

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 154
3079955

BETWEEN KIRSTY BAXTER
 Applicant

AND DAMERELL GROUP
 PROPERTY MANAGEMENT
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Tasha Ioelu, counsel for the Applicant
 Andrew Schirnack, counsel for the Respondent

Investigation Meeting: 17 and 18 June 2020

Determination: 3 May 2021

DETERMINATION OF THE AUTHORITY

- A. From 17 August 2015 to 31 March 2018 Kirsty Baxter was an employee of Damerell Group Property Manager Limited (DGPM), not an independent contractor.**
- B. Within 28 days of the date of this determination DGPM must pay Ms Baxter arrears for annual leave and public holiday pay entitlements arising from her employment from 17 August 2015 to 31 March 2018. The parties have leave to seek a further determination if they cannot agree the amount now due for those entitlements. DGPM must also pay Ms Baxter interest on the amount due, calculated from 30 August 2019 to the date of payment.**

- C. Ms Baxter's employment with DGPM did not end by constructive dismissal but she was disadvantaged by actions of DGPM prior to her resignation.**

- D. DGPM must pay Ms Baxter \$6,000 as compensation for the injury caused to her feelings by the unjustified disadvantage. This sum must be paid within 28 days of the date of this determination.**

- E. Costs are reserved. A timetable is set for lodging memoranda if an Authority determination of costs is needed.**

Employment Relationship Problem

[1] Kirsty Baxter resigned from her role as a property manager for Damerell Group Property Management Ltd (DGPM) on 14 July 2019, giving two months' notice. Ms Baxter worked for DGPM's property management business for four years.

[2] In giving her notice, by email, Ms Baxter said she was unhappy with how she and other staff had been treated, particularly during the previous six months. She referred to "events" which had made her question her confidence, including "sanctions for mistakes made during the last six months".

[3] Soon after her employment with DGPM ended Ms Baxter lodged an application in the Authority seeking resolution of three problems.

[4] Firstly, Ms Baxter sought a finding that the real nature of her relationship throughout the entire time she worked for DPGM was as employee. From 17 August 2015 to 31 March 2018 Ms Baxter had worked under the terms of a written "contract for services" describing her as an independent contractor. From 1 April 2018 this was replaced with a new written agreement in which she was described as an employee.

[5] Secondly, Ms Baxter sought findings she was unjustifiably disadvantaged by actions of DPGM. Those actions were described as requiring her to pay for a mistake that had cost the business money, failing to provide her with adequate support in carrying out her duties and making changes to her work and role without seeking her consent or agreement.

[6] Thirdly, Ms Baxter sought a finding that her employment ended by constructive dismissal, not a freely given resignation. She said her decision to resign was caused by DGPM breaching various duties owed to her.

[7] Ms Baxter also sought a finding that various alleged actions of DGPM breached its good faith duties to her under s 4 of the Employment Relations Act 2000 (the Act).

[8] If the findings Ms Baxter sought about her employment status and personal grievances were made, she sought five remedies: an order for arrears of holiday pay and other entitlements for the period she was incorrectly treated as an independent contractor; reimbursement of \$1,018.20 she had paid towards the cost incurred by a mistake she made in carrying out her work; lost wages; compensation for injury to her feelings and the imposition of penalties on DGPM for breaches of her employment agreement and its good faith obligations.

[9] DGPM denied Ms Baxter's claims about the duration of its employment relationship with her and denied that its actions gave grounds for the personal grievances she alleged.

[10] Shortly before the Authority's investigation meeting DGPM refunded Ms Baxter the sum of \$1,018.20 she had paid towards the costs of her work error. Through a letter from its lawyers DGPM said it believed Ms Baxter made that payment voluntarily but, on seeing her witness statement, accepted she "was not comfortable with the way this issue played out". It apologised to her for the upset caused over it. While reimbursement of the amount she had paid was therefore no longer in issue, the events surrounding how she came to make that payment remained an instance relevant to Ms Baxter's claims that DGPM had treated her unfairly.

The Authority's investigation

[11] The following witnesses provided written statements for the Authority's investigation:

- Ms Baxter;
- her sister Sophie Baxter, who worked as a property manager for DGPM from October 2014 to January 2018;
- Ruby O'Donnell who worked as a property manager for DGPM and then for a related company from March 2016 to August 2019;

- Gower Buchan, a director and shareholder of DGPM, who had recruited Ms Baxter to work at DGPM at the suggestion of her sister Sophie;
- Aaron Haabjoern, a director and shareholder of DGPM, who held the role of chief executive officer in the business; and
- Natalie Gonthier, who had worked at DGPM from June 2019 to April 2020 as a property manager, taking over responsibility for some properties in the portfolio Ms Baxter managed.

[12] Each witness attended the investigation meeting. Under oath or affirmation, they answered questions from me and the parties' representatives. The representatives also provided written submissions on the issues for determination and made oral closing arguments on those submissions.

[13] The written and oral evidence of each witness, and relevant documentary evidence, has been closely considered in preparation of this determination but it was not necessary to record here all the evidence and submissions received. As s 174E of the Act permits, this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. It has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed.¹

[14] Conclusions on disputed facts are reached on the balance of probabilities, that is an assessment of what is more likely than not to have occurred. This assessment weighs what witnesses said and the extent to which points of difference can be reliably corroborated, both from the evidence of others and from documents created around the relevant time and events. The resulting conclusions are made on an objective basis, that is what would have been apparent to a well-informed and impartial observer at the time, rather than later subjective recall or accounts a witness may give in their evidence about what they thought or meant at the time.

The issues

[15] The issues requiring investigation and determination were:

¹ Employment Relations Act 2000, s 174(C)(4).

- (a) Was the real nature of Ms Baxter's relationship with DGPM between 17 August 2015 and 31 March 2018 as an independent contractor or as its employee?
- (b) If Ms Baxter was an employee, should payment of arrears be ordered for entitlements to annual leave and KiwiSaver contributions in that period?
- (c) In respect of her employment, from at least 1 April 2018, was Ms Baxter unjustifiably disadvantaged by various identified actions of DGPM?
- (d) Was Ms Baxter constructively dismissed because her resignation was caused by DGPM breaching its duties and good faith obligations to her?
- (e) If DGPM acted unjustifiably, what remedies should be awarded to Ms Baxter, considering:
 - Lost wages; and
 - Compensation for humiliation, loss of dignity and injury to her feelings?
- (f) Should any remedies awarded then be reduced (under s124 of the Act) for any blameworthy conduct by Ms Baxter that contributed to the situation giving rise to her grievance?
- (g) If a breach of good faith obligations is established, should a penalty for the breach be imposed on DGPM?
- (h) Should either party contribute to the costs of representation of the other party?

