IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 77
EMPC 187/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DOWNER NEW ZEALAND LIMITED Plaintiff
AND	GARRY JONES Defendant

EMPC 189/2017

AND IN THE MATTER	of a challenge to a determination of the Employment Relations Authority
AND BETWEEN	GARRY JONES Plaintiff
AND	DOWNER NEW ZEALAND LIMITED Defendant

Hearing:	21, 22 and 23 November 2017 (Heard at Invercargill)
Appearances:	A Russell, counsel for Downer NZ Ltd M-J Thomas and M Johnson, counsel for G Jones
Judgment:	12 July 2018

JUDGMENT OF JUDGE K G SMITH

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[1] Garry Jones resigned from Downer New Zealand Ltd on 30 June 2016 claiming he had been treated unfairly, bullied and ostracised. His resignation was the culmination of a deterioration in the working relationship which began when Downer declined to alter a work roster. By the time Mr Jones resigned, the issues had grown to include the alleged blacklisting of a business owned by his son, misconduct and his suspension.

[2] Mr Jones says that, while he resigned, he was unjustifiably dismissed and disadvantaged in his employment entitling him to remedies. Downer disagrees. It says Mr Jones resigned and its dealings with him did not breach any duty owed to him or otherwise give rise to personal grievances.

[3] The Employment Relations Authority concluded Mr Jones was not constructively dismissed but upheld his claim for personal grievances for being unjustifiably disadvantaged. He was awarded remedies pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) totalling $14,000, taking into account a modest reduction for contributory conduct.[1]

[4] Both Mr Jones and Downer challenged the determination. Mr Jones challenged both the conclusion that he was not unjustifiably dismissed and the amounts he was awarded for his successful grievances, seeking to increase them. Downer challenged the conclusion that it had disadvantaged Mr Jones and, as an alternative, sought to reduce or extinguish the remedies he was awarded.

[5] Mr Jones' challenge relies on alleged breaches of duties said to be owed to him by Downer that, cumulatively, destroyed the employment relationship. Before considering those pleadings it is necessary to describe Mr Jones' resignation and the events leading up to it.

The resignation

[6] On 30 June 2016, Mr Jones sent Downer a letter resigning from his employment. Four weeks' notice was given. The letter contained several statements explaining why he made this decision. The most significant one was about a meeting he attended with managers on 24 June 2016, which he considered to be the last straw claiming he had been yelled at and targeted by negative comments.

[7] As well as being targeted, Mr Jones' letter said he had been treated unfairly, bullied and ostracised by staff who should have set a better example. He did not explain what had happened to him leading to these comments.

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[1] *Jones v Downer New Zealand Ltd* [2017] NZERA Christchurch 102.

[8] Mr Jones had been suspended by Downer following an incident on 25 June 2016. His resignation letter mentioned this suspension, briefly, by saying it came as no surprise to him. He summed up the position, as he saw it, in the following sentence:

> I honestly believe that I am being treated this way because I "stood in the gap" and because I had issues with the roster.

[9] The expression "stood in the gap" refers to a Downer health and safety policy requiring staff to speak up if something unsafe was happening. Mr Jones ended his letter by saying he had no choice but to resign.

[10] When Mr Jones described the events giving rise to his resignation he maintained he had acted properly and professionally at all times, denying being angry, agitated or confrontational with his managers or colleagues. He rejected any suggestion he behaved confrontationally or might have been at fault. His evidence was that throughout these events, while Downer was behaving unreasonably towards him, he remained level-headed and calm. That evidence can be contrasted with what was said by most of the witnesses called for Downer, who almost universally disagreed with him and the version of events he described. In this judgment, I have reached the conclusion that Mr Jones' evidence, where it conflicted with evidence given for Downer, was not to be preferred.

[11] Mr Jones' dissatisfaction began with the way Downer handled his concerns with a work roster starting with what happened after a staff meeting on 8 April 2016.

The roster

[12] Mr Jones was employed by Downer as a Reticulation and Rural Water Supply Serviceperson based in its Te Anau yard. He worked on a roster designed to provide daily coverage for Downer's contractual obligations to maintain services for its clients. The roster meant he worked a cycle of four days on followed by two days off. Initially, on days one and four he worked with Roger McDougall. On days two and three he worked alone. Over time the roster changed so they worked together on days one and two leaving Mr Jones working alone on days three and four. He came to consider this roster was unsatisfactory because of what he thought was a disproportionate workload,

especially when he completed tasks on day four which took him beyond his usual hours of work.

[13] Mr Jones raised his concerns about the roster with Geoff Gray, Downer's Southland Water Contracts Manager, on 18 February 2016. Mr Gray made a commitment to review the situation and "get back" to him. The roster had been created by John Wilson, Downers Contract Supervisor, and he was asked to prepare a proposed replacement for discussion. One was prepared and distributed at a staff meeting on 2 March 2016. Mr Jones was not at this meeting but its minutes were sent to him; he had previously been sent the draft for comment.

8 April 2016 meeting

[14] A regular staff meeting was planned for Downer's Invercargill office on Friday 8 April 2016 and the proposed roster was on the agenda. At the meeting Mr Gray announced a unilateral decision that the proposed roster would not be discussed because Mr Wilson was absent on bereavement leave. He did so because preparing the roster was not straightforward and he considered Mr Wilson needed to be present if it was to be discussed. That was because the roster had to take account of different work patterns, including managing staff who worked on shifts and those who did not, and covering gaps that would emerge in the work cycle.

