

ATTENTION IS DRAWN TO  
THE ORDER PROHIBITING  
PUBLICATION OF CERTAIN  
INFORMATION REFERRED  
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2018] NZERA Christchurch 155  
3022451

BETWEEN PHILIP DE BUYZER  
Applicant

AND WATTS & HUGHES CONSTRUCTION LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Peter Cahill, Advocate for Applicant  
Lynda Mathieson, Advocate for Respondent

Investigation Meeting: 18 July 2018

Submissions Received: 30 July and 16 August 2018 from Applicant  
8 August 2018 from Respondent

Determination: 25 October 2018

---

**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

---

- A Philip de Buyzer was unjustifiably dismissed.**
- B There is no separate finding that Mr de Buyzer was unjustifiably disadvantaged.**
- C Watts & Hughes Construction Limited is ordered to pay Mr de Buyzer taking contribution into account:**
- (a) Reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000 (the Act) in the sum of \$17,812.48 gross.**

**(b) Compensation under s 123(1)(c)(i) of the Act in the sum of \$11,250 without deduction.**

**D The counterclaim is dismissed.**

**E There is no award for a penalty for breach of good faith.**

**F Costs are reserved and a timetable is set for an exchange.**

### **Prohibition from publication**

[1] I prohibit from publication the names of the recruitment agencies and any details that may identify them.

### **Employment Relationship Problem**

[2] Philip de Buyzer commenced employment as Site Manager with Watts & Hughes Construction Limited (Watts & Hughes) on 9 January 2017. He was employed by Watts & Hughes to work on three different projects for the Christchurch City Council refurbishing Council owned units. Watts & Hughes is a duly incorporated company having its registered office in Auckland and involved in supplying construction management services.

[3] Mr de Buyzer signed an individual employment agreement (the employment agreement) with Watts & Hughes on 13 December 2016 before he commenced employment. Clause 3 of the employment agreement contained a trial provision.

[4] On Friday 21 March 2017 Mr de Buyzer had a discussion with Project Manager Paul Murphy. The Authority did not hear evidence from Mr Murphy. The first issue discussed was that he was being asked to work outside his scope as a licensed builder. The second issue discussed was about what he had said to a Christchurch City Council employee who I shall call T that upset her. The exchange with T occurred following a health and safety desk being left in a unit when the tenant went to shift in. At the end of his discussion with Mr Murphy Mr De Buyzer indicated that he intended to resign. For completeness the evidence supports this discussion between Mr de Buyzer and Mr Murphy was more likely by telephone.

[5] Mr de Buyzer decided over the weekend he did not wish to resign and on Monday 23 March 2017 he asked David Gamlen who is the South Island Regional Manager of Watts & Hughes for a meeting because his resignation had been given in the “heat of the moment.” A meeting took place with Mr De Buyzer, Mr Gamlen, Mr Murphy and the Operations Administrator Rachel Pickworth. Minutes were provided from the meeting that are more likely than not the best evidence of what was said.

[6] Mr de Buyzer was advised towards the end of the meeting on 23 March 2018 that it was the intention of Watts & Hughes to provide him with notice of termination of employment in accordance with clause 3 of his employment agreement.

[7] A letter was sent from Mr Gamlen to Mr de Buyzer dated 25 March 2017 that provided in reliance on the trial provision and ss. 67 (a) and (b) of the Employment Relations Act 2000 (the Act) Mr de Buyzer’s employment was to be terminated. He was given one week’s notice, with his last day of work being 3 April 2017. Mr de Buyzer did not read the email over the weekend however the letter was left on his desk when he arrived at work on Monday 27 March 2017. There was a further meeting that day and then Mr de Buyzer advised that he was on sick leave for the balance of the notice period and did not return to work.

[8] Mr de Buyzer says that he was unjustifiably dismissed. He seeks reimbursement of lost wages, compensation for loss of dignity, humiliation and hurt feelings in the sum of \$20,000. Further he says that there were unjustified actions in his employment that caused him disadvantage and a breach of the duty of good faith for which he seeks a penalty.

[9] Watts & Hughes say that Mr de Buyzer is not entitled to bring a personal grievance because of the trial period. They say he was not unjustifiably disadvantaged and there is no breach of the duty of good faith.

[10] Watts & Hughes counterclaim on the basis that Mr de Buyzer misrepresented his employment history by omitting a period of service with another construction company and

misrepresenting the length of time he had been employed with the council employer<sup>1</sup> before he commenced employment with Watts & Hughes.

