

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 474
3104176

BETWEEN BARBARA-LEE (BARLEE)
 VAN NIEKERK
 Applicant

AND HONEYBUNCH PURE
 NATURALS NZ LIMITED
 First Respondent

AND LISA JOLLY
 Second Respondent

Member of Authority: Nicola Craig

Representatives: Jeremy Lynch, counsel for Barlee Van Niekerk
 Lisa Jolly for the Honeybunch Pure Naturals NZ Limited
 and Lisa Jolly

Investigation Meeting: 9 and 28 June and 28 July 2021

Submissions [and further At the investigation from all parties
Information] Received:

Date of Determination: 27 October 2021

DETERMINATION OF THE AUTHORITY

- A. Barlee van Niekerk was employed by Honeybunch Pure Naturals NZ Limited (Honeybunch).**
- B. Ms van Niekerk was unjustifiably constructively dismissed by Honeybunch.**
- C. Within 21 days of the date of this determination, Honeybunch is to pay Ms van Niekerk the following as remedies for her grievance:**

- (a) \$2,268.00 gross as lost wages; and
- (b) \$18,000 as compensation or humiliation, loss of dignity and injury to feelings.

- D. Honeybunch is to pay Ms van Niekerk \$146 gross as arrears of wages, for an unlawful deduction, within 21 days of the date of this determination, along with interest on that sum from 25 April 2020 until the date of payment.
- E. Honeybunch and Ms Jolly have not established their claims against Ms van Niekerk.
- F. Costs and the issue of obstruction and delay of the Authority's investigation are reserved.

What is the employment relationship problem?

[1] From 2019 Barbara Lee (Barlee) van Niekerk worked for an operation referred to as Honeybunch. She claims that she was unjustifiably disadvantaged and dismissed.

[2] Honeybunch Pure Naturals NZ Limited (Honeybunch or the Company) is a company whose sole director is Lisa Jolly. Honeybunch claims that Ms van Niekerk was a valued worker who resigned of her own free will.

How did the Authority investigate?

[3] The early stages of this proceeding led to a preliminary determination by the Authority which struck out another respondent with a similar name to that of Honeybunch.¹

[4] Subsequently a relatively informal counterclaim was lodged on behalf of Honeybunch and Ms Jolly making claims against Ms van Niekerk. I decided to hear both matters together.

[5] An investigation meeting was originally set for 9 and 10 June 2021. On the morning of the first day Ms Jolly advised that she was very sick which she attributed to having recently had a Covid-19 vaccination. As Ms van Niekerk had travelled from the South Island for the meeting she wished to go ahead with it. I sought a medical certificate from Ms Jolly, which she provided. Given the late notice of sickness and Ms van Niekerk's travel, I decided to go

¹ *Barbara-Lee (Barlee) van Niekerk v Honeybunch Pure NZ Limited, Honeybunch Pure Naturals NZ Limited and Lisa Jolly* [2020] NZERA 503.

ahead and hear the initial part of Ms van Niekerk's evidence and then adjourn. Ms Jolly rejected the option of participating by Zoom audio-visual link. A transcript of Ms van Niekerk's evidence was later provided to the parties.

[6] The investigation meeting resumed on 28 June 2021. Ms Jolly took up the opportunity to question Ms van Niekerk. Evidence was also heard from a Honeybunch employee, who I refer to as the co-worker, and Ms Jolly began her evidence.

[7] The investigation meeting resumed on 28 July 2021 with the remainder of Ms Jolly's evidence and submissions heard. Ms van Niekerk attended the last two investigation meeting days by Zoom. Ms Jolly attended the final day by Zoom.

[8] Ms Jolly also lodged statements from two sisters about their positive experiences working for Honeybunch. The sisters were not brought to the meeting and I accepted their statements but indicated that I did not need to ask them any questions as their evidence concerned their own employment situations and impressions of the Honeybunch workplace.

