

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 125  
3176367

BETWEEN

NATHAN CORRIGAN  
Applicant

AND

PRIME FOCUS SECURITY  
LIMITED (IN  
LIQUIDATION)  
Respondent

Member of Authority: Sarah Blick

Representatives: Javana Schiphorst, counsel for the applicant  
No appearance for the respondent

Investigation meeting: 8 December 2022

Submissions and information received: 8 and 12 December 2022 from the applicant

Determination: 10 March 2023

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**DETERMINATION OF THE AUTHORITY**

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**What is the employment relationship problem?**

[1] The applicant Nathan Corrigan was employed by the respondent Prime Focus Security Limited (PFS) as a security worker. Mr Corrigan says he was unlawfully suspended and subjected to bullying and harassment during a “sham” investigation by PFS, resulting in him being unjustifiably disadvantaged. He also says he was constructively dismissed. He claims compensation and reimbursement of lost remuneration and benefits by way of remedies. He says PFS also breached his employment agreement, its duty of good faith towards him and the Wages Protection Act 1983 (the WPA). He seeks an award of penalties payable to him.

[2] PFS did not file a statement in reply in this matter. After Mr Corrigan filed his application in the Authority, but prior to the investigation meeting, PFS was placed in liquidation.

**What has the Authority's process been?**

[3] The liquidator appointed in PFS's liquidation consented to this matter proceeding, having been served with the statement of problem and annexures, written directions and notice of the investigation meeting. The investigation meeting proceeded in the absence of any representative for PFS, as I was satisfied the liquidators did not intend to take part in or defend the application.

[4] Mr Corrigan filed a witness statement for himself and two former PFS colleagues Ngwe Sanda Aung and Lautofa Ioapo. Each of them attended the investigation meeting and answered questions under affirmation from myself and Mr Corrigan's counsel.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

**What are the issues?**

[6] The following are the issues for investigation and determination:

- a. What was the nature of Mr Corrigan's employment?
- b. Was Mr Corrigan unjustifiably disadvantaged in his employment?
- c. Was he unjustifiably dismissed (on a constructive dismissal basis) from his employment?
- d. If Mr Corrigan's actions were not justified (in respect of disadvantage and/or dismissal), what if any remedies should be awarded and should they be reduced for contributory conduct?
- e. Did PFS breach its employment agreement, the duty of good faith or the WPA and if so should penalties be awarded?

- f. Should either party contribute to the costs of representation of the other party?

## **Background**

[7] PFS provided security services to various client sites in the Auckland area. It has one director shareholder (the director) and another shareholder (the shareholder). Mr Corrigan is a very experienced security worker, having worked in the industry for 17 years.

[8] He was employed by PFS as a security officer between 12 November 2021 until his resignation on 9 May 2022. His evidence was that he started as a security guard then quickly progressed to become a Team Leader within the space of about two weeks.

### *Employment agreement*

[9] Mr Corrigan says he was initially paid \$23 per hour but after three months his pay increased to \$30 per hour. He does not recall being provided with an agreement when he started employment. He has provided the Authority with an employment agreement he received on or about 18 March 2022. Where the agreement requires signatures of the parties, Mr Corrigan's name and the name of the shareholder of PFS is typed with the date of 18 March 2022. I accept this agreement applied to the latter part of Mr Corrigan's employment. It stated he was employed as a "Full time security officer". It then confusingly states:

The employee will work on a full time basis with no expectation of ongoing employment. The employer will give reasonable notice when asking the employee to work, and the employee may choose whether to accept or decline the work. If the offer of work is accepted, the employee must complete it — unless either the employer or the employee ends this agreement.

Each time the employee accepts an offer of work it is considered a new period of employment. The terms of this agreement will apply to each new period of employment unless the employer and employee agree to any changes.

...

The employee is employed on a full time basis and may agree to work if the employer asks them to.

[10] The agreement further states there is no obligation on PFS to offer work or the employee to accept offered work. It further confusingly states there are two options for hours of work – that no fewer than 55 hours for each work session will be offered, or no minimum number of hours for each work session will be offered.

