IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 30
5425621

	BETWEEN	CAROLINE HANGAR Applicant
	AND	REH PROPERTY MANAGEMENT LIMITED (t/a RAY WHITE REAL ESTATE) Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Jenny Murphy, for the Applicant Dave Robb, for the Respondent
Investigation Meeting:	4 December 2013 at Palmerston North
Determination:	7 April 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Caroline Hangar was employed by REH Property Management Limited, trading as Ray White Real Estate, from 26 March 2012 until her resignation effective from 12 July 2013. Ms Hangar claims that her resignation was brought about by the actions of her employer and that she was constructively dismissed.

[2] She also claims to have been unjustifiably disadvantaged in her employment, and to have had her employment agreement breached. Additionally she claims wage arrears and seeks penalties for her employer's breach of good faith in its dealings with her.

[3] REH Property Management Limited (Ray White Real Estate) denies all Ms Hangar's claims. It says that it did not take any course of action that would cause Ms Hangar to resign.

Background:

(a) Contractual relationship

[4] Ms Hangar initially started her paid employment with Ray White Real Estate as a Sales Support Coordinator in the company's Feilding office. She was employed for a minimum 20 hours per week and was paid on the basis of a percentage of the letting fees for rental properties for which she was responsible.

[5] Shortly after commencing employment, Ms Hangar asked to be paid a base salary. Her employer agreed and the parties entered into a second individual employment agreement dated 10 April 2012 in which Ms Hangar's position was described as a Letting Agent. She remained on this arrangement until October 2012 when she was offered, and accepted, the position of Property Manager with Ray White Real Estate.

[6] The employment agreement she signed on 19 October 2012 noted her ordinary hours of work as 40 per week with a provision that she may also be required to work additional hours and days (including weekends) to meet the business demands of the employer. She would not be paid overtime for any hours in excess of 40 per week. Ms Hangar's salary was expressed as being based on $25,000 gross per annum with her total remuneration (inclusive of any commission or incentive payments) to be not less than $28,080 per annum.

[7] The agreement specified that *"subject to the company's commission scheme rules"*, she would be eligible for commission payments where she met key performance indicators (KPIs). Commission payment structures and scheme rules were to be determined and communicated in writing by the Managing Director from time to time at his sole discretion. On commencement, and subject to achieving all KPIs, Ms Hangar was to receive commission of 15% of gross income received from properties she directly managed, including any letting fees charged.

[8] Ms Hangar's employment agreement as Property Manager provided that she reported to the Managing Director. An appendix to the agreement, which provided a role description for her position, specified that she was accountable to both the Property Management Manager and the Principal, i.e. the Managing Director.

(b) Working relationship

[9] Evidence from the Managing Director, Stuart Fleming, and the Property Management Manager, Maria Bayley, was that Ms Hangar had performed beyond their expectations in the first few months of her employment as Property Manager. Following that initial period, however, it appeared that her performance dropped and problems arose in the employment relationship, particularly between Ms Hangar and Ms Bayley.

[10] Ms Hangar acknowledged that some of the issues raised with her by Ms Bayley were legitimate issues for the Property Management Manager to raise but she nonetheless resented them being raised. Ms Hangar referred to being bullied by Ms Bayley over such matters as being asked to have the cuffs on her employer-provided uniform taken up to ensure a smart corporate image was maintained. She also resented Ms Bayley raising the matter of her tongue piercing and asking her to remove her tongue bar while she was at work. Ms Hangar described this as bullying on Ms Bayley's part.

[11] An issue arose in May 2013 when Ms Hangar was the subject of an anonymous complaint relating to her conduct when using her Ray White Real Estate vehicle on personal business in Palmerston North on a Saturday. Ms Bayley discussed the complaint with Ms Hanger, who readily acknowledged she had been using her vehicle to visit a friend in Palmerston North on the day in question. She denied any inappropriate conduct.