The real nature of the relationship: contractor or employee?

The legal standard

[16] The difference between the two forms of working relationship is broadly defined in this way:²

An employee works for the employer, within the employer's business, to enable the employer's interest to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

[17] Section 6 of the Act provides the following direction to the Authority when called upon to determine, in the circumstances of any particular case, whether a person worked as an employee or an independent contractor:

² *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [30].

6 Meaning of employee

- (1) In this Act, unless the context otherwise requires, **employee**—
 - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the court or the Authority—
 - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[18] “All relevant matters” include:³

- The written and oral terms of the agreement between the parties (which will usually contain indications of their common intention concerning the status of their relationship);
- Divergences from, or supplementation of, those terms and conditions which are apparent from how the relationship operated in practice;
- Features of control of the work done and integration into the work of the business of the hirer; and
- Indications as to whether the person effectively worked on their own account, called the ‘economic reality’ test.

[19] The essential issue is whether the person, in the work they performed, served their own business or the business of someone else. However each inquiry is intensely fact-specific so the resulting weight given to the relevant factors for assessment may vary from case to case but the answers to these common questions may assist in determining the reality of the relationship:⁴

- Did the hirer have the right to exercise detailed control over the way the work was performed, so far as there is scope for such control?
- Was the person integrated into the hirer’s organisation?
- Was the person required to wear a uniform and/or display material that associates them with the hirer’s business?

³ *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34 at [32].

⁴ *Leota*, above n 2, at [3] and [38].

- Did the person supply and maintain any tools or equipment?
- Was the person paid according to task completion, rather than receiving wages based on time worked?
- Did the person bear any risk of loss, or conversely have any change of making a profit from the job?
- Was the person free to work for others at the same time?
- Could the person subcontract the work or delegate performance to others?
- Was tax deducted by the hirer from the person's pay?
- Did any business goodwill accrue to the hirer?
- Did the person receive paid holidays or sick leave?
- Did the agreement describe the person as an independent contractor?

What common intention do the parties' written and oral terms of agreement show?

[20] Closing submissions made for Ms Baxter aptly described the terms of the contract for services with DGPM she had signed in July 2015 as presenting a mixed picture as to whether she was an employee or a contractor.

[21] The contract expressly described her role as providing services as an independent contractor. However other terms were more suggestive of an employment relationship. It said she was to be "based at the company's office" with DGPM providing, at its expense, office facilities and access to required support staff. She was required to perform her work with "due diligence and ... due regard to the promotion and protection of the company's business". She was required to comply with the company's risk management policy, office rules, policy procedures and performance standards.

[22] The contract required DGPM to maintain a current professional indemnity insurance policy indemnifying Ms Baxter in all proceedings, claims and costs. This is more typical of an employee relationship, covered by their employer's insurance, rather than a frequent requirement of independent contractors to confirm to their hirer that they have their own insurance cover.

[23] Unless she got DGPM's prior consent in writing, Ms Baxter was also prohibited from undertaking any other type of work in her own name or for any other company that conflicted with her obligations to DGPM. Such a restriction was akin to the

exclusive service usually required of employees rather than the freedom independent contractors more typically have to provide services to more than one client.

[24] Similarly, another term said Ms Baxter could not assign her obligations under the contract without DGPM's prior written consent and she was prohibited from permitting "vicarious performance" of her obligations. This required her to carry out her duties, typical of an employee, and not to engage others to help her do so. It differed from arrangements whereby an independent contractor may engage her or his own employees or subcontractors, paid at lower rates, to carry some tasks and thereby generate a profit on providing those services to the hirer.

[25] Most significantly the following clause provided for direct daily control of her work:

8.2 The Property Manager also acknowledges that they will abide by any directions to them by the Directors of the business on a day-to-day basis.

[26] Clause 12 confirmed any new listings Ms Baxter gained were DGPM's property. It also limited her discretion to adjust fees the company would receive for providing services to those clients:

12.1 All Management Agreements obtained by the Property Manager during the term of this contract shall be and will remain the property of the Company. Upon termination the Property Manager will not encourage, entice, or in any way make efforts to have any prospective client or clients who have or are considering entering into a Management Agreement with the Company, withdraw a Management Agreement from the Company.

12.2 The Property Manager will not negotiate or alter the fee paid to the Company without the express consent of a Company Director on each occasion.

[27] The 2015 contract also set a commission structure in which Ms Baxter was to be provided with an initial 'gifted' portfolio of 30 or so properties to manage, a guaranteed minimum income of \$45,000 for the first year and a graduated scale of commissions for managing additional properties and securing new properties to let.

[28] Three aspects of the contract did however support an analysis of its terms as solely providing an independent contracting arrangement. Firstly, it included a term stating nothing in the contract or the relationship shall be construed as constituting an employment relationship. However, as is clear from the direction given in s 6 of the

Act, such descriptions by the parties are not, on their own, to be treated as determining the nature of the relationship.

[29] Secondly, the contract required Ms Baxter to provide her own car, mobile telephone, laptop computer and iPad tablet. Supplying tools or equipment for the job often indicates a contracting arrangement. However some employees may provide their own ‘tools of the job’, such as chefs bringing their own knives for restaurant work and carpenters having their own tools for use on building sites. Arguably what Ms Baxter had to bring as her tools of trade were, for a property manager out and about around properties on a daily basis, akin to a knife or a hammer in other occupations.

[30] Thirdly, the contract’s term on tax was one applicable to contractors. Ms Baxter was required to supply DGPM with her GST registration number and “render a tax invoice for all commissions” charged. DGPM was to deduct only withholding tax from all commission payments.

[31] Overall, while its terms were a mixed picture, the contract set levels of direction and limits on discretion more akin to an employment agreement than one applicable to an independent contractor. Whatever new business was built by gaining new lettings was declared to be DGPM’s property. It left no real scope for Ms Baxter to develop an entrepreneurial enterprise of her own.

The relationship in practice

[32] How the relationship operated in practice is usefully analysed through the lenses of the three common law tests – of control, integration and economic reality.

Control

[33] The evidence of Ms Baxter and Sophie Baxter established a high degree of control and supervision applied to their work in practice. In Sophie Baxter’s case this, in part, resulted from measures Mr Buchanan implemented to manage some problems specific to how she performed her role.

[34] Putting aside that particular aspect of how DGPM managed her sister’s work, Ms Baxter was clearly not able to set her own hours and pattern of work in the manner more typical of an independent contractor. She was expected to attend a weekly meeting with DPGM’s manager to discuss what property managements had been gained

and lost, any issues with current managed properties and the tenants in them and, more generally, ways to improve the business. She was also expected to seek approval for plans to take leave.