[11] Mr Corrigan says there was never a discussion about his employment being on a casual basis. He understood he was in full time permanent employment.

*Background to 13 April 2022 events*

[12] Mr Corrigan says a male colleague (the colleague) with whom he worked consistently made derogatory sexual remarks about females at work, including in PFS employee group chat messages. He says he did not understand what certain comments at the time meant until PFS team members made him aware of their meaning. Mr Corrigan says the colleague also made offensive remarks over the handheld radio telephone (RT) system used by PFS employees while working.

[13] Mr Ioapo gave similar evidence and referred to the colleague's group chat messages making him feel very uncomfortable. Mr Ioapo said he spoke to Mr Corrigan about the colleague's behaviour and how he no longer felt comfortable associating with him.

[14] Ms Aung says on 8 April 2022 she worked her first shift with the colleague who made a number of offensive comments to or around her. She said the comments made her feel deeply uncomfortable and at some point she raised a complaint to the shareholder. It appears PFS' director was informed. Mr Aung says the director was angry at the colleague.

*13 April 2022*

[15] Mr Corrigan says on 13 April 2022 he was at the director and shareholder's house, when he found out the colleague had just been issued with a renewed certificate of approval to work as a security officer.<sup>1</sup> The shareholder told Mr Corrigan certain information about the colleague (being allegations) which caused Mr Corrigan to have health and safety concerns for PFS staff. Mr Corrigan says he spoke to the director about the information and his concerns. He says the director became upset upon hearing of the allegations. A short time later the colleague and the director agreed to meet at a client site. The director and the shareholder left their home for the client site. Mr

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<sup>1</sup> Such certificates are issued by the Private Security Personnel Licensing Authority pursuant to the Private Security Personnel and Private Investigators Act 2010, upon being satisfied an individual meets certain requirements, and takes into account grounds for disqualification when deciding whether to issue a certificate.

Corrigan followed in his own car. Ms Aung says the shareholder contacted her and Mr Ioapo to meet at the client site to “ensure things did not get out of hand”.

*Impromptu meeting at client site on 13 April 2022*

[16] The witnesses gave evidence that PFS employees were called to gather at the client site. I will generously call this a meeting, although it was clearly more of an impromptu and unorganised gathering of staff without any form of agenda. Ms Aung and Mr Ioapo arrived at the site and joined the meeting, and a short time later Mr Corrigan joined them. Present were the director, shareholder, the colleague, Ms Aung, Mr Ioapo, a further worker (K).

[17] Mr Corrigan says when he arrived the colleague was doing most of the talking, and everyone else was very tense. He says the director then asked if anyone had any issues to talk about. The director then asked Ms Aung to “say what you need to say” to the colleague. Ms Aung says she was shocked, unprepared and felt very uncomfortable, but spoke about the colleague’s comments on her first shift. The witnesses say the colleague did not take her comments seriously and saw his comments as a joke and just what happens in the security industry. Ms Aung says she felt sabotaged and blindsided by the director’s actions in calling the meeting and asking her to speak.

[18] The director then asked Mr Corrigan if he had anything to say. Mr Corrigan talked about having put the colleague on a pedestal and that he respected him, but now his respect and trust for him was gone. He said the team members all felt unsafe working with the colleague and wanted him to leave. PFS later claimed Mr Corrigan referred to the colleague as a “sexual predator” at the meeting. Mr Corrigan denies he used that term, but at the Authority’s investigation meeting said at most he may have said the colleague “come across as a predator”, but he did not recall this. He says he tried his best to be professional while standing firm for the team.

[19] Both Ms Aung and Mr Ioapo recall Mr Corrigan spoke up about the colleague’s behaviour and noted many of the employees were not okay with it and many did not want to work with him. The witnesses recalled the colleague said something along the lines of “back in the day there would be broken bones, not words.” Ms Aung and Mr Ioapo say they do not remember Mr Corrigan referring to the colleague as a “sex predator”. Ms Aung was thankful for Mr Corrigan being present to de-escalate the

situation, and both she and Mr Ioapo were thankful to Mr Corrigan for speaking about how they felt towards the colleague.

