

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 540
3122852

BETWEEN MITCHELL MCINTYRE
 Applicant

AND HIFX LIMITED T/A XE NEW
 ZEALAND
 First Respondent

AND NATHAN CHEESEMAN
 Second Respondent

Member of Authority: Rachel Larmer

Representatives: Aaron Lloyd and Emily Partridge, counsel for the
 Applicant
 Anthony Drake and Rosie Judd, counsel for the
 Respondents

Investigation Meeting: 20, 21 and 23 July 2021 at Auckland

Submissions Received: 17 August 2021 from the Applicant
 7 September 2021 from the Respondent
 14 September 2021 from the Applicant

Date of Determination: 2 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Parties

[1] HIFX Limited, trading as XE New Zealand (Xe), is in the international foreign exchange brokerage business. Mr Nathan Cheeseman was at the material times a Director of Xe. Mr Cheeseman was also Vice-President – Corporate Xe from January 2020 until February

2021, a role with global oversight, and he was appointed to the global executive at the same time.

[2] Mr McIntyre was employed by Xe in January 2017 as a Senior Corporate Dealer for Foreign Exchange. Mr McIntyre's terms and conditions of employment were recorded in a written individual employment agreement and associated company policies.

Applicant's claims

[3] Mr McIntyre made multiple unjustified disadvantage grievance claims over the period 17 August to 25 September 2020. He also claims that Xe breached its duty of good faith to him and implied terms in his employment agreement. Mr McIntyre sought penalties for the alleged breaches of good faith and of his employment agreement. Mr McIntyre also claims that his resignation on 25 September 2020 was a constructive dismissal.

Withdrawal of claim against Mr Cheeseman

[4] During the Authority's investigation meeting Mr McIntyre withdrew his claim that the second respondent, Mr Cheeseman, had aided and abetted Xe's alleged breaches of Mr McIntyre's employment agreement.

Xe's business

[5] Xe's risk and compliance function was controlled by the Head of Risk and Compliance. Xe also had a local Compliance Manager who looked after regulatory compliance and operational compliance, and a risk staff member who reported to the Global Risk Manager.

[6] In New Zealand, the Xe trading desks were divided into a Premium desk, led by John Rea, and a SME desk led by Dave Drummond. Mr McIntyre was a dealer at the Premium desk, so he reported to Mr Rea. Mr Rea and Mr Drummond reported to Head of Corporate Dealing – Alex Hill.

[7] After Mr Hill left, Mr Rea and Mr Drummond then reported to Tara McGoldrick, who was at that time the Head of Corporate (APAC), a role that reported to Mr Cheeseman, in his capacity as the Managing Director (APAC).

[8] In early 2020 Xe decided to get out of the speculative trading business because market movements due to Covid-19 meant that speculative trading presented much larger credit risk

issues. Xe therefore decided to focus on its core business of deliverable (non-speculative) foreign exchanges where customers had a requirement for the currency they bought and sold.

[9] Xe had ongoing discussions and communications with its employees and clients about that decision. Mr Cheeseman described having communicated on multiple occasions to the team both verbally and in email regarding Xe's position that it would not be engaging in speculative trading for its clients.

[10] In May 2020 Xe directed its APAC corporate dealers (which included Mr McIntyre) that speculative trading was not permitted and it directed the unwinding of current positions of specific clients by August 2020. Xe's dealers who had clients undertaking speculative trades were required to communicate this change to the clients. It was made clear to all involved there were to be no speculative positions taken for clients going forward.

Tara McGoldrick

[11] Ms McGoldrick started in the role of Head of Corporate (APAC) on 1 June 2020 and took on the role of Managing Director (APAC) on 8 February 2021. She is a director of the Australian based entity Encore Fx (Aust) Pty Ltd (Encore) and of HIFX Limited trading as Xe New Zealand.

[12] All dealers and sales staff in Australia and New Zealand reported to Ms McGoldrick, who is based in the Sydney office. She has over 25 years' experience in the foreign exchange industry. Ms McGoldrick had been working on changes to procedures and policy around speculative trading, along with Xe's Regional Risk and Compliance Manager.

Concerns involving client "I's" account

[13] Mr McIntyre only had one client, referred to in this determination as "I", that had taken positions Xe considered to be speculative – overlaying trades to protect its credit and to manage risk from foreign exchange contracts.

[14] On 2 July 2020 Ms Tara McGoldrick was asked to approve a release of funds to "I" because it had funds owing to Xe at that time. Ms McGoldrick made further inquiries that included, among other things, speaking to Mr McIntyre and his manager about "I's" account.

[15] Mr McIntyre told Ms McGoldrick that his client “I” did conduct speculative trades, but that he (Mr McIntyre) was winding that book down and that part of the money “I” owed Xe was for close out of trades in March that were out of the money. Mr McIntyre also told Ms McGoldrick that a verbal agreement had been made for “I” to repay the money it owed Xe on a monthly basis, but acknowledged that agreement had not been recorded in writing.

[16] Ms McGoldrick was very concerned about the situation. She told Mr McIntyre that Xe did not deal with speculative accounts and that no further speculative positions were to be entered into for “I”. Mr Rea subsequently also emailed “I” regarding the monthly repayment arrangement that had been verbally agreed with Xe in March 2020.

[17] Mr McIntyre acknowledged to Ms McGoldrick when they spoke on 2 July 2020 that he knew that no speculative trades could be entered into for any clients including “I”. He confirmed he was winding “I’s” book down and closing its positions out. Ms McGoldrick was satisfied that Mr McIntyre had understood the instructions given to dealers in May 2020 prohibiting speculative trading.

[18] The Authority accepted Ms McGoldrick’s evidence that there was no doubt that Mr McIntyre knew and understood the instruction, that there were to be no speculative trades going forward and in particular no speculative trades on the “I” account.

27 July 2020 emails

[19] On 27 July 2020 Mr Rea emailed his team, including Mr McIntyre, asking to be advised about any accounts that appeared to be entering into speculative FX positions. Mr Rea also forwarded a copy of Mr Lynch’s email with the subject “*Spec clients – list*” that stated (among other things) that Xe was clamping down on speculative trading clients and that it was going to be looking closely at clients that booked more than their expected requirements for legitimate underlying trade activities.

[20] On 27 July 2020 Mr McIntyre emailed the Credit Manager Phil Lynch, copied to his manager Mr Rea and the CEO Mr Cheeseman, identifying “I” as the only one of Mr McIntyre’s clients that engaged in speculative trading. Mr McIntyre said that “I”s positions had been wound down so “I” was left with two positions that were congruent with its business operations/deliverable FX requirements.

