IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 219
EMPC 411/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CONCRETE STRUCTURES (NZ) LIMITED Plaintiff
AND	SAM WARD Defendant

EMPC 426/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SAM WARD Plaintiff
AND	CONCRETE STRUCTURES (NZ) LIMITED Defendant

Hearing:	2–3 September 2020 (Heard at Tauranga)
Appearances:	KA Badcock, KS Badcock and L Badcock, counsel for Concrete Structures (NZ) Limited R Bryant for S Ward
Judgment:	4 December 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

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[1] Both parties challenge a determination of the Employment Relations Authority, finding that Mr Ward was unjustifiably dismissed.[1] It was agreed that the hearing would proceed on a de novo basis. The company says that, rather than being dismissed, Mr Ward agreed to take a year off on sabbatical leave and then abandoned his employment. Mr Ward says that the company had made it clear that his employment had come to an end and that he was either actually, or constructively, dismissed at a meeting on 7 November 2016. He contends that the Authority erred in its approach to remedies. He seeks an increase in the orders made in his favour.

[2] Resolution of the parties' conflicting positions is answered by an analysis of the facts as they came out at the hearing.

The facts

[3] Mr Ward was employed by the company in 2004 in a relatively junior capacity and subsequently worked his way up to a site supervisor role. The company director (Mr Mike Romanes) and his family were close friends of Mr Ward's family. Mr Ward had use of a company car for work purposes and, after having completed five years of service, was qualified to be a beneficiary of the company's CS Employees Investment Trust (Investment Trust). The Investment Trust provided that if he remained with the company until 1 April 2019, he would qualify for a distribution of the Investment Trust's pool.

[4] Mr Ward's job took him away from home for extended periods of time. While he had been happy enough with this arrangement from the outset, his personal circumstances changed and he would have preferred to work closer to home. This raised issues for the company from an operational perspective. Mr Ward's mental health had, by this stage, begun to suffer. His health impacted on his work, including his ability to concentrate and be in charge of heavy equipment. A performance review dated 12 March 2016 notes:

> ACHIEVEMENTS FOR THE YEAR: NONE

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1 *Ward v Concrete Structures (NZ) Ltd* [2018] NZERA Auckland 350 (Member Trotman).

AREAS WHERE IMPROVEMENT IS REQUIRED: NEEDS TO GET ON TOP OF HEALTH ISSUES & EVERYTHING ELSE WILL GO AWAY – BRING BACK THE OLD [MR WARD]!

[5] Mr Romanes and Mr Chris Mackie, the company's plant health and safety manager (who was also responsible for human resource management), convened a meeting with Mr Ward on 11 July 2016. Mr Mackie took a file note of what transpired:

> [Mr Ward] stated he isn't happy with the way things are going for him at [the company]. He isn't sure that he wants to leave as he still feels loyalty to [the company].
>
> Mike [Romanes] suggested he take sabbatical leave and try something new or different. He would keep his job open & [Mr Ward] wouldn't forfeit his employee trust entitlements.

[6] Shortly afterwards Mr Romanes travelled to the United States of America for an extended period of time and his son, Mr Paul Romanes, took on a more active role in respect of Mr Ward. Mr Paul Romanes wrote to Mr Ward on 21 October 2016 suggesting that he take on a large out-of-town project. He asked Mr Ward to think about it over the weekend. Mr Ward did not respond to the email and Mr Paul Romanes called him to discuss matters. He followed up the telephone conversation with an email dated 28 October 2016:[2]

> …
>
> - [The company] needs to have someone at your level … on this site from start to finish for continuity for the client and our own personal/works so starting the project is not an option.
>
> - This is the only project suitable/available for you at this time.
>
> - You are quite keen to find some work closer to home and be at home every night, I can understand this but *we simply don't have any work at your level within daily commuting distance now*.
>
> - [The company] respects the effort you have put in over the last 10+ years and recognises that you have some entitlements from this, *should you wish to submit a leave form I will approve it from today until end of 2017 which means you can take some time away from [the company] to find work closer to home and still retain your existing entitlements, should an opportunity arise for you to return to Concrete Structures on or before 10th Jan 2018*.

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[2] Emphasis added.

…

- If you want to take the rest of the week off to make some plans that's fine, we will pay you the standard 9hrs a day for the rest of the week. (this won't use any holiday pay owed)

- *If you want to work the following week we will find something for you to do somewhere, we should draw a line and say your last day will be on or before Friday 11th November*.