[35] To some degree, there was a ‘swings and roundabouts’ approach to when she carried out her work. She would arrive at the office between 9am and 9.30am but often worked later in the evening, attending property inspections and meeting landlords to discuss existing or new lettings. She sometimes spent time working at cafes, rather than returning to the office between appointments to inspect properties with tenants or with property owners who might agree to manage those dwellings. She received frequent phone calls from Mr Buchanan to discuss work matters, including her whereabouts and plans for meetings and inspections during the day. And Ms Baxter gave credible evidence of being expected to make arrangements with others in the business to ensure she or one of the other property managers were at the office when reception staff were away on breaks or on leave. Overall, the way her work was carried out in practice was typical of an employed sales representative ‘on the road’ visiting clients or customers at various premises and returning to a base office at some times throughout the day.

[36] A significant indicator of the reality of the relationship was the degree to which the transition to a formal employment agreement in April 2018 made any real change to Ms Baxter’s work and how it was already carried out. DPGM made the change because reform of tenancy law at that time had banned the use of ‘letting fees’ which had been an important part of its revenue stream. As property managers’ pay was based, in part, on commission from those fees, DPGM needed to change its remuneration structure. Ms Baxter, previously paid a base income with commission on letting and other fees, moved to a salary comprising a base income and “new management” incentives. Those incentives comprised a sliding commission scale for securing agreements with landlords to manage their properties.

[37] Significantly, little changed in what Ms Baxter did in carrying out her work on a day-to-day basis. She worked in the same position, attending meetings scheduled for her by DPGM. She remained based in DPGM’s offices, with regular supervision by Mr Haabjoern of her performance and interactions with clients of the business.

Integration

[38] Observed objectively, including in this case from the point of view of a tenant or property owner dealing with Ms Baxter, her work was clearly integral to and integrated with the business of DPGM, operating under Ray White branding. Her role was core to DGPM's business, not incidental or supplementary.

Economic reality

[39] While Ms Baxter earned commission from gaining new lettings, the accounts for managing those properties remained with DPGM. The benefit of her work in growing that business was controlled and retained by DPGM. What she gained from that work was experience and skills, as an employee would, but she could not grow a separate business of her own.

[40] Ms Baxter also, effectively, provided exclusive service to DGPM. There was no realistic prospect that she could have provided separate services to other landlords at the same time as working the hours she worked for DGPM. Neither could she realistically have filtered out information and contacts gained in her role with DGPM from other information and contacts she could then have used solely for any personal business interests.

[41] While Mr Buchanan suggested in his evidence that Ms Baxter could have, if she wished to do so, hired her own part-time administrative assistant to carry out some of her role, the substance of her role as a property manager dealing with landlords and tenants was not something she was free to have others carry out on her behalf.

[42] Tax status – with PAYE deductions taken from an employee's income or withholding tax kept back from payments to a contractor – may be a strong indicator of the real nature of the relationship. This is particularly so where a person has actively sought tax arrangements that apply to contractors and then enjoyed the benefits of various deductions for expenses and other business-related costs that may apply to the accounting of their tax liability. A dim view may be taken should that person later say they were really an employee.

[43] Once working for DGPM Ms Baxter had generated tax invoices using a system the company provided for her to do so. If she wanted to be paid her commissions Ms

Baxter had to use that function in DGPM's system. She had not actively sought or requested an invoicing arrangement.

[44] Her evidence that she had not fully understood the nature of the relationship at its outset was not particularly compelling. She has a law degree, which she referred to in her email signoff while working for DGPM. As disclosed in her oral evidence, Ms Baxter's studies for that degree included the subjects of contract law and employment law. She could have been expected to have a significantly better understanding than the average person of the differences between an independent contractor and an employee. She also had access to and sought some professional accounting advice about how the contracting arrangement would work. However, the evidence overall suggested the independent contracting description given to her relationship with DGPM was something she had no choice in but had simply acquiesced to in order to secure the role. She accepted the arrangement to get the job rather than as means of pursuing some tax or other benefit from it.

Industry practice

[45] While industry practice may assist in determining the real nature of a working relationship, it was a neutral factor in assessing Ms Baxter's situation.

[46] Career information on a government website identified about 4,600 people as working as property managers with Ministry of Business data indicating around 40 per cent of them were described as "self-employed".⁵ This showed both contracting and employment options were possibilities within industry practice. In Ms Baxter's case other factors were determinative of which categorisation best described the actual nature of her relationship with DGPM.

Conclusion on status

[47] Weighing the evidence relevant to the factors considered above, the real nature of the relationship between Ms Baxter and DGPM was, from its outset, one of employment rather than independent contracting. The notion she had, in her role as a property manager for DGPM, embarked on an entrepreneurial enterprise of her own was a fiction. While there were elements, in respect of the taxation arrangement at least, in which she may have knowingly participated in that illusion, the level of control

⁵ www.careers.govt.nz/jobs-database/finance-and-property/property-services/property-manager

and direction of her work, objectively rather than subjectively assessed, meant she was in reality DGPM's employee throughout.

[48] A useful cross check to that conclusion could be made by considering the answers, in Ms Baxter's particular case, to the common questions asked above at paragraph [19] of this determination.

[49] The way Ms Baxter performed her work was subject to detailed control, including, as part of her role for DGPM and its clients whose properties were under management, meeting the regulatory requirements for renting. Her role was indistinguishably integrated into and core to DGPM's business. Her work bore the branding of the franchise under which DGPM operated its business. She bore no risk of loss and no prospect for profit outside the commission she earned from securing new lettings. She was not, realistically, free to work for others at the same time or subcontract the duties she was required to perform for DGPM. The business goodwill developed from her work, through contact with property owners who might provide additional lettings and the fruits of doing so, contractually belonged to DGPM.

[50] The answers to other questions concerning tax, supplying tools, taking holidays and how the relationship was formally described in her written agreement merely reflected what DGPM had done in setting up the arrangement rather than its reality.

Arrears claim

[51] In light of the conclusion that Ms Baxter was really an employee, DGPM is liable to pay her arrears due for annual leave and public holidays to which she was entitled in the period from 17 August 2015 to 31 March 2018.

[52] In August 2019 Ms Baxter wrote to Mr Buchanan and Mr Haabjoern saying she had annual leave entitlements for that 2015-2018 period totalling 418 hours.