[11] Watts & Hughes say that they were specifically recruiting for a role that required significant experience and solid relationships with government departments, and that had it been known that Mr de Buyzer had only worked for the council for a few months then Watts & Hughes would not have employed him. A further concern they had was that Mr De Buyzer had a history of leaving with negotiated exit packages. Watts & Hughes seek the sum of \$15,000 damages which was the fee paid to a recruitment agency at the time it employed Mr de Buyzer. It also says that Mr de Buyzer breached his obligations of good faith.

[12] Mr de Buyzer says that the Authority does not have jurisdiction to deal with Watts & Hughes counterclaim.

### **The issues**

[13] The Authority needs to determine the following issues in this matter:

- (a) Was there a valid trial period in Mr de Buyzer's employment agreement?
- (b) If the trial period was not valid, then was the dismissal justified?
- (c) Were there unjustified actions on the part of Watts & Hughes?
- (d) If there were unjustified actions did they cause disadvantage to Mr de Buyzer?
- (e) Were there breaches of good faith by either party?
- (f) Does the Authority have jurisdiction to consider the counterclaim by Watts & Hughes?
- (g) If the Authority does have jurisdiction to consider the counterclaim then was there a misrepresentation inducing Watts & Hughes to enter into an employment agreement with Mr de Buyzer?
- (h) If there was a misrepresentation then did Watts & Hughes suffer a loss that was reasonably within the contemplation of the parties at the time of the employment agreement?

---

<sup>1</sup> Not the Christchurch City Council

- (i) If it is found that it did then should there be an award made for damages?
- (j) If the dismissal was unjustified and/or there are found to have been unjustified actions that caused Mr de Buyzer disadvantage, then what remedies should be awarded and are there issues of contribution and mitigation?
- (k) Should a penalty be awarded for any breach of good faith?

**Was there a valid trial period in Mr de Buyzer's employment agreement?**

[14] The trial period provision in clause 3 of the employment agreement provided as follows:

**3 Trial Period**

- 3.1 The Employee's employment is subject to a Trial Period of 90 days in accordance with S 67A of the Employment Relations Act 2000.
- 3.2 The Employer may terminate the Employee's employment during the Trial Period. If the Employer does so the Employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- 3.3 One week's notice will be given to an Employee dismissed during or at the end of the Trial Period. In respect of any dismissal occurring within the 90 day trial period the Employer will act in good faith and be open and communicative with the Employee.

[15] Sections 67A(2) of the Act provides:

- (2) Trial provision means a written provision in an employment agreement that states, or is to the effect, that –
  - (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
  - (b) during that period the employer may dismiss the employee; and
  - (c) if the employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[16] Mr Cahill submits that there is no start date mentioned in the trial provision as required.

[17] Further he submits that Watts & Hughes did not raise concerns they had with Mr de Buyzer during his employment.

[18] Ms Mathieson submits that Mr de Buyzer understood and agreed to the 90 day trial period as described in clause 3. She submits that page 10 of the employment agreement

which contains employee specific details clearly states the commencement date of employment as 9 January 2017 and the termination notice under clause 3 of one week. Further that Mr de Buyzer signed a declaration at page 9 of the employment agreement to say that he had read and understood the conditions of employment and accepted them fully.

[19] Ms Mathieson has referred the Authority to an Authority determination which did not find a similar trial provision to that in Mr de Buyzer's agreement invalid – *Painter v Epic Hair Designs NZ Limited*.<sup>2</sup>

[20] In *Painter* the key issues determined in respect of the trial provision were whether the applicant was an employee before the signing of the employment agreement and whether the provision was invalidated by issues with the payment of notice. The validity of the trial period considered with the requirements of s 67A (2) (a) did not appear to have been argued.

[21] A short time after *Painter* was determined there were four Authority determinations involving the same employer in which there was consideration as to whether a 90 day trial provision met the requirement of s 67A(2) of the Act.<sup>3</sup> The material part of the trial was identical in each of the four cases as below:

15.1 A trial period will apply for a period of ninety days (“the Trial Period”) under s.67A Employment Relations Act 2000, to assess and confirm the suitability of the Employee for the position.

[22] It was held in all four determinations that the employer was precluded from relying on the trial period provision in clause 15 because it did not meet the requirement of s 67A (2) (a) of the Act. That was because it failed to state or contain words “to the effect that” the trial period commenced on the first day the employee started work.