[20] The witnesses say the colleague then resigned in anger at the meeting, handed in his work phone and drove away. Mr Ioapo says after Mr Corrigan left the site that night the colleague returned and spoke with the director.

[21] Later than night, or on 14 April 2022, the director told Mr Corrigan, Ms Aung and Mr Ioapo that the colleague would continue to work for PFS. The witnesses were shocked at this news but the director told them they would not have to communicate or work directly with the colleague from now on.

#### *After the meeting*

[22] Mr Corrigan says after the meeting, the director's attitude towards him changed. He stopped communicating with him and he would hear news only from other team members. He felt he went from an asset to a liability at PFS.

#### *Mr Corrigan suspended on 20 April 2022*

[23] The relationship between PFS and Mr Corrigan deteriorated resulting in Mr Corrigan indicating he would take matters further by going to "court".

[24] After 11pm on 20 April 2022, the director sent text messages to Mr Corrigan saying:

As company policies and procedures of Prime Focus Security Limited, we have to stand you down until this matter is resolved. Due to the threatening nature of you Nathan Corrigan taking Prime Focus Security to Court.

We will have your property ready for you to collect tomorrow morning before 0800...

#### *Colleague appointed Operations Manager*

[25] On the morning of 21 April 2022, the director advised Mr Corrigan, Ms Aung and Mr Ioapo by text message that the colleague had been appointed as Operations Manager to whom they must report. The message said if anyone wants to resign due to this it will be approved. The director then asked Mr Corrigan if he was resigning, to which he responded no and congratulated the colleague and said he will do a great job

for PFS. Mr Corrigan says he was trying his best to stay professional but felt the colleague's promotion was a kick in the teeth.

*Mr Corrigan asked to work while on suspension*

[26] On 21 April 2022 the director also sent a text message to Mr Corrigan asking if he wanted to work at a client site that day. Mr Corrigan replied saying no, because he was stood down he was not legally allowed to work pending PFS's investigation. He also said he would love to work but would not do it illegally, believing to do so would go against security protocol.

[27] The same morning Mr Corrigan emailed the director and shareholder acknowledging he had been stood down, reminded them of PFS's obligation to pay him while suspended, and requested details of the allegations against him and an outline of the procedure of to be followed. He did not receive a reply to the email.

[28] On the evening of 21 April 2022 the director emailed Mr Corrigan a letter entitled "Confirmation of Suspension". Its stated purpose was to advise an allegation of serious misconduct had recently been brought to the attention of PFS. It further stated:

As consulted with you, due to the serious nature of the allegation, we confirm that you will be stood down and suspended from your normal duties pending the resolution of this matter in accordance with clause 21 of your employment agreement.

This period of suspension should not be viewed as a disciplinary action in and of itself and you will continue to receive full pay and benefits during this period of suspension.

Whilst you are suspended you must not go to the worksite or contact any client or fellow employee, without my prior express consent. Such consent will not be unreasonably withheld where it is necessary in order to prepare a response to this matter. Any failure by you to maintain confidentiality may lead to disciplinary action.

During this period of suspension you should await the further instructions and be available to participate in any investigation or disciplinary process upon request.

Please note that you are not to pick up any shifts during this period of suspension.

[29] The letter provided no indication of the nature of the allegations. Mr Corrigan says he was not otherwise consulted about the suspension, which I accept. There is no

clause 21 in the employment agreement as the clauses are not numbered, nor does it refer to PFS otherwise having the right to suspend.

*Invitation to meeting*

[30] At 2.09pm on Friday 22 April 2022 the director sent Mr Corrigan a letter inviting him to a meeting to discuss “a serious concern” he had about Mr Corrigan’s conduct. The letter contained three allegations, that Mr Corrigan:

- a. called the colleague a “sexual predator” at the team meeting on 14 April 2022;
- b. falsified timesheets to claim more hours in pay than he had worked; and
- c. sent a text message to the director’s partner on 16 April 2022 accusing the director of certain behaviour.

