

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 285
3218659

	BETWEEN	EOIN MILES Applicant
	AND	CITADEL CAPITAL LIMITED First Respondent
		FORTLAND CAPITAL LIMITED Second Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Olivia Wensley, advocate for the Applicant Ginrick Credo and Samuel Moore, counsel for the Respondent	
Investigation Meeting:	26 and 27 March 2024 in Auckland	
Submissions and/or further evidence	5 April 2024 from the Applicant 8 April 2024 from the Respondent	
Determination:	14 May 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Eoin Miles, claims that he was constructively dismissed by the Respondents: Citadel Capital Limited (Citadel) and Fortland Capital Limited (Fortland).

[2] Mr Miles further claimed he was unjustifiably disadvantaged by Citadel and Fortland removing his company car in breach of the provisions of the employment agreement.

[3] Mr Miles also claimed he was unjustifiably disadvantaged by the non-payment of a bonus, the delayed provision of an Information Memorandum and by bullying.

[4] Citadel and Fortland deny that Mr Miles was constructively dismissed or unjustifiably disadvantaged.

The Authority's investigation

[5] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Eoin Miles and from Nathan Sands, a former employee.

[6] The Authority received two written witness statements and, under oath or affirmation, oral evidence from the Respondent witnesses: John Schollum, Elle Foenander, Nikki Colebrook, and Farhad Moinfar.

[7] Despite the Authority's Direction that all witnesses should be present on the first day of the Investigation Meeting, only Mr Miles, the Applicant, was present at the commencement of the investigation. The other witness for the Applicant did not appear until day two of the investigation.

[8] The Respondent witness Mr Schollum had made a witness statement but was not present in person until later on the first day. The remaining Respondent witnesses, who did not lodge witness statements as agreed, were present only on the second day and gave oral evidence only. One Respondent witness, despite having made a witness statement, chose not to attend the investigation.

[9] It was necessary to address some inappropriate behaviour and comments made by the representative for Mr Miles to opposing counsel, and it was also necessary to address friction between the parties and their respective representatives.

[10] Written submissions were received from Ms Wensley for the Applicant and from Mr Credo and Mr Moore for the Respondent.

[11] 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. Whilst I have not referred to all the submissions made by the parties, I have fully considered them.

Issues

[12] The issues requiring investigation are whether or not Mr Miles was:

- Constructively dismissed by Citadel and/or Fortland;
- Unjustifiably disadvantaged by Citadel and/or Fortland:
 - removing the company car in breach of the provisions of the employment agreement;

- Failing to pay him a bonus;
- Failing to provide him with the information Memorandum in a timely manner;
and
- Bullying him.

Background

[13] Citadel is a real estate investment and development company based in Auckland, Farhad Moinfar is the sole director and shareholder. Fortland is a management company which markets land investment opportunities. It has two directors, Mr Moinfar and Elle Foenander. Mr Moinfar is the CEO of Citadel and Fortland, and Ms Foenander's role encompassed people and project management in both Citadel and Fortland.

[14] Mr Miles saw a position advertised on Seek for an Investor Relations and Business Development Manager at Citadel. He applied for the position and was offered employment after an interview with Mr Moinfar and Ms Foenander.

[15] Ms Foenander wrote to Mr Miles by email dated 20 April 2022 confirming the job offer with Citadel and attaching an employment agreement and a job description. The letter stated: "We are pleased to offer you the role of Investor Relations and BDM Manager at Citadel."

[16] The letter proposed a start date of 1 May 2022, confirmed a base salary of \$80,000 p.a. and set out a model of projections for a bonus structure:

Commissions (Direct)	\$80,00	Assume \$8,000,000 raised direct by you
Over-rider (Intermediaries)	\$45,000	Assume \$6,000,000 raised by intermediaries
Over-rider (Internal)	\$40,000	Assume \$8,000,000 raised by internal team
Closing bonus	\$100,000	\$30m cash raised (total Fund)
Total projected remuneration	\$385,000	Upon successful close of LP1

Note: the above is only modelled on 1 Fund being subscribed in Year 1, however over the first 12 months we would expect to have closed out at least 2 of the LPs, so in reality remuneration could be significantly higher (in the vicinity of \$700 – 800k)

[17] The attached employment agreement from Citadel contained the following clauses (the Employment Agreement):

15. DISCRETIONARY BONUS

15.1 The Employer may from time to time elect to pay a discretionary bonus based upon various considerations, including the profitability and future forecasts of the business.

15.2 Any payments made will be entirely discretionary and the Employer reserves the right to vary, alter or withdraw its bonus arrangements without notice.

15.3 It is a condition of any bonus that you are employed by the Employer at the time any payment falls due.

16. COMPANY MOTOR VEHICLE

16.1 You may, from time to time, be required to use company motor vehicles to enable you to efficiently perform your duties. This vehicle is provided solely for work-related use.

16.2 The continued provision of a company motor vehicle is conditional upon you at all times holding a valid driver's license.

16.3 The type of company motor vehicle provided is at the discretion of management, and may be swapped at any time in accordance with the Employer's operational requirements.

16.4 At the direction of the Employer, this motor vehicle must be returned to the Employer during any period of leave, whether paid or unpaid.

16.5 Additional rules regarding vehicles and driving are set out in the Handbook which you are expected to read and fully comply with. The Employer reserves the right to vary, alter or withdraw these arrangements and will provide reasonable notice of any such changes.

31. ENTIRE AGREEMENT

The contents of the Agreement constitute the entire agreement between you and the Employer. Any previous agreements, understandings, and negotiations on this subject matter cease to have effect.

32. ACKNOWLEDGEMENT

The Employee acknowledges:

- (a) that they have been advised of their right to take independent advice on the terms of this agreement;
- (b) that they have been provided with a reasonable opportunity to take that advice; and
- (c) that they have read these terms of employment and understand these terms and their implications

[18] Attached to the Employment Agreement was a Schedule which set out (i) the employer as "Citadel Capital Limited", (ii) position as Investor Relations & BDM Manager, (iii) commencement date as 1 May 2022, and (iv) salary as \$80,000.00 per annum. The Schedule also set out the bonus and commission structure:

Bonus/commission Structure

Subject to the provisions of 15.1 – 15.3 of this agreement, the following base bonus structure is provided, with the minimum amounts outlined below.

