. I accept that Mr Ripley first raised the suggestion that Mrs Tuari should resign as part of the settlement with Mr Tuari. SPM wanted her to leave with Mr Tuari and can properly be criticised for initiating those arrangements through Mr Tuari. However, SPM was encouraged to proceed with the arrangements by Mr Tuari and Mrs Tuari knew and (at least) implicitly consented to Mr Tuari continuing to make those arrangements following their lunchtime phone conversation on 8 September 2005. SPM was given to understand that Mrs Tuari had agreed to the arrangements which is why it drafted the settlement document for Mrs Tuari and finalised its agreement with Mr Tuari. SPM gave Mr Tuari the settlement document for Mrs Tuari for the purpose of securing Mrs Tuari's resignation but that was not coercive because SPM was led to believe it had been agreed. The subsequent stand-down was not for the purpose of coercing a resignation. It was to allow the chance to sort out what had happened when Mrs Tuari pretended to know nothing about the proposed resignation. Perhaps grudgingly, but SPM accepted on 14 September that it could not hold Mrs Tuari to the resignation it thought had been agreed through Mr Tuari. I do not accept that Mr Ripley conducted the 14 September meeting in a manner intended to coerce Mrs Tuari's resignation. Indeed, if SPM had at that point intended to secure Mrs Tuari's resignation its better course would have been to insist that its dealings with Mr Tuari remained effective against Mrs Tuari.

[44] It follows from the above analysis that SPM did not embark on a course of conduct with the deliberate and dominant purpose of coercing Mrs Tuari's resignation.

[45] The breach of duty component to the argument must be analysed further. A breach of duty must be sufficiently serious to make it reasonably foreseeable that the employee would not be prepared to work under the conditions prevailing: see *Auckland Electric Power Board v Auckland Provincial District Local Authorities IUOW Inc* [1994] 1 ERNZ 168. The breaches of duty relied on are SPM's failure to accept that Mrs Tuari was a permanent employee, taking work from her and giving it to Mr McMurdo, returning Mr McMurdo to Invercargill against Mrs Tuari's objections, not dealing with Mrs Tuari independently of her husband, the presentation of the document proposing Mrs Tuari's resignation, viewing Mrs Tuari with suspicion in relation to dishonesty, investigating the rumours of dishonesty and doing nothing to dispel them, and the stand-down on 9 September.

[46] SPM's acts and omissions over the rumours do not amount to a breach of duty owed to Mrs Tuari. In evidence, Mrs Tuari refers to it as a fraud investigation that she should have been told of but it never reached that status. SPM did not generate or perpetuate the rumours, but having heard them, it was entitled to make some inquiry. Mr Ripley satisfied himself quickly that there was no truth to the rumours. That was obviously shared with Mr Carlyon because he and Mr Tuari were able to joke about their lack of substance when Mr Tuari was in Christchurch during his sick leave near the end of August. It was then known to Mr and Mrs Tuari that SPM managers did not regard the rumours as having any substance. That distinguishes the present matter from *NZEI v ANI School Trustees* [1992] 3 ERNZ 243, a case referred to by counsel for Mrs Tuari. Mrs Tuari also referred to the issue of the rumours during her meeting with Mr Ripley on 14 September and got the same message although Mr Ripley was guarded about what inquiries he had made.

[47] At the 14 September meeting, Mr Ripley did give Mrs Tuari reason to think he was suspicious about her involvement in the deletion of files and damage to the memory stick. There was a basis for him to be suspicious. Mr and Mrs Tuari seemed the most likely culprits because they were both present and had an opportunity and a reason. During the meeting, Mrs Tuari attributed the damage to Mr Tuari. Her involvement had become apparent by the time of the investigation meeting so Mrs Tuari's evidence is that she was simply following the directions of her manager (Mr Tuari) when she deleted the material off the computer hard drive. More will need to be said about her involvement later but for present purposes, I find

that this assertion by Mrs Tuari is disingenuous. At the time of his meeting, Mr Ripley simply indicated that inquiries were under way. There is no breach of duty in that.