[21] Mr McIntyre also noted in his 27 July email “*the client [I] is aware that any dealings from this point onward are to reduce risk only, and no new speculative positions can be taken.*”

28 July 2020 Powerpoint presentation and follow up email

[22] On 28 July 2020 Ms McGoldrick led two Microsoft Teams calls with all of Xe’s dealers and sales staff, to discuss changes to Xe’s Options business. The invitation to the session announced that it would cover changes to Xe’s approach to Options, including what was described as “*effective immediately non-negotiables*”. Attendance was compulsory at one of the two sessions.

[23] Mr McIntyre attended the first session that ran from 2-2.30pm New Zealand time on 28 July 2020.

[24] Ms McGoldrick took the dealers and sales staff through a PowerPoint presentation that highlighted and emphasised changes to the way that Xe’s dealers could deal options, the types of products they were allowed to deal, how the client was to be dealt with, what each dealer needed to have before making a trade, what the dealers needed to have established regarding a client’s wholesale status, and the documents the dealers had to provide for each client prior to execution of a trade. There were eight points that dealers needed to ensure had been covered before trades were made.

[25] After her presentation Ms McGoldrick followed up with an email to participants that identified items that had to be addressed by them immediately. These included (among other things) that “*no deals to be booked outside the client’s deliverable requirements*” that dealers had to “*check that you have current wholesale status updated in DFX prior to booking your next trade and Option T&C’s completed and save*” and “*client suitability matrix to be completed for each client for next trade and this must be saved in the SFDC*”. She noted that the last two items would be reviewed, so participants had to ensure those items had been completed.

[26] Attached to Ms McGoldrick’s email dated 28 July 2020 were a suitability matrix, a copy of the PowerPoint presentation, the term sheets and a sample of the PDS. She ended her email by stating “*any questions please ask*”.

31 July 2020 trades on the "I" account

[27] On Friday 31 July 2020 Mr McIntyre placed further trades on behalf of "I". This occurred two days after he had attended the Teams call training and subsequent to receiving Ms McGoldrick's follow up email.

[28] Over the weekend of 8-9 August 2020 it came to Ms McGoldrick's attention that the two trades Mr McIntyre had done for "I" on 31 July 2020 appeared to be speculative positions. When she looked into that more closely she also discovered that it looked as if "I" had been classified incorrectly as a wholesale client and that the documentation Xe required for its clients was not on "I's" file.

Xe's concerns

[29] Ms McGoldrick's initial view was that the 31 July trades did not meet the requirements she had laid out in the phone call with Mr McIntyre on 2 July, or in the training and subsequent email he had received on 28 July 2020. Ms McGoldrick was concerned that Mr McIntyre had booked trades that directly contradicted the trading requirements she had outlined on 28 July 2020, thereby increasing the risk to the client and for Xe.

[30] On 20 August 2020 Ms McGoldrick emailed Xe's Human Resources (HR) team (copy to Mr Cheeseman, and Mr Lynch, Xe New Zealand's Head of Credit) identifying a number of concerns about the "I" account. These included that:

- (a) She could not see signed T&C;
- (b) There were no Options terms and conditions in DFX;
- (c) The wholesale status contradicted the notes from the BDM;
- (d) When "I" was signed as a client in 2017 it was recorded as a retail client. Mr McIntyre changed "I's" status from retail to wholesale on 2 September 2019 on the grounds that had more than 20 employees. However, because "I" was a manufacturer, having 20 employees did not turn it from a retail client into a wholesale client;

- (e) Funds had been paid out to an individual's personal account, and not just to "I's" company account;
- (f) Funds were paid out to "I's" US based company, when it did not manufacture in the US, and "I's" website said all products were manufactured in Australia;
- (g) The 31 July 2020 trades were leveraged; and
- (h) She could not see a correlation between the 31 July trades and further reducing "I's" current exposure. Mr McIntyre's email to Mr Lynch on 27 July 2020 had said that although "I" had been engaging in speculative trades, no further trades would occur unless reducing "I's" exposure.

[31] In discussion with HR, Ms McGoldrick decided she needed to meet with Mr McIntyre about the "I" account. Ms McGoldrick and HR considered that the situation was sufficiently serious to warrant a scheduled meeting with Mr McIntyre, instead of an informal chat. The purpose of the proposed meeting was for Mr McIntyre to help Xe understand what had occurred and why.

[32] Ms McGoldrick said she was guided by HR about how to do that in a way that was consistent with Xe's policies and procedures.

17 August 2020 meeting request

[33] HR prepared a Word document that set out Xe's specific concerns for Ms McGoldrick to send to Mr McIntyre along with her meeting request. HR advised Ms McGoldrick to send Mr McIntyre a copy of Xe's Disciplinary and Dismissal Policy and his employment agreement. Ms McGoldrick therefore attached those two documents to the Word document she sent Mr McIntyre on Monday 17 August 2020, that requested a meeting with him on Thursday 20 August 2020.

Matters to be discussed with Mr McIntyre

[34] The 17 August 2020 Word document noted that apparent breaches of the requirements Xe had set out in the 28 July 2020 Powerpoint presentation and follow up email included;

- (a) Deals booked outside "I's" deliverable requirements;

- (b) The knock out product was booked without credit approval and was not in conjunction with a deliverable hedge, so if terminated would leave “I” with no money in the position;
- (c) No client suitability matrix recorded against “I’s” account;
- (d) No Options T&C saved against “I’s” account;
- (e) No term sheet recorded against “I’s” account.

[35] Mr McIntyre was also asked to explain the:

- (a) Basis on which he had reclassified “I” as a wholesale client; and
- (b) Extent to which he had acted in “I’s” best interests.

[36] He noted that it was subject to regulatory requirements regarding the matters identified, so the concerns raised with him had *“potentially significant consequences”*.

[37] He informed Mr McIntyre the meeting with him was *“part of an investigation process to ascertain the factual background to our concerns and your perspective on events [...] and is not a disciplinary meeting, nor have any decisions been made.”*

[38] He recorded that *“the complex nature of these products requires your input and we are committed to understanding your perspective on the matters raised.”*

[39] He also stated that *“If you have information you consider to be relevant – emails, documents (such as those missing outlined above) or people you believe we should speak to as part of this process please let us know and/or send them to [us] before this meeting takes place.”*

Adjournment of first proposed meeting

[40] On 18 August 2020 at 4.45pm Mr McIntyre acknowledged the meeting request and asked for extra time to find a support person to attend the meeting with him. Mr McIntyre said he would get back to Ms McGoldrick by close of business on Thursday with a more suitable meeting time. She agreed to that.

