IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 181
EMPC 473/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BRENDAN FORD Plaintiff
AND	HENRY BROWN AND COMPANY LIMITED Defendant

Hearing:	1–2 July 2024
Appearances:	S Greening, counsel for plaintiff K Cooper, counsel for defendant
Judgment:	27 September 2024

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Ford worked for Henry Brown and Co Ltd (the company) for approximately 12 months. He was summarily dismissed and pursued a personal grievance; the company cross-claimed against him. The Employment Relations Authority (the Authority) dismissed Mr Ford's claims that he had been unjustifiably disadvantaged and dismissed. The Authority also dismissed the company's cross-claim.[1]

---

1 *Ford v Henry Brown and Company Ltd* [2023] NZERA 716.

[2] Mr Ford filed a challenge to the Authority's determination insofar as it related to his dismissal. Evidence was given by both parties relevant to that issue. This judgment resolves the issue of whether the Authority erred in fact and/or law in finding that Mr Ford's dismissal was justified.[2]

Facts

[3] The company is a small, family owned construction company. Its sole director is Mr Brown. Mr Brown has been engaged with the business for around 30 years and had been doing much of the project management work. Towards the end of 2021 he was scheduled to undergo surgery, and he and his wife, Ms Muir, took steps to find a person who could take over aspects of his role. A project management role was advertised and Mr Ford was one of eight people who applied.

[4] Ms Muir took the lead in terms of the recruitment process. She gave evidence that she rang Mr Ford to discuss the role and during that call she asked why he had left his previous employment. She said that the question was repeated when she and Mr Brown subsequently rang Mr Ford. Ms Muir says that on both occasions Mr Ford advised that he had left his previous employment because of relationship issues with the area manager and health and safety concerns. Mr Ford disputes that he was asked why he had left his previous employment; rather, he said that the questions centred on his "fit" for a small, family owned company and that his conversations with Ms Muir, and later Mr Brown, were very informal and relaxed.

[5] What is not disputed is the fact that Mr Ford was asked to provide the names of some referees, which he did. One of the referees had worked with Mr Ford at his previous place of work. The referee had been a colleague of Mr Ford's at the time; he had not been Mr Ford's manager. Mr Brown spoke to the referee. The referee was asked why Mr Ford had left the company. The response is recorded on a form, which Mr Brown filled in as being "issues with the general manager" and health and safety. Mr Brown did not seek to speak to Mr Ford's previous manager to explore

---

2 The evidence was heard afresh despite being a non-de novo challenge. See *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 33, [2023] ERNZ 98.

what the issues may have been. The form also recorded feedback from the referee that Mr Ford could be "stubborn" and "firm". The company was satisfied with the reference, and steps were taken to proceed with Mr Ford's appointment.

[6] Ms Muir emailed Mr Ford twice on 18 October 2021. The first email was sent at 8.43am. It advised Mr Ford that Mr Brown had telephoned one of his referees (unspecified) and had received a "glowing report". She attached what was described as an application form. She asked him to fill in the form and send it back to her. No filled in application form was before the Court and nor was there any evidence that Ms Muir took steps to follow up the issue with Mr Ford prior to completion of the employment process.

[7] The second email was sent by Ms Muir at 11.29am attaching a letter and employment agreement, and noting "really looking forward to you joining our team." Mr Brown accepted in cross-examination that he could not have completed the referee checks by 11.29am.

[8] Mr Ford says that he was having difficulties with his email system at the time. In the event Mr Ford went into the company's office and Ms Muir gave him a copy of the agreement to read over. Mr Ford gave evidence that he signed the agreement after starting work. I did not understand the company to dispute this, and there was no signed copy of the agreement before the Court.

[9] The agreement contained a clause relating to representations. In this regard cl 16 provided that:

> Representations
>
> In appointing you we have relied on your representations as to your qualifications and experience. You confirm that those representations are true and correct and that you have disclosed everything, which if disclosed, may have been material to our decision to employ you. You also acknowledge that we may take disciplinary action against you, including dismissal, if your representations were misleading or incorrect.

