IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 34
CRC 52/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DAVID RODKISS Plaintiff
AND	CARTER HOLT HARVEY LIMITED Defendant

Hearing:	19, 20, 21, 22 August and 28, 29, 30, 31 October 2014 and submissions filed on 5 and 14 November 2014 (heard at Nelson)
Appearances:	N Ironside, counsel for the plaintiff D Erickson and S Van Der Wel, counsel for the defendant
Judgment:	24 March 2015

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The plaintiff issued proceedings in the Employment Relations Authority (the Authority) claiming that on 16 April 2013 he had been constructively dismissed by his employer, the defendant. He also claimed that during the course of his employment he had been subjected to certain disadvantage grievances. In a determination dated 28 November 2013, the Authority rejected the plaintiff's constructive dismissal claim but it upheld his three disadvantage grievances, awarding him compensation in the sum of $6,000.[1]

[2] The plaintiff then commenced proceedings in this Court under the Employment Relations Act 2000 (the Act) challenging by way of a non de novo challenge the findings of the Authority on the constructive dismissal claim. The

[1] *Rodkiss v Carter Holt Harvey Ltd* [2013] NZERA Christchurch 243.

defendant commenced a non de novo cross-challenge in respect of the disadvantage grievances in which the plaintiff had succeeded. The defendant also challenged a costs award made by the Authority. Following a directions conference on 7 March 2014, Judge Couch directed that the combined challenges would proceed as a de novo challenge involving a complete rehearing.

[3] The issues involved in the case cover events that occurred over a relatively brief period of time between November 2012 and April 2013, although the hearing generated the production of a considerable amount of documentation and transcript. The complexity, to a large extent, resulted from a sharp divergence of views over the relevance and application in practice of key parts of the defendant's disciplinary and performance management policies. The hearing was hard-fought throughout and the respective contentions of both parties were well presented.

Background

[4] Mr Rodkiss is 58 years of age. He qualified in production and mechanical engineering in the United Kingdom in the mid-1980s. He and his wife immigrated to New Zealand from the Scottish Borders in April 2002, basically for a "better lifestyle". Initially, he worked with Fletcher Challenge Forestry at their Kawarau sawmill in the Bay of Plenty. As from 5 August 2002, as a result of a takeover, his employer at Kawarau became the defendant, Carter Holt Harvey Limited (CHH). At the Kawarau sawmill Mr Rodkiss worked as the Secondary Process Scheduler and then from 2003 onwards he held the position of Process & Reliability Engineer for the maintenance department at the site. There was uncontested evidence that during his time at Kawarau, Mr Rodkiss was evaluated on a regular basis and that he invariably met the expectations of his position with positive feedback and no areas of concern.

[5] In 2005 Mr Rodkiss applied for the vacant position of Engineering Manager at Carter Holt Harvey's Eves Valley sawmill near Nelson and was offered the position in late September 2005. The move to Nelson involved a significant career progression for Mr Rodkiss; his was a senior position and he became responsible for ensuring the ongoing 24/7 operation of the site which had approximately 200

employees. Mr Rodkiss was directly responsible for the management of a large maintenance department of approximately 30 employees, including planners/engineers/electrical/cleaners/stores staff.

[6] The terms and conditions of Mr Rodkiss' employment at Nelson were set out in a letter written on "Woodproducts" letterhead dated 29 September 2005, from Mr Robert Boddington, Site Manager, Nelson Sawmill. His employer continued to be CHH. As from January 2009, Mr Rodkiss reported to Mr Darryn Adams who had taken over from Mr Boddington as site manager of the mill. Mr Adams had previously been site manager at CHH's Putaururu mill.

Performance Management Policy

[7] As indicated above, the case largely revolved around performance and disciplinary issues. Clause 5 of Mr Rodkiss' individual employment agreement provided for performance reviews and stated:

> **PERFORMANCE REVIEW**
>
> Your performance will be formally reviewed on a regular basis during the year, at least annually. The intention will be to review your performance against agreed key accountabilities (which will change in consultation with the CEO from time to time), to assess your potential and to identify any development needs.

[8] Clause 17.1 of the employment agreement provided that the CHH policies, guidelines and procedures formed part of the terms of employment and Mr Rodkiss was required to familiarise himself with them. Clause 17.2 provided that the policies, guidelines and procedures could be changed by CHH in its discretion from time to time to meet operational needs or changing circumstances but such changes would not be made without first consulting Mr Rodkiss should those changes impact upon him.

[9] Mr Rodkiss told the Court that as a manager, he made sure that he was familiar with the company's policies, guidelines and procedures on performance management. He produced a number of documents which he had obtained over the years from various sources within CHH, either in hard copy or electronic format, which he relied upon to ensure that he was following the correct procedures. There

was dispute over the extent to which some of the performance related documents referred to were still in force and applicable at the relevant time.

Key accountabilities (KAs)

[10] One of the important documents produced was a two-page electronic printout intituled "Performance Management Policy" dated September 2012 which the parties agreed was the current policy document at the relevant time. It had application to all salaried employees of CHH.

[11] The policy recorded that the strategic goal of CHH was to produce "a sustainable competitive business through the performance of its people". It went on to state:

> Performance expectations will be clearly communicated to employees. The review of individual performance will be achieved through company wide performance review initiatives, including regular one-on-one discussions with an employee's line manager. Individual performance will be measured in terms of achievement of the individual's key accountabilities and behavioural expectations.
>
> Maximising employee performance is a leadership function which all managers and supervisors of staff are accountable for. The company will provide the formal structure/program for ongoing performance coaching, appraisal and review. However, optimising performance also requires open and regular two-way dialogue on a less formal basis.

[12] The second page of the performance management policy set out how the key components of the policy would be delivered. It mentioned Key Accountabilities or "KAs" as they were referred to throughout the hearing. The provision is highly relevant to the present case and I set it out in full:

> The key components of the company's performance management policy are delivered through:
>
> - Key Accountabilities – aligned to Business Plan and/or Chief Executive's / General Managers KAs and cascaded top down through the business
> - Regular scheduled one on ones, at least 4 per year, with the employee's immediate manager (note: Mid year and End of Year performance reviews are counted as a 1-1)
> - Formal Performance Reviews – mid and end year. The output of the end of year review is used in the annual salary review process

- Training & Development Plans – fit for purpose (job specific or business specific training or career development plan)

[13] In evidence which was unchallenged, Mr Rodkiss explained that an employee's key accountabilities (KAs) were set at the beginning of each year and could change during the year. The purpose of the KAs was to enable the employee to know what they were expected to achieve. They were required to be specific, measurable, achievable and aligned to CHH's business goals and strategies. They were utilised to provide feed-back to the employee on performance issues and to determine if coaching was required in areas where the employee needed to improve. Individual performance was measured in terms of an employee's achievement of his/her KAs.

[14] Every employee in the company, from the Chief Executive down, had KAs set for each year which were intended to provide a particular focus and target for the year ahead, depending upon the individual's role and the state of the business.

Reviews

[15] Ms Kate Lyon, the People Development Manager for the Woodproducts Division of CHH, explained how the CHH policy required each employee to have four one-on-one meetings with his/her manager throughout the year, usually in April, June, September and December with the mid-year and end of year one-on-one meetings doubling as performance reviews. There appeared to be some flexibility as to the dates of these meetings at the Nelson plant.

[16] The meetings were intended to provide an opportunity to measure how the employee was progressing against the targets in their KAs and other areas of performance. Personal scorecards were filled out in part by the employee and provided to the manager ahead of the meeting. The manager would then complete the remainder of the form and rate the employee in terms of achievement.

[17] The performance ratings were assessed in accordance with numerical guidelines and then identified on the scorecards as either "BT"; below target, "OT"; on target, "AT"; above target, and "OS"; outstanding. The numerical guidelines for

each category are shown in the introductory section to the personal scorecards. BT equates to a figure of less than 94; OT to a figure between 95 and 104; AT to a figure between 105 and 114 and OS to a figure in excess of 115.

[18] It was not disputed that Mr Rodkiss was always well regarded as a hard-working highly competent employee with a high level of technical knowledge and commitment to his responsibilities as a manager. He was invariably marked on or above target.

[19] The four personal scorecards covering Mr Rodkiss' 2012 quarterly reviews were produced in evidence. For his first quarterly review in March 2012 Mr Adams had given him a rating of "about 100" which is defined in the scorecard as: "Demonstrated strong ability to deliver to targets and took a proactive approach to problem-solving". For the next quarterly review dated July 2012 Mr Rodkiss was given a similar rating. For the third quarter dated October 2012 Mr Rodkiss received a rating of slightly higher than 100. Mr Adams agreed in cross-examination that these results showed that Mr Rodkiss was meeting his targets in his KAs and he was "doing a pretty good job" of meeting the key objectives of his role.

[20] One of the boxes to be completed in the personal scorecards was box five which was headed "Actions for Next Quarter". In box five in Mr Rodkiss' scorecard for July 2012, Mr Adams had handwritten:

> Review maintenance spend Stop contractors
>
> Formalise RCA process
>
> CMI Rollout
>
> Maintenance → structure.

