IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE

[2023] NZERA 257
3189399

BETWEEN	RICHARD FLANNIGAN Applicant
AND	CUSHMAN & WAKEFIELD NEW ZEALAND LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Phil Mitchell, counsel for the Applicant Michael Witt, counsel for the Respondent
Investigation Meeting:	22 March 2023 at Wellington
Submissions and further information received:	29 and 30 March 2023 from Applicant 28 March and 3 May 2023 from Respondent
Determination:	23 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Richard Flannigan was employed by Cushman & Wakefield New Zealand Limited (C&W) from January 2021 as Branch Manager – Wellington in the Facilities Services Division.

[2] Mr Flannigan's employment relationship problem centres on the connection between two incidents, being a final written warning (FWW) that he was given by C&W in February 2022 for misconduct and C&W's proposal that Mr Flannigan be placed on a performance improvement plan (PIP). The proposed PIP was discussed at two meetings between Mr Flannigan, his manager Jason Blackmore and C&W's

Human Resources Manager Jenny Smith in May 2022. Following those meetings Mr Flannigan was away from work until his resignation on 29 July 2022.

[3] Mr Flannigan claims that he was unjustifiably disadvantaged by C&W's unreasonable and improper proposal that he be placed on the PIP. He also claims that he was unjustifiably constructively dismissed due to C&W's breaches of the employment relationship. These breaches are said to be:

(a) C&W's implementation of the PIP; and

(b) C&W's refusal to engage in good faith to resolve a personal grievance about the implementation of the PIP, and demonstrated intention to dismiss Mr Flannigan, based on repeated statements that the FWW would be taken into account in assessing Mr Flannigan's performance against the PIP.

[4] C&W say that its actions in proposing the PIP were reasonable and justifiable, as was its position that warnings were cumulative so the FWW could be taken into account in assessing Mr Flannigan's performance against the PIP. C&W say that Mr Flannigan elected to resign and was not constructively dismissed.

[5] At the investigation meeting and in submissions following a breach of good faith was raised in relation to C&W's actions in engaging directly with Mr Flannigan about leave and pay issues. I have considered this issue also as a potential breach of Mr Flannigan's employment agreement or the Holidays Act 2003.

[6] At the investigation meeting C&W raised a counter-claim of breach of good faith and sought a penalty against Mr Flannigan for covertly recording a meeting with Mr Blackmore and Ms Smith.

The Authority's investigation

[7] For the Authority's investigation written witness statements were lodged from Mr Flannigan, Mr Blackmore and Ms Smith. The covert recording made by Mr Flannigan was also provided and played at the investigation meeting. All witnesses answered questions, under affirmation, from me and the parties' representatives. The representatives also provided written closing submissions.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues

necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[9] The issues requiring investigation and determination were:

(a) Was Mr Flannigan unjustifiably disadvantaged by C&W proposing he be placed on a PIP?

(b) Should Mr Flannigan's resignation be treated as an unjustifiable constructive dismissal caused by C&W placing him on a PIP and refusing to separate the PIP from the FWW?

(c) If C&W's actions were not justified (in respect of disadvantage or dismissal), what remedies should be awarded, considering:

- Lost wages (subject to evidence of reasonable endeavours to mitigate Mr Flannigan's losses); and
- Compensation under s123(1)(c)(i) of the Act

(d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Flannigan that contributed to the situation giving rise to his grievance?

(e) Did C&W breach Mr Flannigan's employment agreement, the Holidays Act 2003 or its good faith obligations by using Mr Flannigan's annual leave without consultation or agreement?

(f) Did Mr Flannigan breach his good faith obligations by covertly recording a meeting with Mr Blackmore and Ms Smith and, if so, should a penalty be imposed?

(g) Should either party contribute to the costs of representation of the other party.

Agreed facts and difference of views that are relevant to Mr Flannigan's employment relationship problem

[10] Mr Flannigan and C&W agreed to the following facts that are relevant to Mr Flannigan's employment relationship problem:

(a) Mr Flannigan was issued a FWW by Ms Smith on 10 February 2022 for an admitted allegation about comments made by Mr Flannigan at a toolbox meeting which were not in line with C&W's ethos. A number of specific expectations were outlined in the letter advising Mr Flannigan of the FWW, which was expressed as remaining in effect for twelve months;