[10] Mr Ford started work with the company on 26 October 2021. It appears that Mr Ford and Mr Brown initially got on relatively well. Mr Ford says that during a

casual conversation, he talked to Mr Brown about his experiences at his previous place of work and told Mr Brown that he had been dismissed. Mr Brown accepted in cross-examination that he would have had conversations about why Mr Ford's previous employment had come to an end but could not recall whether this was before Mr Ford commenced his employment.

[11] It was not long before issues began to arise within the employment relationship, both from Mr Ford's and the company's perspective. On 9 September 2022, Mr Ford emailed Mr Brown and Ms Muir advising that he was notifying a personal grievance in respect of the company's approach to health and safety issues. A further email followed after a meeting of staff which Ms Muir and Mr Brown attended. Mr Ford advised that he was notifying a personal grievance of bullying conduct by Ms Muir in relation to things she was alleged to have said at the meeting.

[12] Ms Muir and Mr Brown were concerned about Mr Ford's behaviour and the manner in which he was interacting with staff, themselves, subcontractors and clients. They say that they were so concerned they decided to contact his referee at his previous place of work to see if they could shed light on the issue. Having rung through to Mr Ford's previous employer they were told that the referee no longer worked there. They say that they were asked what the purpose of the call was, and, when they advised that they were ringing about Mr Ford, they were told that he had been fired and that they (Mr Brown and Ms Muir) would be better off without him.

[13] The company responded to Mr Ford's personal grievances through a human resources consultant on 20 September 2022. The same day, the company wrote to Mr Ford advising that it had concerns that he had misrepresented himself to it when applying for the role and was in breach of cl 16, having not advised, when asked, that he had been dismissed from his previous employment. It said that termination was a possible outcome and sought his response.

[14] Mr Ford responded through his lawyer, advising that prior to being offered and accepting the role he had not been asked why he had left his previous employment. He said that he had not sought to mislead or deceive the company about his

background; he had provided the name of a person from his previous employment as he had been requested to do.

[15] The company wrote to Mr Ford on 29 September 2022, advising of a preliminary decision to dismiss, and confirmed that decision by letter dated 3 October 2022. The decision to dismiss was said to be squarely based on cl 16 of the employment agreement.

[16] Mr Ford then pursued a claim for unjustified dismissal and disadvantage. As I have said, it is only the finding relating to unjustified dismissal that is now before the Court.

The meaning of cl 16

[17] Central to the challenge is the correct interpretation of cl 16. That is because the company based its decision to dismiss Mr Ford on cl 16; the Authority concluded that the company's actions in dismissing Mr Ford were open to it as a fair and reasonable employer for the purposes of s 103A of the Employment Relations Act 2000 (the Act) having regard to what it determined was a proper interpretation of the clause.

[18] The Authority Member's analysis of cl 16 was:

> [51] Clause 16 refers to the disclosure of "everything" which is material to a decision to employ a prospective employee. The use of the term 'everything' makes it reasonable to interpret "qualifications and experience" broader. A broader interpretation of "experience" should extend to how a job applicant's employment ended with a previous employer. For this reason, [the company's] interpretation of clause 16 is correct, and it was able to rely on it when it started its disciplinary process against Mr Ford.

[19] The approach to the interpretation of employment agreements is objective. The aim is to ascertain the meaning which the agreement would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the agreement. This objective meaning is taken to be that which the parties intended. While the meaning of a clause in an agreement may appear clear, meaning is informed by

context. A provisional conclusion as to meaning is to be cross-checked against the context provided by the agreement as a whole, and any relevant background.[3]

[20] I start with the natural and ordinary meaning of the words of cl 16. The clause is titled "representations". The first sentence makes specific reference to the type of representations relied on in appointing to a position, namely representations "as to … qualifications and experience." The second sentence reinforces the point. It refers to "those representations", indicating (on its face) that reference is being made to the representations as to qualifications and experience in the immediately preceding sentence.

[21] The second sentence does, as Ms Cooper (counsel for the company) points out, go on to refer to a disclosure of "everything". She submitted that use of the word "and" indicated a distinction between "qualifications and experience" and "everything" else. That interpretation is available but appears to me to be strained. A more natural reading would be that "and" is being used as a linking word back to the representations already referred to (namely as to "qualifications and experience").

[22] The final sentence of cl 16 refers to disciplinary action if "your representations" "were misleading or incorrect" – again, on its face appearing to be a reference back to representations as to qualifications and experience.

[23] I do not see it as according with the natural and ordinary meaning of cl 16 to interpret the "disclosure of everything" which (if disclosed) "may have been material to our decision to employ you" in the disjunctive way contended for by the company, and which found favour with the Authority. That would require the reference to "misleading or incorrect" representations in the final sentence to be read as including

---

[3] *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696. See too *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63]. Note that while these judgments related to commercial agreements, a full Court of this Court confirmed that the same broad approach applies in respect of employment agreements in *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 78, [2022] ERNZ 304 at [27]–[31]. See too the earlier Supreme Court judgment, which did arise in the context of an employment agreement, in *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [71]. The applicable principles were discussed in *Le Gros v Fonterra Co-Operative Group Ltd* [2023] NZEmpC 193, (2023) 20 NZELR 112 and *Television New Zealand Ltd v E Tū Inc* [2024] NZEmpC 93.

not just representations as to qualifications and experience but also a failure to "disclose everything". A failure to disclose suggests a failure to say something; a representation suggests that something was said. And it is notable that no mention is made of "disclosures" in the final sentence.

[24] Ms Cooper submitted that the reference to "qualifications and experience" was to be read broadly as including experiences at previous workplaces, including any disciplinary action that may have occurred or grievances that may have been pursued (successfully or otherwise). I do not accept that this is consistent with how a fair and reasonably informed objective observer would likely read cl 16. It is more likely that such a person would read it as being limited to any technical qualifications for the role and background experience relevant to the position, such as having worked as a project manager and the sort of activities undertaken at previous work places (precisely the sort of information that Mr Ford says he provided, when asked, to the company).

[25] Nor do I accept that cl 16, on its face, goes so far as requiring that a prospective employee proactively disclose "everything" that may be relevant to the employer's decision to employ them. It is likely that if such breadth was intended, the clause would not contain the first sentence reference to qualifications and experience. It would simply refer to the disclosure of everything that might be relevant. But in any event, the open-ended interpretation advanced by the company would bring with it such a significant amount of uncertainty as to have been unlikely to have been intended by the parties. How would a prospective employee know what "may" be regarded as relevant to the employer and accordingly what they had to disclose? What of information that an employer is not lawfully permitted to ask about or rely on when making hiring decisions, but which the employer might regard as relevant? Would family commitments, health issues, an historic criminal conviction be relevant?

[26] I have cross-checked the plain and ordinary meaning of cl 16 against contextual matters. The only potentially relevant point I can identify is the nature of the role and the type of duties associated with it, as set out in sch 2 of the employment agreement. Those duties plainly require some expertise, in respect of managing contractors, site inspection work and the building consent process. This reinforces the focus of cl 16

that appears on its face, namely as to the qualifications and experience required to undertake a relatively technical job.

[27] Also relevant to the interpretative exercise is the fact that the company drafted the agreement. Ordinary rules of construction suggest that any ambiguity should be construed against their interests. So, insofar as there is any ambiguity on the face of cl 16 (and I am not persuaded there is) that tells against the expansive interpretation submitted for by the company.[4]

[28] For these reasons I consider that the Authority erred in its interpretation of cl 16 of the agreement. It was not open to the company to dismiss Mr Ford on the basis that cl 16 was engaged in the circumstances of this case, and the dismissal was unjustified.

[29] I now turn to deal with the other issue raised by the company, namely in respect of the disputed statements made by Mr Ford to Ms Muir and Mr Brown about why he had left his previous job.

What was asked and what was said about prior employment

[30] As I have said, the evidence relating to what (if anything) Mr Ford was asked about the circumstances surrounding his departure from his previous job and what (if anything) he said, was in dispute. The point is relevant because the evidence was heard afresh on the challenge.

[31] I understood the company to submit that it was very interested in ascertaining the reasons why Mr Ford had left his previous employment and that it was more likely than not that questions relating to this topic were put to Mr Ford prior to his appointment.

[32] It is apparent from the documentation that the company did have a level of interest in why, as a prospective employee, Mr Ford had left his previous employment

---

4 See *Kaipara District Council v McKerchar* [2017] NZEmpC 55, [2017] ERNZ 243 at [235]-[241].

– that is reflected in the form Mr Brown filled in when talking to his referee (notably "why did the applicant leave?"). The same question appears on an application form that Ms Muir says is normally used for recruitment purposes.

[33] What is less apparent is why, if the topic (reason for departing previous employment) was of key importance, the company did not ask if Mr Ford was happy to provide the contact details for his previous manager to confirm, to its own satisfaction, the reasons why his previous employment had come to an end. It may also be noted that, while the question appears on the company's standard form for applications, no filled in form in respect of Mr Ford's application was before the Court.

[34] Ms Muir was, as Ms Cooper pointed out, very firm in her evidence that during a pre-employment telephone conversation with Mr Ford, she had asked him why he left his previous employment, and that she "vividly recalled" sitting in the company office and having a second conversation with him by telephone, during which time Mr Brown asked the same question as he worked his way through the questions on the application for employment form.

[35] Relevantly, Mr Brown could not recall whether he asked Mr Ford during the second conversation about why he had left his earlier job. He accepted, when asked in cross-examination, that it is possible that he did not ask Mr Ford the question during the interview at the second meeting but that the topic may have come up later, once Mr Ford was employed and during a casual discussion. Mr Ford was firm that neither Mr Brown nor Ms Muir had asked why he had left during the pre-appointment process – rather the conversations were relaxed and more directed at whether he would be a good fit for a small family owned company.

[36] The Authority concluded that the evidence of Ms Muir and Mr Brown was more plausible, and that on balance the company *did* ask Mr Ford why he left his previous employment and that he did not appropriately disclose that his termination was for misconduct. While the company could have taken steps to better understand

how Mr Ford's employment ended, the Authority found that it was entitled to rely on Mr Ford's verbal response.[5]

[37] As will be apparent, the evidence came out differently during the course of the hearing before the Court. Most notably Mr Brown was unclear about whether he had asked Mr Ford about the circumstances surrounding Mr Ford's exit from his previous role and accepted that it may have been a topic Mr Ford later raised with him during a casual conversation. And while there is a lack of contemporaneous documentation it may be noted that Mr Ford's initial response to the company's allegation of a misrepresentation, which itself came closely on the heels of concerns raised by Mr Ford, was a firm denial. That appears to have been his consistent response ever since.

[38] It is for the company to establish that its decision to dismiss fell within the target of reasonableness. It has the onus of showing that it has satisfied the test of justification in s 103A of the Act. I am not satisfied that it has done so based on the evidence, which was confused in a number of respects and was not assisted by the lack of documentation to support the recruitment practice that the company says it went through.

[39] The Authority's determination must accordingly be set aside.

Remedies

[40] Mr Ford seeks an order of compensation for non-pecuniary loss under s 123(1)(c)(i); reimbursement of lost wages and costs. The company submits that if the dismissal was unjustified any orders made in Mr Ford's favour should be reduced for contribution under s 124.

Compensation under s 123(1)(c)(i)

[41] Mr Ford gave some evidence of the impact of the decision to dismiss him. He said that it came out of the blue and that it was hurtful to be part of a team one day and then be targeted for removal the next. He said that the work environment became

---

5 *Ford*, above n 1, at [45].

hostile as soon as he started to raise concerns, that holiday plans had to be cancelled (because of financial pressure) and that his health suffered.

[42] Mr Greening, counsel for Mr Ford, submitted that Mr Ford's losses sat within band 2 and that a compensatory award of $20,000 would be appropriate. Ms Cooper submitted that an award at the lowest end of band 1 would suffice to compensate for any humiliation, loss of dignity and injury to feelings.

[43] A compensatory award under s 123(1)(c)(i) is directed at assessing the amount of emotional harm suffered as a result of the employer's breaches.

[44] As Ms Cooper pointed out, Mr Ford's evidence as to the impact of the dismissal on him was not corroborated and there was no additional material before the Court to support his claims. That is not determinative, for reasons I explained in *Keighran v Kensington Tavern Ltd*.[6] I am satisfied on the balance of probabilities that Mr Ford suffered compensatable loss. The company's concerns about alleged misrepresentations and non-disclosure did come as something of a surprise; it did not obtain Mr Ford's prior approval to contact his referee before doing so and did not seek his prior approval before contacting his previous workplace for information about his time there. It was this step which set the (unjustified dismissal) ball rolling. Mr Ford felt aggrieved about the circumstances surrounding his dismissal, including that his privacy had been breached.

[45] It is relevant, when assessing what was causative of Mr Ford's emotional harm, that there were a number of issues going on in the workplace at the time of Mr Ford's dismissal and the lead-up to it. He had, by this time, notified two personal grievances (which the Authority subsequently investigated, which were not made out, and no challenge was made against those findings) and he appears to have been unhappy in his role. I have put the impact of these matters to one side when assessing the level of emotional harm causally connected to the company's established breach. This leads to placement towards the top of band 1.

---

6 *Keighran v Kensington Tavern Ltd* [2024] NZEmpC 28 at [33].

[46] Standing back, I am satisfied that compensation in the sum of $9,000 is appropriate, subject to a reduction for contribution which I discuss below.

Reimbursement

[47] Where the Court determines that an employee has a personal grievance and that they have lost remuneration as a result of that grievance, it must order reimbursement to the employee.

[48] Section 128(2) provides that the order for lost wages is to be the lesser of a sum equal to the remuneration lost or to 3 months' ordinary time remuneration. That is subject to the proviso in s 128(3) which provides that the Court may, in its discretion, order an employer to pay to an employee by way of compensation a sum greater than that to which an order under subs (2) may relate.

[49] Mr Ford was unemployed for the period 3 October 2022 to 5 December 2022. He seeks the equivalent of nine weeks' lost wages.

[50] While, as the company pointed out, there was limited evidence before the Court in relation to Mr Ford's attempts to find alternative work, it appears from the documentation that, by 30 November 2022, he had secured another position and that he had made contact with the recruitment consultant well before that time. Mr Ford also gave some oral evidence as to the steps he took to find employment following his dismissal.

[51] In the circumstances I am satisfied that an award equivalent to nine weeks' lost wages is appropriate.

Contribution

[52] Section 124 provides:

> **124 Remedy reduced if contributing behaviour by employee**
> Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—

(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and

(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[53] As s 124 makes plain, the Court is required to consider whether there ought to be a reduction for employee contribution whenever it is satisfied that a personal grievance has been established. Before doing so the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance. The Court must then undertake an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[54] The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality. The Court of Appeal has explained s 124 as operating like a contributory negligence provision and that "… if the employee, by his or her own behaviour, is partly the cause of the employer's hasty or ill-judged action (here, in dismissing the employee), then the employee should have the remedies to which he or she would otherwise have been entitled reduced."[7]

[55] I understood Ms Cooper to say that if Mr Ford had been upfront about the reasons why he had left his previous employment the situation giving rise to the grievance would not have occurred. That may be so. However, the failure to go on the front foot in the circumstances as I have found them to be does not amount to the sort of blameworthy conduct that s 124 is designed to capture, and I make no reduction for contribution.

Costs

[56] The Authority has not determined costs, and it accordingly falls on the Court to do so. I consider it appropriate to provide the parties with an opportunity to seek to agree costs in the Authority and the Court. If agreement does not prove possible I will receive memoranda, with the plaintiff filing and serving within 20 working days from

---

7 *Salt v Fell* [2008] ERNZ 155 (CA) at [79].

the date of this judgment; the company filing and serving within a further 15 working days and anything strictly in reply within a further five working days.

Summary of orders

(a) Mr Ford was unjustifiably dismissed. His challenge succeeds.

(b) The company must pay Mr Ford the equivalent of nine weeks' remuneration by way of lost wages.

(c) The company must pay Mr Ford the sum of $9,000 by way of compensation under s 123(1)(c)(i) of the Act.

(d) Costs are reserved in both the Authority and the Court.

Christina Inglis
Chief Judge

Judgment signed at 9.30 am on 27 September 2024