[21] It appears that in the October 2012 personal scorecard, Mr Rodkiss completed the entries in box five (because they were typed out) and Mr Adams had later ticked each entry. The entries read:

> Finalise shift roster proposals for Maintenance dept – mid November
>
> Complete PD for maintenance admin position – end of November

> Submit CAPEX for Heat plant thermal oil replacement, pipe installation and filter pack – First week of November.

Performance improvement plan (PIP)

[22] The other document I need to refer to briefly before turning to consider the facts was essentially a one-page document headed "Performance Improvement Plan", or "PIP" as it was referred to throughout the hearing. The PIP was a pivotal document in the case. CHH contended that the PIP document set out a process intended to improve performance. Mr Rodkiss maintained that it was part of the CHH disciplinary process.

[23] Mr Rodkiss gave evidence about his one and only previous experience with a PIP at the Nelson plant. He told the Court about one of his staff members, a storeman, who had been a persistently poor performer in his position for several months in the second half of 2011. The storeman was aware of his poor performance and had been receiving support in one-on-one meetings as well as additional training to try and bring him up to an acceptable level of performance. Mr Rodkiss told the Court that he had been following what he referred to as "the normal disciplinary procedures" with the storeman, "having formal meetings with him and trying to make sure he fully understood where his failures were, what he would have to work on."

[24] Mr Rodkiss said that in February 2012 the storeman was placed on a PIP at the suggestion of Mr Adams, as Mr Adams had expressed frustration about how long it was taking to "get rid of that storeman". The PIP handed to the storeman documented the areas of concern and how his improvement was going to be measured. Mr Rodkiss explained that he had not been aware of the PIP process up until then. He explained that the PIP template he used for the storeman on that occasion was forwarded to him by Mr Adams who in turn had received it as an email attachment from Mr Tim Slade, the CHH Group General Manager Operations, based in Auckland.

[25] In his evidence, Mr Adams denied indicating to Mr Rodkiss at any time that he wanted to get rid of the storeman but Mr Rodkiss was not challenged on this

particular aspect of his evidence and he was able to produce the email chain showing that the PIP template had originated with Mr Slade having sent the document to Mr Adams. The end result was that the storeman resigned during the implementation of the PIP process.

[26] Mr Rodkiss told how there had been "general talk" amongst staff including managers during 2012 that PIP's were being used to get rid of people that senior management considered to be either poor performers or not wanted in the business. He named a department manager and an engineering manager at the Whangarei site who had been placed on PIPs and had resigned in the process in May 2012 and December 2012 respectively. He also named an engineering manager at the Kawarau site who had been placed on a PIP in November 2012 and had raised a personal grievance before resigning in May 2013.

[27] CHH accepted that the three managers in question had been placed on PIP's but the evidence from Mr Gary Andrews, HR Manager for the Woodproducts Division, was that the department manager at Whangarei had been on a final written warning for failing to follow CHH procedures; the engineering manager eventually successfully completed the PIP process and the claim by the engineering manager at Kawarau had been settled through mediation.

[28] Against that background, I now turn to consider the chain of events leading up to Mr Rodkiss' alleged constructive dismissal.

October 2012 review

[29] The one-on-on meeting Mr Rodkiss was scheduled to have with Mr Adams, according to Ms Lyon in September, actually took place in October 2012. It was uneventful apart from the fact that it was not a one-on-one meeting. Unbeknown to Mr Rodkiss, Mr Adams had invited Mr Matthew Walker to sit in on the meeting. Mr Walker was the Commercial Manager at the Nelson plant. Mr Rodkiss told the Court that Mr Adams indicated to him that Mr Walker was present as an observer and that he would be assisting him in finalising a 24/7 roster for the maintenance

department as he (Mr Walker) would be responsible for assessing the financial implications of the roster for CHH.

[30] Mr Rodkiss said that no concerns were raised in any way about his performance and he was rated on target, meeting his KAs. The personal scorecard records that Mr Rodkiss explained that it had been a very busy period for his department and the high workload was on occasions negatively impacting on staff morale.

[31] As noted in [21] above, the October personal scorecard recorded three actions in box five which Mr Rodkiss was required to complete. They were the CAPEX submission by the first week of November, completion of the shift roster review by mid-November and, completion of a position description for the stores administration position by the end of November.

[32] Mr Rodkiss explained the complications involved in producing a new shift roster and how major changes were limited by existing employment contracts; headcount and the maintenance department budget. In all events, the new shift roster was completed and presented within the timeframe of mid-November. At that point Mr Adams suggested extending the scope of the review to include all of the maintenance staff, not just existing shift staff and to consider expanding the shifts into a two shift operation over a seven-day week. It was agreed by Mr Adams that Mr Walker and Mr Rodkiss would continue working on the roster review process and no specific target date was set but by early February 2013 the roster proposal had been completed and was with Mr Walker to determine the financial impact.

[33] The background to the second required action arising out of the October review, namely completion of a position description for the stores administration position was that in 2011 Mr Adams had arranged for an employee from another department to assist with the stock take for the stores department. After the stock take was completed, Mr Rodkiss asked for the employee to be returned to his former department because he did not have enough work for him in his department. However, he was told by Mr Adams that he had to retain the employee and he was asked to create a position description for him. Mr Rodkiss said that he encountered

some delays in confirming the content of the new job description because of the need to discuss the various proposed tasks with the incumbent's direct supervisor but the job description was completed before Mr Rodkiss' next one-on-one meeting.

[34] The action required regarding the CAPEX submission related to the acquisition of a heat plant. Mr Rodkiss established that the initial costings from suppliers were excessive and it was agreed and accepted by Mr Adams that he should explore a lower cost option. It is documented that the CAPEX had been submitted and approved and it was not listed as an outstanding action at Mr Rodkiss' next one-on-one meeting in February 2013, which doubled as his year end review.

[35] Mr Rodkiss made the point in his evidence, which I accept, that neither before nor during his October 2012 one-on-one meeting was any complaint or negative feedback raised about the maintenance department or about any aspect of his own performance.

[36] The site was shut down for planned annual maintenance between 22 December 2012 and 28 January 2013. Mr Adams was on leave throughout that period but he delegated Mr Rodkiss full responsibility for the entire site operations during the extended shutdown period. Mr Rodkiss told the Court that he successfully managed the shutdown activities which was exceptionally challenging due to the tight timeline involved and the high number of contractors working on site. He delivered the plant ready for start-up as scheduled and Mr Adams agreed after the site reopened in 2013 that he had "done a good job of managing the shutdown".

The end of year performance review

[37] The one-on-one meeting doubling as the employees' end of year performance review which Ms Lyon indicated would normally be held in December was, in the case of Mr Rodkiss, held on 12 February 2013. The reason for the delayed meeting was not explained to the Court but February may have been the usual month for end-of-year performance review meetings at the Nelson plant because of the long shutdown period referred to in the previous paragraph.

[38] When Mr Rodkiss arrived for the 12 February meeting he was again surprised to see that Mr Adams had Mr Walker present with him. He questioned why Mr Walker was at the meeting and Mr Adams told him that he was there to support the review meeting process and to ensure that he (Mr Adams) was being fair and balanced in his evaluation of Mr Rodkiss' performance. Mr Rodkiss remained puzzled. He had reason to be. The CHH Performance Management Policy provided clearly that the performance reviews were intended to take the form of a one-on-one discussion "with an employee's line manager" Mr Walker was not Mr Rodkiss' line manager.

[39] Mr Adams then asked Mr Rodkiss to talk through his personal scorecard which he did by going through each section and discussing the content. Positive comments and acknowledgements were made by Mr Adams and Mr Walker on what he had presented. Mr Adams had not inserted any comments of his own on the personal scorecard.

[40] When it came to the final section of the scorecard where the employee's performance rating was awarded for the year, Mr Rodkiss told the Court that he was "extremely surprised" when Mr Adams indicated that in his view Mr Rodkiss was not quite "on target" as he had not fully delivered on two actions from his previous review. Mr Rodkiss explained how the staff roster review had been completed on time but had then been expanded in scope but was now completed. He said that Mr Adams and Mr Walker accepted this.

[41] In relation to the remaining action for the next quarter listed from his previous review, Mr Rodkiss acknowledged that there had been a delay in producing the job description for the storeman but he had completed it and told Mr Adams that he had it with him at the meeting. He said that Mr Adams did not bother to read it or take it from him.

[42] Mr Adams then went on to tell Mr Rodkiss that he had a perception about his performance in some areas because of feedback he had been getting and he was asking himself whether he (Mr Rodkiss) would be able to handle the "bow wave" of work that would be heading his way in the coming year. When Mr Rodkiss asked

for specific instances or events or examples of where he had failed to perform, Mr Adams could not provide any but he proceeded to hand Mr Rodkiss a PIP that had already been prepared in advance of the meeting. An email was produced which showed that the draft PIP had been sent by Ms Lyon to Mr Adams and Mr Walker on 1 February 2013. Mr Rodkiss said that the PIP listed three performance issues, none of which had been raised with him previously but they "seemed quite vague and broad in context".