20 August 2020 meeting request

[41] On Thursday 20 August 2020, HR advised Ms McGoldrick to put a Microsoft Teams request in the calendar, so that some time was blocked out for participants of the meeting that Xe wanted to hold with Mr McIntyre that week.

[42] Accordingly, at 9.38am on 20 August Ms McGoldrick sent Mr McIntyre a follow up email with a second meeting request for 2pm the next day, which was Friday (the last day that week). The request stated *“I just realised that I hadn’t moved today’s call as you requested yesterday. Hoping that 2pm NZT is convenient. [...]”*

[43] At 10.35am Mr McIntyre responded to Ms McGoldrick, expressing confusion about the second meeting request, as the time he had been given to obtain a representative and to propose an alternative meeting time had not yet expired. The second proposed meeting was also adjourned at Mr McIntyre’s request.

Response by Mr McIntyre’s counsel to Xe’s meeting requests

[44] At 11.02am Ms McGoldrick received an email from Mr McIntyre’s lawyers that alleged process problems associated with the way the proposed meeting had been arranged. Concern was also raised that Xe had not attempted to speak to Mr McIntyre about its concerns before inviting him to a meeting. There was a complaint made that although the meeting had been described as an investigative meeting only, it was in fact a disciplinary meeting - because the meeting request had been accompanied by a copy of Xe’s Disciplinary and Dismissal Policy.

[45] Mr McIntyre’s counsel further claimed that Xe’s statement that the meeting was investigatory only was misleading, and that sending him the Disciplinary and Dismissal Policy was intimidating conduct, *“amounting to a blatant threat to him that if he does not do whatever it is the company wants, it will dismiss him.”*

[46] Xe viewed this response to its meeting requests as *“way over the top”*.

[47] Ms McGoldrick was confident that Mr McIntyre could answer the concerns that were being raised with him without the need to be more formal, as the matters to be discussed during the investigation meeting were not complex.

[48] Xe wanted to understand why Mr McIntyre had booked several deals for “I” on 31 July 2020 that appeared speculative and that did not reduce “I’s” current exposure. These deals appeared to be in breach of Xe’s instructions to Mr McIntyre, in breach of Xe’s trading policy and in breach of the 28 July 2020 trading requirements.

[49] Mr McIntyre had intimate knowledge of “I’s” trading position and of the account, so he should have been able to answer these queries based on his existing knowledge. Ms McGoldrick said it was difficult to understand what additional information Mr McIntyre thought he needed to be able to respond to the queries Xe had identified.

Sick leave

[50] The investigation meetings Xe proposed never occurred. Mr McIntyre went on sick leave on 24 August 2020 and he did not return to work before resigning on 25 September 2020. Mr McIntyre did not provide a substantive explanation to the concerns that Xe had raised with him before he resigned.

Encore employees

[51] Encore was an Australian Foreign Exchange brokerage that went into receivership in March 2020. At that time, Xe had a sales and business development presence in Australia and was looking to extend its Australian Financial Services Licence (AFSL) to allow dealing in Australia. However, Xe had not applied for an AFSL at the time it took on nine ex-Encore staff, so the new accounts brought to Xe by ex-Encore staff in Australia were managed by dealers in New Zealand.

[52] Mr McIntyre told the Authority he believed the Encore employees had been engaged by Xe to take over the roles of long serving and highly paid employees, such as himself, on the basis that Xe could pay the Encore staff less than it paid its New Zealand based employees.

[53] Mr McIntyre claims that Xe employed an ex-Encore employee into his position before he had resigned.

[54] The Authority accepted Xe’s evidence that the ex-Encore staff in Australia are separate from the New Zealand dealing teams. There was never any intention or expectation by Xe that the Australian ex-Encore staff would ever take over the New Zealand business, and that has not in fact occurred. Mr McIntyre’s fears about the Encore employees are therefore unfounded.

Sick leave cover by ex-Encore employee

[55] As a result of Mr McIntyre taking sick leave in August 2020, and not returning to work before his employment ended, the dealing teams in New Zealand were short staffed. Xe needed another dealer to look after Mr McIntyre's accounts on a temporary basis while he was away from work. Xe's credit team had an extra head count, so loaned that to Xe to hire another dealer to assist with client requests across the entire book of Xe clients.

[56] An ex-Encore staff member covered Mr McIntyre's accounts, which included managing some of Mr McIntyre's portfolio, while he was away on sick leave. This was not a permanent arrangement but was instead a reasonable and understandable way of ensuring Xe's clients' needs were met while Mr McIntyre was unavailable to assist them.

[57] The ex-Encore employee was not employed to take over Mr McIntyre's job. The intent and understanding was always that Mr McIntyre would take his portfolio of accounts back when he returned to work.

[58] The evidence did not objectively support Mr McIntyre's claims that Xe engaged Encore employees to take over the jobs of Xe's New Zealand employees.

Improper motives

[59] The Authority does not accept Mr McIntyre's claim that Xe had improper motives for raising concerns about the "I" trades and account with him. The concerns potentially impacted on Xe's regulatory requirements, so had to be investigated and appropriately addressed. That was still underway at the time of the Authority's investigation meeting.

[60] Mr McIntyre believed that the purpose of the investigation meeting was to remove him from his employment, so he could be replaced by less expensive ex-Encore employees. The evidence did not support Mr McIntyre's belief about that, because the ex-Encore employees had no relevance to his ongoing employment.

Mr McIntyre's knowledge of trading requirements for the "I" account

[61] The Authority does not accept Mr McIntyre's claim that he was too busy working on 28 July 2020 to properly participate in the Teams call. Mr McIntyre's work phone call log

shows that he did not take or make any calls while he was attending the Teams call. He made a four minute call at 1.46pm and a 38 second call at 2.45pm on 28 July 2020.

[62] Mr McIntyre should have been clear on what was required regarding speculative trades on the “P” account due to his discussions with Ms McGoldrick on 2 July 2020, the instructions given to him by his manager Mr Rea in May 2020, the communications about that from Mr Cheeseman, and as a result of the PowerPoint training Ms McGoldrick held on 28 July 2020 and the subsequent email summarising the trading requirements going forward that she sent out after that training.