---

<sup>2</sup> *Painter v Epic Hair Designs NZ Limited* [2016] NZERA Christchurch 112

<sup>3</sup> *Clark v Lighthouse ECE Limited* [2016] Auckland 281, *Du Plooy v Lighthouse ECE Limited* [2016] NZERA Auckland 282, *Baxter v Lighthouse ECE Limited* [2016] NZERA Auckland 283 and *Honey v Lighthouse ECE Limited* [2016] NZERA Auckland 284.

[23] The then Chief Judge Colgan of the Employment Court in *Smith v Stokes Valley Pharmacy (2009) Limited*<sup>4</sup> stated that ss. 67A and 67B of the Act remove longstanding employee protections and access to dispute resolution and to justice and they should be interpreted strictly and not liberally. It was stated that legislation that removes previously available access to courts and tribunals should be strictly interpreted and that consequence must be clearly articulated.<sup>5</sup>

[24] There is specific reference in *Smith* to s 67A (2)(a) of the Act and that the start of the trial period is “at the beginning of the employee’s employment”.<sup>6</sup>

### **Conclusion on validity of the trial provision**

[25] I return to the trial provision that was in Mr de Buyzer’s employment agreement mindful in doing so of the strict interpretation approach as set out in *Smith*.

[26] Clause 3 in the employment agreement does not state that the trial period starts at the beginning of Mr de Buyzer’s employment.

[27] I have then considered whether clause 3.1 of the employment agreement is “to the effect” that the trial period starts at the beginning of Mr de Buyzer’s employment with Watts & Hughes.

[28] I do not find that it could be reasonably implied from a reading of clause 3.1 or clause 3 as a whole that the trial period starts at the beginning of Mr de Buyzer’s employment with Watt & Hughes. There is no link between clause 3 on page 1 and the employee specific details that contain a commencement date for Mr de Buyzer on page 10 of the employment agreement. Ms Mathieson refers to the notice period for the trial provision but that period is referred to both in clause 3 and under the employee specific details on page 10. It could not be said that it is so obvious it goes without saying that the trial provision commences at the beginning of Mr de Buyzer’s employment

---

<sup>4</sup> *Smith v Stoke Valley Pharmacy (2009) Limited* [2010] ERNZ 253

<sup>5</sup> Above n 4 at [48]

<sup>6</sup> Above n 3 at [51]

[29] I have also considered whether the reference to s 67A (2)(c) of the Act in clause 3 provides that the trial period starts on commencement of employment by incorporation. That argument did not find favour in the four *Lighthouse ECE Limited* determinations.<sup>7</sup> I do not find reference by incorporation satisfies the strict interpretation approach required in *Smith* where there is removal of longstanding employee protection and access to dispute resolution.

[30] In conclusion I do not find that clause 3 contains a trial provision that states or is to the effect that the trial period starts at the beginning of Mr de Buyzer's employment.

[31] As a result of that finding Mr de Buyzer can raise a personal grievance about his dismissal and Watts & Hughes are required to justify the dismissal in accordance with the test of justification under s 103A of the Act.

### **Justification for the dismissal**

[32] Section 103A of the Act requires an objective consideration of whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[33] There are procedural fairness factors set out in s 103A (3) of the Act that must be considered by the Authority. These require concerns to be raised before dismissal, an opportunity for an employee to respond to the concerns and time for a response to be considered. A fair and reasonable employer could also be expected to comply with good faith obligations in s 4 of the Act and that includes access to information relevant to the continuation of employment and an opportunity to comment on information before dismissal.

### *Reasons for dismissal*

[34] Mr de Buyzer understandably concluded that he was dismissed for his exchanges with T from the Council because that was the main issue raised during the meeting on 23 March 2017. Mr Murphy also raised during that meeting that Mr de Buyzer appeared aggressive/abrupt in some of his email communications.

---

<sup>7</sup> Above n 3

[35] Mr Gamlen's evidence was that the basis for the termination was because Mr de Buyzer left one of his employers off the resume supplied by the recruitment agency and overstated his time with the Council employer. Mr Gamlen said that he started asking questions of Mr de Buyzer's previous employers but no-one would talk to him which concerned him. Although he said that he had these concerns since February 2017 he did not raise them with Mr de Buyzer. It was not until after termination that Mr de Buyzer became aware of concerns of that nature.