[43] Mr Rodkiss told the Court that he was deeply concerned that any issues could be of such a serious nature as to require a PIP which could result in disciplinary action being taken against him. He told Mr Adams that to his knowledge, the PIP process was used and designed to give CHH the ability to easily exit staff from the business. Mr Adams and Mr Walker rejected that proposition and they indicated a desire for Mr Rodkiss to agree to the content of the PIP and sign it. Mr Rodkiss said that he was reluctant to sign the PIP at such short notice. Mr Adams agreed that he could take it away and another follow-up meeting would be arranged.

[44] Mr Adams did not provide Mr Rodkiss with a copy of the completed scorecard containing his comments and overall 2012 performance score as he was required to do. That information was not provided to Mr Rodkiss until he obtained a copy of his employment file on 26 March 2013.

The PIP

[45] Because of its significance in the case, I set out the provisions of the first page of the PIP handed to Mr Rodkiss in full:

> **CarterHoltHarvey**
> **Woodproducts New Zealand**
>
> **Performance Improvement Plan**
>
> As per our discussion on [Date] from WPNZ's perspective we feel you need to have a lift in your current performance level, and to ensure your behaviours and actions conform to what is expected leadership behaviour within the workplace. We are hopeful the programme will enable us to focus on a sharp improvement within an agreed timeline.
>
> The following PIP will be in place from 25 March 2013 till 25 June 2013, with formal reviews being held weekly. The key area for

improvement is around meeting role expectations. At each of these meetings you will need to outline documented progress against the planned activities contained within the plan. Slippage against agreed objectives will not be deemed acceptable; this needs to be thought of in terms of a critical path towards high performance within a role.

Please note that these targets and timelines may be reviewed, in consultation with you, and can change at any stage of the PIP. You will have the Company's full support during this time. You will need to initiate and drive any additional support you feel you need by communicating to me exactly what you require in a timely manner.

If you have any questions with regard to the above, please contact me immediately. I also wish to remind you of our Company Employee Assistance Programme, run through EAP, where you can utilise confidential external professional support services.

Please remember that we are here to support you, and we very much want to see you succeed. I look forward to working through this plan with you in a direct yet supportive manner.

Darryn Adams
Nelson Site Manager

Acknowledgement:

I, _____have read and understood the performance plan and understand that failure to improve satisfactorily may lead to disciplinary action.

Employee Name	David Rodkiss	Manager's Name	Darryn Adams
Signature		Signature	
Date		Date	

[46] The second page of the PIP set out three performance issues and detailed the standard required, the action required, and the manner in which improvement was to be measured. The three performance issues listed were:

(a) Lack of planning and structure in maintenance department.

(b) Lack of decisive decision-making, leading to confusion in the maintenance department, and

(c) Timeliness issues are an area of concern. Lateness to meetings noted and attendance at meetings that could be delegated to maintenance staff.

[47] In his evidence, Mr Adams told the Court that the reason why he produced the PIP for Mr Rodkiss was that he was concerned about his failure to deliver two of the three actions discussed at the October 2012 review, coupled with the fact that he had been receiving ongoing complaints from other managers regarding "timeliness of work". He said that his perception was that "Mr Rodkiss was getting bogged down in the day-to-day detail of his department and not spending enough time on the management side of his role."

[48] On 12 and 13 February respectively, Mr Adams emailed a summary of staff performances to Mr Andrews and Mr Slade in which he recorded in relation to Mr Rodkiss:

> There have been some real positives from the Maintenance department this year with improved reliability across the site better control of spend and a well planned and executed Christmas shut. This has been offset by some projects not been (sic) delivered and slow response to some issues. We are putting a PIP in place to address these short comings.

Mr Rodkiss did not become aware of that document until during the Authority investigation.

Meeting 2 February 2013

[49] Mr Rodkiss said that he was deeply worried and anxious trying to understand why he had been issued with the PIP. He felt it was important, particularly as he had not been given the opportunity of having a support person present, to keep an accurate record of future discussions. He had a personal digital recorder which he had used at work in the past to ensure accurate minutes were kept and he decided to record future meetings. He did not disclose the fact that the meetings were being recorded. His wife made a transcript of the recordings which were produced by consent at the hearing.

[50] The follow-up meeting with Mr Rodkiss was arranged for Friday, 22 February 2013. Those in attendance were again Mr Adams, Mr Walker and Mr Rodkiss. The meeting ran for approximately two hours and the transcript totalled 95 pages. It is not easy to summarise such a meeting in a paragraph or two but, as Mr Adams expressed in his evidence a recurring theme throughout the meeting was the concern raised by Mr Rodkiss that the PIP was intended to exit him from the business. Mr Adams explained that the PIP was not an "exit Dave Rodkiss plan". He accepted that there was no question about Mr Rodkiss' commitment to his work but there were some areas that required improvement - hence the PIP.

[51] At one point during the meeting, Mr Adams had to leave the room to take a telephone call from Mr Slade on an unrelated matter. In his absence, Mr Walker volunteered some information to Mr Rodkiss about what he thought may have been part of Mr Adams' reasoning in terms of implementing the PIP process. He expressed the opinion that Mr Adams may have decided to implement the PIP as part of a "political exercise" to keep Mr Slade off his (Mr Adams') back "about making sure that you're not here in six months time". Mr Rodkiss responded that it left him in a "very, very uncomfortable position".

[52] When Mr Adams returned to the meeting, both he and Mr Walker acknowledged that the PIP had evolved a connotation in the business for being used when CHH wanted to exit someone out of the business. Mr Walker said that in the previous 12 months the PIP had been deployed for probably 95 per cent of the time for people who, if it didn't work, were going to be exited out of the business and he suggested that Ms Lyon should do an education campaign to point out that PIP's were for training and development purposes rather than discipline.

[53] Mr Adams went on to explain how when Mr Slade took over as Group Manager of Operations at CHH he had a negative perception of the managers in Nelson and he had given Mr Adams "free range to wipe the whole lead team out". Mr Adams added that he (Mr Adams) had "supported every one of you guys and I still do today. I think we've got a very good team … it's very diverse … it's got problems … but no more problems than what the other sites have got … no more no less."

[54] In evidence, Mr Adams described the meeting as "quite a positive one". He said there was no suggestion that Mr Rodkiss was a poor performer or that his employment was at risk. He also said he was encouraged by Mr Rodkiss acknowledging that there were aspects of his performance that could be improved and his apparent willingness to work through those issues. However, the meeting ended without the PIP being signed.

Aftermath of meeting

[55] On 26 February 2013, Mr Adams emailed Mr Rodkiss an amended version of the PIP document and indicated he would like it signed off by 1 March 2013. The amended PIP contained an additional performance issue, namely, "overall improvement in the way you portray yourself". That issue had not previously been discussed with Mr Rodkiss nor had he been informed that it was going to be added to the PIP. The remedial action required was also specified and there were some additional measures added to the other issues listed in the original PIP.

[56] On 27 February 2013, Mr Rodkiss wrote to Mr Adams seeking clarification as to why it was necessary to introduce a PIP. He stated:

> Dear Darryn
>
> With regard to your email received today attaching a revised PIP document.
>
> I would like clarification as to why we are not following the CHH "Coaching for Success" 3 Part Process.
>
> This documented process states that; if, at Quarterly Meetings, expectations are not being met, the next step is "Monthly 1:1 Meetings" *before* introducing a PIP. It states that these monthly 1:1 meetings are in place to address the same issues which you have raised on the PIP.
>
> During our recent discussions, you informed me that you had marked me "on target" for the 2012 Annual Review and that the issues which you have raised on the PIP, were only "a small part of my overall performance". Given the above, I feel that they would be best dealt with using due process of Monthly 1:1 Meetings.
>
> Yours sincerely
>
> Dave Rodkiss
> Manager Engineering

[57] Mr Adams did not respond to Mr Rodkiss' letter of 27 February.

Meeting Friday 8 March 2013

[58] The next meeting was held on Friday 8 March 2013. Again, Mr Adams was accompanied by Mr Walker. Mr Rodkiss was unaccompanied but he recorded the meeting on his digital recorder. Mr Rodkiss reiterated the point he had made in his letter to Mr Adams of 27 February 2013. He took to the meeting a copy of the CHH Performance Management Policy referred to in [10] above and he put it to Mr Adams that, while he (Mr Adams) had his full support, he felt firmly that the performance improvement he was seeking should more appropriately be worked through using the Performance Management Policy of one-on-one meetings rather than the PIP process.

[59] Mr Adams acknowledged that he had not seen the CHH performance management policy in question but he wanted the PIP completed and he stressed that the debate had to stop. Mr Rodkiss said that the issue he had with the PIP was that it had a serious tone to it in that on the bottom line it stated that failure to deliver would result in disciplinary action. Mr Rodkiss pointed out that the KA's and the review process provided the opportunity for training, coaching and development but those options had not been explored with him; instead they had proceeded directly to the PIP process.

[60] Mr Rodkiss expressed his concern that the PIP removed employment rights to due process and the transcript records him as saying:

> So I've got to figure out … is this disciplinary … if you want to sack me … come up front now and we'll deal with it.

[61] Mr Adams made the point that if he had wanted to sack Mr Rodkiss then he would have done so because Mr Slade had given him the option of removing the whole lead team but he had not done that. Mr Adams reiterated that the PIP was not disciplinary because Mr Rodkiss had delivered on the majority of his KAs throughout the year, achieving on or slightly above target.