[15] Mr Jones was unhappy with that decision. After the meeting he approached Mr Gray to remonstrate with him because, he considered, Mr Wilson's absence was an inadequate reason for not having a discussion. He confronted Mr Gray, accusing him of not having "the fucking balls" to make a change and of being "fucking gutless".

[16] In response, Mr Gray reminded Mr Jones that a commitment had not been made to change the roster and had gone only so far as to agree to review it. He went on to say he had spoken to everyone concerned. Other Downer staff were happy with the current roster and he was not prepared to make changes without Mr Wilson being involved. Mr Gray was aware that a cause of Mr Jones' dissatisfaction was his working relationship with Mr McDougall. In response to this approach he encouraged Mr Jones to rectify "past squabbles" with Mr McDougall.

[17] Mr McDougall was still in Downer's yard after the meeting. Taking up the invitation by Mr Gray, Mr Jones approached him to discuss the roster. What followed was an altercation which came to Mr Gray's attention reasonably quickly.

[18] Later that day Mr Gray sent an email to staff, stating he had decided to leave the roster "as is". His reason was that no roster would ever suit everyone and his email contained the following remark: "I am always available to discuss in an adult manner all and future aspects of this decision."

[19] By the time Mr Gray decided not to change the roster he had complied with the commitment he made in February to "review the situation". That is, he had reviewed the current roster by asking Mr Wilson to prepare a revision of it. That revision had been circulated for comment and he had spoken to all staff about it, although not in the formal environment of the meeting on 8 April 2016. Mr Gray knew Mr Jones' opinion about the current roster and his preference for the revised one.

[20] Mr Jones began annual leave the next day and was to be away from work until 18 April 2016. When his leave ended he began a period of paid sick leave lasting until a meeting, about his return to work, on 18 May 2016.

18 May 2016 return to work meeting

[21] When Mr Jones indicated he was able to return, a meeting was organised to discuss his fitness to resume work given the time he had been away. The meeting took place on 18 May 2016 and was attended by Mr Jones, Mr Gray and Rodger Dawson, Downer's South Island Operations Manager - Water. During this meeting they discussed Mr Jones' fitness to return to work and he was told that Aaron Green, with whom he worked at Te Anau, had been appointed as the team leader there on a trial basis. One of Mr Green's tasks was to assist with what Mr Gray referred to as perceived roster issues and Mr Jones' workload.

[22] A few days later a letter was sent to Mr Jones confirming what had been discussed. The letter recorded the decision not to change the roster, saying it was taken after consultation. Mr Jones was informed he would not be required to carry out "on call" duties until further notice; that is, duties outside of his rostered hours of work.

Mr Green's appointment was confirmed as was his stated task of monitoring and communicating to Downer if he felt there was any risk to Mr Jones' health because of his work. The letter recorded the importance of Mr Jones and Mr Green maintaining daily contact.

27 May 2016 safety report

[23] Unfortunately, a cordial working relationship between Mr Jones and Mr Green did not last long. On 27 May 2016, Mr Jones saw Mr Green not wearing his safety gear at a Downer's site and requested that he put it on or leave. As it transpired, Mr Green acknowledged not wearing the equipment but considered he was not on the worksite at the time but was adjacent to it.

[24] Later that day Mr Jones telephoned Mr Gray to report Mr Green not wearing safety gear. Mr Jones said he had informed WorkSafe. During this telephone call, Mr Jones was agitated and sarcastic before abruptly ending it, after repeatedly saying "bye bye Geoffrey".

[25] Mr Gray's response was to contact WorkSafe to ask about the incident that had been reported but, aside from being informed that it was not regarded as serious, no other information was provided. Later that evening, Mr Gray telephoned Mr Jones and required him to provide his account of what had happened in a formal incident report. An incident report was prepared by Mr Jones on 30 May 2016, but it was incomplete.

[26] What Mr Jones said about this telephone call was markedly different from Mr Gray's evidence. In Mr Jones' version, his call to Mr Gray was not taken seriously until the point was reached where he said he would report the incident to WorkSafe. On this version of events, it was only when confronted with this choice that Mr Gray said he would deal with the matter himself. Mr Jones went on to say that, when he reported to Mr Gray, confirmation was provided that the incident had been reported to WorkSafe. He also said that, when he asked Mr Gray for the name of the person at WorkSafe to whom the report had been made, the answer was that the person's name or an incident reference had not been supplied.

[27] Mr Jones said he contacted WorkSafe to ask about the incident only to discover that no report had been made and considered he had been misled.

31 May 2016 incidents

[28] Several events occurred on 31 May 2016 indicating a deteriorating employment relationship. First, Mr Jones sent an email to another Downer employer, who dealt with health and safety, attaching a photograph of Mr Green not wearing safety gear on a different work site from the one that prompted him to talk to Mr Gray on 27 May 2016. The photograph had been taken several months earlier, in December 2015. This email said the photograph had been sent to him by a concerned member of the public. It had actually been taken by his son who had been working on or near the site.

[29] Downer was aware this photograph was not recent, because of the site pictured, but the matter was taken seriously and raised with Mr Green whose response was to immediately step down from his role as a health and safety representative. This incident was discussed at a monthly staff meeting on 2 June 2016, as was Mr Green's decision to step down.