[9] I have considered all the material provided by the parties. However, as permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[10] The first issue is whether Ms van Niekerk was employed by Honeybunch or Ms Jolly personally. The remaining issues for investigation are:

Ms van Niekerk's claims

- (a) Was Ms van Niekerk actually or constructively dismissed and, if so, was that unjustified?
- (b) Was she unjustifiably disadvantaged by her employer not providing a mobile device?
- (c) Was she not paid a \$150 bonus which she was entitled to or was that amount deducted from her wages?
- (d) What remedies, if any, should be awarded for any of the claims established?

Honeybunch and Ms Jolly's claims

- (e) Is Ms van Niekerk liable to Honeybunch for the costs of defending what is described as a “false fraudulent claim”?
- (f) Does she owe Honeybunch anything for a keyring?
- (g) Does she owe anything for a photoshoot of her children?
- (h) Does she owe anything for bottles of essential oils not returned on her departure?
- (i) Does she owe \$150 paid to her in error?
- (j) Does she owe Honeybunch for “damage and false lies and time to defend that she had claimed she worked for another person who she had never met”?

[11] In addition, as a result of Ms Jolly’s conduct during the proceeding, the Authority was invited by counsel to consider imposing a penalty on her for obstructing and delaying the Authority’s investigation under s 134A of the Act. I decided to investigate that allegation. It is a matter potentially overlapping with costs so I reserve it for later consideration.

[12] A claim that Ms van Niekerk was owed money for a wage reduction to 80% of her earlier income was withdrawn at the start of the first day of the investigation meeting.

[13] A claim on behalf of Ms van Niekerk for penalties regarding Honeybunch’s alleged breaches of the duty of good faith and non-payment of the \$150 bonus was only raised at the investigation meeting. Given the circumstances, including the quasi-criminal nature of penalties, I was not satisfied that this claim should be able to proceed with the existing claims. I conclude that a claim in the closing submissions that Ms Jolly should be regarded as a person involved in breach of employment standards under s 142W of the Act was made too late to proceed with the other claims.

What about credibility?

[14] Ms Jolly was very critical of Ms van Niekerk’s honesty and thus credibility. She focused on earlier evidence by Ms van Niekerk that Ms Jolly had asked her to post in an online Honeybunch competition but subsequently accepted that it was the co-worker who had asked her that. I find this to be an appropriate concession which did not dent Ms van Niekerk’s credibility.

[15] Similarly the co-worker said in her witness statement, which she confirmed at the investigation meeting, that Ms Jolly offered to buy Ms van Niekerk a phone but later retracted that when the error was put. This also appeared an appropriate concession.

[16] I found Ms van Niekerk to be a credible witness who on occasions offered evidence which was contrary to her interests.

What work did Ms van Niekerk undertake?

[17] From October 2019 Ms van Niekerk worked at the Honeybunch Takanini site. This was initially in a packing position which Honeybunch indicated to her was a contract position. She was paid the minimum hourly wage.

[18] At the end of Ms van Niekerk's first week Ms Jolly told her that she was paying her a \$30 bonus to recognise her efforts as Ms Jolly saw her as very hard working. After about two weeks on the job Ms Jolly approached Ms van Niekerk to offer her more hours in the lead-up to Christmas. Ms van Niekerk ended up working every week until the Christmas break.

[19] Before Christmas, the co-worker approached Ms van Niekerk, advising that there was a full-time role which she could apply for. Ms van Niekerk was reluctant to apply as it was a five day a week role and she had young children. After some discussion with Ms Jolly and the co-worker, it was agreed that the role could become four days a week.

[20] Ms van Niekerk was given an employment agreement as a soap maker on 23 December 2019. The employment agreement identified the employer as Honeybunch Pure NZ Limited. This is the company with a very similar name to the current first respondent in this proceeding. It is that company which was struck out as a party in the preliminary determination referred to above.

[21] Not realising that there were any difficulties with the agreement, Ms van Niekerk signed it. Ms Jolly also signed the agreement by DocuSign.