[12] Ms Bayley removed Ms Hangar's privilege of taking the vehicle home in the evenings while she investigated the complaint. The vehicle was available to Ms Hangar for work purposes during business hours. Ms Bayley arranged another employee to provide transport for Ms Hanger to and from work. The work vehicle was eventually restored to Ms Hangar some three weeks after the anonymous complaint had been received.

[13] While Ms Bayley was endeavouring to investigate the allegations over the car, other issues arose which resulted in her requesting a meeting with Ms Hangar. She emailed Ms Hangar on 15 May 2013 to request her attendance at the meeting without disclosing its purpose. On the late afternoon of Friday 17 May 2013, Ms Bayley contacted Ms Hangar to advise her that she could bring a support person to the

meeting if she wished. The meeting took place at 10 o'clock on the morning of Monday 20 June 2013.

[14] On the morning of 12 June 2013, Ms Hangar attended training in Palmerston North with what Ms Bayley described as *"very bright pink stripes through her hair"*. Towards the end of the morning, Ms Bayley took Ms Hangar aside and told her that she needed to do something about her hair, asking if she could have it sorted by Friday of that week. Ms Hangar agreed and returned to the Feilding office.

[15] By Friday, according to Ms Bayley, Ms Hangar's hair remained the same. Ms Bayley again took Ms Hangar aside and reiterated her request that she do something about the pink stripes, suggesting that she should treat herself and have it fixed at a hairdresser's. Ms Bayley asked that she have it fixed by Monday.

[16] Ms Hangar maintained she had been washing her hair twice a day to try to remove the colour. The colour had been a mistake as it was intended to be burgundy not pink. She had been to a local hairdresser and had much of the pink colouring removed but was told it would cost her $130 to have it removed in its entirety. Ms Hangar said she did not have that money to spend on her hair.

[17] On Monday, 17 June 2013, Ms Bayley arrived at the Feilding office and, finding that Ms Hangar's hair remained pink, told her that she needed to go home and sort her hair out. Ms Hangar took this news badly, swearing at Ms Bayley, telling her that they were *"not at school",* and that she had washed her hair several times.

[18] Ms Hangar did not return to work and eventually submitted her resignation by letter dated 11 July 2013, effective from 12 July 2013.

Issues

[19] The issues for determination are:

(a) Whether Ms Hangar was unjustifiably disadvantaged in her employment by her employer's actions in:

(i) removing her work vehicle for travel to and from work;

(ii) requiring her attendance at a meeting on 20 May 2013;

(iii) sending her home on 17 June 2013 because of the colour of her hair.

(b) Whether Ms Hangar was underpaid wages throughout her employment;

(c) Whether she is owed commission payments; and

(d) Whether she was unjustifiably constructively dismissed.

Test of Justification

[20] Whether an employer's actions are justifiable must be determined on an objective basis by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.[1]

[21] I am required to consider the following factors, specified at s. 103A (3) (a) to (d) of the Employment Relations Act 2000 (the Act), in applying this test as well as any other factors I think appropriate:

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
(c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[22] The Act constrains me from determining a dismissal or an action to be unjustifiable solely because of defects in the process followed by the employer if the defects were—

(a) minor; and
(b) did not result in the employee being treated unfairly.

Was Ms Hangar unjustifiably disadvantaged by the removal of her work vehicle?

[23] Ms Hangar's individual employment agreement provided that:

> *The Company may provide you with a "tool of trade" vehicle at their expense, which must be used in strict accordance with the Company's motor vehicle policy. Personal use is limited to travel between work and home. The company will meet costs associated with general vehicle running, maintenance and insurance. You will be responsible*

[1] Section 103A Employment Relations Act 2000

> *for costs, claims or losses which arise out of an accident which is otherwise not covered by the Company's motor vehicle insurance policy.*

[24] The wording of the agreement made the provision of a vehicle for work purposes, and for travelling between home and work, a matter of discretion for Ray White Real Estate. Ms Hangar had no contractual entitlement to a vehicle.