[30] Despite those steps being taken the same photograph was placed on noticeboards in Downer's Invercargill and Te Anau yards. An instruction was given for it to be removed because there was no reason for it to be displayed; the incident had been addressed. When the photograph was removed it was replaced by Mr Jones. This happened somewhere between 10 and 12 times. Mr Jones did not explain why it was necessary to display this photograph on the notice board, or to replace it, once Downer had dealt with the incident. The only explanation offered for sending the photograph in the first place was because, he said, he was being bullied by Mr Green and Mr Gray. He did not say how.

[31] The second incident on 31 May 2016 was an email to Mr Green, ostensibly sent by Mr Jones. Mr Green had sent him an email asking for daily job reports to be supplied before 8.30 am each day. The out-of-context reply was:[2]

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2 Reproduced verbatim.

> Hi Aaron,If you see me smiling,it's because I'm thinking of doing something evil or naughty.If you hear me laughing it's because I've already done it.!

[32] Mr Green interpreted this email as a threat to him and reported it to Downer. Initially, Mr Jones accepted he sent the email; he said it was something he had seen on Facebook. When told it had been interpreted as a threat, his response was that he had been having some fun with Mr Green and nothing more. Throughout his dealings with Downer he allowed the company to believe he had sent this email. However, at the investigation meeting, and at trial, he said the email was sent by his wife without his knowledge after they had both seen something to that effect on Facebook. Mrs Jones said she wrote the email and the reason for sending it was a "hint to back off".

[33] Separately, on 31 May 2016, another member of Downer's staff sent a work email to Mr Jones having no obvious connection with Mr Gray. Mr Jones replied expressing concern for Mr Gray's health. Mr Gray was described as stressed, and Mr Jones asked the employee to keep an eye on him. He explained this email by saying he sent it because he thought Mr Gray was stressed but he had no adequate explanation for sending this message as a reply to emails unrelated to Mr Gray.

[34] From about 3 June 2016 until about 8 June 2016, Mr Jones was asked for further information to complete the incident report arising from what happened on 27 May 2016, but he did not provide further information. His reason was because he was waiting for a copy of a site plan to be sent to him. On 13 June 2016, Downer wrote to Mr Jones inviting to him to a disciplinary meeting.

13 June 2016 letter

[35] Downer sent a letter to Mr Jones requiring him to attend a disciplinary meeting to address six complaints. Among them was one that he would not take instructions from Mr Green and would only accept instructions from Mr Gray in writing. The other complaints were about:

(a) the report to WorkSafe on 27 May 2016;

(b) the email to Mr Green on 31 May 2016;

(c) failing to provide the information requested for the incident on 31 May 2016;

(d) speaking aggressively or in a derogatory manner to Mr Gray on stated dates; and

(e) failing to carry out work issued to him in a reasonable and timely manner.

[36] The disciplinary meeting was held on 23 June 2016.

23 June 2016 meeting

[37] The attendees at this meeting were Mr Dawson, Mr Gray, a human resources manager, Mr Jones and his representative. Before reaching any conclusions, Mr Gray decided not to proceed with a disciplinary investigation and, instead, to attempt to make the employment relationship functional. He ended the meeting and investigation.

[38] That decision was confirmed by letter the same day. Mr Jones was informed a meeting to discuss the roster was to occur at which he would be given an opportunity to state his concerns and to put forward an alternative. As well as ending the disciplinary investigation this letter said the disciplinary meeting was confidential to the attendees.

24 June 2016 meeting

[39] As indicated the previous day, a meeting was organised to discuss the roster. Mr Jones was present, as were Mr Dawson, Mr Gray and Mr Wilson. The meeting started reasonably well but did not end constructively. The proposed roster previously prepared was discussed and, initially, agreement was reached to trial it. However, as the meeting progressed, Mr Jones began to take exception to general comments about this new roster requiring effective communication by everyone affected by it. More than once he took exception, because he thought the comment was directed at him. As the meeting progressed Mr Jones became argumentative and aggressive. Despite

several interruptions, Mr Gray eventually said he would be happy to implement the proposed roster, on a trial, before adding the gratuitous remark that "the bullshit stops from this point". Mr Jones took umbrage to the remark and demanded to know what was meant by it. Mr Wilson provided an answer, saying it referred to the photographs of Mr Green, not wearing safety gear, which were described as "dobbing in" his workmates.

[40] The meeting was disintegrating and Mr Dawson stopped it. Mr Wilson and Mr Gray were told to leave and, for about the next hour, Mr Jones and Mr Dawson continued to talk. Mr Jones' demeanour at the end of the first part of this meeting was angry and volatile. During this private conversation Mr Jones was asked why he was agitated and reminded that the meeting was designed to resolve the roster issue as he had asked. The response was not encouraging, because Mr Jones described Mr Gray, Mr Wilson, and Mr Green as all being "as bad as each other" and the meeting was just a chance to have "a go" at him. He went on to say that he would not stop until he had "taken down" Mr Green and Mr Gray. In particular he claimed that Mr Green had been responsible for blacklisting Jones Electrical, a business operated by Mr Jones' son. Attempts to invite Mr Jones to deal with Mr Dawson, if he had problems, did not gain much traction. Eventually, Mr Jones requested an opportunity to speak to a named senior HR manager, which Mr Dawson agreed to arrange. The meeting ended and Mr Jones returned to work.

[41] Despite the obvious agitation which had accompanied the meeting, and the unsatisfactory way in which it had ended, subsequent texts were exchanged between Mr Dawson and Mr Jones about the roster. Mr Dawson sent a text to Mr Jones telling him about arranging to speak to the HR manager, as requested, if he wanted to. Mr Jones was asked if he would continue to work on his roster "as normal" in the interim. He responded by text saying he would work as normal on the same roster with no changes.