[22] While working in the role, Ms van Niekerk learnt how to be a soap maker and took great pride in the quality of the product she was making. She found it satisfying to be continually refining her skills. She also enjoyed working with the co-worker.

Who was the employer?

[23] Given that the company identified in the employment agreement was a company unrelated to Ms Jolly but with Honeybunch in its name, there is a question about the identity of Ms van Niekerk's employer.

[24] Ms van Niekerk did not take a position as to whether Honeybunch or Ms Jolly was the employer.

[25] Ms Jolly identifies Honeybunch as Ms van Niekerk's employer. Having become aware of the other company being identified in this employment agreement, Ms Jolly has checked the other employees' employment agreements and identified a few which also named the other unrelated company as employer. Ms Jolly provided some evidence which she asserted showed she was pursuing the office administration advisors who drafted the agreements through the Disputes Tribunal. There was some question about the nature of their dispute and the extent to which Ms Jolly was progressing it. I am unable to conclude that Ms Jolly deliberately included the other Honeybunch company's name as the employer in these employment agreements.

[26] From looking at the documents and hearing the witnesses it was established that the first respondent Honeybunch Pure Naturals NZ Limited was the employer rather than Ms Jolly personally.

What happened in the lead up to the first COVID-19 lockdown?

[27] At some point during Monday 23 March 2020, the day the first Covid-19 Level Four lockdown was announced, Ms Jolly decided that staff were to start working from home for the next two weeks. Ms Jolly had started a Facebook Messenger chat group to communicate with her employees and that became the main method for communication during lockdown. Ms Jolly was isolating at home after returning from an overseas work trip. Ms van Niekerk did not usually work on Mondays.

[28] Ms Jolly messaged Ms van Niekerk about working from home and asked her to come in to collect materials and ingredients. Ms van Niekerk went in and the co-worker helped her load these items into her car and so was aware of what was taken in terms of raw materials. The co-worker told Ms van Niekerk not to come back into work and that she would advise of further jobs.

[29] On Wednesday 25 March 2020 Ms Jolly messaged the group of a requirement for them to post their "video daily here using the hash tags and sharing as per the company both of

Facebook and Instagram...All videos to be up by 7pm...make it fun and make it viral". At some point it was spelled out that videos of staff undertaking exercise activities was required.

[30] The same day Ms van Niekerk advised Ms Jolly via the group chat that she had run out of some of the raw ingredients and down to quarter of a bag of salt. She mentioned the number of soaps she had made. Ms Jolly gave some instructions on what she was to make.

What happened during Level 4?

[31] On 26 March 2020 tensions developed about the video plan. On the group chat Ms van Niekerk expressed reservations saying it was not her thing. Ms Jolly replied "Not happy", noting Ms van Niekerk posted things and did fitness and played squash so questioned why joining together to do something for the business was not her thing. Ms van Niekerk replied that she did not record herself and she was not comfortable doing it. Ms Jolly responded including:

It's 'not my thing' to pay people when we are all pulling together socially as a team to get through and make our business socially strong. This is what pays people's wages. I can't force you Barlee but I'm not impressed at all.

[32] At the end of the first week Ms van Niekerk ran out of ingredients to produce the bath product she had been making. On Tuesday 31 March Ms Jolly messaged Ms van Niekerk and asked her how things were going. Ms van Niekerk replied that she had nothing to do because she had run out of supplies. Ms Jolly responded:

Ok so what are you doing this week? Did you ask for another job? I may have missed it sorry as I have been busy working away on overseas stuff.

[33] Ms van Niekerk replied that she did not have anything to do this week as she didn't have any more ingredients available. There was one task she could do but it took some space (in her home) and so she was intending to leave it until the end of lockdown. She also commented that she had mentioned last week that she had run out of one product and was down to a small amount of salt. Ms Jolly replied that she would have jobs for Ms van Niekerk tomorrow and:

There was no mention of not having anything to do this week, and I think that is not right.

[34] Ms van Niekerk replied:

Sweet as [emoji] I only have lav and rose frag, a small amount of coconut oil and blue & red dye, that's it.