[31] Mr Corrigan says this was the first he had ever heard of these allegations. The meeting was to be held via Zoom at 1pm on Tuesday 26 April 2022. The letter advised Mr Corrigan he could bring a support person or representative. It said if the meeting time did not suit he should let PFS know so a time that suits could be found. However, it noted Mr Corrigan was currently being paid so PFS expected him to be available and if the meeting time needed to be postponed unreasonably then PFS reserved the right to make the suspension unpaid. The letter advised depending on Mr Corrigan’s response and/or explanation, PFS may need to follow a disciplinary process that might amount to a finding of serious misconduct and action up to and including summary dismissal. The letter advised given the situation escalated earlier in the week Mr Corrigan was placed on suspension so that “parties could cool down and approach this rationally”. The letter invited comment by 5pm that day as to whether Mr Corrigan considered it appropriate his suspension should continue.

[32] Mr Corrigan says he was not consulted about the suspension, the allegations, or anything at all related to the letter. This was a big shock to him and caused him a great deal of stress and anxiety.

[33] Mr Corrigan indicated to PFS he did not have enough time to prepare before the meeting. Notice of the meeting was given mid-afternoon on a Friday before the long weekend, with 25 April being a public holiday.

[34] PFS engaged an advocate, who on 22 April 2022 emailed Mr Corrigan. The advocate stated the weekend was “ample” time and the meeting “will take place on Tuesday at 1pm”. He also stated “your employer reserves the right to make a decision in your absence if you choose not to attend.” Mr Corrigan says he found the email and tone of the writing threatening and of a bullying nature.

[35] At 8.36pm the same day the advocate sent a “Confirmation of Suspension” letter which again stated Mr Corrigan was suspended on full pay and benefits. He had already been suspended in the earlier letter, and in the text message from the director.

[36] At the time of the proposed meeting, Mr Corrigan emailed the director saying he had now engaged a lawyer, and would not be attending the meeting as he needed to obtain legal advice. He also stated he did “not want to give you the wrong idea by not showing up, I just want to make sure I handle this right”. Mr Corrigan asked the director to deal directly with his lawyer. Not long after his email the advocate emailed back saying:

...you have pulled out of a meeting 5 mins before it started. This was your opportunity to provide feedback to the allegations. As I have already said, you did not have short notice for this meeting. you have had since Friday, and Saturday and Sunday were work days so ample time to prepare for the meeting.

We will provide you with one final opportunity to provide feedback to the allegations. you can do this in writing by 5pm on Thursday 28 April 2022. If you require any further information you can email me for that.

All correspondence in this matter needs to be directly with me.

[The director] and I have discussed your suspension and agree that it should not continue so it is now lifted. As stated previously, you will be paid for the shifts that you agreed to during the period when you were on paid suspension.

[37] In relation to suspension, Mr Corrigan says he had not agreed to anything about being paid for shifts he agreed to work as he had been working on average 60-hour weeks for PFS.

[38] A short time later, Mr Corrigan’s new counsel emailed the director and advocate stating insufficient notice for the formal meeting was given. The advocate emailed back, reminding counsel of the 5pm Thursday deadline to respond and that PFS would not be entertaining an indefinite delay.

[39] Late in the afternoon on 27 April 2022 counsel replied advising she was obtaining further instructions from Mr Corrigan.

[40] At 10.08am on 28 April 2022, the advocate emailed counsel asking if she was still representing Mr Corrigan and if so PFS “will be receiving feedback on the allegations by 5pm today”. Counsel later sent a detailed email response that afternoon focusing on Mr Corrigan’s suspension. It said it was procedurally and substantively unjustified and he was entitled to be paid his average weekly pay at 60 hours per week.