[36] Mr Gamlen said that he felt that the whole basis of the questions asked of Mr de Buyzer at his interview was that he wanted people skills with the ability to manage multiple stake holders. He said that he recalled the main conversation being about the employment with the Council and Fletchers EQR. Ms Mathieson referred in her final submission to a history Mr de Buyzer had with "fall outs" and exits with financial settlements with previous employers. There was no evidence about that and Mr de Buyzer did not accept that to be the situation. He said that he had not been involved in any earlier legal actions with any previous employer's and any payments on exit were of a contractual nature.

*Nature of concerns and explanations to the T issue and tone of email communication*

[37] Mr de Buyzer explained at the outset of the meeting on 23 March 2017 that he had no reason to resign and from his perspective had performed a good job. He accepted that there was "a hiccup on Monday" where he said some things he should not have to T but he said she also said things she should not have and he wanted a report of what has been said to have occurred. He described the incident as occurring in two seconds.

[38] Mr Murphy said at the meeting that the incident had compromised the relationship Watts & Hughes had with the Council and the company reputation.

[39] Mr de Buyzer explained about the circumstances with the desk and T. It was put to him that he did not seem to be aware of the potential negative impact when he talked to people and that he had not apologised to T who had cried because of the way he spoke to her. Mr de Buyzer responded that he had not seen her to apologise but that he did intend to do so. He asked if there had been a paper trail which he would like to reply to.

[40] Mr de Buyzer said that he had no idea what Mr Murphy was referring to and that he was not aware of the concerns of others about his communications and that he was careful how he spoke to people.

[41] Mr Gamlen made mention of the lack of care when Mr de Buyzer stated that he would resign. It was also mentioned that the Council did not want Mr De Buyzer on the job.

#### *Procedural fairness*

[42] There was an absence of procedural fairness before dismissal because Watt & Hughes relied simply on a trial provision.

[43] Any concerns about earlier employment were not raised with Mr de Buyzer and therefore he did not have an opportunity to respond to them and have that explanation genuinely considered by Watts & Hughes. He also asked for information about the T situation but that was not provided. The procedural unfairness was significant and meant that the procedural fairness requirements in s 103A (3) of the Act were not satisfied.

#### *Substantive justification*

[44] The procedural unfairness was such that I am not satisfied the dismissal was substantively justified.

#### *Decision to dismiss*

[45] A fair and reasonable employer could not have reached a decision to dismiss Mr de Buyzer in the circumstances as set out above.

[46] Mr de Buyzer has a personal grievance that he was unjustifiably dismissed. He is entitled to consideration of remedies but before turning to those I shall consider the claim that there were unjustified actions causing disadvantage.

#### **Were there unjustified actions on the part of Watts & Hughes that cause disadvantage?**

[47] Section 103 (1) (b) of the Act provides that:

That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was

(during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[48] It is alleged that there is a personal grievance that Mr de Buyzer's employment or 1 or more conditions of employment was affected to his disadvantage by some unjustified action of Watts & Hughes. Most of the actions are absorbed into the claim for unjustified dismissal. The grievance appears to relate to the events after Mr de Buyzer received notification that his employment was to be terminated on 3 April 2017 and during his notice period.

[49] Mr de Buyzer had said that he wanted to talk to his lawyer at the meeting on 23 March and Watts & Hughes had concluded he required a further meeting. A date was set for Thursday 30 March and advised to Mr de Buyzer at or about the same time he received the letter of termination. The meeting minutes were attached.

[50] Mr Cahill in an email to Rachel Pickworth on Sunday 26 March 2017 confirmed that Mr De Buyzer had requested that he represent him at that meeting.

[51] Ms Mathieson then responded on 26 March on behalf of Watts & Hughes. She stated that there seemed to be confusion regarding a meeting for the Thursday. She wrote that Watts & Hughes had not requested Mr de Buyzer to attend a meeting and had no matters to discuss. Rather she wrote that Watts & Hughes were under the impression that Mr de Buyzer wanted to hold a meeting which was agreed to and scheduled for 30 March at 3.30pm. She confirmed that Mr de Buyzer already had the meeting minutes and advised that it appeared that Mr de Buyzer does not require a meeting with Watts & Hughes and it will be cancelled from their schedule.

[52] Against that somewhat confusing background Mr de Buyzer then attended work on Monday 27 November 2017. He said that he received a phone call from Mr Murphy telling him to clear his desk and leave the site and come to the office at 12 noon to discuss alternative work for the week as the Council did not want him on the site. Mr de Buyzer considered that was contrary to what had been said at the meeting the previous week. Objectively assessed there had been some mention of that at the meeting on 23 March and in the meeting minutes.