(b) Two meetings occurred on 17 and 27 May 2022 between Mr Flannigan, Mr Blackmore and Ms Smith where the proposal that Mr Flannigan be placed on a PIP and the content of the proposed PIP was discussed. Following the first meeting Mr Blackmore prepared a draft PIP and following the second meeting a revised PIP was provided. The second meeting was covertly recorded by Mr Flannigan, with the recording disclosed as part of Mr Flannigan's evidence and played at the investigation meeting;

(c) Mr Flannigan took a period of sick leave following the meeting and was represented by counsel in almost all interactions with C&W from that date, which included raising a personal grievance on 31 May 2022, participating in mediation and eventually agreeing on 27 July 2022 to return to work with the PIP in place on 1 August 2022;

(d) Communications by and on behalf of Mr Flannigan from May through July 2022 challenged C&W's position that warnings could be cumulative and for different matters (behaviour or performance), seeking an assurance from C&W that the FWW would not be taken into account in assessing Mr Flannigan's performance against the proposed PIP. C&W repeatedly asserted its position that warnings could be cumulative for different matters and declined to provide the assurance sought by Mr Flannigan. The final communication of C&W's position was from Ms Smith on 28 July 2022;

(e) Ms Smith directly advised Mr Flannigan on 17 June 2022 that as he had used all his sick leave C&W had entered some annual leave and some leave without pay to cover Mr Flannigan's time off work; and

(h) On 29 July 2022 Mr Flannigan sent a letter of resignation to Ms Smith, stating that C&W's "insistence that I return to an unjustifiably truncated (ie one month) PIP with what you claim is a Final Written Warning hanging over my head, leaves me with no option but to resign."

[11] Mr Flannigan's employment relationship problem turns on a difference of views about the following matters, where this determination makes findings of fact:

(a) the process of arranging the meetings on 17 and 27 May 2022, and in particular whether Mr Blackmore had clearly advised Mr Flannigan of

the purpose for the first meeting, that Mr Flannigan could have a support person present if he wished and that Ms Smith would be attending;

(b) whether C&W acted procedurally and substantively fairly in proposing Mr Flannigan be placed on the PIP, in its response to Mr Flannigan's comments on the draft PIP, particularly related to the duration of the proposed PIP, and what comments were made about the consequences of the measures in the proposed PIP not being achieved or improved on; and

(c) whether Mr Flannigan's resignation was caused by C&W's course of conduct or breaches of duties, and whether Mr Flannigan's resignation was foreseeable.

[12] There are also fundamental differences of views about the law related to C&W's position that warnings could be cumulative, for different matters (behaviour or performance), and that the FWW could be taken into account in assessing the consequences if Mr Flannigan did not achieve or make improvements against the measures in the proposed PIP. The difference in legal positions was clearly expressed by Mr Flannigan, Mr Blackmore and Ms Smith, and in submissions on behalf of Mr Flannigan and C&W. At its core, Mr Flannigan's employment relationship problem resulted from these differences of views about the law and the application of the law to the facts (as agreed or found).

Was Mr Flannigan unjustifiably disadvantaged by C&W proposing he be placed on a PIP?

[13] In relation to this issue I need to determine whether C&W's proposal to place Mr Flannigan on a PIP was procedurally and substantively justified.

[14] The test of justification is set out at s 103A of the Act.

[15] The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[16] In reaching my conclusion, reflecting s 103A I must consider:

a. having regard to the resources available to it, did C&W sufficiently investigate before taking action?
b. did C&W raise concerns that it had with Mr Flannigan before taking action?

c. did Mr Flannigan have a reasonable opportunity to respond?

d. did C&W genuinely consider Mr Flannigan's comments?

[17] I may also take into account any other factors I think are appropriate.

[18] While the first claim before me is for an unjustified disadvantage in proposing Mr Flannigan be placed on a PIP, the summary of requirements in relation to a dismissal following a PIP process, in *Yan v Commissioner of Inland Revenue (CIR)*, is helpful:[1]

> … the factors identified in *Trotter v Telecom* (which largely mirror or are subsumed within the statutory considerations set out in s 103A(3)) provide a useful framework for analysis and it is convenient to summarise them at the outset:
>
> a) Did the employer in fact become dissatisfied with the employee's performance?
>
> b) Did the employer inform the employee of its dissatisfaction and require the employee to achieve a higher standard of performance?
>
> c) Was information given to the employee readily comprehensible, an objective critique of the employee's work and an objective statement of the standards to reach?
>
> d) Was the employee given a reasonable time to attain the required standards?
>
> e) Following the expiry of a reasonable time:
>
> i) Use of an objective assessment of measurable targets?
>
> ii) Fairly putting tentative conclusions before the employee?
>
> iii) Listening to the employee's explanation with an open mind?
>
> iv) Considering the employee's explanation and favourable aspects of the employee's service and the employer's responsibility for the situation (for example, not detecting weaknesses sooner or promoting beyond level of competence).
>
> v) Exhausting all remedial steps including training, counselling and exploring redeployment.