[53] An arrears order in this case needed a broad assessment of the outstanding entitlements, from which the parties could then practically calculate the amount DGPM must pay. For that purpose the period for which entitlements are due is to be taken as comprising two full years and eight months. For each whole year Ms Baxter was entitled to be paid annual leave of 20 days (that is four weeks) and 11 public holidays, that is 31 days' pay. For the part-year, the total is to be taken as a further 14 days of annual leave and seven paid public holidays. The result is an entitlement to 54 days of

paid annual leave and 29 days of paid public holidays, totalling 83 days, for the two year and eight month period. The parties must apply the provisions of s 24 and s 49 of the Holidays Act 2003 to calculate the amount due, based on the relevant records regarding Ms Baxter's salary and actual earnings.

[54] Any paid leave Ms Baxter actually took during the relevant period should be excluded from the calculation. In her oral evidence Ms Baxter said she "took a day off here or there to have a long weekend, but not more than two or three days at a time."

[55] Also excluded from these calculations is any amount for KiwiSaver employer contributions. Ms Baxter claimed these were due to her but there was no evidence to establish she had previously joined the scheme or that, had she been working from 2015 under the provisions of an employment agreement, she would necessarily have opted to join the scheme and generated an entitlement to KiwiSaver employer contributions. This situation did change when her employment became subject to the terms of the employment agreement operative from 1 April 2018. The 2018 agreement included a KiwiSaver contribution clause. The two payslips in evidence relating to that later period show adjustments to her remuneration were made for KiwiSaver contributions from her as the employee and by DPGPM as the employer. However the clause provided for her total salary to be inclusive of whatever contribution her employer made. This was referred to on those payslips as the "salary sacrifice" amount. On the balance of probabilities, the same total remuneration approach would have been taken in the counterfactual scenario of DGPM treating Ms Baxter as an employee from the outset, that is from 17 August 2015. Accepting as probable that she would have opted into those contribution arrangements at that earlier time, her total income (comprising the salary and commission paid) would have remained the same. And during that supposed period of being a contractor no deductions were, in fact, made or kept by DGPM for transfer to IRD for payment into a Kiwisaver account. Rather Ms Baxter kept the total salary and commission payments made to her during that period, so DGPM was not liable now for additional payments on that account.

[56] DGPM is however liable to pay Ms Baxter interest on the amount calculated as due to her for the annual leave and public holiday entitlements. Interest on the amount due for those entitlements must be calculated using the Ministry of Justice civil debt calculator for the period from 30 August 2019 to the date of payment.⁶

⁶ www.justice.govt.nz/fines/civil-debt-interest-calculator.

[57] The amount due in payment of arrears and interest is to be paid within 28 days of the date of this determination.

[58] Leave is reserved for the parties to revert to the Authority for further determination should they be unable to agree on the payment due.

Unjustified disadvantage and breach of good faith

[59] Ms Baxter's application to the Authority identified six areas in which DGPM, through the actions or inaction of Mr Buchanan or Mr Haabjoern, were said to have unjustifiably disadvantaged her. These were summarised as:

- (a) What was done about the tenancy error she made, including requiring her to contribute financially to meeting costs to the business resulting from that error;
- (b) Failing to provide her with a healthy and safe workplace and to support her when she needed help;
- (c) Removing a number of properties under her management without her consent;
- (d) Announcing Ms Baxter was taking a new role, without first obtaining her agreement;
- (e) Changing her system access password after she resigned; and
- (f) Refusing to engage with her on a number of post-resignation issues.

(a) Conduct over a work mistake

[60] In March 2019 tenants in a property managed by Ms Baxter asked for early release from their fixed-term tenancy agreement. They asked this be permitted without charging them a fee for breaking the term. As Ms Baxter was able to find new tenants to replace them, she agreed to the request. She made a verbal agreement with the existing tenants about the date they would vacate those premises. The date was not recorded in writing. Relying on this verbal agreement Ms Baxter then told the new tenants when they could move in. The new tenants signed their tenancy agreement on that basis. Soon afterwards the outgoing tenants told Ms Baxter they could not vacate the property until a fortnight later than verbally agreed. This meant the new tenants could not move in on the date set in their recently-signed tenancy agreement.

[61] Ms Baxter talked with Mr Haabjoern and an external advisor on tenancy matters about how to deal with the situation. Relying on her understanding of what Mr Haabjoern told her, Ms Baxter drafted and sent a firmly-worded email message to the new tenants setting out limits on what they could claim as compensation for the delay and what proof of financial loss they would have to provide. Mr Haabjoern saw the text of the email before it was sent and in an email to Ms Baxter said “that’s fine”.

[62] Soon after Ms Baxter had sent her email a parent of one of the new tenants contacted a senior Ray White executive and then Mr Buchanan to complain about the situation and to demand an appropriate remedy. Mr Buchanan became concerned at the prospect of negative publicity for DGPM because a parent of one of the new tenants was said to be involved in the media.

[63] From talking to the parent who contacted him, and from seeing Ms Baxter’s email to the new tenants, Mr Buchanan realised the situation arose from an error by Ms Baxter – that was not confirming in writing when the existing tenants had agreed to vacate the property. He then made an angry telephone call to Ms Baxter. He told her to arrange alternative accommodation for the new tenants until their property was available. He also told her she would be liable for meeting the costs of her mistake.

[64] Ms Baxter arranged for a property for the interim use of the new tenants to be booked through Airbnb. She said Mr Buchanan had, in subsequent conversations, strongly recommended she consider paying half the cost of that booking. In a separate conversation, Mr Haabjoern reiterated Mr Buchanan’s suggestion.

[65] In Mr Haabjoern’s account of that conversation he said Ms Baxter told him she did not think it was fair she should pay the full cost of the alternative accommodation booked for the tenants. Instead, he said, she suggested paying a third of those costs was fair as what happened was her responsibility.

[66] The matter was also the subject of a Tenancy Tribunal application involving the vacating tenants. DGPM, on behalf of the property owner, was not successful in that application because there was no written evidence of an agreed departure date.

[67] After the tribunal decision was released in late April Ms Baxter made arrangements for \$1,018.20 to be deducted from her pay. Her email to DGPM’s payroll

accountant said she agreed to that amount being deducted from her wages as it was one third of the cost of the Airbnb accommodation.

[68] While she was not prompted to make that payment at that time by Mr Buchanan or Mr Haabjoern repeating their earlier suggestions to her, Ms Baxter's evidence was that she had done so because she felt pressured by what Mr Buchanan had said at the time of the event some weeks earlier.

[69] Another relevant factor in Ms Baxter deciding to make that payment was that Ms Baxter had been asked around that time to consider becoming a shareholder in DGPM. She subsequently did not take up that offer but, at the time, it may have influenced how she dealt with the situation, making the payment to demonstrate she was willing to take more responsibility than would typically apply to an employee.