[35] Ms Jolly replied:

It's not sweet as. I'm angry. Just can't believe that you are at home for two days with no work being done whilst I'm working crazy hard to support everyone. I'm not going to reply any more. I'm too angry. I'll revert back tomorrow.

[36] There was no immediate reply from Ms van Niekerk. Ms van Niekerk reports being very embarrassed by being criticised publicly on the group chat.

[37] Later that day Ms Jolly was messaging on the group chat with another employee, arranging for a product to be dropped at Ms van Niekerk's home. Ms Jolly messaged something which she later removed. The other staff member replied:

“Lacing of Cyanide” is that separate product?

[38] Ms Jolly said that it could not be proved what she had written and when pressed, she said she could not recall. However, Ms van Niekerk saw it and I accept her evidence that it referred to something along the lines of a lacing of cyanide. The reply the other staff member supports her evidence. I found Ms Jolly's suggestion that any comment deleted might not have been about Ms van Niekerk unlikely in the circumstances of the discussion and the subsequent entries.

[39] Ms Jolly replied to the other employee “or cocaine. Just being nasty sorry”. The other worker messaged “Lacing of cocaine Lol” with Ms Jolly indicating “Might hurry the videos up”.

What was the new agreement?

[40] Honeybunch's office administration advisors, who undertook bookkeeping and payroll functions, suggested new employment agreements as the minimum wage was increasing. On 2 April 2020 the advisors sent Ms van Niekerk a new employment agreement asking her to review it and ask make contact if she had any questions

[41] Later that day Ms van Niekerk responded, that a clause requiring social media involvement seemed to have little to do with the rest of her job description. She sought clarity

as to what the clause was and its validity against her current job role (as soap maker). The advisors asked Ms van Niekerk to discuss the matter directly with Ms Jolly.

[42] Ms Jolly emailed saying the clause required team players who were involved in social media.

[43] On 7 April 2020 Ms Jolly requested the contract be return, signed presumably. Ms van Niekerk emailed Ms Jolly noting several changes from the previous employment agreement which had not been discussed and which she would like to talk about:

- (a) new key responsibility including being involved in social media as directed, noted to be a requirement of the business. Ms van Niekerk indicated some limitations on what she was prepared to do in this regards; and
- (b) removing her previous agreement's 20 hours a week Tuesday to Friday provision and replacing it with a casual "as required" arrangement.

[44] She suggested an online meeting as the country was still in lockdown. Later that day Ms Jolly replied, indicating that the changes to the agreement were within her "rights and necessary to ensure the survival of the business". The new key responsibility of being involved in social media as directed was said to be a "requirement of the business for everyone going forward".

[45] Ms Jolly told the Authority that she was not aware that the new agreement referred to Ms van Niekerk as a casual until after Ms van Niekerk resigned or that Ms Jolly thought of Ms van Niekerk as a casual beforehand anyway. I find those propositions unlikely given that Ms Jolly's 7 April 2020 email refers to:

...as a business owner and as it is a state of emergency I am within my rights to change any employees to casual going forward as it is my responsibility to see the business survives...

...I'm issuing the new terms of your contract within my rights under this state of emergency.

You are welcome to give me a call but I'm [sic] my end I have no flexibility as this is my business...

So it you don't like it. Then leave after the 12 week subsidy.

[46] Having received Ms Jolly's position, Ms van Niekerk felt she had no choice other than to resign. She saw there being no reasoning with Ms Jolly about the new agreement.

[47] The following day Ms van Niekerk wrote to Honeybunch saying she was resigning her position with her last day of employment to be 24 April 2020. Ms Jolly emailed back "Thanks Barlee. All the best".

[48] Ms van Niekerk continued to message about the work she was undertaking with Ms Jolly dropping off and picking up supplies and completed product from outside Ms van Niekerk's house.

Was there an actual dismissal?