[62] Mr Walker suggested that Mr Rodkiss sign the PIP noting on it a caveat that it was subject to detailed debate with someone like Mr Gary Andrews, the Human Resources Operations Manager, or Ms Kate Lyon, the People Development Manager, when they were next in Nelson. Mr Rodkiss told the two men that he would not be signing the PIP that day but he would take it away to consider what words he would add to it.

[63] On 19 March 2013, Mr Rodkiss sent an email to Mr Adams attaching a copy of the CHH Performance Management Policy and Coaching for Success guidelines. The email stated:

> Darryn
>
> Please see the attached policy and guidelines. Given that I believe to have been assessed as being "on target" my KA's this year any optimising of my performance at this stage should be done through open and regular two-way dialogue between us.
>
> Dave

[64] Mr Adams did not respond to that email.

Meeting with Mr Andrews

[65] In the late afternoon of Thursday 21 March 2013, Mr Rodkiss had a brief meeting with the HR Operations Manager, Mr Andrews, before Mr Andrews was due to leave the Nelson site for his flight back to Auckland. He had earlier contacted Mr Adams to let him know that he would be speaking with Mr Andrews about the PIP. Mr Adams commented that he had already had some discussions with Mr Andrews about the matter. Mr Rodkiss read out to Mr Andrews the words in the PIP document that referred to the acknowledgement and statement that if he did not succeed then disciplinary action may be taken. He told Mr Andrews that it sounded like a disciplinary process to him. Mr Andrews said that he had not seen the PIP but he told him that the PIP was not a disciplinary process, not to worry about it too much and he told him just to go ahead and sign it. Mr Rodkiss told the Court that he felt Mr Andrews was not addressing his concerns but was simply supporting Mr Adams by telling him to go ahead and sign the PIP.

[66] Mr Rodkiss was due to have a further meeting with Mr Adams the following day but before the meeting he telephoned Mr Andrews to again express his concern about the PIP being inconsistent with CHH processes and the implications for his employment if he were to sign the document given that he would be acknowledging that it could lead to disciplinary action against him. Mr Andrews reiterated that the PIP was not a disciplinary document and he told him that if he had any issues relating to the PIP then he should seek specifics from Mr Adams on what the performance issues were and what was expected of him.

Meeting Friday 22 March 2013

[67] Mr Rodkiss had another meeting with Mr Adams and Mr Walker on Friday, 22 March 2013. Again, it was recorded and there was no dispute about what was said. Both parties reiterated their respective positions. Mr Rodkiss made it clear that he had no dispute with Mr Adams trying to get all the managers at the site up to the highest performance level but he could not understand why Mr Adams was not following CHH's established procedure for dealing with such matters which was through tools such as the KAs and the one-on-one meetings.

[68] Mr Adams acknowledged that his understanding of the PIP was that, "if you go back eighteen months it was a process to exit people from the business" but "this is not the case today". The transcript also records Mr Adams having said in relation to the PIP form, "And Gary's [Gary Andrews – CHH HR Operations Manager] reaffirmed that some of that documentation is out of date … that you can write on that form and say what you want to do."

[69] Mr Adams made it clear that he was becoming frustrated over Mr Rodkiss' reluctance to sign the PIP but the meeting finished on the basis that Mr Rodkiss would make changes to the document to clarify the position as he understood it from the discussions, namely that the PIP process was not disciplinary but was intended to improve his performance. Mr Rodkiss also agreed to make arrangements to meet with Ms Cher Williscroft who Mr Walker had recommended as a "Life Coach" who could work with both Mr Rodkiss and Mr Adams to identify any communication issues or difficulties between them.

The amendments

[70] On Monday, 25 March 2013, Mr Rodkiss telephoned Mr Andrews to tell him that he was going to produce an amended PIP. He sought Mr Andrews' assurance that the PIP was not disciplinary because he was proposing to make a statement to that effect in his amendment. Mr Andrews told Mr Rodkiss that the PIP was not disciplinary and that he could write what he wanted on the form. Mr Rodkiss suggested that for the sake of other employees, Mr Andrews should tidy up the PIP document as it did not present itself the way Mr Adams said he was using it, namely, as a development plan. Mr Andrews indicated that he was proposing to review the PIP form in the light of his feedback.

[71] Later that same day, Mr Rodkiss emailed Mr Adams an amended version of the PIP document. It included all the wording in the original PIP as set out in [45] above but after the words "disciplinary action" in the acknowledgement, Mr Rodkiss had added:

> Further to discussions, the site Manager has stated that this PIP process is not to be considered disciplinary; it is to be considered as part of a coaching and development process to optimise my performance. NOTE: This PIP is not consistent with the CHH coaching for success documented process as I have not participated in any formal monthly 1-1 discussions to review my performance and respond.

[72] Mr Rodkiss called Mr Adams later that day and explained what he had done and asked Mr Adams to review the modified PIP and get back to him. Mr Adams agreed to do so.

Investigation meeting

[73] On the afternoon of Tuesday, 26 March 2013, after a maintenance meeting at the workshop, Mr Adams followed Mr Rodkiss back to his office and told him that he did not believe that he had engaged in the PIP process and he (Mr Adams) was, therefore, taking the matter to the next level. Mr Adams then produced a sealed envelope stating that it was a serious misconduct letter because he had not engaged in the PIP process. The letter required Mr Rodkiss to attend an investigation meeting on Thursday, 28 March 2013 at 10.00 am. The letter stated that Mr Walker would

also be present at the meeting and Mr Rodkiss was entitled to bring a representative with him. It went on to state:

> …
>
> The purpose of this meeting is to determine the circumstances around your refusal to comply with a reasonable request to participate in a defined process. Given the events described, the Company has formed an initial view that your alleged behaviour may amount to serious misconduct. The Employee Handbook (enclosed) states that serious misconduct can include:
>
> A refusal to perform normal duties or refusal to comply with a lawful and reasonable instruction of a manager.
>
> You need to be aware that an outcome of this meeting may be disciplinary action, which may lead to dismissal.
>
> Should you have any further queries please contact me.

[74] In his evidence, Mr Adams explained these developments in this way:

> 10.14 I was not prepared to sign the PIP as amended by Mr Rodkiss. He was essentially asking me to acknowledge I was not following the Coaching for Success document. His notation also recorded his view the process should be considered a coaching and development process. This undermined the whole purpose of the PIP, which was to have a clearly documented process and a description of the consequences should the process not be successful. I had specifically chosen the PIP process because the more informal discussions had not worked. I was concerned that under Mr Rodkiss' formulation, there would be less structure and in the absence of structure and clear consequences for non-improvement the process could drag on indefinitely.
>
> …
>
> 10.18 Because of the lack of progress in getting the process underway, I believed I needed to try a slightly different tactic. I therefore decided to initiate an investigation with Mr Rodkiss arising out of his failure or refusal to engage in the PIP process. My intention in doing so would be that he would realise the seriousness of the situation and sign off the PIP document. If he did this, then there would be no need to take the disciplinary investigation any further.

[75] For his part, Mr Rodkiss told the Court that he was "absolutely shocked, extremely stressed and confused" as to how such charges could be made against him. Later that same Tuesday Mr Rodkiss had a short conversation with Mr Walker and he inquired as to how the letter had come about. Mr Walker told him that he was facing the serious misconduct allegation because of his comment saying that he had

not had any opportunity to have monthly 1:1s (one-on-ones). Mr Walker expressed the view that this "would have pissed off Mr Adams, as it would have reflected badly on him."

[76] Mr Rodkiss saw Mr Adams again in his office before going home that day to see if he would reconsider the matter and withdraw the disciplinary letter. Mr Adams told him that he would let him know the next morning. Mr Rodkiss approached Mr Adams twice during the course of the following morning to find out what he had decided but he was not given an answer. At that point Mr Rodkiss decided to consult a solicitor. As he told the Court:

> It was apparent that my only options were to agree to not follow the correct processes, sign the acknowledgement on the PIP and face possible disciplinary action in the future or face loss of my job through a disciplinary process for not signing the PIP. As I was at risk of losing my job either way I decided the time had come where I needed professional help and made contact with a lawyer experienced in dealing with employment issues.

Further developments

[77] I do not propose to extend this narrative by recording subsequent exchanges of correspondence involving the parties' solicitors. Each sought to reinforce the arguments advanced by their respective clients. There were, however, some separate developments which I need to refer to.

[78] Mr Rodkiss had brief meetings again with Mr Adams on 2 and 3 April 2013. By that time, Mr Adams had received a letter dated 28 March from Ms Ironside who had been instructed by Mr Rodkiss. Mr Adams expressed concern that the matter had escalated and about Ms Ironside's involvement in the case. He referred to a previous experience involving Ms Ironside where, as he described it, she had focused completely on process and he made the point that at the end of the day there might be a finding that the process was not right but what he advised Mr Rodkiss to do was to concentrate on what he was intending to achieve through the PIP document rather than the process. Mr Adams further indicated that as far as he was concerned, a turning point had been reached and Mr Rodkiss either had to get on with the PIP or end up "in a shit fight" which would tarnish and strain the relationship.

