

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 206
5454855

BETWEEN GARY ADAMS
 Applicant

A N D ENABLE ROOFING LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Mark Beech and Jessica Dickson, Counsel for the
 Applicant
 Scott Wilson, Counsel for the Respondent

Investigation Meeting: In Christchurch on 13 and 14 August 2015

Submissions Received: 31 August and 25 September 2015 from the Applicant
 11 September 2015 from the Respondent

Date of Determination: 23 December 2015

DETERMINATION OF THE AUTHORITY

- A. Gary Adams was unjustifiably disadvantaged in his employment and constructively dismissed.**
- B. Enable Roofing Limited is to pay Gary Adams:**
- i. Lost remuneration for a period of 12 months from the day after the date in early 2014 that Mr Adams' sick leave and annual leave allocation were exhausted; and**
 - ii. Royalty payments based on the \$3.50 per metre rate for all installations done by ERL during the same 12 month period; and**

iii. Compensation of \$17,500 under s 123(1)(c)(i) of the Employment Relations Act 2000.

Employment relationship problem

[1] Gary Adams claims that he was unjustifiably disadvantaged, by being issued with a written warning, and constructively dismissed by his former employer Enable Roofing Limited (ERL).

[2] Mr Adams resigned from his employment on 10 June 2014, after having been on sick leave from 13 January 2014.

[3] Mr Adams claims that ERL breached its duty of good faith to him.

[4] By way of remedy Mr Adams claims lost remuneration between 13 January 2014 and October 2015; the term of his employment set out in his employment agreement. He also seeks compensation of \$25,000 for humiliation, loss of dignity and injury to his feelings.

[5] Mr Adams initially claimed a payment of commission at \$10 per metre of tile laid and payment for all jobs completed by ERL since it started business. However, in counsel's submission that was modified to be for \$3.50 per metre of tile laid.

[6] ERL says Mr Adams was not unjustifiably disadvantaged in his employment. It says its actions in investigating allegations of misconduct and in issuing Mr Adams with a disciplinary warning were justified. ERL also says that Mr Adams was not constructively dismissed and that he resigned during the process of it considering whether it could keep his employment open for him on an ongoing basis with no end in sight of his recovery and ability to return to work. ERL denies that it breached its duty of good faith and says it acted consistently with its obligations.

[7] Mr Adams' statement of problem, lodged on 10 November 2014, claimed penalties should be awarded for breaches of good faith by ERL. However, s 135(5) of the Act requires an action for the recovery of a penalty to be commenced within 12 months after the earlier of the date when the cause of action first became known to the person bringing the action or when the cause of action should have become known to the person bringing the action. All of the claimed breaches occurred while Mr Adams

was still employed which was more than a year prior to the lodging of the statement of problem. The claims for penalties are out of time and cannot be considered.

The issues

[8] In determining this matter the Authority must consider:

- (a) What Mr Adams' status and the terms of his employment were.
- (b) Were there unjustified actions, in particular in the disciplinary process and its outcome, that disadvantaged Mr Adams and if it is found that there were, what remedies should be awarded, taking into account contribution?
- (c) Did ERL breach any of its obligations of good faith to Mr Adams?
- (d) Was the decision of ERL to consider dismissing Mr Adams because of his long absence on sick leave what a fair and reasonable employer could have done in all the circumstances at the time? or
- (e) Did any of ERL's actions result in Mr Adams being constructively dismissed, and if so,
- (f) What remedies are due, taking into account contribution and mitigation?

The employment history and agreements between the parties up to the end of 2013

[9] Mr Adams is an experienced roofer by trade and moved to New Zealand in 2009 from the United Kingdom. He and his family live in Tauranga. From 2010 he worked for a company called Climatize Limited, originally in Gisborne, installing insulation. Carl Hamlin is a director of Climatize. By 2012 Mr Adams was the Climatize branch manager in Tauranga.

[10] Mr Adams saw the potential in New Zealand for using Cambrian Slate, a tiling product he had worked with in the UK. He contacted Monier Redland Limited

(Redland) in the UK, the company which supplies the slate and discussed the potential to introduce the product to New Zealand.

[11] Mr Adams did not have the capital or the contacts to introduce the product on his own and instead envisaged laying the tile and training other installers. Mr Adams approached Mr Hamlin with the idea of jointly entering into business to introduce Cambrian Slate into the Christchurch rebuild.

[12] Mr Hamlin's father-in-law, Peter Hubbard, was based in Christchurch and expressed interest in the venture as an investor. Mr Hubbard, Mr Adams and Mr Hamlin met in about September 2012 and discussed the idea. They agreed to proceed although Mr Hamlin and Mr Hubbard told Mr Adams that because of their Brethren religion they were restricted in how they could structure the deal.

[13] Mr Adams says they told him they *could not be seen on paper to be going into business together* and could not incorporate a company together. Mr Hamlin and Mr Hubbard say they told Mr Adams they could not go into business together. Various potential business structures were discussed. None were agreed on at that time; although it was discussed that Mr Adams would set up his own company.

[14] Mr Hamlin met sometime later with Mr Adams and Trish Adams, his wife, and discussed the possibility of a company called Enable Roofing Limited being formed.

[15] Mr Adams says he was not too concerned about what legal structure would be used so long as he was *tied into profits for Cambrian Slate*. At that stage Mr Adams considered that he would have to travel to the UK with Mr Hamlin to secure a supply deal from Redlands. Mr Adams says Mr Hamlin encouraged him to think that by telling him to keep his passport up to date for the trip. He arranged for sample tiles to be supplied to Mr Hamlin and Mr Hubbard.

[16] In November 2012 Mr Adams and Mr Hamlin entered into a memorandum of understanding:

Jointly working together on Cambrian Slate Roofing Tiles with a MOU of a long-term relationship built on the following points

The Slate was introduced to Carl by Gary who is very acquainted with the product and the company.

The branches/funding and staff requirement was more than Gary could do alone.

This is an overarching MOU realising details could change such as

...

- *Garys m2 rate*
- *The M2 rate for other approved installers trained by Gary*
- *Any rates/remuneration for induction/training courses run by Gary*

But in Principle we both acknowledge we couldn't have done this on our own and will work together for years to come for mutual prosperity.

[17] The first roofing job was due to begin in January 2013 in Christchurch but there was a shipping delay and the product did not arrive until mid-February.

[18] ERL was registered on 7 February 2013. The majority shareholder of ERL is Enable Group Limited (EGL) which owns 51% of ERL. Peter Hubbard and his three sons, Jonathan, Nicholas (Nick) and William Hubbard are the directors and shareholders of EGL.

[19] Carl Hamlin and his wife, Charlotte Hamlin¹, own the remainder of shares in ERL between them (49%). Peter Hubbard and Mr Hamlin are the directors of ERL.

[20] From about 7 February 2013 Mr Adams was paid by ERL not Climatize. He remained on the same pay rate of \$25 per hour. During February 2013 Mr Adams did roofing work for ERL by being contracted out to another roofing company.

[21] In about May 2013 Mr Adams was told by a customer that Mr Hubbard and Mr Hamlin were going to travel to meet up with Redlands in the UK. Mr Adams was shocked as he understood he was to be involved in that too. He asked Mr Hamlin about it and was told it was only a visit to look around. However, while they were away Mr Hamlin texted Mr Adams to say they had signed exclusive rights to Cambrian slate. Mr Adams was upset as he felt he had been excluded.

[22] On 13 May 2013, while still in the UK, Mr Hamlin sent Mr Adams an email headed *Outcome from Meeting with Peter Hubbard* setting out some changes the company had made *starting immediately*, including increasing Mr Adams' hourly rate to \$35 per hour from \$25 per hour. Other changes were to the amount two labourers were to be paid and notifying that a food allowance would no longer be paid.

¹ Peter Hubbard's daughter.

[23] In addition, daily timesheets were to be required, including from Mr Adams. Mr Hamlin concluded with *Peter/Gary and Carl meet once back from the UK to discuss way forward.*

[24] Mr Adams' response was to say he was unhappy about so many decisions being made on his behalf without any input from him. He pointed out that they had agreed that ERL was to take control of tile importing, sales and distribution and that:

all installation including project management quality control and training was solely my responsibility.