[53] Mr de Buyzer then contacted Mr Cahill and asked that he go with him to the meeting. He did not advise Mr Murphy that he was bringing Mr Cahill. Mr Murphy did not react well to Mr Cahill's presence and Mr Cahill then agreed to leave. Ms Mathieson then arrived at the office. Mr Cahill was no longer at the office. Mr de Buyzer said that he made it clear that he would not discuss work issues with Ms Mathieson present and left. Both accused the other of being aggressive in subsequent correspondence. The Authority did not hear from Ms Mathieson, Mr Murphy or Mr Cahill.

[54] I have therefore considered the email exchanges on 27 March from Mr Cahill and the response from Ms Mathieson on that same day. Mr Cahill's main concern was that Ms Mathieson attended the meeting in his absence. Ms Mathieson in her email confirmed stated that she happened to call into the office at the same time Mr Cahill departed and took the opportunity to enquire with Mr de Buyzer why he had brought his lawyer to a work meeting. She asked amongst other matters that Mr de Buyzer confirm his attendance for the work handover in the morning with Mr Murphy.

[55] After the meeting Mr Murphy telephoned Mr de Buyzer to return to discuss his work for the week. He was not prepared to do that without his representative and then was on sick leave until his employment was terminated on 3 April 2017.

[56] The unjustified disadvantage grievance was not addressed to any degree in the applicant's final submission. On the balance of probabilities I find that the meeting on 27 March was to discuss where Mr de Buyzer could work for his period of notice as it appeared that the Council did not want him on site.

[57] The actions of Watts & Hughes in not allowing Mr de Buyzer to have his representative present at the meeting but then having its own representative subsequently attend the meeting could be seen as unjustified in the circumstances. The more appropriate way to deal with the matter would have been for Ms Mathieson to contact Mr Cahill directly.

[58] The evidence did not support that Mr de Buyzer engaged with Ms Mathieson but rather left the meeting and I do not conclude disadvantage as a result. I find that it was then made very clear to Mr de Buyzer that day that he could return to talk about his work for the week. His partner however advised Watts & Hughes that he would be on sick leave. I do not

therefore conclude that Mr de Buyzer was not able to or was prevented from working out his notice period because of any unjustified action on the part of Watts & Hughes.

[59] In conclusion to the extent that it could be said there was an unjustified action I am not satisfied that there was corresponding disadvantage. The grievance is not made out and remedies consequently do not flow.

### **Were there breaches of good faith by either party?**

[60] Ms Mathieson submits that Mr de Buyzer breached his obligations of good faith by “contriving a personal grievance during the meeting on 23 March 2016” and further by misleading and deceiving Watts & Hughes about his employment history.

[61] The meeting minutes about the first concern have to be read in context. Mr de Buyzer made it clear that he was not resigning and that he thought he was doing a good job on the project. It was in that context that he made a statement about needing to come to an agreement. I do not find that what Mr de Buyzer said at that meeting was a breach of good faith.

[62] At the time it was alleged that Mr de Buyzer misrepresented and deceived his employer about his employment history he was not in an employment relationship with Watts & Hughes. The duties of good faith in s 4 of the Act apply to parties to an employment relationship specified in subsection 2 of the Act.

[63] Mr Cahill seeks a penalty for a breach of good faith although there is little detail about what is relied on aside from the matters that gave rise to the findings of unjustified dismissal. Watts & Hughes made enquiries of Mr de Buyzer’s previous employers and concerns about his employment history as set out in the resume and at interview arose. There was no discussion with him about those concerns before his employment was terminated.

[64] The Authority has not found the trial period to be valid but at the time of dismissal that was what Watts & Hughes were relying on. Watts & Hughes did not consider it necessary to raise the concerns about previous work history with Mr de Buyzer. The meeting focussed on the matters at the time Mr de Buyzer indicated he was intending to resign. There was to be a further meeting at which Mr de Buyzer was to be represented on 30 March 2018.

It may have been at that meeting that a discussion could have taken place about the reasons for termination however that meeting was overtaken by earlier events described under the analysis of the unjustified disadvantage grievance.

[65] The trial period was relied on as being valid. If there was a breach of good faith I do not find it appropriate for a penalty to be imposed. To do so in such a case I find would involve a degree of overlap with any remedies for the unjustified dismissal.

### **Counterclaim**

[66] Watts & Hughes claim damages of \$15,000 from Mr de Buyzer which is the amount they paid to the recruitment agency.

[67] Mr de Buyzer's resume was provided to Watts & Hughes by their recruiting agency. The Authority did not hear evidence from anyone from the agency.