[79] Mr Rodkiss said that at those meetings Mr Adams was not prepared to discuss the amendments he had suggested for the PIP but he produced a new copy of the original PIP and said that if Mr Rodkiss signed the document then the investigation into serious misconduct would go away. Mr Adams acknowledged that, as result of the discussions Mr Rodkiss had with Mr Andrews, the CHH Performance Policy was going to be changed so that they could implement a PIP at any stage with the monthly one-on-one meetings being removed from the process. For the reasons he had previously expressed, Mr Rodkiss was still not prepared to sign the PIP. The transcript of the meeting on 2 April 2013 records Mr Adams making the remark at one stage that "Tim [Slade] thinks we should be doing better with our maintenance stuff."

[80] Mr Rodkiss told the Court that it was around this time that he had a discussion with Mr Grant Arnold who had been the site manager at the CHH Whangarei sawmill between 2006 and April 2012. In the course of that discussion, Mr Arnold told him about a conversation he had with Mr Slade in which Mr Slade had instructed him to dismiss one of the managers at the Whangarei site, who he named. Mr Slade also told him that he had instructed the Nelson site manager to get rid of three "drop kicks" at the Nelson site and if he did not do so then he would go down and do it. Mr Arnold said that Mr Slade had gone on to name the three drop kicks as being Mr Rodkiss, the Planer Mill Manager, and the Sawmill Manager (both were named). Mr Rodkiss said that he found these comments deeply worrying because they seemed to confirm the earlier observations made to him by Mr Walker, "that Mr Slade did not want me in the business".

[81] On 4 April 2013, Mr Rodkiss sought medical help to manage his anxiety symptoms. A medical report was produced to the Court. There was communication between the respective lawyers in early April and on 10 April 2013 there was a meeting between Mr Rodkiss, with his wife, Mrs Audrey Rodkiss, as a support person, and Mr Adams and Mr Andrews. It did not resolve anything. A mediation meeting was held on 16 April 2013 which Mr Rodkiss attended with his wife and his lawyer. Mr Adams and Mr Andrews represented the company. The mediation was not successful. Mr Rodkiss described in evidence how the mediation ended:

> By 4.30 pm in discussion with my wife, I decided to end the mediation and return home. I told Audrey that I could see no way forward for me with CHH and that I could not go back and work for them as I could never trust them again and felt my working relationship would never recover. It was an agonising decision for me to make, and I told Audrey that it was probably the hardest decision I have ever had to make. Before I left the building with my wife and lawyer I informed the mediator to tell Mr Adams and Mr Andrews that I was resigning my position and would not be returning to the workplace. I did not return to work.

[82] On 17 April 2013, Mr Erickson, counsel for CHH, emailed Ms Ironside a letter from Mr Adams addressed to Mr Rodkiss proposing an alternative approach which was to remove the current PIP and allow Mr Rodkiss' performance to be reviewed against objectives in his key accountabilities at his next one-on-one meeting.

[83] Mr Rodkiss described his reaction in this way:

> Given the way I had been treated by the company over the PIP I had already lost all faith and confidence that CHH would treat me fairly and honestly in my employment with them, and considered that the relationship was irretrievable. Because of that I had already resigned and decided not to return to work for the company on 16 April after the failed mediation.

[84] For the record, I should confirm that the defendant applied for an order that the evidence referred to in [81] above relating to the communication by Mr Rodkiss of his resignation as he was leaving the mediation room should be ruled inadmissible under s 148 of the Act. In an interlocutory judgment dated 19 May 2014, Judge Corkill dismissed the application.

The issues

[85] Apart from the principal issue of whether the plaintiff was unjustifiably constructively dismissed from his employment there are other alleged grievances raised in the pleadings, however they are not pleaded as specifically as they might have been. The reason for that most likely is because the case started off as a non de novo challenge and there was no challenge made by the plaintiff to the unjustified disadvantage claims which the Authority had upheld, namely:

(a) The defendant's failure to respond to the plaintiff's action of adding a statement to the PIP form to the effect that the PIP was not disciplinary and was in breach of the defendant's guidelines.

(b) The failure of the defendant to consult with the plaintiff in relation to the changes made to the Coaching For Success document on or about 9 April 2013.

(c) Mr Adams' comments to the plaintiff on 2 and 3 April 2013 regarding the plaintiff's decision to engage a lawyer.

[86] At this stage, I propose to put these alleged disadvantage grievances to one side. They are inextricably interwoven into the narrative and will be subsumed by the more substantive constructive dismissal claim, if that can be established.

Legal principles

[87] The legal principles relating to constructive dismissal are well established and have been applied by this Court in a number of previous decisions. In *Auckland Shop Employees Union v Woolworths (NZ) Ltd*,[2] the Court of Appeal enunciated three non-exhaustive categories of constructive dismissal:

> Where the employee is given a choice of resignation or dismissal;
>
> Where the employer has followed a course of conduct with the deliberate and common purpose of coercing an employee to resign; and
>
> Where a breach of duty by the employer leads a worker to resign.

[88] In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc*,[3] the basis of the employee's claim throughout was that his resignation had been caused by a breach of duty on the part of the employer and therefore the case fell within the third of the three non-exhaustive categories of constructive dismissal referred to in the *Auckland Shop Employees Union* case.

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2 *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374-375.

3 *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415.

Elaborating on that category, the Court of Appeal in the *Auckland Electric Power Board* case stated:[4]

> In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[89] The Court of Appeal noted that there were a number of duties of an employer which were potentially relevant in this field and, after referring to relevant reported United Kingdom cases, specifically affirmed the application in New Zealand employment law of the implied term that "employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."[5]

[90] As Judge Perkins noted in *Hamon v Coromandel Independent Living Trust*,[6] the duty of trust and confidence is now encapsulated in s 4(1)(a) of the Act which requires the parties to an employment relationship to deal with each other in good faith. Section 4(1A)(a) specifically provides that such a duty "is wider in scope than the implied mutual obligations of trust and confidence". Section 4(1A)(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".

Submissions

[91] Mr Rodkiss claimed that he was unjustifiably constructively dismissed. His case was that his unjustified dismissal fell within both the second and third

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4 At 419.

5 *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 at 670 cited in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* above n 3 at 419 and *Auckland Shop Employees Union v Woolworths (NZ)* above n 2 at 375.

6 *Hamon v Coromandel Independent Living Trust* [2014] NZEmpC 54 at [49].

categories described in *Auckland Shop Employees Union*, namely, where the employer follows a course of conduct with the deliberate and common purpose of coercing the employee to resign and where a breach of duty by the employer leads an employee to resign. The plaintiff contends, in terms of the *Auckland Electric Power Board* decision that the breach of duty was sufficiently serious to make it reasonably foreseeable by CHH that he would not be prepared to work under the conditions prevailing.

[92] The thrust of Ms Ironside's submissions in relation to the constructive dismissal claim were that the actions taken by CHH against Mr Rodkiss, in particular from 12 February 2013 until his resignation on 15 April 2013, amounted to serious and sustained breaches of the company's policies, procedures and guidelines; the employment agreement and its statutory duty of good faith. As counsel expressed it:

> This action would have made it reasonably foreseeable to CHH that Mr Rodkiss could no longer tolerate working under those conditions. The company was well aware of Mr Rodkiss' grievances throughout this period and the stress and anxiety that Mr Rodkiss was suffering. It was not unreasonable for [Mr Rodkiss] to be extremely worried about being dismissed once the PIP had been introduced in the 12 February meeting.

[93] The defendant denied all of the plaintiff's claims. Mr Erickson submitted that even if the Court concluded that there had been a breach of duty on the employer's part, the breach was not causative of the plaintiff's resignation, nor was it sufficiently serious to amount to a constructive dismissal. Counsel submitted that the defendant could not be held responsible for rumours in the workplace or any erroneous perception on the plaintiff's part that senior management wanted him out of the business. Mr Erickson submitted that it was not a situation where Mr Rodkiss had no choice but to resign. As counsel stated:

> He could have accepted the assurances from Mr Adams that there was no strategy to get rid of him. He could have accepted Mr Adams' assurances he did not view the plaintiff as a poor performer and simply wanted some fine tuning.

Discussion

[94] Mr Rodkiss attended the meeting with Mr Adams on 12 February 2013 in the expectation that it was going to be a usual one-on-one quarterly review meeting

which, in this case, would double as his end of year review. He had no outstanding actions from his last quarterly review and he considered himself to be "on target" as he had performed well throughout the year and had overseen some good improvements in safety and production performance. The plant had been closed down for maintenance work between 23 December 2012 and 28 January 2013 and Mr Rodkiss had been left in sole charge of the site during that period. I accept that Mr Rodkiss would not have been anticipating any untoward surprises at his one-on-one end of year review.

[95] The first surprise that greeted Mr Rodkiss at the meeting was the presence of Mr Walker. Mr Rodkiss had not been told that Mr Walker would be present. When he inquired as to the reason why Mr Walker was at the meeting, Mr Adams informed him that he was there to support the review meeting process and to ensure that he (Mr Adams) was being fair and balanced in his evaluation. Having Mr Walker present was a breach of the CHH Performance Management Policy which provided that the one-on-one meetings were to be with the employees "immediate manager". Mr Adams said in evidence that Mr Rodkiss did not query Mr Walker's presence but I do not accept that.

[96] Mr Rodkiss said that he was then shocked during the meeting when Mr Adams handed him the PIP document that had been produced prior to the meeting. Mr Rodkiss knew what a PIP was. He was a senior manager at the plant. Twelve months earlier he had put one of his own staff on a PIP at the suggestion of Mr Adams. The staff member (a storeman) had been a persistent poor performer and he had failed to respond adequately to additional training and support provided to him in one-on-one meetings. After about a month into the PIP, the storeman resigned. Mr Rodkiss was also aware from general talk in 2012 among staff, including other managers, that PIP's were being used to get rid of people who senior management considered to be either poor performers or not wanted in the business. I accept all of that evidence.

[97] Against that background Mr Rodkiss' reaction was understandable. For sound reason he saw the PIP process as part of a disciplinary process. He equated it in his own mind with a warning letter. Mr Adams and Mr Walker told him that the

PIP was not a disciplinary process but instead it was aimed at assisting him in lifting his performance to the level they expected. They described it as "fine tuning". Mr Rodkiss said that there was a strong indication given to him at the meeting that they wanted him to sign the PIP but he was not prepared to do so at such short notice. The part that concerned him most was the acknowledgement he was expected to sign which stated that he had read and understood the document and understood "that failure to improve satisfactorily may lead to disciplinary action".

[98] The evidence was that Mr Adams had made his decision to issue Mr Rodkiss with a PIP in late 2012. Mr Adams said that part of the reason for his implementing the PIP was because of Mr Rodkiss' failure to deliver two out of the three actions discussed at his October 2012 review and he said that he had also been receiving ongoing complaints from other managers regarding timeliness of work. Mr Adams also told the Court that his perception was that Mr Rodkiss "was getting bogged down in the day-to-day detail of his department and not spending enough time on the management side of his role. … the maintenance department lacked planning and structure which was the cause of the negative perception of the department and the complaints I had received."

[99] The problem with that explanation, however, is that the issues identified were all matters that reflected adversely on Mr Rodkiss' performance and, as such, in terms of CHH's basic obligations of fairness and good faith, they should have been discussed with him and he should have had an opportunity to comment upon them before Mr Adams made his decision to implement the PIP. None of the three performance issues identified in the PIP had been listed in Mr Rodkiss' personal scorecard for the third quarter of 2012. Mr Adams told the Court that he had had informal discussions with Mr Rodkiss about them but Mr Rodkiss denied that proposition and said that none of the issues had ever been specifically raised with him, nor had there been any consultation, instead the PIP was given to him "as a fait accompli". I accept Mr Rodkiss' evidence in this regard. He impressed me as a careful witness who was not given to overstatements. On the contrary, I found Mr Adams' evidence vague on specifics. I listened in vain for a cogent and credible explanation of the need to issue Mr Rodkiss with a PIP containing an acknowledgement making reference to "disciplinary action".

[100] I also accept Ms Ironside's submission about the basic unfairness of Mr Adams having Mr Walker present as his support person without any consultation over the matter and without offering the opportunity to Mr Rodkiss to bring along a support person of his own. But those findings are not conclusive. The resignation which the plaintiff must establish amounted to a constructive dismissal did not occur until two months later.

[101] At the next meeting on 22 February 2013, Mr Adams again had Mr Walker present as his support person. Mr Adams had no note takers at any of the meetings. Mr Rodkiss said that he did not feel comfortable recording the meeting but as he was never given the opportunity to have someone else with him he made the recording to help him understand and clarify any points that were not clear to him. The transcript of the meeting ran to 95 pages. Mr Rodkiss continued to make the point that the matters raised in the PIP should first have been dealt with through one-on-one meetings instead of a PIP. He expressed concern as to why he was being placed on a PIP when he wasn't a poor performer or below target. Mr Rodkiss was happy to partake in all of the development suggestions contained in the PIP and the evidence was that he had actually started on some of them but, given his knowledge of the way in which PIPs had been used to exit poor performers out of the company, he felt strongly that the PIP was inappropriate in his situation and he was uncomfortable being requested to sign the acknowledgement on the PIP that "failure to improve satisfactorily may lead to disciplinary action".

[102] I can understand Mr Rodkiss' reaction. He would have received little comfort from Mr Walker's comments, when Mr Adams left the meeting room for a short period, to the effect that there might be a little bit of keeping "the wolves at bay" in that Tim Slade "doesn't like any of the current engineering managers in the Woodproducts NZ group" and putting Mr Rodkiss on the PIP may well have been part of a political exercise to keep Mr Slade off Mr Adams' back by making sure that Mr Rodkiss was not around in six months time. When Mr Adams returned to the meeting, Mr Walker acknowledged in his presence that during the previous 12 months the PIP had been deployed "probably 95 per cent of the time" for people who, if it did not work, were going to be exited out of the business.

[103] At the next meeting on 8 March 2013, Mr Rodkiss took with him documentary extracts from the CHH Performance Management Policy and indicated that what Mr Adams was endeavouring to achieve was covered by the development plan process described on page two of the policy. Mr Rodkiss made it clear that he was happy to work within a development plan under the Performance Management Policy. Mr Adams admitted that he had not read the policy in question but he was tired of debating whether or not the PIP was the appropriate process and so far as he was concerned, the debate on whether or not the PIP was the correct process had to stop and Mr Rodkiss had to sign the acknowledgement on the PIP. Later in the meeting, Mr Adams acknowledged that going back 18 months, the PIP process had been used to exit people from the business and that the form he was requiring Mr Rodkiss to sign was out of date. He suggested that Mr Rodkiss could write on the form any changes that Mr Rodkiss wanted to make.

[104] The problem, however, was that when Mr Rodkiss subsequently made the changes to the PIP form which he felt were appropriate, Mr Adams refused to accept them. Furthermore, when Mr Rodkiss attempted to discuss with Mr Adams the amendments he had made to the PIP, Mr Adams simply refused to respond. In other words, not only had Mr Adams misled Mr Rodkiss by inviting him to make changes to the PIP and then ignoring them, but in further breach of his good faith duty to be responsive and communicative, he refused to discuss with Mr Rodkiss the alterations he had submitted. By that time in the narrative, I consider that Mr Rodkiss was more familiar with the documentation relating to CHH's performance development plans and disciplinary policies than Mr Adams was.

[105] The situation did not improve. Positions became more entrenched. Instead of responding in a constructive way to the amendments Mr Rodkiss had suggested to the PIP form, Mr Adams aggravated the situation by issuing Mr Rodkiss with a disciplinary letter falsely accusing him of serious misconduct in not engaging fully in the PIP process. He was summoned to a meeting with a warning that the outcome of the meeting could be disciplinary action leading to dismissal. Given the background described above, it is a serious indictment on the company that matters were allowed to degenerate to this nadir in the employment relationship. I have no doubt that if Mr Adams had agreed to delete that part of the acknowledgement on the

PIP form that referred to "disciplinary action" then, even though he rightly considered that the wrong process was being used, Mr Rodkiss would have signed the document and co-operated fully in its implementation.

[106] The question which arises is why was the relationship between these two senior managers in the company permitted to deteriorate in such an unseemly way? As noted above, at the meeting on 22 February 2013, Mr Walker told Mr Rodkiss that Mr Slade did not like any of the CHH Woodproducts engineering managers. Mr Slade was the CHH Group General Manager of Operations. Mr Walker indicated that the issuance of the PIP by Mr Adams may well have been a political exercise to keep Mr Slade off his (Mr Adams') back because Mr Slade did not want Mr Rodkiss in the business in six months' time. Mr Rodkiss told the Court that "Mr Slade had an intimidating management style which created a culture of fear and paranoia within the workforce". He described how at their first brief meeting in 2010, Mr Slade had asked for some data numbers which Mr Rodkiss did not have immediately available to him. He said that Mr Slade then told him, while using his hand as a symbolic gun pointing at him, that if he did not perform to his expectations then he would be gone.

[107] The evidence was that Mr Slade had instigated a review of the PIP template for CHH in February 2012. Ms Lyon said she understood that he had obtained the template from Fonterra. An email from Mr Slade to Ms Lyon and Ms Mayling, who was the Human Resources Manager at the time, enclosing the template was produced in evidence. Mr Slade commented that he liked the template. He noted that: "The first page spells out the specific issue that need(s) to be improved, as well as the consequence if not achieved." The stated consequence was: "Please also know that should you fall short of the performance targets of this PIP will without a reasonable explanation, then formal disciplinary action will likely follow."

[108] There was no evidence that Mr Rodkiss knew about Mr Slade's involvement in the review of the PIP template but that evidence adds substance to the observations made by Mr Walker. Mr Erickson submitted that Mr Slade's conduct at his first meeting with Mr Rodkiss had occurred back in 2010 and it was not sufficient to give rise to a constructive dismissal. I accept that submission but I also accept that it would naturally have had a bearing upon Mr Rodkiss' reaction to what

he was told by Mr Walker at the meeting on 22 February 2013 and it would help explain why Mr Rodkiss told Mr Walker that the information he had conveyed placed him in "a very, very uncomfortable position".

[109] Mr Erickson also submitted that the conversation Mr Rodkiss had with Mr Grant Arnold in which Mr Arnold described how Mr Slade had told Mr Adams to "get rid of three drop kicks" at the Nelson plant, being Mr Rodkiss and two other named managers, was hearsay and should be treated with caution. Again, I accept that submission but all the briefs of evidence were filed well in advance and if Mr Slade had wished to give evidence challenging any part of the plaintiff's case then he had ample time in which to do so.

[110] Mr Rodkiss was cross-examined at some length about the PIP document and it was put to him that it was not part of the disciplinary process. Mr Rodkiss described it as having all the characteristics of a written warning. That seemed to me to be a reasonable description of the document. There was CHH documentation produced which had "PIP" listed in the same box as "Second or final written warnings". There was an argument about whether that documentation was still in force. The fact of the matter, however, was that, whatever the exact status of the PIP within the CHH policies and procedure documentation, the reality was that it had all the connotations of a disciplinary document. Mr Rodkiss was keenly aware that the PIP had been used in other cases as a means of exiting people from the company. He had used the PIP process himself, at the suggestion of Mr Adams, to exit a storeman from CHH. That factor, coupled with the advice he had received from Mr Walker about Mr Slade's expectations gave Mr Rodkiss good reason to feel "very, very uncomfortable".

[111] As noted above, Ms Ironside submitted that the case came within both the second and third category of constructive dismissal identified in the *Auckland Shop Employees Union* decision. In relation to the second category, where the employer has followed a course of conduct with the deliberate and common purpose of coercing an employee to resign, Ms Ironside submitted:

> The only tenable explanation for CHH's serious and sustained breaches of its policies, procedures and guidelines, its contract with Mr Rodkiss and its

> duties of good faith is that CHH wanted Mr Rodkiss removed from the business and embarked on a course of conduct directed to that end.

[112] That was a particularly serious submission and it was not lacking in substance. Having given the matter careful consideration, however, I am not prepared to hold that it has been substantiated. I consider that the more likely explanation for Mr Adams' flagrant breach of the defendant's good faith obligations was self-preservation. In my view, Mr Walker summed the position up reasonably accurately during his recorded discussion with Mr Rodkiss at the meeting on 22 February 2013 when he made the point that Mr Adams was aware that Mr Slade did not like any of the current engineering managers, including Mr Rodkiss, and Mr Adams' would have felt that if Mr Slade considered that a site had a useless engineering manager it would reflect adversely on the site manager as well.

[113] Mr Adams would have been aware that Mr Slade was an enthusiastic supporter of the PIP process. He had obtained the PIP template from Fonterra and had been involved in adapting it for CHH. He had also sent the PIP template to Mr Adams which was used to exit a storeman from the Nelson plant. The day after Mr Adams placed Mr Rodkiss on the PIP, he advised Mr Slade of what he had done. As Mr Walker commented, that would probably have got Mr Adams a "tick" from Mr Slade. In other words, Mr Slade would have been very comfortable that Mr Adams had taken that initiative. Mr Walker described the move as a political exercise which would keep Mr Slade off Mr Adams' back in relation to Mr Slade's expectation that Mr Rodkiss would not be in the business in six months time.

[114] I think that those observations by Mr Walker were close to the mark. I do not accept, however, that in issuing Mr Rodkiss with the PIP, Mr Adams was pursuing a deliberate course of conduct designed to coerce Mr Rodkiss into resigning. The more likely explanation was that, in colloquial terms, he was protecting his own back against any further criticism from Mr Slade. The problem he was up against was that once he placed Mr Rodkiss on the PIP and advised Mr Slade to that effect, there was no turning back. No matter how persuasive Mr Rodkiss or his legal adviser may have been in attempting to point out the injustice of the move, Mr Adams had gone past the point of no return. To him it had become a matter of survival and saving face. Once he embarked on what Mr Walker referred to as this "political exercise"

designed to keep Mr Slade at bay Mr Adams found himself unable to retrieve the situation. No matter how compelling or logical the case made out by Mr Rodkiss might have been, Mr Adams could not bring himself to contemplate having to advise Mr Slade that the PIP issued to Mr Rodkiss had been withdrawn or amended. In terms of the old expression, he was hoist with his own petard.

[115] For those reasons, I reject the submission that Mr Adams' conduct amounted to a deliberate course of contract designed to coerce Mr Rodkiss into resigning. In other words, the case was not a constructive dismissal in terms of the second category identified in the *Auckland Employees Union* decision.

[116] In relation to the third category of constructive dismissal, namely, where the resignation has been caused by a breach of duty on the part of the employer and the breach of duty was sufficiently serious to make the resignation reasonably foreseeable, Ms Ironside submitted that the serious and sustained breaches of contract and statutory duty identified in her submissions would have made it reasonably foreseeable to CHH that Mr Rodkiss could no longer tolerate working under those conditions.

[117] I accept that submission. The provocation, in the form of the incessant breaches of duty that Mr Rodkiss was subjected to, was unfair, unreasonable and unrelenting. In terms of the foreseeability requirement, I consider that from an early stage in the narrative Mr Rodkiss' resignation was or should have been reasonably foreseeable to Mr Adams as the likely outcome. For example, the transcript of the third meeting relating to the PIP on 8 March 2013 records Mr Rodkiss telling Mr Adams that the PIP removed certain employment rights relating to due process and he asked Mr Adams: "if you want to sack me come up front now and we'll deal with it." At the meeting on 22 March 2013 Mr Adams said that one of his concerns was, "the more you get the lawyers, HR and all those people involved the relationship is going to deteriorate and there might not be any way back that's my concern." It must have been patently clear to Mr Adams that the company's ongoing breaches of duty were inevitably leading to Mr Rodkiss' resignation.

[118] For these reasons, I uphold Ms Ironside's submission that the case comes within the third category of constructive dismissal identified in the *Auckland Employees Union* decision. Mr Rodkiss' resignation was caused by various breaches of duty on the part of CHH sufficiently serious to make the resignation reasonably foreseeable.

[119] Having concluded that the plaintiff has established his claim of constructive dismissal, I turn briefly to the s 103A test of justification. In *Hamon*,[7] Judge Perkins made the observation that where the Court reached the conclusion that a resignation amounted to a constructive dismissal, it was unlikely to find that the employer's actions were nonetheless justifiable by application of the test under s 103A of the Act. I respectfully agree with those observations. I nevertheless confirm that in this case, for the reasons stated above, the employer's actions and how the employer acted were not what a fair and reasonable employer could have done in all the circumstances at the time the constructive dismissal occurred. The numerous defects in the process followed by CHH, which I have enumerated were significant and resulted in Mr Rodkiss being treated unfairly.

Remedies

[120] I turn now to consider the issue of remedies. Mr Rodkiss has claimed reimbursement of lost income, compensation for distress, penalties for breach of good faith obligations, damages and interest. I deal in turn with each head of claim.

Reimbursement of wages

[121] Mr Rodkiss was unjustifiably constructively dismissed on 16 April 2013. He obtained a position as an engineering surveyor with SGS NZ Ltd, which he commenced on 10 June 2013. He had been receiving from CHH a base salary of $104,632.00 plus benefits of employer superannuation contribution of 7.5 per cent and employer subsidised health cover valued at $2,355.96 per annum. His total gross annual remuneration with benefits amounted to $114,835.36 or $4,416.74 gross per fortnight. His new salary with SGS amounted to $85,000 gross per annum paid fortnightly in the amount of $3,269.23. The relevant supporting documentation

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[7] Supra at [50].

was produced. The difference between Mr Rodkiss' gross fortnightly pay from CHH and SGS amounted to $1,147.51. Mr Rodkiss seeks reimbursement of seven weeks' lost wages and benefits pursuant to s 123(1)(b) and (c) of the Act for the period from 16 April 2013 to 1 June 2013 amounting in total to $15,258.85.

[122] Counsel for the defendant submitted that Mr Rodkiss was under a duty to mitigate his loss and there was "no evidence of mitigation as such". It was further submitted:

> Specifically, there was no evidence of any steps taken by the plaintiff to secure a job paying the same or more than what he was paid by the defendant. The general requirement for moderation should also be taken into account.

[123] I do not dispute the application of the principles of mitigation and moderation. The evidence, however, was that Mr Rodkiss started applying for other positions the day after his dismissal. He was not cross-examined on this aspect of his evidence and I accept that he acted promptly in trying to obtain other employment in mitigation of his loss. I, therefore, allow the full amount claimed under this head of $15,258.85.

Other financial loss

[124] Mr Rodkiss also sought reimbursement for the difference between his earnings and benefits from CHH and SGS, namely $1,147.51 per fortnight, for the 41 fortnightly periods between 1 June 2013 and 30 December 2014. The claim was based on his evidence that he expected to be in his CHH job for at least a further five years and, therefore, the amount claimed in respect of the 18-month period between June 2013 and December 2014 was reasonable. His claim under this head totalled $47,048.32.