[49] Submissions for Ms van Niekerk argued that the provision of a casual agreement to a permanent employee amounted to a dismissal. The earlier employment agreement provided that changes could be made to it by written agreement.

[50] Honeybunch did not cease to provide or accept work from Ms van Niekerk. It was attempting to impose the new agreement but the work did not cease. I regard this as being better dealt with as a possible constructive dismissal than an actual dismissal.

Was Ms van Niekerk constructively dismissed?

[51] In the alternative it is argued that Ms van Niekerk was constructively dismissed. Honeybunch's position is that Ms van Niekerk was an exceptional soap maker and it did not want her to resign.

[52] Constructive dismissal is where an employee leaves their work but the impetus for the resignation comes from the employer. The usual three categories of constructive dismissal set out by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* are:

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

[53] There is an element of the first category here with Ms Jolly saying that if Ms van Niekerk did not like the new agreement she could leave. I also regard the third category as relevant. For that category it is not sufficient for the employer's conduct to be inconsiderate thus causing some unhappiness to the employee.² What is required is dismissive or repudiatory conduct; a breach of the employer's duty to the employee. If that is established, I then need to examine:

- (a) Whether the conduct caused the resignation; and
- (b) Was the breach of duty sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing? Was there a substantial risk of resignation?³

[54] Turning to the facts, Ms van Niekerk sent a written resignation letter dated 8 April 2020. The letter indicated that her last day of employment would be 24 April 2020 and concludes "Best wishes to you and the company for the future".

[55] The letter does not assist Ms van Niekerk's constructive dismissal claim as there is no indication of why she is resigning or more broadly, of any dissatisfaction with Honeybunch or Ms Jolly.

[56] Although it is common for constructive dismissals to involve the employee finishing work immediately, that is not always the case. The working out of a notice period is not fatal to a constructive dismissal claim.

[57] Having heard the evidence and looked at the documents I conclude there were a number of factors which lead to Ms van Niekerk's dismissal:

- (a) She felt pressure to be involved in actions which she did not consider right in lockdown wrong things, particularly a request to pick up products from work and items being dropped off and collected from her home;
- (b) Rudeness on group chat (especially the cyanide and cocaine comments);
- (c) Pressure to do social media, including as part of the new agreement; and

² *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC).

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] NZLR 415 (CA).

(d) The attempt to impose a new agreement without negotiation;

[58] Not all of these matters may individually have been sufficiently serious to establish a breach or breaches of agreement sufficient to found a constructive dismissal claim. However, the imposition of a casual arrangement certainly was. Under the new agreement Ms van Niekerk went from having a guarantee of 20 hours' work a week to no guarantee of any hours at all. She was not obliged to accept such a change but Ms Jolly indicated that there was no room for discussion and she was imposing the change.

[59] Ms Jolly was wrong that she was able to change an employee's status without agreement from a permanent to a casual "as required" arrangement. The state of emergency did not remove the usual obligations on parties to an employment agreement to change the terms only by agreement or as specified in the original agreement itself. In addition Ms Jolly suggested that if Ms van Niekerk was not like the agreement she could leave.

[60] Honeybunch and Ms Jolly's behaviour caused Ms van Niekerk to resign the day after that communication.

[61] Ms van Niekerk indicated in writing that she was not happy with some of the changes. I consider that it was foreseeable to a fair and reasonable employer that imposing a change from a permanent arrangement to a casual arrangement, without the employee's agreement, created a substantial risk of resignation.

[62] Ms Jolly should have followed up when she received the resignation. Instead she chose to accept resignation and not attempt to discuss the reason for it, despite it coming after Honeybunch had attempted to impose a significant change to the nature of the arrangement as well as the social media obligation which Ms van Niekerk was clearly unhappy with.

[63] I conclude that Ms van Niekerk was constructively dismissed.

Was the dismissal justified?

[64] The test is whether Honeybunch acted as a fair and reasonable employer could have done in the circumstances.⁴

⁴ The Act, s103A.