- *If you wish to finish before this date that is fine, you are not involved in any projects currently so 24hrs notice will be fine*.

I will let you sort your Ute/Tools/Phone etc. with [Mr Mackie]

Thanks again for all of your efforts to date, I have thoroughly enjoyed working together.

[7] It was put to Mr Paul Romanes that the email made it clear that Mr Ward's time with the company was ending. He did not accept this. It was put to Mr Ward that Mr Paul Romanes was simply setting out a number of options which he could choose from. Mr Ward did not accept this. When read in context the underlying message contained within the 28 October 2016 email was tolerably clear - the company had no work for Mr Ward in his preferred location; it had become necessary to "draw a line" and he was expected to finish up, with his last day being on or before 11 November 2016 (following, if Mr Ward wished, a week's work doing "something … somewhere"). The message of departure was underscored by reference to the return of Mr Ward's work vehicle, his tools and his mobile phone and the way in which the last sentence of the email was drafted.

[8] Mr Ward responded to the 28 October 2016 email advising that Mr Paul Romanes' summary of the conversation was not entirely accurate from his perspective. He concluded by saying:

> You [said] you [don't] want it to feel like you are pushing me out but with a final date now sounds a bit different…

[9] Mr Paul Romanes sent a reply on 2 November 2016 with comments in the body of Mr Ward's earlier email, which stated:[3]

> Given all the effort you have put in over the years I don't want you to feel like we are pushing you out but *we don't have any work for you around home and*

[3] Emphasis added.

you don't want to commit to a job 2hrs from home so I don't have a lot of options.

[10] Mr Ward was concerned that his employment was being terminated and asked a family friend (who was not a lawyer) to represent him (having earlier contacted the Ministry of Business, Innovation and Employment helpline for advice). Mr Ward's representative wrote to Mr Paul Romanes on 3 November 2016 advising that he understood that the company was purporting to terminate Mr Ward's employment; confirming that Mr Ward had not resigned; and asking for urgent clarification of Mr Ward's employment status. The same day the company removed access to Mr Ward's email accounts and forwarded all of his emails to Mr Paul Romanes.

[11] Mr Mackie sent an email to Mr Ward on 4 November 2016 noting that, as Mr Ward was no longer working on site, his company vehicle, mobile phone and tools needed to be returned. Mr Mackie said that he intended to collect them from Mr Ward that afternoon, as they were required for site projects. Mr Mackie went on to acknowledge that Mr Ward had not resigned and was still employed by the company. He said that in those circumstances Mr Ward should report for duty at the company's Rotorua factory on 7 November 2016 where he would be assigned duties for "the immediate future".

[12] The company gave evidence that the requirement to return the work vehicle and gear did not reflect a view that Mr Ward's time with it was ending. Rather it was said that these items needed to be returned because Mr Ward was no longer working on site, consistent with the basis on which they had originally been provided to him. I pause to note that there was no documentation before the Court supporting the assertion that Mr Ward's use of the work vehicle, mobile phone and tools was conditionally provided on the basis that he was working on site. The document that is before the Court, namely one dated 18 July 2008, does not contain the sort of qualifications that the company sought to read into the arrangement. Further, Mr Ward gave evidence (which I accept) that he had worked off site from time to time over the years and had never been requested to return these items when he did so.

[13] When Mr Ward's representative raised the issue as to the basis on which the company was requiring return of the vehicle and work gear, the company's lawyer

advised that if Mr Ward declined to hand them over it would be taken as a refusal to comply with a lawful request and disciplinary action could follow. I return to the issue later.

[14] Mr Ward attended at the Rotorua factory as requested on 7 November 2016. Mr Mackie and Mr Henderson (the precast manager) were present when Mr Ward arrived. Mr Ward says, and I accept, that he was confused as to what was going on. While some of the detail of what occurred at the meeting is in dispute, a number of things are clear, including that the conversation went beyond a simple discussion of what duties Mr Ward would perform while he was at the factory. In this regard Mr Ward made reference to Mr Paul Romanes' 28 October 2016 email and said that he was getting advice on it. Both Mr Mackie and Mr Henderson gave evidence that they got the impression that Mr Ward was confirming that he had decided to take up the offer of sabbatical leave contained within the email. The basis for such an impression remained unclear given that Mr Ward made no express mention of sabbatical leave and, while he had referred to Mr Paul Romanes' email, he had made it clear he was getting advice on it.