This has clearly failed as I have had no input concerning labour charges for works that have been priced both present and future and continue to be dealt with as an employee of your company.

Your email has made no mention of the contract I requested concerning my involvement and since your dictation of my hourly rate I therefore conclude my involvement is purely as an employee. That was not what was verbally agreed and is in no way acceptable.

[25] Mr Hamlin replied with the breakdown of costs on a job in Harewood Road and asked Mr Adams to advise how he saw the venture:

moving forward, especially in relation to the following

Where should Cambrian be priced in the market per m2?

If you were to run all the teams what price would you give us per m2 to strip felt and batten and install?

[26] In June 2013 Mr Adams presented Mr Hamlin and Mr Hubbard with a Business Plan in which he set out his expectations of the business venture. He said he had hoped for 30% of the company but understood that was not possible and so he wanted 30% of the profit per unit. He acknowledged that they needed *to agree on terms on how we work together.* He wrote:

Initially I will need to be salary based while I work on the install side but my salary will be paid through labour and once we have 2 teams running, Carls salary will be covered based on 100k then labour profit to be agreed by me and Carl.

[27] He ended his proposal:

But again these are my thoughts and would like to discuss yours in detail so we can move forward working together to achieve our goals.

[28] Mr Hamlin and Mr Hubbard responded by putting together a proposal which became a Heads Of Agreement (HOA) signed by Mr Adams and Mr Hamlin in August 2013:

Projects managed by Gary as an employee:

- \$0.70/tile (\$10.00 metre approx). In addition to project labour cost as agreed on a job by job basis. Gary responsible for workmanship. Enable Roofing to be responsible for warranty. Hourly rate \$35/hr

Projects managed by Gary as a contractor:

- \$0.70/tile (\$10.00 metre approx). In addition to agreed total installation contract cost. (Currently around \$50/sq m including felt and battens) Gary to warrant quality of installation for 3 years.

All other projects

- \$0.28/tile (\$4.00/meter approx.) as a royalty (subject to annual review.)

Notes

We would expect that Gary would become a contractor in his own right as soon as workload warrants this.

This is a HOA. Once finalised a full contract will be drafted and signed.

Natural slates are in addition and a remuneration package will be agreed once a few jobs have been done, at this stage on the same basis as above.

Agreed and signed.

[29] On 9 September 2013 Mr Adams visited his lawyers and took a copy of the signed HOA to them for safe-keeping.

[30] During September 2013 Mr Adams received his first royalty cheque based on the HOA rates, in addition to his wages. I will come back to the significance of this later.

[31] By this stage, Nick Hubbard was Enable Roofing's Operations Manager and Business Development Manager and had advised his father and Mr Hamlin that there was no commercial basis to pay Mr Adams an on-going commission for introducing the product.

[32] On 23 September 2013 Mr Hubbard, Mr Hamlin and Nick Hubbard held a meeting in which Mr Adams says they sought to renegotiate the HOA. The respondent says that to the contrary they were attempting to create the full contract that was to be finalised, drafted and signed as the HOA stated.

[33] Mr Adams says a new proposal to him was already written up on a whiteboard when he went into the room. The respondent's witnesses say that the proposal was developed during the meeting with input from Mr Adams. Nick Hubbard says that he recorded the discussion points on the whiteboard.

[34] I conclude that the proposed offer was in large part fully developed by the respondent before Mr Adams came to the meeting. That is partly because the meetings notes recorded by the respondent state:

Discussed the situation with Gary. Attempt to come to an agreed arrangement.

Discussion

Went over the way forward for Enable Roofing ...

Suggested that Gary has his own business in Tauranga ...

Went over the offer as it stands until the 31/3/13 as per the [white]board photo (emphasis added)

[35] A digital photograph of the whiteboard is attached to the notes. In addition, Mr Adams and Mr Hamlin agree that none of the writing on the whiteboard is Mr Adams' writing.

[36] The proposal presented was that Mr Adams would become a contractor in April 2014 with exclusive rights to Cambrian Slate in the Bay of Plenty. ERL would assist him to set up his own contracting business. Until then Mr Adams would get a salary of \$100,000 per annum and receive a royalty payment of \$5 per metre.

[37] In the meantime, he would be required to work a minimum of 40 hours per week. He was required to work three weeks out of four in Christchurch and he could be in Tauranga for one week. In practice, Mr Adams had been working in Christchurch for three out of four weeks and in Tauranga for one week since February 2013. He did not carry out any work while he was in Tauranga. It was envisaged that there were further terms to be negotiated and that the offer was open until 21 October 2013.

[38] The written proposal was provided to Mr Adams after the meeting:

Recognition for introducing Cambrian

- *\$5/m2 until 1/4/14 on all completed Cambrian installations as a product commission.*

- Assistance with setting up Gary Adams business in Tauranga as licensed Contractor for installation of Cambrian products. Exclusive territory Bay of Plenty. Including waiving of license fees, provision of a website and sales assistance for the first 3 confirmed jobs.

Gary Adams job and business establishment offer

Period from 1/10/13 to 31/3/14 as Enable Roofing Employee.

- Employed by Enable Roofing as Projects Coordinator on salary of 100,000 pa gross.
- Managing the installation jobs in Canterbury, with Nick supporting for supply of materials etc.
- Minimum of 40 hours per week.
- 1 x return flight per month Tauranga to Christchurch.
- 1 week per month in Tauranga, the balance in Christchurch
- Accommodation provided for Gary till 16/10/13.
- Use of the red van in Christchurch
- Pricing and running jobs at \$50/m² for tiling and \$35/m for detailing, any upside on this is paid to Gary (these figures to be confirmed in the next 2-3 months)

Period from 1/4/14 onwards as Gary Adams' own business

- Gary Adams business to be the licensed contractor for the Bay of Plenty area
- Gary Adams business to be available for installations throughout NZ at agreed rates per M2 and LM. Tabling \$60/m² and 35/lm as a starting point but this will be confirmed.
- Gary to be available as a technical adviser to Enable Roofing for up to 3 days per month. For these three days Enable Roofing will cover travel and accommodation costs for Gary.

DISCUSSION POINTS

This offer or variation thereof will remain in discussion until a decision is reached between Gary Adams and Enable Roofing on 21st October 2013. After this time the offer will no longer be applicable or at the sole discretion of Enable Roofing the discussion may continue.

Items to be confirmed

- M2 rates for Gary's commission – amounts and duration.

To be worked thorough in the next 24 months:

- Installation rates for installer. Currently \$50/m² for tiling and \$35/m for detailing. Further jobs needed to finalise this rate when all operational systems are working properly.
- Timing of the setup of Gary's business in Tauranga (Scenic Roofing Limited).

NOTES

Should that offer be acceptable a new employment agreement will be required for Gary's employment by Enable Roofing. The commission and other rewards for introducing Cambrian will be dependent on Gary remaining an Employee of Enable Roofing, or at the discretion of Enable Roofing

[39] During September 2013 Mr Adams telephoned Andy Dennis, Sales Director, of Monier Redland and raised some concerns he had about how the product was being applied by Enable. On 26 September 2013 Mr Dennis replied by email that *the Redland position supply to NZ is fixed.*

[40] On 26 September 2013 Mr Adams replied to him:

Since our conversation I have had further talks with Enable group concerning way forward with quality being top priority. Big steps have been taken to resolve the situation. Thank you.

[41] Mr Adams says after receiving the proposal he was concerned that ERL was not honouring the arrangements set out in the HOA. Discussions were held between Nick Hubbard and Mr and Mrs Adams over the next few weeks, some of them by phone while Mr Adams was in Tauranga, discussing the arrangements proposed by ERL on 23 September 2013.

[42] Mr and Mrs Adams say the pressure from Nick Hubbard to enter into a new agreement was extreme and they felt harassed. Nick Hubbard denies that he put undue pressure on either of them or made too many phone calls. However, in his evidence he conceded that he may have told Mr and Mrs Adams that the HOA was not legally binding.