[48] None of SPM's actions in respect of Mr McMurdo amount to a breach of any duty owed to Mrs Tuari. SPM was entitled to have Mr McMurdo return to the Invercargill yard despite Mrs Tuari's objection, as explained above. The re-arrangement of work to accommodate Mr McMurdo's return occurred from 15 August 2005 and breached no term of Mrs Tuari's employment. At the meeting on 14 September, Mr Ripley made it clear that Mr Pape was in charge of the branch with Mr Porter responsible to him for the yard and Mr McMurdo for the office. None of that was a breach of any duty owed to Mrs Tuari.

[49] SPM did fail to deal with Mrs Tuari independently of her husband over her resignation as explained above. That went as far as it did because of Mr Tuari's assurance that he had spoken with Mrs Tuari, having been asked to do so. As it has turned out, Mrs Tuari did implicitly authorise her husband to continue with those discussions. However, when Mrs Tuari asserted that the arrangements had been made without her knowledge or consent, SPM backed away from the arrangement and apologised for what then appeared to be its failure to seek Mrs Tuari's prior approval. It is said that the apology and Mr Ripley's offer on 14 September for Mrs Tuari to resume work were insincere. I do not accept that perspective. Mr Ripley accepted that he should not have made an arrangement affecting Mrs Tuari with Mr Tuari. SPM was entirely genuine in making that acknowledgement and in its offer for Mrs Tuari to return to work. Accordingly, I do not accept that there was any breach of duty entitling Mrs Tuari to resign arising out of this matter.

[50] Mrs Tuari complains about being *stood down* on 9 September. The reason for the stand down was Mr Ripley's surprise when Mrs Tuari reported for work claiming to know nothing of the resignation arrangements. He wanted time to get to Invercargill to meet with Mrs Tuari and talk about the situation. That is not the reason that was given to Mrs Tuari so Mrs Tuari is right to be critical of SPM. However, she knew that reporting for work when SPM thought she had resigned would provoke a reaction and to some extent she orchestrated the situation. I note also that this was not a disciplinary suspension. I do not accept that there was any disadvantage to Mrs Tuari arising from the stand down. Nor do I accept that SPM breached any duty entitling Mrs Tuari to resign.

[51] The point that SPM's failed to acknowledge Mrs Tuari's status as a part-time employee has some merit. SPM knew that it had been arranged through Ms Olive that Mrs Tuari was a permanent employee and Mrs Tuari knew that they knew that. Mr Ripley should have acknowledged that on 14 September or at least not continued with any assertion to the contrary. Assuming that this was a breach of duty I do not accept that it was sufficiently serious so as to make it reasonably foreseeable that Mrs Tuari would not continue to work. The wrong assertion about Mrs Tuari's status made no difference to what she was to do at work, when she was to do it or the circumstances in which her work was to be performed. Any effect would have come later if SPM sought to rely on Mrs Tuari's allegedly casual status to reduce or discontinue her work but there was no suggestion of that on 14 September. In the meantime, Mrs Tuari knew there were ways to enforce her status if necessary and SPM understood she knew that. In these circumstances I do not accept that it was reasonably foreseeable that Mrs Tuari might resign.

[52] Accordingly, I find that Mrs Tuari resigned and was not constructively dismissed. She has no sustainable personal grievance. It also follows that she cannot succeed with any penalty claim against SPM or its officers.