[41] The email advised Mr Corrigan strongly “denies all three allegations and has explanations and/or evidence to the contrary” and they were not serious enough to warrant suspension. The email said “please excuse Mr Corrigan from work. He will obtain a Medical Certificate as soon as possible.” The email also requested a copy of Mr Corrigan’s employment agreement.

[42] The advocate emailed back saying if Mr Corrigan has explanations and/or evidence to the contrary”, then this is the time to provide it. The advocate said Mr Corrigan had until 2pm the next day to do so. He further acknowledged the initial suspension decision was flawed. He also stated Mr Corrigan had not been disadvantaged by the suspension, that he operated as a casual employee for some time and that he cancelled a shift by text with no explanation. Mr Corrigan says he cancelled the shift because he was on suspension while under investigation. Mr Corrigan says he found the advocate’s emails and demands and PFS’ false allegations very stressful and humiliating.

[43] On 28 April 2022 the advocate sent an unsigned statement purporting to be from K, the other colleague who was present at the 13 April 2022 meeting, and asked for comment. This statement said Mr Corrigan spoke highly of the colleague at the meeting, that he liked and admired the colleague and put him on a pedestal. The statement said Mr Corrigan referred to the colleague as “intimidating” and a “sex predator” and that he did not like the colleague.

[44] Mr Corrigan says he was so stressed and anxious from the “intimidating” emails from the advocate that he could not sleep so took sick leave and provided a medical certificate for four days sick leave.

[45] On 29 April 2022 the advocate then extended the reply date to 5pm 2 May 2022. The advocate attached Mr Corrigan's employment agreement and admitted it was "poorly drafted" and claimed it was a casual agreement.

[46] On 2 May 2022 counsel advised the advocate she would reply the next day as she had an urgent matter to attend to. A response was not provided the next day.

[47] On 4 May 2022 the advocate then provided a "findings" and "outcome" email stating the first two allegations resulted in serious misconduct and no finding had yet been made on the third allegation about falsified timesheets. As a consequence, the advocate proposed summary dismissal and requested Mr Corrigan's view on that proposal. The advocate also stated PFS would reopen the investigation if Mr Corrigan provided explanations or evidence. The advocate expected a response by 3pm the next day. The advocate further said there was nothing in Mr Corrigan's medical certificate to suggest he was not able to respond. The advocate also said if Mr Corrigan could not reply he would need to provide a more "fulsome medical certificate." Mr Corrigan says he felt the advocate, on behalf of the director, was continuously bullying and intimidating him at this point.

[48] Later on 4 May 2022 counsel sent a letter to the advocate stating the suspension was unlawful and PFS had an obligation to pay Mr Corrigan while he was suspended. The letter said PFS had pressured and badgered Mr Corrigan into attending a meeting and/or providing a response. Copies of text messages and emails shared between Mr Corrigan and the director during April were provided.

[49] The letter denied the first allegation – that Mr Corrigan said the colleague was a "sexual predator or anything of this nature" but acknowledged other statements were made. The letter further said the first allegation was a minor one and not misconduct, and if it were considered misconduct, would not justify a suspension with or without notice.

[50] The letter also denied the second allegation, that Mr Corrigan falsified timesheets, saying it was completely untrue. He said he did not change the timesheet from 42 hours to 60 hours. He said he worked 50 hours on the relevant week and was entitled to 10 hours for a public holiday he did not work, so recorded 60 hours.

[51] The letter denied the third allegation, that Mr Corrigan made allegations about the director towards his partner.

[52] The same day the advocate replied by email saying Mr Corrigan had failed to focus on the allegations. The advocate also stated things like “Your client is well enough to provide you with instructions”, “Does Mr Corrigan believe that defaming his employer's Director is conducive to the employment relationship?” and “This is not high school [counsel]”. The email finished by encouraging Mr Corrigan to respond to the proposed dismissal so PFS can take his feedback into account before making a decision. Mr Corrigan says PFS's emails were unprofessional, unbearable, and created severe anxiety for him every time he read them. He says he was so stressed and getting to the point where he could not take it anymore, and on 9 May 2022 he resigned from his employment. Mr Corrigan later raised personal grievances for unjustified disadvantage, constructive dismissal, as well as claims for breaches of contract and good faith.