[15] It is common ground that Mr Ward advised Mr Mackie to talk to his representative when the conversation moved to the 28 October 2016 email. It is also common ground that Mr Ward repeated this request a number of times during the course of the meeting. It is notable that Mr Mackie did not adjourn the meeting to enable such discussions to take place or to provide Mr Ward with an opportunity to be supported by his representative. Nor did he take any other steps, either during or after the meeting, to take up Mr Ward's request. The failure to stop the meeting and allow time for discussions with Mr Ward's representative was, in the circumstances, both inexplicable and inexcusable. It served to significantly increase the negative impact of the company's actions on Mr Ward.

[16] Mr Mackie wrote some notes at the meeting. The notes recorded the following:

> [Mr Ward] says talk to [representative] not me.
>
> Gear & vehicle as of today.
>
> [Mr Ward] says finishing this Friday 11/11/16.

[Signed by Mr Mackie and Mr Henderson]

[Representative] to sign for [Mr Ward]?

[17] Mr Mackie asked Mr Ward to sign the record of the meeting. Mr Ward refused to do so on the basis that it was inaccurate.

[18] After the meeting Mr Ward was driven home and his work tools were removed from his work vehicle and noted on a check list.

[19] Mr Ward's representative raised issues about the 7 November 2016 meeting shortly after it had concluded, alleging in an email that the company had attempted to bully Mr Ward into resigning. It appears, from the way in which the email is drafted, that while Mr Ward felt like the company had been trying to push him out it had not (to his mind) succeeded in doing so. And in cross-examination Mr Ward agreed that he did not consider at the time that he had been dismissed during the course of the meeting.

[20] The company's lawyer responded to the representative's email by advising that Mr Ward had said at the 7 November 2016 meeting that his last day would be 11 November 2016 in accordance with the 28 October 2016 line-drawing email, and that he was being paid in lieu of notice.

[21] The company contends that the parties were effectively at cross purposes at the 7 November meeting, like ships passing in the night, and that it was under the impression that Mr Ward had elected to take up the offer of sabbatical leave but would remain an employee. This aspect of the company's case sat uncomfortably with what Mr Ward had actually said at the meeting and, equally importantly, what he did not say at the meeting (no mention of leaving on a sabbatical). It also sat uncomfortably with the fact that when the line-drawing email was referred to it was coupled with a request that Mr Mackie speak to Mr Ward's representative; and the fact that Mr Ward had refused to sign Mr Mackie's notes of the meeting on the basis that they were inaccurate.

[22] The next step in the chronology was the preparation of a final pay checklist by Mr Mackie. It was accepted that this was a step that was routinely undertaken when

employment with the company came to an end, as the form itself reflects. Mr Ward was promptly paid his final pay, calculated in accordance with the notice provisions of his employment agreement.

[23] Despite these steps the company says that it considered that Mr Ward remained an employee and had departed on a period of sabbatical leave; it had simply facilitated an early final pay; and the documentation which had been filled in (which may otherwise have implied termination of employment) reflected the fact that the company did not have any forms to note the real basis on which Mr Ward was leaving. I pause to note that the latter point appears to be at odds with the contents of Mr Paul Romanes' email referred to at [6] above, where Mr Ward was invited to submit a leave form if he wished to take up the offer of a sabbatical. In the event no leave form was filled out and nor was Mr Ward requested to do so.

[24] On 30 November 2016 Mr Ward's representative wrote a without prejudice email (which the parties elected to put before the Court) advising that Mr Ward had been unjustifiably dismissed and that, while Mr Ward had found alternative short term employment, it was at a lower rate of pay. The email advised that while Mr Ward would be entitled to seek reinstatement that was unlikely to be an option given he would find it difficult to return to the company given the breaches that had occurred. Settlement was proposed. On 2 December 2016 the company's lawyer advised that Mr Ward had never been dismissed; Mr Ward had confirmed that he was taking sabbatical leave; and that the company was confused and wanted clarification as to what Mr Ward was saying. Clarification was not immediately forthcoming. Rather Mr Ward's representative reiterated the advice that Mr Ward would consider settlement. A statement of problem was later filed in the Authority.

Was there a dismissal and if so when?