[70] In his oral evidence Mr Haabjoern accepted he knew Ms Baxter had made the payment in April, although neither he nor Mr Buchanan had pressed her at that time to do so. He said he thought she had been happy to make the payment but now accepted he should have told her not to.

[71] Mr Buchanan, also in his oral evidence, said he also now accepted that such a mistake was simply a cost of business to DGPM. Although Ms Baxter was a senior property manager, who should not have made the error over recording the vacating date, Mr Buchanan accepted she should not have been asked to contribute to meeting the resulting costs to DGPM.

[72] Although the wrong was in part remedied by a belated repayment to Ms Baxter after her grievance proceedings began, she was unjustifiably disadvantaged by how she was treated in that situation. Mr Buchanan had spoken angrily to her after learning about it but had not adequately investigated how it arose. If he had done so, he would have found that Mr Haabjoern had seen and approved the email communication with the new tenants. Mr Haabjoern was not responsible for Ms Baxter's initial error but he was involved in that further stage which made the situation, and possibly the resulting expenses, worse for the business. He faced no consequence for the error of judgement made in the tone of the email sent to the tenants, which had enflamed the situation, but Ms Baxter did. That was unfair.

[73] A fair employer could not have failed to give Ms Baxter a proper opportunity to explain or, in the circumstances in which she was DGPM's employee at the time, could not reasonably have suggested and then accepted payment from her for the mistake made in the course of carrying out her duties. An employee should not be treated as their employer's insurer or be required to contribute to the cost of every unintended error made in the course of carrying out their duties.⁷

(b) *Providing support and a safe workplace*

[74] An employer has a duty to maintain a safe workplace for its staff. This is a statutory requirement and a term implied in every employment agreement.

[75] This duty includes taking all reasonably practicable steps to prevent risks to the health and safety of a worker. In Ms Baxter's case, the agreement governing her employment from 1 April 2018 expressly addressed those health and safety obligations:

22. Health and Safety

22.1 We are committed to ensuring the good health of all our employees, to safe working conditions and to the safe operation of all equipment in the workplace. To facilitate these objectives you agree that:

- a. you will take responsibility for ensuring your own safety and that of fellow employees and clients, including complying with all health and safety statutory requirements, policies, procedures, training, guidelines and recommendations given to you by us or health and safety consultants.
- b. you will immediately report all work related injuries, accidents, near misses and hazards or potential hazards to us, whether or not the accident took place on our premises ...

[76] Failure by an employer to provide a workplace which meets such health and safety standards, whether set by statute or by the express and implied terms of an employment agreement, is grounds for a claim of unjustified disadvantage.⁸

[77] Some 19 or so years ago the Court of Appeal summarised the obligations of employers and workers in its decision in *Attorney-General v Gilbert*.⁹ The court's summary remains accurate and apposite, although the relevant legislation is now the Health and Safety at Work Act 2015:

⁷ *George v Auckland Council* [2013] NZEmpC 179 at [147].

⁸ *FGH v RST* [2018] NZ EmpC 60 at [191] and [198].

⁹ *Attorney-General v Gilbert* [2002] 1 ERNZ 31 at [83].

... The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of “all practicable steps”. What is “reasonably practicable” requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s 19 the employee must [herself or] himself take all practicable steps to ensure [her or] his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer’s obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[78] In assessing Ms Baxter’s claim that DGPM failed to meet its obligations to her, the Authority must consider whether DGPM could have reasonably foreseen the risk of any harm found to have been caused to her. This assessment must take account of what was known at the relevant times during her employment rather than with the benefit and bias of hindsight.¹⁰

[79] Ms Baxter claimed DGPM has unjustifiably disadvantaged her by failing to provide her with a healthy and safe workplace, including by not supporting her when she needed help. She submitted DGPM should have foreseen she was at risk of mental harm from workplace stress.

[80] Ms Baxter said DGPM knew she was a dedicated worker who worked long hours, including from home in the evening. She had regular ‘catch up’ meetings with Mr Haabjoern and told him of her concerns about her workload. On some occasions she asked to work from home because she was feeling depressed and was just “hanging on” until new staff were hired.

[81] Mr Haabjoern and Mr Buchanan knew she experienced depression and anxiety as Ms Baxter talked openly about her mental health issues. Mr Buchanan recalled instances when she told him she had forgotten to take her medication. Another instance identified was in a text Sophie Baxter sent Mr Haabjoern in December 2017 which said about her sister:

¹⁰ *FGH*, above n 8, at [199].

She has also run of out antidepressants but keeps saying she is too busy to go to the doctor ... I've told her multiple times to talk to you ... and also to book time for the doctor but she's convinced she can't. Please help.

[82] In March 2019 Mr Haabjoern informed Mr Buchanan of a discussion he had with Ms Baxter who told him she wanted to reduce the number of properties she managed. By email to Mr Buchanan Mr Haabjoern reported that Ms Baxter had told him she knew such a change would reduce her pay but she “would rather earn less and have good mental health, less stress and less anxiety”.

[83] Ms Baxter submitted that the commission structure she worked under put unreasonable pressure on her to take on more properties in order to increase her pay and there were too few staff to cover her if she wanted to leave to rest and recover. She gave the example of a week's leave she took in September 2018, during which she continued to answer emails and texts each morning.

[84] She said measures DGPM did take to support her were inadequate so that she felt compelled to ask for a decrease in the number of properties she managed.

[85] Ms Baxter's evidence established that some risk to her was reasonably foreseeable. However her own evidence, along with that of her sister Sophie Baxter and of Mr Haabjoern and of Mr Buchanan, also showed DGPM was attentive to Ms Baxter's needs and took reasonable steps to address immediate problems and resolve longer term issues she identified.

[86] The following examples, including four identified in DGPM's closing submissions, illustrate how Ms Baxter's concerns were taken seriously and addressed appropriately:

- In October 2017 Ms Baxter responded to a text message from Mr Buchanan asking if she was ok by saying she was “just tired” and feeling she might be getting sick. Mr Buchanan replied: “Ok. Is there anything I can take off your plate? Any chance you can take tomorrow off?” Mr Baxter responded she would work from home the next afternoon but come in to the office in the morning.
- In her May 2018 self-assessment Ms Baxter wrote that she felt “highly valued” in “a fantastic work culture and it feels like everyone is happy and has a place and feels valued.”