Issues

[63] The following issues are to be determined:

- (a) Did Xe unjustifiably disadvantage Mr McIntyre in his employment?
- (b) If so, what if any remedies should be awarded?
- (c) Did Xe breach its duty of good faith towards Mr McIntyre?
- (d) If so, should a penalty be imposed?
- (e) Did Xe breach any implied terms of Mr McIntyre’s employment agreement?
- (f) If so, should a penalty be imposed?
- (g) If penalties are imposed on Xe, should some or all of any penalties be paid to Mr McIntyre personally instead of, or as well as, the Crown?
- (h) Was Mr McIntyre dismissed?
- (i) If so, was his dismissal justified?
- (j) If not, what if any remedies should he be awarded?
- (k) Should the Authority issue Xe with a recommendation to take steps to prevent similar employment relationship problems occurring?
- (l) What, if any, costs should be awarded?

Did Xe unjustifiably disadvantage Mr McIntyre in his employment?

[64] Mr McIntyre claims that the following actions by Xe unjustifiably disadvantaged him in his employment by:

- (a) Commencing a formal investigation process, that he said was disciplinary in nature, without first discussing it with him informally;
- (b) Attaching Xe's Disciplinary and Dismissal Policy to the meeting request, while claiming the meeting was not a disciplinary meeting, was an example of Xe engaging in misleading and deceptive conduct;
- (c) Changing its policy around permitted trading options without consultation;
- (d) Insinuating he had breached "*regulatory obligations*" without detailing what those obligations were or why Xe considered he had breached them;
- (e) Causing him significant harm and then refusing to provide him with additional paid sick leave;
- (f) Replacing him with a new employee before his employment had ended;
- (g) Insisting he attend a "*grievance hearing*" in response to his unjustified disadvantage personal grievances;
- (h) Failing to substantively respond to his personal grievances, despite numerous requests for Xe to do so.

Legal requirements

[65] In order to establish a disadvantage grievance Mr McIntyre must establish that his employment has been affected to his disadvantage. This is a broader concept than merely establishing a breach of contractual terms.

[66] The test for justification is set out in section 103A of the Employment Relations Act 2000 (the Act). For disadvantage grievances the Authority must determine whether an employer's actions and how it acted was what a fair and reasonable employer could have done in all the circumstances, at the time the action occurred.¹

[67] The Authority therefore needs to determine if any of the actions Mr McIntyre identified disadvantaged him and if so, then assess whether the disadvantage he suffered was justified, in accordance with the justification test in section 103A of the Act.

¹ Section 103A(2) of the Act.

Was Mr McIntyre disadvantaged in his employment?

[68] The Authority is not satisfied any of the actions Mr McIntyre identified objectively disadvantaged him for the following reasons:

- (a) *Commencing a formal investigation process* – this was not a disciplinary meeting and Xe made that clear. It was an investigation meeting because it would not result in a disciplinary sanction. That approach was consistent with Step 1 of Xe’s Disciplinary and Dismissal Policy that provided for a preliminary investigation before a disciplinary meeting was held. Because it was a structured meeting, Mr McIntyre had advance notice about the specific concerns Xe wanted to discuss with him. He also had an opportunity to take advice before providing his explanation and to be accompanied by counsel at the meeting. That benefited Mr McIntyre because it would not have occurred had Xe elected to have an informal chat with him. Xe was not legally required to have an informal conversation with Mr McIntyre before it asked him to attend an investigation meeting. The seriousness of the concerns and potential adverse consequences for all involved warranted more than an informal discussion. The approach taken by Xe advantaged, not disadvantaged, Mr McIntyre because it involved a structured meeting, where he knew what was going to be discussed, enabling him to prepare his explanation and to have the assistance of counsel.
- (b) *Attaching Disciplinary and Dismissal Policy to meeting request* – this was not an example of misleading or deceptive conduct as Mr McIntyre alleged. It was appropriate for him to receive a copy of that policy at the outset of Xe’s inquiries, because it set out the process that would be followed if his explanation did not alleviate Xe’s concerns. That advantaged, not disadvantaged, Mr McIntyre because he was able to obtain legal advice on the specifics of the relevant policy before having to give any explanation to the matters of concern.
- (c) *Changing the policy regarding trading options* – this was not a change in policy, it was a realignment with the requirements of Xe’s license. It was also not done without consultation. The matter had been under discussion within Xe since March 2020. It was clear that Mr McIntyre was aware of the policy and had agreed to adhere to the requirement that there be no speculative trading, particularly for the “I” account, from May 2020 onwards. Mr McIntyre was not

disadvantaged by Xe ensuring that its practices aligned with the terms of its license. Failure to do so could have resulted in regulatory compliance problems.

- (d) *Insinuating breaches of “regulatory obligations”* – this was an incorrect assumption that Mr McIntyre made. Xe never alleged that Mr McIntyre had breached regulatory obligations. Xe’s communications all recorded that it wanted to ensure that it was operating in line with its regulatory obligations. There was no insinuation that Mr McIntyre had breached regulatory obligations. The specific concerns were clearly recorded in the 17 August 2020 Word document. Xe wanted to speak to Mr McIntyre so it could properly assess whether the “I” situation raised any regulatory concerns regarding its licensing requirements.
- (e) *Causing significant harm and then refusing additional paid leave* – Xe did not cause Mr McIntyre significant harm. Mr McIntyre was uniquely adversely impacted by stress. Mr McIntyre became highly stressed after being asked to explain matters involving the “I” account. Mr McIntyre’s stress arose from his belief that his employment was in jeopardy. Xe’s desire to speak to Mr McIntyre was reasonable and did not disadvantage him. Before deciding what if any action needed to be taken, Xe asked Mr McIntyre to help it understand what had occurred and why, because he was the person who had the most knowledge of the “I” account. That request was not an example of Xe causing Mr McIntyre significant harm. Xe provided Mr McIntyre with five extra days of paid leave and it invited him to use another 11 days of paid leave he had owing to him. Xe also offered Mr McIntyre EAP assistance, to help him deal with stress. There was no legal obligation on Xe to have done more than it did.
- (f) *Replacing Mr McIntyre with a new employee* – that did not happen. Mr McIntyre was not replaced by Xe before his employment had ended. Xe understandably made arrangements for an employee from another part of the business, who had excess capacity and who was experienced in handling the type of work that was required on Mr McIntyre’s accounts, to cover his clients while he was away from work. It advantaged, not disadvantaged, Mr McIntyre to have his accounts taken care of by an experienced colleague while he was away. It could have fundamentally undermined Mr McIntyre’s relationship with

his clients if they had been left with no support while he was away on extended sick leave, with no known return to work date.