SPM's Claims against Mrs Tuari for Damages and Penalties

[53] SPM says that Mrs Tuari had contractual duties of good faith and fidelity and implied duties of trust and confidence, fidelity and good faith extending to not acting in a manner disruptive to the respondent's business, an obligation to take reasonable care of the respondent's property and to report any misconduct. The obvious difficulty with any reliance on express terms of the employment agreement is that the oral arrangements through Ms Olive did not extend to any of these issues. To succeed, SPM must rely on implied terms of

trust and confidence and the like. Counsel also submitted that there is a duty to report misconduct and referred me to *Tesco Stores Limited v Pook* [2004] IRLR 618. However, that case discussed the duty on directors and certain senior employees to report their own breaches of fiduciary duties, none of which is applicable here to Mrs Tuari. That leaves the implied duty of trust and confidence which I accept extends to a prohibition on intentionally damaging company property.

[54] More must be said about Mrs Tuari's actions. At first, Mrs Tuari asserted that she was simply following orders from her manager when she deleted the files from the computer and handed the memory stick to Mr Tuari. There is no merit in that assertion. Mr Tuari's employment was ending. He was in no position to give Mrs Tuari any employment directives and Mrs Tuari knew this. There is also a suggestion that Mrs Tuari deleted her own work, not company property. I do not accept this. The material deleted was created by Mrs Tuari in her work for SPM so it is company property. When questioned, Mrs Tuari acknowledged that she did not think her actions were innocent and she accepted that there was an element of vindictiveness on her part given the company's attitude towards her husband and her own view that she had been badly treated. That is the context in which Mrs Tuari breached her obligations to her employer. Her breaches were the deletion of data files from the computer and assisting Mr Tuari to break the memory stick. I should note that Mr Tuari acknowledges breaking the memory stick. However, SPM has not sought any award of damages against Mr Tuari.

[55] SPM must be able to show loss arising from the breach to succeed with its damages claim. The claim is for \$1,550.00 in special damages but there is no evidence of any actual loss aside from the broken memory stick. The evidence establishes that copies of the computer files had been forwarded to SPM's head office in the ordinary course of business up to the end of August. What was lost was any data input into spreadsheets for the first week of September but the paper invoices and receipts containing the source data remained unaffected. Some time was apparently spent by staff in Auckland recreating spreadsheets for earlier periods but I am not satisfied that this was done or needed to be done to recover any files deleted by Mrs Tuari. SPM neglected to provide any satisfactory evidence on the cost of replacing the memory stick but the best guess is that it would be about \$50.00 at the most. Accordingly, I order Mrs Tuari to pay that sum to SPM.

[56] There is a claim for general damages for loss of the use of technology, loss of information or access to it and inconvenience. I do not accept that SPM has established that there was any loss of the use of technology. The computer remained undamaged and could be (and was) used after 8 September 2005. There was no loss of information or access to it as copies of the relevant spreadsheets were available at the head office. I do not accept that SPM can succeed in a claim for damages for inconvenience.

[57] As a result of the above findings, I dismiss SPM's claim against Mrs Tuari for damages except for the \$50.00 for the memory stick. There remains its claim against her for statutory penalties for breaching implied terms of her employment agreement and/or for aiding and abetting Mr Tuari in breaching his employment agreement. The claim comprises the statutory maximum penalty multiplied by the number of terms of employment allegedly breached by two to account for aiding Mr Tuari. However, by way of submission, counsel argued for a penalty of at least \$10,000.00 to be imposed on both Mr Tuari and Mrs Tuari.

[58] While SPM has not been able to establish any significant compensable loss in its damages claim, it remains the case that Mrs Tuari breached the term of trust and confidence implied into her employment agreement by deleting the computer files and by assisting Mr Tuari to break the memory stick. These were intentional acts done with an element of vindictiveness. It is appropriate then to impose a penalty on Mrs Tuari for her part in this. However, I do not accept that the conduct should be divided up into two separate actions nor should one look for different incidents of the implied term to establish separate breaches. The best that can be said for Mrs Tuari is that the consequences of her actions were not severe. The circumstances call for the imposition of a modest penalty which I fix at \$1,000.00.

Mr Tuari's unfair bargaining claim

[59] It makes sense to deal with this point first as the full and final term of the settlement agreement otherwise prevents Mr Tuari's penalty and grievance claims.