[25] The nature of the allegation made by the anonymous complainant, who identified herself only by her Christian name, was serious. The car was identifiable by its livery as a Ray White Real Estate vehicle. It was reasonable for the employer to investigate a complaint about the conduct and alleged intoxication of the vehicle's driver.

[26] Ms Hangar was given the opportunity to provide an explanation, and did so. She acknowledged she had taken the vehicle to Palmerston North on a Saturday afternoon to visit a friend. She denied being intoxicated or acting improperly. Ms Bayley decided that in light of the serious nature of the allegations Ms Hangar should not take the vehicle home after work until she had investigated the matter further.

[27] Ms Hangar's acknowledgement that she had used the vehicle to visit a friend in a different town was a tacit admission that she had breached the vehicle usage term of her employment agreement. The agreement explicitly provided that personal use of a work vehicle was to be limited to travel between work and home. The social visit to a friend in Palmerston North over a weekend did not comply with that term.

[28] Mr Fleming said the company allowed some latitude with after-hours use of vehicles, such as shopping or picking up employees' children. That did not extend to taking the vehicle out of town, as Ms Hangar did, without requesting the employer's permission.

[29] Ms Hangar was undoubtedly frustrated by the temporary loss of the vehicle for getting to and from work. However, her employer ensured she had transport from another employee during that period. Ms Hangar still had access to the vehicle during work hours to fulfil her work responsibilities.

[30] It was Ms Bayley's evidence, which I accept, that she attempted over the next two or three weeks to investigate the complaint. Despite efforts including door knocking at the property the anonymous complainant had claimed to own, she was

unable to identify or locate her. Ms Bayley eventually concluded she was unable to continue the investigation. At that point she arranged for the car to be returned to Ms Hangar for travel between home and work.

[31] I find that Ray White Real Estate had good cause to remove Ms Hangar's use of her work vehicle for travel to and from her workplace while it investigated the complaint about her. Any disadvantage she may have experienced from her employer's action arose from a justifiable action on its part.

Was Ms Hangar unjustifiably disadvantaged by the meeting of 20 May 2013?

[32] Ms Hangar says the meeting breached the principles of natural justice and the good faith provisions of the Employment Relations Act 2000 (the Act). She was not advised in advance of the subject matter of the meeting, and did not know it was to discuss her performance.

[33] She was advised that she could bring a support person late in the afternoon of the Friday before the scheduled Monday morning meeting. Matters relating to allegations of serious misconduct were raised with her at the meeting which she had no opportunity to consider in advance.

[34] It was Ms Bayley's evidence that the purpose of the meeting was not disciplinary, despite the notes that she prepared before the meeting referring to *"occurrences of serious misconduct that has occurred on several occasions over that* [sic] *past months"*. She says she telephoned Ms Hangar and offered to postpone the meeting if Ms Hangar was unable to arrange a support person in time. Ms Hangar disputes this and says Ms Bayley asked to be informed if she was going to bring support person to the meeting.

[35] It is clear from the evidence of both participants at the meeting that there was discussion of Ms Hangar's recent performance. They also discussed Ms Hangar's personal circumstances and some difficulties she was experiencing in both her personal life and at work.

[36] Both Ms Bayley and Ms Hangar agreed that the outcome of the meeting was positive. Ms Hangar acknowledged she had had some personal issues which had caused her performance to drop recently. Ms Bayley obtained a better understanding of Ms Hangar's perspective and both agreed to move forward without any further

repercussions from the matters Ms Bayley had raised. Those matters had been a mixture of performance and behavioural matters.

[37] Ms Bayley's setting up of the meeting without providing information in advance about its purpose, and the lateness of her offer to Ms Hangar to bring a support person, was unfair. However, I do not find that those procedural deficiencies ultimately disadvantaged Ms Hangar. The meeting appeared to have involved a free and frank discussion of matters that resulted in a shared commitment by Ms Bayley and Ms Hangar to put any performance and behavioural issues behind them and focus positively on the future. Ms Hangar acknowledged that her communication and relationship with Ms Bayley improved following the meeting of 20 May 2013.