[65] I accept that Honeybunch may have been under financial pressure as a result of the lockdown, as were many business. There was government support but Ms Jolly was still concerned about the viability of her business.

[66] That does not justify Honeybunch acting as it did. A new employment agreement apparently initiated as a result of the increase in the minimum wage was used to attempt to introduce precarious employment via a casual provision. From Ms Jolly's evidence it seems this was on the off chance that it was needed, whereas employees' actual hours of work were maintained.

[67] The good faith obligations require parties to be active and communicative.⁵ Here, a new employment agreement was sent without very significant changes being highlighted or explained. Ms van Niekerk's attempt to discuss the changes was met with an assertion that the employer could make the changes (without agreement) and a prompt to leave if she did not like it. Honeybunch failed to act as a fair and reasonable employer could have done.

[68] Ms van Niekerk was unjustifiably dismissed by Honeybunch.

What remedies should Ms van Niekerk receive?

Lost wages

[69] Ms van Niekerk seeks a total of a little over six weeks' lost wages. That covers the initial three weeks it took her to find a job and then some further time after her first job finished a few weeks later due to a change in Alert levels. Ms van Niekerk was initially searching for work during the time New Zealand was in Level 4 lockdown.

[70] My lost wages assessment is six weeks of wages, which at \$378 gross per week, totals \$2,268.00 gross.

Compensation

[71] The sum of \$20,000 is sought as compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

⁵ The Act, s 4.

[72] Ms Jolly gave some context to the compensation claim when she said in the evidence that the co-worker should be awarded a lot of money due to Mr Jolly's behaviour towards her. The co-worker was said to enjoy the challenge.

[73] Ms van Niekerk did not. Instead she found the situation she was in highly stressful. She was sleepless, worrying about her family's financial position during a lockdown period when finding other employment was challenging. Ms van Niekerk's relationships with her husband and children were adversely affected, with her often needing to sit alone in her bedroom.

[74] I recognise that Ms van Niekerk was intending to move away from Auckland with her whānau and would thus have left Honeybunch. But Honeybunch's actions meant she left the job earlier than she would otherwise have done and in a distressed manner.

[75] I assess compensation of \$18,000 as appropriate before looking at whether a reduction should be made.

Contribution and award

[76] I now consider whether to make a reduction for contribution by Ms van Niekerk to the situation giving rise to her dismissal. In order for a reduction to be made conduct must be blameworthy and causative.⁶ Ms Jolly was critical of Ms van Niekerk's behaviour.

[77] Honeybunch asserts that Ms van Niekerk was not a team player. It is understandable that Ms Jolly wanted to try to increase Honeybunch's social media profile in order to increase possible sales during and after the 2020 lockdown.

[78] In her personal life Ms van Niekerk did contribute to social media and had previously willingly to post pictures for Honeybunch of the soap making process and her products. However, Ms van Niekerk could not be seen as blameworthy for resisting providing videos of herself exercising which she personally found to be an uncomfortable situation. The fact that she had some months previously posted a video of herself talking to a Honeybunch competition to encourage others to participate does not detract from that. The situations are different.

⁶ *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178] and *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 (Full Court) at [175].

[79] I conclude that Ms van Niekerk's actions were not blameworthy and so no reduction is required. Honeybunch is ordered to pay Ms van Niekerk the following within 21 days of the date of this determination:

- (a) \$2,268.00 gross lost wages; and
- (b) \$18,000 as compensation for humiliation, loss of dignity and injury to feelings.

What about the mobile phone?

[80] The employment agreement specifies that the employer will provide the employee with a mobile device or devices and pay for all work-related data for calls "if applicable". The phone could not be used for personal activities. The clause goes on to provide that the employer "can decide to stop providing the device if it is no longer needed for the employee's duties...".

[81] There was no discussion between the parties regarding a phone at the time the employment agreement was signed in 2019. No device was provided at any point. Both parties agree that Ms van Niekerk did not really need a phone for her work when she was making soap at the Honeybunch premises. There was a spare phone there which could have been used and wifi was provided.