[42] Mr Jones had not agreed to the proposed roster being trialled because he thought it came with unacceptable demands that:

(a) it could be replaced with the old roster at any time;

(b) he was to report to the yard every morning and talk to Mr McDougall and Mr Green about work;

(c) he was to be more responsive to Mr Green and to acknowledge him as the team leader; and

(d) he was required to communicate with Mr Green whether or not it was a normal working day or his day off.

[43] No one else at this meeting considered conditions had been sought or imposed as part of agreeing to trial the proposed roster. They said the discussion was about improving communication and, in particular, Mr Jones was not required to communicate on his days off. The proposed roster was not implemented.

25 June 2016 incident

[44] The following day Mr Jones and Mr Green clashed at the Te Anau yard. Mr Green had gone to work when he was on leave to collect daily job reports from Mr Jones that had been requested previously. He also intended to have Mr Jones take a trailer of gravel from the yard to repair potholes, the possibility for this work being needed having been signalled in an email the day before.

[45] Mr Green said that he had already filled the trailer with gravel and all that was needed was for Mr Jones to take it to fill in the potholes. When requested to do so, Mr Jones refused saying he was waiting for a digger to be brought from Invercargill to do the job. Using a digger probably required another employee to be available to assist with its safe operation. Mr Green said there was no need to use a digger but Mr Jones refused to do the work without one. Instead he was instructed to do some weed-eating.

[46] The impression given by Mr Green's evidence was that he was being taunted by Mr Jones who was described as smiling and laughing at him while this conversation took place. Mr Green linked that behaviour to the email of 31 May 2016. On the face of things, a straightforward exercise of attending the yard to collect reports, and to issue innocuous instructions, had been met with upsetting defiance. Mr Green was

distressed by what happened and was crying. He telephoned Mr Gray to report what had happened and threatened to resign. He also spoke to Mr Dawson.

[47] Mr Jones' version of what happened was markedly different. He maintained he was required to fill the trailer with gravel, by hand, but such an effort was unnecessary because there was a digger available to use in the yard. He claimed he did not refuse to do the work. He denied smiling or laughing at Mr Green in a way designed to taunt him.

Suspension

[48] Mr Gray's response was to suspend Mr Jones which he did by telephone that day. That decision was made by Mr Dawson who had also spoken to Mr Green and gauged how upset he had been. Mr Dawson explained he was concerned for Mr Green's safety, wanted to prevent any potential harm and to defuse the situation. Subsequently, Mr Jones telephoned Mr Dawson who confirmed the suspension. During the call, Mr Jones said he was worried about Mr Green.

[49] There was no discussion with Mr Jones about the possibility of his suspension before it occurred. It was an immediate response to the situation as Mr Dawson understood it to be, in the knowledge of what had been said by Mr Jones the previous day and out of concern for Mr Green. Mr Dawson considered the safest option, for everyone, was for Mr Jones to be removed at least temporarily.

[50] After being suspended Mr Jones sent an email to Mr Dawson and Mr Gray expressing concern for Mr Green whom he described as having entered the office that morning "looking extremely upset and looking as if he hadn't slept for days". It went on to say Mr Green was "clearly not himself" and invited them to check on him. On the following Monday, 27 June 2016, he sent an email to another Downer's employee describing his suspension as "Just bullshit but the most fun I've had in a long time".

[51] An attempt was made to communicate with Mr Jones the following Tuesday, 28 June 2016, to invite him to attend a meeting to discuss what had happened and a potential return to work. There was a dispute about whether this conversation happened on 28 June 2016, and therefore prior to Mr Jones' resignation, or on 7 July

2016. Mr Jones believed the call happened on 7 July 2016 because he linked it to efforts he was making to clean and return Downer's vehicle. The significance of that dispute is that, if the telephone call occurred prior to the resignation, what was said may have a bearing on the claim for constructive dismissal. If the call occurred afterwards it may have no bearing at all.

[52] Mr Gray said the call occurred on 28 June 2016, because he recorded the conversation on his cell phone that day. Furthermore, the context of the call showed it had occurred on 28 June because it discussed what had happened on the previous Friday and Saturday.

[53] I am satisfied the telephone call happened on 28 June 2016, and as part of the conversation, Downer made efforts to discuss a possible return to work ending the suspension. The invitation was rejected. Two days later Mr Jones resigned. By agreement he was paid for his notice period instead of working it out.

Constructive dismissal?

[54] The claims for constructive dismissal and unjustified disadvantage stem from the same events following the decision about the roster made on 8 April 2016.

[55] Six cumulative events were pleaded as breaching Downer's duties and destroying the employment relationship:

(a) the unilateral decision not to change the roster on 8 April 2016, without conducting a formal meeting or "true consultation";

(b) the unfair raising of performance and misconduct issues at the return to work meeting on 18 May 2016;

(c) the blacklisting of Jones Electrical;

(d) Mr Jones' report to WorkSafe being treated as a disciplinary matter in a meeting on 23 June 2016;

(e) the unfair raising of performance and misconduct issues at the meeting on 24 June 2016; and

(f) the suspension on 25 June 2016.

[56] Each of those pleadings is discussed below, after considering the relevant legal principles.