[125] Section 128(3) of the Act provides that the Court has a discretion to order an employer to pay additional compensation for remuneration lost as a result of the personal grievance and I consider that this is an appropriate case for the Court to award additional compensation under this head. Mr Rodkiss had significant financial commitments which made it necessary for him to seek and obtain other employment at short notice. Ms Ironside submitted that if he had waited to secure a

job paying the same or more than his CHH salary then he could be criticised for not mitigating his losses and he may still be unemployed today. I accept that submission.

[126] Mr Erickson made no specific submissions in relation to this particular head of claim but simply drew the Court's attention to *Sam's Fukuyama Food Services Ltd v Zhang*[8] where the Court of Appeal stressed, in relation to the necessity in awarding compensation for financial loss for the Court to have regard to all contingencies that might, but for the unjustifiable dismissal, have resulted in the termination of the [employee's] employment.

[127] Mr Erickson's submission in this regard was entirely appropriate. At the very end of his evidence Mr Rodkiss told the Court how, since his own dismissal from the company, Mr Adams, the site manager, and Mr Brian Hartley, the planer mill manager, had also left CHH along with four other senior managers and three employees who reported directly to Mr Rodkiss. Mr Rodkiss said that all of these people cited to him as the reasons for their resignation "excessively high workloads and discontent in their work due to unfair and unreasonable treatment by CHH."

[128] Mr Rodkiss did not give a date for the various departures from CHH except in the case of Mr Hartley who he said left CHH on stress leave in November 2013 and subsequently pursued a personal grievance claim against CHH. Although Mr Rodkiss may have anticipated staying with the company for a longer period, if the workplace had become as unpleasant as he described, and if some of his work colleagues had departed then, in my view, there is a reasonable likelihood that he would not have remained with CHH beyond the middle of December 2013. Rounded off, I am prepared to award $16,000 under this head of claim.

Compensation for hurt and humiliation

[129] Mr Rodkiss claims $30,000 as compensation pursuant to s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. Mr Rodkiss gave compelling evidence about the anxiety and stress which he experienced as a result of the unjustified actions of CHH. He told how his professional reputation was

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8 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 609, at [37] - [38].

significantly damaged and how he had to retreat from social interaction involving his work colleagues at CHH who had previously been close friends. He also explained how it had been necessary for him to cash in his pension and use money that had been set aside for his retirement in order to reduce his significant mortgage commitments following his departure from CHH on 16 April 2013.

[130] Mr Rodkiss also gave evidence about "destructive actions" taken by CHH after he left the firm which impacted on his new work. His role for his new employer, SGS, is to travel around New Zealand carrying out inspections and compliance checks on machinery. The CHH Eves Valley Mill was one of SGS's customers but CHH refused to allow him on the site to do his work for SGS. That remains the position. It financially impacted on his new employer who has to fly another person from Christchurch to the Nelson mill to carry out the work. Mr Rodkiss told the Court that this is a concern for his ongoing employment.

[131] Mr Erickson noted that the medical certificate produced to the Court regarding the acute anxiety suffered by Mr Rodkiss was signed by a General Practitioner (GP) rather than a specialist and the views of the GP should be treated with caution. He submitted that only a modest award of compensation was warranted and he contended that no separate awards should be made for the alleged disadvantage grievances.

[132] I accept that it would be inappropriate to make separate awards for the alleged disadvantage grievances. As noted above, I have put them to one side to avoid any duplication in the awards of compensation.

[133] Turning to the quantum of compensation awards under this head, in the recent decision of *Hall v Dionex Pty Ltd*,[9] Judge Inglis reviewed recent developments on the issue and expressed considerable sympathy for the submission made on behalf of the plaintiff that the quantum of compensatory awards under s 123(1)(c)(i) of the Act in both the Authority and this Court had fallen "woefully behind". The situation has no doubt been highlighted in the public mind in recent times by the extensive publicity given to two high profile decisions of the Human

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9 *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, at [87].

Rights Review Tribunal - *Hammond v Credit Union Baywide*[10] and *Singh v Singh anor,*[11] where damages were awarded for humiliation, loss of dignity and injury to feelings in the amounts of $98,000 and $45,000 respectively. Although it would not be appropriate to attempt to compare the facts of those cases with the present, the awards in question do appear to be substantially in excess of awards made in both the Authority and in this Court for arguably similar wrongs committed on employees.

[134] I accept that Mr Rodkiss has made out a significant claim under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. I propose to follow the approach adopted by Judge Inglis in *Hall,*[12] of endeavouring to fix a fair and reasonable amount for compensation bearing in mind the recognised need in this jurisdiction for moderation in such awards. In all the circumstances, I consider the appropriate award under this head to be $20,000 and I order accordingly.

[135] In relation to the remedies and the application of s 124 of the Act, I confirm that for the reasons outlined in this judgment I do not consider that the actions of Mr Rodkiss contributed in any way towards the situation that gave rise to his grievances.

Penalties

[136] Mr Rodkiss seeks a penalty of $5,000 against CHH for its breaches of its good faith obligations under s 4(1) of the Act and applies to have the penalty paid to him personally. Ms Ironside submitted that CHH's breaches of its good faith obligations were deliberate and sustained and it was therefore an appropriate case to impose a penalty.

[137] Mr Erickson accepted that a breach of the duty of good faith may result in the ordering of a penalty but he submitted that penalties were punitive and should only be awarded if the conduct warranted punishment. Mr Erickson further submitted

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10 *Hammond v Credit Union Baywide* [2015] NZHRRT 6.
11 *Singh v Singh anor* [2015] NZHRRT 8.
12 At [80].

that the threshold was a high one and the onus rested on the plaintiff to establish that a penalty was appropriate.

[138] I accept Mr Erickson's submissions in relation to this head of claim. If I had found that the constructive dismissal came within the second category identified in the *Auckland Employees Union* case and concluded that CHH had followed a deliberate course of conduct intended to coerce Mr Rodkiss to resign from the business then the situation may well have been different but that was not my finding. I, therefore, reject the claim for a penalty.

Damages

[139] Mr Rodkiss claims damages for breach of contract arising out of CHH's failure to comply with the relevant policies, processes and guidelines and to engage in consultation on a change to the processes. Exemplary damages are also claimed for deliberately creating a situation of harm to Mr Rodkiss.

[140] In response, Mr Erickson submitted that the claim should not be permitted; correctly pointing out that the claim for exemplary damages had not been pleaded in the statement of claim but it was raised for the very first time on the second to last day of the hearing. I accept that submission. No application was made to amend the pleadings.

[141] The primary purpose of pleadings is to inform the opposition party in advance of the issues so that they can take steps to address them. The statement of claim does seek:

> An order for damages and a penalty in the sum of $5,000 payable to the plaintiff in respect of the above finding.

[142] The damages pleading is quite abstruse and it certainly gave no indication to Mr Erickson of the issues that might be involved. No mention is made of exemplary damages. The reference in the pleading to "the above finding" is also vague in that it refers to other relief claimed and, if permitted to stand, could involve a duplication in the amount of compensation recoverable. For these reasons I decline the relief sought in damages.

Interest

[143] Mr Rodkiss seeks an award of interest under cl 14 of the Third Sch to the Act on all monetary awards made to him at the rate of 7.5 per cent from 16 April 2013 until the date of payment. Reliance was made on the decision of Colgan J (as he then was) in *Gilbert v Attorney General*.[13]

[144] Mr Erickson submitted that *Gilbert* was distinguishable in that interest was awarded on general compensatory damages for distress, not compensation payable under the Act. Mr Erickson invited the Court to apply the approach adopted by this Court in *Salt v Fell, Governor for Pitcairn*[14] which recognised that the Court had jurisdiction to order interest on sums awarded under s 123(1)(b) and s 123(1)(c)(ii) of the Act but not on compensation awards under s 123(1)(c)(i) or for non-monetary benefits under s 123(1)(c)(ii) of the Act.

[145] Again, I accept Mr Erickson's submissions on this issue. I consider that the awards I have made above in favour of Mr Rodkiss are appropriate without the addition of interest. I decline the claim.

Conclusions

[146] Mr Rodkiss succeeds in his claim. I have found that he was unjustifiably constructively dismissed by the defendant.

[147] By way of relief, I have awarded the plaintiff the following:

(a) Lost wages $15,258.85

(b) Other financial loss $16,000

(c) Compensation for distress $20,000

[148] The plaintiff is also entitled to an award of costs. I have deliberately not dealt with the defendant's challenge to the Authority's costs determination. The Authority had awarded the plaintiff costs in the sum of $6,710. To a large extent the

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13 *Gilbert v Attorney General* (unreported) 4 December 2003, AC 63/03.
14 *Salt v Fell, Governor for Pitcairn* [2006] ERNZ 449.

defendant's submissions on its costs challenge were dependent upon the eventual outcome of the hearing in this Court. Now that the outcome is known, I propose to allow the parties the opportunity to try and reach agreement upon costs in both the Authority and in this Court. If agreement cannot be reached, however, then Ms Ironside is to file submissions within 28 days and Mr Erickson is to have a like period in which to file submissions in response. If necessary, Ms Ironside will then have an additional 10 days in which to file submissions in reply.

A D Ford
Judge

Judgment signed at 12.20 pm on 24 March 2015