[43] On 7 October 2013 Mr Adams sent Nick Hubbard a text proposing:

*GARY ADAMS 7th October 2013 – Proposal
Salary – Ongoing rolling contract - \$100,000 annually, 40 hour working week
Royalty - \$4 square metre, rolling contract on Cambrian product
Future buy-out clause for royalties and salary optional once company and product is secure and rolled out throughout NZ. Buy-out clause for when you fell company no longer needs my input.*

[44] The following day, Nick Hubbard sent Mr Adams an email referring to his text:

Your suggestion above is not acceptable to Enable Roofing. On reflection we feel the offer we have made to you is a fair and generous offer. You will also recall we suggested at our meeting on the 23rd September that you seek external advice on our offer.

The offer stands without modification until the 21st of October 2013, and we look forward to your acceptance of this so we can move forward.

[45] On Friday, 11 October, Mrs Adams sent Nick Hubbard an email which stated it came from her and Mr Adams:

Concerning your proposal.

A royalty rate set at \$3.50 per metre square for all Cambrian product installed throughout New Zealand tied into a permanent working contract.

With an employment contract to be approved by both yourself and Gary to suit all parties and company needs.

Would be acceptable in moving forward.

[46] Later that evening, Nick Hubbard replied:

Trish and Gary,

Thanks for your letter and conversations today, it's great to get a resolve to the situation. Gary and I will work through the details next week.

Looking forward to cranking the business with your full support Gary, see you Monday (as early as possible so we can continue on Drayton Drive).

Enjoy your weekend!

[47] Mr Adams returned to Christchurch on Sunday, 13 October to begin work on 14 October.

[48] Mr Adams and Nick Hubbard give conflicting evidence about what happened during the week beginning 14 October. There is a signed employment agreement which Nick Hubbard dated 14 October 2013 under his signature and Mr Adams' also wrote 14 October 2013 under his signature. Mr Adams signed in a line confirming that he had read the terms and conditions of employment set out in the agreement and in the position description letter. According to the IEA Mr Adams' signature apparently warranted that he fully understood the terms of the agreement and their implications and accepted the offer of employment.

[49] There is a separate sheet which Mr Adams and Nick Hubbard have initialled. It is headed *an offer to Gary Adams*:

- *\$3.50 per metre. Ongoing royalty on all Cambrian roofs in NZ supplied by Enable Roofing Limited as long as Gary is employed by Enable Roofing Limited.*
- *Position: Site foreman*
- *\$80,000 per year salary*

- \$400 per week travel and accommodation allowance for six months from start. Gary to manage this on the allowance given. Will be aiming to provide a forward schedule of requirements so you can book cheap flights ahead.
- 100% support for the business and its objectives of maximum growth.
- Adherence to company policy (appearances, company image etc etc as discussed).
- Two years of employment with Enable Roofing Limited guaranteed for Gary Adams, subject to:
 - Enable Roofing Limited remaining profitable and liquid, and;
 - The terms of the Enable Industries standard employment agreement being adhered to by Gary, and;
 - Gary not setting up a company in opposition to Enable Roofing Limited during his employment with Enable Roofing Limited.

Installation Rates

It is Enable Roofing Limited's intention to work out a fair square metre rate for installation of Cambrian and Natural Slate, and a fair lineal metre rate for detail work; and allow foremen within the company to work on this basis and be paid a bonus for achieving an installation in less than allowed hours. The bonus would amount to the difference between the allowed rate and the actual time taken. Metre rates for Cambrian Slate installation to be confirmed within six months or after two more jobs have been completed, whichever comes first. Lineal metre rates for detail work will be a part of the bonus as well.

Examples of how this could work (rates to be confirmed as above).

- 250m² house, 40m of detailed work.
- \$50/m² allowed for installation, calculated to be 358 hours based on \$85/hour combined wage of the team. \$35/m allowed for the detail work, calculated to be 40 hours. Total for the job is 398 hours.
- Job is completed in 360 hours. Difference to allowed hours is 38, so bonus of \$85/hour x 33 hours = \$3,230.
- 50% of the bonus to be paid to the foreman, and the balance of 50% split evenly between the workers on the job according to their paid hours on that particular job.

On the example above:

- Total bonus $398 - 360 = 38$. $38 \times 85/\text{hour} = \$3,230$
- Foreman receives $\$1,330/2 = \$1,615$.
- Two other workers spent the same amount of time on the job each, so split the balance evenly.
- Each of the two workers receives $\$1,615/2 = \807.50 each.

[50] There is no express recognition in either the IEA or in the above agreed offer that Mr Adams spends one week in every four in Tauranga and that the practice was that he did not do work for Enable while up there.

[51] Mr Adams says that the employment agreement was signed on 14 October 2013. He says he signed it under duress and in a hurried way when he saw Nick Hubbard at the office before work started on the Monday morning. He said he did not have his reading glasses with him, so he could not read it and was reluctant to sign it but that Nick Hubbard represented that it was just standard and needed to be signed before he could let Mr Adams go and work onsite.

[52] Nick Hubbard says that the employment agreement was not signed until 16 October although he and Mr Adams discussed it on 15 October. He says that the separate page which is dated 15 October 2013 reflects the terms and conditions discussed with Mr Adams on 15 October and emailed to him as an offer later that day. He says that both documents were signed on 16 October 2013 but the reason that the employment agreement appears to be dated 14 October 2013 (the date beside both of the signatures) is that he and Mr Adams agreed to backdate the arrangements to 14 October 2013.

[53] Mr Adams' evidence prepared for the investigation meeting was that he did not recall having signed that document but could have done so.

[54] Having carefully considered all the evidence I consider it more likely than not that the two documents, the IEA and the separate document, were signed on 16 October 2013 by Nick Hubbard and Mr Adams, and backdated to 14 October. The main reason for my conclusion is that the two draft and unsigned documents from ERL were emailed to Mr Adams on 15 October 2013 and the covering email asked Mr Adams to bring them in *tomorrow morning to be signed*. I accept Mr Adams evidence that he did not have the ability to print out documents when he was in Christchurch. He also gave evidence that he was not able to open documents sent by email to his phone when he was in Christchurch. If Mr Adams felt pressured into signing the agreements at the time he did not raise that with Nick Hubbard, or anyone else from ERL.

The events leading to and the disciplinary process culminating in a final warning

[55] Towards Christmas 2013 there was pressure on ERL to finish certain jobs by Christmas. Mr Adams was due to go home to Tauranga and have the week there. On Tuesday, 26 November 2013 Nick Hubbard asked Mr Adams if he could work

from Monday 2 December until the end of the month. Mr Adams said that he might be able to do that and said that he would come back to Mr Hubbard.

[56] On 28 November Mr Hubbard and Mr Adams had another discussion. Mr Adams told Mr Hubbard he would not be able to get back to Christchurch by Monday², but he said he could possibly return on Wednesday, 4 December.

[57] Mr Hubbard said that Mr Adams raised the possibility of working on a job in Garden Road on a labour only basis and also mentioned the possibility of fast tracking getting into business on his own.

[58] However, Mr Adams says that instead Mr Hubbard asked him to start his own business the following week and to take over the Drayton Drive job as well as engage Bronson Maurirere. Mr Adams says he refused to do that and Mr Hubbard said that ERL would be happy for him to work as an employee until Drayton Drive was finished.

[59] On 29 November 2013 Mr Hubbard sent Mr Adams an email which he set out as a summary of a discussion that he and Mr Adams had had. He wrote:

For your comfort and reassurance here's what we discussed.

[60] The email stated that Mr Adams would get back to Drayton Drive by 4 December and stay until 20 December aiming to complete the job by Christmas. ERL would provide Bronson and another labourer to assist him. It set out a number of details suggesting that Mr Adams would not be paid a salary during that time, that he and Mr Hubbard would agree on the total price that he would complete the job for, which would include an allowance for royalty, etc. It also proposed that Mr Adams would do the natural slate job in Garden Road in January at \$85 per m² as a subcontractor to ERL. Again, he would not be paid a salary during that time because it was a fixed price contract. Mr Hubbard envisaged that Mr Adams' subcontracting business entity would be established and that he would also be a licensed building practitioner by then so he could sign off on the job.

[61] Nick Hubbard also wrote that ERL would support Mr Adams' move to set up his business in the North Island by providing Cambrian slates at a favourable rate,

² Because of child care issues.

although they would need to work out the details of that from a purchase transaction point of view.