- In July 2018, when Ms Baxter reported being sick, Mr Haabjoern insisted she hand over keys for property inspections to another manager. His text message to her, in part, read: “You can’t keep working when you’re sick – you will never recover. This isn’t a suggestion!! Got to bed, rest. I will be checking with [another property manager] to make sure.”
- In her August 2018 self-assessment Ms Baxter wrote: “I enjoy coming to work” and “we have a really fantastic environment”.
- DGPM hired additional staff in April 2018, February 2019 and April 2019 to assist Ms Baxter with property viewings and inspections. Mr Haabjoern also assisted her by carrying out some property inspections.
- When Ms Baxter took leave in September 2018 Mr Haabjoern sent an email to other DGPM property managers asking them to “please be respectful ... and not call her with any questions etc whilst she is away so she can have a proper break”.
- In March 2019 Ms Baxter was offered a position as Business Development Manager after she talked with Mr Haabjoern about reducing the number of properties she managed and concentrating on bringing in new managements.

[87] The offer of the Business Development Manager role and the steps taken to reduce the number of properties Ms Baxter managed as part of moving to that role were two relevant instances of DGPM addressing her concerns about a healthy work environment and a reasonable workload. However both of those actions were the subject of a separate disadvantage grievance. They are addressed separately below.

[88] One other factor also needed to be addressed in considering Ms Baxter’s claim she was unjustifiably disadvantaged by the demands made on her so that her workplace was not healthy. This concerned her own responsibility to take practicable steps to ensure her own safety at work.

[89] Ms Baxter’s oral evidence established she was reluctant to take leave and reluctant to hand over work to others, even if she was unwell or away on leave. She had a strong work ethic and wanted to maximise her earnings, in part to assist with her plans to grow her personal wealth by investing in properties. Those elements of her personality, expressed in a commitment to her work, contributed to lapses in her own management of her medication, with consequent effects on her health.

[90] One example of a matter that distressed her was Ms Baxter's view that Mr Buchanan and Mr Haabjoern had mocked her over the location of a house she purchased as an investment in April 2019. Both Mr Buchanan and Mr Haabjoern denied disparaging the location of the house, which was in a South Auckland suburb. Mr Haabjoern conceded he had told Ms Baxter the purchase was a bad idea, but not on the basis of its location. Rather, he did so because the property was on a cross lease and Ms Baxter would likely have difficulties getting permission from the other lessees for any changes she wished to make.

[91] However, even if Mr Buchanan and Mr Haabjoern had made mocking comments, it was not a work-related matter. It concerned Ms Baxter's private interests. The occasion in which she said it occurred was social, while they were playing pool in a bar. She had also earlier sought and received personal advice from Mr Haabjoern about her property purchase plans, seeking the advantage of his knowledge in those matters. If she felt distressed by it, it was not a matter for which DGPM bore responsibility to her as an employee.

[92] Overall the evidence established DGPM had taken reasonable steps, based on which it knew at the time, to assist Ms Baxter manage her workload and to take appropriate steps to make the workplace healthy and safe for her. She had not established she was unjustifiably disadvantaged on that ground.

(c) Changing number of properties in work portfolio

[93] Ms Baxter said DGPM's actions in reducing the number of properties she managed, in response to her expressing concern about her workload, were a further and specific disadvantage to her.

[94] However the initiative for that change came from Ms Baxter. She spoke to Mr Haabjoern about the idea on 19 March 2019. As he recorded in his account of the conversation, by email to Mr Buchanan the next day, Ms Baxter knew this would affect her income "but [she] would rather earn less and have good mental health, less stress and less anxiety". She also expected she would be able to "boost" her income by concentrating on "bringing in new managements".

[95] It was Ms Baxter's suggestion that led to Mr Buchanan and Mr Haabjoern offering her a newly created role of Business Development Manager (BDM). The offer

also guaranteed her salary for 12 months so she would not be financially disadvantaged while she developed the role.

[96] The BDM role was intended to focus on gaining new properties. Ms Baxter was recognised as being particularly effective in gaining new business, from new clients or from existing clients agreeing to have DGPM manage other properties those clients owned. One benefit of the new role for Ms Baxter was expected to be less of the evening and weekend work needed to carry out property inspections and visits.

[97] Although Ms Baxter, in bringing her claim, suggested she was not enthusiastic about the notion of taking up the BDM role, the evidence of what she said and did at the time of that proposed change was different. On 31 May 2019 Ms Baxter wrote the following comment in her self-assessment report in response to a question about the greatest opportunity to grow personally and professionally in 2019:

I am really looking forward to moving to more of a BDM role so my day-to-day task consist less of tenant phone calls/complaints and routine inspections and more prospecting and growing the business.

[98] In his comment on that report Mr Haabjoern wrote: “I can’t wait to see Kirsty rip into the BDM role and show what she is truly capable of in the growth space’.

[99] DGPM arranged for Ms Gonthier, who had recently been hired to work as a property manager in a different office, to instead be redeployed to manage properties to be handed over by Ms Baxter. Ms Baxter engaged in training Ms Gonthier without any apparent rancour over those transfers. Ms Gonthier’s evidence of her conversations with Ms Baxter was consistent with the comments in Ms Baxter’s self-assessment report in May, noted above. Over the period of a week Ms Baxter drove Ms Gonthier around various properties in the portfolio she would be handing over and spoke excitedly about taking up the BDM role.

[100] Ms Baxter and Mr Haabjoern had also spent time in mid-June working through a list of properties in her existing portfolio, identifying 65 to be transferred Ms Gonthier and around 50 that Ms Baxter wished to keep as part of her BDM role.

[101] There was no evidence, apart from Ms Baxter’s later account, that she expressed any disquiet or objection to the change at that time. Rather, what there was, suggested it was a welcome change she expected to improve her working life.

[102] Ms Baxter had not established that change was to her unjustified disadvantage.

(d) Announcing her new role without her agreement

[103] On 6 June Ms Baxter was sent a draft job description for the BDM role but made no comments on it. In the following weeks, possibly as late as 18 June, Ms Baxter met with Mr Haabjoern and Mr Buchanan to further discuss the role. Their evidence was that Ms Baxter confirmed she wanted to take up the job and had said words to the effect of “send me the contract”. Their discussion had included guaranteeing her salary for the first 12 months she was in the role while she developed the work which would generate commissions from gaining new property management agreements.

[104] In her evidence for the Authority investigation Ms Baxter did not deny asking for the agreement but she did deny having agreed to take the role as unequivocally as Mr Buchanan and Mr Haabjoern had described. She suggested the arrangements were still conditional on receiving, considering and then signing the written employment agreement for the role.