- (g) *Insisting on a “grievance hearing”* – there was no insistence on a grievance hearing. Consistent with Xe’s policies and procedures, Mr McIntyre was offered a meeting (“*grievance hearing*”) with the person who was investigating his complaints, as the first step in trying to resolve his disadvantage grievances internally. That was not in breach of employment legislation, as Mr McIntyre alleged. It was a reasonable and appropriate way of attempting to resolve grievances internally in the first instance. Xe’s offer of a grievance hearing did not disadvantage Mr McIntyre. It did not restrict or preclude the exercise of his statutory rights. Mr McIntyre rejected the offer of a grievance hearing and Xe accepted that. He was not instructed or compelled to attend a grievance hearing.
- (h) *Failing to substantively respond to Mr McIntyre’s grievances* – Xe did not fail to respond to Mr McIntyre’s grievances. On 25 September 2020 Xe responded to the disadvantage grievances Mr McIntyre had raised on 22 September 2020, by acknowledging them and advising that it would investigate his grievances in accordance with its Grievance Policy. Xe advised Mr McIntyre that its HR Executive, Nigel Chambers, would lead the investigation into his grievances. Mr McIntyre was offered a meeting (“*grievance hearing*”) with Mr Chambers to discuss the nature of his grievances. Mr McIntyre rejected that offer on 25 September 2020, incorrectly claiming it “*was not compliant with New Zealand law*” and alleging that he had been constructively dismissed. Xe also provided a substantive response to Mr McIntyre’s personal grievances in an email from the VP - Global HR, Ms Kerri Lewis, dated 29 September 2020. Xe’s responses to Mr McIntyre’s personal grievances did not disadvantage him, and were not inconsistent with its legal obligations to him.

Authority’s findings

[69] Mr McIntyre formed an extremely adverse view of Xe as soon as he received the meetings request on 17 August 2020, and that coloured his perceptions and feelings about everything from that point on. Examples of this include;

- (a) Mr McIntyre’s counsel in an email dated 20 August 2020 describing Xe’s actions in sending a copy of the Disciplinary and Dismissal Policy with the

meeting request as “*intimidatory*” and amounting to a “*blatant threat to him that if he does not do whatever the company wants, it will dismiss him*”.

- (b) Mr McIntyre told the Authority “*As soon as I saw the [17 August 2020] letter I felt Xe was hostile towards me*”, and “*As soon as I saw the points in the letter I didn’t agree with, I thought it was a put up job, the company was hostile towards me, and it was premeditated.*”
- (c) Mr McIntyre’s claim that Xe had “*insisted*” he attend a grievance hearing, when it clearly had simply invited him to a meeting to discuss his grievances with Mr Chambers (the person who would be investigating Mr McIntyre’s complaint), in accordance with its Grievance Policy.
- (d) Mr McIntyre’s claim that Xe’s offer of the grievance meeting with Mr Chambers breached New Zealand law.

[70] Mr McIntyre’s subjective views were not objectively justified.

[71] Mr McIntyre’s extremely negative perception of Xe’s actions during the period in issue was inconsistent with an objective analysis of the evidence presented to the Authority, and therefore the reality of the situation.

[72] The 17 August 2020 meeting request was not evidence of a pre-meditated dismissal, it was a straightforward request to Mr McIntyre to explain his dealings on the “I” account, because the trades he undertook for “I” on 31 July 2020 appeared to be contrary to Xe’s no speculative trading policy and to communications that Xe managers had had with Mr McIntyre regarding the reduction of risk required on the “I” account.

[73] Xe wanted and needed to hear from Mr McIntyre. It was fair, reasonable and appropriate for Xe to want to meet with Mr McIntyre promptly to discuss the concerns it had about the “I” account. Xe had not predetermined the outcome of the meeting it wanted to have with Mr McIntyre. Xe intended to meet with Mr McIntyre as part of its information gathering stage, in an investigation that was wider than just speaking to Mr McIntyre.

[74] Because Mr McIntyre was unable to establish on the balance of probabilities that any of the matters he had identified had disadvantaged him in his employment, his unjustified disadvantage grievance claims do not succeed.

Did Xe breach its duty of good faith towards Mr McIntyre?

Mr McIntyre's breach of good faith claims

[75] Mr McIntyre claims that Xe:

- (a) Misled and deceived him;
- (b) Caused him significant harm as a result of its treatment of him;
- (c) Gave him reasonable cause to believe he could not have trust and confidence in his employer;
- (d) Failed to be active and constructive in maintaining a productive employment relationship;
- (e) Failed to be responsive and communicative;
- (f) Failed to provide Mr McIntyre with information relevant to the continuation of his employment.

Good faith obligations

[76] Section 4 of the Act sets out the statutory good faith obligations that apply to employment relationships. This requires parties in an employment relationship to deal with each other in good faith and not do anything that misleads or deceives each other. It also requires the parties in an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.²

[77] Where an employer is proposing to make a decision that may adversely impact on an employee's ongoing employment, s 4(1A)(c)(i) of the Act requires the employer to provide the employee with access to relevant information and an opportunity to comment on it before a final decision is made.

Authority's findings

[78] The Authority was not satisfied on the balance of probabilities that Xe had breached its good faith obligations regarding any of the issues identified by Mr McIntyre. In particular:

² Section 4(1A)(b)(i) of the Act.

- (a) Mr McIntyre was not misled or deceived by not being told of specific regulatory concerns, because Xe never alleged he had breached any regulatory obligations. Xe simply asked Mr McIntyre to meet to explain matters pertaining to the “I” account. Xe made the request in a straightforward way, so Mr McIntyre knew what he was expected to discuss at the investigation meeting, had it proceeded. Xe also made it clear that the meeting was a ‘please explain’ investigation meeting, not a formal disciplinary meeting, so Mr McIntyre was not misled or deceived by Xe about the nature of the proposed meeting.
- (b) Xe did not cause Mr McIntyre significant harm and it did not treat him in a manner that was contrary to its good faith obligations. Xe gave Mr McIntyre five days’ extra paid leave and offered him EAP assistance. Xe allowed him time to obtain counsel and the two investigation meetings Xe proposed were both adjourned at Mr McIntyre’s request.
- (c) Xe did not give Mr McIntyre reasonable cause to believe he could not have trust and confidence in it to act fairly or reasonably. The meeting request was reasonable and it fairly set out what was going to be discussed. The meeting request Mr McIntyre received on 17 August 2020 accurately identified Xe’s concerns made it clear that the proposed meeting was:
- Part of an investigation process to ascertain the factual background to our concerns and your perspective on events (in particular the points raised at (3) and (4) above) and is not a disciplinary meeting, nor have any decisions been made.
- (d) Xe did not fail to be active and constructive in maintaining a productive employment relationship. Nor did it fail to be responsive and communicative in its dealings with Mr McIntyre.
- (e) There was an acknowledgement that the documentation missing from “I’s” file and the complex nature of the products involved required Mr McIntyre’s input. Xe recorded that it was “*committed to understanding your perspective on the matters raised*”. Xe advised Mr McIntyre that his responses would be considered as part of its investigation, that the matter would be fully investigated before any decisions were made about what if any further action (including possible disciplinary action) might be required. Mr McIntyre was therefore on notice that while the meeting was not a formal disciplinary process, what he said

would influence Xe's decisions about what next steps were appropriate. On 21 September 2020 Mr Gill offered Mr McIntyre an opportunity to respond in writing to the matters raised in the 17 August meeting request, for Xe to consider as part of this investigation. Mr McIntyre did not take up that offer. Xe had legitimate concerns that needed to be raised and responded to. There was nothing in Xe's actions that objectively indicated that it had a closed mind about any of the issues it wanted to discuss with Mr McIntyre. The 17 August meeting request stated:

If you have information that you consider to be relevant – emails, documents (such as those missing outlined above) or people you believe we should speak to as part of this process please let us know and/or send them to [HR] and myself and [Ms McGoldrick] before this meeting takes place.

- (f) Xe did not fail to provide Mr McIntyre with information relevant to the continuation of his employment, and in particular regarding regulatory obligations. The Authority was satisfied that Mr McIntyre understood Xe's concerns and had sufficient particulars to know what it was that he was expected to respond to, and sufficient information to be able to respond. Mr McIntyre also knew what the potential consequences could be if his explanation was unsatisfactory. Xe did not allege that Mr McIntyre had breached regulatory obligations. The references to the regulatory obligations were to Xe's obligations under its licenses. The 17 August meeting invitation stated, "*As you are aware, Xe is subject to regulatory requirements in this regard and the matters raised in the letter have potentially significant consequences.*" However, as at 17 August 2020, Xe was not in a position to establish whether or not it faced any regulatory risks associated with the "I" account, because it had not had the benefit of Mr McIntyre's response to its concerns. Xe cannot have been in breach of good faith by failing to provide information about regulatory breaches that it had not, at that point, been able to clarify for itself. This was not a situation where Mr McIntyre was facing disciplinary allegations - he had simply been requested to attend a 'please explain' meeting.

[79] Mr McIntyre was therefore unable to establish that any of the matters relied on had involved Xe breaching its good faith obligations to him under s 4 and/or s 4(1A) of the Act. Accordingly, Mr McIntyre's breach of good faith claims do not succeed.

Did Xe breach any implied terms of Mr McIntyre's employment agreement?

[80] Mr McIntyre claims that Xe breached the implied terms that it would:

- (a) Provide him with a safe workplace; and
- (b) Treat him fairly and reasonably.

[81] The Authority was satisfied that Xe did provide Mr McIntyre with a safe workplace and that it did treat him fairly and reasonably.

[82] Mr McIntyre claims the redundancy of his Options Manager significantly increased his workload, which increased the risk of harm to him from stress. However, Mr McIntyre did not raise concerns about that while employed. A review of Mr McIntyre's workload compared to other traders did not indicate that it was out of proportion to what was reasonably expected or required of him.

[83] It was Xe's request that Mr McIntyre explain himself what appeared to have caused him significant stress and associated ill health. While that was unfortunate, it was nevertheless necessary and appropriate for Xe to have made those inquiries of him.

[84] The Authority did not consider the evidence supported Mr McIntyre's claim that Xe breached its obligations under the Health and Safety at Work Act 2015. Nor did the evidence establish that Xe had failed to provide Mr McIntyre with a safe work environment.

[85] Asking an employee to explain their actions, in the way that Xe did with Mr McIntyre, cannot reasonably be viewed as a breach of an employer's health and safety obligations under the Health and Safety at Work Act 2015. Nor is it a breach of the implied health and safety duties inherent in an employment relationship.

[86] The Authority was satisfied that Xe conducted its investigation into its concerns, and made inquiries of Mr McIntyre, in a fair and reasonable way.

Was Mr McIntyre dismissed?

[87] Mr McIntyre claims his resignation on 25 September 2020 was a constructive dismissal.

Constructive dismissal

[88] A constructive dismissal arises where an employer's actions amount to a 'sending away' that is equivalent to a dismissal, or where an employer's conduct is effectively a dismissal. For example, where the employer has compelled the employee to leave their employment, such as by being given a choice of resigning or being dismissed.

[89] This means that a resignation may still be considered a dismissal in law if the facts establish that the initiative for the ending of the employment came from the employer's actions or omissions, instead the employee's free (voluntary) choice.

Case law

[90] The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* identified three non-exclusive situations in which a constructive dismissal could occur:³

- (a) The employee is given a choice between resigning or being dismissed;
- (b) The employer follows a course of conduct which has the deliberate and dominant purpose of coercing the employee to resign; and
- (c) The employer's breach of duty causes an employee to resign, in circumstances where it is reasonably foreseeable that due to the seriousness of the breach the employee would not be prepared to continue working.

[91] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Offices IUOW Inc* recognised that an employer's breach of duty could give rise to a constructive dismissal, if the breach was sufficiently serious to make it reasonably foreseeable that the employee would not be prepared to continue to work under such circumstances.⁴ The Court of Appeal put the test in this way:

If a breach of duty is established then the employment institutions have to assess **whether a substantial risk of resignation was foreseeable, having regard to the seriousness of the breach.** (emphasis added).

³ [1985] 2 NZLR 372.

⁴ [1994] 1 ERNZ 168 (CA) at [172].

Authority's role

[92] The Authority must firstly determine whether there was a breach of duty by Xe, and if so, then establish whether the breach was sufficiently serious that it made Mr McIntyre's resignation foreseeable.

[93] The Authority must determine the real source of Mr McIntyre's resignation, to assess whether it was a genuine and voluntary resignation or a constructive dismissal by Xe. It is therefore important for the Authority to consider all of the circumstances associated with Mr McIntyre's resignation.

Mr McIntyre's constructive dismissal claims

[94] Mr McIntyre's Statement of Problem identifies the following matters to support his constructive dismissal grievance. He claims Xe:

- (a) Embarked on a course of conduct with the deliberate and dominant purpose of coercing him to resign;
- (b) Breached its duty to him to act fairly, reasonably and in good faith;
- (c) Breached its duty to provide Mr McIntyre with a safe workplace and to ensure, so far as reasonably practicable his health and safety;
- (d) Acted in a concerted and ongoing way that made it unreasonable to expect him to continue in his employment.

Embarked on course of conduct with the deliberate and dominant purpose of coercing resignation?