[38] In the absence of any disciplinary outcome, and in light of the acknowledged positive change in the relationship between Ms Hangar and her manager, I find that Ms Hangar was not disadvantaged by Ms Bayley's failure to follow best practice in the lead up to the meeting of 20 May 2013.

Did Ray White Real Estate act unjustifiably by sending Ms Hangar home on 17 June 2013?

[39] Ms Hangar says she was suspended by her employer when Ms Bayley sent her home on 17 June 2013 because of the colour of her hair. Ms Bayley did not give Ms Hangar prior warning that she was considering such action and nor did she consult her about her decision. Ms Hangar says the suspension appeared to have been lifted at midday on 19 June 2013 when she advised her employer that she was in possession of a medical certificate.

[40] Ray White Real Estate denies suspending Ms Hangar. It says it had given her a lawful instruction to remove the pink streaks from her hair as her appearance breached a term of her employment agreement to:

> "*..maintain a high standard of personal presentation to a standard acceptable to the company. Your attire should be appropriate to the job performed and consistent with a professional, neat and well groomed image.* "

[41] Ray White Real Estate says that Ms Hangar did not comply with that instruction despite several reminders from Ms Bayley. It says that sending Ms Hangar home to sort out her hair was not a suspension. It was a requirement of her to comply with a term of her employment agreement.

[42] Ms Bayley gave evidence of her expectation that Ms Hangar would return to work later the same day or, at the latest, the following day. She sent a text message to Ms Hangar on the evening of 17 June informing her that she was "*to immediately return to work to resume normal duties when you are able to comply with the Company's expectations with regard to your personal presentation*".

[43] The text noted that Ms Hangar had failed to adhere to her employer's lawful and reasonable instructions to remove the pink dye from her hair and asked whether she had now changed her hair colour and when and what time she would be returning to work.

[44] Ms Bayley did not inform Ms Hangar that she was being suspended, and I accept she did not regard her action as a suspension at the time. Her evidence to the Authority, however, referred to Ms Hangar ignoring instructions and company policy, which suggests that she saw Ms Hangar's failure to remove the pink colour from her hair as misconduct.

[45] In that situation there was no mechanism available to Ms Bayley to require Ms Hangar to leave her workplace other than by suspending her from her employment or by obtaining Ms Hangar's consent. It would have been clear to Ms Bayley from Ms Hangar's outraged response that she did not consent to being sent home.

[46] I find that Ms Bayley did suspend Ms Hangar from her employment on 17 June 2013 when she sent her home with instructions to sort out her hair colour. Having found that Ms Hangar was suspended, the question is whether that suspension was justified.

[47] Ms Hangar's employment agreement contained the following provision for suspension:

> "*After discussion with you, the Company may suspend you from duties, on pay, when investigating allegations of serious misconduct. When on suspension you are to remain available for meetings or duties.*"

[48] In this instance there was no discussion before Ms Bayley sent Ms Hangar home. Ms Hangar had no opportunity to explain why pink streaks were still visible in her hair or to describe any efforts she may have made to comply with the request to remove the colour.

[49] Also, I am not satisfied that Ms Bayley ever gave Ms Hangar the lawful and reasonable instruction she claimed to have given her. Ms Bayley's written evidence to the Authority referred to her gentle "*requests*" to Ms Hangar "*to do something about her hair*" and to "*treat herself and have it done/fixed at a hair dresser*". It did not refer to "*instructions*" given to Ms Hangar. Nor did Ms Bayley give Ms Hangar any indication that she could be suspended if she failed to remove the pink colouring as requested.

[50] Suspension has been described as a drastic step which *"if more than momentary must have a devastating effect on the officer concerned".*[2] The Court of Appeal in that case described suspension, whether paid or unpaid, as an action which merited the application of the principles of natural justice.