<u>Remuneration</u>		<u>Payment Date</u>
Commission (Direct Subscriptions)	1.00% of capital raised	On Fund close (fully subscribed)
Business Development - Commissions For subscriptions effected via your business development activities (engaging with third parties such as financial planners or other intermediaries, and establishing terms of business)	0.75% of capital raised	On Fund close (fully subscribed)
Internal Team – Investor Relations Management over-rider For subscriptions effected by direct team and managed by you	0.50% of capital raised	On Fund close (fully subscribed)
Fund closing Bonus Upon successful close of each Fund/LP	\$100,000	On Fund close (fully subscribed)
Motor Vehicle	Motor vehicle will be provided (model and type at companies discretion)	
Discretionary Bonus	Determined from time to time by the Managing Director	

[19] Mr Miles said he had read the Employment Agreement, signed it and gave it to Ms Foenander. After receiving the offer from Citadel, he resigned his current employment.

[20] I find that Citadel was Mr Miles' employer.

[21] Mr Miles commenced employment with Citadel on 1 May 2022. He said that his role was focused upon: "building strong relationships with key clients and stakeholders" as set out in his job description which stated that Mr Miles would work collaboratively to ensure the growth of the fund by creating relationships with stakeholders nationwide and: 'have the ability and skill to drive the delivery of the investor guideline.'

[22] Mr Miles said he reported to Mr Moinfar, but predominantly to Ms Foenander, and to Mr Moinfar via Ms Foenander.

[23] One of the tasks set for Mr Miles was to raise capital commitments to a land development project. In order to do so Citadel was in the process of producing an information memorandum (the Information Memorandum) which would be provided to prospective investors.

[24] Mr Miles said that his understanding upon commencing employment at Citadel was that the Information Memorandum was close to completion, however there was a delay for some months before it neared completion.

[25] Ms Foenander said that Mr Miles had been fully aware of what stage the Information Memorandum had reached throughout his employment.

[26] Citadel had twelve employees at the time Mr Miles was employed. They all worked in an open plan office. From the evidence of the witnesses, it was a relatively informal and collegial work environment.

Bullying Behaviour

[27] Mr Miles said that initially his relationship with both Mr Moinfar and Ms Foenander had been good, however his employment with Mr Moinfar deteriorated from December 2022 onwards.

[28] He said that Mr Moinfar's manner toward him from December 2022 was often aggressive and dismissive and that other employees commented upon it to him. Mr Miles said that he found the Citadel office culture to be inappropriate and referred to several instances of this including:

(i) Subordinate of the Month Award

[29] Mr Miles said that Citadel held a 'Subordinate of the Month' nomination each month. Employees would nominate a person to receive this award. He said he found the designation 'subordinate' coined by Mr Moinfar to be dehumanising and disrespectful. He had received a certificate on one occasion as 'runner up'.

[30] Mr Schollum, Chief Financial Officer of Citadel, said the concept was introduced by either Mr Moinfar or Ms Foenander as a way to recognise some achievement akin to an 'Employee of the Month' award. He said it was also known as 'Citadelian of the Month' and was a fun office activity.

[31] Mr Sands, an ex-employee, also said it was a humorous activity with an element of bonding in it.

[32] Ms Foenander said the winner would receive a 'prezzy card' and a certificate. She said that the employees regarded the competition as light-hearted and cited the fact that the company van had been nominated and won the award twice as evidence of this.

[33] She also said that during his employment, both Mr Miles and Mr Sands fully participated in the competition, making nominations for the awards regularly.

(ii) *Cost comparisons*

[34] Mr Miles said that it was not uncommon in Citadel for employees to compare the costs of an item to a teacher's salary. He referred to Mr Moinfar stating he had stayed in a suite whilst on holiday using a comparison to a teacher's salary to emphasise how expensive it had been. He had found this particularly offensive as he said Mr Moinfar was aware that his partner was a teacher and directed the comment at him.

[35] Mr Schollum said it was not uncommon in Citadel for a teacher's salary or a Suzuki Jimny to be as cost comparators, but this was as a joke.

[36] Mr Moinfar said he did not recall making the cost comparison to his holiday as alleged by Mr Miles and said he had never stayed in a suite. He said the cost comparison comment about a teacher's salary had been in usage by the employees prior to Mr Miles joining Citadel and making it known his partner was a teacher, and it was not meant to be offensive either to Mr Miles, or to teachers.

[37] He said Mr Miles had not made him aware of any discomfort with the usage of the phrase, if he had done so, the usage would have ceased.

(iii) *Van purchase*

[38] Mr Miles said he had been given use of a company car, a Tesla, at the commencement of his employment.

[39] On 13 September 2022 he said Mr Moinfar had told him to purchase a van and use it for his commuting. He understood it was a punishment for his having taken a sick day the previous day.

[40] Mr Moinfar said he had been made aware of Mr Miles informing the other office employees that he had not been genuinely sick on the Monday and agreed that the van usage had been used to express disapproval of Mr Miles behaviour. Rather than disciplinary action though, he said it was a light-hearted approach to the situation.

[41] Mr Moinfar noted that the van usage had been temporary, and the Tesla returned to Mr Miles usage after a week.

(iv) *Alpaca Incident*

[42] Mr Miles said that after another employee, Mr Sands, had left Citadel, he had been given responsibility for Fortland Park, which comprised the Citadel events centre and sales office and which was where business events were held.

[43] Mr Miles said that during his Christmas leave break in December 2022 he had been contacted by a neighbour to Fortland Park informing him that an alpaca owned by Citadel had escaped. As a result, he was on site at Fortland Park until the early hours of the morning attempting to get the alpaca back onto Citadel land. There were two other repetitions of a similar nature over the Christmas holiday.

[44] Mr Miles said Ms Foenander when he had made her aware of the situation, had reacted by finding it amusing. There was a text message exchange on 27 December 2022 between Ms Foenander and Mr Miles:

EF: Eoin, it tickles me f***ing pink that those Alpacas are your problem.

EM: F*** you. F*** the alpacas. F*** the shitty fence I didn't even have a hand in constructing which is now my inherited responsibility.

3 bullets and a butcher Nate knows might be a good solution at this point.

....

EF: You're in charge of raising 35 million dollars, and also the alpacas.

[45] Ms Foenander said a few of the employees had responsibilities in connection with Fortland Park because capital raising activities took place there.

[46] Ms Foenander said she had regarded the text message exchange with Mr Miles as good-humoured banter. She had not objected to his swearing at her in his text message because she regarded them as having a good relationship and because "he was a friend".

Events of the 17 February 2023

[47] Mr Miles said that it became clear to him from events from Friday 17 February 2023 that the continuation of his employment at Citadel was untenable.

[48] The Information Memorandum was finalised and made available to provide to prospective investors on 17 February 2023. Mr Miles said the delayed date of completion had hindered his ability to raise capital until that point.

[49] Mr Miles said that although 17 February 2023 was the first date that Citadel could legally sign-up subscribers, he was pressurised by both Mr Moinfar and Ms Foenander to sign up subscribers that day.

[50] He had been sitting at his desk on the morning of 17 February 2023 when Mr Moinfar entered the office, appearing to be agitated, and enquired after his plans for the day.

[51] Mr Miles said he had arranged to play golf that day in Hamilton with some potential investors. After he had left the office, Ms Foenander messaged him asking who his meetings were with that day. Mr Miles messaged her back with the details and asked if she wanted him to cancel and return to the office. Ms Foenander responded: “no all good, just get some sign ups.”

[52] Towards the close of the day at 4.15 p.m. Ms Foenander asked if he had subscribed anyone that day.

[53] Ms Foenander said that it had taken a long time to reach the point when the Information Memorandum was ready because it involved a significant amount of checking by a team of lawyers. As a result of its being ready for distribution on 17 February 2023, it was an exciting day for Citadel.

[54] Whilst it was appreciated that any investors would need to carry out their own due diligence on the Information Memorandum, she said they should have been made familiar with the concept and investment opportunity by Mr Miles before 17 February 2023.

[55] Consequently, whilst she had not been expecting investors to make their investment that day, she had expected that Mr Miles would have built up a strong anticipatory relationship with his clients and been able to elicit strong commitments from them to commit to investing in the Fund provided they were satisfied with the Information Memorandum.

[56] Mr Miles also exchanged text messages with Mr Moinfar on 17 February 2023 timed at 12.49 p.m. :

FM: OK I'll catch up with you Monday. I suggest you get those guys you have ready to invest already signed up over the weekend while its still hot.

EM: Okay. Yes, that is what I'm pushing for.

FM: Will they meet you Saturday?

EM: Called and asked. They are at beach for the weekend. Meeting with their FA on Monday.

FM: Ok. Have your Hamilton meetings generated any interest.

[57] There is no evidence of a response from Mr Miles to that last text message.

[58] Later that day at 4.12 p.m. Mr Miles received a text from Mr Moinfar which stated: “Going to need the Tesla this evening. Can you drop to Nicki at 6pm.”

[59] Mr Moinfar added: “And let’s catch up at 9 am Monday. Need to discuss a number of issues.”

[60] Mr Miles also received a text message from Ms Foenander at 4.15 p.m. which stated: “Have you subscribed anyone today?”

[61] Mr Miles said he had been upset by the messaging. He considered he had achieved a successful day with potential investors and considered he was being pressurised into achieving what he regarded as an impossible task given the fact that potential investors would not have had sufficient time to carry out their due diligence on the Information Memorandum. As a result, they would be unable to ‘sign up’ to the fund.

[62] He was also concerned that there was an error in the financial information contained in the Information Memorandum and said there had been a statement that resource consent had been obtained in relation to the investment property which was not also correct.

[63] He said that being asked to use the Information Memorandum in such circumstances would contravene the Financial Markets Authority (FMA) regulations and place him at a professional and personal disadvantage.

[64] He also regarded the text message from Mr Moinfar asking him to deliver the Tesla to Ms Colebrook as a bullying tactic intimating that he was to be dismissed, based upon what he had been told by Mr Sands whose company vehicle had been removed prior to the termination of his employment.

[65] Mr Miles said his concerns about the security of his employment were also raised by the reference in Mr Moinfar’s text message to a meeting on Monday. He said the phrase ‘a Monday meeting’ was accepted code in Citadel for someone about to be dismissed.

[66] Mr Schollum said the phrase a ‘Monday Meeting’ was a joke in Citadel.

[67] Ms Foenander agreed the comment was in usage at Citadel, but not as code but as a joke after one employee had left Citadel on a Monday. However, she said Monday meetings were a regular feature of the working week at Citadel.

[68] Mr Miles confirmed in cross-examination that he had attended Monday meetings during his employment at Citadel.

[69] Mr Moinfar said that the primary reason for the meeting on Monday 20 February 2023 had been having a 'live' fund. Since Mr Miles had not been available on the Friday, it had been the first opportunity to meet and discuss that.

[70] While he said that he had not expected Mr Miles to obtain subscriptions on Friday 17 February 2023, he had expected to see some firm expressions of interest in the investment opportunity from the clients Mr Miles had been meeting that day. That was because Mr Miles's focus should have been on encouraging clients to the point when the Information Memorandum was available and they could make their subscriptions.

[71] Mr Miles said Ms Foenander telephoned him at 4.24 p.m. that day, 17 February 2023, and during the conversation said "I don't care that you're golfing with friends" which he regarded as dismissive of the four legitimate meetings he had with genuine potential investors.

[72] Mr Miles said Ms Foenander had referred to not wanting to 'see him go' and stated: 'I will protect you as much as I can but (Farhad) is going to do what he wants to do', and she was: "trying to talk Mr Moinfar "off a ledge". He understood this as meaning his continued employment was in jeopardy.

[73] Mr Miles said Ms Foenander called him 'lazy' and asked what he had done in the previous year. He responded: 'I am here to raise capital, I have only been able to do that legally from this morning.' He said he added: 'I understand you probably hired me too early. That is not my fault' and said Ms Foenander agreed with that statement.

[74] Ms Foenander said it was the first day of capital raising activities which had been exciting. She had been disappointed by what appeared to be Mr Miles' "lack-lustre" attitude. She said she had not been convinced that Mr Miles had been committed to his role and agreed she had expressed her frustration during the conversation.

[75] She explained that her frustration arose in part from the fact that Mr Miles was expected to have a pipeline of clients ready to invest once the Information Memorandum was ready, but no registration of interest of the clients Mr Miles believed he could convert had been entered on the CRM (Customer Relationship Management software programme) despite her having asked Mr Miles to do so.

[76] She also confirmed having said that she did not want 'to see Mr Miles go', which was correct, but denied having affirmed Mr Miles' comment that he had been engaged too early.

Telephone conversation 19 February 2023

[77] Mr Miles said Ms Foenander telephoned him a second time on Sunday 19 February 2023. He recorded the call surreptitiously, not informing Ms Foenander that he was doing so.

[78] The call was fairly lengthy, and he said he apprehended dismissal as a result of some of the comments made by Ms Foenander. These included:

EM: You know, on Friday, you, you said that you're concerned for my job. Should I not turn up on Monday with subscriptions.

EF: Yeah, I was pretty concerned. And I am pretty concerned. But it's not about the subscriptions. You know, it's like the conversation I had with you, it speaks more of like, I don't know, an attitude, in general, a general (line cut out)

EF: ... Farhad was just in a f***ing feral state on Friday, and I try to talk him off a ledge, but you know how he is, he'll do what he wants to do. And there's only so much I can do, you know, it always comes down to what he wants. And like I said to you, I just don't want to see you go. ...

EM: I'm here to raise capital. Right. And I haven't had the ability to raise capital until Friday, and all other tasks.

EF: Do you think that, like raising capital doesn't require preparation, like, I don't know, everything that has to do with the CRM, and, you know, all of these things that we're working at is required. There hasn't been a great deal of initiative or planning or thought. Farhad has to have to kind of ask and ask and ask again. ...

EM: ... I have not had the full tools for my role at my disposal until Friday.

EF: what I am talking about is your attitude

...

EM: So I'm not feeling particularly wanted to say the very least.

EF: Yeah, totally. I think that yeah, I do think Farhad has just kind of had enough I like you. We get on and I want you to stay in the business. I think you are good at what you do.

...

EM: Yeah, and again, I don't know where that stipulation has come from, considering I am here to raise capital and only been able to do so from Friday to handle business development.

EF: I'm just gonna give you a heads up. If you come in tomorrow and say that you sure as shit won't have a job ... I guess just just don't, don't go in there with that attitude. Attitude is what I am talking to you about.

...

EF: Two weeks ago, when I told you that you needed to put your whatever into CRM, you said "I need to spend some time doing that". You know, you haven't fulfilled like a really basic task that is required of you to do your job. So I'm talking about that. And at this point, I don't even know if you want to stay. I would like you to stay. I think you will be fantastic at what you do. I think you will. I want you to stay. I am not sure if you want to stay but I would like to work through this. But you've got to work with me ...

EM: ... I am the consequence of an early hire. You know, I feel like I'm facing the consequences of, you know, an early hire.

EF: I just think you are the consequence of being lazy and just not willing to accept.

...

EM: Okay. So all right. And tomorrow's meetings, tomorrow's meetings, agendas, it's all performance related, I imagine.

EF: 100%

EM: Okay, okay.

EF: Do you want to stay?

EM: I don't feel particularly welcome. And it's been made. It's been made fairly evident.

EF: That's not what I asked.

...

EF: And I just think tomorrow stand your ground, be truthful about what you're proud of, what you've done, what you believe. And I mean, yeah, I'm here for you.

EM: I appreciate it Elle.

[79] Ms Foenander said that by the time of the telephone conversation with Mr Miles on 19 February 2023 there had been a degree of frustration at what she and Mr Moinfar regarded as Mr Miles' "lacklustre" performance and attitude to that point. However, they had wanted Mr Miles to stay employed with Citadel.

[80] Mr Miles said he considered that his employment with Citadel was at an end following the interchanges with Ms Foenander and Mr Moinfar over the weekend. He did not accept that any of the comments made by Ms Foenander about his performance were justified but agreed that he did accept some of what she had said.

[81] Following the telephone conversation with Ms Foenander, he discussed the situation with his sister, Ms Wensley who was his representative.

[82] Mr Miles said he had also checked on the Tesla App if the car had been used over the weekend, but it appeared that it had not moved from Ms Colebrook's driveway.

[83] Ms Colebrook said she had a need for a vehicle that weekend, and Mr Moinfar had said she could use the Tesla Mr Miles had been driving. She did not understand why the Tesla App had shown that it had not moved from her driveway since she confirmed she had used it.

Monday 20 February 2023

[84] Mr Miles said the meeting with Mr Moinfar and Ms Foenander was delayed. At the start of the meeting, he asked if it was a performance meeting and Mr Moinfar responded that it was just a chat.

[85] Mr Moinfar confirmed that Mr Miles had asked if it was a performance meeting and he had replied: “sure whatever that means”.

[86] At that point Mr Miles asked if he could call his sister who was acting as his representative, and that had been agreed. Ms Wensley had joined the meeting and started to read a prepared statement.

[87] Mr Miles said Mr Moinfar and Ms Foenander did not stay to hear all the statement Ms Wensley was delivering but stood up and exited the room in which the meeting was being held into the main office. Mr Moinfar said he had left the meeting when Ms Wensley talked about a resolution because he regarded this as a “premediated assault” and made a “demand for cash.”

[88] Ms Foenander said she and Mr Moinfar had been shocked and confused at what occurred which is the reason they left the meeting.

[89] Mr Miles said Mr Moinfar would not let him exit the room through the main office but told him he had to leave through the direct exit. Mr Moinfar denied having asked Mr Miles to leave by another exit.

[90] Mr Moinfar said 15 minutes afterward the meeting ended he received an email from Ms Wensley containing the prepared statement she had started to read in the meeting. It stated:

Good morning Elle and Farhad,

As you left the meeting this morning before I could finish reading Eoin's statement after notifying you that he intends to raise a personal grievance (against the obligation of good faith that employers are required to follow), please find the following grounds for which he is doing so.

Unjustified disadvantage: Requesting that Eoin raise a significant amount of capital in a short amount of time, with threats of potential dismissal if this is not achieved, could be considered an unjustified disadvantage.

This is because Eoin has only just been legally able to raise capital, and has a large number of potential investors who need time to review the documents before making a decision. The FMA rules are extremely clear - for good reason. ...

Breach of contract: Eoin signed the employment contract based on the promise of bonuses up to \$800,000 in the first 12 months, but the employer has allegedly made it impossible for Eoin to achieve this.

Interference with property: Requesting that Eoin hand over their company vehicle without a valid reason could be seen as interference with property.

Inappropriate workplace culture:

Failure to follow procedure: Citadel has failed to follow the required process for performance management under New Zealand employment law.

...

[91] The statement concluded with a proposal for resolution.

[92] Mr Miles said that within half an hour after he had left the Citadel office, he received an email from Ms Colebrook, Office Manager, asking him for his company laptop password to log him out of Citadel emails. He received notification that he had been removed from the Tesla vehicle App within an hour following the meeting.

[93] Ms Colebrook said she had left the office with a colleague to get a coffee when she met Mr Miles outside. This was shortly after the time of the meeting. Mr Miles told her he had left Citadel and would not be returning.

[94] It was part of her job to off-board employees, so when she returned to the office, she commenced that process in regard to Mr Miles. As part of that process, she had text messaged Mr Miles and asked if she could have his laptop password. Mr Miles responded: “Hey Nicki, ... for the password. Keys for Tesla and building in my top drawer.”

[95] She said Mr Miles had left his laptop on his desk together with his swipe card and the Tesla keys. Although Mr Miles said he had been taken off the Citadel website shortly after he had left the Citadel office, Ms Colebrook said that was part of her responsibilities and she had only removed Mr Miles when he had asked her to do so a few days later.

Was Mr Miles constructively dismissed by Citadel?

[96] Mr Miles claims that he was constructively dismissed by Citadel.

[97] An employee who has resigned has not been dismissed. A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[98] One difficulty of this case is that Mr Miles did not provide a resignation to Citadel. His evidence was that raising a personal grievance for constructive dismissal constituted a resignation.

[99] In *Urban Décor Ltd v Yu* the Employment Court observed:

... whether or not an employee has resigned is an objective test as to whether a reasonable employer, with knowledge of the surrounding circumstances, would have reasonably considered the employee to have resigned. Clear words of resignation are likely to clear that bar unless a different understanding can be informed by the surrounding circumstances.¹

¹ *Urban Décor Ltd v Yu* at [64].

[100] Following the meeting on 20 February 2023, Mr Miles left the Citadel offices. He met Ms Colebrook outside the offices and told her that he “was not coming back”. He had left behind his laptop, car and office keys.

[101] When Ms Colebrook subsequently asked him for his laptop password so she could log him out of Citadel emails, Mr Miles did not inform her that he would be returning but rather provided her with the laptop password and told her where to find the Tesla car and building keys.

[102] I find that Mr Moinfar and Ms Foenander had sufficient information from the statement provided by Ms Wensley and Mr Miles’ behaviour and Mr Miles’ communications to Ms Colebrook on 20 February 2023 to reasonably consider that Mr Miles had resigned.

[103] Following the meeting on 20 February 2023 Citadel’s lawyer wrote to Mr Miles’ representative and set out Citadel’s view that Mr Miles had abandoned his employment. A clear confirmation from Mr Miles that he had resigned would have resolved that issue and I find it perplexing that Mr Miles did not confirm his resignation at that stage. However notwithstanding, it does not alter my conclusion that Mr Miles’ actions were indicative of the fact that he had resigned on 20 February 2023.

[104] In order to be able to conclude that Mr Miles had been constructively dismissed by Citadel it is necessary to establish whether or not there had been a breach of the terms of the employment agreement serious enough to warrant the employee leaving the employment of the employer.²

[105] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* there are three fundamental situations in which a constructive dismissal claim may arise:

- i. An employee is given a choice between resigning and being dismissed;
- ii. There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;

² *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985).

- iii. There had been a breach of duty by the employer which causes an employee to resign.³

[106] Mr Miles is claiming that Citadel created a situation in which his working conditions were so intolerable that he was forced to resign. Mr Miles' evidence is that this became clear by the events on Friday 17 February 2023 and the telephone conversation on Sunday 19 February 2023.

[107] Part of the consideration of constructive dismissal involves assessments of causation and foreseeability. If these come from the employer, then there is a constructive dismissal.⁴

Removal of the Tesla car

[108] Mr Miles claims that the removal of the Tesla motor car was one such indicator.

[109] The Employment Agreement set out at clause 16.1 that Mr Miles would be required to use a company motor vehicle to perform his duties, and that it was provided solely for work-related usage.

[110] The evidence is that employees were allowed to use the vehicles for personal usage, but there is no contractual entitlement to that usage.

[111] Mr Miles was requested by Mr Moinfar to deliver the Tesla car to Ms Colebrook for the weekend. Mr Miles said he was deprived of an essential tool and would be unable to carry out his work-related duties as a result.

[112] I note that in the text message from Mr Moinfar he does not refer to a permanent removal of the car, only to a requirement for its use by another employee for a limited period: "Going to need the tesla this weekend". Immediately preceding that text message, Mr Miles had confirmed he had no work-related duties planned for that weekend.

[113] Mr Miles' evidence was that he based his view that the removal of the Tesla was indicative of his impending dismissal was based upon the van incident and what had occurred in regard to Mr Sands.

³*Auckland Shop Employees etc IUOW etc v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; [19785] 2 NZLR 372.

⁴ *Wellington, Taranaki & Marlborough Clerical Administrative & Related Workers Industrial Union of Workers (IUOW) v Greenwich, VV & CF (t/a Greenwich & Associated Employment Agency & Complete Fitness Centre* [1983] ACJ 965.

[114] The vehicle Mr Sands had been using had been removed from him during his employment which was ended by resignation. Mr Miles understood from Mr Sands that the vehicle had been removed from him prior to his resignation as a punishment and this contributed to Mr Sands' decision to resign rather than be dismissed.

[115] Mr Sands had use of a company vehicle when he was carrying out external responsibilities managing projects, but once these came to an end, his role had been office based and he therefore did not require a vehicle.

[116] During cross-examination Mr Sands confirmed that he had no contractual entitlement to a company vehicle and after his responsibilities changed and he became predominantly office-based, did not need one regularly, although he said one was made available when needed to carry out his work responsibilities.

[117] Mr Sands stated in his resignation letter dated 11 December 2022:

I am incredibly grateful for the opportunity to have worked for you both and at times it has been a liberating and awakening experience. There was a period of time where I was telling people that I had the best job in the world.

[118] I find no evidence supporting Mr Miles' view that the removal of Mr Sands' company vehicle prior to his resignation had been a punishment or a disciplinary action. I also note that Mr Sands was not dismissed but resigned from his employment, apparently leaving Citadel on good terms based on his comments in his resignation letter.

[119] I therefore find Mr Miles' view in regard to the removal of the Tesla, being based on what he understood from Mr Sands' experience, was incorrect.

[120] Ms Colebrook's evidence was that she had needed a car for the weekend, and Mr Miles had no work-related duties arranged for that weekend as he had confirmed to Mr Moinfar. Mr Moinfar's evidence was that the Tesla would have been available for Mr Miles' usage for work related duties on Monday 20 February 2023.

[121] I find there was no evidence to establish that the Tesla was permanently removed from Mr Miles prior to the termination of his employment. Mr Miles retained the Tesla keys, leaving them in his desk drawer and only notified Ms Colebrook that she could retrieve them from there after he had informed her he had left Citadel, subsequently texting and advising her where he had left the keys.

Monday meeting

[122] Mr Miles' evidence was that he further feared his job would be terminated by Citadel by the invitation to a meeting to be held on Monday 20 February 2023.

[123] Mr Moinfar suggested that he met with Mr Miles in a text message immediately following the request to deliver the Tesla to Ms Colebrook. Mr Moinfar messaged: “And let’s catch up at 9 am Monday. Need to discuss a couple of issues”. Mr Miles responded: “Sure, will see you Monday”.

[124] I note that earlier in the same text message exchange, Mr Moinfar messaged:

OK I’ll catch up with you Monday. I suggest you get those guys you have signed ready to invest already signed up over the weekend while it’s still hot.

[125] I find no indication in the messages from Mr Moinfar that the meeting on Monday was other than a meeting to discuss progress on the investor situation, especially in light of his suggestion of ongoing actions Mr Miles could take now the Information Memorandum was available and Mr Miles’ expressed intention to meet with the Financial Advisor of the clients that day.

[126] Mr Miles said that Ms Foenander also commented on a Monday meeting and taken in the context of her other comments, his concern that his continued employment was in jeopardy was confirmed.

[127] Ms Foenander’s evidence was that the purpose of the meeting was to discuss progress given the finalisation of the Information Memorandum.

[128] Mr Miles’ evidence was that he had attended previous meetings on a Monday. Clearly these had not resulted in the termination of his employment.

[129] I find there is no evidence supporting Mr Miles’ perception that the proposed meeting being held on a Monday meant he was to be dismissed at it.

The telephone conversations 17 and 19 February 2023

[130] Mr Miles said it was clear to him from comments made by Ms Foenander during the telephone conversations on Friday 17 February and Sunday 19 February 2023 that his job was in jeopardy.

[131] It is evident from the telephone conversation that Citadel had concerns about Mr Miles’ performance. Ms Foenander refers to Mr Miles’ performance as ‘lack-lustre’ and to him being ‘lazy’ and confirmed when asked that the meeting was performance related.

[132] Prior to this conversation I observe that Mr Miles and Ms Foenander had a good relationship. In the text message exchange on 27 December 2022 about the alpacas, Mr

Foenander uses an expletive as a descriptor when texting Mr Miles ('it tickles me f***ing pink) but in contrast Mr Miles' expletive is directly at her ('F*** you).

[133] When questioned at the Investigation Meeting as to whether or not she objected to that, Ms Foenander said she had not taken offence because it was accepted as a method of communication between colleagues in a positive working relationship: "he was a friend".

[134] I consider it is within the context of a relationship of this nature that the telephone conversations take place. In the telephone discussions Ms Foenander does confirm that Mr Moinfar was in an agitated state, and that he "has just kind of had enough".

[135] However she also states several times that she 'wants Mr Miles to stay' and suggests how best to present himself at the meeting the next day because she wants him to stay in the business and she thinks he is: "good at what you do."

[136] I find that taken as a whole there was sufficient information provided for Mr Miles to conclude that Mr Moinfar and Ms Foenander had some concerns about his performance which were to be discussed in the meeting, but not sufficient evidence for Mr Miles to conclude that the intention was to dismiss him at the meeting on Monday 20 February 2023.

[137] As stated, I find that it is clear the meeting on Monday 20 February 2023 was intended to discuss a number of matters which included Mr Miles' performance.

[138] An employer may meet with an employee to discuss their performance informally without proceeding to a formal process.⁵ In the case of *Greetham v Lawter (NZ) Limited* the Court set out elements that would indicate that a communication would not constitute grounds for a constructive dismissal: These included:

- a) the communication not indicating any immediate expectation for resignation or dismissal;
- b) the employer being willing to listen to any feedback from the employee and provide support; and
- c) the performance issues did not come 'out of the blue'.⁶

[139] Often the informal performance approach negates the need for a formal process by addressing the employee's performance and providing advice on areas of improvement.

⁵ *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36 at [62].

⁶ *Greetham v Lawter* [2020] NZEmpC 174 at [65].

[140] Mr Miles' evidence was that that he considered various factors had made the intention to dismiss him apparent.

[141] I do not consider there was sufficient grounds for Mr Miles to conclude the removal of the Tesla car over the weekend indicated an intention that his dismissal was inevitable.

[142] There had been an isolated incidence of an employee leaving Citadel after a Monday meeting, but no evidence that she had been dismissed. Whilst a 'Monday meeting' may have been a joking euphemism in the Citadel office for a dismissal, the evidence was that Monday meetings were a regular feature of the working week and Mr Miles had attended Monday meetings previously with no impact on the continuity of his employment.

[143] The context for the meeting on Monday 20 February 2023 was the launch of the Information Memorandum. As Mr Miles stated in his evidence, this had been delayed and therefore I find that a meeting to discuss progress with regard to potential investors now it was available would not be unreasonable.

[144] I consider that Mr Miles was correct in having concern that his performance was to be discussed at the meeting from the comments made by Ms Foenander because Mr Moinfar had concerns about it, in particular that Mr Miles' attitude was 'lack-lustre'.

[145] However, Mr Moinfar had suggested that he and Mr Miles have a 'catch-up' on the Monday. There is no indication in that comment that there was any intention of ending Mr Miles' employment. The subsequent text message refers to needing "to discuss a number of issues". There is no indication in that comment that dismissal or any other form of disciplinary outcome was intended.

[146] It is also evident from Ms Foenander's comments in the telephone discussions on 17 and 19 February 2023 that her wish was that Mr Miles would remain in Citadel, and that she would assist him to present himself in a positive light at the meeting.

[147] The reference in the telephone conversation on 19 February 2023 to the topic in the meeting being performance related does not indicate an immediate expectation of resignation or dismissal. When Mr Moinfar was asked by Mr Miles to confirm that it was a performance meeting, Mr Moinfar responded "Sure whatever that means".

[148] I find no evidence that Mr Miles' resignation or dismissal was expected, or indeed intended or wanted, by Citadel at the meeting on 20 February 2023.

[149] In all the circumstances I determine that Mr Miles was not constructively dismissed by Citadel.

Was Mr Miles unjustifiably disadvantaged by the removal of the Tesla motor vehicle over the weekend of 17to 19 February 2023?

[150] As set out in clause 16 of the Employment Agreement, Mr Miles could be required to use a company motor vehicle in order to perform his work-related duties.

[151] In regard to the removal of the Tesla over the weekend of 17 to 19 February 2023, Mr Miles had confirmed in a text message to Mr Moinfar that he did not require a company vehicle to perform work related duties over the weekend.

[152] I find there was no variation, alteration or withdrawal of the vehicle for work related usage in February 2023.

[153] I determine that Mr Miles was not disadvantaged by the removal of the Tesla motor car over the weekend of 17 to 19 February 2023.

Was Mr Miles unjustifiably disadvantaged by the non-payment of a bonus?

[154] In the letter of offer dated 20 April 2022 Mr Miles received a model of projections in the schedule of a bonus structure. Contained on the projection are a number of assumptions, and the ‘Total projected remuneration is based ... upon successful close of LP1’. The note below the projections table qualifies the projections as provisional and based upon certain assumptions being achieved: ‘we would expect to have closed’ and “remuneration could be significantly higher”.

[155] Mr Miles’ evidence was that he accepted the projections in the letter of offer as capable of achievement.

[156] I find there is no firm commitment by Citadel that the bonus was guaranteed at \$700,000 - \$800,000. Even if that were not the case, the letter dated 20 April 2022 was accompanied by the Employment Agreement which sets out at clause 31 that it comprised the entire agreement between the parties and it superseded any previous agreements, understandings and negotiations between the parties.

[157] I find that the Bonus/commission Structure in the Employment Agreement is therefore the operative clause.

[158] The bonus projections in the Employment Agreement are based: “On Fund close (fully subscribed).” Payment of a bonus was therefore conditional, and unless the condition was met, no bonus was payable.

[159] At the time Mr Miles had left Citadel, the Fund had not been fully subscribed, the condition had not been met, and therefore I find the bonus/commission payments in respect of the Fund were not payable.

[160] I also observe for completeness that the Bonus/commission Structure in the Employment Agreement also contains reference to a ‘Discretionary Bonus’ which “would be determined from time to time by the Managing Director”. As a discretionary bonus Mr Miles would have no entitlement to its payment, but he has made no claim in this respect.

[161] I determine that Mr Miles was not unjustifiably disadvantaged by the non-payment of a bonus.

Was Mr Miles unjustifiably disadvantaged by the delayed provision of the Information Memorandum?

[162] It is submitted for Mr Miles that he was significantly disadvantaged by the delayed provision of the Information Memorandum. Further that given the errors in it, he would be disadvantaged in respect of the breaches of the Financial Markets Authority regulations because of the implications for his professional reputation.

[163] In regard to the breaches of the Financial Markets Authority (FMA) regulations, I note firstly Mr Miles’ evidence that he had been aware of the financial errors in the Information Memorandum. I find that he would therefore have been in a position to point these out to any clients in discussions with them and thus obviate any breach of the FMA regulations pending a revision of the Information Memorandum.

[164] Secondly the issue about the resource consent not being approved was not published and known to Mr Miles until June 2021, some months after his employment with Citadel had ended.⁷ It cannot therefore either have placed him in breach of the FMA regulations or have been a contributing factor in his ability to raise capital via the Information Memorandum in February 2017.

⁷ It was highlighted in an article by National Business review dated 21 June 2023.