[60] Section 68 (1) of the Employment Relations Act 2000 states that bargaining for an individual employment agreement is unfair if one or more of the circumstances in subsection (2) applies to one party and the second party knows or ought to know that those circumstances apply to the first party. Subsection (3) provides that an individual employment agreement includes a term or condition of an individual employment agreement. Subsection (4) prevents any other challenge to an individual employment agreement on the basis that it is unfair or unconscionable. The initial question is whether the settlement agreement entered into by Mr Tuari and SPM is a term or condition of an individual employment agreement.

[61] Counsel for SPM referred me to *Hands v WEL Energy* [1992] 1 ERNZ 815. That case dealt with whether redundancy agreements registered under the Labour Relations Act 1987 that remained in force at the date of the Employment Contracts Act 1991 were collective employment agreements for the purposes of section 19(4) of the latter Act. If they were, upon expiry their terms became part of an individual employment contract that continued to bind the employee. A transitional provision in the latter Act provided that unexpired redundancy agreements registered under the former Act remained in force according to their tenor and were enforceable as if they were collective employment contracts. In that context, the Court of Appeal held that stand alone redundancy agreements were not collective employment agreements and doubted that they were even contracts of service. Counsel argues that the settlement agreement between Mr Tuari and SPM is similarly not an employment agreement. However, *Hands* is essentially a case about the application of transitional provisions in the Employment Contracts Act 1991 and provides no assistance in the present case.

[62] In *Shaffer v Gisborne Boys' High School Board of Trustees* [1995] 1 ERNZ 94 the Court of Appeal was prepared to treat a settlement agreement created under the Employment Contracts Act 1991 as an addition to the terms of the employment contract that had to be read alongside the original contract to ascertain the full terms of the contractual relationship. In *Kerr v Associated Aviation (Wellington) Ltd* [2005] ERNZ 632 the Employment Court did not apply that same analysis when faced with an issue about the enforceability of a settlement agreement not made under the mediation provisions of either the Employment Contracts Act 1991 or the Employment Relations Act 2000. The Court described the approach in *Shaffer* as an *almost artificial categorisation of a settlement ...as an employment contract or variation to a contract ...*. In *Kerr* the Court held that the settlement agreement related to an employment relationship so section 161(1)(r) of the Employment Relations Act 2000 brought the action within the exclusive jurisdiction of the Authority and the Court on a challenge. These cases all deal with settlement agreements created well after the termination of the employment relationship which gives some context to the Employment Court's description of the reasoning as *almost artificial*. However, in *Finnigan v Hanover Group Limited* unreported, L Robinson, 7 July 2006, AA 236/06 the Authority adopted the reasoning in *Kerr* when dealing with a deed of settlement made during the employment that brought it to an end.

[63] More on point is *Department of Survey & Land Information v NZ Public Service Assn* [1992] 1 ERNZ 851. There the Court of Appeal held that a settlement arrangement by which two employees terminated their employment relationship in exchange for a payment amounted to a variation of their employment contracts. The point at issue was whether there had been consideration for the contractual variation but the Court held that the settlement arrangements amounted to a significant change in the employees' terms of employment. Similarly in the present case, under his settlement agreement Mr Tuari forewent an entitlement to continued employment, which was a significant variation to his terms of employment. Applying *DOLSI* I find that the settlement agreement reached between Mr Tuari and SPM by which his employment ended does amount to a term of his employment agreement. It follows that the merits of Mr Tuari's claim about unfair bargaining should be considered. In assessing the merits I have referred to *F v Attorney-General* [1994] 2 ERNZ 62.