[19] Ultimately the proposed PIP did not come into effect and Mr Flannigan's performance was not assessed against it, meaning the focus of the unjustified disadvantage claim is on factors a) to c) above, though I comment also on factor d) in relation to the timeframe that was proposed for the PIP. While Mr Flannigan's statement of problem suggested the outcome of the proposed PIP was predetermined, I consider

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[1] *Yan v Commissioner of Inland Revenue (CIR)* [2015] NZEmpC 36 at [3]. Citation omitted.

that aspect of his claim can better be addressed in relation to his unjustified constructive dismissal claim.

What resources are available to C&W?

[20] C&W is part of a substantial multi-national employer with significant resources. I was told that it operates internationally in 70 countries, with approximately 55,000 employees. C&W's New Zealand operations involve approximately 300 employees, with between 180 and 190 of those in the Division that Mr Blackmore leads.

[21] While C&W has a relatively small human resources function, which Ms Smith leads, they are a member of the Employers and Manufacturers Association, from where Ms Smith said C&W accessed specialist employment relations and legal advice, including to support previous, unrelated PIP processes. Ms Smith also described having run performance management training for a number of years, which both Mr Blackmore and Mr Flannigan had participated in.

[22] I have taken these resources into account in assessing C&W's actions.

Did C&W sufficiently investigate before taking action?

[23] C&W provided evidence, in the form of a series of emails from Mr Blackmore, of raising a range of performance concerns with Mr Flannigan, as well as addressing the issues covered by that correspondence at the investigation meeting. The tone of the emails starts with queries, including feedback directed at a number of Mr Blackmore's direct reports (who were Mr Flannigan's peers), and reinforcing Mr Blackmore's expectations of Mr Flannigan.

[24] A change in the tone of feedback was clear from an email Mr Blackmore sent Mr Flannigan on 26 April 2022 regarding requirements for a quote, which concluded:

> There are a few challenges of late that I think we need to create some direct focus and look to ensure that there are some tracked improvements. Ill [sic] touch base this week to set up some initial meetings where we can set some objectives.

[25] Mr Blackmore's evidence was that his informal approach to raising concerns with Mr Flannigan was not being sufficiently responded to and there was a sufficient pattern of issues to need to move to a more formal conversation. Mr Blackmore and Ms Smith both described having discussed Mr Blackmore's concerns and I am satisfied that C&W had become concerned with Mr Flannigan's performance by May 2022.

Did C&W raise concerns that it had with Mr Flannigan before taking action?

[26] Mr Flannigan and C&W agree that two meetings occurred on 17 and 27 May 2022 between Mr Flannigan, Mr Blackmore and Ms Smith where the proposal that Mr Flannigan be placed on a PIP and the content of the proposed PIP were discussed.

[27] There were different views, however, about whether Mr Blackmore had clearly advised Mr Flannigan of the purpose for the first meeting, that Mr Flannigan could have a support person present if he wished and that Ms Smith would be attending. Mr Flannigan was adamant that this did not occur and described feeling ambushed at the first meeting, which led to him covertly recording the second meeting.

[28] Mr Blackmore says that he covered these matters in a phone call with Mr Flannigan and Ms Smith says that she understood that to be the case. Their reasoning for not being more specific in writing was that Mr Blackmore and Ms Smith had discussed the meeting potentially leading to a range of different outcomes including follow-up on actions agreed or proposing that a PIP be implemented, depending on the response at the meeting from Mr Flannigan to their concerns.

[29] I was not convinced by Mr Blackmore and Ms Smith's explanation for the limited record in writing of the purpose of the 17 May 2022 meeting and the lack of any convincing explanation about the inconsistency to the process for the investigation that led to the FWW. For that earlier investigation process Ms Smith had clearly spelled out in writing the purpose of inviting Mr Flannigan to a meeting. By contrast the invitation from Mr Blackmore to Mr Flannigan for the 17 May 2022 meeting was labelled "Wellington Discussion" and the contents of the email were unclear about what would be discussed. Mr Blackmore acknowledged with hindsight that it would have been clearer if he had of recorded in writing the matters to be discussed at that meeting.

