

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUHAHI**

**[2020] NZEmpC 73
EMPC 436/2018**

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
BETWEEN	WASTE MANAGEMENT NZ LIMITED Plaintiff
AND	BRIDGET JONES Defendant

Hearing: 8-11 October 2019 and 14 November 2019
(Heard at Christchurch)

Appearances: D Erickson and T Hossain, counsel for plaintiff
M McDonald, advocate for defendant

Judgment: 29 May 2020

JUDGMENT OF JUDGE K G SMITH

[1] Bridget Jones resigned her employment with Waste Management NZ Ltd because she was dissatisfied with an investigation that began as an inquiry over GPS data obtained from her company car. She claimed deficiencies in the investigation forced her to resign in circumstances that made the resignation an unjustifiable dismissal.

[2] The Employment Relations Authority agreed and awarded her compensation of \$20,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and

reimbursement of lost wages of \$11,192.54 gross.¹ Waste Management was subsequently ordered to pay her costs.²

[3] Waste Management challenged the determinations and sought a full rehearing of both of them. The company's case is that Ms Jones resigned and was not dismissed.

Ms Jones' employment

[4] Waste Management operates a waste and recycling business across New Zealand. Ms Jones was employed on 26 April 2010 as a territory manager responsible for sales of the company's services to small and medium sized commercial customers in a designated part of Christchurch.

[5] The parties completed a more or less conventional employment agreement, specifying her hours and days of work, agreed break times and that she was to be paid a salary plus commission. A company car was provided and the nominated place of work was the company's premises.

The investigation

[6] In February 2016 Waste Management installed GPS data collection units in all its light vehicles, including Ms Jones' company car. All staff knew about this development. The reasons for installing them were vehicle security, driver health and safety, and route efficiency. Each unit recorded data such as the location of the vehicle and when its ignition was started and switched off.

[7] In April 2016, two months after the GPS units were installed, Andrew Shipley, Ms Jones' manager, had his attention drawn to a GPS unit alert because the vehicle it was installed in was involved in a significant speeding incident. That incident prompted him to look at other GPS data for vehicles used by all his staff.

[8] As a result of this review, Mr Shipley was not satisfied with what the GPS data showed for Ms Jones' car during several business days in April 2016. On 22 April 2016, he delivered a letter to her requesting she attend a meeting with him about

¹ *Jones v Waste Management NZ Ltd* [2018] NZERA 170 (Member Doyle).

² *Jones v Waste Management NZ Ltd* [2018] NZERA 186 (Member Doyle) at [10] and [11].

“Attendance/Vehicle GPS inconsistencies” identified from her car’s GPS data. This letter informed Ms Jones that there was to be a preliminary investigation over concerns about what the GPS data showed for her attendance at work from 4 April 2016 to 21 April 2016. In summary, the issues identified in this letter were that the data showed:

- (a) On three occasions her car was started for the first time on a working day after 9 am, on seven times after 10 am and twice after 11 am.
- (b) Her car was switched off at her home address, on business days, once between 1 pm and 2 pm, ten times between 3 pm and 4 pm and twice after 4 pm.
- (c) Several residential addresses had been regularly visited during business hours for significant periods of time.
- (d) Regular trips had been made to two shopping malls or addresses in the Christchurch CBD. One trip was to Sumner at a time when Ms Jones was unable to attend a scheduled meeting with Mr Shipley because of sickness.

[9] Mr Shipley’s letter included advice to Ms Jones that he was unaware of any work arrangements consistent with the data and that there was no evidence of client visits. The letter informed Ms Jones that this investigation could lead to disciplinary action and for that reason the company recommended she seek legal advice and be represented at the proposed meeting.

[10] Ms Jones took advice from an employment advocate, Robert Thompson. After protracted correspondence between him and Mr Shipley, the meeting requested in April 2016 was held on 7 June 2016. As will become apparent later in this decision, that meeting was difficult.

[11] On 8 June 2016 Mr Thompson wrote to Daniel Garratt, Waste Management’s Human Resources Business Partner, complaining about the meeting of the previous day and the quality of the investigation. This email began by explaining that Ms Jones

had been on “medical leave” for a considerable time due to stress caused by the investigation process. Mr Shipley was criticised for being biased, hostile and not open minded. Three examples were given of claimed deficiencies in the meeting and the investigation. They were that Mr Shipley was:

- (a) a witness to Ms Jones’ claim that he had instructed her that working from home was acceptable;
- (b) aware that Ms Jones had created time off in lieu by working beyond her expected times and through meal breaks; and
- (c) had investigated matters previously, questioned Ms Jones regarding her commitment to continue with her job and that he held without prejudice discussions intending to end her employment.

[12] Mr Thompson expressed concern that Ms Jones would not receive a fair and reasonable hearing, because Mr Shipley was said to be bullying her out of her employment. This email ended with a statement that, if she did not receive assurances within 24 hours, she would be forced to resign and claim she had been dismissed. Waste Management replied but what was said did not satisfy Ms Jones.

[13] On 13 June 2016 Mr Shipley wrote to Ms Jones about the investigation. This letter stated what was known to him taken from a combination of the explanations provided by Mr Thompson and her answers to questions in their meeting. The explanations recorded in the letter were:

- (a) As to being at home during the business day:
 - (i) She was either working from home or taking time off in lieu but could not recall which.
 - (ii) If working from home, she sometimes connected to the internet and sometimes used her mobile phone or her home phone to make company calls. Working from home could involve research by reading the newspaper and magazines.

- (iii) If she was not working, she was taking time off in lieu. She believed she was entitled to this time off because her normal working hours had been exceeded and/or she had worked through her breaks.
 - (iv) On one occasion she had gone home at 2 pm to meet a tradesman.
- (b) Regarding unusual travel to Sumner, other residential addresses, the CBD and malls during business hours:
 - (i) She could not recall which clients were visited.
 - (ii) At areas like the CBD, and malls, she was prospecting for new business.
 - (iii) She had no diary notes, client information or confirmation of sales activities.
- (c) As to the occasion when she travelled to a residential address and then to Sumner, after calling in sick and being unable to attend a meeting with Mr Shipley, she may have gone to visit friends or family.

[14] Mr Shipley did not accept these explanations and his letter informed Ms Jones that the majority of his concerns remained. He commented that there were no company arrangements for “self-managed time off in lieu”. At the conclusion of this letter, she was advised that he had referred these concerns to his manager, the General Manager – Sales, Craig Wilson. The letter did not make any statement about whether Mr Shipley considered Ms Jones to have breached the employment agreement although that was implicit.