[62] Nick Hubbard also said that he had talked to Carl who was happy if Bronson came down to do Drayton Drive with Mr Adams. He said he just needed to contact Bronson and talk him through the offer. He suggested that Mr Adams approach him directly because the sooner Bronson could start the better, possibly even Monday. He finished by writing:

For me the ultimate is if you can set up your business entity early next week (so should only take a day or two) so you can invoice us for Drayton.

Again I appreciate the opportunity to talk, feel free to call to discuss anything you are concerned about. Looking forward to seeing you get into it on the Drayton!

[63] On 1 December Mr Adams replied by email that if he was going to start up on his own it would not be until 2014 and he would need capital. He said that after the Garden Road slate job he could review the situation. However, he saw Bronson as Nick Hubbard's responsibility or ERL's responsibility. He then wrote:

There's no way I would have Drayton signed over to me. It's your company's responsibility to complete and as soon as possible. I'd simply agreed to help as much as I can.

[64] The two men spoke on the phone that same day. Nick Hubbard says Mr Adams was aggressive and confrontational. Mr Adams denies that he was aggressive but says he was clear he did not want to be hurried into being an independent contractor before he was ready. On the same day Nick Hubbard emailed:

With regards to the conversation tonight, I am prepared to pretend that never happened on the basis that we move forward as discussed face to face on Thursday last week.

[65] Nick Hubbard then said that he believed he was acting fairly and generously in supporting Mr Adams' goals for the future and it was only reasonable to expect cooperation from Mr Adams. He agreed that ERL did have responsibility for the Drayton Drive job as it was between ERL and the building contractor. What he was talking with Mr Adams about was the:

...labour component left to go for installing. We have worked through the commercial matters for which the job was paused, and we are back on the job. Trust that helps ...

What do you think is a fair \$/m² rate for the 257m² flat tiling?

[66] Mr Adams replied on 2 December 2013 questioning whether Nick Hubbard wished to change his contract again and wanted to terminate his employment on completion of the Drayton Drive job. He wrote:

As I have pointed our m2 rate or salary without proper manpower the job can no way be completed within timescale.

This is not a financial issue but a lack of skilled manpower.

[67] On the same day, Nick Hubbard replied that ERL was not suggesting that Mr Adams' employment should terminate at any particular time. He said that the discussions that the email were a part of had come out of Mr Adams' request for assistance to fast track establishing his own business in the North Island. Mr Hubbard denied that ERL was attempting to re-negotiate the contract that was signed in October. He said that if Mr Adams did not want to be paid at a rate per square metre then the contract would remain and he would be paid his current salary. He then wrote:

Irrespective, as agreed last week we require you to be on site Wednesday morning December 4th. Please confirm today that you will be here as we will otherwise have to hand this job over to another team.

Please note the details in my email of 29th November include no contractual offer or obligations between the two of us. This was merely a summary of the discussions we had.

[68] Mr Adams replied that he was glad Nick Hubbard recognised there had been a miscommunication and as he was aware Mr Adams was not due back until 9 December. He wrote:

Accommodation was booked weeks in advance and only held back on flight to try and return some time sooner, but due to childcare issues earliest flight on December 5th is best I can do. But that will still leave accommodation issues as nothing's in place for an earlier return.

[69] Nick Hubbard responded on 3 December:

We've had to get a team on to the job tomorrow to keep things moving and maintain our commitments to the main contractor. As

discussed last Thursday, we needed a team there on Monday. We managed to put that off until Wednesday, but that's as much as we could get away with. We need you to cooperate with us in the arrangements we have had to make to complete Drayton. Looking forward to seeing you on Thursday.

[70] Mr Adams queried that same morning whether arrangements had been made with Bronson. He also said that accommodation needed to be sorted out for Thursday through to Sunday night but he had already got accommodation sorted from the Monday until Christmas. That same morning Nick Hubbard replied that unfortunately Bronson was not coming down and the accommodation was something that Mr Adams needed to sort out.

[71] Later that same day Nick Hubbard sent another email to Mr Adams. He reiterated that time was of the essence. He further wrote:

On Thursday last week you confirmed the soonest you could come was Wednesday. You then told me on Sunday night that Wed/Thur was when you would come down. You are now suggesting that you will come down Monday 9th. This is not acceptable. I will remind you that I have allowed you have a flexible arrangement for work hours giving you 3 weeks on the job and 1 at home that is not in your contract. I have allowed this to help you be with your family, but you still must work a minimum of 40 hours per week. As you are only working 3 of every 4 weeks you need to be doing 53 hours per week on average to make this up. It is your responsibility to be here for work as request and in addition we are helping you out by paying a \$400 per week contribution to your travel and accommodation. You need to be here ready for work on Thursday. Please confirm.

[72] Mr Adams did not return on the Thursday or the Friday and his scheduled flight on the morning of 9 December 2013 was cancelled. He telephoned Nick Hubbard and told him that he could not be there that day. Mr Adams was unable to return to work until Tuesday, 10 December 2013.

[73] In a letter dated 9 December 2013 Nick Hubbard wrote to Mr Adams and asked him to attend a disciplinary meeting on Thursday, 12 December. Nick Hubbard foreshadowed the letter on the phone. After that Mr Adams sent a text asking to bring the meeting forward to Tuesday, 10 December at 9am. However, Nick Hubbard and Mike Johnson, ERL's human resources consultant, were not available then.

[74] The two concerns outlined in the 9 December letter inviting Mr Adams to a disciplinary meeting were that Mr Adams' employment agreement stated that he was

expected to work no less than 40 hours per week and any other hours as may be reasonably required to complete his duties. ERL says it had agreed flexible hours with him enabling him to work three weeks on and have a week off. However, it was raised for the first time that ERL considered that would require fitting a minimum of 160 hours into the three weeks that Mr Adams worked. ERL's concern was that Mr Adams had not been achieving those hours and therefore had not been fulfilling his side of the flexibility. ERL wrote:

Which could also be viewed as non-compliance with your obligations under your employment.

[75] The second concern was that Mr Adams' employment agreement said it was his duty *to carry out all work reasonably required by the company*. But his failure to come back earlier and his failure to come on Monday the 9th when he said he would, according to Nick Hubbard:

seemed to be both not in compliance with your employment obligations and disrespectful of me as your employer. Such disrespect could be considered as insubordination or a refusal to comply with a reasonable instruction, which at very least could be considered to be misconduct.

[76] Mr Adams was advised that he was welcome to have a support person or representative present.

[77] Nick Hubbard's letter enclosed a summary of Mr Adams' time record from 16 October 2013 until 28 November 2013.

[78] A disciplinary meeting was held with Mr Hubbard and Mr Adams and in the presence of Mike Johnson, a Human Relations Consultant engaged by ERL. There are notes of the disciplinary meeting which show that Mr Adams indicated that he was happy to proceed without a support person.

[79] Mr Adams told them he had been approached by Kane of Climatize who seemed to know the details of the disciplinary meeting and that its probable outcome would be his dismissal. The meeting notes state *we were all concerned at this and Nick undertook to investigate it*.

[80] In relation to the allegation that Mr Adams had been working fewer hours than required by his employment agreement, Mr Adams responded that he understood he

was on a salary and only expected to work 40 hours in each week that he was in Christchurch but not while he was in Tauranga. Mr Adams believed he was still entitled to one week per month in Tauranga. Beside this Mr Johnson has written (*even though the signed contract said nothing about this*).

[81] Mr Adams also said he believed that the reason his salary had come down to \$80,000 per annum from \$100,000 per annum, which had been included in the September offer, was because of the reduction by one week a month in paid time. He also said that one reason why he had not worked longer hours was simply because there was no more work available to do, either because of lack of work or because of poor weather.

[82] The Minutes of the meeting note:

Gary also outlined many reasons why he was finding this job stressful.

[83] None of those concerns are recorded in the notes of the disciplinary meeting. However, according to Mr Adams, he raised the following concerns:

- *Danger to which ERL's employers were being exposed on site such as working in the rain with plugged in power tools and inadequate scaffolding.*
- *Threats made about a contractor that Mr Hamlyn was going to have kneecapped if he did not pay them.*
- *Problems which had required a structural engineer on Ilam Road.*
- *Inconsistency of the dates on the documents purporting to be governing the employment relationship.*
- *That ERL had breached its obligations under the Heads of Agreement.*

[84] Mr Adams says that Nick Hubbard denied the existence of the Heads of Agreement document at that stage. Nick Hubbard denies this but acknowledges that Mr Adams told him that the operational issues he raised (the list above) were causing him stress.