[82] During lockdown Ms van Niekerk used her personal phone more to communicate with Honeybunch staff and Ms Jolly, taking photos of her attempts at making products she was not familiar with. She did not ask for recompense or a work phone during this time.

[83] There are difficulties with this claim. The agreement does specify that a device will be provided if applicable. There was little basis for Ms van Niekerk to have a work device whilst she was working from Honeybunch premises. I conclude that the phone was not applicable during that period. Once Ms van Niekerk began working from home there is more argument that it was applicable for her to have a phone, so she could access the group chat. This was enhanced once videos were sought. However, Ms van Niekerk did not provide any videos in this time.

[84] I cannot conclude that Ms van Niekerk was disadvantaged by any failure to provide her with a phone or other device. Her phone or internet plan/s at home were not provided. The group chat was by Messenger meaning only internet access was required. Ms van Niekerk's reluctance to participate in the video scheme was not based on her having to spend money on

data. There is also the contract provision which permitted Honeybunch to remove the device had it provided one.

What was the story with the bonus?

[85] Both parties made a claim regarding the same bonus. Ms van Niekerk initially sought payment of it but later amended this to claiming unpaid wages for about the same amount. Ms Jolly sought the return of the bonus. Teasing out what actually occurred regarding various payments was not straightforward in part due to similarity between two amounts being considered.

[86] Ms Jolly offered a sizeable bonus if Ms van Niekerk finished a large order at short notice. Ms van Niekerk almost achieved the target. Ms Jolly said she would pay her \$150 for her effort.

[87] A wage payment received on 11 February 2020 was larger than usual and it was not clear to Ms van Niekerk how the payment was made up. She checked with Ms Jolly whether there was an error or whether it included the bonus. Ms Jolly indicated that the bonus was deserved but the payroll provider messaged there was a data entry error. I had little detail about what or how that occurred. The next pay explicitly included a \$150 bonus.

[88] Ms van Niekerk's early April pay was for 32 hours instead to her 40 hours' work a fortnight. Although not entirely clear, this may have been a deduction for an earlier payroll error. After she finished work she sought payment for those eight hours and for her final week of work which had not been paid at all. Ms Jolly indicated she would be paid for her final week but not the eight hours.

[89] A deduction of eight hours was made from Ms van Niekerk's pay, meaning she was not fully paid for the hours she worked in that pay period. Under s 4 of the Wages Protection Act wages must be paid without deduction. Deductions are permitted where the employee consents to or requests a deduction.⁷

⁷ Wages Protection Act, s 5.

[90] Similarly the employment agreement provides for money to be deducted from pay if the employee has requested or agreed. It was not established that Ms van Niekerk did either of those things and so the clause does not assist Honeybunch. The deduction made was therefore unlawful under the Wages Protection Act.

[91] I conclude that Honeybunch owes Ms van Niekerk pay for eight hours' work, rather than the bonus which was already paid. At the applicable hourly rate of \$18.25 gross, that amounts to \$146.00. Within 21 days of the date of this determination Honeybunch is ordered to pay Ms van Niekerk the sum of \$146.00 gross for wage arrears along with interest on that sum from 25 April 2020 until the date of payment.⁸

What about Honeybunch and Ms Jolly's claims?

Costs of defence

[92] Ms Jolly's first claim seeks to make Ms van Niekerk liable to Honeybunch for the costs of what is described as a "false fraudulent claim". Honeybunch claims 40 hours of Ms Jolly's time at \$150 per hour, totalling \$6,000. I have found that Ms van Niekerk's constructive dismissal and wages claims are substantiated. In any event Honeybunch and Ms Jolly's claim is really a matter for costs, the process for which is covered below.

Key ring

[93] Ms Jolly was travelling to Guam. Ms van Niekerk collects key rings from different countries and asked Ms Jolly to pick up one on her trip, offering to pay. The time taken for the purchase was not specified by Ms Jolly. On her return she gave the key ring to Ms Niekerk who again offered to pay. Ms Jolly refused, making it a gift. Now that relations between the parties have deteriorated, Ms Jolly has changed her mind and seeks \$30. There is no basis on which to now seek payment for the cost or her time.