[51] The Employment Court has held in more recent cases[3] that there is no absolute rule that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to influence the employer's decision. A sensible and flexible approach needed to be taken on a case by case basis to determine what the requirements of fairness were in the particular circumstances.

[52] In this instance I find Ms Hangar was unfairly treated by not being advised that her employer was considering suspending her over the colour of her hair and by having no opportunity to influence that decision. She was disadvantaged by those omissions. Her suspension also breached a term of her employment agreement that referred to discussion preceding any suspension.

[53] The unfairness was compounded by Ray White Real Estate's stance on payment for the two and a half days of Ms Hangar's suspension before she provided a medical certificate for her absence. Correspondence from the employer's representative to Ms Hangar's representative made the employer's view clear:

> "*Caroline was not suspended, she was sent home until she is fit for work so this is not a situation like suspension where the employer needs to pay for the time off*."

[54] There was some confusion at the investigation meeting over this issue. Ms Bayley believed the days had been paid as normal working days. Mr Fleming was

---

[2] *Birss* v *Secretary for Justice* [1984] 1 NZLR , 513 at 521

[3] *Tawhiwhirangi* v *A-G in respect of CE Dept of Justice* [1993] 2ERNZ 546; *Graham v Airways Corporation of New Zealand* [2005] ERNZ 587

unsure whether Ms Hangar had been paid for those days but acknowledged she should have been paid.

[55] The matter was clarified by the company's accounts person who gave evidence that on Ms Bayley's instruction Ms Hangar was paid for the days but that they were treated as annual leave and deducted from Ms Hangar's annual holiday entitlement. The payment did not go through in the pay run for the period but was made a fortnight later. I accept that evidence and find the employer should reimburse Ms Hangar for those two and a half days.

Was Ms Hangar underpaid wages during her employment?

[56] Ms Hangar claims that her remuneration fell below the level set by the Minimum Wage Orders after she entered into her second employment agreement effective from 10 April 2012. The Minimum Wage Order 2012 and the Minimum Wage Order 2013 were the orders applicable during that time.

[57] The employment agreement provided for Ms Hangar to receive a base annual salary of $25,000. She was required to work for a minimum of 36 hours per week. Ms Hangar says that in the 28 week period from 12 April to 24 October 2012 she received total remuneration of $13,599.56. She claims an entitlement under the Minimum Wage Act 1983 (the MWA) to $15,120 for that period, and calculates that she was underpaid by $2,193.52.

[58] Ms Hangar has calculated incorrectly. The difference between the remuneration she was paid and the amount she claims to have been entitled to receive under the 2012 Minimum Wage Order is $1,520.44, not $2,193.52. However I find she has made a further error in aggregating the amount by which her remuneration fell below the minimum wage over the 28 week period instead of calculating it on a weekly basis.

[59] Paragraph 4 of the Minimum Wage Order 2012 provides minimum rates for adult workers as follows:

> (a) for an adult worker paid by the hour or by piecework, $13.50 per hour:
>
> (b) for an adult worker paid by the day,—
>
> (i) $108 per day; and

(ii) $13.50 per hour for each hour exceeding 8 hours worked by a worker on a day:

(c) in all other cases,—
(i) $540 per week; and
(ii) $13.50 per hour for each hour exceeding 40 hours worked by a worker in a week.

[60] As a salaried employee category (c) "*all other cases*" applied to Ms Hangar who was entitled to be paid not less than $540 per week. She was paid fortnightly and worked consistent hours with a fortnightly salary of $961.54 gross. By my calculations she was underpaid at the rate of $59.23 per week for 24 weeks during this period, totalling $1,421.52. Holiday pay at 8% is also owing on this sum.