[85] The disciplinary meeting notes indicate that Nick Hubbard said the reduction from \$100,000 per annum to \$80,000 per annum was primarily because of an enhanced royalty offer from a fixed period to 31 March 2014 to an ongoing duration

while Mr Adams remained working for ERL and an undertaking that ERL would provide at least two years employment. Nick Hubbard also said the October agreement contained no clause providing for a week in Tauranga each month. He stated that the October agreement provided for extra hours as needed and said that while Bronson was not going to be available for the Drayton Drive job that Roger was. Nick Hubbard said that he would think things over overnight and talk with Mr Hamlin before making a decision.

[86] After the meeting Mr Adams stayed in Christchurch working on a job in Circuit Street. The job was eventually finished on 14 December.

[87] On Friday 13 December Nick Hubbard wrote a letter to Mr Adams. On 14 December they spoke at work and Nick Hubbard told Mr Adams ERL was not going to dismiss him. Mr Adams received the letter on 15 December:

... my ultimate objective in this process is to ensure you are able to continue working here and clear up any outstanding issues in relation to your work. For that to happen it is really important that we can build trust in you to work constructively with us as managers.

This letter summarises the matters we discussed and confirms my preliminary decision as a result of it.

...

- (a) *Apparent noncompliance with working hour requirements. You indicated you had understood you did not have to work an average of 40 hours every week, but only when you were not in Tauranga. I have considered this and find it difficult to believe you can reasonably hold this viewpoint, especially because the right to have a week a month in Tauranga is not included in your signed employment agreement. While I accept that sometimes there may be insufficient work in any one week, I do not perceive any attempt by you to achieve the required number of hours on an ongoing basis. I am therefore of the opinion that this does amount to misconduct.*
- (b) *Apparent disrespect or possibly insubordination in relation to a refusal to return to work Wednesday/Thursday 4/5 December 2013. You indicated that you had never said you would return on Wednesday and I accept that. You also indicated that you believed you only had to return on Thursday to supervise Bronson and Shaun and so didn't come, when you realised they would not be there. I know I had to stress the importance of getting back to the Drayton job during the week, and although I understand you disagreed with the timetable for the job, you had agreed with me that you would come back on Thursday. When*

you decided not to, I believed that was in direct non-compliance with my wishes and what we had agreed. This deliberate act I believe amounts to serious misconduct as it creates a real sense of distrust in the relationship.

...

I have made a preliminary decision to issue you with a final written warning for noncompliance with instructions and a first warning for breach of employment conditions and I advise that any further examples of significant noncompliance could result in termination of employment.

I want you to know that we are all very pleased with the quality of your recent workmanship and that your skills and abilities are a valued part of our business.

[88] Mr Adams replied that he did not accept that he was not entitled to one week in every four in Tauranga as that had been the practice for the last year and he had not been alerted that had changed. He believed the salary reduction from \$100,000 to \$80,000 was to recognise that he did not work for one out of four weeks.

[89] He also said that he understood his early return was to supervise Bronson and when Bronson was not coming down he thought there was no need for him to return early. He considered Nick Hubbard had not been clear to him about why he was to return early and that there had been a miscommunication. In addition, Nick Hubbard told him he would not pay for accommodation and that he would not be paid extra for working during his usual week off in Tauranga. He objected to Nick Hubbard raising the apparent requirement for him having to work 53.33 hours per week when that had never been raised before.

[90] He stated that since he had never had a warning, either verbal or written a final written warning was not acceptable.

[91] He wrote that he had a problem with Nick Hubbard requesting him to start his own company within two days and asking him to take on the contracts ERL was having problems with. He says he clearly told Nick Hubbard that he wanted him to stop his bullying tactics.

[92] On 19 December 2013 Mrs Adams sent an email to Nick Hubbard threatening to go to the media in New Zealand and the UK about how Brethren rules had been breached by the offer to share profits with Mr Adams outside of the Brethren fellowship.

[93] Later that day Nick Hubbard responded to Mr Adams that he wanted to fully consider the points he made before he made a final decision. He said that he would do so in the Christmas/New Year break and contact Mr Adams in the New Year, after 13 January 2014, which was when Mr Adams was due to commence work.

[94] Mrs Adams also communicated by email with Mr Johnson who made some suggestions about how the situation could be resolved.

[95] On 7 January 2014 Mr Adams consulted his doctor and was found to be medically unfit to work from 13 January until 3 February 2014. No details were given to ERL of the nature of his unfitness to work. However, Mrs Adams telephoned Nick Hubbard and told him Mr Adams' unfitness to work was attributable to workplace issues.

[96] On 14 January 2014 Nick Hubbard proposed to hold off communicating the disciplinary process until Mr Adams was back at work. The parties agreed that Mr Adams' sick leave and annual leave would be used while he was unwell.

[97] On 30 January 2014 Mr Adams' lawyers wrote to ERL raising a personal grievance of unjustified disadvantage on the basis of the proposed final warning. ERL's lawyers responded denying any unjustified disadvantage and suggesting mediation.

[98] Mr Adams attended his doctor again on 3 February and was certified unfit for work from that day until 17 March 2014. Again no details of his illness were given.

[99] On 11 February Nick Hubbard wrote expressing concern that Mr Adams was so unwell and asking for details of his medical condition and:

whether this is impacted by your work, or what your prognosis is for a full recovery and return to work. When your wife called me in early January 2014 about your first period of absence, she alluded to work place issues as being the reason for your absence but no other information has been provided. It is important we have this information so that we can understand the reasons for your absence and investigate any workplace issues if these are contributing to your absence. As a business we also need to plan ahead with some degree of certainty.

...

You need to be aware that we are not able to keep your job open indefinitely, although our primary concern at this stage is for your health and understanding your current condition.

[100] On 3 February 2014 Nick Hubbard wrote a letter detailing ERL's disciplinary decisions. However, he did not send it and instead attached it to the above letter. He wrote that to date ERL had delayed communicating its decision to Mr Adams because of his illness.

[101] The letter communicated that ERL had decided not to issue a warning about the 40 v 53 hours a week issue because it accepted Mr Adams' breach was not deliberate and was based on a mistaken belief. However, it indicated that ERL expected him to work an average of 40 hours each week in the future meaning that Mr Adams was expected to work 160 hours in the 3 weeks leading up to a week in Tauranga, subject to workflows.

[102] In relation to the allegation of his failure to return early to Christchurch Nick Hubbard confirmed a final written warning. He then wrote that any future failure to follow lawful and reasonable instructions, or any misconduct or serious misconduct, could result in disciplinary action up to and including termination of employment.

[103] From 13 February 2014 onwards there was much correspondence between Mr Adams' and ERL's lawyers.

[104] Mr Adams wanted mediation to take place in Tauranga, partly because of cost and partly because of his health. ERL insisted that it occur in Christchurch because that was Mr Adams' place of work.

[105] Mr Adams' doctor provided a further medical certificate on 11 March certifying him as unfit to work and indicating she would reassess him on 22 April 2014. Again no details of his medical condition were provided.

[106] ERL offered Mr Adams a \$400 payment towards flights to Christchurch for mediation to take place. Mediation was held but was ultimately unsuccessful.

[107] On 24 April 2014 ERL wrote:

While we are sorry that you are unwell, you do need to understand that we need to be able to plan ahead with some degree of certainty and are not able to keep your job open indefinitely. Specifically, we may not be able to keep your job open beyond 30 May 2014. Put another way, your employment with Enable Roofing is potentially in jeopardy if you are unable to return to full duties by that stage. ...

We want to make it clear that no decisions about your employment have yet been made. We will want to first consider any relevant medical information and consult with you before making any decisions which could affect your employment with us.

[108] ERL requested information on Mr Adams' current condition, his short and long-term prognosis and the prospects of him returning to work by 30 May 2014, and any other information it should know of as his employer. ERL wished to have that information by 2 May 2014.