[105] Consequently, Ms Baxter said she was therefore both surprised and embarrassed to find out on 19 June 2019 that Mr Haabjoern had announced her change of role in an email to all DGPM staff. His email said he would have made the announcement in person as a property managers’ meeting due to be held the next day but could not do so as he was due to be away at a conference on that day.

[106] His email said DPGM had been looking for a dedicated BDM and Ms Baxter had said she was keen to take on the challenge of the role. He wrote that Ms Baxter would be “bloody good in this role” given the number of new managements she already brought in. He then explained that she could not do the role with her current portfolio size so Ms Gonthier, who had been appointed to work in the Mount Albert office, would also spend some time in the Grey Lynn office and take over 65 properties from Ms Baxter.

[107] In closing submissions Ms Baxter accepted “she may have appeared excited about the role” but submitted that a fair and reasonable employer could not have made that announcement without having her formal acceptance of a written employment agreement.

[108] DGPM conceded it had wrongly understood Ms Baxter had already accepted the role but said it acted in good faith, relying on Ms Baxter's apparent enthusiasm about the role and associated plans, in telling staff before completing the formalities of a written offer and acceptance.

[109] While the lag in completing formal arrangements was less than ideal, all the key terms were agreed verbally and Ms Baxter made no protest in the following weeks about DGPM's agreement and announcement. In all the circumstances no actual disadvantage was established, so Ms Baxter's claim on that count fails.

(e) Changing access password after resignation

[110] On the morning of 21 August 2019 Ms Baxter sent Mr Haabjoern a text message saying she was "exhausted again today" and needed more sleep. She suggested working from home or taking an unpaid leave day. Mr Haabjoern responded that he did not want her working if she was unwell and asked her to put a leave request through the company's electronic pay system.

[111] It followed an instance a fortnight earlier where Mr Haabjoern had pressed Ms Baxter to take time off after she reported feeling exhausted and 'burnt out'. She had also provided medical certificates saying she was unfit for work for most of the days between 5 and 13 August.

[112] At 5.49pm on 21 August Mr Haabjoern sent Ms Baxter this text message:

Hi Kirsty, hope you are feeling better. I want to make sure you are getting the rest you need and that you are not stressing out about work. I have changed your email password to make sure that you are not sneaking in some work from home. Let me know how you feel in the morning – if you need another day that's fine, of course.

[113] This led to an exchange of text messages with Ms Baxter questioning why her access was cut and when it would be restored. Mr Haabjoern assured her that her access would be restored and reiterated the health-related reason for it. He restored her password access the next day.

[114] Ms Baxter submitted Mr Haabjoern's actions on the evening of 21 August unjustifiably disadvantaged her. She said it caused her further stress and embarrassment, and left her feeling not trusted and wondering if she would get access to her emails again.

[115] What Ms Baxter's submission overlooked was her history, well-known to Mr Haabjoern, of trying to keep on working while unwell and of working on during the night to get tasks completed. An earlier instance of Mr Haabjoern sending Ms Baxter a stern message about this sort of situation, in July 2018, has already been described in this determination. On that occasion he wrote: "You can't keep working when you're sick – you will never recover. This isn't a suggestion. Go to bed, rest ... Kirsty I am serious. I'm not asking, I'm telling."

[116] Against that background what Mr Haabjoern did in August 2019 was not unreasonable or some reactive gesture about her notice of resignation, given more than five weeks earlier. He did it openly. He let Ms Baxter know. He also promptly assuaged her anxiety that her access to personal emails and work information would not be restored. Given she was on health-related leave and was not required to do any work outside working hours, Ms Baxter suffered no unjustified disadvantage as a result.

(f) Engagement on post-resignation issues

[117] After giving her notice of resignation Ms Baxter raised a number of issues about her employment and its end. These included retaining use of her mobile phone number after she left DGPM, some outstanding holiday pay (since resolved) and the question of her employment status while working under the 2015 contract. She has advised Mr Buchanan and Mr Haabjoern of those issues by email on 19 August and sought to discuss them in a meeting on 22 August 2019. According to a note Ms Baxter made of their discussion that day Mr Buchanan and Mr Haabjoern said they had sought legal advice, felt "backed in to a corner" and "could not discuss anything in a free and frank manner anymore".

[118] Ms Baxter said she was unjustifiably disadvantaged by the approach they took that day and, by doing so, had also failed in their good faith duty to be responsive and communicative with her while she remained DPGM's employee.

[119] However Ms Baxter's own note of the meeting also showed Mr Buchanan and Mr Gower gave reasons for the approach they took which were not unreasonable in the circumstances. Her note says "they kept repeating that my health and safety is their main concern as I have a history of not taking time off, working after hours and depression".

[120] Although Ms Baxter took along a co-worker as a support person, they asked Ms Baxter to provide a medical certificate confirming she was fit for work before they went ahead with the discussion she wished to have with them. The request for medical clearance was a reasonable and fair precaution to take in the circumstances of the leave Ms Baxter had taken in the previous weeks and the reasons given for it. Mr Buchanan and Mr Gower also said they wished to have a legal representative attend and assist them in such a discussion, again reasonably given the nature of the employment issues she wished to talk about.

[121] It was not a failure to respond and communicate but rather was within the range of responses that a fair and reasonable employer could have made in the particular circumstances. Ms Baxter's claim of a personal grievance on that account was not established.

No constructive dismissal

[122] Ms Baxter submitted that her resignation was, in reality, not freely given but resulted from such sufficiently serious breaches by DGPM of duties owed to her that it was reasonably foreseeable she would resign rather than put up with that situation and those breaches had, in fact, caused her resignation. Her employment therefore ended, she submitted, by a form of constructive dismissal – that is a resignation has really been compelled by actions of the employer. To succeed in that claim Ms Baxter had to establish that there were breaches of duty, that those breaches caused her to resign and that the breaches were sufficiently serious so that it was reasonably foreseeable she would resign rather than put up with that situation.

[123] She said there were three relevant breaches:

- (a) Pressure on her to pay for a tenancy mistake for which she was not liable;
- (b) Failure to provide her with a safe workplace; and
- (c) Unilateral alterations of her terms of employment by removing properties from her portfolio and announcing she was taking a new role without her agreement.

[124] For reasons already given, in assessing Ms Baxter's related claims of unjustified disadvantage, the evidence did not support findings that DGPM had breached duties owed to her to provide a safe workplace or by its communications about a change of role and the adjustment of workload associated with that change. Rather its actions,

viewed overall and in context, showed DGPM had been attentive to concerns raised by Ms Baxter and involved her in plans for a new role which would enable her to develop her strengths and get a better work-life balance.