Legal principles

[57] The legal principles to apply when considering a claim of constructive dismissal are well settled. The concept was first described in *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich*, where the Arbitration Court said there was no substantive difference between a case where an employer intends to dismiss the employee and does so and one where the employer, by conduct, compels the employee to leave employment.[3]

[58] Classically a constructive dismissal arises where, in substance, the employer has dismissed the employee although technically there was a resignation: *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd.*[4] In *Woolworths,* the Court described three non-exhaustive situations where constructive dismissal might occur:[5]

(a) when the employee is given a choice of resigning or being dismissed;

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

(c) where a breach of duty by the employer leads an employee to resign.

[59] The pleadings in this case rely on the third category, alleging breaches of duty leading to the resignation.

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3 *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* [1983] ACJ 965, (1983) ERNZ Sel Cas 95 (AC) at 104.

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

5 At 374 – 375.

[60] Breaches of duty were discussed by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* as follows:[6]

> 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 other 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.

[61] The test requires causation and foreseeability. This case also involves the 'final straw' which Ms Thomas submitted was the suspension. The 'final straw' test was first mentioned in *Pivott v Southern Adult Literacy Inc*[7] and more recently considered in *Spotless Facility Services NZ Ltd v Mackay.*[8] In *Pivott,* the 'final straw' was described in this way:

> [61] The legal position regarding 'final straw' cases, as they are often referred to, was considered by the English Employment Appeal Tribunal in *Triggs v GAB Robins (UK) Ltd.* There, the Tribunal provided a concise restatement of the principles first enunciated by the Court of Appeal of England and Wales in *Omilaju v Waltham Forest London Borough Council.* The Tribunal outlined these principles as follows:
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>> [32] We derive the following principles from Omilaju 's case. (1) The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial. (2) Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous. (3) The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test. (4) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence.
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> (footnotes omitted)

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6 *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415 (CA) at 419.

7 *Pivott v Southern Adult Literacy Inc* [2013] NZEmpC 236, [2013] ERNZ 377.

8 *Spotless Facility Services NZ Ltd v Mackay* [2016] NZEmpC 153.

[62] The burden of establishing that Mr Jones' resignation was actually a dismissal rests with him.[9] Each of the pleadings is examined in turn.

(a) Not changing the roster on 8 April 2016.

[63] The pleading of a unilateral decision not to change the roster was particularised as the decision being made without a formal meeting or "true consultation". This pleading carried with it an assumption Downer was required to consult Mr Jones in a more thorough way than occurred in the lead-up to, and immediately following, the April meeting. The source of that duty was not explained in the pleadings or submissions.

[64] The employment agreement did not require Downer to consult Mr Jones before implementing, or changing, the roster. The references to consultation in the agreement applied only to the company's rules, policies and procedures and then where appropriate.

[65] That leaves whether the duty arose in any other way. Ms Thomas submitted that s 4 of the Act required the parties to an employment relationship to be responsive and communicative, but that statutory duty does not assist in this situation. The structure of this pleading was designed to circumvent the difficulty presented by the communication that took place. The company knew what Mr Jones wanted and did respond. It communicated effectively by deciding not to change the roster and telling him so. In the absence of a contractual requirement to do so, it would carry any duty to consult too far to say what occurred was insufficient and needed to take place in a formal meeting.

[66] Presumably "true consultation" means something more elaborate, and all-embracing, compared to what happened. There is no justification for concluding something more than occurred was required. Mr Jones was not ignored but what he wanted was refused, at least initially. Mr Jones has not satisfied the burden on him to demonstrate that the circumstances of this case required a more elaborate consultation.

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

[67] Even if Mr Jones had established a duty to consult him in the way pleaded, it would be artificial to ignore what happened before he resigned several weeks later. Mr Gray's email did not close down all possibility of a roster change in future. The roster was revisited on 24 June 2016 with the express purpose of introducing a new one, to suit Mr Jones, for a trial period. There is no doubt the meeting on 24 June 2016 discussed the proposed roster even to the extent of proposing it be implemented. Mr Jones thought it came with unacceptable conditions but that does not alter the fact he participated in the discussion and was, therefore, consulted.

[68] The decision not to change the roster on 8 April 2016, without conducting a formal meeting or "true consultation", did not breach any duty Downer had to Mr Jones.

(b) Performance and misconduct issues at the meeting on 18 May 2016

[69] The pleading was that Mr Jones was subjected to performance and misconduct issues at this meeting but did not describe what had been raised with him. The meeting was prompted by Mr Jones' return to work after an extended period of sick leave. This meeting was wide-ranging but concentrated on his fitness and ability to work. The discussion included events preceding his sick leave and he was asked if he wanted to be back at work.

[70] There were frank comments about the need to communicate, and a concern about a lack of adequate communication during his absence, but they did not cross over from being a candid discussion into being about performance or misconduct.

[71] His previous work and behaviour were not reviewed or criticised. That was confirmed by Downer's letter to Mr Jones dated 24 May 2016. It reiterated the "number one concern" was his health and wellbeing, and that he was fit to return with no potential harm to his health, or risk to others, while carrying out his normal duties. A brief passage recorded his medical problem by describing some of its symptoms. The letter recorded that, when asked if the roster issue had caused his medical condition, he informed the company it was not the cause but was "rather the last straw or trigger", and he had other things going on at the time outside of work.

[72] The letter recorded the company's decision not to change the roster. It responded to an issue raised by Mr Jones, about previously returning from leave to discover incomplete work orders, by giving him instructions about what steps to take if that situation occurred in future. Interim steps were described to assist Mr Jones, including checking daily with Mr Gray about issues arising where his health might be deteriorating, or affecting his ability to work, and not being required to carry out "on-call" duties until advised. Mr Green's appointment as the team leader, and his role, were stated to assist Mr Jones with his daily work requirements. He was to monitor and communicate to the company if there was any risk to Mr Jones' health because of assigned duties. Nothing in that letter shows the meeting delved into performance or misconduct issues.

[73] There was nothing untoward in a candid discussion between an employer and an employee returning to work after a long absence on sick leave. The meeting on 18 May 2016 did not raise performance or misconduct issues.

(c) The blacklisting of Jones Electrical

[74] Mr Jones' son owns Jones Electrical. From time to time, that company provided electrical services to Downer as a contractor. An incident arose at one of Downer's sites where electrical work undertaken by a contractor was considered to be substandard and dangerous. An email about this work was sent to staff, including Mr Jones, but the contractor responsible was not identified.

[75] Mr Jones thought this communication was an implied criticism of his son's business and an oblique attack on him by taking steps impacting on his family. There are two problems with this pleading. First, Jones Electrical was not held responsible. Second, even if Jones Electrical was wrongly held responsible, that action could not amount to a breach of duty to Mr Jones.

(d) Health and safety incident and disciplinary meeting of 23 June 2016

[76] The disciplinary meeting on 23 June 2016, discussed Mr Jones' report to WorkSafe about the safety gear incident involving Mr Green. Mr Jones disputed the

appropriateness of this subject being part of the disciplinary process because he claimed to be complying with Downer's policy.

[77] The complaint did not seek to criticise Mr Jones for adhering to this policy, but for going to WorkSafe without first raising the issue with the company. Mr Dawson explained that there could be minor breaches arising from forgetfulness or inadvertence which could be dealt with adequately without involving WorkSafe. In raising the subject, Downer was investigating the circumstances in which Mr Jones had purported to report to WorkSafe over a matter which, on the face of things, did not appear to have the gravity normally associated with its investigations.

[78] Very promptly after this subject was raised it was dropped without any consequences for Mr Jones. Downer was entitled to raise it with Mr Jones and to do so without breaching a duty to him. Things might have been different if Downer had carried on with the investigation but it did not.

(e) The unfair raising of performance and misconduct issues at the meeting of 24 June 2016

[79] The meeting on 24 June 2016, was to discuss the proposed roster. The only statement made at this meeting that could potentially be characterised as performance-related, or about misconduct, was the remark by Mr Gray supplemented by what Mr Wilson said. Mr Jones may have thought the remark was the re-opening of the disciplinary meeting from the day before but he had no basis for such a conclusion. The remark was unacceptable to Mr Dawson who required Mr Gray and Mr Wilson to leave the meeting. Once they left the meeting the remark was not revisited in any way. That action was inconsistent with Downer endorsing the remark or that it intended to raise performance or misconduct issues.

[80] Ms Thomas' submissions did not explain how this remark could properly be described as a performance issue or misconduct. Mr Gray and Mr Wilson were not present at the disciplinary meeting the previous day and did not know what had been discussed. From their perspective there was no reason for the photograph to be continually replaced when removed, especially after Mr Green had stepped down from

his position as a health and safety representative and the company had addressed the subject in a subsequent meeting. If the photograph was intended to force change it had served its purpose so its continued publication was unnecessary.

[81] Ms Thomas sought to supplement her submissions by referring to a power imbalance at the meeting. That is not an accurate characterisation of the meeting or its dynamics. Mr Jones did not back down when Mr Gray made his remark and had not shied away from speaking directly and forcefully to his managers before.

[82] The remark may have been ill-advised, but that is insufficient to amount to a breach of duty leading to a constructive dismissal. Mr Jones knew that as well because of Mr Dawson's immediate response to it.

[83] This meeting did not raise performance or misconduct issues and cannot form any part of a claim for constructive dismissal based on a breach of duty owed to Mr Jones.

(f) The suspension of the plaintiff on 25 June 2016

[84] Mr Jones was suspended immediately after the incident with Mr Green on 25 June 2016. There is a possibility the disagreement prompting this suspension was the result of a misunderstanding but that was not explored in the evidence.

[85] Mr Russell submitted that, while there was a failure to discuss the suspension prior to it being implemented, there are situations where it is not necessary to consult an employee before acting. He relied on *Graham v Airways Corporation of New Zealand Ltd.*[10] In that case, the Court said:[11]

> ... justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise.

[10] *Graham v Airways Corp of New Zealand Ltd* [2005] ERNZ 587 (EmpC).
[11] At [104].

[86] That judgment went on to say there is no immutable rule requiring an employee to be told about the proposal to suspend with a view to giving him or her the opportunity to persuade the employer not to do so.

[87] The reasonably banal circumstances which immediately preceded Mr Jones' suspension suggest that, at first blush anyway, there was no reason to suspend him or to do so without consultation. Mr Green was at the Te Anau work site only temporarily having gone there while on leave to collect some reports and follow-up on work. Mr Jones would have carried on working and there was little or no prospect of any further clash between them that day.

[88] However, the context of this suspension is placed in a different light when the events of the previous day are taken into account. In the unsatisfactory meeting which occurred to discuss the proposed roster, Mr Jones had told Mr Dawson about getting even with anyone who crossed him including naming Mr Green. Mr Dawson described Mr Jones as agitated, and upset, which evidence I accept. By the time the suspension occurred, Mr Dawson was aware that there were continuing clashes between Mr Jones and other Downer employees particularly Mr Green. The behaviour exhibited by Mr Jones, when he confronted Mr Green, was taunting and was meant to be. It was a continuation of his decision to confront Downer to get his own way and an expression of his stated intentions to get even from the previous day.

[89] The circumstances confronting Mr Dawson justified him being concerned about safety and acting urgently by suspending Mr Jones without first giving him an opportunity to comment. Mr Dawson's decision cannot be impugned in all the circumstances for being procedurally unfair. The suspension, in the circumstances, was justified.

Last straw

[90] Strictly speaking, it is not necessary to consider submissions on "the last straw" event, given the previous conclusions. Even if the suspension had not been justified it was unlikely to have been the basis for the resignation being treated as a dismissal, on "the last straw" test. It was not relied on in the resignation letter which concentrated

on the meeting of 24 June 2016. He dismissively described his suspension as "the best fun he had in a long time". That communication was inconsistent with the suspension being the last straw and, therefore, the basis for a constructive dismissal claim.

Foreseeability

[91] Finally, a brief comment is required about foreseeability. It would not have been foreseeable to Downer that any of the events which occurred from 8 April 2016 onwards might, either by themselves or in combination, were likely to lead Mr Jones to resign. That is evident from the events themselves and how Downer responded to them. From the meeting of 18 May onwards Downer was engaged in attempting to create a working relationship with Mr Jones, including creating systems to assist him and, eventually, agreeing to his request over the roster. While Mr Dawson was disturbed over what happened in the 24 June meeting, he attempted to organise human resources assistance as requested. Nothing in those steps, or in inviting a discussion about returning to work after being suspended, suggests Downer could, or should have, foreseen the resignation.

Cumulative effect and conclusion on constructive dismissal

[92] The pleadings relied on do not show that, either individually or cumulatively, there was a breach of duty by Downer. Mr Jones was the cause of his own misfortune. From about 8 April 2016 onwards, he set himself on a collision course with Downer by being disruptive and confrontational.

[93] Mr Jones has failed to show his resignation was, in reality, a dismissal.

Unjustified disadvantage?

[94] The Authority held that Mr Jones had been unjustifiably disadvantaged because of Mr Gray's email of 8 April 2016, the remark at the meeting on 24 June 2016, and by being suspended. Each of these events was held to be not what a fair and reasonable employer could do. Consequently, Mr Jones was determined to have suffered unjustified disadvantages within the meaning of s 103(1)(b) of the Act.

[95] That section reads:

> **103 Personal grievance**
>
> (1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—
>
> …
>
> (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[96] In relation to the email of 8 April 2016 the Authority said:

> [110] I find that this disadvantage was unjustified as no fair and reasonable employer could have failed to have rearranged the roster meeting in all the circumstances. Mr Jones' evidence is that he was upset by this decision, and it led to him taking 36 days sick leave.

[97] It recognised not all of Mr Jones' sick leave could be attributed to the consequences said to have arisen from the email, but he was awarded $7,500.

[98] As to Mr Gray's comment, the Authority concluded his outburst caused Mr Jones a disadvantage because he was entitled to expect a manager to speak to him in a measured way rather than an angry way. It concluded Mr Gray was frustrated but his conduct was not justified. An award of $2,500 was made.

[99] The Authority held an unjustified disadvantage arose because of the suspension and awarded Mr Jones $5,000. A deduction of $1,000 was made for contributory conduct. The net amount awarded Mr Jones pursuant to s 123(1)(c)(i) of the Act was $14,000.

[100] Mr Jones challenged the whole of the determination to increase the number of disadvantage grievances being pursued and to increase the awards made in his favour for those the Authority had accepted occurred. His claims largely repeated each event relied on to establish a constructive dismissal as follows:

(a) Mr Gray's unilateral decision not to change the roster or allow him to discuss his concerns regarding it.

(b) The meeting on 18 May 2016 which was said to have gone beyond the scope of his return to work to be about his performance and misconduct. He pleaded it was unreasonable to bring up performance matters during the meeting and that, as a result, he was stressed and unfairly disadvantaged.

(c) The blacklisting of Jones Electrical. He pleaded that his son's business was being unfairly punished because of him and that the reason for this action was unjustified.

(d) Mr Jones pleaded the meeting of 24 June went beyond a discussion of the proposed roster because of the remark by Mr Gray.

(e) His suspension on 25 June 2016.

[101] For each alleged disadvantage compensation of $10,000 under s 123(1)(c)(i) of the Act was sought. During closing submissions, the claims arising from the meeting on 18 May 2016, and relating to Jones Electrical, were withdrawn. Each remaining claim is discussed below.

8 April 2016

[102] Ms Thomas' submissions assumed Mr Gray's action in sending his email, truncating the process of reviewing the roster, amounted to a breach of s 103(1)(b). Mr Russell rested Downer's case on the basis that the circumstances could not be said to realistically give rise to a grievance.

[103] Mr Jones' employment agreement with Downer did not require the company to consult him about establishing and changing a roster, so there was no breach of the employment agreement arising from the decision to end the process of reviewing the roster. Section 103(1)(b) refers to employment being affected to the employee's disadvantage but, in this case, there was no impact on Mr Jones' employment arising from the decision to not change the roster.

[104] That leaves for consideration whether a condition of his employment was affected to his disadvantage by this decision. In *ANZ National Bank Ltd v Doidge*, the Court analysed the meaning of s 103(1)(b) where that section refers to conditions of the employee's employment being affected to the employee's disadvantage.[12] In that case the Court concluded the section was not confined to breaches of contract because a personal grievance is a broader notion.[13] Some aspect of an arrangement between an employer and an employee could, therefore, be a "condition" of employment while not being a term of the contract.[14] By way of explanation, the Court held that not everything an employer provides, or an employee expects to receive, during employment is either a term or a condition of the agreement between them.[15]

[105] The Court in *Doidge* had drawn on the Court of Appeal's decision in *Tranz Rail Ltd v Rail & Maritime Transport Union Inc.* In the context of discussing a bonus scheme, the Court of Appeal commented that a term of employment as a concept is necessarily wider than the term of an employment contract.[16] In *Doidge* the Court decided a mileage allowance previously paid to a casual employee, which was not a term of the employment agreement, was a condition of employment so a claim under s 103(1)(b) was available. In that case, however, the unilateral withdrawal of the mileage allowance was not an unjustified action and no remedies were available.

[106] Using the definition of "condition" in *Doidge*, it is difficult to see how the decision by Downer could give rise to Mr Jones' conditions of employment being adversely affected to his disadvantage by what happened on 8 April 2016. While not identified in submissions, the only potential condition might (at a stretch) arise from an expectation of consultation because of what Mr Gray committed Downer to when first approached by Mr Jones about the roster. Some support for that proposition comes from *Tranz Rail* where the Court referred to a legitimate expectation flowing from an equitable interest in the bonus scheme. It is doubtful that the commitment made created a legitimate expectation but, even if it did, that went no further than a review and one was carried out. The way Mr Gray's decision was reached and

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12 *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC).
13 At [45].
14 At [45].
15 At [46].
16 *Tranz Rail Ltd v Rail & Maritime Transport Union Inc* [1999] 1 ERNZ 460 (CA) at [26] – [27].

communicated might be characterised as unsympathetic, and even hard-nosed, but that is not enough to give rise to a personal grievance.

[107] Even if the decision could be described as a disadvantage it was not unjustified. The company was entitled to make a decision about its roster. Mr Gray's decision did not become an unjustified disadvantage merely because it was in the company's interests but, arguably, not in Mr Jones' interests.

[108] If that assessment is wrong, and Mr Jones suffered a personal grievance, an issue arises about whether he would also be entitled to remedies. Downer challenged any award of remedies to Mr Jones because of what it said was his contribution to the circumstances giving rise to what occurred on April 2016 and subsequently. I agree. This case is one of those rare examples, referred to in *Xtreme Dining Ltd v Dewar*[17] where the appropriate course would be to hold that the grievant is entitled to a finding of the existence of a personal grievance but no other remedies. The email was triggered by Mr Jones' behaviour in confronting both Mr Gray and Mr McDougall. It is highly unlikely Mr Gray's email would have been sent had Mr Jones not acted as he did. Had Mr Jones established a personal grievance from what happened on 8 April 2016 no remedies would have been awarded.

Meeting of 24 June 2016

[109] The meeting of 24 June 2016 was said to give rise to the second disadvantage grievance because of Mr Gray's remark. This is a robust workplace where plain but effective language was common. Using this language, and the message it conveyed, cannot reasonably be said to have adversely affected Mr Jones' employment or its conditions. All that happened was that he was told, in blunt language, about one person's expectations over his behaviour. The remark was not endorsed by Mr Dawson and there was nothing to conclude it represented Downer's view. Even if Downer must accept responsibility for what Mr Gray said, it had no impact on Mr Jones' employment, or the conditions of it. In the end, this claim boils down to annoyance at being spoken to bluntly but nothing more.

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[17] *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10.

[110] Had a conclusion been reached that the remark did give rise to a disadvantage, it would not have been unjustified. By the time Mr Gray made it, the company had been dealing with Mr Jones' behaviour for some time. By being difficult he had got his own way and it was reasonable for the company to state its expectations while agreeing to what he wanted. Mr Jones was being told he had got his way, but his poor-quality behaviour had to stop. That was a fair comment in the circumstances.

Suspension

[111] That leaves for consideration the fact that compensation was awarded for Mr Jones' suspension. The conclusion has already been reached that, in the circumstances of this case, Downer was justified in suspending Mr Jones. It follows, therefore, that the award of compensation cannot stand. Even if a contrary conclusion had been reached remedies would not have been awarded.[18] By the time the suspension occurred, Mr Jones had embarked on a level of disruptive behaviour that caused Mr Dawson to be concerned and to act as he did.

Post-dismissal behaviour

[112] A claim was made that Mr Jones' behaviour after the dismissal was relevant to determining these proceedings. The events referred to do not require detailed discussion. An accusation was made that, sometime after his employment ended, he gestured to Mr Dawson by forming his hand into the shape of a gun. He was also accused of driving his car into the path of an oncoming Downer's car driven by Mr Green. Mr Jones denied those events saying he had done no more than make an innocuous gesture to Mr Dawson, which may have been misunderstood, and denied entirely driving his vehicle into the path of the much larger Downer's vehicle.

[113] The connection between these alleged events, and what took place between April and June 2016, was not satisfactorily explained. They are irrelevant.

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18 See *Xtreme Dining Ltd*, above n 17.

Outcome

[114] Mr Jones' challenge to the determination of the Authority is unsuccessful and is dismissed. Downer's challenge to the determination is successful. The Authority's determination is set aside and this judgment stands in its place.

[115] Costs are reserved. If they cannot be agreed memoranda may be filed.

K G Smith
Judge

Judgment signed at 12:45 pm on Thursday 12 July 2018