The resignation

[15] Before any further action was taken by Waste Management Ms Jones resigned. Her resignation was in a letter sent on her behalf by Mr Thompson on 22 June 2016.

She resigned because, she claimed, the company had not provided her with clear assurances after the June meeting with Mr Shipley.

[16] Before discussing why Ms Jones considered she was constructively dismissed it is appropriate to discuss what that means.

Constructive dismissal

[17] In *Auckland Shop Employees' Union v Woolworths (NZ) Ltd* the Court of Appeal accepted constructive dismissal arose in situations such as where:³

- (a) an employer had given an employee an option of resigning or being dismissed;
- (b) an employer had followed a course of conduct with a deliberate and dominant purpose of coercing the employee to resign; or
- (c) a breach of duty by the employer led an employee to resign.

[18] The third limb from *Woolworths* (breach of duty) was considered again by the Court of Appeal in *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Officers IOUW Inc.*⁴ In that case the employee was a meter reader who, while working, had been bitten several times by dogs. He resigned and claimed his action was caused by a breach of duty owed to him by his employer. The Court of Appeal accepted that the employee had been constructively dismissed but added foreseeability to the test in the following way:⁵

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

³ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA) at 374-375.

⁴ *Auckland Electrical Power Board v Auckland Provincial District Local Authorities Offices Industrial Union of Workers (Inc)* [1994] 2 NZLR 415, [1994] 1 ERNZ 168 (CA).

⁵ At 419.

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.

[19] The focus of a claim of constructive dismissal is on the employee's motivation for ending the employment. The test is an objective one.⁶

[20] Ms Jones' case was based on her claim that Waste Management had breached the second and third limbs in *Woolworths*. That is, the company had either followed a course of conduct with a deliberate and dominant purpose of coercing her to resign, or it had breached a duty to her that led her to resign where that resignation was reasonably foreseeable having regard to the seriousness of the breach.

[21] Ms Jones pleaded that the events leading to her resignation were a constructive dismissal involving actions by the company amounting to the "final straw", a concept referring to some act that, in combination with earlier acts, makes on-going employment untenable.⁷

The issues

[22] The issues in this proceeding are:

- (a) Did Waste Management engage in a course of conduct with the deliberate and dominant purpose of causing Ms Jones to resign?
- (b) Did Waste Management breach its duties to the extent that Ms Jones lost trust and confidence in it as her employer?
- (c) If the answers to (b) is yes, was Ms Jones' resignation foreseeable?

Engaged in a course of conduct?

[23] A sustained course of conduct by Waste Management, in breach of the company's duty of good faith, was attributed to Mr Shipley bullying Ms Jones out of

⁶ *Edmonds v Attorney-General* [1998] 1 ERNZ 1 at 13-14.

⁷ What amounts to a "final straw" was discussed in *Pivott v Southern Adult Literacy Inc* [2013] NZEmpC 236, [2013] ERNZ 377 at [61]-[63].

employment. No particulars of this allegation were provided in the statement of claim but Mr McDonald, Ms Jones' advocate, explained that what was relied on arose from the following events:

- (a) Despite repeated requests for Waste Management to clarify instructions about "work away from the office", it refused to state what that meant or how it should be actioned.
- (b) The company refused to detail its concerns to Ms Jones about the employment relationship and her performance.
- (c) It initiated a formal process against Ms Jones, treating her differently from other staff members who worked from home.
- (d) It repeatedly asked her if she wanted to keep her job.
- (e) It allowed Mr Shipley to investigate Ms Jones' work movements when he was the main witness "to the matter".
- (f) It allowed Mr Shipley to continue to investigate Ms Jones' work movements after being advised that she felt he was bullying her out of her position.
- (g) Mr Shipley failed to take any further steps to investigate the issues raised by Ms Jones at the company's investigation/disciplinary meeting.
- (h) Mr Shipley phoned Ms Jones when she was on sick leave caused by workplace stress and his attitude during that call.

[24] The conduct relied on overlapped with Ms Jones' pleading about the alleged breach of duty, discussed later in this decision.

[25] Each submission about the course of conduct is discussed below.

Clarify instructions about work away from the office

[26] As a territory manager the company expected Ms Jones to spend time away from its office securing business from existing and potential customers. As explained by Mr McDonald, this aspect of the alleged course of conduct by Waste Management was a lack of clarity about where she was able to be while working away from the office. That lack of clarity made it unfair, it was said, for Mr Shipley to investigate her conduct and to criticise her for being at home during the business day. It also followed that there was nothing wrong with working from home.

[27] There are really two aspects to this part of Ms Jones' case. The first is that the company had always known she occasionally spent part of the business day at home and had either expressly consented to her doing so or had, at least, acquiesced. Mr McDonald said that the company had tolerated this "individual work style" given Ms Jones' overall performance and, therefore, Mr Shipley's investigation was inappropriate. Mr McDonald was also critical of the implication that Ms Jones was not working.

[28] The second aspect is that, on the only occasion when Mr Shipley remonstrated with Ms Jones about working from home, instead of giving an instruction about that, he made vague and uncertain comments on the subject. Consequently, the subsequent investigation was a criticism of her for not satisfying the expectations he had failed to communicate.

[29] The starting point is the employment agreement. It gives the location of Ms Jones' work as the company's office and specifies conventional hours of work; Monday to Friday 8.30 am to 5 pm each day. Despite what the agreement said, for several years Ms Jones had, from time to time, spent the whole or parts of the working day at home. This pattern was said to have been known to both Mr Shipley and his predecessor, Andrew Boyd.

[30] Mr Shipley's April 2016 investigation was not the first time the company had raised concerns with Ms Jones about her attendance at work. The subject was raised with her in October 2010 and in May 2011 Mr Boyd wrote to her about it, referring to both whole and part day absences.

[31] Absenteeism was raised again just over a year later. In September 2012, Mr Boyd wrote to Ms Jones and proposed a meeting to discuss it. His letter prompted a response from Ms Jones' employment advocate, Mr Thompson, whose reply disputed that her absences were excessive. The company was challenged to establish that she had acted wilfully to affect or undermine the employment relationship.

[32] A meeting followed, on 15 October 2012. A week later Mr Boyd wrote to Ms Jones about its outcome. No disciplinary action was taken but the letter recorded, without subsequent criticism or comment, the company's ongoing concern about these unplanned absences.