[61] The next period of employment for which Ms Hangar claims to have been underpaid started after she entered into a new employment agreement as Property Manager from 22 October 2013. Her base salary remained $25,000 and she was also eligible for commission payments. The salary provision of her agreement specified that her total remuneration, inclusive of any commission or incentive payments, would not be less than $28,080 per annum. This amount was clearly set to ensure Ms Hangar's remuneration did not fall below the minimum wage.

[62] For the period from 25 October 2012 to 27 March 2013 Ms Hangar claims her remuneration fell below the minimum wage by $1,066.19. I disagree. I have followed the approach to commission payments taken in *Gunning v Bankrupt Vehicle Sales and Finance Limited*[4]. Referring to the second Full Court decision in *Dickson*[5] Couch J said:

> *"…the majority concluded that an allowance paid in respect of a number of hours should be credited by averaging it over the hours concerned. A similar approach was suggested in respect of piece work payments. Where a supplementary payment is earned by work done over a period of time which exceeds the basis for the rate of pay, that is appropriate. Where the payment was earned by a single action, the approach may be more direct.*"

[63] In Ms Hangar's situation, her commission payments were paid monthly and were made in respect of properties she managed over the previous month. In that situation the payments should be applied over the month in which they were earned.

[4] [2013] NZEmpC Christchurch Registry 212
[5] Idea Services Limited v Dickson (No 2) [2009] ERNZ 372

I find Ms Hangar was not paid less than the minimum wage in any pay period between 25 October 2012 and 27 March 2013.

[64] Ms Hangar claims to have been underpaid by $553.84 for the period from 28 March to 19 June 2013. The minimum wage had risen to $13.75 per hour from 1 April 2013. Applying the same methodology to her commission payments as above, I find she was not paid below the minimum wage for this period.

Does Ray White Real Estate owe Ms Hangar commission payments?

[65] This question arises from Ms Hangar's claim that her employer unilaterally changed the basis for the payment of her commission which had the effect of reducing the amount of commission she received.

[66] The employment agreement Ms Hangar entered into when she took on the position of Property Manager provided for the payment of commission, subject to the company's commission scheme rules, where she met key performance indicators (KPIs). The agreement stated that commission payment structures and scheme rules would be determined and communicated in writing by the Managing Director "*at his sole discretion from time to time*". Subject to achieving all KPIs Ms Hangar would receive 15% of gross income received from properties she directly managed, including any letting fees charged.

[67] Ms Hangar says that her commission payments for March, April and May 2013 were made on the basis of 12% of gross income received from the properties she managed, instead of the 15% to which she was entitled. Ray White Real Estate denies not paying all commission due to Ms Hangar. It says she was required to meet "all KPIs" to qualify for a commission payment and that it would have been within its rights to pay no commission at all for those months as she did not meet that standard of performance. Instead it decided to pay commission at the rate of 12%.

[68] Ms Bayley said that discussions had been ongoing with employees for several months about changes to the way commissions would be paid. Information was handed out at a meeting of affected staff, including Ms Hangar, on 3 April 2013 and staff had the opportunity to raise concerns. She says Ms Hangar raised none.

[69] Ms Hangar's evidence was that she had had to leave that meeting early to keep a hospital appointment and did not receive the written information until it was

sent to her representative (on 3 July 2013) after she had commenced sick leave on 19 June 2013. Ms Bayley acknowledged that she had not discussed with Ms Hangar the implications of her not meeting all her KPIs and had not informed her of her failure to meet them.

[70] Mr Fleming acknowledged during the investigation meeting that the way the changes were introduced may not have been correct from a contractual perspective. Nonetheless he maintained that the whole team, including Ms Hangar, was aware of the new rules well before their implementation.

[71] I agree with Ms Hangar that the changes were unilateral and made without her agreement. I accept her evidence that she did not receive notification in writing about the changes from Mr Fleming as required by her employment agreement. I find that Ray White Real Estate owes Ms Hangar commission payments in the sum of $328.64 gross in respect of March 2013; $558.47 gross in respect of April 2013; and $629.27 gross in respect of May 2013. Holiday pay at 8% is owing on these sums.