[30] Ms Smith did not make such an acknowledgement, either in response to questions from me or when questioned on behalf of Mr Flannigan. Submissions on behalf of Mr Flannigan were that Ms Smith's refusal to make reasonable concessions on this point, amongst others, should be taken into account in assessing her credibility as a witness. I do not agree. While not convinced by Ms Smith's explanations on this point, I consider that this is adequately taken into account in my finding (at paragraph [31] below) that there were minor procedural faults on the part of C&W.

[31] Notwithstanding the process of setting up this meeting was unclear, the evidence of each of Mr Flannigan, Mr Blackmore and Ms Smith was clear and consistent that the 17 May 2022 meeting concluded with Ms Smith inviting Mr Blackmore to prepare a draft PIP for Mr Flannigan to comment on. The draft PIP was shared by Mr Blackmore with Mr Flannigan on 19 May 2022, with an invitation to provide feedback. I consider that any procedural faults in relation to the initial invitation were minor, taking into account the common understanding of what was proposed by the end of the 17 May 2022 meeting and the process that followed.

Did C&W genuinely consider Mr Flannigan's comments?

[32] The recording provided of the meeting of 27 May 2022 clearly demonstrated Mr Flannigan's view was that the proposed PIP was not required. Mr Blackmore and Ms Smith maintained that a more formal step was required and there was then some discussion of a number of the measures in the proposed PIP. While Mr Flannigan's evidence was that he acquiesced to the proposal for a PIP, I find that the comments that he did make were genuinely considered by C&W. There were a number of points that were updated or clarified (for example, the measure on quote management was updated to set expectations where the timeframe for turn-around of quotes could not be achieved) and measures on communication were removed.

[33] This is reflected further in the subsequent correspondence to Mr Flannigan's counsel, where there were commitments to further update measures in the proposed PIP, if any further comments were provided. A revised draft PIP was provided with an opportunity for further comments, which was not taken up by Mr Flannigan.

What other factors should be taken into account?

[34] Mr Flannigan raised a concern that the timeframe for the proposed PIP was initially unclear and then the timeframe proposed at the meeting of 27 May 2022 and subsequently was unreasonably short. In response to these concerns initially being raised, C&W clarified the draft PIP to include a date after which progress against the measures in the draft PIP would be reviewed. While the one-month period proposed was short, it does not appear to have been unreasonable, given the expectations in the draft PIP were primarily about following business processes, including documentation, and achieving service delivery KPIs.

[35] There is also an incongruity between Mr Flannigan's concern and his view that he could meet requirements of the proposed PIP, expressed at the time he initially indicated that he intended to return to work and in his evidence to me. If that was the case, then an assessment at the end of the month should have shown that the measures had been met and would have resulted in the PIP ending, as performance would have been meeting C&W's expectations.

[36] This was unfortunately not tested due to Mr Flannigan's insistence that he would not return to work unless C&W agreed to resile from their position that the FWW not be taken into account in assessing progress against the measures in the draft PIP.

[37] While in a different context of refusing to attend an interview in a redeployment context, the Employment Court's judgment in *New Zealand Steel Ltd v Haddad* provides useful guidance on what could have been a more prudent approach. In that circumstance the Court said:[2]

> I note, however, that it is a high risk strategy to refuse to attend an interview and that, as an alternative, an employee could consider recording their concerns and then attending on a without prejudice basis. In that way, as the former Chief Judge aptly put it, the employer can be put to the test.

[38] I have also taken into account Mr Blackmore and Ms Smith's evidence that other PIP processes they have been involved in have resulted in timeframes for progress being extended or measures being removed, where those were met. The recording of the meeting of 27 May 2022 was clear to me that this was a possibility, depending on the progress that was made by Mr Flannigan against the proposed measures, and that if the assessment of progress was challenged on a factual basis (eg in relation to the accuracy of the PowerBI report data) then this would be taken into account. Again, this was unfortunately not tested due to Mr Flannigan's actions in resigning.

[39] Submissions for Mr Flannigan also raised as a procedural concern statements that progress against the measures would be reviewed by Ms Smith and Mr Blackmore, without the involvement of Mr Flannigan.

[40] I do not consider that reflects the process that would have been required, should the proposed PIP have been implemented. It would not have been unreasonable that Ms Smith and Mr Blackmore would confer on progress at the end of the month, taking into

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[2] *New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57 at [145], citing *Rolls v Wellington Gas Co Ltd* [1998] 3 ERNZ 116 (EmpC) at 125.

account the weekly meetings that had been scheduled by Mr Blackmore, involving Mr Flannigan.

[41] Submissions for C&W were that "Of course, [Mr Flannigan] would have been involved in the review of the PIP and consulted on an outcome." I do not consider that the correspondence relied on was as clear as it could have been that consultation on the outcome of that review would have occurred, although would classify this as a minor procedural fault. C&W's assessment of progress would, however, have had to be discussed with Mr Flannigan, had he chosen to return to work with the proposed PIP in place, before C&W could have taken any further steps. This would have provided Mr Flannigan with the best opportunity to put C&W to the test on their assertions that the PIP was intended to help him to improve performance, rather than being a step towards dismissal.

[42] Submissions for Mr Flannigan also raised concerns that he was not offered "… counselling, support, mentoring or additional training to assist him in elevating his areas of performance." I find that access to counselling (in the form of C&W's Employee Assistance Programme (EAP)), should Mr Flannigan have wished to take that up, was indirectly offered through the provision of information about C&W's EAP programme in Mr Blackmore's email invitation to the weekly review meetings and directly in Ms Smith's correspondence with Mr Flannigan's counsel.[3] I consider that these offers were reasonable in the circumstances.

[43] In terms of the provision of further support, mentoring or additional training, high-level statements about wanting to support Mr Flannigan to be successful were made by Mr Blackmore in the recording of the meeting of 27 May 2022. During evidence, Mr Blackmore and Ms Smith indicated that they did not think mentoring or further training was needed to achieve the objectives signalled in the proposed PIP, however, there was a column clearly labelled "What support is required to enable success?" in the proposed PIP. While it may have been good practice for Mr Blackmore or Ms Smith to explicitly check that Mr Flannigan did not seek further support, mentoring or additional training at that meeting, there was a clear opportunity for Mr Flannigan to do so in providing comment on the proposed PIP. This was also expressly offered as part of Ms Smith's correspondence with Mr Flannigan's counsel.[4]

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[3] Letter from Jenny Smith to Phil Mitchell, 9 June 2022.
[4] Ibid.

Overall assessment of C&W's proposal to place Mr Flannigan on a PIP

[44] Mr Flannigan's evidence was clear that he did not consider that the issues raised were sufficient to require a PIP be proposed. Mr Flannigan did not appear to recognise, however, Mr Blackmore's clear frustrations that feedback was not being responded to or that C&W had formed a view that a more formal step was required.

[45] In the circumstances, I find it was reasonable for C&W to have reached that view and to have proposed that a PIP be implemented. While C&W could have followed a clearer procedure in initially raising its concerns with Mr Flannigan ahead of the 17 May 2022, I find that C&W had reasonably raised concerns by the time of the meeting of 27 May 2022, had provided opportunities to comment before and after that date, and had genuinely considered and responded to comments provided by Mr Flannigan.

[46] I find that Mr Flannigan was not unjustifiably disadvantaged by C&W's proposal to place him on a PIP. In any event, C&W's proposal to place Mr Flannigan on a PIP was not implemented, due to Mr Flannigan going on leave following the meeting of 27 May 2022.

Should Mr Flannigan's resignation be treated as an unjustifiable constructive dismissal caused by C&W placing him on a PIP and refusing to separate the PIP from the FWW?

The legal approach to a constructive dismissal

[47] In some circumstances a resignation may amount to a dismissal. The Court of Appeal in *Wellington Clerical Union v Greenwich* stated that:[5]

> There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. …
>
> It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[5] *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

[48] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:[6]

(a) Where the employee is given a choice of resignation or dismissal;

(b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

(c) Where a breach of duty by the employer leads a worker to resign.

[49] While submissions for C&W covered both the second and third situations described by the Court of Appeal in *Woolworths*, it appeared to me that submissions for Mr Flannigan relied on the third situation described by the Court of Appeal in *Woolworths*, being that a breach of duty by C&W led him to resign.

[50] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* set out the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.[7] In determining that all the circumstances of the resignation must be examined not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.

[51] Mr Flannigan has the burden of establishing that the resignation was a dismissal.

What was the reason for Mr Flannigan's resignation?

[52] On 29 July 2022 Mr Flannigan sent a letter of resignation to Ms Smith, stating that C&W's "insistence that I return to an unjustifiably truncated (ie one month) PIP with what you claim is a Final Written Warning hanging over my head, leaves me with no option but to resign."

[53] This statement reflected the difference in positions on the law in relation to warnings, which I will turn to further below, and was the key reason for Mr Flannigan's resignation.

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[6] *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

[7] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

[54] Submissions for Mr Flannigan also pointed to allegations of numerous breaches of good faith, being the advertising of what Mr Flannigan considered to be his role while he was on leave, instructions to other staff to not communicate with him and the breaking into of his locked desk. What I consider to be a separate issue was raised in relation to Ms Smith contacting Mr Flannigan directly during sick leave, when communications were occurring via counsel, to advise that he had been paid annual leave on exhausting his sick leave, before being moved to leave without pay.

Was Mr Flannigan's resignation caused by breaches of C&W's duty?

[55] Submissions for Mr Flannigan focused on the proposition that "An employer cannot rely on previous unrelated warnings when dismissing an employee" and that doing so was a breach of C&W's duty. This position was advanced consistently by Mr Flannigan and his counsel, with reference to *Trotter v Telecom Corporation of New Zealand Ltd*.[8] As noted above at paragraph [18], *Trotter* has been endorsed by the Court in *Yan v Commissioner of Inland Revenue (CIR).*[9]

[56] Both *Trotter* and *Yan* confirm the ability of an employer to raise performance concerns with an employee, including proposing that an employee be placed on a PIP, which was accepted by Mr Flannigan. I have considered whether C&W's repeated statements that the PIP would be assessed based on Mr Flannigan already being on a FWW represents a breach of duty by C&W that caused Mr Flannigan's resignation.

[57] Submissions for Mr Flannigan were that:

> To invoke the FWW for misconduct, misconduct of the same type, or similar, had to occur. The performance issues raised in May were completely different to the issue that was dealt with by way of FWW in February.

[58] The challenge with this submission was that Mr Flannigan's employment agreement was explicit in the following respects:

> **Performance Management**
>
> The Employee and his/her Manager will meet formally at least annually to set performance goals, monitor progress and review performance against goals.
>
> Where performance expectations are not met, the Manager will meet with the Employee to identify the performance problem and solution. Subsequent failure to meet and maintain the performance expectations could result in appropriate disciplinary action.

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[8] *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659.

[9] Above at note 1.

…

> **Disciplinary Actions**
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> …
>
> The Employer may issue warnings for behaviour considered to be misconduct, including failure to follow company safety procedures. Warnings remain alive from the date of issue for 12 months and are not limited to repetition of the same behaviour. …

[59] Submissions for Mr Flannigan also suggested that there should be a distinction between performance or conduct based on the examples of unacceptable conduct in C&W's Global Corrective Action Policy referring to "Unsatisfactory job performance or conduct" (emphasis added). This was said to denote distinction, with examples given of "left or right", "black or white" and "up or down". This notion of distinction was Mr Flannigan's main ground for claiming that the FWW for conduct could not be invoked in relation to the proposed PIP for performance reasons.

[60] C&W consistently advised Mr Flannigan that it did not accept his proposal that the FWW should not be taken into account in assessing progress against the measures in the draft PIP. While submissions for Mr Flannigan is that C&W were obdurate in maintaining this position, I consider that C&W were being clear and firm in representing their view, based on the provision in Mr Flannigan's employment agreement that "warnings … are not limited to repetition of the same behaviour" and C&W's Global Corrective Action Policy.

[61] The same reasons noted above in paragraphs [13] to [45] in relation the reasonableness of C&W's proposal that Mr Flannigan be placed on the proposed PIP apply here. I consider that C&W's actions were not unreasonable in drawing to Mr Flannigan's attention the potential consequences of him being on a FWW, when assessing the consequences if Mr Flannigan's performance did not meet the measures in the draft PIP. While Mr Flannigan did not agree with C&W's approach, that does not mean that C&W had breached its duty to him.

[62] In relation to the first three breaches of good faith alleged at paragraph [54], I find that:

a. While the role that was advertised had similar features to Mr Flannigan's role, it was in fact to cover for a different division of C&W to cover for another employee who was overseas and reported to another manager ie not Mr Blackmore; and

b. No evidence was provided to substantiate the allegations that C&W had instructed other staff to not communicate with Mr Flannigan or to break into his locked desk.

[63] It follows that these allegations do not amount to breaches of duty by C&W, even if there could have been a clearer response to those concerns from C&W. Email evidence was provided by C&W in relation to their position on these matters and I was advised that these matters were discussed at mediation. While it might have been preferable that there was a formal written response to these concerns, I do not consider the absence of this to be a breach of C&W's duty of good faith.