[64] First, I must consider whether Mr Tuari was unable to adequately understand the implications of the agreement by reason of diminished capacity due to his illness or emotional distress which was known or should have been known to SPM. While I accept that Mr Tuari had been unwell there is no evidence that he could not adequately understand the implications of the settlement agreement whether for that reason or any other. Indeed, the evidence is that Mr Tuari went to the meeting on 8 September intending simply to resign. The result was better than that, a fact that Mr Tuari clearly understood. There is no evidence to suggest that Mr Tuari did not comprehend the effect of the rest of the settlement agreement. Accordingly, he cannot succeed under section 68(2)(a) of the Employment Relations Act 2000.

[65] The next question is whether Mr Tuari was induced to enter into the settlement agreement by oppressive means, undue influence or duress. The answer to this aspect also lies in Mr Tuari's evidence that he formed his intention to resign before the meeting occurred. I accept that there was some pressure placed on Mr Tuari by the two options unexpectedly presented to him at the meeting but an argument that he was induced to enter into the settlement agreement cannot succeed in the face of Mr Tuari's clear evidence of prior intention. There is nothing in any of the dealings between Mr Tuari and SPM predating the 8 September meeting that could support an attempt to avoid the effect of the settlement agreement.

[66] It follows from the above that Mr Tuari entered into a valid agreement to fully and finally all matters relating to his employment by SPM. He therefore cannot succeed in a personal grievance claim even if leave was granted to raise a grievance out of time. Nor can Mr Tuari circumvent the effect of the settlement by penalty actions against SPM or any of its officers.

Claims against Mr Tuari

[67] There are penalty claims totalling \$50,000.00 against Mr Tuari. He is said to have breached five express and implied terms of his employment agreement as a principal and aided and abetted Mrs Tuari's similar five breaches. There is no damages claim against Mr Tuari.

[68] As with Mrs Tuari, I treat Mr Tuari's actions as a single breach of the implied term of trust and confidence. For the same reasons as applied to Mrs Tuari, it is appropriate to impose a penalty against Mr Tuari. The issue for further consideration is the appropriate level of a penalty. Mr Tuari was brought into these proceedings as part of SPM's counter offensive against Mrs Tuari, designed to dissuade her from proceeding with her personal grievance claim. It appears that SPM was content to ignore the damage done by Mr Tuari to the memory stick until it received Mrs Tuari's proceedings. SPM only just initiated its proceedings against Mr Tuari within time. The timing and circumstances are unfortunate from Mr Tuari's perspective but these issues are not sufficient reason to affect the level of a penalty. I am left to assess whether Mr Tuari was any more or less culpable than Mrs Tuari. He caused the physical damage but only because Mrs Tuari handed him the memory stick. Mr Tuari was the branch manager with a greater level of responsibility but he also was suffering from a stress related illness which no doubt affected his actions. I see no reason to distinguish between them both as to their level of culpability and accordingly will impose a penalty of \$1,000.00 against Mr Tuari.

[69] SPM complains of difficulties in retrieving all its property from Mr Tuari and some intemperate comments apparently made by Mr Tuari when at the yard. I do not accept that there was any breach of the employment agreement in respect of these matters. They either occurred after 8 September 2005, the date on which the employment relationship ended, or they do not reach the high standard required to amount to a breach of agreement punishable by the imposition of a penalty.

Summary

[70] Mrs Tuari's personal grievance and penalty claims fail.

[71] All Mr Tuari's claims fail.

[72] Mrs Tuari is to pay Sims Pacific Metals Limited \$50.00 by way of damages in respect of her involvement in the destruction of the memory stick.

[73] Mrs Tuari is to pay a penalty of \$1,000.00 for breach of her employment agreement.

[74] Mr Tuari is to pay a penalty of \$1,000.00 for breach of his employment agreement

[75] I was not asked to make an order requiring the payment of any penalties to Sims Pacific Metals Limited so the penalties above are payable to the Crown.

[76] Costs are reserved.

[77] Except for what has been included in this determination, there is to be no publication of any of the evidence about Mr Tuari's breakdown.

Philip Cheyne
Member of Employment Relations Authority