Did White Real Estate unjustifiably constructively dismiss Ms Hangar?

[72] It is well established that an employee may be constructively dismissed by the employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*[6] held that constructive dismissal includes, but is not limited to, cases where:

(a) An employer gives an employee a choice of resigning or being dismissed.

(b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

(c) A breach of duty by the employer causes an employee to resign.

[73] Ms Hangar claims her employer embarked on a course of action with the deliberate and dominant purpose of coercing her to resign and breached her employment agreement seriously enough to warrant her leaving her employment.

[74] In support of her claim to have been constructively dismissed she relies on the disadvantage claims I have already dealt with. She also claims that the actions of her

[6] [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

employer after she had obtained a medical certificate and commenced sick leave on 19 June 2013 were intended to intimidate and disadvantage her by making her more unwell and forcing her to resign. She cites 25 different actions and omissions of her employer as contributing to this.

[75] I have already made findings about Ms Hangar's disadvantage claims. I do not intend to make findings on each additional matter she has raised but will consider those claims about Ray White Real Estate's actions, and inaction, to determine whether, in the aggregate, they support a finding of constructive dismissal.

[76] Ms Hangar gave evidence of being "bullied" and "picked on" in her employment, mainly by Ms Bayley, but also on occasion by Mr Fleming. Ms Hangar, as already noted, resented Ms Bayley raising issues with her although she conceded it was part of her manager's job to do so.

[77] She particularly resented Ms Bayley taking issue with her standard of personal presentation. However, she acknowledged in the investigation meeting that it was up to her employer to set the standards and to take action if they were not being met. I found no basis to Ms Hangar's allegations of bullying by her employer.

[78] Ms Hangar said in evidence she expected her employer to have known that she was starting to suffer from a depressive illness during her employment. She acknowledged she did not inform either her manager or Mr Fleming about it. She thought Mr Fleming should have picked up on it by comments she had made to him and by her occasional tearfulness.

[79] Mr Fleming agreed he had discussions with Ms Hangar from time to time in which she voiced concern over being "*picked on*" by Ms Bayley, sometimes over personal presentation issues and sometimes over property portfolio matters. He said they would talk through those issues, usually resolve them, and move on. He had no idea that she was becoming unwell during this time. I accept his evidence on this.

[80] Ms Hangar commenced sick leave on 19 June 2013 and supplied a medical certificate stating her unfitness for work until 3 July 2013[7]. As she did not have sick leave available she agreed to her outstanding annual leave being used for this purpose. Ms Bayley wrote to Ms Hangar on the same day the employer received her medical

[7] The first medical certificate, dated 19 June 2013, cited 3 June 2013 as the date for return to work, an error subsequently amended by the issuing of a replacement medical certificate.

certificate to require her attendance at a disciplinary investigation meeting at which a number of "*serious employment-related allegations*" were to be discussed.

[81] Those allegations all related to Ms Hangar's pink hair colour and included her breaching her "*obligations to be able to be present at work which arose as a direct result of your failure to immediately comply with the Company's Personal Presentation requirements*". One of the allegations concerned Ms Hangar's abusive language towards Ms Bayley on 17 June when she was instructed to go home. Ms Hangar claims the raising of these allegations by her employer at this time was designed to intimidate her.

[82] The disciplinary meeting was postponed because of Ms Hangar's illness. It did not ever take place as she obtained a further medical certificate covering her absence until 15 July 2013. Before then the parties had agreed to attend mediation to discuss the personal grievances she had by then raised. However, Ms Hangar resigned before that took place and did not personally attend the mediation. Her resignation letter was addressed to Mr Fleming and contained bitter criticism of Ms Bayley and Mr Fleming for the unfair way in which she believed herself to have been treated. I find the timing of Ms Bayley's letter unfortunate but do not find it to be in breach of Ms Hangar's employment agreement or to have been written in an attempt to intimidate her or persuade her to resign.