[25] Mr Ward's case was run from the outset (including in the Authority) on the basis that dismissal had occurred at the meeting of 7 November 2016. In cross-examination Mr Ward conceded that he did not think he had been dismissed at the meeting of 7 November 2016. I accept that the concession, which was repeated, reflected Mr Ward's belief as to what had occurred at the time. It became the central

focus of closing submissions for the company. The submission was that, if Mr Ward believed that he had not been dismissed at the meeting, it fatally undermined his claim that he had been actually or constructively dismissed on that date.

[26] Does Mr Ward's subjective belief as to his employment status as at a particular point in time inexorably lead to the legal outcome that the company contends for, or is the ultimate question one for the Court to decide on the basis of all of the evidence?

[27] The classic definition of "dismissal" comes from *Wellington Clerical Workers Union v Greenwich*, which called it "the termination of employment at the initiative of the employer".[4] That definition has been applied in a number of cases since, but none in a situation where the employee did not think they had been dismissed.

[28] In a recent decision, Judge Holden summarised the approach as follows:[5]

> [45] The test is an objective one: was it reasonable for somebody in Mr Gildenhuys' position to have considered that his or her employment had been terminated?

[29] If (as I accept) the test for assessing whether an employee has been dismissed is objective, it logically leaves room for a finding that dismissal occurred even if the employee did not subjectively believe it to be so. It also logically leaves room for a finding that a dismissal occurred even if the employer did not subjectively believe it to be so, and (by extension) where neither the employee nor the employer subjectively believed dismissal had occurred. There may, for example, be circumstances where the affected employee and/or employer, for a variety of reasons, miss what a reasonable person would have seen.

[30] All of this is relevant in this case. Mr Ward was suffering from mental health issues at the relevant time. The company was well aware of these issues. Mr Ward was confused going into the 7 November meeting, did not have the benefit of a support person or his representative and his requests that contact be made with his representative were ignored. While I accept that Mr Ward did not subjectively believe

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4 *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich (t/a Greenwich and Assocs Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 103.

5 *Cornish Trucks & Van Ltd v Gildenhuys* [2019] NZEmpC 6.

that he had been dismissed at the meeting, objectively assessed, a reasonable person in his position would likely have considered that their employment was being terminated. That assessment would have been reinforced by steps the company took at the meeting, including asking Mr Ward to sign a document noting a finish date of 11 November 2016 (which he refused to sign); the demand for the immediate return of company property and work vehicle; and what occurred immediately afterwards – uplifting company property in his possession and making a final payment in accordance with the notice provisions in this employment agreement. It is also reinforced by what the company did not do, including formally documenting what it says the basis of Mr Ward's departure was. Mr Ward's departure was treated as if his employment had come to an end.

[31] I was not drawn to the company's characterisation of the position, both at the time and subsequently, namely that Mr Ward remained an employee. No contemporaneous documentation was before the Court which makes any reference at all to the fact that Mr Ward was departing on sabbatical leave and that he remained employed and entitled to any benefits under his agreement, including the benefits under the Investment Trust deed. Rather, the contemporaneous documentation that was before the Court reinforces my conclusion that the departure was being treated by the company as a final termination with no ongoing employment relationship.

[32] For completeness I note an email from the company's lawyer dated 8 December 2016 in which it is said that Mr Ward had not been dismissed. It stated that if he did not want to accept the offer of a sabbatical set out in the company's email of 28 October 2016, then he could work at the Rotorua factory from 8 January 2017. While the correspondence is crafted in a way that suggests an ongoing relationship, the damage had, by this stage, already been done. The dismissal had occurred and could not retrospectively be recast as something more benign.[6]

[33] I did not understand the company to be contending that if Mr Ward was dismissed it was nevertheless justified. Plainly it was not, both substantively and

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[6] Contrast the situation in *New Zealand Cards Ltd v Ramsay* [2012] NZEmpC 51, where the employee wrongly believed that they had been dismissed during a meeting. The Court held that the employer had an obligation to correct the employee's mistaken understanding within a reasonable timeframe.

procedurally. Mr Ward was unjustifiably constructively dismissed at the meeting of 7 November 2016 against the backdrop of events preceding that date. The fact of dismissal is reinforced by what subsequently occurred. It follows that the company's challenge is dismissed and its claim that Mr Ward abandoned his employment cannot succeed.