[95] Mr McIntyre relied on the following matters to support his claim that he had been coerced into resigning:

- (i) Commenced formal disciplinary investigation without first raising issues with him informally;
- (ii) Sent Disciplinary and Dismissal Policy without commentary or discussion;
- (iii) Changed permitted trading options policy without consultation;

- (iv) Insinuated Mr McIntyre had breached ‘regulatory obligations’, without detailing what they were;
- (v) Refused to provide extra paid sick leave for his entire absence;
- (vi) Replaced Mr McIntyre with a new employee before his employment had ended;
- (vii) Insisted Mr McIntyre attend a ‘grievance hearing’ in response to him raising disadvantage grievances;
- (viii) Failed to substantively respond to Mr McIntyre’s disadvantage grievances;
- (ix) Sent second calendar invitation for meeting before time for Mr McIntyre to propose alternative meeting time and date had expired;
- (x) Insinuated to others that Mr McIntyre had been suspended;
- (xi) Progressed with investigation while Mr McIntyre was sick;
- (xii) Declined to attend mediation.

[96] The matters in (i) - (viii) have been considered by the Authority, in the context of Mr McIntyre’s disadvantage grievance claims, and none of these concerns/claims were upheld. None of the examples in (i) - (viii) above are instances of Xe acting improperly and/or attempting to coerce Mr McIntyre into resigning. Accordingly, these matters do not support Mr McIntyre’s claim of constructive dismissal.

[97] In terms of item (ix) above - *second calendar invitation for meeting was sent before the time for Mr McIntyre to propose alternative meeting time and date had expired* – this was a simple administrative action that was taken to ensure that those who would be participating in the meeting had time booked out of their diaries to enable that to occur.

[98] Ms McGoldrick’s attempt to reschedule an investigation meeting on 21 August, by unilaterally sending Mr McIntyre a second meeting request on 20 August, was clumsy because the time she had given Mr McIntyre to revert to her with an alternate meeting time and date had not at that point expired.

[99] However, it needs to be viewed within context. Ms McGoldrick had indicated to Mr McIntyre when he asked for the first extension of time that Xe wanted to meet with him

that week (w/c 17 August), and Friday 21 August 2020 was the last day in that week. Ms McGoldrick was also following HR advice to ensure that everyone who would be attending the meeting had been allocated time in their diaries so that could occur.

[100] The second meeting invitation was not an attempt to coerce Mr McIntyre to resign. It was simply a practical step taken to ensure that the intended investigation meeting could proceed that week.

[101] In terms of item (x) above - *insinuated to others that Mr McIntyre had been suspended* – the evidence did not support this claim. Mr McIntyre’s perception about that was based on hearsay evidence from an unidentified person. There is no evidence that Mr Cheeseman and/or Ms McGoldrick communicated anything to staff about Mr McIntyre’s absence. The allegation that there was ‘an insinuation of suspension’ was therefore not made out on the evidence.

[102] When Mr McIntyre was on sick leave other colleagues of his were also away from work. That apparently caused some chatter among Mr McIntyre’s co-workers about why their colleagues were not at work. It is perhaps understandable that there would be some office gossip as to the whereabouts of colleagues in such circumstances.

[103] Mr McIntyre could have shared the reason for his absence with his colleagues, had he felt the need to. Xe cannot be held responsible for discussions and speculation that may have occurred amongst Mr McIntyre’s co-workers. It was not Xe’s responsibility to share information about Mr McIntyre’s absence with his colleagues, and it would have been improper for it to have done so.

[104] In terms of item (xi) - *progressed with investigation while Mr McIntyre was sick* - that was not an instance of Xe coercing Mr McIntyre to resign. These were serious matters, so it was to be expected that Xe would continue its investigations in Mr McIntyre’s absence.

[105] Xe accepted that Mr McIntyre was unable to meet in person while on sick leave, and it did not force him to do so. Xe offered him an opportunity to provide written feedback, but he elected not to do so.

[106] Xe fairly and reasonably continued with its own investigations. That included attempting to find the missing documentation, obtaining further information about the matters of concern, and obtaining advice on regulatory issues. That was appropriate in the

circumstances, so was not a breach of duty, and therefore does not support a claim of constructive dismissal.

[107] In term of item (xii) - *declined to attend mediation* – that was not an instance of Xe coercing Mr McIntyre to resign. Mr McIntyre lodged a Statement of Problem with the Authority and the parties were directed to, and attended mediation.

[108] Prior to that, Mr McIntyre raised disadvantage grievances on 22 September 2020. Xe responded on 25 September 2020 by offering him a meeting (‘grievance hearing’) with the person who was investigating his claims, in accordance with its internal procedures.⁵ That offer was refused by Mr McIntyre, who resigned that same day.

Breach of duty?

[109] In order to establish that a dismissal has occurred as a result of a breach of duty the Authority has to be satisfied that Mr McIntyre resigned as a result of a breach by Xe. This is the causation element of a constructive dismissal claim, which is the first limb of the Court of Appeal test *Electric Power Board*, with the second limb being foreseeability.⁶

[110] Mr McIntyre claimed that Xe breached its duty to:

- (a) Act fairly reasonably and in good faith; and
- (b) Provide a safe workplace, and to ensure his health and safety.

[111] The breach of good faith and implied terms of his employment agreement claims raised by Mr McIntyre have been determined by the Authority, and did not succeed. Nor did Mr McIntyre’s claim that Xe had failed to provide him with a safe workplace and/or had failed to ensure his health and safety. These matters therefore do not support his claim of constructive dismissal.

⁵ Xe’s Grievance Policy.

⁶ Above note 4.

Acted in a way that made it unreasonable to expect Mr McIntyre to continue in his employment?

[112] Xe did not act inappropriately or improperly. It did not conduct itself in a way that made it unreasonable to expect Mr McIntyre to continue in his employment or that made it reasonably foreseeable that Mr McIntyre would resign.

[113] Mr McIntyre's adverse response to Xe's 'please explain' meeting request was surprising. From the initial meeting request onward Mr McIntyre interpreted all of Xe's communications in a negative way.

[114] Mr McIntyre did not put forward the explanations he presented to the Authority when giving his evidence. That would have been an easy way for him to have addressed Xe's concerns at the outset. Instead Xe had to wait until the Authority's investigation meeting to hear Mr McIntyre's explanations.

[115] Mr McIntyre expected Xe to halt its investigation, without even getting his response to any of the concerns it had identified. Given the seriousness of the matters involved that was unrealistic. The situation with the "I" account was not something that Xe could or should have simply dropped. Mr McIntyre's explanation and knowledge of the "I" account was a critical element in enabling Xe to properly understand the entire situation.