[53] Mr Corrigan says PFS initially denied his entitlement to be paid while suspended and attempted to short pay his guaranteed hours under his employment agreement.

### **What was the nature of Mr Corrigan's employment?**

[54] I must first consider this issue of the nature of Mr Corrigan's employment. Mr Corrigan says he regularly worked 60 hours on a roster on average per week. He says he went from being a security guard to being a team leader which means in the industry that he was a permanent employee. He acknowledges receiving holiday pay each pay period, but says he did not have any reason to believe this meant his contract was not permanent and it is usual practise in his industry to be paid holiday pay while working. He says casual workers were told there was no work – and he was never told there was no work. The least number of hours he worked in a day for PFS was 9 hours and the most was 15 hours a day. He says PFS required him to turn up for at least 55 hours every week. He says he would not have signed the agreement and moved from his previous security officer job to PFS if this was a casual contract, as it would not be reliable enough to cover his expenses to support his family.

[55] Although he received annual holiday pay each pay period, other factors strongly point to Mr Corrigan being a permanent employee. For example, his employment agreement stated he was employed as a full time security officer. Tellingly, had Mr Corrigan in fact been casual, it is entirely unclear why PFS followed a disciplinary process when it could have simply not offered Mr Corrigan further work sessions.

[56] I confirm Mr Corrigan was employed on a permanent and fulltime basis.

### **Was Mr Corrigan unjustifiably disadvantaged in his employment?**

[57] An employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.<sup>2</sup>

[58] Section 103A of the Act details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner.

#### *Suspension*

[59] In deciding whether to suspend an employee, an employer must comply with the rules of natural justice and, in order to meet the test of justification as set out in s 103A of the Act, must follow a fair and reasonable process. An employer must also comply with any applicable employment agreement. The rules of natural justice also mean an employee generally ought to be told a suspension is being contemplated, the reasons why, and almost always be given an opportunity to be heard before a decision is made.<sup>3</sup> Generally suspension is only possible if there is a specific contractual right under the employment agreement to suspend and there is a real business need to suspend. Neither of those factors are present here. Additionally, Mr Corrigan suffered disadvantage in that he was initially not paid for the suspension.

[60] PFS did belatedly give Mr Corrigan an opportunity to provide feedback on the continued suspension several days after the suspension was implemented, after which he had already suffered a disadvantage. That PFS offered Mr Corrigan work the day after he was advised of his suspension does not mitigate PFS' unjustified action. In my

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<sup>2</sup> Employment Relations Act 2000, section 103(1)(b).

<sup>3</sup> *Hong v Auckland Transport* [2019] NZEmpC 54 at [50].

view, Mr Corrigan quite properly declined the offer of work, concerned his professional responsibilities as a certificate of approval holder prevented it. The fact work was offered to Mr Corrigan also obviously undermines PFS's justification for the suspension. The suspension was clearly unjustified and caused disadvantage to Mr Corrigan.

#### *Investigation process*

[61] Mr Corrigan was asked to come to a disciplinary meeting and with the weekend and public holiday factored in, Mr Corrigan was provided with less than a working day to prepare. PFS had not raised any allegations against Mr Corrigan with any haste prior to 22 April 2022, and it was not reasonable to expect his attendance at such short notice. He chose to access representation which likely could not reasonably be obtained in the suggested timeframe. In its letter, PFS had indicated it was open to agreeing to another time. This was clearly not the case given its advocate's response to Mr Corrigan excusing himself from the meeting on the day it was to occur.