[125] However DGPM had breached its duty to Ms Baxter in how it dealt with the error she made in managing a tenancy. In her closing submissions Ms Baxter accepted she had made the mistake but said Mr Buchanan could be reasonably expected to have properly discussed with her what had happened and whether any assistance with her performance in future was needed. She is correct. As already noted earlier in this determination, DGPM failed to treat Ms Baxter fairly because Mr Buchanan criticised her without any sufficient inquiry into the circumstances, including Mr Haabjoern's involvement in the steps she took to try and address the problems resulting from her error. This resulted in Ms Baxter, some weeks later, feeling she had to make some payment towards the cost of her error and DGPM then compounding the unfairness by accepting rather than rejecting her contribution.

[126] Ms Baxter's email tendering her resignation appears to refer to that payment by mentioning "sanctions for mistakes". In full her email of 14 July 2019 read:

Since the start of this year, a lot of things have happened that have made me question my future in this business. I have been unhappy with how both myself and other staff have been treated and have been seriously considering resigning over the past month. Upon reflection of all events that have made me question my confidence and self-worth during the last 4 years, as well as the treatment of other staff including sanctions for mistakes made during the last 6 months, I feel I can no longer worker at Ray White Damerell Group.

I don't have a new job to go to, but please accept this as my 2 months' notice that my last day of work will be Friday 6th September.

Thanks so much for the opportunities I've had over the past 4 years.

[127] Taking the reference to "sanctions for mistakes" as meaning the payment she had made in April, Ms Baxter had identified it as a declared cause of her resignation. Her case did not however establish that the breach was serious enough to make the prospect of her resigning over it reasonably foreseeable. Rather, if it was a matter of ongoing concern to her, DGPM might have expected she would have told Mr Buchanan or Mr Haabjoern. If she had, and DGPM had then refused to address her concern at that time, the situation may have been different. However this was a situation where DGPM's conduct, including through what Mr Buchanan had said to Ms Baxter without properly investigating what had happened, was inconsiderate and caused her some

unhappiness and resentment. But examination of the actual facts of the case did not show what DGPM had done about that error and payment clearly crossed the line into being conduct dismissive and repudiatory of the employment relationship.¹¹

[128] Accordingly Ms Baxter had not established her employment ended by constructive dismissal. Her claim on that ground is dismissed.

No failure of good faith behaviour by DGPM

[129] Ms Baxter's claim identified the grounds given for bringing her grievances of unjustified disadvantage and unjustified dismissal as also being instances where DGPM failed to meet its good faith duties to her. For reasons already given, the evidence did not establish DGPM had failed to be responsive and communicative with her in all but one of those instances. Overall, the evidence established DGPM was active and constructive in responding to concerns she raised. This included making staffing decisions to address workload issues she had raised, responding to concerns about managing her health and work stresses, and making arrangements for a new role she appeared keen to take up.

[130] In the instance concerning the payment Ms Baxter made to contribute to the cost of an error, DGPM had acted unjustifiably but the substance of that shortcoming was a failure in fairness of the process it followed rather than a failure of good faith behaviour. And, because good faith is an obligation which lies on both parties to an employment relationship, Ms Baxter's own conduct around some matters of concern to her was also open to question. She appeared to make the level of contribution she paid for the error willingly and did not openly communicate any concern about it to Mr Haabjoern or Mr Buchanan. If she had done so, and they then ignored her, Ms Baxter would have had stronger grounds concerning good faith behaviour.

[131] Similarly Ms Baxter was not upfront about the reservations she later expressed about the BDM role. At the time she appeared happy with the proposal and discussions about the transitional arrangements.

¹¹ *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cases 95 at 104.

Remedies

[132] Ms Baxter has established she was unjustifiably disadvantaged by how DGPM treated her over the tenancy error and the payment she made to contribute to the costs generated by it. Her other grievances have not been established.

[133] The available remedy for the established disadvantage grievance is compensation for humiliation, loss of dignity and injury to her feelings. The degree of distress resulting from those circumstances, and the appropriate level of compensation for it, has to be identified without regard to other matters of concern to Ms Baxter for which she had not successfully established DPGM acted unjustifiably.

[134] No compensation was due for the element of embarrassment Ms Baxter felt about her own mistake and the resulting loss of the Tenancy Tribunal case. But she was entitled to compensation for how Mr Buchanan treated her over it. She was humiliated by his sharp reaction, including yelling at her. He did so without taking the time to hear her side of the story. If he had done so he would have found out that Ms Baxter had sought advice from a legal advisor and from Mr Haabjoern before sending the email that then caused the upset to which Mr Buchanan was reacting. This injured Ms Baxter's feelings who, although she realised she had made a mistake, thought she was doing the right thing to minimise its impact. The injury was compounded by Ms Baxter feeling she was bound to contribute to the resulting costs to pay \$1,018.20.

[135] The appropriate level of compensation is not affected by DGPM's repayment to Ms Baxter of that amount. It was a payment DGPM would have been required to make to her anyway and did not address the injury to her feelings caused at the time.

[136] The sum of \$8,000 was an appropriate level of compensation to order DGPM pay Ms Baxter as compensation under s 123(1)(c)(i) of the Act for her experience of humiliation and injury to her feelings in relation to that issue.

[137] In making an order for that remedy, s 124 of the Act requires the Authority to consider whether any reduction of remedies was required due to blameworthy conduct by Ms Baxter that contributed to the situation giving rise to that personal grievance.

[138] In this case Ms Baxter admitted her initial error. As an experienced property manager failing to have the tenants' vacation date recorded in writing was blameworthy conduct requiring reduction. She also contributed to the poor communication with the

incoming tenants, which was more of a service failure than a failure to observe basic regulatory standards. However the degree to which she could be held responsible for the communication failure was limited because Mr Haabjoern, her manager, had approved the email to the new tenants before it was sent.

[139] To mark Ms Baxter's contribution to the situation giving rise to her grievance, the compensation award has been reduced by 25 per cent, that is from \$8,000 to \$6,000.

[140] DGPM must pay Ms Baxter \$6,000 as compensation under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Costs

[141] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[142] If the parties are not able to resolve the issue of costs and instead an Authority determination on that aspect is needed, Ms Baxter should lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum DGPM would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[143] In determining costs the Authority could be expected to apply its usual notional daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.¹² As an initial indication of a starting point, the relative degree of success in the outcome suggests Ms Baxter would be entitled to an award of costs at tariff for one day only. This assessment may change depending on what, for instance, memoranda from the parties might reveal about any proposals made for earlier settlement of Ms Baxter's claims.

Robin Arthur
Member of the Employment Relations Authority

¹² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].