Photoshoot

[94] Ms Jolly claims \$650 for photos taken of Ms van Niekerk's children. This appears to be an estimate of the cost of a professional photographer.

⁸ The Act, Schedule 2, cl 11. Interest calculated as per <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

[95] Ms Jolly was seeking children to be photographed for advertising material for Honeybunch. Ms van Niekerk offered to bring her children. A photographer took pictures of the children with a Honeybunch lip balm. The children were able to keep the product. A link to the photos was sent out however, it became apparent during the investigation meeting that Ms van Niekerk was no longer in the receiving group when the link was sent so was unaware of the photos being available.

[96] No invoice was provided. Ms van Niekerk understood from the photographer that he was a friend or acquaintance of Ms Jolly and so was not certain whether a charge was made. Ms Jolly says she paid for the photoshoot, which also had sessions for a number of other children.

[97] There was no discussion between the parties prior to the shoot of Ms van Niekerk having to pay. In any event Ms Jolly used some of the photos for the commercial benefit of Honeybunch. She seemed satisfied with the arrangement without payment until Ms van Niekerk brought a claim against Honeybunch and herself.

[98] I find that there is no basis for Ms van Niekerk to have to pay for the photoshoot.

Essential oils

[99] Ms Jolly claims that Ms van Niekerk retained three one-litre bottle of essential oils when she finished with Honeybunch. She acknowledges they would have been partly used bottles. The first indication of this being an issue for Ms Jolly was when the counterclaim was lodged a year after Ms van Niekerk finished with the company.

[100] Ms van Niekerk acknowledges that she had two of Honeybunch's essential oils at home during the first 2020 lockdown, in order to make products. She used a portion of them then returned the remainder with other goods which Ms Jolly picked up from outside Ms van Niekerk's house.

[101] Ms Jolly says no bottles were retrieved although the possibility of someone else picking them up after they were left outside cannot be ruled out.

[102] I am not satisfied that Ms van Niekerk retained the oils. There is no basis for Honeybunch's claim.

Bonus

[103] The bonus is already discussed above. Ms Jolly claims that the bonus was paid in error. There is no evidence to support that. Her text message at the time establishes that she wanted the bonus paid. There is no basis on which she can now require it to be repaid.

Damage, “false lies” and time to defend

[104] This claim is a mixture of defamation and costs. It relates to the initial incorporation of the other company as a party to the proceeding.⁹ The Authority indicated to Ms Jolly prior to the investigation meeting that it did not have jurisdiction to consider defamation claims and costs matters could be dealt with after this determination.

[105] Ms van Niekerk’s employment agreement has the name of the other Honeybunch company identified specifically as the employer and also referred on at least two further points, including just above where Ms Jolly DocuSigned her signature, offering the agreement.¹⁰ The inclusion of that company as a party to the proceeding is thus not surprising. The names are similar. There appears to have been some past difficulties between the two owners. I do not accept that there was any deliberate attempt to confuse matters or involve the owner of the other Honeybunch company, as Ms Jolly suggests. I make no finding that Ms van Niekerk is liable to pay anything to Honeybunch or Ms Jolly.

Costs

[106] Costs are reserved. The parties are encouraged to resolve the matter.

[107] If they are unable to do so Ms van Niekerk shall have 21 days from the date of this determination to file a memorandum on costs. Honeybunch and Ms Jolly shall have a further 14 days in which to file a memorandum in reply. Submissions claiming costs must include a breakdown the costs and be accompanied by supporting evidence.

Nicola Craig
Member of the Employment Relations Authority

⁹ *Barbara-Lee (Barlee) van Niekerk v Honeybunch Pure NZ Limited, Honeybunch Pure Naturals NZ Limited and Lisa Jolly* [2020] NZERA 503.

¹⁰ Electronic agreement and signature system.