[33] While Mr Boyd did not undertake any further formal inquiry, he continued to have concerns about how Ms Jones was spending time away from the office during the working day. There were days when he assumed she was visiting customers only to hear, subsequently, that she had been attending to personal business. As a result, he had several conversations with her emphasising the importance of ensuring she used her work day efficiently. Mr Boyd remained concerned about Ms Jones going home early and, for that reason, insisted she return to the office to complete paperwork at the end of the day. This requirement worked for a while until, for reasons that were not entirely clear, it slipped away.

[34] Mr Boyd said that the degree of autonomy allowed to territory managers did not extend to picking and choosing the days and hours they worked and there was no agreement or understanding that Ms Jones was able to work from home.

[35] In contrast, Ms Jones said she understood Mr Boyd's requirement, to return to the office, meant she could work from home during the day provided she cleared that action in advance. Mr McDonald sought to support that contention by pointing out that there were no concerns about absenteeism between October 2012 and Mr Boyd's departure in 2015.

[36] I prefer Mr Boyd's recollection. Ms Jones' interpretation of her dealings with Mr Boyd were inconsistent with his correspondence and ongoing concern about absenteeism. His requirement that she return to the office could not be interpreted as

permission to either spend parts of the working day at home or to shorten the working day.

[37] That was where matters stood for about three years until Mr Boyd was succeeded by Mr Shipley in late 2015. Ms Jones insisted that she had been given permission by Mr Shipley to work from home. She was referring to an email he wrote to her on 15 September 2015:

Please also try and start to change the mode in which you work. Suggesting customer visits straight from home in the morning, come into office around 12pm for an hours (sic) or so then back out for afternoon visits. Working on this now will make it easier when we move.

[38] It is apparent from this email that there must have been concerns about work attendance to prompt it. That aside, the email plainly does not authorise being at home as Ms Jones claimed. It required attendance at the office during the day but granted permission for the working day to begin from home, avoiding an unnecessary trek across the city to the company's office. The reference to "customer visits straight from home in the morning" could not be interpreted as authorising remaining at home, returning there during the business day, or allowing a truncated working day.

[39] That leaves for consideration a conversation between Ms Jones and Mr Shipley on the footpath outside her home on 8 October 2015 and its aftermath. This discussion assumed considerable importance to Ms Jones' argument that there was a lack of clarity in what the company required of her. It took place outside Ms Jones' home because Mr Shipley presented himself there unannounced during the afternoon, well before the end of the business day.

[40] Mr Shipley said he went to Ms Jones' home because he had been attempting unsuccessfully to contact her by phone. Driving to her home was explained as something he did on the off-chance she might be there. It was convenient, he said, for him to drive by because he had just returned from a business trip and had called into his own home, that was reasonably close to where Ms Jones lived, on his way back to the office.

[41] The reason for Mr Shipley having visited Ms Jones' home, and the explanation he gave in the Authority for doing so, were strongly contested in this hearing but that dispute does not need to be resolved. What is not disputed is that, having been unable to raise Ms Jones by phone, he sent her a text message while outside her home explaining where he was and that led to a conversation on the footpath.

[42] Mr McDonald submitted that Mr Shipley did not accept Ms Jones should have been at home or that she was working, but he did not communicate those concerns to her clearly, either then or in a subsequent meeting on 12 October. His concerns were said to have been raised in a deliberately obtuse fashion and was part of a pattern repeated throughout the time they worked together.

[43] The follow-up meeting, on 12 October 2015, was secretly recorded by Ms Jones. That recording was played to the Court and a transcript of it was provided. During this meeting, Ms Jones raised the subject of her working from home and criticised Mr Shipley for a lack of clarity about what she was allowed to do. Her remarks invited Mr Shipley to accept that the situation was unclear.

[44] It was obvious from the tone of Mr Shipley's response that he was displeased at having found her at home in the middle of the afternoon on a business day. He criticised the fact that she must have left the office and driven across town to her home. He asked her to reflect on her actions and referred her to his September email. Towards the end of the conversation, he informed her that he was not going to start any sort of disciplinary process.

[45] Mr McDonald's submission concentrated on only one aspect of these conversations, the absence of a formal instruction not to work at home. However, the submission took only a narrow view of the conversations and did not consider their context. Ms Jones already knew about the problems she had encountered with Mr Boyd and had received Mr Shipley's email. Against that background, while Mr Shipley did not give Ms Jones an instruction during their conversations he did not need to. She knew what was required of her because of what had happened before. Far from lacking clarity, Mr Shipley was delivering a rebuke by inviting Ms Jones to

reflect on her actions and in his final statement that he was not beginning a disciplinary process.

[46] There is one further subject that needs to be addressed to deal with this topic, because the company did approve of territory managers spending time in cafes, or other convenient locations, between appointments. It did so in an effort to be more efficient by avoiding them having to drive back to its office between appointments.

[47] Mr McDonald argued there was a lack of clarity in the company's expectations because there was no difference between stopping at a café between meetings and Ms Jones stopping at home between them. There are two responses to this submission. The first one is that Mr Boyd said that there were very few Waste Management customers whose business premises were close to Ms Jones' home. The bulk of her customers were in suburbs that made returning to her home an unreasonable detour. The second response is that what was being investigated was not a brief stop between meetings. There is a qualitative distinction between a convenient break and unauthorised absences from work.

[48] It is instructive that, during the June 2016 meeting, Ms Jones was not able to describe the work she said was being done from home other than in extremely general terms. That was despite being on notice about the purpose of the meeting and having had ample time to prepare for it.

[49] Part of Ms Jones' explanation for being at home was that she considered herself entitled to time off in lieu. It is not obvious from Mr McDonald's submission that there was any lack of clarity over Waste Management's position on time off in lieu. The employment agreement is explicit and did not contain any reference to time off in lieu. Mr Boyd had not approved that sort of leave previously and, as far as he was concerned, no such arrangements existed. In fact, Ms Jones never said he had approved time off in lieu and there was no suggestion that Mr Shipley had approved it either.

[50] The company's expectations were known to Ms Jones from the beginning of her employment and nothing said or done by the company lacked clarity or led to any confusion or uncertainty.

The company refusing to detail its concerns?

[51] The second aspect of the alleged course of conduct was a claim that the company had refused to detail its concerns to Ms Jones about the employment relationship and her performance.