[165] I also observe that raising capital was not Mr Miles sole responsibility as he could perform a significant number of the other tasks set out in his job description without the Information Memorandum, a point conceded by Mr Miles in cross examination.

[166] As part of his role, Mr Miles would have been expected to ensure he had achieved a pipeline of investors ready to commit once they had received the Information Memorandum. Once the clients made an investment, which could occur in a relatively short time period, Mr Miles would be in a position to qualify for a bonus payment.

[167] However, I accept that the Information Memorandum was an important tool which Mr Miles needed to be able to ensure the Fund was fully subscribed in order that he could qualify for commission. Mr Miles had been given an expectation that it would have been ready for issue shortly after his employment commenced. This did not occur until some months after employment.

[168] I accept that the lengthy delay in the production of the Information Memorandum which Mr Miles had been given to expect would be ready after the commencement of his employment did cause him anxiety and frustration, especially in his perception that it impacted upon his ability to reach the targets required for him to qualify for a staged bonus payment.

[169] I determine that the delay in the availability of the Information Memorandum unjustifiably disadvantaged Mr Miles in his employment.

Was Mr Miles disadvantaged by being bullied during his employment at Citadel?

[170] As set out in case law, the definition of workplace bullying is repeated, and unreasonable behaviour directed at an employee. It takes place over a period of time and can take various forms.

[171] Mr Miles believed he was disadvantaged in respect of the requirement to sign up clients to the Fund on 17 February 2023, and by various incidents in the workplace.

a. By a requirement to sign up clients to the Fund on 17 February 2023

[172] Mr Miles believed that he was being coerced into securing investment commitment from his clients on 17 February 2023 as exemplified in the text messages sent to him by Ms Foender and Mr Moinfar enquiring about his progress.

[173] Mr Moinfar messaged: “Ok I’ll catch up with you Monday. I suggest you get those guys you have ready to invest signed up over the weekend while it’s still hot”. Later Mr Moinfar asked if Mr Miles’ Hamilton meetings had generated any interest.

[174] Ms Foenander also advised Mr Miles to get “some sign ups” and then asked if he had subscribed anyone.

[175] Mr Miles concluded he was being bullied to secure investment commitment, something he perceived as impossible given the lack of time for investors to review the Information Memorandum.

[176] To constitute bullying the behaviour must be unreasonable and repeated. The only instance of the investor subscription pressure occurring took place on Friday 17 February 2023.

[177] I do not find that there was bullying as a result of a requirement to sign up investors on 17 February 2023.

[178] I determine that Mr Miles was not unjustifiably disadvantaged by a requirement to sign up clients to the Fund on 17 February 2023.

b. By the workplace culture instances

[179] Mr Miles referred to several instances of other behaviour constituting bullying: being the Subordinate of the Month award, the teacher salary cost comparison, and the alpaca text message exchanges.

[180] The Subordinate of the Month award was repeated but was not directed at Mr Miles, who took part by making nominations.

[181] There is no evidence that Mr Miles made Citadel aware that he objected to the word ‘Subordinate’ which Mr Moinfar’s evidence was that he understood it was synonymous with ‘employee’.

[182] I do not find the Subordinate of the Month award to constitute bullying.

[183] The teacher salary cost comparison was repeated but was not directed at Mr Miles because the evidence established that the comparison was one such comparator in usage prior to Mr Miles making it known that his partner was a teacher. Nor did Mr Miles make his employer aware that he objected to the usage of the comparison.

[184] I do not find the teacher salary cost comparison, whilst it might be offensive to Mr Miles, to have constituted bullying of him.

[185] The alpaca text messages were sent on 27 December 2022. Whilst directed at Mr Miles, it was not repeated, being only one instance. It is clear that Ms Foenander found the situation

involving the alpaca escape to be humorous, but Mr Miles responded in the same humorous tone. I do not find that bullying was involved.

[186] I do not accept that these incidents, some of which may have been inappropriate in a modern office environment, constitute bullying on the basis that they were not either directed at Mr Miles and/or repeated, and the evidence establishes that on occasion he was a participant.

[187] Mr Miles did not raise any complaint about any of these incidents during his employment.

[188] I determine that Mr Miles was not unjustifiably disadvantaged by the workplace culture instances.

(c) The van incident

[189] Mr Miles had been given the van to drive after a day of sickness absence and some, unsubstantiated, view that it had not been genuine.

[190] Whilst I accept that the Employment Agreement refers in clause 16 to 'company motor vehicles' not to a specific type of vehicle, and in clause 16.3 that the vehicle could be swapped at any time with reasonable notice, I regard it as inappropriate to assign a van to Mr Miles as an alternative to disciplinary action. Moreover, there was no 'reasonable notice' of the swap provided.

[191] There is no doubt that Mr Miles was upset by the incident, especially as his colleagues were aware of the incident and the circumstances. He was not given the opportunity through a proper disciplinary process to refute the allegation that he had not been genuinely sick, and the assignment of the van occasioned him as the registered (though not the actual owner) of the vehicle to incur parking fines.

[192] In the circumstances I determine that Mr Miles was unjustifiably disadvantaged by the substitution of a van as his company-provided vehicle.

Remedies

[193] I have found that Mr Miles was unjustifiably disadvantaged by a delay in the availability of the Information Memorandum. This caused him stress and anxiety through a perception that it restricted his ability to earn a bonus to that point.

[194] I have also found that Mr Miles was unjustifiably disadvantaged by being required to use a van as his work-related vehicle. This circumstances in which this occurred I accept caused

him humiliation and embarrassment. It also affected him financially by the imposition of fines which also caused him stress.

[195] I find that Mr Miles suffered hurt and humiliation in respect of these unjustifiable disadvantages.

[196] **Citadel is ordered to pay Mr Miles the sum of \$15,000.00 as compensation pursuant to s 123(1)(c)(i) of the Act.**

Costs

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

[198] I note that Mr Miles was represented by Ms Wensley and may therefore not have incurred any costs in bringing this matter to the Authority.

[199] However, if that is not the case, the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Miles may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Citadel will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[200] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁸

Eleanor Robinson
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1