[83] Five of the twenty five actions claimed by Ms Hangar to have contributed to her constructive dismissal concerned payment of wages and commission. A number of these concerns were raised by her representative in a letter sent to Mr Fleming on 18 June 2013. Other issues, subsequently pursued as the personal grievances I have considered above, were also canvassed in that letter which included a request for wage records for Ms Hangar.

[84] Over the next three weeks there was considerable correspondence between the parties' representatives and much financial information was requested and supplied. I have addressed the wage arrears issue separately and have noted that the wages and commissions information did reveal underpayment of Ms Hangar, although that was not accepted by the employer. I accept that this would have contributed to the anxiety felt by Ms Hangar while she was on sick leave from her employment.

[85] I find Ms Hangar's resignation was brought about by a combination of events. Her suspension from her employment on 17 June 2013, together with her employer's refusal to acknowledge that it was a suspension, or that she should have been paid for that time, was a significant factor in this. The late payment for the time she was suspended, and the deduction of two and a half days of annual holidays from her leave entitlement meant that Ms Hangar had less annual leave to use for her period of illness and caused her both financial pressure and anxiety.

[86] The underpayment of her wages for a period in 2012 was another factor. The unilateral change to the basis on which she was paid commission, which resulted in a reduction to the commission payments Ms Hangar received from March 2013 onwards, was also a significant factor causing her to resign. I do not accept Ms Hangar's claim that her employer embarked on a course of action with the deliberate and dominant purpose of coercing her to resign. However, I find that the cumulative effect of these actions was sufficiently serious a breach of the terms of Ms Hangar's employment agreement to warrant her leaving her employment. Her resignation was in effect a constructive unjustifiable dismissal by Ray White Real Estate.

Remedies and Contribution

[87] Ms Hangar has been successful in some of her wage claims and personal grievances. I am required to consider the extent, if any, to which her actions contributed to the situation that gave rise to her personal grievances and to take that into account in awarding remedies.

[88] Ms Hangar could be criticised for not responding quickly enough to her manager's requests for her to address the issue of her hair colour. She could also be criticised for her angry and abusive response to her suspension. However, these did not contribute to her employer's action in suspending her without consultation.

[89] Nor did she contribute in any way to her employer's actions in paying her less than the minimum wage for part of her employment, or to its decision to change the basis of payment of her commissions. These actions breached her employment agreement and were elements making up her successful claim to have been constructively dismissed.

Mitigation

[90] Ms Hangar provided medical evidence, respectively dated 7 September and 9 October 2013, of her continuing incapacity to undertake full time work. Before the investigation meeting she had been cleared to work up to 15 hours a week. Although her medical practitioner was not able to attend the investigation meeting, I am satisfied that Ms Hangar was unable to seek employment for several months after the termination of her employment.

Penalties

[91] Ms Hangar has claimed penalties for her employer's breaches of good faith in its dealings with her. Submissions on this aspect of Ms Hangar's claims were meagre. I am not satisfied this is an appropriate case for penalties and I decline to award any penalties against Ray White Real Estate.

Determination

[92] Ray White Real Estate is to pay Ms Hangar the following sums:

a. $192.31 gross, being reimbursement of two and a half days annual holiday entitlement;

b. $1,535.24 gross, being wage arrears including holiday pay relating to underpayment of wages between 12 April and 24 October 2012;

c. $1,637.69 gross, being commission arrears including holiday pay owing from March to June 2013;

d. Interest on the above sums at the rate of 5% per annum from 12 July 2013 to the date of payment;

e. Payment of four months' ordinary time remuneration in accordance with s.128 of the Act; and

f. Compensation in the sum of $6,000 pursuant to s. 123(1)(c)(i) of the Act.

[93] Leave is given to the parties to return to the Authority if they are unable to quantify any of the amounts due.

Costs

[94] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority