

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 130
3019075

BETWEEN KARAN GULATI
Applicant

AND FAT PROPHETS (NZ) PTY
LIMITED
Respondent

3019076

BETWEEN VISHAL RATHOD
First Applicant

AND FAT PROPHETS (NZ) PTY
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: David Fleming for Applicants
Paul Fisher for Respondent

Investigation Meeting: 18 and 19 December 2017

Additional information
received: 22 December 2017

Submissions Received: 11 and 31 January 2018 from Applicant
26 January 2018 from Respondent

Determination: 27 April 2018

DETERMINATION OF THE AUTHORITY

- A. Fat Prophets (NZ) Pty Limited is ordered to pay to Mr Gulati a sum equivalent to AUD\$42,468 gross under section 131 of the Act within 28 days of the date of this determination. An adjustment is to be made to account for the NZD\$2,000 paid to Mr Gulati**

before his employment ended.

- B. Fat Prophets (NZ) Pty Limited is ordered to pay to Mr Rathod a sum equivalent to AUD\$36,323.56 gross under s 131 of the Act within 28 days of the date of this determination. An adjustment is to be made to account for the NZD\$2,000 paid to Mr Rathod before his employment ended.**
- C. Fat Prophets (NZ) Pty Limited is ordered to pay interest on the arrears of wages in A and B calculated from 15 May 2017 at 5% per annum until the date payment is made in full.**
- D. One or more conditions of Mr Gulati's employment were affected to his disadvantage by the unjustified actions of Fat Prophets (NZ) Pty Limited.**
- E. Fat Prophets (NZ) Pty Limited is ordered to pay to Mr Gulati the sum of \$15,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.**
- F. One or more conditions of Mr Rathod's employment were affected to his disadvantage by the unjustified actions of Fat Prophets (NZ) Pty Limited and he was unjustifiably constructively dismissed.**
- G. Fat Prophets (NZ) Pty Limited is ordered to pay to Mr Rathod the following sums within 28 days of the date of this determination:**

 - a) \$4,878.33 lost wages under s 123(1)(b) of the Act; and**
 - b) \$20,000 under s 123(1)(c)(i) of the Act.**
- H. Costs are reserved.**

Non-publication orders

[1] On 10 October 2017 I made orders pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) to protect the confidential information regarding investors in Global Contrarian Fund Limited and the confidential company correspondence and emails lodged by the applicants in support of their claims.

Employment relationship problem

[2] In 2016 Fat Prophets Holdings Pty Limited, an Australian registered company launched an initial public offering of the Fat Prophets Global Contrarian Fund as a Listed Investment Company (LIC) that would see it listed on the Australian Stock Market. The initial marketing, advertisements, interest registration, initial applications and collections of fund were carried out by the Australian company.

[3] In February 2017 a number of employees left the Sydney operations. Mr Greg Smith, the head of the New Zealand company, Fat Prophets (NZ) Pty Limited asked Mr Karan Gulati and Mr Vishal Rathod to work on the collections for the LIC fund. Messer's Gulati and Rathod were employed as Senior Account Managers in New Zealand. They were remunerated on the basis of a salary of \$55,000 per annum plus commission based on the business they wrote on a monthly basis. The commission was calculated on net revenue, after refunds.

[4] Mr Gulati and Mr Rathod say that on 21 February they verbally agreed to a variation to their employment agreement. They say they accepted an offer to work on the LIC and receive a commission payment of 1% for any money they collected for the fund.

[5] Messer's Gulati and Rathod claim they have not received the LIC commissions they were promised, that one or more conditions of their employment were affected to their disadvantage by the unjustified actions of Fat Prophets and that Fat Prophets has breached their employment agreements, the Act and its statutory duty of good faith.

[6] On 4 October 2017 Mr Rathod resigned from his employment. He claims his resignation was in fact a dismissal and the dismissal was unjustified.

[7] Fat Prophets denies all claims.

[8] The cases lodged under matter numbers 3019076 and 3019075 were based on similar facts and by the consent of the parties both cases were heard together.

Issues

[9] In order to resolve Mr Gulati and Mr Rathod's employment relationship problems I must determine the following questions:

- a) Are either, or both, Mr Gulati and/or Mr Rathod owed arrears of wages by way of unpaid LIC commissions and if so how much?
- b) Were either or both Mr Gulati and/or Mr Rathod subject to disadvantage by the unjustifiable actions of Fat Prophets and if so, what if any remedies should be awarded?
- c) Should any penalties be imposed for breaches of the Act, the employment agreements or the statutory duty of good faith and if so, what level of penalty should be imposed?
- d) Was Mr Rathod unjustifiably constructively dismissed and if so what if any remedies should be awarded?

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Gulati, Mr Rathod and Fat Prophets but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Arrears of wages

[11] Mr Gulati and Mr Rathod both claim that they verbally agreed to a new term of employment being the payment of 1% commission on all money they collected for the Fat Prophets Global Centrarian Fund LIC. Mr Gulati says he collected AUD\$4,246,800 in funds for the LIC while Mr Rathod says he collected AUD\$3,632,356.

[12] Mr Gulati claims he is entitled to total commission payments of AUD\$42,468 gross. Mr Rathod claims commission payments of AUD\$36,323.56 gross. Both men received a payment of NZD\$1,000 each in June and NZD\$500 each in July and August making a total of NZD\$2,000 each. Fat Prophets does not deny the men were entitled to receive a commission payment but says the payment was discretionary and was not based on 1% of the funds they brought into the LIC.

[13] At the time of the events giving rise to these claims both employees reported to Mr Leo Lopez who was based in Australia, however Mr Greg Smith, Head of Research, had oversight of them and was based in the New Zealand office in Auckland.

[14] Mr Rhys Williams was a sales manager based in Australia. He left the company in mid-February 2017 after work on the LIC had started. When he left a number of Sydney based sales staff left with him.

[15] Mr Smith told me that when he was told of Mr Williams departure he suggested Messers Gulati and Rathod be asked to get involved in the capital raising. This suggestion was accepted. Mr Smith was doing roadshows in New Zealand and Australia meeting with large numbers of subscribers at the time. While in a taxi travelling from Melbourne airport he rang Mr Gulati and Mr Rathod and told them Fat Prophets needed their help with the capital raising. Mr Smith told Messers Gulati and Rathod that he would get them a list of potential subscribers and they would be paid "...1% on what you bring in." No details about when or how the commissions would be paid were discussed.

[16] After agreeing to undertake the work the two men received leads including a list of potential investors and started work on ringing the contacts to secure their funds.

[17] Both men kept Fat Prophets New Zealand and Australia updated about their daily collections. They were provided with leads from LIC webinar attendees, LIC roadshow attendees, LIC ad click clients, and other marketing tools used to gather leads. The leads came from both the Australian and New Zealand offices. The goal

for Fat Prophets was to reach the maximum collection for the LIC of \$15,000,000 on or before 10 March.

[18] While following up leads to secure funds both employees also booked clients for roadshows held in Perth, Brisbane, Auckland, Melbourne and Sydney and followed up after the roadshows to answer questions and help clients complete their investment into the fund.

[19] The fund closed on 10 March. After that date Mr Gulati and Mr Rathod sent a number of emails to Mr Smith, Mr Patrick Ganley, a Director and at that time the Chief Operating Officer, and Mr Robert Dardano the Chief Financial Officer, outlining the amounts they had collected and seeking payment of the 1% commission. No responses or payments were received.

[20] On 19 May Mr Leo Lopez who replaced Mr Ganley as the COO met with Mr Gulati and Mr Rathod in Auckland. During that meeting Mr Lopez told the two employees that they should forget about the 1% commission and that Fat Prophets would pay them \$6,000 each in total. Mr Lopez also told them that if they got fired in the meantime the company would not pay anything.

[21] I have been provided with a copy of a recording made of the meeting together with a typed transcript. At no stage during the meeting does Mr Smith deny promising Mr Rathod and Mr Galuti payment of commissions at the rate of 1% for the LIC work or that the 1% would apply to all funds brought in by each of the two men. The absence of any denial is evidenced in all of the email communications between the two employees and Fat Prophets' managers between March and May 2017.

[22] The offer of the payment of \$6,000 was rejected by both men.

[23] Fat Prophets denies there was an agreement to pay 1% commission on all funds received through the efforts of Mr Galuti and Mr Rathod. Fat Prophets' says the agreement was that 1% of the minimum of \$15m was to be paid to all those involved in the capital raising. That is, a total pool of \$150,000 would be split among all those involved on the basis of their effort and performance during the LIC period.

[24] If Fat Prophets intended the LIC commission pool to be capped at \$150,000 that information should have been advised to Messers Gulati and Rathod before they agreed to put their usual work to one side and focus all their attention on the LIC.

[25] I heard evidence from a number of witnesses for Fat Prophets, based in the Sydney sales team that it was clear to them there was a maximum \$150,000 available for LIC commission payments and this had been spelled out in a sales meeting in January. No witnesses could specifically confirm that either Mr Gulati or Mr Rathod had participated in the sales meeting in January. I have concluded it is more likely than not that they did not participate in the January meeting and so were not aware of the discussion about the LIC commissions. That would not be unusual given they did not become involved in the LIC until February.

[26] Fat Prophets says payment of the bonus was discretionary. During the investigation meeting I asked Fat Prophets to provide me with any written documentation supporting its assertions that it had raised with its employees that the bonus was discretionary. I have been provided with an email from Mr Ganley dated 16 December 2016 which refers to the LIC. Mr Ganley states he "...spoke to the guys about the 1% commission structure with [Mr Geddes]." There is no mention that the commission was intended to be discretionary or that there was a cap on the amount of the commission to be paid out.

[27] In an email dated 24 January Mr Dardano advised Mr Ganley that the sales team would receive 1% on new funds if they hit \$15m. There is no indication in this email that the payment was discretionary. The only barrier to receiving the 1% commission is that the team must achieve funds in excess of \$15m.

[28] Neither Mr Gulati nor Mr Rathod was copied into either of the two emails. This is not surprising given that they were not involved in the LIC until February.

[29] I am satisfied the parties, through Mr Smith, entered into an agreement that Mr Gulati and Mr Rathod would focus on the LIC and would be rewarded by payment in the words of Mr Smith, 1% commission on all funds they brought into the LIC. My finding is consistent with an email sent by Mr Smith on 1 March to another employee based in Australia where he confirmed the employee would be paid a commission rate of 1% of any money brought into the business.

[30] The LIC closed on 10 March. In April Mr Geddes emailed Mr Lopez and Mr Ganley setting out the conditions attaching to the payment of the 1% commission. This email post-dates the offer made by Mr Smith and accepted by both Mr Gulati and Mr Rathod and post-dates the end of the LIC project.

[31] The onus was on Fat Prophets to ensure the terms and conditions applying to the payment of the LIC commission were clear to Mr Gulati and Mr Rathod before they entered into the agreement with Mr Smith. Given the dispute that has now arisen, the absence of any documentation recording the conditions attached to the payment of the commission is regrettable. I am satisfied there was a binding promise. Mr Smith was a senior manager and had the authority to bind the company. Mr Smith promised Mr Gulati and Mr Rathod that Fat Prophets would pay them a commission of 1% of all of the money they brought into the LIC.

[32] In order for a binding contract to exist consideration must flow between both parties. The consideration for entering into the agreement to work on the LIC for Messer's Gulati and Rathod was that they would put all their other work aside for which they could earn commission payments and they would work only on the LIC to secure the money from the investors. This is what they did. They gave up the possibility of earning commissions on their normal tasks in favour of earning 1% commission on the money they helped raise for the LIC.

[33] There is a dispute over how much of the money brought in by Mr Gulati and Mr Rathod is attributable to their efforts. Fat Prophets seeks to exclude clients who registered for educational events, clients who had said they would make a payment but had not done so and clients who had previously been contacted by other Fat Prophets' employees.

[34] In my view the exclusions are not warranted. The promise relied on by Mr Gulati and Mr Rathod did not relate solely to clients introduced by them. The promise related to money collected by them. Mr Gulati and Mr Rathod were given lists of the names of people who had registered for and/or attended seminars. These were the leads used by Mr Gulati and Mr Rathod and from which they secured the investment funds for Fat Prophets. At the time they were given the lists there was no distinction made between potential investors they could or could not claim

commissions for on funds they brought into the LIC. They were told to contact the people on the lists and to bring in as much money as they could.

[35] Both Mr Gulati and Mr Rathod regularly reported to Fat Prophets about their activities and the amount of funds they were bringing into the LIC. At no time did Fat Prophets raise with Mr Gulati or Mr Rathod that they were wrongly including categories of investors.

[36] Mr Gulati and Mr Rathod have established to my satisfaction a claim for arrears of wages for unpaid LIC commissions.

[37] Fat Prophets (NZ) Pty Limited is ordered to pay to Mr Gulati a sum equivalent to AUD\$42,468 gross under section 131 of the Act within 28 days of the date of this determination. An adjustment is to be made to account for the NZD\$2,000 paid to Mr Gulati before his employment ended.

[38] Fat Prophets (NZ) Pty Limited is ordered to pay to Mr Rathod a sum equivalent to AUD\$36,323.56 gross under s 131 of the Act within 28 days of the date of this determination. An adjustment is to be made to account for the NZD\$2,000 paid to Mr Rathod before his employment ended.

Interest

[39] Mr Gulati and Mr Rathod seek the payment of interest on the wage arrears.

[40] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908, which is currently 5% per annum.¹

[41] I consider it reasonable and fair that Mr Gulati and Mr Rathod are paid interest on the arrears of wages. Employees based in the Sydney office received payment of LIC commissions on 15 May. Mr Gulati and Mr Rathod have not had the use of the outstanding commissions from that date when they could reasonably have expected to receive payment.

¹ Judicature (Prescribed Rate of Interest) Order 2011.

[42] Fat Prophets (NZ) Pty Limited is ordered to pay interest on the arrears of wages calculated from 15 May 2017 at 5% per annum until the date payment is made in full.

Penalties

[43] Messer's Gulati and Rathod seek the imposition of penalties against Fat Propets for its failure to pay the LIC commissions when they were due, for breaching the employment agreement to pay the commissions and for breaches of the Wages Protection Act in failing to pay the commissions when they fell due. The applicants seek the maximum penalty and have asked that any penalty be paid to them under s 136 of the Act.

[44] The facts relied on by the applicants in claiming penalties are the same facts that relate to the disadvantage grievance claims. I have found the applicants were disadvantaged in their employment by the way Fat Prophets' dealt with them following their repeated requests for payment of the commissions and they have been compensated for that conduct.

[45] I am not satisfied a penalty is warranted in the circumstances of this case.

Disadvantage grievances

[46] Mr Gulati and Mr Rathod say the failure to pay the LIC commissions was unjustified and led to one or more conditions of their employment being affected to their disadvantage. They also say that after making their requests for payment of the LIC commissions they were subject to actions by Fat Prophets including warnings, hostile phone calls and humiliating meetings and that these actions were unjustified and also resulted in one or more conditions of their employment being affected to their disadvantage.

[47] Mr Gulati and Mr Rathod bear the onus of establishing on the balance of probabilities that they were disadvantaged in their employment. If they discharge that onus then the burden of proof moves to Fat Prophets to establish on the balance of probabilities that any disadvantage Messer's Gulati and Rathod may have suffered was justified.

[48] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Fat Prophets actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

Commission payments

[49] On 19 May 2017 Mr Gulati and Mr Rathod met with Mr Smith and Mr Lopez to discuss the outstanding payment of LIC commissions. During this meeting Mr Smith and Mr Lopez denied the two employees were entitled to payment of commissions at the 1% rate promised by Mr Smith and instead told Mr Gulati and Mr Rathod that Fat Prophets would pay them each \$6,000. Payment was to be made by six monthly instalments.

[50] No agreement was reached about this payment and despite Mr Gulati and Mr Rathod asking for the criteria used to calculate the \$6,000 that information was not provided. The \$6,000 was not paid however the employees did receive instalments amounting to \$2,000.

[51] I am satisfied the failure to pay the promised LIC commission payments affected both employees to their disadvantage. The failure to even pay the \$6,000 in full was not the action a fair and reasonable employer could take in all the circumstances. Mr Gulati and Mr Rathod have established their claim and are entitled to a consideration of remedies.

Other conduct - Mr Gulati

[52] Mr Gulati says that after making the requests for payment of the LIC commissions he was required to sell a product unfamiliar to him and expectations were put on him to achieve sales at an unreasonable level. The format of the product was changed and the price was reduced from \$1,950 to \$380 which exacerbated the difficulties he was having in meeting sales targets.

[53] There was no process leading up to the meeting. Mr Gulati was not provided with an opportunity to seek advice or representation before or during the meeting and was not advised prior to the meeting that a warning was a possible outcome.

[54] Warnings make an employee's employment less tenuous. Mr Gulati's warning put him on notice that a failure to meet sales targets in the future would result eventually in the termination of his employment. A dismissal or resignation would have an additional effect on Mr Gulati as Fat Prophets had made it clear that the LIC commission would not be payable in the event that Mr Gulati no longer worked for Fat Prophets.

[55] Mr Gulati has established that one or more conditions of his employment were affected to his disadvantage by the issue of the warning. Issuing the warning to Mr Gulati in all the circumstances of this case was not an action an employer acting fairly and reasonably could take. Mr Gulati is entitled to a consideration of remedies for his personal grievance.

[56] Following the issue of the warning Mr Gulati says his monthly sales targets were changed three times and he was required to attend meetings which he says were put in place to secure his resignation.

[57] Initially Mr Gulati's sales target was limited to booking a specified number of seats in workshops. This was changed to a monthly revenue target set initially at \$15,000, then increased to \$20,000.

[58] Mr Lopez required Mr Gulati to meet with him four times over a period of eight days. During one of these meetings Mr Gulati says Mr Dardano made an unannounced appearance at the meeting and began shouting at him, told him he would not receive any commission payments and increased his monthly revenue target to \$25,000.

[59] I am satisfied that the meetings were part of a process initiated by Mr Lopez to with a view to supporting Mr Gulati to achieve the agreed sales targets.

[60] The resetting of sales targets did not contribute to Mr Gulati's disadvantage. The notes from the meetings with Mr Gulati indicate he agreed to the raising of the sales targets in accordance with the terms of his employment agreement.

[61] Mr Gulati resigned from his employment in September 2017 and moved to the United States of America. He has not challenged the ending of his employment relationship.

Other conduct - Mr Rathod

[62] Mr Rathod also met with Mr Lopez on 19 May to discuss the future of the business. During that discussion it was agreed Mr Rathod would remain in his role until 30 May and a new sales resource would start on 1 June. Following 30 May Mr Rathod would assist with booking road show seminars and assist Mr Lopez and Mr Smith in growing the business. It was agreed Mr Rathod's role would be reviewed in August.

[63] On 20 June Mr Rathod attended a meeting with Mr Lopez by telephone. A file note from the meeting records that Mr Lopez advised Mr Rathod the opportunities offered to him at the meeting on 19 May for alternative work were no longer available and Fat Prophets "...will need to look at ceasing his employment."

[64] Later that day Mr Lopez emailed Mr Rathod inviting him to attend a meeting with him and Mr Smith. Mr Lopez told Mr Rathod it would be a formal meeting to discuss the agreed actions to finalise his employment and they would go through Mr Rathod's entitlements and notice period.

[65] This notification is consistent with advice given by Mr Lopez to Mr Geddes, Mr Dardano and Mr Smith that same day. In his emailed advice Mr Lopez advises the senior management team that he had invited Mr Rathod to a meeting to discuss an action plan "...to finish him up."

[66] Mr Rathod was issued with a final written warning on 21 June for his failure to meet sales targets. The final written warning was issued in the absence of any process. Mr Rathod had not been told the meeting was a disciplinary meeting that might result in a final written warning and did not have an opportunity to seek advice or representation.

[67] The notes of the meeting provided by Mr Lopez indicate the warning was issued to Mr Rathod at the beginning of the meeting. When looked at in the round and given the telephone discussion Mr Lopez had with Mr Rathod and the email he sent to the senior management team the previous day, I have concluded the decision to issue the final written warning was pre-determined. The actions of Fat Prophets and

how it acted was not the actions an employer acting fairly and reasonably could take in all the circumstances.

[68] Mr Rathod has established one or more conditions of his employment were affected to his disadvantage as a result of the unjustified actions of Fat Prophets when it issued the final written warning on 21 June 2017. Mr Rathod is entitled to a consideration of remedies for his personal grievance.

Unjustified dismissal – Mr Rathod

[69] Mr Rathod resigned from his employment on 4 October 2017. Mr Rathod says that in reality his resignation was a dismissal because he had no option but to resign. Mr Rathod claims a constructive dismissal.

[70] In *Auckland Shop Employees Union v Woolworths (NZ) Ltd*² the Court of Appeal listed three situations in which a constructive dismissal might occur, although the Court noted that these were not exhaustive. The three situations are:

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

[71] Mr Rathod bears the onus of establishing on the balance of probabilities that he did not freely or voluntarily resign. Mr Rathod relies on the second situation set out above to support his claim that his resignation was not voluntary.

[72] I must assess whether there was a course of conduct that crossed the line to become dismissive or repudiatory conduct sufficient to justify the termination of the employment relationship.³

[73] In his letter tendering his resignation Mr Rathod told Fat Prophets he was being forced to resign because:

² *Wellington Clerical Workers IUOW v Greenwich* [1985] 2 NZLR 372.

³ (1983) ERNZ Sel Casual 95 at 104.

- Fat Prophets had wrongly deprived him of his LIC commission entitlements and failed to acknowledge and appreciate his contributions in the success of the LIC fund collection;
- After trying to discuss his commission entitlements he was victimised, humiliated and threatened with dismissal;
- There were broken promises and lies and he had lost trust in the company;
- He felt unsupported, lonely and alienated at work and had lost motivation to continue in such a stressful environment;
- Had become depressed due to the stress and anxiety over several months;
- His health had suffered and he had been diagnosed with depression;

[74] Mr Lopez pre-determined the issuing of a final written warning to Mr Rathod. Seven days later, on 3 July, in the absence of any discussion with Mr Rathod, Mr Lopez advised Mr Dardano, Mr Smith and Mr Ganley that because Mr Rathod was below target for sales by 30 June he would "...need to be issued with a follow up warning."

[75] I have concluded it is more likely than not that the action by Mr Lopez of issuing a final written warning and increasing sales targets were designed to put pressure on Mr Rathod to drop his claim for the LIC commission and send him a clear message that his employment was extremely tenuous.

[76] Mr Rathod did not see the 3 July email until these proceedings were under way. That email could not have played a part in his decision to resign but is indicative of the strategy by Fat Prophets to end Mr Rathod's employment.

[77] I am satisfied the failure by Fat Prophets to pay the LIC commission has contributed to Mr Rathod's expressed loss of trust in Fat Prophets. After raising the issue a number of times Fat Prophets offered a payment of \$6,000 to be paid in six monthly instalments on the condition Mr Rathod remained in employment. This was

not acceptable to Mr Rathod who was insistent that he receive the full 1% to recognise his efforts. Fat Prophets say, but I do not accept, that Mr Rathod accepted the \$6,000 deal. Fat Prophets paid a portion of the \$6,000 in June, July and August. If it was agreed that Mr Rathod would receive monthly payments as proposed, it has provided no explanation as to why no payment was made to Mr Rathod in September.

[78] After raising the issue of the LIC commission Fat Prophets embarked on a performance process issuing an unjustified warning which itself followed verbal advice from Mr Lopez that Mr Rathod's employment was ending with his last day of work being 30 June. These actions have all the hallmarks of putting pressure on Mr Rathod to leave his employment.

[79] Mr Rathod raised a personal grievance on 26 June. This was followed by a further meeting where Mr Rathod says Mr Dardano shouted at him and threatened to unilaterally increase his sales targets to \$25,000 per month. A target Mr Rathod says would not be achievable.

[80] On 19 May Mr Rathod says he was taken off his normal duties and put into a temporary role that was to be reviewed in August. Fat Prophet's says Mr Rathod agreed to the change. I am satisfied there was an agreement for a change in role for Mr Rathod. The discussions from the meeting were confirmed by email and Mr Rathod was provided with an opportunity to clarify if the record of the discussion was correct or not. Mr Rathod did not take any steps at that time to rectify what he now says were not agreed changes. However, these agreements were unilaterally removed by Fat Prophets in June when Mr Lopez advised him the alternative duties were no longer available to him.

[81] Mr Rathod says Fat Prophets put pressure on him to achieve sales targets that he felt were not achievable. This evidence is inconsistent with the sales figures provided to the Authority which shows that Mr Rathod met his sales targets in July and August.

[82] Mr Rathod says Fat Prophets failed to provide support to him to meet his monthly sales targets and points to a number of emails between himself, Mr Lopez and another sales representative based in Sydney regarding supplying new leads for following up. The July emails show that Mr Rathod did ask for new leads and was

given advice about following up over 900 leads already attributed to him in the sales database. Mr Rathod was insistent that he wanted new leads and felt the 900 leads referred to in the emails were too old to follow up.

[83] On 20 September Mr Ganley emailed Mr Rathod alerting him to the fact that his sales for September were not looking good and asking him to let Mr Ganley know what his plan was to lift sales and what help or support he needed from Sydney to achieve his target.

[84] In response Mr Rathod advised that he was waiting for marketing to be done for a new workshop in Melbourne which was his main focus and asked for new leads. Mr Ganley advised Mr Rathod of the name of an employee who could help with new leads and followed up on ensuring the marketing emails were sent out regarding the Melbourne workshops.

[85] Mr Rathod told me that while Mr Gulati was working alongside him he felt able to continue working for Fat Prophets but once Mr Gulati left on 27 September he could no longer continue because Mr Gulati had provided him with significant support in continuing with his work. Mr Rathod attended his doctor on 3 October and resigned on 4 October while on sick leave.

[86] Fat Prophets offered assistance to Mr Rathod which Mr Rathod declined. He advised Fat Prophets on 9 October that he simply had to get himself out of the situation he was in.

[87] The nature of a claim for constructive dismissal requires scrutiny of the events preceding the resignation. The focus is on the employee's motivation for their decision to leave, and whether the motivation arises from the actions of the employer.⁴

[88] Repudiatory conduct by an employer may involve a series of events over a period of time such that no single event may be sufficiently serious to enable an employee to treat the employment agreement as repudiated but the cumulative effect may be.⁵

[89] I am satisfied Mr Rathod has established by the cumulative effect of Fat Prophets' conduct he reached a point where he was entitled to cancel the employment

⁴ *Commissioner of Police v Hawkins* [2009] NZCA 209.

⁵ *Lewis v Motor World Garages Limited* [1986] ICR 157 (CA).

agreement and remove himself from the employment relationship. The possibility that Mr Rathod would take such an action was reasonably foreseeable and based on the communications from Mr Lopez to the senior management team was a desired outcome for Fat Prophets. Mr Rathod was constructively dismissed and that dismissal was unjustified. The actions of Fat Prophets' from May to September 2017 were not the actions an employer acting fairly and reasonably could take.

Remedies

[90] Both Mr Gulati and Mr Rathod have established one or more conditions of their employment were affected to their disadvantage by the unjustified actions of Fat Prophets. Mr Rathod has also established he was unjustifiably constructively dismissed.

Mr Gulati

[91] Mr Gulati seeks payment of \$15,000 for humiliation, loss of dignity and injury to feelings as a result of his personal grievance. I have taken a global approach to the award of compensation for the disadvantage grievances relating to the failure to pay the LIC commission and for the actions of Fat Prophets in issuing Mr Gulati a written warning.

[92] Mr Gulati's evidence is that he continues to upset by the actions of Fat Prophets. He told me he feels "...ripped off..." and "...lied to...". Mr Gulati gave evidence that he found the situation stressful and very difficult and turned his involvement in the LIC from a very positive experience to a negative one.

[93] I accept the effects on Mr Gulati were such that he genuinely lost trust and confidence in his employer. I assess \$15,000 as being a suitable award, in all the circumstances.

[94] As required under s 124 of the Act I have considered the extent to which Mr Gulati's actions contributed to the situation that gave rise to his personal grievances. I find Mr Gulati did not contribute in any blameworthy way such that his remedies should be reduced.

[95] Fat Prophets (NZ) Pty Limited is ordered to pay to Mr Gulati the sum of \$15,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Mr Rathod

[96] Mr Rathod seeks a global payment of \$20,000 for humiliation, loss of dignity and injury to feelings as a result of his personal grievances in addition to reimbursement of his lost earnings resulting from the unjustified dismissal grievance.

[97] Mr Rathod has produced evidence that his lost wages total \$4,878.33. This amount takes into account earnings he received for the seven weeks following the ending of the employment relationship to the date of the investigation meeting. I am satisfied Mr Rathod has taken adequate steps to mitigate his loss and he is entitled to be reimbursed for wages lost.

[98] Mr Rathod told me the cumulative effect of not being paid the promised LIC commission, being issued with a final written warning, and being told his employment was to end, left him feeling humiliated and isolated.

[99] In relation to his dismissal grievance Mr Rathod gave evidence that he suffered from stress and depression which has resulted in sleeplessness and poor health. He told me his wife and family have been affected by his emotions and continues to be upset by the conduct of Fat Prophets. Mr Rathod gave evidence of lost weight from a loss of appetite, low energy and tiredness. All symptoms of his depression.

[100] I accept the effects on Mr Rathod were such that he became ill and the best option for him was to leave his employment despite the financial ramifications for him and his family. I assess \$20,000 as being a suitable award, in all the circumstances.

[101] Fat Prophets (NZ) Pty Limited is ordered to pay to Mr Rathod the following sums within 28 days of the date of this determination:

- c) \$4,878.33 lost wages under s 123(1)(b) of the Act; and

d) \$20,000 under s 123(1)(c)(i) of the Act.

[102] As required under s 124 of the Act I have considered the extent to which Mr Rathod's actions contributed to the situation that gave rise to his personal grievances. I find Mr Rathod did not contribute in any blameworthy way such that his remedies should be reduced.

Costs

[103] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Gulati and Mr Rathod will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Fat Prophets will have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[104] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority