

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 75
3193159

BETWEEN

JANE KITTO
Applicant

AND

APL KWIKFORM PTY
LIMITED
Respondent

Member of Authority: Claire English

Representatives: Mary-Jane Thomas, counsel for the Applicant
Scott Worthy, counsel for the Respondent

Investigation Meeting: 23 and 24 November 2023 in Invercargill and by AVL

Submissions received: 8 and 14 December 2023 from Applicant
8 and 14 December 2023 from Respondent

Determination: 9 February 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Kitto was employed by APL Kwikform Pty Limited (Kwikform) as a Branch Co-ordinator. Her manager was Mr Peter Varrie. Ms Kitto became concerned that Mr Varrie was not properly accounting for cash payments received from a particular contractor, and raised a concern with Kwikform's New Zealand General Manager about this. She later became concerned that Mr Varrie was making comments to her that she considered were inappropriate in the workplace, and amounted to harassment, including a concern that Mr Varrie was targeting her in part due to her "whistleblowing" about the cash payments.

[2] She raised her concerns with the Human Resources team, and with approval, went on paid leave.

[3] Kwikform engaged an independent investigator to investigate and consider Ms Kitto's complaints. She also sought legal advice and representation.

[4] The investigator interviewed Ms Kitto and Mr Varrie.

[5] During this time, Ms Kitto remained on paid leave and communicated with Kwikform about her return to the workplace. Although multiple options were proposed, Ms Kitto then declined to return to the workplace and elected to remain on paid leave.

[6] She sought alternative employment, secured it, and resigned with immediate effect. She started new employment the same day she resigned from Kwikform.

[7] Following Ms Kitto's resignation, the investigator produced a draft report. Kwikform sought Ms Kitto's feedback on it and the report was then finalised.

[8] Ms Kitto raises a claim of constructive dismissal. She also raises claims of unjustified disadvantage into what she says are Kwikform's actions and inactions following her raising of a formal complaint; unjustified disadvantage arising from Kwikform's alleged disclosure to Mr Varrie that Ms Kitto was the whistleblower re the cash handling complaint; unjustified disadvantage re Kwikform's failure to direct a colleague to talk to the investigator; unjustified disadvantage in that Ms Kitto was not given an opportunity to talk to the decision-maker and have input into his final decision following the ending of her employment.

[9] As set out in the statement of problem, Ms Kitto seeks remedies of: compensation of \$20,000 for hurt feelings, humiliation, and loss of dignity; lost wages; a penalty of \$5,000 payable to Ms Kitto in relation to Kwikform's refusal to attend mediation on a voluntary basis; and a penalty of \$5,000 payable to Ms Kitto for Kwikform's failure to disclose correspondence between itself and/or its legal advisors and the investigator.

[10] Kwikform says that Ms Kitto was not constructively dismissed but resigned, and that at all times, it treated her appropriately and in accordance with its good faith obligations towards her. It denies any remedies are properly owed.

The Authority's investigation

[11] For the Authority's investigation written witness statements were lodged from Ms Kitto and her husband Mr Kitto, and on behalf of Kwikform by Mr Andrew Heng, Mr Mark Winnard, and Ms Andrea Wadsworth. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave written and oral closing submissions.

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[13] The issues requiring investigation and determination were:

- a. Was Ms Kitto constructively (unjustifiably) dismissed?
- b. Did Ms Kitto suffer unjustified disadvantage/s in her employment, on the grounds set out above?
- c. If Kwikform's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of loss and reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act
- d. If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Kitto that contributed to the situation giving rise to her grievance?
- e. Should any penalties be awarded against Kwikform for the either failure to voluntarily attend mediation, or failures to disclose certain documents, and if so, should any amount of these penalties be awarded to Ms Kitto?

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

Background

[14] Ms Kitto was the Branch Co-ordinator for the Invercargill branch of Kwikform. Kwikform is a scaffolding company, with a New Zealand-based General Manager, Mr Winnard, and a head office based in Australia.

[15] Kwikform had a business relationship with a local scrap metal company, who removed scrap metal and paid cash. Ms Kitto became concerned that Mr Varrie was collecting this cash but was not banking it. She raised her concerns in confidence with Mr Winnard. This was described as a “whistleblower” type action, and Ms Kitto expected that the fact that she had raised concerns against her own manager to be kept in confidence.

[16] Mr Winnard gave evidence that he took this matter seriously, including Ms Kitto’s request that her identity as a complainant be kept in confidence. Mr Winnard gave evidence at the investigation meeting that he had taken action including speaking with Mr Varrie, and the matter was resolved to his satisfaction with new processes being put in place. He states that he never told Mr Varrie that Ms Kitto was the one who raised these concerns with him, and generally indicated that he felt it was proper for her to have done so.

[17] Ms Kitto continued to have concerns about Mr Varrie and how he interacted with her. On 31 May 2022, Ms Kitto raised serious concerns about how Mr Varrie had treated her at work with Mr Heng who is the Group Human Resources Director based in Australia. Mr Heng called Ms Kitto without delay to hear her concerns. In brief, Ms Kitto raised a large number of separate instances where she said Mr Varrie had acted inappropriately at work and/or said inappropriate things to her, including saying that he knew she had raised a complaint about his cash handing to Mr Winnard. Ms Kitto characterised this as bullying and harassment.

[18] Ms Kitto asked to be allowed to remain home on full pay for the time being, to which Mr Heng immediately agreed. Mr Heng told Ms Kitto that Kwikform took her complaint very seriously and she had his full support. He also told her he would be away for two weeks as part

of a planned overseas management conference. This included Mr Winnard. Unfortunately, Mr Winnard also developed Covid-19 during this time.

[19] Mr Heng followed this up with Ms Kitto by text, although Ms Kitto disputes receiving the texts, which are in evidence.

[20] On 2 June 2022, Ms Kitto's lawyer advised Kwikform she was acting. On 3 June, Ms Kitto's lawyer wrote again, putting Ms Kitto's complaint in writing.

[21] On 14 June 2022, Mr Heng confirmed that an Kwikform was engaging an independent investigator.

[22] It is this period of time, between 2 or 3 June, which Ms Kitto put her concerns in writing, and 14 June, when Kwikform advised an investigator was being appointed, that Ms Kitto says was an unreasonable delay giving rise to the first of her four claims of unjustified disadvantage.

[23] On 15 June 2022, Ms Kitto through her lawyers raised a personal grievance and indicated she intended to return to work on 16 June. It was later agreed that Ms Kitto would remain on paid leave for the time being.

[24] On 15 June 2022, Kwikform advised that an investigator had been appointed. Ms Kitto was asked for comment on the proposed terms of reference for the investigator.

[25] Ms Kitto engaged with the investigator, including giving comments on the terms of engagement, and attended an interview. She provided substantive comments.

[26] On 22 June, Ms Kitto indicated she would return to the office on 27 June. She and Kwikform through their respective lawyers, attempted to negotiate the terms on which Ms Kitto would return to work. Kwikform put forward two different proposals.

[27] Ms Kitto rejected them both and by email on 27 June, advised that she wished to remain on paid leave for the duration of the investigation. In verbal evidence, she explained that she had decided that she did not want to return to work at Kwikform, or to work with Mr Varrie.

[28] It is submitted for Ms Kitto that she was “entitled not to be around Mr Varrie” and that by Kwikform’s failing to suspend Mr Varrie or somehow otherwise remove him from the workplace, Ms Kitto suffered an unjustified disadvantage.

[29] Ms Kitto gave in person evidence explaining that, once she had had to seriously consider the return-to-work proposals put forwards by Kwikform, she realised she did not want to return to the workplace. She looked for another job, and found a local company who was hiring. She went to an interview, and was offered the role. After she had been offered the role and accepted it, she resigned from Kwikform with immediate effect.

[30] In her in-person evidence, she says she started work at her new job that same day, meaning she lost no salary.

[31] The investigation into her complaint was well advanced at this point. After Ms Kitto resigned, the investigator provided her with a draft of his report, and asked for her comment on it on 21 July 2022.

[32] Ms Kitto, through her lawyer, provided comment on the draft report. The investigator then updated and finalised the report and provided it to Kwikform. The investigator found that most of Ms Kitto’s complaints were not made out for various reasons as stated in the report. However, the investigator did uphold some of Ms Kitto’s complaints, and agreed that certain statements made by Mr Varrie to her were not acceptable in the workplace. The report made recommendations to Kwikform including that Mr Varrie provide a written apology to Ms Kitto (which occurred despite her having ended her employment some time before), and that Kwikform consider training on bullying and sexual harassment in the workplace.

[33] Ms Kitto was not further asked to comment on the report, or to be involved in Kwikform’s decision-making process as to how to respond to the recommendations or to the report as a whole. Ms Kitto says she should have been provided with a copy of the final report, and should have had the opportunity to speak with the decision-maker (Mr Winnard) about what should happen as a result and to have input into the decision-making despite not being an employee at the relevant times.

[34] Ms Kitto also says that Kwikform should have instructed a former colleague of hers to speak to the investigator. The investigator approached this person, and they refused to speak with him, and I understand did not return phone or email contact. It is submitted for Ms Kitto that despite this, Kwikform should have instructed them, as an employee, to attend on the investigator in any event.

Analysis

[35] Ms Kitto has raised four disadvantage claims, which may be described as follows:

- a. The First Disadvantage Claim – this claim was raised on 15 June 2022, being that Kwikform had failed to respond to Ms Kitto’s complaints in a timely manner and/or ensure her safe return to work;
- b. The Second Disadvantage Claim – the alleged disclosure to Mr Varrie that Ms Kitto was the whistle-blower;
- c. The Third Disadvantage Claim – that Kwikform should have ordered Ms Kitto’s colleague to speak to the investigator, despite that colleague’s objections to doing so;
- d. The Fourth Disadvantage Claim – that Ms Kitto should have been consulted about the report and what steps Kwikform should taken next, despite her no longer being an employee.

[36] Ms Kitto’s claim of constructive dismissal is based on the first, second, and third, disadvantage grievances, as set out in her personal grievance letter of 1 September 2022. The legal submissions for Ms Kitto filed after the investigation meeting focus on the first and second disadvantage claims to support Ms Kitto’s claim of constructive dismissal. Accordingly, I will consider these matters in turn.

First Disadvantage Claim

[37] This is a claim that between 31 May 2022 and 14 June 2022, Kwikform did not act in a timely way to progress Ms Kitto’s complaints. Ms Kitto accepts that after 15 June 2022 when

she was notified of the appointment of the investigator (and raised this grievance) matters then progressed at what she considered to be a satisfactory rate.

[38] Kwikform does not accept that there was any particular delay, or that if there was, it was in any way undue. This is on the basis that there was a period of some 14 days between receiving Ms Kitto's complaint and the taking of a specific and serious step, progressing to hire an outside investigator. During that time, Ms Kitto's complaint was received, notified to the New Zealand General Manager Mr Winnard and senior leadership as necessary, and a decision made to hire an outside investigator (pending approval of the terms of engagement).

[39] Also during this time, Mr Heng, Mr Winnard, and the senior leadership team were overseas and/or traveling to and from New Zealand for a planned conference, as advised to Ms Kitto, and Mr Winnard was suffering from Covid-19.

[40] In these circumstances, this claim is essentially that Kwikform should have engaged the investigator faster, eg in less than 14 days time. It is hard to see how Kwikform could realistically have achieved this in all the circumstances. It is also hard to see how this short period of time, during which Kwikform was actively taking steps to progress Ms Kitto's complaint by informing leadership and hiring appropriate resources to act on it, could amount to a disadvantage in any term of Ms Kitto's employment. Kwikform, through its actions, took Ms Kitto's complaint seriously. The taking of a short period of time to action Ms Kitto's complaint and hire an investigator is not a disadvantage to Ms Kitto.

[41] Any delay there might have been during these 14 days was adequately explained by pre-existing travel commitments and illness, of which Ms Kitto was advised. Kwikform's actions were not unjustified.

[42] It is also submitted for Ms Kitto that Kwikform "had an obligation" to have her safely "return to work in a reasonable time".¹ Ms Kitto was on paid leave at her request, and when she raised the possibility of return to work, had again agreed via her counsel, to remain on paid

¹ Submissions for the applicant dated 8 December 2023, at para 24.

leave. It is not a disadvantage for Kwikform to take her at her own word when she has asked to be temporarily away from the workplace.

[43] This claim cannot stand in the face of the evidence that Ms Kitto stated in correspondence that she would return to work on 16 June, and then chose not to. She also stated at a later date that she would return to work on 27 June and again chose not to. Her own in-person evidence in explanation as to why she stated she would return to work but then did not, was that she did not in fact want to return to the workplace, even though Kwikform was actively negotiating with her lawyer for her return to work.

[44] Overall, this claim is contradicted by Ms Kitto's own evidence, as well as by her own actions and communications to Kwikform at the time. No unjustified disadvantage claim is made out.

[45] Neither of the two elements making up the first disadvantage claim are made out.

Second Disadvantage Claim

[46] Ms Kitto raised as an unjustified disadvantage grievance, a claim that Kwikform had disclosed to Mr Varrie that Ms Kitto was the whistle-blower.

[47] Ms Kitto received a transcript of Mr Varrie's interview with the investigator on either 30 June or 1 July 2022. Via her lawyer, she responded on 12 July 2022. In that transcript, Mr Varrie stated that "it was disclosed to me" that Ms Kitto had brought the cash handling issue to Mr Winnard's attention as part of a meeting he had with Mr Winnard and the health and safety manager, Ms Wadsworth.

[48] Mr Varrie was not called to give evidence. Mr Winnard gave evidence and denied disclosing Ms Kitto's identity to Mr Varrie, emphasising that he took the confidentiality of the process seriously. Ms Wadsworth also gave evidence that she did not disclose Ms Kitto's identity to Mr Varrie, and was not aware of that matter at all (and therefore could not have made such a disclosure) until she learned about this allegation during the course of these proceedings.

[49] Essentially, I am being invited to prefer the untested documentary record of what Mr Varrie said, in circumstances where he was being investigated based on a complaint by Ms Kitto, over the in-person evidence of Mr Winnard and Ms Wadsworth. I record that I do accept the in-person evidence of Mr Winnard and Ms Wadsworth that neither of them disclosed Ms Kitto's identity as the whistleblower to Mr Varrie.

[50] This denial was conveyed to Ms Kitto via lawyer's correspondence at the time, but it is apparent that she did not accept this, and remained concerned that her confidence had been betrayed. Having acknowledged this, it is also difficult to see what else could have been done by Kwikform to reassure her when she was not willing to accept Mr Winnard's denial. Communicating that denial formally by way of correspondence to Ms Kitto's lawyer (which was the method of communication that Ms Kitto had asked for) was a reasonable response. I also note it is not beyond the realms of possibility that this comment amounted to a "lucky guess" on Mr Varrie's part given that he had faced two serious complaints in a short space of time, and knew for certain that Ms Kitto had raised the second once after the first complaint had been put to bed. But Ms Kitto did not make such an assumption.

[51] What is apparent is that by this stage, Ms Kitto had rejected the attempts by Kwikform to negotiate her return to work in some agreed form, and as per her in-person evidence, had decided she did not want to return to the workplace with Mr Varrie in it, and was in the process of seeking other employment. I accept that she felt genuine concern over the idea that her employer had not kept her identity confidential, even if this was mistaken. However, I do not accept that she suffered any disadvantage in her employment as there was no change to her employment status, or that Kwikform's actions in response to her expressed concern were unjustified.

[52] This claim is not made out.

Third Disadvantage Claim

[53] This is a claim that Kwikform should have ordered Ms Kitto's colleague to speak to the investigator, despite that colleague's objections to doing so. Ms Kitto considered that one of her colleagues in particular should have been spoken to by the investigator, on the grounds that

there were a handful of instances where she alleged Mr Varrie had made inappropriate comments to her and she believed her colleague had heard these comments. The legal submissions for Ms Kitto state that:

Irrespective of whether [the colleague] would have supported or disputed the allegations against Mr Varrie, the investigation hinged on credibility. [The colleague] was the only person who could provide a third perspective on the matter...²

[54] In addition, Ms Kitto relies on the terms of engagement, which stated that the colleague would be interviewed, and on a text message the colleague sent to Ms Kitto on 27 May. In that text message, the colleague told Ms Kitto that:

I had an hour chat with mark, layed it out on the table, lay it out that your [sic]a woman and need to b treat [sic] and talking to in a manner that isn't personal, sexual or emotional or manipulative, your roll needs to b [sic] out line clearly and understood...

[55] Ms Kitto essentially suggests that this text message shows that Mr Winnard had information, gained from his conversation with the colleague, that would support her complaint.

[56] However in the event, the colleague told Mr Winnard that he would not engage with the investigator, and when the investigator attempted to contact him in any case, he refused to engage with the investigator. The investigator stated in his report:

Counsel for the complainant argues that [the colleague] was “a crucial part of the investigation” but, with respect, that can only be right if [the colleague] is prepared to engage in the investigation, and he clearly was not.³

[57] Ms Kitto says that Mr Winnard should have ordered the colleague to attend upon the investigator, despite his explicit refusals to engage, and that the failure to do so amounts to an unjustified disadvantage in her employment.

[58] Ms Kitto faces a difficulty in that by the time the issue arose about whether the colleague should be required to attend the investigator despite his objections, and she raised this issue with the investigator on 22 July 2022, she had already resigned her employment. This means that Kwikform’s decision about whether or not to order the colleague to attend the

² Submissions on behalf of the applicant, dated 8 December 2023, at para 28.

³ Appendix 3 to the final report, para 6.

investigator could not have any disadvantageous impact on Ms Kitto's employment, because she was no longer in an employment relationship with Kwikform.

[59] For this reason alone, this claim of unjustifiable disadvantage must fail.

[60] More fundamentally, I do not consider that there was an absolute obligation on Kwikform to direct or require one of its employees (who was not a party to the complaint) to attend the investigator. The actions of the colleague show that he was not willing to co-operate with the process, and it is hard to see how this would have assisted the investigator. In addition, the investigator took the view that despite it having been initially anticipated that he would interview the colleague, attempting to interview someone who refused to engage with him was futile. Kwikform was entitled to rely on the investigator's judgement that nothing was to be gained by attempting force the matter. It is significant that this was in circumstances where the employee had communicated to Kwikform as his employer that he did not want to participate, and even knowing this, the investigator chose to reach out directly, but was ignored. The reference to interviewing the colleague in the terms of reference cannot be understood to be an absolute commitment under those circumstances.

[61] For this reason, I also consider Kwikform's decision not to require the colleague to be interviewed to be a decision which was open to it in all the circumstances. No unjustified disadvantage claim is made out.

Fourth Disadvantage Claim

[62] This is a claim that Ms Kitto should have been consulted about the report once finalised and what steps Kwikform should have taken next, despite her no longer being an employee.

[63] Ms Kitto resigned with immediate effect as of 19 July 2022. Following her resignation she was provided with the draft report on 21 July and given the opportunity to comment on it, which she did by way of correspondence from her lawyer on 22 July.

[64] On 10 August 2022 the report was then finalised, and sent to Ms Kitto via her lawyer, and to Kwikform. The report found that:

- a. A significant number (nearly half) of the allegations raised by Ms Kitto were not accepted by the investigator as capable of being viewed as inappropriate behaviour⁴.
- b. There was no evidence that Ms Kitto raised any concerns she had with Kwikform before leaving the workplace on 31 May 2022.⁵
- c. There were five instances where the investigator found Mr Varrie had made inappropriate comments, but these did not amount to bullying or harassment, and did not represent the totality of the relationship between Ms Kitto and Mr Varrie.⁶
- d. Although he was not persuaded that bullying or harassment had occurred, the investigator found that Mr Varrie should apologise to Ms Kitto accordingly⁷.

[65] The report was given to Kwikform, and Mr Winnard's evidence was that he did take this up with Mr Varrie, and among other things, formal workplace training was provided. Mr Varrie also provided a written apology to Ms Kitto.

[66] It is submitted for Ms Kitto that because Kwikform had elected to continue with the investigation after Ms Kitto's employment ended, this created a "legitimate expectation that the applicant would continue to be involved".⁸

[67] I am not persuaded that Kwikform was required to consult with Ms Kitto about what steps Kwikform would take as a result of the report after Ms Kitto had left the workplace. Ms Kitto's employment relationship with Kwikform ended on 19 July 2022. Kwikform's decisions as to what to do as a result of that report from 10 August onwards cannot have had an adverse

⁴ Paragraph 31 of the final report.

⁵ Paragraph 32 of the final report.

⁶ Paragraphs 35, 36, and 44 of the final report.

⁷ Paragraphs 44 and 46 of the final report

⁸ Submissions on behalf of the applicant, dated 8 December 2023, at para 47.2.

impact on Ms Kitto's terms and conditions of employment as she was no longer in an employment relationship with Kwikform.

[68] There is no obligation on an employer to consult with former employees about how it deals with its current employees. In addition, there was no particular indication from Kwikform that Ms Kitto would have been consulted about what actions Kwikform were to take as a result of the report at all, even if she had remained in employment. This was not part of the terms of reference, and had not been discussed between the parties.

[69] Ms Kitto's counsel pointed to case law suggesting that where an employee is the subject of a disciplinary investigation (eg, their employment or the security of it is at risk), there is an obligation on the employer to satisfy itself of the matters in dispute before issuing a disciplinary sanction. It is submitted that Kwikform "took the report at face value without considering whether the steps taken by the investigator and the conclusions drawn were justified".⁹

[70] Dealing with the first point, these authorities are not directly relevant to Ms Kitto, as she was not the subject of any disciplinary proceeding, and her employment was never at any risk. The second point disregards Mr Winnard's evidence at hearing that he did not simply accept the report at face value, but took time to consider it, and time to speak with Mr Varrie about the report and his expectations of Mr Varrie going forwards, as well as implementing training for all staff.

[71] I am not persuaded that Kwikform had any obligation to consult with Ms Kitto after the ending of Ms Kitto's employment. Once Ms Kitto's employment with Kwikform was at an end, there was no longer any relationship between her and Kwikform which would have entitled her to have any say in the way the report was dealt with. By the same token, any decisions made by Kwikform in response to the report would and could have no impact on Ms Kitto, as she was no longer in any relationship with Kwikform. There was nothing in the way that Kwikform interacted with Ms Kitto that would have led her to believe she would have direct input into Kwikform's final decision-making apart from her input into the report itself, especially after the ending of her employment.

⁹ Submissions on behalf of the applicant, dated 8 December 2023, at para 53.

[72] The criticism of Mr Winnard for supposedly taking the report at face value was resisted strongly by him at hearing, and cannot stand in the face of his explanations as to his own obligations and the steps he took to consider matters himself. His actions were within the range of options open to a fair and reasonable employer. No claim is made out.

Constructive Dismissal

[73] Ms Kitto raises a claim that she was constructively dismissed. This is said to be because there were breaches of duty by Kwikform that caused her to resign. Those breaches of duty are the first, second, and third disadvantage grievances.

[74] For there to be a constructive dismissal, there must not only be a breach of duty by the employer, but also the breach must be of such a nature as to make the employee's resignation reasonably foreseeable.¹⁰

[75] Not every breach of contract will lead to constructive dismissal. There must be "a breach of a sufficiently serious nature to bring a reasonable employee to the conclusion that the employer does not intend to be bound by the contract and, therefore, cannot be relied upon to perform it fully or consistently in the future".¹¹

[76] When considering whether any of the claims that Ms Kitto raises are breaches of duty by Kwikform, my view is that overall, they are not made out for the reasons set out above. In addition, the three claims she relies on cannot realistically support her constructive dismissal claim, for the following reasons:

- a. Looking at the first disadvantage claim, being a delay in Kwikform's initial response and a failure to expedite her return to work prior to 15 June, this cannot have been causative of her resignation because subsequent to this, she expressed the view that she wished to negotiate a return to work, and then that she wished to remain on paid leave while the investigation continued. Any breach (which I have found is not made out) has been affirmed by Ms Kitto's actions.

¹⁰ See *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140, (2011) 8 NZELR 604.

¹¹ *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd* (1990) ERNZ Sel Cas 791 (LC) at 803.

- b. Looking at the second disadvantage claim, that Kwikform had disclosed Ms Kitto's identity as the whistleblower to Mr Varrie, this was denied by Kwikform at the time, and Ms Kitto appears to have chosen to believe Mr Varrie's account over Mr Winnard's account. The statement by Mr Varrie in the face of Mr Winnard's rebuttal cannot reasonably have been causative of Ms Kitto's resignation, especially in circumstances where she had made it clear she did not trust Mr Varrie.
- c. The third disadvantage, that the investigator had not spoken to Ms Kitto's colleague, cannot have been causative of Ms Kitto's resignation as it only came to her attention after she had resigned.

[77] However, it is important to stand back and consider the situation as a whole. Ms Kitto raised serious complaints with Kwikform's senior human resource advisor. He responded to her promptly, took her seriously, and immediately authorised her to take paid time off work while the company conducted an investigation.

[78] Despite practical difficulties caused by distance, travel, and sickness, Kwikform promptly engaged an investigator. The investigator met with Ms Kitto, and was in the process of producing a draft report when Ms Kitto and Kwikform began negotiating what a return to work might look like that would be satisfactory for both Ms Kitto and Kwikform.

[79] Ms Kitto then decided that she did not want to return to work with Mr Varrie, and sought other employment. She did not tell Kwikform this.

[80] Ms Kitto secured other employment and settled on a start date. She resigned from Kwikform with immediate effect, and started new employment that same day.

[81] At the time Ms Kitto tendered her resignation, Kwikform was actively investigating her complaint, and was still at the beginning of that process. The investigator had interviewed her, and the next steps in that process were to be the circulation of a draft report for comment. When Ms Kitto had asked for paid leave, this had been readily provided. When Ms Kitto asked about

a return to work instead, this was actively negotiated, and her subsequent decision to again continue on paid leave was readily accepted.

[82] These are not the actions of an employer that would indicate to a reasonable employee that the employer did not intend to continue to honour the employment relationship. On the contrary, the actions taken by Kwikform once Ms Kitto raised her complaint should have indicated to her that she was being taken seriously, and that Kwikform was doing its best to meet her (expressed) needs while still continuing to manage a relatively small team. This is particularly the case with regard to Ms Kitto's changing views as to whether she wanted to remain on paid leave or whether she wanted to return to work. When Ms Kitto asked to be placed on paid leave, Kwikform readily agreed to this. When she later sought to return to work on conditions, Kwikform readily entered into negotiations, and made no comment on her change in stance.

[83] At the time of her resignation, nothing about Kwikform's actions indicated a serious breach of duty or that Kwikform was not intending to honour the on-going employment relationship. Rather, as Ms Kitto herself stated in her in-person evidence, she had reached the conclusion that she did not want to work with Mr Varrie under any conditions, and the prospect of returning to work for Kwikform – even given the active negotiations as to how that would be managed – was not something she wanted. So she found other employment and started as soon as possible. Ms Kitto is entitled to make this choice, but this does not suggest her resignation was caused by a breach of duty on the part of her employer.

[84] Overall, I find that there was no breach of duty on the part of the employer, or any conduct that was sufficiently serious to make Ms Kitto's resignation reasonably foreseeable. Her claim of constructive dismissal is not made out. No remedies are awarded.

Other matters inc. Penalties

[85] Ms Kitto has claimed that a penalty of \$5,000 should be awarded against Kwikform for failing to attend mediation on a voluntary basis once the employment had ended. This claim is set out in paragraph three of the statement of problem, with no further detail provided as to what

other steps may have been taken to try to resolve the problem. No further reference to this pleading is made in the applicant's written legal submissions.

[86] Kwikform says that it was not under an obligation to attend mediation on a voluntary basis, and once the Authority directed the parties to attend mediation, it did so. Kwikform says no penalty should be awarded.

[87] It is well established that attendance at mediation, absent a direction from the Authority and once the employment has ended, is something the parties may chose to engage in, but is not compulsory. Kwikform's decision not to attend mediation until directed to do so by the Authority was one that it was free to make. As no obligation has been breached, no penalty can be awarded. No orders are made.

[88] Ms Kitto has also claimed that a penalty of \$5,000 be awarded for Kwikform's failure to disclose correspondence between itself and/or its legal advisors and the investigator. In brief, Ms Kitto sought the provision of all correspondence between Kwikform and the investigator. Kwikform says that it was not obliged to provide this as all such correspondence was between counsel and the investigator and therefore covered by legal professional privilege, and in any event, was not relevant to the personal grievance claim before the Authority.

[89] It is certainly arguable that legal professional privilege applies in this instance, especially given that Ms Kitto raised a personal grievance some three days after first raising a complaint, so my view is that both privilege for communications with legal advisors, and privilege for preparatory materials for proceedings are likely to apply to these communications. Disclosure of correspondence between Kwikform's counsel, and the investigator hired by Kwikform is therefore not appropriate.

[90] However, and perhaps more fundamentally, I am of the view that disclosure of this correspondence is not necessary or relevant to determining the personal grievance claim. The actions of the investigator are the actions of Kwikform for the purposes of these proceedings. The investigator is the agent of Kwikform. Any failings of the investigator are therefore the failings of Kwikform, and Ms Kitto was able to challenge them by way of a personal grievance claim against Kwikform, which she has done. Notably, she has challenged the decision of the

investigator not to interview her colleague as giving rise to an unjustified disadvantage grievance, as discussed above.

[91] It was suggested for Ms Kitto at the investigation meeting that the conclusions reached by the investigator were ones he could not reasonably have reached and that Kwikform could not reasonably have relied on the final report setting out those conclusions. However, this is not a grievance claim raised by Ms Kitto. By the time the report was finalised, her employment with Kwikform had ended. Insofar as this comment goes to the complaint that Kwikform accepted the report uncritically, and did not truly make its own decisions on Ms Kitto's complaint, I have already outlined above that I accept Mr Winnard's evidence to the contrary.

[92] I am not persuaded that there was any obligation on Kwikform to disclose correspondence between its counsel and the investigator. Accordingly, there is no breach for which a penalty can be claimed. No orders are made.

Orders

[93] Ms Kitto's four claims of unjustified disadvantage are not made out. Ms Kitto's claim of constructive dismissal is not made out. Breaches of obligation related to failure to attend mediation and failure to disclose documents are not made out. No orders are made.

Costs

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

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

[96] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹²

Claire English
Member of the Employment Relations Authority

¹² Please note the Authority's Practice Note on costs available at:
<https://www.era.govt.nz/determinations/awarding-costs-remedies/#:~:text=The%20Authority%20normally%20awards%20a,additional%20day%20of%20investigation%20meeting.>