[64] As foreshadowed at paragraph [19], I consider it appropriate to consider Mr Flannigan's claim that the outcome of the proposed PIP was predetermined in relation to whether there was a breach of duty by C&W that caused Mr Flannigan's resignation. Mr Flannigan's resignation letter included reference to this as part of his reasons for resigning, stating:

> My lawyer has written to you repeatedly, spoken to you on the phone and otherwise engaged with dialogue with you to try and point out to you that the FWW issued in February of this year for alleged misconduct cannot be used against me in a performance setting. You have refused to acknowledge that and insist that I return to what is clearly a pre-determined outcome and dismissal at the end of a deeply flawed, one month PIP.

[65] I do not consider that the outcome of the proposed PIP was pre-determined, taking into account the following factors that support C&W had indicated an openness to appropriately assessing Mr Flannigan's performance against the proposed PIP:

a. C&W had made changes to the indicators in the proposed PIP and were open to making further changes (discussed at paragraphs [32] and [33] above);
b. Mr Blackmore and Ms Smith's evidence that other PIP processes they have been involved in have resulted in timeframes for progress being extended or measures being removed, where those were met. The recording of the meeting of 27 May 2022 was clear to me that this was a possibility in the case of Mr Flannigan (as discussed at paragraph [38]), which is the opposite of pre-determination; and
c. While not acknowledged at the meeting of 27 May 2022 or subsequent correspondence, I consider that C&W would have to have consulted Mr

Flannigan on the outcome of C&W's review of progress against the proposed PIP (as discussed at paragraphs [39] to [41]) and in any event did not have the opportunity to be tested on that.

[66] While I accept that returning to work on the basis C&W were proposing would no doubt have been uncomfortable for Mr Flannigan, that would have been the only way to test C&W's adherence to the process for assessing progress against the proposed PIP before further action, including dismissal, could have occurred (as outlined in the Court's judgment in *Yan*, quoted in paragraph [18] above). Any such action would have required a number of further steps and I have no basis on which to find that C&W would not have followed those steps, should they have considered that appropriate following the review of progress.

[67] I find that Mr Flannigan's resignation was not caused by a breach of duty by C&W and he was not therefore unjustifiably constructively dismissed.

[68] Having reached this finding, I am not required to consider whether Mr Flannigan's resignation was reasonably foreseeable.

Did C&W breach Mr Flannigan's employment agreement, the Holidays Act 2003 or its good faith obligations by using Mr Flannigan's annual leave without consultation or agreement?

[69] On 9 June 2022 Mr Flannigan's counsel emailed Ms Smith, responding to C&W's response to Mr Flannigan's raising an employment relationship problem, including the statement:

> You have not responded to my email regarding Mr Flannigan's current status and suggestion that he should be on paid special leave at the moment.

[70] Ms Smith's response on 13 June 2022 was that:

> Jason and I have discussed your suggestion that Richard be granted special leave but we both feel that Richard should rely on his sick and annual leave to cover his absence from work.

[71] Ms Smith then emailed Mr Flannigan directly on 17 June 2022 advising:

> Just touching base as you will have seen on your payslip that you have exhausted your sick leave.
>
> We entered some annual leave and some LWOP to cover your time off work.

[72] I questioned Ms Smith about this and she acknowledged that there had not been agreement or a request from Mr Flannigan before this occurred, but said that if sick leave was exhausted it was known that leave would change to annual leave. She also indicated that she was clear that the use of annual leave could have been reversed and changed to all LWOP, and that she had advised this to Mr Flannigan's counsel, who did not object. Ms Smith seemed to place great weight on the fact that she had done this to ensure that Mr Flannigan was paid and believed that C&W had complied with its obligations under Mr Flannigan's employment agreement and the Holidays Act 2003. Submissions for C&W did not refer to conversations between Ms Smith and Mr Flannigan's counsel, but stated:

> [Mr Flannigan] was not disadvantaged by [C&W] utilising his annual holiday entitlement in lieu of entitled paid sick leave. [C&W] did this to ensure that [Mr Flannigan] was being paid during a period that otherwise would have been leave without pay. Had the Respondent not paid annual leave then, the Respondent would have received payment of the annual holiday entitlement upon termination of his employment. Either way, the Applicant received the payment and therefore did not suffer a disadvantage.

[73] I do not accept Ms Smith's interpretation here or C&W's submissions. Both Mr Flannigan's employment agreement and s 39 of the Holidays Act 2003 are clear that an employer may allow an employee to take annual holidays if sick leave entitlements have been exhausted, where this is requested by an employee. Neither allow an employer to require that an employee use annual holidays entitlements in these circumstances, which is what C&W in effect did.

[74] On 20 June 2022 counsel for Mr Flannigan reiterated his proposal that "It would be appropriate for Mr Flanigan to be paid special leave at the moment while these issues are sorted out." I was not provided with any documentation showing a subsequent response to this point.

[75] Submissions for Mr Flannigan were that Ms Smith's contact directly with Mr Flannigan was an intentional breach of good faith, where Ms Smith knew Mr Flannigan was represented and had been in regular email contact with Mr Flannigan's counsel. In contrast C&W submitted in response that Ms Smith's actions were not intended to circumvent counsel and that Ms Smith did not believe her email was contentious.

[76] I consider that C&W's failure to follow the process under Mr Flannigan's employment agreement and s 39 of the Holidays Act 2003 constituted a breach of that agreement and statutory requirement. I do not, however, consider that C&W's actions

went so far as to be a breach of its duty of good faith (which is what submissions for Mr Flannigan argued it was), although Ms Smith's direct approach to Mr Flannigan in the circumstances it occurred was not wise and her subsequent justification for her actions was not convincing. I also do not accept C&W's submission that because the payment would have been received at a later date there was no disadvantage or breach.

[77] The amount of annual holidays that were used in this way was not quantified (as it was subsumed in a broader claim of remedies for lost wages). I therefore order that C&W calculate and pay Mr Flannigan an amount equal to the value of the annual holidays that were used without Mr Flannigan's agreement, as reimbursement of other money lost under s 123(1)(b). If the parties are unable to agree on the amount payable, then they may seek a determination of the Authority of the amount payable.

[78] For completeness, I note that this issue was not claimed as a reason for Mr Flannigan's resignation, but if it had been, then I do not consider that it would not have been sufficient to cause his resignation.

Did Mr Flannigan breach his good faith obligations by covertly recording a meeting with Mr Blackmore and Ms Smith and, if so, should a penalty be imposed?

[79] At the investigation meeting C&W raised a potential counter-claim of breach of the duty of good faith and contract, and indicated it may seek a penalty against Mr Flannigan for covertly recording a meeting with Mr Blackmore and Ms Smith. Submissions for C&W clarified that it was seeking a penalty on the basis this was a breach of Mr Flannigan's obligations under his employment agreement, as:

> [C&W's] Global Corrective Action Policy specifically stipulates that it is unacceptable behaviour to record conversations in the workplace or conversations with Company employees or without clients, without prior Company approval.

[80] Mr Flannigan explained, in response to questions from me, that he may have been familiar with the requirements of C&W's policy but was not focused on that. Rather he said he recorded the conversation to assist in his personal recollection if matters went further.

[81] I do not consider that Mr Flannigan's actions were a breach of good faith. Counsel for C&W accepted at the investigation meeting that it may have been appropriate to give Mr Flannigan the benefit of doubt that he was seeking to ensure he had an accurate record of the meeting. I also note that the recording assisted me and

both parties with having an accurate understanding of what was discussed at the meeting.

[82] Having reached this finding, I am not required to consider whether a penalty should be imposed.

Summary of outcome

[83] For the above reasons:

a. Richard Flannigan's claims that he was unjustifiably disadvantaged (in relation to the proposal he be placed on a performance improvement plan) or unjustifiably constructively dismissed by Cushman & Wakefield New Zealand Limited are dismissed and no remedies follow;
b. Cushman & Wakefield breached Richard Flannigan's employment agreement and s 39 of the Holidays Act 2003, when it used his annual leave without consultation or agreement, after he exhausted his sick leave, but did not breach its duty of good faith;
c. Cushman & Wakefield are to calculate and pay Richard Flannigan an amount of equal to the value of annual holidays that were used in this way; and
d. Cushman & Wakefield's counter-claim that Richard Flannigan breached the duty of good faith and his contractual obligations by covertly recording a meeting with Mr Blackmore and Ms Smith is dismissed and no remedies follow.

Costs

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

[85] My preliminary view is that while this may be viewed as a case of mixed success, C&W were substantially the successful party, with Mr Flannigan successful only with a minor element of his employment relationship problem, which was only articulated in submissions. It may be that given the nature of this mixed success, that this is a matter where it is appropriate that costs should lie where they fall.

[86] If parties do not agree with the above comments on the approach to costs, and an Authority determination on costs is needed, reflecting the above comments C&W

may 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 Mr Flannigan 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.

[87] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[10]

Shane Kinley
Member of the Employment Relations Authority

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[10] See www.era.govt.nz/determinations/awarding-costs-remedies.