[34] Before turning to remedies, I record that I raised with counsel during the course of closing submissions the potential application of s 122 of the Employment Relations Act 2000 (the Act) in the event that I found that Mr Ward had not been unjustifiably dismissed. Mr Badcock, counsel for the company, submitted that the claim had been advanced on the basis of an unjustifiable dismissal claim and it would prejudice the company to have the claim recharacterized and dealt with on another basis. It remained unclear what the precise nature of any prejudice might be, or what additional or different evidence might have been given. If I had not reached the finding that Mr Ward had been unjustifiably dismissed, I would have found that he had a personal grievance other than alleged, namely of unjustifiable disadvantage. I would have exercised my discretionary powers under s 122 and awarded remedies against the company on this basis.

Remedies

Humiliation, loss of dignity and injury to feelings

[35] I deal with compensation for humiliation, loss of dignity and injury to feelings first.

[36] I accept that Mr Ward suffered compensatable harm under s 123(1)(c)(i) of the Act. He was significantly negatively impacted by the company's unjustified actions, and his mental health (which was already compromised) deteriorated further.[7]

[37] I invited Mr Ward to explain to the Court the impact of his departure from the company. His evidence was compelling. He was unable to sleep, or function properly;

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[7] See *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [42]-[43] in relation to pre-existing conditions.

he lost confidence; his relationships deteriorated; he became anxious and withdrawn; and sought medical assistance. Mr Ward's evidence was reinforced by the evidence given by his partner, none of which was seriously challenged in cross-examination. His partner described him having extreme mood fluctuations and an inability to face others due to low self-esteem. She described him overall as "a mess". His father, who was not cross-examined, described similar behaviour, including observing that Mr Ward closed himself off and was unable to engage in conversation. Both noted the added stress this caused given that Mr Ward and his partner had a new-born to provide for.

[38] The Court has adopted a banding approach to claims for compensation under s 123(1)(c)(i).[8] This case falls within band 3 – high level loss or injury. In reaching that view as to where on the spectrum of cases this case sits I have had regard to the significant level of harm experienced by Mr Ward as a result of the company's breach and assessed that against other comparable cases. Compensation of $30,000 is sought. I accept that this is a quantum that is well within the range. I also have no difficulty finding that an award at this level would be a fair and just award in the present case.

[39] Subject to contribution, the company is ordered to pay Mr Ward the sum of $30,000 by way of compensation under s 123(1)(c)(i) of the Act.

Lost remuneration and benefits

[40] Mr Ward seeks lost wages of $40,743.52 gross for the period between 8 November 2016 and 31 March 2018.

[41] Section 128 provides that, where the Court determines that an employee has a personal grievance and has lost remuneration as a result of the personal grievance, the Court may order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration. The Court may, in its discretion, order a sum greater than that amount for remuneration lost as a result of the grievance.

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8 *Cheng*, above n 7, at [67].

[42] Mr Ward was out of work for some time following his departure from the company. He was not in a position, because of his health issues, to seek full time work. He did some odd jobs (which he described as essentially work created for him by a family friend). In the event Mr Ward was able to secure a permanent full time position on 10 July 2017 but this was at a reduced rate of pay.

[43] I am satisfied that it is just to order a sum greater than three months' lost remuneration in the particular circumstances. I do not discount the possibility that Mr Ward's health issues, and the existing strains on the relationship, may have led to an earlier parting of the ways. However, Mr Ward was a loyal employee of the company for many years and, barring the unjustifiable actions by the company, I consider it more likely than not that he could reasonably have been expected to continue his employment for much longer.[9] While Mr Ward had expressed a preference for working close to home, possible options and the extent to which the company's operational demands might be accommodated were never explored because of the route the company decided to travel down. I note too that Mr Ward's representative had confirmed to the company's lawyer as late as 5 November 2016 that Mr Ward *was* available for work away from home, and the company's lawyer had subsequently confirmed in correspondence that the company could in fact provide work for Mr Ward in Rotorua from January 2017.

Duty to mitigate?

[44] For completeness, I touch on the company's submission that Mr Ward failed to adequately mitigate the losses he sustained and that this ought to be reflected in any remedies awarded in his favour. As observed in *Maddigan*:[10]

> [62] It is well established that in ordinary breach of contract cases a plaintiff is under no duty to mitigate their losses. And no positive duty emerges from the wording of the Act. The key question is not whether a legal duty exists but what the prerequisites for reimbursement are. The asserted duty on employees to mitigate their losses, which has become a well-engrained mantra in this jurisdiction, tends to be used as an unhelpful shorthand which focusses the inquiry on steps taken, or not taken, by an employee rather that what – if

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9 See *Telecom New Zealand Ltd v Nutter* [2014] ERNZ 315 (CA) at [70]-[81].

10 *Maddigan v Director-General of Conservation* [2019] NZEmpC 190, [2019] ERNZ 550 (footnotes omitted).

> anything – might reasonably have been expected in the particular circumstances.

[45] The steps Mr Ward took to find alternative work following his dismissal must be viewed in context. I accept that Mr Ward was severely impacted by the company's actions, and the loss of his job, and that this undermined his capacity to actively pursue employment or engage in anything other than casual work for a period. The company submitted that he could have taken up an offer of a return to work contained in its lawyer's email of 8 December 2016. I have no difficulty concluding that the failure to do so was reasonable, given the background circumstances and having regard to the nature of the breaches that had occurred and the damage that had been caused to what had previously been a close relationship.

[46] The company is ordered to pay Mr Ward lost wages for the period between 8 November 2016 and 31 March 2018, minus any sums Mr Ward earnt during that period.

[47] I accept that, had Mr Ward not been unjustifiably dismissed, he would likely have been in employment as at the date his entitlements under the Investment Trust matured, and that he lost this benefit as a result. The company is accordingly ordered to pay Mr Ward the monetary value of 8.37 units in Pool 2 on the company's Investment Trust, subject to any deduction for contribution – which I turn to next.

Contribution?

[48] The Court is obliged to consider the extent to which Mr Ward's actions contributed towards the situation that gave rise to the grievance and if those actions so require, reduce the remedies accordingly.[11] The company contends that any remedies awarded in Mr Ward's favour should be reduced by 70 per cent for contribution. The Authority applied a 40 per cent reduction when determining remedies. Mr Ward submits that no reduction is appropriate in the circumstances.

[49] Mr Ward was suffering from mental health issues at the relevant time. Mr Mackie, the company's health and safety manager who was responsible for human

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[11] Employment Relations Act 2000, s 124.

resource issues within the company, was aware of this. I have already accepted that Mr Ward went into the 7 November 2016 meeting confused. He was told that the meeting was to discuss his hours at the factory, but it is apparent that the conversation went further than this. Mr Ward told Mr Mackie a number of times during the course of the meeting that he should speak to his representative, which did not occur – either at the time or afterwards. No effort was made to clarify that everyone at the meeting was talking about the same thing, despite the fact that Mr Mackie knew that there was a background context; he knew that Mr Ward was suffering from mental health issues; and he knew that Mr Ward was taking issue with what was contained within the record of meeting he had prepared (because Mr Ward had refused to sign it).

[50] A causal link between the employee's actions and the "situation giving rise to the personal grievance" is required to trigger a reduction for contribution under s 124 of the Act. The grievance in this case was the unjustified dismissal which occurred on 7 November. I do not accept that Mr Ward contributed to the circumstances giving rise to the grievance, particularly in light of the background and his known vulnerabilities. The bottom line is that if Mr Mackie genuinely believed that Mr Ward was picking up an offer of one year's sabbatical he should have done more to check that assumption given the number of red flags that had been raised but which, for unexplained reasons, he chose to ignore.

[51] Mr Ward himself was in a compromised mental state and I do not think it can reasonably be said that he contributed to the situation, such that a reduction in remedies is warranted. Nor do I consider that events following the company's unjustified actions are material. In this regard, it is difficult to see how a subsequent failure to respond to correspondence can be said to have retrospectively contributed to the situation giving rise to a grievance which had already crystallised.

Summary

[52] The company's challenge is dismissed. Mr Ward was unjustifiably dismissed from the company on 7 November 2016. Mr Ward's challenge to the Authority's determination as to remedies succeeds. The Authority's determination is set aside and this judgment stands in its place.

[53] The company is ordered to pay Mr Ward the following sums by way of relief:

- $30,000 by way of compensation under s 123(1)(c)(i);

- A sum equivalent to lost remuneration for the period 8 November 2016 to 31 March 2018, minus any remuneration received during that period;

- The company is ordered to pay Mr Ward the monetary value of 8.37 units in Pool 2 of the company's Investment Trust.

Such sums are to be paid to Mr Ward no later than **23 December 2020**. The parties are granted leave to return to the Court if there is a dispute as to the appropriate calculation of the latter two amounts.

[54] I anticipate that the parties will be able to agree costs. If that does not prove possible I will receive memoranda.

Christina Inglis
Chief Judge

Judgment signed at 2.30 pm on 4 December 2020