

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 387
3233099

BETWEEN VONETTE CHERRY
Applicant

AND HOKITIKA RIMU TREE TOP
WALK LIMITED PARTNERSHIP
Respondent

Member of Authority: Helen Doyle

Representatives: Laurie Knight, counsel for the Applicant
Shane Abel for the Respondent

Investigation Meeting: 19 and 20 March 2024 in Hokitika

Submissions Received: 28 March 2024 from the Applicant
5 April 2024 from the Respondent

Further information received: 12 April 2024 from the applicant

Determination: 1 July 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Hokitika Rimu Tree Top Walk Limited Partnership (the Partnership) was registered under the Limited Partnership Act 2008 on 21 October 2011. Its general partner is Fly West Pty Limited. Jennifer Abel and Shane Abel are the directors of Fly West Pty Limited and they hold 25.5 percent and 20.32 percent respectively of its shares. Mr Abel is the Managing Director.

[2] The Partnership owns and operates an adventure tourist park near Hokitika (the adventure park). A new attraction, a dual zipline, was installed at the adventure park and opened on 23 December 2022. The zipline is owned and operated by another company called West

Coast Tower Zipline Limited (Tower Zipline) which was incorporated on 25 July 2022. Mr and Mrs Abel are the directors of that company.

[3] Vonette Cherry worked for the Partnership between 16 February 2016 and 19 May 2023. She worked initially in a front of house role but from 1 November 2017 managed the adventure park.

[4] During much of the time Mrs Cherry worked for the Partnership the two directors were Neil Wade and Mr Abel. Mr Wade and Mr Abel resided in Australia. Mrs Cherry mainly dealt with Mr Wade on day-to-day matters. Mr Wade's health deteriorated in 2022 and he passed away in January 2023. Mr Abel took on more of a role in the oversight and management of the Partnership during that year. There was a period of time when Mr Abel was the only director until Mrs Abel was appointed a director on 10 March 2023.

[5] Mrs Cherry said that when Mr Abel became more involved in the management of the Partnership from 2022, serious issues began to arise for her. She asks the Authority to resolve a number of employment relationship problems.

[6] Mrs Cherry says that she is owed amounts for a share in annual profits under her employment agreement and that should be awarded with interest for the financial years there was an annual profit for the Partnership.

[7] Mrs Cherry says that she was subjected to bullying behaviour by Mr Abel during a meeting on 8 March 2023 and an unjustified action causing disadvantage about that is alleged.

[8] On 5 May 2023 Mrs Cherry resigned giving two weeks' notice. She says that her resignation was in the nature of an unjustified constructive dismissal. Her letter of resignation states the "final nail in the coffin" was finding out that a recruitment company had been hired to find her replacement.

[9] Mrs Cherry seeks reimbursement of the sum of \$44,630.30 being annual profit share amounts together with interest from 1 June each year, the sum of \$50,000.00 compensation together with reimbursement of lost wages in the sum of \$7,930.36 gross. Holiday pay and KiwiSaver entitlements were claimed in final submissions together with reimbursement of a lawyer's invoice about the lawfulness and reasonableness of an instruction.

[10] The Partnership does not accept that a profit share should be paid to Mrs Cherry. Mr Abel says that the Authority was provided with a “draft employment agreement” and that it was understood that Mr Wade may have varied the agreement. Mr Abel said that the employment agreement was kept by Mr Wade and he does not have a copy. Further Mr Abel said that any profit that was available in the Partnership account was used to pay down part of the bank loan.

[11] The Partnership does not accept that the meeting on 8 March was as described by Mrs Cherry. It does not accept that Mrs Cherry’s resignation was in the nature of a constructive dismissal. It says that it wanted to see if it could obtain a replacement manager because Mrs Cherry threatened to resign on five occasions, and it would have been difficult to fill the manager position on the West Coast.

[12] Mr Abel says that Mrs Cherry was instructed to transfer funds to the Tower Zipline. The Partnership says that Mrs Cherry refused to follow that instruction on several occasions, and it is not liable for any legal fees that she incurred as a result of her concerns about the lawfulness and reasonableness of the instruction.

[13] In final submissions the Partnership stated that any final payment to Mrs Cherry must take into account overpayments made to her husband who was also an employee at the adventure park, credit card expenses that were not work related and provision of free staff lunches when instructed not to provide the lunches. There is a statement in final submissions:

It is our intention to seek legal advice to recover a substantial amount of funds in relation to a number of matters including the credit card expenses and over payment of wages.

[14] The Authority set out for the parties the issues for investigation following a case management conference on 21 September 2023.¹ In the absence of a counterclaim by the Partnership the Authority can only consider these matters advanced by Mr Abel by way of contribution or after discovered misconduct. Mrs Cherry has had an opportunity to respond to these matters and denies that there was blameworthy conduct on her behalf.

¹ Notice of direction dated 21 September 2023. An amendment to the original statement of problem included an additional unjustified disadvantage claim about the 8 March meeting.

The investigation meeting

[15] The parties attended an investigation meeting in Hokitika over two days on 19 and 20 March 2024.

[16] The Authority heard sworn or affirmed evidence from the following witnesses.

- (a) Mrs Cherry.
- (b) Douglas Cherry, Mrs Cherry's husband, who had also worked at the Partnership.
- (b) Paul who had worked at the Partnership as a zipline operator. His evidence was given by telephone.
- (c) Ann and Andrea who had been contacted from the recruitment agency about a management role which they concluded was Mrs Cherry's role at the Partnership.
- (d) Mr Abel.
- (e) Angela a current employee at the Partnership.

[17] Submissions were timetabled for provision after the investigation meeting. Mrs Cherry was given an opportunity to respond to some allegations in information provided by Mr Abel that appeared to be provided to the Authority on the basis of after discovered misconduct for the first time with submissions.

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

The Issues

[19] A claim in the original statement of problem for unpaid annual leave has now been resolved.

[20] The remaining issues for resolution are as follows:

- (a) Is the employment agreement provided to the Authority the agreement Mrs Cherry had with the Partnership at the material time?

- (b) Did the employment agreement entitle Mrs Cherry to a ten percent profit share bonus at the end of each financial year?
- (c) If there is an entitlement was there an annual profit at the end of each financial year?
- (d) If there was an annual profit what amount is Mrs Cherry entitled to be paid?
- (e) Is Mrs Cherry entitled to an award of interest?
- (f) What is the legal approach to a constructive dismissal claim?
- (g) Were there breaches of Mrs Cherry's employment agreement?
- (h) If there were breaches of the employment agreement then were they sufficiently serious so that it would have been foreseeable Mrs Cherry would not have wished to continue to work in the prevailing conditions?
- (i) Alternatively, was there a course of conduct with the deliberate and dominant purpose of coercing Mrs Cherry to resign or a choice of resignation or dismissal?
- (j) If Mrs Cherry was constructively dismissed from her employment was the dismissal justified?
- (k) Alternatively, or additionally, were there actions by the Partnership that were unjustified and disadvantaged Mrs Cherry in her employment?
- (l) If the Authority finds that there is money owing then what remedies should be awarded and are there issues of mitigation, contribution and after discovered misconduct?
- (m) Should Mrs Cherry receive reimbursement for the lawyer's invoice?
- (n) Should costs be reserved?

Is the employment agreement the Authority was provided with the agreement Mrs Cherry had with the Partnership at the material time?

[21] Mrs Cherry provided with the original statement of problem a copy of an unsigned individual employment agreement between herself and the Partnership.² She said in her

² An amended statement of problem lodged on 21 December 2023.

evidence that when she started as a manager with the Partnership Mr Abel emailed her a draft employment agreement for the role. Ms Cherry said there were no changes made to the draft and Mr Abel flew over from Australia to sign the agreement with her on or about 17 November 2017 and she took a signed copy but has misplaced it.

[22] Mr Abel did not dispute that he had flown from Australia to sign the employment agreement with Mrs Cherry in or about November 2017. He agreed that the employment agreement provided to Mrs Cherry was the same agreement that the Partnership had with the previous manager. Mr Abel said that he gave the signed employment agreement to Mr Wade and assumed a copy would have been kept on site in Hokitika. He suggested that there was a possibility the agreement had been varied by Mr Wade and the clause in the employment agreement that provided a profit share may have been removed.

[23] I am satisfied on the balance of probabilities that the employment agreement provided as an attachment to Ms Cherry's original statement of problem was the employment agreement entered into when she became a manager. I am not satisfied that it was subsequently varied. A variation to the profit share clause was proposed by Mr Abel in March 2023 but Mrs Cherry did not agree to that.

Did the employment agreement provide an entitlement to a ten percent profit share bonus at the end of each financial year?

[24] Clause 7.2 provides as follows:

7.2 bonus percentage of annual profit

A bonus incentive of ten percent of the annual profit to the maximum of \$30,000 per annum to be based on the end of year financial reports will be paid to the manager in addition to the base salary.

[25] Mr Abel submits that there was no profit distributed to the shareholders nor paid to Mrs Cherry as there were no surplus funds available to do so. He makes reference to liabilities to which the profit was directed.

[26] Clause 7.2 provides for a bonus incentive of ten percent of the annual profit to be based on the end of year financial reports. There must be a profit and the bonus incentive paid each year is to a maximum of \$30,000. The plain words of the clause do not support if there is an

annual profit that payment is only available in the circumstances where there is a profit distribution to shareholders and/or the profit is not directed elsewhere.

[27] The employment agreement provides for a bonus incentive of ten percent of annual profit to a maximum of \$30,000 per annum in clause 7.2.

Did the Partnership make an annual profit?

[28] There were three financial years when Mrs Cherry was a manager that the Partnership made a profit. The Authority was provided with a letter from the Partnership accountant setting out that for the financial years ending 31 March 2021 and 31 March 2022 there was a profit. For the financial year ending 31 March 2023 the Partnership 2023 financial report was provided also showing a profit.

[29] The profits for the three years are set out below:

Financial year ending 2021: \$420,100.

Financial year ending 2022: \$125,013.

Financial year ending 2023: \$ 21,490.49.

[30] Mrs Cherry is entitled under her employment agreement to ten percent of the annual profit to the maximum of \$30,000 per annum based on the end of year financial reports in addition to her base salary.

What amounts is Mrs Cherry entitled for be paid for the annual profit?

[31] Mrs Cherry is entitled to be paid the following amounts:

(a) \$30,000.00 for the financial year 2020/2021.

(b) \$12,501.30 for the financial year 2021/2022.

(c) \$2,149.00 for the financial year 2022/2023.³

³ The amount claimed was \$2,129. I have calculated ten percent to be \$2,149 and the total claim is therefore about \$20 higher.

[32] The total amount owing to Mrs Cherry for annual profit bonuses under clause 7.2 of her employment agreement is \$44,650.30.

Should interest be awarded on the above amounts?

[33] The Authority has the power to award interest in any matter involving the recovery of money in clause 11 of the second schedule to the Act. Interest is to be calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

[34] Ms Knight proposes that interest be awarded from 1 June of each year a profit was made and a bonus was owing being two months after 31 March.

[35] I conclude that it is appropriate to award interest on the amounts due to Mrs Cherry. There has been a delay in payment. I accept 1 June is an appropriate date to calculate interest from each year there was a profit.

The legal framework for a constructive dismissal

[36] In some circumstances a resignation may amount to a dismissal. Judge Williamson stated in the Court of Appeal judgment in *Wellington Clerical Union v Greenwich*:⁴

There is no substantial difference between the case of an employer who, intending to terminate the employment, dismisses the employee, and the case of the employer who, by conduct, compels the employee to leave the employment.

[37] The Court of Appeal listed three non-exhaustive situations where a constructive dismissal might occur.⁵

- (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.

[38] Ms Knight submits that Mrs Cherry's situation falls in all of the three categories.

⁴ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

⁵ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

[39] Where breaches are alleged the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* has held that the correct approach is to firstly conclude whether the resignation was caused by a breach of duty on the part of the employer. 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.⁶

[40] Mrs Cherry has the burden of establishing that the resignation was actually a dismissal.

What were the reasons for Mrs Cherry's resignation?

[41] In the letter of resignation dated 5 May 2023 Mrs Cherry referred to several reasons for her resignation.

[42] The first Mrs Cherry puts in her resignation letter as most important was Mr Abel's lack of trust and faith in her demonstrated because he questioned whether she was inputting data into the system correctly. Mrs Cherry stated in her letter that she had been doing the job for five and a half years and knew how to input figures from invoice and till systems.

[43] The second was that she had been on call 24/7 when working at the adventure park.

[44] The third was that she could not work with someone that she did not trust and she referred to Mr Abel as a bully in the following way.

I should have gone to the employment tribunal the day after you had me closed in my office for four hours yelling at me and demanding I do something I didn't feel was right. That was wanting me to set up the transfer of \$----from West Coast tree Top Walk account to your personal business account West Coast Tower Zipline.

[45] The fourth was a matter that as set out earlier was referred to as "the final nail in the coffin" was when she found out that a recruitment agency had been hired to find a replacement for her.

[46] In the resignation letter Mrs Cherry asked for her profit share to be paid out and, if not, she would take the matter further and would lodge a claim for bullying.

[47] I am satisfied that those are the reasons for Mrs Cherry's resignation.

⁶ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

[48] The original statement of problem was lodged on 1 June 2023. The statement of problem alleged both a constructive dismissal and a personal grievance about the 8 March 2023 meeting. Both grievances were raised within the statutory time frame for doing so in the Act.

[49] Ms Knight in final submissions refers to a warning letter as also constituting an unjustified disadvantage. I am not satisfied a personal grievance about the warning was raised within the statutory timeframe and the Authority lacks jurisdiction to consider it as a separate unjustified disadvantage grievance. Evidence about the warning can provide background context to the alleged unjustified constructive dismissal claim as the events that led to resignation are not constrained in the way that a disadvantage grievance is to the 90-day statutory period.

Was the resignation caused by a breach on the part of the Partnership?

The instruction on 20 February 2023

[50] The employment relationship began to deteriorate after an instruction to Mrs Cherry was made on 20 February 2023 to transfer some money.⁷ At the time of the instruction to transfer funds the Tower Zipline account was not set up for EFTPOS payments. That meant that all the income from the zipline went into the Partnership account and therefore not all the income in the Partnership account was that of the Partnership.

[51] Mr Wade, Mr Abel and Mrs Cherry had been signatories to the Partnership bank account. Mr Wade's death in January 2023 meant that the only two signatories were Mrs Cherry and Mr Abel. By email dated 20 February 2023 Mr Abel asked Mrs Cherry to transfer to the Tower Zipline account funds to part pay an account for the zipline that Mr Abel had forwarded earlier to Ms Cherry. The amount which I do not need to set out was reasonably large. The instruction was never followed by Mrs Cherry.

[52] Mrs Cherry in her evidence advanced a number of reasons why she felt uncomfortable transferring the money following receipt of the February 2023 email. Mr Abel when questioned

⁷ Mr Abel in his evidence said the relationship between him and Mrs Cherry had deteriorated earlier in December 2022 following his questioning about what Mrs Cherry's husband was being paid. His evidence was that Mrs Cherry got angry and they got offside.

at the Authority investigation meeting could only recall Mrs Cherry raising an issue that transferring that amount of funds would mean the Partnership would not be able to meet its outgoings. Mr Abel said that he told Mrs Cherry there was sufficient cashflow in the Partnership to meet its outgoings after the sum was transferred as he understood the outgoings for the months ahead. He recalled an issue being raised that Mrs Cherry wanted to hear from the other partners that they were comfortable. Mr Abel said that as Managing Director he had the power under the shareholders agreement to manage the business and request the transfer. He said that he could not recall an issue was raised with him that the amount requested to be transferred was more than Tower Zipline was owed.

[53] Additional reasons advanced by Mrs Cherry were that there was already money owing from Tower Zipline to the Partnership for invoices paid and that she considered such a transfer may be illegal and that she could be charged with fraud. Mrs Cherry said that she had before the instruction raised the issues of payment of her performance bonuses and she was additionally concerned there may not be enough money left to pay those. Mrs Cherry said that Mr Abel was angry that she would not follow his instruction when she advised him after receiving the request in February 2023.

[54] Mrs Cherry said she believed she should act in the best interests of the Partnership to ensure the company funds were handled in the correct way. She notified Mr Wade's family who were or were in the process of becoming shareholders. Mrs Cherry advised them about the request from Mr Abel and her evidence was that they did not approve the payment and asked her if she could "hold off and stall" Mr Abel.

[55] There is an email dated 28 February 2023 from one of the Wade family members to Ms Cherry attached to the original statement of problem. The email, which copied in a number of others including the Partnership accountant, appears supportive of Mrs Cherry's stance.⁸ Although not specifically referring to the transfer instruction it more generally states the following amongst other matters:

...I'd like to thank you so much for your good judgement and determination handling this awkward situation.

...I understand this has placed you in an unreasonable position and has likely been stressful...

⁸ Mr Abel was not copied into the email.

[56] Mr Abel followed up his instruction again to transfer funds with Mrs Cherry in or about late February or early March 2023. Mrs Cherry said that she told him she was very uncomfortable with the request and if he insisted that she transfer money without the Partnership's approval she would hand in her notice.

8 March 2023 meeting

[57] Mr Abel travelled to Hokitika on 8 March 2023. He wanted to look at an issue with the zipline and to meet with Mrs Cherry.

Purpose of the meeting

[58] Mr Abel described the purpose of the meeting with Mrs Cherry as a performance review against a background of the failure to make the requested transfer to the Tower Zipline account and performance concerns. Mrs Cherry said that a performance review meeting was a surprise to her and she did not receive earlier advice that this would be the nature of the meeting.

[59] In final submissions Ms Knight refers to two aspects of this meeting as fundamental breaches. The first aspect was the way the meeting was conducted. Ms Knight submits this was unreasonable and amounted to bullying with aspects of surprise, detention and shouting but in any event was unjustified. The second aspect is that there was a storing up of purported performance concerns about Mrs Cherry and laying them out aggressively.

The way the meeting was conducted.

[60] Mr Abel's evidence was that the meeting was about one hour in duration between 8.30 and 9.30 am. He did not accept that he yelled, shouted, or raised his voice during the meeting. He denied trapping or detaining Mrs Cherry in the room and said he sat in a corner of the room which did not inhibit Mrs Cherry's ability to leave the room. He did not observe that Mrs Cherry was distressed or tearful.

[61] Mrs Cherry's evidence was that the meeting was four hours in length during which Mr Abel was aggressive and loud and effectively detained Mrs Cherry in the office. Mrs Cherry said that when they left the meeting she was very distressed and in tears and some of her colleagues and her husband tried to console her.

Tone and volume

[62] The meeting commenced with a discussion about the transfer of the money instruction.

[63] I agree with Ms Knight's submission that at the Authority investigation meeting Mr Abel's voice increased in volume and he became more animated when talking about Mrs Cherry's failure to follow the instruction in his evidence. He saw the failure to follow the instruction as the main cause of all the difficulties between the parties and did not accept that there could be any reasonable concern about the instruction or its lawfulness.

[64] I heard evidence from other witnesses about what they heard of the exchange. Paul who formerly worked as a zipline operator at the Adventure Park said that he heard shouting and screaming from behind a closed door between Mr Abel and Mrs Cherry. He said this continued for a couple of hours. Paul recalled Mr Abel going in and out of the office several times looking angry and annoyed. Paul approached Mr Cherry and voiced his concerns about the situation and said in his oral evidence that he regretted not intervening. Mr Cherry said that when he arrived at work at about 9.30am the morning of 8 March 2023 he was met by several other staff members who told him that Mr Abel was shouting at Mrs Cherry. He said in his oral evidence that he could hear Mr Abel shouting from outside the office in the public area of the building. He went to investigate and met Mrs Cherry in the hallway who said words to the effect that she did not want him to become involved.

[65] Mr Abel stated in final submissions that the evidence from Paul and Mr Cherry should be treated with caution. He said that there were issues with Paul's onsite behaviour and whether he could even have heard the discussion as he worked with the zipline not in the office/staff area. Further that Mr Cherry being the husband of Mrs Cherry would not provide an independent and true witness statement. He expressed surprise that another witness who had provided a written statement was not called as a witness because her account differed about what she overheard. The Authority cannot place weight on their account because there has been no testing of their evidence. Neither Paul nor Mr Cherry said they were present in the office for the entirety of the meeting. I accept their evidence that when they were in the vicinity of the office they could hear Mr Abel shouting.

[66] It is likely in circumstances where Mr Abel's view was that Mrs Cherry should simply follow the instruction and transfer the money he was frustrated and upset that she refused to do

this. It is likely that Mr Abel raised his voice above the tone he would normally use to the extent that it could be heard by others outside of the room.

[67] The conversation about the money transfer discussion ended when Mr Abel said they would go into the bank at 12.30 pm when it opened to make the transfer payment. She said that he did not want to listen anymore and to bring the conversation to an end she agreed and said “yes.” It is less likely that Mr Abel raised his voice throughout the meeting in its entirety to the same degree although Mrs Cherry felt that other performance issues were raised with some aggression.

Detention

[68] Mrs Cherry said at the start of the meeting that Mr Abel yelled at her that he was the Managing Director and she had to do what he said about transferring money. She said that she tried to explain that she was uncomfortable about doing that and when she went to leave the office she was told to “sit down.” I accept that Mrs Cherry probably felt that she had no choice but to stay in the room at that point. The evidence supported later after the discussion about the money transfer Mrs Cherry and likely Mr Abel left the office. Mrs Cherry said in her evidence that she went to get a booking folder and wanted to leave the door open to her small and quite warm office but Mr Abel slammed it shut and she had to open the window. Paul’s evidence suggested Mr Abel left the meeting room several times looking angry and then returned to the room and slamming the door. Whilst Mr Abel wanted to discuss the money transfer issue and a failure to discuss that would not have been acceptable to him I do not conclude he made a conscious decision to detain Mrs Cherry in the room.

Length of the meeting

[69] Mrs Cherry refers to the meeting duration as four hours in her resignation letter. The evidence supports the meeting was likely longer than one hour which was Mr Abel’s evidence. The resignation letter was written closer in time to the meeting and is more likely to be reliable. At the time of the writing the resignation letter Mrs Cherry had not lodged a statement of problem with the Authority so there is no issue about litigation having an impact on what was written. It seems likely that after the initial exchange about transferring the money Mrs Cherry and Mr Abel left the room from time to time and the meeting did not proceed over a continuous unbroken period of four hours.

Going to the bank after the meeting

[70] Mrs Cherry said that after four hours Mr Abel advised it was time to go to the bank and he suggested one car. Mrs Cherry said it would be better for them to go in two cars as Mr Abel was not returning to the adventure park.

[71] Mrs Cherry decided rather than going to the bank to drive home instead. She sent a text message to Mr Abel advising him that she would not be meeting him at the bank and would not return to work while he was there. Her evidence was that Mr Abel sent her a text in response and advised he was leaving that day to go to Christchurch, and she would pick the car up from the airport. Nothing further was said at that stage about the transfer.

Bullying?

[72] Mrs Cherry says that the way Mr Abel conducted himself at the meeting amounted to bullying. A definition of bullying is found in a guideline document from Worksafe New Zealand about preventing and responding to bullying at work.⁹

Workplace bullying is: repeated and unreasonable behaviour directed towards a worker or group of workers that can lead to physical or psychological harm.

[73] There is a description of what workplace bullying is not in the Worksafe guide. This includes setting high performance standards, reasonable instructions, and single instances of unreasonable behaviour. There is no evidence that the conduct was repeated after 8 March 2023. The conduct at the meeting by Mr Abel does not meet the definition of behaviour that is bullying.

Unsafe?

[74] Mrs Cherry had already indicated before the meeting that she would resign if there was insistence that she comply with the instruction. It's likely one of the objects of the meeting was to have Mrs Cherry comply with the instruction in the face of that clear resistance. Consistent with that there was no evidence to support any discussion that if the instruction was not complied with there would be a disciplinary outcome. It is more likely in order to result in the desired object of the transfer of money Mr Abel raised his voice and Mrs Cherry felt unsafe.

⁹ Worksafe New Zealand "Preventing and Responding to Workplace Bullying Good Practice Guidelines" updated in March 2017.

Others who overheard were also worried. Mr Cherry observed Mrs Cherry was distressed for some time after the meeting.

[75] There were options for a fair and reasonable employer other than attempting to pressure Mrs Cherry into transferring the money. A fair and reasonable employer could have been expected to understand the reasons for failing to follow the instruction and respond to them. In the employment agreement a serious or repeated failure to follow a reasonable instruction could amount to serious misconduct.¹⁰ If Mr Abel was still satisfied that the instruction was reasonable and lawful then the matter could have been dealt with as a disciplinary matter.

[76] The employment agreement provided that the Partnership would deal with Mrs Cherry in good faith and take practicable steps to provide her with a safe and healthy work environment.¹¹ The way the meeting was conducted about the instruction did not satisfy those obligations. Mrs Cherry was distressed as a result.

Performance concerns

[77] Ms Knight submits that Mr Abel stored up a list of purported performance concerns and laid them out aggressively at a “surprise meeting.” An employer is entitled to raise performance concerns with an employee and should identify as a matter of fairness any areas of dissatisfaction. Proper notice should be given about the concerns so that an employee can respond to the issues.

[78] Ms Knight referred the Authority to an Employment Court judgment in *Donaldson and Youngman v Dickson* in final submissions. In that matter there had been a surprise meeting with the employee and presentation of a two-page list of concerns. The employee had no opportunity to reflect on and respond to the concerns and the meeting ended with a resignation. It was held to give rise to a constructive dismissal grievance.¹²

[79] This matter is distinguishable from that in *Donaldson and Youngman* as there was some discussion and some opportunity to respond.¹³ After the meeting on or about 10 March 2023

¹⁰ Clause 13.2 of the employment agreement between Mrs Cherry and the Partnership.

¹¹ Employment agreement clause 4.1(ii) and (iii).

¹² *Donaldson and Youngman v Dickson* [1994] 1 ERNZ at pg 920.

¹³ Above n 10.

Mrs Cherry received a document headed draft notes from the review meeting. An analysis of the draft notes of the review meeting show a mix of performance concerns about data entry, timeliness of provision of reports, threats to resign and failure to follow instructions and also management and budgetary matters to attend to going forward. Mrs Cherry did not respond to the draft notes of review but there was opportunity if she had chosen to respond to the contents.

[80] Mrs Cherry said in her evidence that most of what was written in the review document was wrong. Further in contrast to what was said in the document she believed her performance and that of Mr Cherry were seen positively by staff and the West Coast community. A letter attached to her statement of evidence from the Mayor of Westland praised the work of Mrs Cherry and Mr Cherry.

[81] Mrs Cherry said that she had never had a performance review during her years employed as a manager as there were no issues Mr Wade identified with her work to discuss. She had concluded, not surprisingly, that her performance when Mr Wade was managing her was satisfactory. The employment agreement in clause 2.5 provided that the employer shall conduct a performance review of the employee on at least an annual basis but Mrs Cherry said a performance review had not taken place previously. The parties had agreed a performance review meeting was required to be undertaken each year.

[82] Mrs Cherry in her letter of resignation raised as the most important concern that Mr Abel did not have trust and confidence in her using the data entry, was questioning others and that she had been doing the role for five years and knew what she was doing. I accept that there were significant trust issues developing in the employment relationship.

[83] Mrs Cherry should have had advance notice that there was to be a performance review and I cannot be satisfied about that aspect. The discussion about performance matters was likely clouded by the way the meeting had been conducted in respect of the instruction to transfer money. There was some opportunity to respond after the meeting to the draft notes. If there was a breach then I do not conclude it to be a fundamental breach.

[84] Mrs Cherry also raised an issue about the hours she was working in her resignation letter. I accept that Mrs Cherry worked additional hours for the Partnership in undertaking her role. There had been no previous issues raised about her commitment. Mrs Cherry's employment agreement referred to a requirement of reasonable overtime in clause 6.1. I

concluded from the evidence the concern was more that Mrs Cherry considered her efforts were not being recognised by Mr Abel and his expectations about report delivery were unrealistic. I could not be satisfied that there was a breach about this matter.

The written warning

[85] On 14 March Mrs Cherry received a first written warning for refusing to transfer funds from the Partnership account into the Tower Zipline account as directed by Mr Abel and the failure to attend at the bank as agreed on 8 March 2023 to address other banking issues.

[86] The warning letter referred to clause 13.2 (iv) of the employment agreement and contained a further instruction. Mrs Cherry was instructed to go to the Bank on 21 March 2023 at 1 pm and lodge paperwork for Mrs Abel who was a director at that point to become a signatory on the Partnership Account. Mrs Cherry was advised that a failure to follow the instruction would constitute a second and final warning.

[87] Mrs Cherry said that she realised that adding Mrs Abel as a signatory to the account would mean Mr and Mrs Abel could transfer the money without her involvement. Mrs Cherry did not believe this was in the best interests of the Partnership and might involve criminal activity. She told Mr Wade's family about the instruction and again her evidence was that they asked her to stall. They also suggested that she get legal advice for her own protection. Mrs Cherry said that she got legal advice on 16 May 2023 and that was to the effect that if the instruction was lawful and reasonable, she would need to comply. Her lawyers wanted to get some additional advice from their commercial lawyer because it was a limited Partnership. Mrs Cherry said that she could not afford to take it further as at that point the legal fees were over \$2000.

[88] Mrs Cherry said that she was so anxious and worried about the situation that it contributed to her taking time off work. Mrs Cherry took a period of almost three weeks sick leave for which medical certificates were supplied.

Lawyer is instructed by Mrs Cherry

[89] Mr Abel received an email from Mrs Cherry's lawyer on 21 March 2023. He was asked to explain the lawful and reasonable basis for the instruction. Mr Abel explained that the income for the zipline was going into the Partnership bank account. He attached an income

spreadsheet showing the Tower Zipline income that was in the Partnership account. He wrote that he had the power under the Constitution and Shareholders Agreement to request a transfer. Copies of these were provided. There was advice in Mr Abel's response that if the amount was not transferred by the end of the week Court orders would be obtained.

[90] There was money belonging to Tower Zipline in the Partnership account. The basis for Mrs Cherry's concerns about potential fraud or anything else of a criminal nature is unclear but suggests significant trust issues about Mr Abel which was a matter referred to in the resignation letter.

[91] Once Mrs Cherry returned to work in April 2023, she signed the bank paperwork although said she was still not comfortable with the situation. The written warning was procedurally unfair because it did not have the minimum procedural fairness factors set out in the justification test in s 103A of the Act.

Engagement of a recruitment company to see if there were potential candidates for Mrs Cherry's role

[92] Mrs Cherry said that she made a decision to resign because she was told by a person that they had been approached about whether they were interested in Mrs Cherry's job on 4 May 2023. That person had asked not to be named and Mrs Cherry referred to her as Jane Doe. The Authority did not hear evidence from Jane Doe. Mrs Cherry said that she found the advice very upsetting and said that it was clear to her that Mr Abel wanted to replace her. She did not want to be dismissed and was fearful how that would affect her reputation in Hokitika. On 5 May 2023 Mrs Cherry resigned.

[93] When she was working out her notice Mrs Cherry went to an international tourist conference in Christchurch to promote the Partnership business. Whilst there she found out that Andrea and Ann had been approached by a recruitment agency. Both had worked out during the discussion with the recruitment agent that it was Mrs Cherry's role. They were both advised to keep the matter confidential. Andrea in her evidence said that the call was received from the recruitment agency on 21 April 2023. Andrea provided a copy of an email from the recruitment agent about the role dated 21 April 2021.

[94] Mr Abel said in his evidence that he engaged a recruitment company because Mrs Cherry had said she would resign multiple times and it was necessary to look for a replacement in the event Mrs Cherry followed through with her resignation. The notice period required in the employment agreement was only two weeks and Mr Abel said he did not want to put more stress on the business, staff and on himself by not having an onsite manager for a period.

[95] Mrs Cherry said she had only twice stated she would resign. Once was in response to the instruction to transfer money and the second was in or about March/April 2023 when Mr Abel proposed laying off some staff over the winter period. Some emails about this proposal between Mr Abel and Mrs Cherry were provided to the Authority by Mrs Cherry after the investigation meeting.

[96] A recruitment agency was engaged in mid-April to identify potential candidates for Mrs Cherry's role. A potential candidate, not Angela or Ann, was interviewed a little over a week after Mrs Cherry resigned but did not accept the role. Another candidate not put forward by the recruitment agency was offered the role after Mrs Cherry's resignation. That person did not take up the role until June leaving the business without a manager for some six weeks.

[97] The Authority did not hear evidence from the recruitment agent. Andrea's evidence was that she was asked if she was interested in a role becoming available. She recalled being told this was because of a restructuring or potentially connected to an illness but she was clear the current incumbent was not aware their position was listed with the agency. She was advised to keep the matter confidential. A job outline was provided and Andrea was asked if she would consider applying for the position and if not what would it take. Her evidence supported that a role was becoming available.

[98] Ms Knight refers to it being a secret scheme to find a replacement for Mrs Cherry representing the "antithesis of good faith relations." The engagement of a recruitment agency cannot be seen in isolation. It was a step undertaken in the context of Mrs Cherry saying that she would resign if certain things happened. Mr Abel's evidence was that there could have been potential difficulties with the filling of the onsite manager role in a timely manner if resignation were carried through. He was entitled to protect his business interests in the circumstances where the business could be left without an on-site manager and he lived in Australia.

[99] Ms Knight submits there were good faith breaches in not advising Mrs Cherry about the engagement of a recruitment company to assess whether there were potential candidates for her role.

[100] There was no evidence to support a replacement had been found and offered the role before Mrs Cherry resigned. Had that occurred I agree with Ms Knight to be consistent with good faith obligations there would have had to be communication with Mrs Cherry. The evidence does not support that before Mrs Cherry resigned the recruitment agent went beyond preparatory steps to sound out potential candidate interest in the role. As it transpired the person who ultimately obtained the role was not one approached by the recruitment agent. The Partnership was without an on-site manager for six weeks after Mrs Cherry resigned.

[101] Whilst unfortunate that Mrs Cherry came to learn of the recruitment agent's approach the evidence from those the Authority heard from who had been approached was that they held Mrs Cherry in high regard. They were complimentary about her management skills.

[102] I do not conclude that approaching a recruitment company to take some preparatory steps to see if there was a potential candidate for Mrs Cherry's role was a breach of a duty in all the circumstances. In light of earlier statements about resignation by Mrs Cherry I do not consider the preparatory steps undertaken by the recruitment agent would satisfy the "last straw" test.

[103] I do not conclude that Mr Abel followed a course of conduct with the dominant or deliberate purpose of coercing Mrs Cherry to resign. I do not conclude she was faced with a choice of resignation or dismissal.

Conclusions about whether the resignation was caused by a breach of duty on the part of the Partnership

[104] Until Mr Abel took over the day-to-day management of the adventure park Mrs Cherry worked quite autonomously. She had got on very well with Mr Wade and could not recall any disagreement or argument with him. Mrs Cherry said that with the help of Mr Wade over the years she was able to have a reasonable working relationship with Mr Abel. With Mr Wade's death Mr Abel became the sole director for a time. Mr Abel's management style was quite different to Mr Wade's. There was some evidence to support adapting from operating

autonomously to being more closely managed was not easy for Mrs Cherry. I do not however conclude a breach in that respect.

[105] The instruction to transfer money was a pivotal matter in the relationship. The suggestion to try to stall the transfer from the Wade family accorded with and strengthened Mrs Cherry's view about not following the instruction. The difficulties in the relationship came to a sharp point at that time.

[106] I have found the conduct about the instruction at the meeting on 8 March 2023 amounted to a breach of the Partnership's obligations.

[107] After Mrs Cherry returned to work in early April she signed the bank documents to enable the money to be transferred. She described things during that period as difficult with Mr Abel but not as bad as in March and she was just getting through. Both parties had different views about the timeliness of the provision of reports.

[108] Mrs Cherry then said she would resign again if a proposal to reduce staff over the winter period went through. Mr Abel refers to a number of emails in which he said Mrs Cherry wrote she would resign about her salary. These are mentioned in the draft performance review notes of the 8 March 2023 meeting but the emails were never provided to the Authority. Mrs Cherry did not accept she had said she would resign about her salary level.

[109] The evidence does not support that before Mrs Cherry resigned the recruitment agent went beyond preparatory steps to sound out potential candidate interest in the role. Mrs Cherry then found out that someone had been approached about her role. I have not found a breach of duty in respect of the exploratory activities of the recruitment agent about whether there were potential candidates for Mrs Cherry's role in the circumstances.

[110] The only breach I have concluded was about the 8 March 2023 meeting. I could not be satisfied that in isolation that caused the resignation.

Were the breaches of a serious nature and was it reasonably foreseeable that Mrs Cherry would not be prepared to continue to work for the partnership?

[111] I do not conclude that it would have been foreseeable that Mrs Cherry would resign because of the meeting on 8 March. The resignation was some two months later. If Mrs Cherry

had asked Mr Abel about the recruitment agent's approaches before her resignation he could have advised her that he had not obtained a replacement for her role. He could have explained that he had asked the agent to undertake preparatory steps to see if there were potential candidates given statements from Mrs Cherry about resigning and difficulties with finding suitable people for the position on the West Coast. Mrs Cherry said correctly that he did not approach her after her resignation letter to explain what was occurring. Foreseeability is assessed at the time of resignation.

[112] This employment relationship was fragile and its continuation far from certain. Mrs Cherry had said at least twice in response to an instruction and proposal that she would resign. The management relationship with Mr Abel was not the same as Mrs Cherry had had with Mr Wade. Mrs Cherry had become unhappy and had lost trust in Mr Abel.

[113] Mrs Cherry has not established that her resignation was a dismissal.

Did the meeting on 8 March 2023 amount to an unjustified action that caused disadvantage?

[114] Section 103(1)(b) of the Act provides that a personal grievance includes a claim:

That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer...

[115] The meeting on 8 March 2023 about the instruction took place against the known background of Mrs Cherry refusing to follow the instruction including her saying that she would resign if forced to do so. Mr Abel wanted to encourage compliance with the instruction. I am satisfied that in the face of continued resistance he raised his voice to the point others, whose evidence I have accepted, considered it to be shouting. Whilst Mr Abel was no doubt frustrated at the non-compliance with the instruction and financial pressure to make payment of an account there were as outlined earlier some other steps that could be taken. Mrs Cherry said that she felt unsafe in the meeting and was distressed. The Partnership had express obligation to provide Mrs Cherry with a safe and healthy workplace and this conduct fell short and was unjustified.

[116] Mrs Cherry has established a personal grievance that the conduct by Mr Abel at the meeting on 8 March was unjustified and as a result she was disadvantaged. She is entitled to an assessment of remedies.

Remedies

Compensation

[117] There was clear evidence in this matter about humiliation, loss of dignity and injury to feelings during the meeting on 8 March 2023. Mrs Cherry felt humiliated and distressed by the exchange and was concerned that others had overheard what was being said during the meeting.

[118] Some stress must also have arisen from Mrs Cherry being in the middle of a suggestion by a shareholder to stall the transfer of money and an instruction by the Managing Director to transfer the money. It would not be fair to visit that on the Partnership.

[119] I have considered compensatory awards in comparable cases. I conclude subject to contribution that a suitable award for compensation is \$12,000.

Contribution

[120] Section 124 of the Act requires that the Authority, where it has determined that an employee has a personal grievance, consider the extent to which the employee contributed towards the situation that gave rise to the personal grievance when deciding the remedies.

[121] Mr Abel raised many matters that he says should reduce any award. In assessing whether there was contribution the actions of Mrs Cherry must be blameworthy and have contributed to the situation that gave rise to the personal grievance. Some of the matters such as alleged overpayments to Mr Cherry did not contribute to the situation that gave rise to the 8 March meeting so there is no causal link established. Further this could not be said to be after discovered misconduct because there had been some focus on Mr Cherry and what he was paid from in or about December 2022.

[122] Mr Abel raised concerns about the failure by Mrs Cherry to follow the instruction to transfer money. Not following the instruction had a damaging impact on the relationship but I could not conclude that Mrs Cherry was not genuine in her concerns. Mrs Cherry took the step of taking advice from a lawyer. Ultimately Mrs Cherry signed the necessary paperwork so Mrs

Abel could be a signatory. Mrs Cherry was not responsible for the way in which the meeting was conducted on 8 March 2023 and that could have been dealt with differently. I do not conclude the failure to follow the instruction contributed to the situation that gave rise to the personal grievance. The situation that gave rise to the personal grievance was the manner in which the meeting took place.

[123] I do not for completeness find any contributing conduct in respect of performance concerns. An employer can undertake a process to address these and deal with performance issues.

[124] Subsequently discovered misconduct of a truly significant nature can be taken into account when determining remedies.¹⁴ Credit card expense statements were provided by Mr Abel who referred to Mrs Cherry “embezzling” the work credit card. Mrs Cherry went through the statements and set out that the purchases were work related. I am not satisfied that there has been misconduct with the credit card established.

[125] I have also considered in the category of subsequently discovered misconduct that Mr Abel said that Mrs Cherry discussed commercial confidential information with staff and denigrated him in front of staff, Hokitika residents and bank staff.

[126] Mrs Cherry accepts that she did tell staff about intended job cuts but denies that she told staff about any other matters. Angela said that she knew from Mrs Cherry about the money that Mr Abel wanted to be transferred and said that Mrs Cherry bad mouthed Mr Abel in town as well as on site. She also said that Mrs Cherry told them uncharitable things about Mr Abel and that they would all lose their jobs. Angela had written an email to Mr Abel on 7 May 2023 in which she had referred to knowledge about the instruction to transfer money. In answer to a question from the Authority Angela said she was told about the money transfer by Mr and Mrs Cherry. I conclude it more likely that the money transfer was discussed as well as the possible loss of jobs with Angela or within her hearing. There was no direct evidence from bank staff or residents about what was said to them. I do not conclude that what was discussed with Angela or within her hearing was subsequently discovered misconduct of a truly significant nature.

¹⁴ *Salt v Fell* [2008] NZCA 128.

[127] I do not conclude that Mrs Cherry contributed to the personal grievance established and the compensatory award is not reduced.

Should Mrs Cherry receive reimbursement for the lawyer's invoice?

[128] I am not satisfied that this is the sort of expense for which the Partnership should be liable for by way of specific damages. The response to the lawyers from Mr Abel repeated much of what Mr Abel had told Mrs Cherry. This claim is declined.

Findings and orders made

[129] The Authority has found that Mrs Cherry is owed payment of annual profit shares amounts and that it is appropriate to award interest on those amounts.

[130] Mrs Cherry has not established her claim of unjustified constructive dismissal.

[131] Mrs Cherry has established a personal grievance for unjustified disadvantage for the failure to provide a safe workplace at the meeting on 8 March 2023.

[132] Hokitika Rimu Tree Top Walk Limited Partnership is to pay to Vonette Cherry the following amounts:

- (a) The sum of \$44,630.30 being bonus incentives of annual profit under clause 7.2 of the employment agreement.
- (b) Interest calculated in accordance with the Interests on Money Claims Act 2016 as below:
 - (i) For the financial year ending 2021 interest on the sum of \$30,000 from 1 June 2021 until the date of this determination in the sum of \$3,361.78.
 - (ii) For the financial year ending 2022 interest on the sum of \$12,501.30 from 1 June 2022 until the date of this determination in the sum of \$1,228.22.
 - (iii) For the financial year ending 2023 interest on the sum of \$2,149 from 1 June 2023 until the date of this determination in the sum of \$135.74.
- (b) Compensation in the sum of \$12,000 without deduction under s 123(1)(c)(i) of the Act.

Costs

[133] Costs are reserved.

[134] Ms Knight has made submissions as to costs in final submissions and the parties are encouraged to resolve any issue of costs between themselves if they can.

[135] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Abel may have 14 days to lodge any reply memorandum to Ms Knight's submission about costs. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[136] 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.¹⁵

Helen Doyle
Member of the Employment Relations Authority

¹⁵ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1