[52] Mr McDonald did not describe the concerns the company was said to have had but refused to state. The only issue raised for investigation was derived from the GPS data. It was not about any other aspect of her performance and the company accepted she met the targets it set for her. The purpose of the investigation was stated clearly, and concisely, and there could have been no doubt about what had to be addressed.

[53] It is possible that this submission is a continuation of the argument that any concerns Mr Shipley intended to raise in October 2015 were unsuccessfully or inadequately communicated. If that is the argument, I do not accept it. As has already been described, the conversations did not take place in a vacuum.

[54] This submission does not support a conclusion that there was a course of conduct on the part of Waste Management with a deliberate and dominant purpose of compelling Ms Jones to resign.

A formal process treating Ms Jones differently?

[55] The conduct attributed to Waste Management was that it initiated a formal process treating Ms Jones differently from other staff members. Mr McDonald said that the process could not be seen as purely investigative, because of the tone and content of Mr Shipley's letter. I agree that the process was formal; clearly that was intended from the beginning and explains why Ms Jones was told about possible consequences if the outcome of the inquiry was adverse to her. By itself that formality did not cause Ms Jones any difficulties. She immediately instructed Mr Thompson,

with whom she had dealt before, and he took steps on her behalf. There was nothing unfair in the formality of the process.

[56] The second part of this submission requires further elaboration. The claim was that other territory managers were working as she did but without criticism. That was not the case. One person, who was a key account manager not a territory manager, had an arrangement with Waste Management to work from home. This role was substantially different from territory managers' jobs because it involved tenders for national accounts. Aside from the nature of the job, part of the reason for the company approving the key account manager working from home was that the employee had a hearing impairment that made working in the office difficult.

[57] The other circumstance relied on has already been touched on, namely that the company knew and approved of territory managers spending time in convenient locations between appointments. One of those territory managers was Mathew Darnbrough, who was a member of Waste Management's sales staff until 2014. Once or twice a month he would spend time in a library to complete paperwork. Waste Management knew he did that and accepted he could.

[58] Mr Darnbrough's occasional work in a library, and the key account manager having permission to work from home, are not comparable to the concerns raised with Ms Jones. The investigation was about far more than an occasional or brief stop between meetings.

[59] Furthermore, the other Waste Management employees relied on to support the contention that Ms Jones was treated differently did not claim to have taken self-managed time off in lieu.

[60] Finally, this argument is not consistent with Ms Jones' explanations. In anticipation of the meeting requested by Mr Shipley, Mr Thompson wrote to him explaining what was shown in the GPS data. The explanations did not include a statement that Ms Jones was doing what other managers did or that she was completing work-related tasks between appointments.

[61] This submission does not support a conclusion that there was a course of conduct leading to Ms Jones' employment ending.

Repeatedly asked her if she wanted to keep her job

[62] It is unclear what this submission relies on to support Ms Jones' case. It may be intended to refer to the conversations on 8 and 12 October 2015. Ms Jones claimed that on 8 October 2015 she was told by Mr Shipley that she was letting the team down, possibly indicating her job was in jeopardy.

[63] Mr Shipley denied making that statement on 8 October 2015 or subsequently. He accepted he asked her if she wanted to be part of the team, but explained that was because, previously, she told him about being bored and looking for new challenges. Ms Jones agreed she said both of those things to him but not during their October conversations.

[64] Mr Shipley's comments, in light of Ms Jones' remarks, were understandable and cannot be construed as conduct with a deliberate and dominant purpose of ending her employment. As well as being understandable his remarks were not repeated.

Mr Shipley was allowed to investigate when he was the main witness

[65] A constant criticism by Ms Jones was that Mr Shipley was a witness and should not, therefore, have been investigating. That raises a question about what he was supposed to have witnessed that made his role as investigator inappropriate.

[66] The only way Mr Shipley might be regarded as a witness is if some material part of the investigation relied on what he had said or done and was contestable. The only possible dispute was Ms Jones' contention that her actions were authorised by him.

[67] That authorisation was attributed to the self-explanatory email of 15 September 2015. While it might, at a stretch, be possible to treat Mr Shipley as a witness because he wrote the email, that was not enough to disqualify him from conducting the investigation. The email did not require elaboration, or further investigation, and it

did not materialise from some disputed conversation where contested recollections would make it preferable for someone else to have investigated.

[68] By the time of the June meeting, and before the resignation letter was sent, Ms Jones knew that:

- (a) her employment agreement specified her days and hours of work and did not authorise working from home or time off in lieu;
- (b) there were no company policies or procedures that authorised working from home or time off in lieu;
- (c) she had been involved in earlier investigations about her unauthorised absenteeism;
- (d) she had previously received instructions from Mr Boyd about returning to the office at the end of the day;
- (e) she had Mr Shipley's 15 September 2015 email authorising her to begin her working day from home;
- (f) she had the GPS data and Mr Shipley's summary of it; and
- (g) she had offered explanations in response to the investigation.

[69] This information did not require an evaluation of Mr Shipley's conduct or anything he said.

[70] There was nothing improper in Mr Shipley conducting the investigation.

Waste Management allowed Mr Shipley to continue to investigate

[71] This claim overlaps with the previous one but may be intended to refer to the situation that developed after the meeting on 7 June 2016, when a complaint was made to Waste Management that Mr Shipley was bullying Ms Jones. The bullying allegation

was made in an email Mr Thompson sent on 8 June 2016. The claim was that Mr Shipley was hostile during the investigation and the meeting was unfair.⁸

[72] After Mr Garratt received Mr Thompson's email the investigation was transferred to Mr Wilson. Mr Shipley informed Ms Jones about that decision in his letter of 13 June 2016. The letter was ambiguous because, after listing the explanations given to him, it concluded that many of his concerns remained. Despite that ambiguity Ms Jones, and Mr Thompson, who is an experienced employment advocate, knew that the investigation was not finished. That was apparent from the resignation letter that contemplated she would successfully demonstrate that the allegations were baseless before expressing concern that, in any event, the relationship with her manager was irrevocably damaged. Those comments showed that Ms Jones knew there would be a further opportunity to respond to the investigation before any decision was made. She did not attempt to take up that opportunity before resigning, even though Mr Wilson had not taken any steps to complete the investigation or to begin any disciplinary process.

[73] Mr McDonald's submissions claimed that Mr Shipley attempted to hold without prejudice discussions with Ms Jones and that disqualified him from investigating. Mr Shipley denied doing that. In that situation Ms Jones has failed to show that there were such discussions but, even if they had taken place, it is not clear from the allegation why they would have compromised his ability to participate in the investigation.

Failed to take any further steps to investigate the issues raised by Ms Jones

[74] Mr McDonald submitted that Waste Management failed to take any further steps to investigate the issues raised by Ms Jones at the meeting on 7 June 2016. The claim was that Ms Jones' responses required Waste Management to undertake further work before any decision could be made based on the GPS data and her explanations.

[75] By the time of the meeting, Mr Shipley had provided the GPS data and his summary of it. He had received explanations that were complete in themselves and

⁸ The email is described at paragraphs [11] and [12] above.

nothing further needed to be investigated before they were evaluated. It is difficult to see what further investigation was required.

[76] This submission may encompass the adequacy of Mr Garratt's response to the complaint about Mr Shipley's conduct at the June meeting. Mr Garratt undertook a brief investigation but recognised that the complaint was confined to the meeting and that the alleged behaviour had not been repeated. The claim of bullying was rejected, but that is not surprising given that it was confined to one episode during which Ms Jones was represented. In the circumstances that inquiry was sufficient.

[77] This submission suffers from a more fundamental problem. When Ms Jones resigned she knew the investigation was not complete and must have appreciated that her decision would pre-empt any further investigation.

[78] This ground of Ms Jones' complaint for constructive dismissal based on the company engaging in the course of conduct is not made out.

Phoning on sick leave

[79] The last matter said to support the claim that Waste Management engaged in a course of conduct to end Ms Jones' employment was about a phone call Mr Shipley made to her on 2 May 2016 and his alleged attitude during it. A subsidiary point was a challenge to the appropriateness of Mr Shipley phoning her when he knew she was represented by Mr Thompson.

[80] Ms Jones had been absent on sick leave for several weeks. The phone call was made to her because the medical certificate authorising her absence from work had expired. She was expected at work that morning but had not arrived or communicated to explain her absence. In those circumstances Mr Shipley was entitled to call to find out why she was not at work. There was no reason for him to speak to her representative about such an innocuous inquiry.

[81] The second part of this complaint was an allegation about Mr Shipley's attitude during the phone call. He was said to have broached the possibility of ending Ms Jones' employment for medical incapacity.

[82] Initially, Mr Shipley had unsuccessfully attempted to phone Ms Jones. She returned his call but secretly recorded it. During the discussion Ms Jones explained that she had been suffering from stress. Mr Shipley said that was something he had not previously known about and that Waste Management would need to understand what that would mean if she had ongoing problems and could not fulfil her role. That comment was unsurprising, because Ms Jones had been on sick leave for some time and was indicating her leave could be ongoing. In response, she returned to her previous theme, saying that the stress she was talking about involved being lied to by him and his pretence that they got on well while all the time attempting to get rid of her. Mr Shipley did not respond to those comments and the conversation went no further before he said he would wait for her doctor's certificate.

[83] When Mr Shipley was goaded he touched on the subject of incapacity, only briefly, in the context of a discussion with an employee who had been absent for some time and while asking for a medical certificate. The conversation falls well short of displaying any intention to end Ms Jones' employment for medical incapacity.

Conclusion on course of conduct

[84] The grounds relied on, attempting to demonstrate that Waste Management had adopted a course of conduct with a deliberate and dominant purpose of coercing Ms Jones to resign, cannot succeed. None of the factors relied on, either by itself or in combination with other factors, amount to a course of conduct to force Ms Jones to leave her employment.

Breach of duty?

[85] Ms Jones pleaded that Waste Management breached its duties to the extent that she lost her trust and confidence in the company which left her no option but to resign, which was foreseeable.

[86] This pleading was supported by nine particulars describing these alleged breaches. As already explained, some of the pleadings overlap with the claimed course of conduct by Waste Management. In dealing with the alleged breaches it is not necessary to repeat those that overlap with the alleged cause of conduct attributed to

Waste Management because they would fail for the same reasons. The balance of this judgment deals with the remaining pleadings alleging a breach of duty in that:

- (a) Mr Shipley would be prepared to lie if it were a situation where “he said/she said”.
- (b) The company purposely altered Ms Jones’ performance evaluation plan, changing the ratings she received to wrongly show poor performance.
- (c) There was a breach of good faith by failing to provide all relevant information.
- (d) There was a breach of good faith to complete a fair and full investigation.
- (e) When Ms Jones’ representative put the company on notice that she would be forced to resign if “assurances were not received”, there was no satisfactory response, which was in breach of its obligation to be responsive and communicative.

[87] Each of those pleadings is discussed in turn.

Prepared to lie?

[88] This pleading relies on the secretly recorded conversation between Mr Shipley and Ms Jones at the meeting on 12 October 2015. During the conversation Ms Jones accused Mr Shipley of lying about what was said on the footpath outside her home several days before. The pleading seeks to attribute this alleged preparedness to lie by Mr Shipley to Waste Management.

[89] During the meeting Mr Shipley declined to engage in a conversation where they disagreed about what was said previously and that would degenerate into a “he said/she said scenario”. Ms Jones’ response to Mr Shipley’s attempts to deflect the discussion was to accuse him of lying about their previous conversation. His reply

was that he could say she was lying. The choice of words was poor but not a confession that any previous statement was knowingly untrue or a statement of preparedness to lie in future.

[90] Ms Jones knew she was recording the conversation and was clearly attempting to get Mr Shipley to make a compromising statement. That never happened. All he did was disagree about what was said previously.

[91] Ms Jones has failed to show that Mr Shipley had previously said he was prepared to lie.

Changed performance ratings

[92] Waste Management evaluates staff performance annually and the outcome may affect the employee's income. A tool used in this evaluation is a performance evaluation plan. The staff member undertakes a self-appraisal by recording scores in that plan against stated criteria. His or her manager completes an evaluation of the employee against the same criteria. The completed form is sent electronically to the company's human resources department where the scores might be moderated.

[93] Mr Shipley and Ms Jones completed her performance evaluation plan at a meeting in February 2016. During the meeting the plan was displayed on Mr Shipley's computer monitor. On completion, Mr Shipley sent it to the company's human resources department. Ms Jones did not keep a copy of the final version of this plan and did not receive one until it was supplied to her, at her request, on 8 June 2016.

[94] Ms Jones pleaded that Mr Shipley altered her performance evaluation plan by changing the scores in it from those she completed. The alleged changes, she said, meant she wrongly received a poor rating.

[95] In opening Ms Jones' case, Mr McDonald conceded that there was no evidence to support the pleading that the performance evaluation plan was falsified. In his closing submissions, this concession changed and was replaced by a claim that the performance evaluation plan was deceitfully altered by Mr Shipley. No explanation was given for the significant shift between the opening and closing submissions to

justify both a change in position and such a strongly worded criticism attributing dishonesty to Mr Shipley.

[96] This claim relies on Ms Jones' recollection of the scores entered in the plan at the February meeting, concerns that the one supplied in June contained information that was wrong, and her general sense that her achievements were better than those shown in that plan. Mr Shipley denied altering the plan in any way.

[97] Ms Jones bore the burden of proving this claim but has failed to establish that the plan was altered deceitfully or otherwise. There was no adequate basis to plead that it had been altered, let alone deceitfully, and the submission attributing dishonest conduct to Mr Shipley should not have been made.

Breach of good faith for failing to provide all relevant information?

[98] This pleading was expressed as a breach of good faith for failing to provide relevant information to Ms Jones before requiring her to respond to the investigation. Ms Jones' claim was that her requests were reasonable and should have been responded to fully but were not.

[99] Waste Management's response to requests for information made on Ms Jones' behalf was said to be deficient in two ways. The first was in failing to adequately and completely answer several requests for information. The second was attributing an attitude to Mr Shipley that his limited efforts to try to find information held by the company was sufficient compliance with the requests. There was a related claim that Mr Shipley attended the 7 June meeting with documents which he refused to disclose.

[100] I do not accept Mr McDonald's submission that Waste Management failed to provide relevant information. With one possible exception, to be discussed shortly, all of the requests for information were adequately and promptly answered by Waste Management by emails on 26 April 2016, 2 May 2016, 8 and 9 June 2016.

[101] On 25 April 2016 Mr Thompson emailed the first request for information, making it clear that the meeting Mr Shipley had requested would not take place without the material sought being supplied. The request was for:

- (a) a copy of Ms Jones' individual employment agreement;
- (b) her time and wage records;
- (c) any company policies and procedure manuals; and
- (d) copies of any emails or communication held by the company in relation to working from home.

[102] This email did not specify any parameters for the time and wage records, or what policies and procedures were to be provided.

[103] Mr Shipley replied by sending back a version of the email annotated with answers. A copy of Ms Jones' employment agreement was sent and Mr Thompson was informed that she had electronic access to her time and wage records and the company's policies and procedure manuals. Mr Thompson was informed that a printed policy manual was available for staff at the company's premises, so photocopies could be taken from it. As to the request for copies of information or communication about working from home, the answer was that there were no arrangements.

[104] On 28 April 2016 Mr Shipley proposed a meeting on Monday 2 May at 10 am, coinciding with Ms Jones' then anticipated return to work that day from sick leave. This request included a comment that it was important to meet "with some urgency" to ensure the preservation of goodwill.

[105] Mr Thompson's response was discordant with the invitation, characterising Mr Shipley's proposal for a meeting as a demand for one. The company's response to the information request was criticised as very confusing. Mr Thompson implied that the company had to provide what was asked for and that being able to access it was insufficient. The initial requests were repeated with some piquancy; without the company's policies, and time and wage records, Ms Jones' "right to a defence" was described as hampered.

[106] By return email Mr Shipley denied that the company's answer had been deficient. He asked that, when appropriate, Mr Thompson and Ms Jones confirm a suitable time to meet.

[107] The email exchange continued when Mr Thompson responded on 2 May 2016. For the first time he said that Ms Jones did not have full access to the information requested and described the situation as a "Mexican standoff", caused by the company's refusal to provide information. His email went on to say that, as the employer, Waste Management was required to provide the information to enable Ms Jones to fully and fairly respond to the allegations that had been made. Mr Shipley was referred to s 4 of the Act, and the Privacy Act 1993, and informed that a failure to satisfy the request would lead to legal action being taken.

[108] Mr Thompson's 2 May email included expanded requests for information. As to the time and wage records, the company was told it must supply them under s 130(2) of the Act. It was clear that the entire time and wage record was being sought stretching back to the beginning of Ms Jones' employment. A request was made for copies of any file notes, documents or "any other written material of whatever nature" held by the company in respect of the events leading up to the investigation. The request for a copy of Ms Jones' employment agreement was repeated even though one had already been supplied. The company was asked for any other personal information about Ms Jones, written or otherwise, held by Mr Shipley. As to Waste Management's policies and procedures, the request was refined to any information about working from home and taking breaks.

[109] Mr Thompson's email said that a failure to comply with these requests was placing Ms Jones under additional stress and that she was unable to properly prepare for the meeting. The failure was criticised as a deliberate act intended to cause "maximum harm". The invitation from Mr Shipley, for confirmation of a time to meet, was rejected as "simply out of order". The email concluded by recommending to Mr Shipley that he familiarise himself with the Holidays Act 2003.

[110] Mr Shipley responded a few hours later. He stated Waste Management was aware of its obligations and repeated what had been communicated earlier; online

access was available to Ms Jones using the company iPad supplied to her, so she had access to time and wage records and to all policies and procedures. Importantly, he advised that, if Ms Jones had problems in gaining access, the company would have its IT staff fix that for her and if there was something specific she could not access he should be informed.

[111] In this response Mr Shipley pointed out that a copy of the employment agreement had already been supplied. As to other company records, he attached to this email a copy of Waste Management's memorandum to all staff about installing GPS units in the company's vehicles. He confirmed having checked his emails to answer the request for personal information and reported that he had not come up with anything. Attempting to obtain a meeting, he advised Mr Thompson of his availability on 16 May 2016, which date coincided with the expected end of Ms Jones' absence from work on sick leave.

[112] The last link in the email chain was Mr Thompson's response, on 11 May 2016. Ignoring Mr Shipley's response, about electronic access to information, Mr Thompson criticised Waste Management by describing its position as highly unusual. He described the company's failure to supply the requested information as giving rise to an assumption that it was intentionally trying to cause delays or problems. He acknowledged knowing about the conversations in October 2015 and commented that any instructions from Mr Shipley were vague and unclear. Mr Thompson then addressed the references to the company's policies and procedures noting that, as there were none about working from home, Ms Jones had been "...working on [an] assumption".

[113] This 11 May email listed five bullet point explanations in response to the investigation. They were that Ms Jones:

- (a) had been working in excess of her contracted hours;
- (b) regularly worked through her breaks;
- (c) understood that there was flexibility to use this saved up time in lieu;

- (d) was meeting her performance targets and had complied with instructions from Waste Management; and
- (e) the fact that she was too unwell to attend work did not prohibit her from visiting family and friends.

[114] The company was criticised as lacking information:

In the event that you have evidence to suggest that she was on personal time, this should be supported with relevant information. Finally, the proposed meeting is not disciplinary, our clients (sic) employment is not at risk and attending such [a] meeting is not compulsory. If in the event that you find that a disciplinary meeting is warranted this will be opposed.

[115] The invitation to meet was declined because Ms Jones saw no value in attending as: "...you have no evidence that our client has acted inappropriately". The email ended with a comment that Ms Jones felt Mr Shipley was intending to make her role untenable and attempting to force her out of her employment.

[116] Mr Erickson, counsel for Waste Management, submitted that the duty to supply information in s 4(1A)(c) of the Act was not triggered by these requests, because when the information was asked for the company was not proposing to make a decision that was, or was likely to, have an adverse effect on Ms Jones' continuation of employment. The basis for that submission was that Mr Shipley was investigating not conducting a disciplinary process. I do not accept that submission. It was apparent from the letter that disciplinary action could follow the investigation and, if it did, might conclude in dismissal. In that situation the letter triggered s 4(1A)(c).

[117] However, I do accept Mr Erickson's submission that the section can be satisfied if the employer provides access to information. In *Vice Chancellor of Massey University v Wrigley* the Employment Court held that access, within the meaning of s 4(1A)(c), may in appropriate cases, be given in ways other than providing full copies of the source document.⁹ In *Wrigley*, the Court held that the appropriate means of providing access to relevant information will depend on the nature of the information, the volume of it and the circumstances of both the employer and employee. What will

⁹ *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37, [2011] ERNZ 138 at [59].

be consistent with the Act is a means of access enabling the employee to fully comprehend the information and retain it for sufficient time to formulate any comment about it.¹⁰ I agree with that conclusion.

[118] The breadth of Mr Thompson's requests was so broad that the company could not reasonably have been expected to provide hard copies. Waste Management discharged the obligation imposed on it by s 4(1A)(c), and in so doing met the duty of good faith to be responsive and communicative, by supplying information to Ms Jones and provided access to the information it had not supplied. That was achieved in a combination of Mr Shipley's letter supplying the GPS data, documents sent to Mr Thompson and the access Ms Jones had to all other information through the iPad.

[119] This conclusion is not affected by Mr Thompson's email of 2 May 2016, where he commented about Ms Jones not having full access to the information requested. Ms Jones could not remember whether she had any technical difficulty obtaining access through the iPad. Likewise, Mr Thompson was unable to recollect why the demands for information were repeated. He attempted to explain that, because he kept asking, Ms Jones must have had difficulty accessing the information using her iPad. I am not prepared to give Mr Thompson's evidence on this subject any weight. It was a reconstruction of what happened, derived from reading his emails and surmising why they were written, not from his recollection or by reference to the file he had for this work.

[120] Even if difficulties were encountered, Mr Shipley offered to have Waste Management's IT staff fix them. That offer passed without further comment from Mr Thompson or Ms Jones. I am satisfied the company had done enough to enable access to the information requested.

[121] The only possible exception to the adequacy of Waste Management's response to the information requests was about the extent of Mr Shipley's inquiry, when he was asked for copies of any emails or communication held by the company about working from home. This request was eventually expanded to include copies of any file notes,

¹⁰ At [61].

documents or other written material, described by Mr Thompson as “...in respect of the events leading up to the investigation”.

[122] In the first place, Mr Shipley’s answer was that there were no arrangements for working from home. That was clearly correct. Subsequently, he referred to having checked his emails with the request in mind. A copy of the company’s information about installing the GPS data was supplied as part of Mr Shipley’s reply. What was not supplied was a copy of Mr Boyd’s letter about absenteeism or Mr Shipley’s 15 September 2015 email. Even if both of these documents fell within the ambit of the request that would not be enough to qualify as a failure on the part of the company amounting to a breach of duty sufficient to make Ms Jones’ resignation foreseeable. Ms Jones already had them.

[123] There is a more fundamental issue about this request for information. Section 4(1A)(c)(i) refers to access to relevant information. Determining what is relevant may not always be easy but, in this case, some of the requests were for information that was obviously not relevant.

[124] The parameters of the investigation were clearly defined by Mr Shipley’s letter. Against that background time and wage records for the whole of Ms Jones’ employment were not relevant. The time period of the investigation covered one month and, in any event, she was paid a salary that was in full recompense for her work. It should have been obvious that this record would not provide any assistance in understanding or responding to the investigation. As it happens, the whole time and wage record was sent to Mr Thompson on 8 June 2016 but it was not subsequently referred to by Ms Jones. Similarly, the initial request for policies and procedures was not confined to those that could relate to working from home, or time off in lieu, but sought all of them.

[125] Even if it might be said that prudence dictated the need to check all potential avenues of inquiry, it should have been obvious from the beginning that what was being sought went too far. That is exemplified by the fact that the explanations offered by Ms Jones were not based on any issue, or potential issue, over those time and wage records or company policies.

[126] The balance of the requests, once amplified, attempted to place an onus on Waste Management to exhaustively review all of its databases in case there might have been an email, or some other correspondence, that Ms Jones could have relied on in order to establish her entitlement to be at home during the identified days in April 2016. In making these requests Ms Jones knew she had assumed she could be at home and that her explanations would not rely on material the company was asked to search for.

[127] Even if this analysis is wrong, and Waste Management should have provided more information, or searched more diligently than it did, I would not be prepared to hold that any such failings gave rise to a serious breach resulting in a constructive dismissal. Ms Jones' responses to the inquiry were not hampered by any problems encountered over her requests for information.

Breach of good faith for failing to complete a full and fair investigation?

[128] It is not clear what this pleading refers to. It may be intended to capture complaints made about the meeting on 7 June 2016 or, alternatively, the company's alleged failure to take steps about that meeting when Mr Thompson complained the following day.

[129] If the complaint is about the way Mr Shipley conducted the investigation meeting, it is not made out. Ms Jones was supported at the meeting by her step-father, Paul Rabbitt. She, Mr Thompson and Mr Rabbitt described Mr Shipley's behaviour as domineering, and rude, and that he failed to provide Ms Jones with copies of documents he was said to have with him at that meeting. This behaviour was said to be so concerning that Mr Thompson felt the need to begin to record the meeting. Regrettably that recording was lost.

[130] Conversely, Mr Shipley described the meeting as stressful and said his attempts to discuss what was shown by the GPS data with Ms Jones were hampered by Mr Thompson.

[131] I prefer Mr Shipley's description of the meeting for the following reasons. First, Mr Thompson accepted that he was attempting to assert himself at the meeting

as Ms Jones' representative. That is consistent with how Mr Shipley described what he said and did, including attempting to have questions directed to him rather than to Ms Jones. It is also consistent with the tone of Mr Thompson's emails.

[132] Second, Ms Jones' recollection of the meeting is not reliable. She said she had taken anxiety medication before the meeting and was not fully aware of what was happening. That statement was not supported by evidence about the medication and whether it may have impaired her. No one else at the meeting said her behaviour was impaired. By this stage, as well, Ms Jones had formed an adverse opinion of Mr Shipley, and his reliability, and was unlikely to view his actions favourably.

[133] Third, Mr Rabbitt's recollection of the meeting was materially at odds with what was said by everyone else. He considered it lasted two to three hours with a break. Everyone else agreed it was short, lasting about 20 to 30 minutes. Mr Rabbitt's recollection was so different from what the others said that no weight can be placed on it.

[134] Complaints about how the meeting was conducted are, however, a red herring and I do not accept that there was a failure to complete a full and fair investigation because of what happened at it. While the meeting was difficult it served its purpose; providing an opportunity for Ms Jones to talk to Mr Shipley to provide further information about the investigation. Part of her explanation had already been provided by Mr Thompson, and this meeting was an opportunity for both parties to impart further information to progress the inquiry. That is what happened.

[135] Despite the difficulties that were encountered, there was one area where there was no disagreement. Mr Shipley made notes during the meeting and, at its end, was asked by Mr Thompson for a copy of them. Mr Shipley took the time to handwrite a copy of his notes for him. At no time subsequently was there a complaint about the accuracy or completeness of those notes. Nor was there a complaint that Ms Jones was deprived of an opportunity to offer a further explanation because of difficulties encountered during the meeting. By the conclusion of the meeting she had offered Waste Management the explanations she wanted to rely on. It follows there is no basis

for the pleading that the investigation was incomplete and, for the same reasons, the meeting was fair to Ms Jones.

[136] It is possible that this pleading refers to the way Mr Garratt dealt with the subsequent complaint, made on 8 June 2016, about alleged bullying at the meeting the previous day. If that is the case it was not pleaded but will be addressed for completeness.

[137] Mr Garratt did investigate although it was not as full and complete as Ms Jones may have wanted. It relied on the allegations made by Mr Thompson and an interview, or at least a review, with Mr Shipley. That, however, was not a deficiency in the process because matters had been referred to Mr Wilson. By the time Ms Jones resigned Mr Wilson had taken no steps to progress the investigation.

[138] I am satisfied that the process and the investigation were full and fair, although not completed by the time of the resignation.

Waste Management did not respond adequately about assurances making her resignation foreseeable

[139] This pleading is a reference to Mr Thompson's email to Mr Garratt on 8 June 2016 ending with this ultimatum:

If we do not receive some clear assurances within 24 hours our client will be forced to resign and claim a forced resignation.

[140] Mr Thompson's email began by explaining that Ms Jones had been on leave for a considerable time because of stress caused by the investigation. He recounted Ms Jones' version of the meeting the previous day and criticised Mr Shipley's conduct.¹¹

[141] The company's failings were said to be a serious breach of good faith and likely to lead to a resignation unless Ms Jones received assurances. Those assurances were not described and cannot be ascertained by inference from the balance of the email. While the email detailed her complaints it did not indicate what she considered should

¹¹ See paragraph [11] above.

be done to satisfy them beyond providing assurances. Mr Garratt's response asked what assurances were sought. There was no answer before Ms Jones resigned about a fortnight later.

[142] When questioned Ms Jones could not explain the assurances being sought on her behalf and, instead, deferred to Mr Thompson to describe them. He could not explain what assurances he had been instructed to seek and was confined to reading his email and attempting to reconstruct his instructions from it. By that method he thought the assurances were about being treated in good faith, something his email did not mention.

[143] The pleading was that the company did not respond, but it did because Mr Garratt asked what assurances were being sought and got no reply. Making a demand for unspecified assurances, that are not explained when asked for, cannot be translated into a breach of duty by Waste Management. Waste Management cannot be criticised for the way in which it responded to the claims for assurances.

[144] There was no breach of duty on the part of the company much less one which would have made her resignation foreseeable.

Conclusion on breach of duty

[145] I am satisfied that Waste Management did not breach of any duty owed to Ms Jones. Even if I am wrong in that conclusion, Ms Jones would need to establish that there was a causative link between her resignation and a breach of sufficient seriousness to make her resignation reasonably foreseeable.¹² That threshold has not been met. None of the pleaded breaches, either by itself or in combination with any other breach, would have made the resignation foreseeable.

Other matter

[146] There is one other matter that needs to be addressed for completeness. Mr McDonald's closing submissions dealt with an alleged disparity of treatment of Ms Jones attributed to Mr Shipley. That disparity involved several claims about what Mr

¹² *Auckland Electric Power Board*, above n 4.

Shipley was said to have done in relation to Ms Jones' work, including moving her work area to an unsatisfactory place to her detriment.

[147] Those allegations were not pleaded. Mr Shipley was not questioned about them and nor were any other witnesses called for Waste Management. For those reasons they cannot be taken into account.

Outcome

[148] Waste Management did not engage in a course of conduct, or any breach of duty, that made Ms Jones' resignation foreseeable and she was not constructively dismissed.

[149] The Authority's determinations are set aside and this decision stands in their place.

[150] The Registrar is holding funds paid by Waste Management as a condition of a stay of execution of the Authority's determinations. Those funds, together with accumulated interest, are to be returned to Waste Management.

[151] Costs are reserved. The parties are encouraged to agree on costs. In the absence of agreement Waste Management may file submissions within 20 working days, Ms Jones may respond within a further 20 working days, and there is a right of reply within a further five working days. Costs submissions are to be confined to no more than 10 pages.

K G Smith
Judge

Judgment signed at 4.55 pm on 29 May 2020