[116] It was not unreasonable for Xe to require Mr McIntyre to assist it in understanding what had occurred and why. That is what the 17 and 20 August 2020 meeting requests sought to achieve. These requests did not make it reasonably foreseeable that Mr McIntyre would resign instead of providing his explanation to the matters of concern.

Timing of resignation

[117] The timing of events does not support Mr McIntyre's claim that he was constructively dismissed.

[118] Xe's offer inviting Mr McIntyre to a 'grievance hearing' was made by Mr Gill, who is based in the United Kingdom, to Mr McIntyre's counsel on 25 September 2020. That offer was rejected at 9.33am New Zealand time (NZT) on 25 September 2020 that was 10.33pm in the United Kingdom time (GMT).

[119] In rejecting that offer, Mr McIntyre's counsel stated that he required "*a legally compliant response to our correspondence by 5pm today*". The Authority finds that Mr Gill's offer of a grievance hearing was a legally compliant response to the disadvantage grievance claims that had been raised by Mr McIntyre.

[120] At 6.15pm NZT on 25 September 2020 (7.15am GMT) Mr McIntyre's counsel wrote to Mr Gill notifying Xe of Mr McIntyre's immediate resignation, and constructive dismissal grievance. Xe therefore only had from 10.33pm GMT to 7.15am GMT on 28 September 2020 to reply to Mr McIntyre's counsel.

[121] Mr McIntyre did not give Xe a proper opportunity to substantively respond to his personal grievance claims before resigning. Although Xe provided a substantive response, in an email from Ms Lewis on 29 September 2020, seven days after the disadvantage grievances had first been raised, by then Mr McIntyre had resigned.

[122] Mr McIntyre's request for a substantive response to his grievances by 5pm NZT on 25 September 2020 was unreasonable. Mr Gill was based in the United Kingdom and the email requesting a response by 5pm that day had been sent to outside of the United Kingdom's normal business hours.

[123] Mr McIntyre's resignation was also sent to Mr Gill before the commencement of the United Kingdom's normal business hours. There was therefore no real or realistic opportunity for Xe to have substantively addressed Mr McIntyre's issues before he resigned. To that extent his resignation was a *fait accompli*.

Was this a genuine and voluntary resignation?

[124] There was no action by Xe that could be viewed as 'the straw that broke the camel's back'. The parties were in ongoing communications. Mr McIntyre had raised grievances, Xe had offered to meet with him to discuss his complaints, he had declined that offer, and that response had been accepted by Xe.

[125] No new date had been set for the investigation meeting and Mr McIntyre had not provided a substantive explanation to any of the matters of concern Xe had identified.

[126] The Authority considers that Mr McIntyre's actions were unreasonable. He had rejected the offer of a grievance hearing. He had sent an ultimatum outside of business hours

and then resigned before the recipient had an opportunity to review it. This was an arbitrary and unreasonable timeframe.

[127] The Authority accepts that Mr McIntyre was genuinely experiencing serious health problems that were aggravated by stress. However, the Authority considers it more likely than not that this stress arose from Mr McIntyre's subjective belief that he was going to lose his job, rather than as a result of any objectively unfair, unreasonable or improper actions by Xe.

[128] While Mr McIntyre understandably made the decision to resign to alleviate the real stress he was under, that was not a decision that Xe is legally responsible for.

[129] The Authority finds that Mr McIntyre's resignation is more likely than not a genuine and voluntary resignation, made for legitimate and understandable personal reasons, rather than a constructive dismissal that arose from Xe's alleged unjustified actions and/or breaches of health and safety, good faith, duties and/or implied contractual terms.

[130] Mr McIntyre was not objectively entitled to form the view that Xe had breached and/or no longer intended to be bound by the terms of his employment agreement. None of Xe's actions that Mr McIntyre relies on to support his constructive dismissal claim made it reasonably foreseeable that there was a substantial risk of him resigning. So, even if Mr McIntyre had been able to establish a breach of duty by Xe, the second limb of the *Electric Power Board* Court of Appeal test of foreseeability would still not have been established.⁷

[131] Mr McIntyre's response to Xe's meeting request on 17 August, and the subsequent communications, were not a reasonable, proportionate or understandable response to Xe's attempts to discuss the "I" account with him.

Should the Authority issue Xe with a recommendation?

[132] Mr McIntyre's Statement of Problem asks the Authority to recommend that Xe take steps to prevent similar employment relationship problems occurring. However, neither party provided evidence or submissions on that issue.

⁷ Above note 4.

[133] Xe is in receipt of advice from experienced counsel. The situation that evolved with Mr McIntyre was uniquely fact dependent on his personal situation and circumstances. The Authority concludes that a recommendation is not necessary or appropriate.

Summary of findings

[134] The Authority makes the following findings:

- (a) Mr McIntyre was not disadvantaged in his employment;
- (b) Mr McIntyre's disadvantage personal grievance claims for unjustified action do not succeed;
- (c) Mr McIntyre was not dismissed from his employment. His employment ended as a result of his genuine and voluntary resignation;
- (d) Mr McIntyre's claims that Xe breached its good faith duties to him does not succeed;
- (e) Mr McIntyre's claims that Xe breached its duty to provide him with a safe workplace and/or to ensure his health and safety did not succeed;
- (f) Xe did not fundamentally breach any duties to Mr McIntyre that would have made it reasonably foreseeable that he would have not been prepared to continue working in the face of such breaches;
- (g) Mr McIntyre's personal grievance claim for a constructive dismissal does not succeed;
- (h) Mr McIntyre's claim for penalties does not succeed;
- (i) Mr McIntyre's request for a recommendation does not succeed;
- (j) Xe as the successful party is entitled to a contribution towards its actual legal costs.

What if any costs should be awarded?

[135] The parties are encouraged to resolve costs by agreement. However, if that does not occur then the following timetable applies:

- (a) Xe's costs submissions are to be filed and served within 14 days of the date of this determination;

- (b) Mr McIntyre's costs submissions are to be filed and served within 28 days of service of Xe's costs submissions, to account for the intervening Christmas/New Year break; and
- (c) Xe is not required to file reply cost submissions, but it may elect to do so. In which case any reply costs submissions are to be filed and served within 7 days of service of Mr McIntyre's cost submissions. If Xe decides not to file reply costs submissions then can it please advise the Authority of that at the earliest opportunity.

[136] The Authority is likely to adopt its usual notional daily tariff based approach to costs, with the notional starting tariff being adjusted to reflect the particular circumstances of this case. The parties are therefore invited to identify any factors they say should result in the notional starting tariff being adjusted.

Rachel Larmer
Member of the Employment Relations Authority