[62] I find PFS did not sufficiently investigate its concerns in breach of s 103A(3)(a) of the Act, before it made the two findings upon which it proposed to dismiss Mr Corrigan. In relation to the first allegation, PFS provided one purported (unsigned) statement to Mr Corrigan confirming the allegation, but it appears no other inquiries were made with the other employees present at the meeting, and still working for it. After Mr Corrigan advised he would not attend at short notice and wanted time to prepare, PFS did not propose another time for an investigation meeting. I also find Mr Corrigan was not given a reasonable opportunity to respond to PFS' concerns before it made findings of serious misconduct, in breach of s 103A(c) of the Act. Finally, because PFS did not provide Mr Corrigan with a genuine opportunity to provide an explanation to its concerns in breach of s 103A(3)(d) of the Act, it could not engage in the required exercise of genuinely considering Mr Corrigan's responses or any other contextual circumstances (s 103A (4)).

[63] I consider s 103A(5) is not applicable as the defects in the process were not minor and they resulted in Mr Corrigan being treated unfairly. PFS' actions were not justified on procedural grounds.

### *Findings from investigation process*

[64] In relation to the first allegation against Mr Corrigan, the evidence of whether he used the words claimed was equivocal. I find even if Mr Corrigan uttered the words, that utterance cannot be divorced from its context. PFS created the unfortunate situation its employees found themselves in at the impromptu meeting on the night of 13 April 2022. Employees were urged by PFS to speak frankly about their concerns about the colleague, which Mr Corrigan and Ms Aung did. It knew Ms Aung's concerns were in the nature of alleged sexual harassment. By having a number of employees present and asking them to voice their concerns about the colleague in his presence, in an open forum, was completely inappropriate. A reasonable employer could not have conducted itself in this way. A fair and reasonable employer could not have then attempted to discipline Mr Corrigan for words he used in speaking up for his colleagues, when put on the spot to do so in a heated situation.

[65] In relation to the second allegation, PFS's findings were based on the same procedurally flawed process above, and I consider its findings were unsafe on substantive grounds due to this.

[66] Even if established, I am not satisfied Mr Corrigan's alleged conduct was capable of constituting serious misconduct in either instance.

### **Was Mr Corrigan unjustifiably dismissed (on a constructive dismissal basis) from his employment?**

[67] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:<sup>4</sup>

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.

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<sup>4</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

[68] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow or, in this case that Mr Corrigan would leave his employment.<sup>5</sup>

[69] I find Mr Corrigan was constructively dismissed in terms of the second category. The series of events leading to his resignation indicate PFS's course of conduct was motivated by a deliberate and dominant purpose of coercing Mr Corrigan to resign. If I am wrong on that, I am also satisfied there was a breach of the implied term that PFS ought not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence (incorporated in the duty of faith) between it and Mr Corrigan.<sup>6</sup> PFS made Mr Corrigan's ongoing employment practically untenable when it appointed the colleague to the role of operations manager - a role to which Mr Corrigan would then have to report. When advising Mr Corrigan of that news, PFS asked if Mr Corrigan was resigning. Its subsequent actions support the Authority's finding - it suspended Mr Corrigan without notice or an opportunity to comment; it initially withheld his pay while suspended and then disputed his entitlement; it pursued a disciplinary process and made findings without adequately investigating, or giving him an adequate opportunity to respond or explain, including while he was on a period of sick leave; it was unreasonably aggressive in its communications towards him during that process through its advocate, and it claimed Mr Corrigan was a casual employee when he was in full time employment. PFS' actions breached the obligations owed to Mr Corrigan under the parties' employment agreement to treat him fairly and reasonably. I find in all the circumstances it was reasonably foreseeable Mr Corrigan would leave his employment. Mr Corrigan was unjustifiably constructively dismissed.

### **What remedies should be awarded and are there issues of contribution?**

[70] Mr Corrigan has established personal grievances for unjustified disadvantage and constructive dismissal. He is entitled to a consideration of the remedies sought.

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<sup>5</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

<sup>6</sup> *Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407(EmpC), applying *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415, [1994] 1 ERNZ 168(CA).

### *Reimbursement of lost remuneration*

[71] Following the investigation meeting, Mr Corrigan claims he was still owed \$1,120.00 gross in unpaid wages plus Kiwisaver and accrued annual leave entitlements in relation to his suspension period. Although I accept there was a delay in paying Mr Corrigan during his suspension period, the evidence on the amounts he is still owed for this period was equivocal. I am not satisfied an amount is still owing for the suspension period and therefore make no orders in relation to it.