[109] Mr Adams was reassessed by his doctor on 28 April and certified unfit to work from 21 April until 9 June 2014. She wrote that he was unfit:

*due to reactive stress and depression as a result of his work. ...
He has been under my care with this since January 2014.*

[110] On 10 June 2014 ERL sent a letter via its lawyer outlining its consideration of terminating Mr Adams' employment in reliance on clause 28.3 of the IEA on the basis that he was incapable of the continuous proper performance of his duties as a result of his illness. It gave Mr Adams an opportunity to provide further information including from his doctor and make any submissions he wished to be taken into account.

[111] On 10 June Mr Adams resigned stating he was disappointed in ERL's insensitive approach during his sick leave due to stress and depression which *has been due to your behaviour*. Mr Adams wrote that ERL had misled and deceived him in their business relationship and as to the terms of his employment providing him with an agreement that did not reflect previously agreed terms:

Given the level of deceit and double-dealing I have lost all trust and confidence in you as my employer. Now, given your actions I do not think I can remain your employee. Therefore, I resign from my position as Project Foreman for Enable Roofing Ltd.

What was Mr Adam's employment status with ERL?

[112] When Mr Hamlin and Mr Adams signed the MOU Mr Adams was not an employee of Enable Roofing but of Climatize. The MOU did not mention employment and was a stand-alone business proposition.

[113] Once ERL was incorporated Mr Adams was paid by ERL. Until 16 October when Mr Adams signed an IEA he says he did not consider himself an employee. Rather he considered he was a business partner of ERL, although he was paid a salary while assisting to establish the business. His email to Mr Hamlin in May 2013

clarified that he did not consider himself an employee at that stage and he said his involvement as an employee alone was not acceptable.

[114] The HOA was signed in August 2013 and is the first document to mention Mr Adams as an employee and to contrast that with mention of his involvement as a contractor.

[115] Contrary to Mr Adams' view of himself as a business partner and not an employee before 14 October 2013 I consider that the true nature of the relationship between the parties was one of employment from the date of the HOA being signed. It envisaged Mr Adams as either an employee or a contractor. He was not a contractor at that stage and so was an employee.

[116] Mr Adams was an employee as he wanted to be as well as having a business arrangement with ERL. The two agreements were in tandem.

[117] Mr Adams proceeded to work installing the tiles for ERL demonstrating that he considered himself bound by the HOA. There was at least one payment made by ERL to Mr Adams under the HOA agreed royalty rate. I consider that to be evidence that ERL considered itself bound immediately by the per metre royalty rate of \$4 per metre. That means that particular aspect of the HOA needed no further negotiation or finalising to become part of a full contract and binding on both parties. The per metre rates for projects managed by Mr Adams as an employee, and as a contractor were already agreed. The royalty rate was also agreed and was open-ended although it was subject to annual review.

[118] There were other aspects of the working relationship that needed to be finalised but the royalty rate was not one of them.

[119] It is significant that it was directors of ERL who negotiated and signed the HOA. When Nick Hubbard became involved he informed the directors that he could see no commercial reason for the royalty rate to be paid indefinitely. It was at that stage that ERL represented to Mr Adams that they needed to negotiate a more detailed contract and to include an employment agreement.

[120] An employment agreement was necessary as Mr Adams demonstrated that he wished to remain an employee until he was ready and able to set up his own business in the Bay of Plenty.

[121] Mr Adams was advised to seek independent advice about ERL's offer made in September 2013 which amongst other things contemplated changing the length of time a royalty would be paid for. Mr Adams did not seek legal advice on the offer but made a counter-offer through his wife and reached an agreement that in return for guaranteed employment for two years he would accept the royalty rate of \$3.50 per metre to be limited to the term of his employment.

Were there any breaches of good faith or unjustified disadvantageous actions by ERL?

[122] **Was the HOA royalty rate binding?** ERL's 23 September proposal included changing the royalty rate to \$5 per metre but only for a limited time until 1 April 2014, rather than being open-ended with an annual review as in the HOA. When Nick Hubbard was negotiating with Mr and Mrs Adams about the royalty rate he referred to the HOA as not being legally binding. That was incorrect as performance of one aspect of the HOA had already occurred when ERL by paid Mr Adams based on it. That confirmed the royalty rate in the HOA was binding. I find that representation misled Mr Adams into believing he had to accept a time limitation on the royalty rate rather than the open-ended arrangement originally agreed in the HOA.

[123] In addition, Nick Hubbard accepted under questioning that he may have told Mrs Adams that *Gary was not irreplaceable* when they were negotiating the terms of what became the October agreements.

[124] Both of Nick Hubbard's comments were in breach of ERL's duty to treat Mr Adams in good faith and were the kind of breaches that began to affect the trust and confidence Mr Adams was entitled to have in his employer.

Did ERL follow a fair disciplinary process?

[125] I am reluctant to say that ERL was not entitled to embark on a disciplinary process as Mr Adams' counsel asks me to do. An employer must be entitled to embark on a disciplinary process but in doing so it must ensure it is a fair process and that the outcome of the process is one that a fair and reasonable employer could have imposed.

[126] Clause 27 of ERL's employment agreement outlined the disciplinary process for misconduct or poor performance. The consequences of instances of misconduct are outlined as:

In a case of a:

27.2.4 First offence: A written warning shall be given and include: a statement of the problem; identification of any rule that has been broken; any consequences that may have resulted from the breach; the corrective action required by the Employee and the time when it must be taken; the proposed action by the Company of corrective action is not taken by the Employee (including possible dismissal); a reference to any previous verbal warning.

Second offence: as above, and with reference to the first written warning.

Third offence: dismissal.

[127] The letter containing the allegations envisaged a possible warning or even termination of Mr Adams' employment depending on the outcome of the meeting.

[128] Nick Hubbard's conclusion seems to have been that Mr Adams' failure to return early to Christchurch was a failure to obey a lawful and reasonable instruction, which I consider to have been a finding of simple misconduct as opposed to the more serious finding of insubordination that he had indicated he considered in the disciplinary letter of 9 December.

[129] I do not consider that the conclusion was justified in all the circumstances which were that Mr Adams had never before been expected to give up his week at home with his family. So although the request for him to return early was lawful it was not reasonable in all the circumstances for ERL to expect that he was bound to do that.

[130] Even if there was a substantively justifiable conclusion of misconduct any such finding obliged ERL to follow its own policy in terms of a disciplinary consequence. Because Mr Adams' failure to return to Christchurch was the first finding of misconduct against him in imposing a disciplinary sanction ERL could not have escalated the warning to a final written warning. A fair and reasonable employer could not fail to follow its own disciplinary procedures which allowed it to issue a first warning as set out in clause 27.2.4 of the IEA, but not a final written warning.

[131] **Complainant as decision-maker** - I am concerned that Nick Hubbard's involvement in framing the allegations and conducting the disciplinary meeting was not fair. He was the complainant who believed Mr Adams had acted with disrespect towards him. He was also the decision-maker, although he apparently consulted with Mr Hamlin. It is not possible for a complainant to adequately objectively consider an employee's explanation for an allegation of misconduct when they are so clearly personally affronted by the employee's behaviour. That raises a concern about Nick Hubbard's pre-determination of the outcome of the disciplinary process; that is, he had probably already decided that Mr Adams had been insubordinate and disrespectful and decided that a disciplinary sanction would be applied.

[132] **Mr Adams' business relationship with ERL taken into account in the disciplinary process** - In addition, Nick Hubbard's evidence was that he was so concerned about Mr Adams' refusal to return to work early because Mr Adams was fully aware of the problems ERL had faced with Southern Reconstruction and *he had some skin in the game*. I consider that Nick Hubbard was more concerned about Mr Adams' apparent failure to take the commercial considerations into account about the job possibly not being finished by Christmas because Mr Adams had a business relationship with ERL and was not just any employee. I consider Nick Hubbard would not necessarily have been so incensed if another employee acted in the way Mr Adams did. However, I consider that to be an irrelevant consideration and one that prevented Nick Hubbard from being truly objective about the situation.

[133] It is also unclear whether Nick Hubbard took into account Mr Adams submission on 15 December that it was unfair to impose a final written warning when he had never had any kind of warning before.

[134] Mr Adams was disadvantaged by the disciplinary sanction imposed and by the process used. His employment situation was rendered less certain by the final written warning.

[135] In relation to the allegation of failure to follow a fair and reasonable instruction I find that a fair and reasonable employer could not have conducted the process in the way ERL did and could not have imposed a final written warning. Mr Adams has a personal grievance of unjustified disadvantage in getting a final written warning which made his employment less secure.

[136] The procedural flaws were not minor and resulted in Mr Adams being treated unfairly.

[137] **The allegation of failure to work adequate hours** - The allegation that Mr Adams had not worked adequate hours was initially used by Nick Hubbard to secure Mr Adams' cooperation with an early return to work. He raised it first in his email of 3 December 2013. The ERL offer dated 23 September expressly included the provision of 3 weeks in Christchurch and one week in Tauranga, alongside a requirement that Mr Adams work 40 hours a week. There was no provision setting out that because he was going to be in Tauranga one week out of four that meant that he had to work an average of 53 hours a week for three weeks prior.

[138] The only aspects of the 23 September offer that were not acceptable to Mr Adams were the short term nature of the royalty and the short employment period. There was simply never any negotiation about what the fact he was entitled to one week per month in Tauranga meant for his working hours while in Christchurch.

[139] The specific difference between what was offered in the September offer and what was offered in October was that instead of one return flight to Tauranga per month and ERL paying for accommodation only until 16 October Mr Adams would be paid \$400 per week, including the weeks he spent in Tauranga, for the six months from 14 October 2013.

[140] I do not accept Nick Hubbard's evidence that he and Mr Adams discussed the fact that Mr Adams would need to work an average of 53 hours a week each of the three weeks per month he was in Christchurch and that Mr Adams agreed to that in October. The one week per month in Tauranga was not specified in the documents signed in October. However, both parties proceeded in the same way that they had previously and Mr Adams took that one week in Tauranga. I find it to have been a condition of his employment that was impliedly carried over that he was entitled to one week in every four in Tauranga and was not required to make up the 40 hours he spent in Tauranga in the other three weeks.

[141] One of the reasons for that decision is that from 16 October and for all of November Mr Adams worked sometimes more and sometimes less than 40 hours per work week; that included one week of 52.5 hours and one week of 53 hours. ERL did not raise any concern with him in the weeks he did not work about 53 hours.

[142] I find that there was never any agreement that Mr Adams needed to work an average of 53 hours per week for three weeks to be entitled to his one week in four off work and in Tauranga. It was simply not something that had been contemplated by the parties during any of their negotiations and the reason it was not written into Mr Adams' IEA is that it was not a term or condition of his employment. However, it is clear that Mr Adams was ready and willing to work such hours when work was available and the weather conditions were favourable enough.

[143] If it was a deliberate action to leave out of Mr Adams IEA and appended business offer the requirement that he worked 160 hours within 3 weeks that would have been a breach of good faith. However, I find that ERL simply had not turned its mind to that requirement until Nick Hubbard was trying to enforce the requirement that Mr Adams return early to Christchurch.

[144] Starting and continuing a disciplinary process in relation to this issue was of disadvantage to Mr Adams in his employment as it put into question a fundamental term of his employment and one he understood to have been agreed. The fact that ultimately no sanction was imposed for this 'misconduct' did not mitigate the damage to the employment relationship, because in ERL's 3 February letter confirming its decisions it unilaterally imposed a requirement that Mr Adams was required to work an average of 160 hours over the three weeks he was in Christchurch, subject to workflows. The reality was that the parties had a dispute over what the IEA meant. A fair and reasonable employer could not have justifiably issued an instruction to Mr Adams in the light of a genuinely disputed term of the contract.

[145] A fair and reasonable employer could not have considered that Mr Adams' hours of work during October and November were in non-compliance with his obligations as alleged or that his work pattern amounted to misconduct as found in the letter of 13 December 2013. Until 3 December 2013 ERL and Mr Adams proceeded on the basis that he was not obliged to work more than 40 hours per week while in Christchurch but was nevertheless entitled to take one week per month off and spend it in Tauranga. The finding of misconduct was not justifiable on substantive grounds, and that decision was also made with the same procedural flaws that I identified above in Nick Hubbard being the complainant and the decision maker.

[146] The procedural flaws were not minor and resulted in Mr Adams being treated unfairly. Mr Adams has a personal grievance of unjustified disadvantage.

[147] **Failure to investigate and respond to Mr Adams' disclosure of stress before coming to a decision** - in the disciplinary meeting on 12 December Mr Adams' raised operational issues that he disclosed were causing him some stress. These were not recorded in the meeting notes and were disregarded by Nick Hubbard as operational issues unrelated to ERL's allegations.

[148] However, once ERL was aware that Mr Adams had become unwell and particularly once Mrs Adams had told Nick Hubbard that his illness was due to workplace issues it had a responsibility to do all it could to minimise any work related stress. In its letter dated 11 February, ERL attempted to get more information, including medical information, from Mr Adams in order to investigate what workplace issues may have been contributing to Mr Adams' absence. However, it also attached its decision letter to that communication. The issuing of the decision letter without further investigation into Mr Adams' allegations of work related stress, and without waiting for the medical and other information it had requested was not an approach a fair and reasonable employer could have taken in all the circumstances.

[149] **Failure to investigate and get back to Mr Adams about his disclosure that Kane from Climatize knew about the disciplinary process and was saying that the result was likely to be Mr Adams' dismissal** – Nick Hubbard says he asked Mr Hamlin about this and Mr Hamlin denied any knowledge of it. However, there is no evidence that ERL talked to Kane or any of the other staff in the Tauranga Climatize office about what they knew about the disciplinary process and how they knew that. ERL did not report back to Mr Adams about its investigation. The failure of ERL to properly respond to Mr Adams' allegation meant that he remained suspicious of ERL's motives in instigating the disciplinary process. This suspicion remained so long as the issue of how a Climatize employee apparently knew about it before Mr Adams did remained unexplained. The failure to adequately follow up on that issue despite undertaking to do so in the 12 December meeting was a procedural breach that was not minor, contributed to Mr Adams being treated unfairly and amounted to unjustified disadvantage to Mr Adams.

[150] **Was ERL entitled to ask for mediation to be held in Christchurch?** This is one of the factors Mr Adams relied on in his letter of resignation alleging ERL had made discussion around mediation fraught. Mediation is generally held in the place where the employment was and ERL paid \$400 towards Mr Adams' costs of travel to

Christchurch. I do not consider that ERL's actions were a breach of good faith or an unjustified disadvantage to Mr Adams given that it did not have any details of his illness or why his attendance in Christchurch may be difficult for him.

Was Mr Adams constructively dismissed?

[151] The very nature of a claim for constructive dismissal is dependent on the events that preceded it; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty.

[152] One type of constructive dismissal occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence.³ If an employer acts that way it is not necessary to show that the employer intended to repudiate the contract.⁴

[153] To found a claim for constructive dismissal the breach or breaches of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable.⁵

[154] The test of justification under s 103A of the Employment Relations Act 2000 (the Act) applies to the claims of unjustified disadvantage and unjustified dismissal. The test is whether what the employer did, and how it did it, were actions that a fair and reasonable employer could have taken in all the circumstances at the time.

[155] In applying the test the Authority must consider a number of factors set out in s 103A(3) of the Act that relate to the process followed by the employer and any other factors it considers appropriate.

[156] However, the Authority must not find a dismissal to be unjustified solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

³ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372

⁴ *Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407

⁵ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[157] Both parties also have duties of good faith. Section 4 of the Act states good faith goes beyond the mutual obligations of trust and confidence and that parties must be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[158] I consider that the cumulative effect of the respondent's breaches of its duty of good faith, and its actions meaning Mr Adams was unjustifiably disadvantaged, were serious enough to go to the heart of the trust and confidence Mr Adams ought to have been able to have in his employer. The breaches destroyed his trust and confidence in the respondent. The breaches were of a type that meant his resignation was reasonable foreseeable by the respondent.

[159] Therefore, I need to consider remedies.

Remedies

Compensation

[160] Although there is no medical evidence from October 2013 as to Mr Adams' state of mental health I consider it established by Mr Adams' and Mrs Adams' evidence that Mr Adams was already showing signs of stress related symptoms in October 2013. I am satisfied that was attributable to ERL's representation that the HOA was not legally binding and its attempts to get Mr Adams to agree to a limited time for royalty payments.

[161] Mr Adams evidence about the effect on him of the disciplinary process and what flowed on from that was that he could not get past what had happened, and feels useless because he cannot provide for his family. He feels very disappointed that his dream of setting his daughters up for their future by introducing Cambrian tiles throughout NZ has failed. He said that his doctor had wanted him *to take happy pills* but that was *not a road I want to tackle*. He said he was afraid of becoming too reliant on the anti-depressants. He says he did take mild sleeping pills.

[162] His evidence is that he has problems with his self-worth now and has thought that his family would be better off if he was dead, although he acknowledges those are selfish thoughts. At the investigation meeting he said that he was still finding things difficult.

[163] Mrs Adams' evidence about the effect on Mr Adams of the disciplinary process, waiting for the decision and decision itself was that he withdrew from talking to friends or family and became uncommunicative and irritable. She says he would not leave the house and would say things like *I feel like if I died it would be fine*.

[164] I take into account Dr Robertson's evidence about Mr Adams' medical condition contained in her letter dated 12 August 2015. Her diagnosis of Mr Adams remains consistent with her explanation of his medical condition contained in her medical certificate of 28 April 2014; being reactive stress and depression related to his work environment. I acknowledge that her view of the cause of Mr Adams' depression must be based on his self-reporting. However, that does not detract from the compelling evidence given in the investigation meeting by Mr and Mrs Adams which can be taken into account alongside Dr Robertson's evidence. The evidence Dr Robertson has provided is that Mr Adams' work situation with ERL has rendered him *unable to work and has severely impacted on his daily life. These symptoms have been ongoing since he was first seen here in January 2014*.

[165] Mr Adams evidence was that he has not applied for any jobs in Christchurch, despite the respondents' witnesses evidence that they believe there remains plenty of suitable work for Mr Adams in Christchurch. Mr Adams says that Christchurch is not a good place for him to be. I accept that in Mr Adams' current state of health he would not have been able to work in Christchurch, especially if he was required to be working away from his family.

[166] Mr Adams has established that the effects on him of ERL's actions have caused him ongoing distress of the kind that entitles him to compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to his feelings.

[167] I am mindful that compensatory payments should not be artificially low and the need to balance that with the need for moderation. That was the formulation for exercising the discretion to award compensation recently expressed by Judge Inglis in *Hall v Dionex Pty Limited*.⁶ I conclude \$17,500 is the appropriate award for the particular circumstances of Mr Adams' case.

⁶ [2015] NZEmpC 29

Lost remuneration

[168] Section 123(1)(b) of the Act allows me to provide for the reimbursement by the respondent of a sum equal to the whole or any part of wages or other money Mr Adams lost as a result of his grievance. Section 128(2) of the Act provides that I must order ERL to pay Mr Adams the lesser of a sum equal to his lost remuneration or 3 months' ordinary time remuneration.

[169] Despite his illness and his doctor's ongoing willingness to verify that he is unfit for work I accept that Mr Adams has been applying for work. However, because I am satisfied that the cause of Mr Adams' ill health is the treatment he was subjected to by his employer I do not consider I need to decide whether he sufficiently mitigated his loss. The fact is his ill health has prevented him from getting work to replace his ERL work.

[170] Mr Adams is seeking his full lost remuneration from 13 January until 13 October 2015. That has been calculated by his counsel to be \$152,064.50 plus the royalty at \$3.50 per metre for jobs done by ERL using Cambrian Slate during that period.

[171] I am satisfied that Mr Adams' loss of remuneration for the first three months must be paid by Enable, pursuant to ss 123 and 128 of the Act. At a salary of \$80,000 per year he would have been paid \$20,000 gross for the first three months, or 13 weeks, after that. I consider the time that should flow from is the date that Mr Adams' paid sick leave and annual leave ceased. Hopefully, the parties can reach agreement on when that was.

[172] I am also satisfied that the agreed royalty payment, contained in the October 2013 document that formed part of Mr Adams' employment agreement, of \$3.50 per metre of tiles should have been paid for all work during that time.

[173] However, I am not satisfied that I have jurisdiction over the HOA and the rates that were payable under that document. It is not so clearly linked to the employment relationship at the time.

[174] Section 128(3) gives the Authority discretion to award further compensation for lost remuneration beyond three months. Mr Adams asks me to exercise that discretion. ERL's witnesses were clear that if Mr Adams had remained well it fully

expected him to remain employed by ERL and therefore to remain eligible for the royalty payments during his employment. The royalty payments were not discretionary or dependant on Mr Adams' performance and were to recognise the fact that he had identified the business opportunity in working with Cambrian Slate and had introduced that product to ERL.

[175] In assessing how much lost remuneration to award I need to make allowances for any other contingencies which may have arisen during the remaining period of Mr Adams' employment agreement; a counter-factual analysis.

[176] The principles outlined by the Court of Appeal in *Sam's Fukuyama Food Services v Zhang*⁷ are applicable to my consideration of reimbursement of lost wages to Mr Adams. The first principle is that an employee can only be reimbursed for actual lost income. Mr Adams has not had a source of income since his dismissal.

[177] In the Employment Court decision of *Jinkinson v Oceania Gold (NZ) Limited*⁸ Judge Couch awarded Mrs Jinkinson lost earnings of approximately three and a half years, less three months for failing to take up an offer of outplacement assistance.

[178] In the *Zhang* case the Court of Appeal considered that the Employment Court's award of 47.4 weeks lost wages was excessive in the circumstances. The Court considered that between 26 and 30 weeks would be a moderate award, based on the discretionary power under s 128(3) of the Act, for lost income.

[179] Mr Zhang had been employed for 10 months and the Court considered that as the employment relationship had broken down he was unlikely to have remained employed for the whole period up to 30 weeks until he got a new job. The Court awarded Mr Zhang 26 weeks of ordinary time remuneration in total.

[180] Mr Adams had been employed by ERL just over a year when the warning letter was issued. Without that I am certain that he would have done his very best to ensure the employment relationship was sustained and remained on foot until he was personally ready to commence his own contracting business. However, I consider that he may not have remained employed for the whole period until October 2015 because he had started to have some concerns about how the work was being done by ERL. In addition, it is by no means certain that Mr Adams' ongoing absence from his

⁷ [2011] NZCA 608

⁸ [2010] ERNZ 482

family for three weeks out of four over the next almost two years would have been sustainable in family relationship terms.

[181] I consider it reasonable in all the circumstances of the case that Mr Adams is reimbursed for a twelve month period altogether from the date that his sick leave and annual leave entitlements finished. I leave the exact amount to the parties to agree on although I reserve leave for Mr Adams to come back to the Authority if the amount is unable to be agreed. In addition, I consider the royalty payment of \$3.50 per metre of tiles should be paid for all work done by ERL during that time.

[182] Section 124 of the Act requires me to consider the extent to which Mr Adams' actions contributed towards the situation that gave rise to the personal grievance; and if those actions so require, to reduce his remedies accordingly.

[183] For ERL the disciplinary process arose out of Mr Adams' failure to return to work on Drayton Drive in a week he usually had off. Mr Adams was in Tauranga and tried to accommodate ERL's request but his family situation and his misunderstanding of the situation once Bronson was not available to work under his supervision meant that he did not do so. He did not make a conscious decision to be difficult or to disobey an instruction. In all the circumstances I do not consider that his actions contributed to the situation that gave rise to his personal grievances. There will be no reduction of remedies.

Costs

[184] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs. Mr Adams is legally aided. Any question of costs is subject to the requirements of sections 45 and 46 of the Legal Services Act 2011. If a determination of the Authority is nevertheless required on costs, Mr Adams may lodge a memorandum by 29 January 2016 and ERL would then have 14 days from the date of service to lodge a memorandum in reply.

[185] Unless appropriate to vary its usual practice because of legal aid requirements, other particular circumstances of the case, or due to the application of the general

principles on costs, the Authority would likely determine costs on the basis of its usual daily tariff of \$3,500 per day over a two day investigation meeting

Christine Hickey
Member of the Employment Relations Authority