[72] Mr Corrigan was out of work for one week following his constructive dismissal. He obtained new employment at the rate of \$23 gross per hour. I am satisfied Mr Corrigan is entitled to reimbursement under s 123(1)(b) of the Act of one week's wages calculated at his 55 guaranteed hours at \$30 per hour, totalling \$1,650.00 gross. For 11 weeks thereafter he is entitled to the shortfall between his new hourly rate and the rate he earned at PFS, calculated at 55 guaranteed hours totalling \$4,235.00. Mr Corrigan is entitled to associated KiwiSaver benefits and annual holiday that should have been paid during the lost remuneration period.

### *Compensation for hurt and humiliation*

[73] I accept Mr Corrigan suffered distress and humiliation during the suspension and disciplinary period, and following his constructive dismissal. He gave compelling evidence about the emotional impacts on him. The Authority is satisfied Mr Corrigan has experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation.<sup>7</sup> Having regard to the particular circumstances of this case, I consider that an award of \$20,000 under section 123(1)(c)(i) is appropriate to address his grievances.

[74] I am satisfied no deduction from the remedies awarded should be made under s 124 of the Act.

### **Did PFS breach the employment agreement, the WPA and its duty of good faith and should penalties be awarded?**

[75] Mr Corrigan says PFS breached his employment agreement, ss 5 and 5A of the WPA and s 4(1) of the Act in failing to pay his guaranteed hours during the unlawful

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<sup>7</sup> *Richora Group Limited v Cheng* [2018] NZEmpC 113.

suspension period. I understand the breach relates firstly to PFS saying it would pay Mr Corrigan during his suspension but failing to pay, then that it would not pay him and then would only pay a portion of his guaranteed hours. I accept PFS did breach the employment agreement by initially failing to pay Mr Corrigan his guaranteed hours during the suspension period, and that also constituted a breach of s 4 of the WPA. In assessing a penalty for this breach I have had regard to the factors set down in s 133A of the Act. The Employment Court provided guidance over the application and weighting of those factors in *Borsboom (Labour Inspector) v Preet PVT Limited* and further refinements have been subsequently made by the Court, including in *Nicholson v Ford*.<sup>8</sup> In relation to this breach I award an award of \$1,000, with 50 percent of this award being payable to Mr Corrigan.

[76] Mr Corrigan has belatedly claimed PFS cancelled two shifts without the required 48 hours' notice of cancellation in his employment agreement. There was very little evidence before the Authority to support this claim, and I am not satisfied a breach has occurred nor that he is within time to bring a penalty claim in relation to it. That claim is declined.

[77] Mr Corrigan says PFS breached the duty of good faith through its conduct before and after his suspension without notice. It is not clear to the Authority how the claim for breach of good faith is distinct from the personal grievance claim for unjustified disadvantage and constructive dismissal. This penalty claim is declined.

### **Summary of orders**

[78] Prime Focus Security Limited is ordered to pay the following amounts within 14 days of the date of this determination to Nathan Corrigan:

- a. \$5,885.00 gross as reimbursement of lost remuneration; and
- b. Kiwisaver and holiday pay (calculated based the amount at a.); and
- c. \$20,000 as compensation; and
- d. \$500 as a penalty.

[79] Prime Focus Security Limited is also ordered to pay a \$500 penalty to the Crown

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<sup>8</sup> *Borsboom (Labour Inspector) v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson v Ford* [2018] NZEmpC 132.

Account within 14 days of the date of this determination.

**Should either party contribute to the costs of representation of the other party?**

[80] Mr Corrigan has asked that costs are reserved.<sup>9</sup> He may lodge, and then should serve, a memorandum on costs on the liquidator within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum PFS 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.

Sarah Blick  
Member of the Employment Relations Authority

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<sup>9</sup> For further information about the factors considered in assessing costs, see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).