[68] Mr de Buyzer accepted in his evidence that he had had a falling out with a construction company before he went to work at the council. He talked about that with a person from the recruitment agency. He said that he did not see the resume provided by the recruitment agency to Watts & Hughes about him although accepted that the one provided by Watts & Hughes did not set out accurately the length of his employment with the council.

[69] I am not persuaded that the Authority lacks jurisdiction to consider this claim. The concerns raised by Mr Cahill I find are really about the remoteness of any damage.

[70] There is an issue about what induced Watts & Hughes to enter into an employment agreement with Mr de Buyzer. Mr Gamlen said in his evidence that he felt the whole basis of the decision to enter into an employment agreement was what had been represented about people skills and managing stake holders and relationships at multiple levels. His evidence was that the main conversation at the interview was about the Council employment and Fletchers EQR. Mr de Buyzer said in his evidence that he did not think anything was discussed about his relationship experience or whether he had a solid relationship with the council. No reference was provided by the council.

[71] There has been a considerable passage of time exists between the interview and the proceedings lodged by way of counterclaim. There was very limited written information about the discussions and there are only brief notations on the resume. It was also known at the time of the interview that Mr de Buyzer had left another construction company because of a personality clash with a project manager. I note that this “relationship clash” is specifically referred to in an email from the recruitment agency to Mr Gamlen dated 5 December 2016 putting forward his details. There is an excellent reference check provided about Mr de Buyzer from the then service manager of that construction company where he left because of a relationship clash. Ms Mathieson submits that Watts & Hughes were prepared to give Mr de Buyzer a chance with that disclosed knowledge on the basis of a 90 day trial period.

[72] There is also the issue of who prepared the resume and on what basis. Whilst Mr de Buyzer could have liability for misrepresentations made by his agent, the recruitment agency was primarily an agent of Watts & Hughes. There were no submissions made about that matter. The recruitment agency has a clause in its terms of business to the effect that Watts & Hughes is required to satisfy itself about a candidate and the agency makes no representation to the company about background, integrity etc.

[73] Primarily however the difficulty with the claim is what loss was suffered. There was no evidence that Mr de Buyzer was not performing well as Site Manager save for the one issue raised about how he had spoken to T. The employment agreement contained a 90 day trial provision albeit found not to be a valid provision for an assessment of suitability. Even if loss could be established which is somewhat doubtful I do not find that it could have been within the reasonable contemplation of Mr de Buyzer and Watts & Hughes when they entered into the employment agreement that if his employment history was misrepresented the loss he would be liable for would be the recruitment fee paid by Watts & Hughes.

[74] It was available to Watts & Hughes to raise the matter with Mr de Buyzer in a disciplinary context. The employment agreement provides in clause 23.2 that a disciplinary process may be initiated for provision of false information in the curriculum vitae or at the job interview.

[75] The counterclaim however does not succeed for the reasons set out above and is dismissed. The issue of misrepresentation will fall to be considered with any issues of contribution.

### **Remedies for unjustified dismissal**

#### *Lost wages*

[76] After dismissal Mr de Buyzer increased the amount of work he had been undertaking since December 2016 as an Uber driver. He said that he applied for some other work in the construction industry but was not successful. The Authority has received details of gross earnings over a period of 63 weeks from 3 April 2017 until the week ending 9 July 2018 just short of two weeks before the investigation meeting. I accept that there was an attempt to mitigate loss,

[77] Mr De Buyzer received when he was employed at Watts & Hughes a gross salary of \$95,000. That is a weekly income of \$1826.92 gross.

[78] Section 128 of the Act provides for reimbursement of lost wages where the employee has a personal grievance and has lost remuneration as a result. It provides that the Authority must whether or not it provides other remedies order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months ordinary time remuneration. I am not satisfied that this is a situation where I should exercise my discretion and order a sum greater than that be paid.

[79] In order to assess actual loss I have multiplied \$1826.92 gross which was the weekly income at Watts & Hughes by 63 weeks and have arrived at the sum of \$115,096.60 gross. From that I have taken away earnings over that period of \$55,357.72 leaving a balance of \$59,738.88. That is Mr de Buyzer's actual loss.

[80] Three months loss of income is \$1826.92 multiplied by 13 weeks which is \$23,749.97. That amount is less therefore than the actual loss.

[81] Three months loss when assessed with earnings from 3 April 2017 was incurred over a period of 24 weeks from 3 April 2017 to 18 September 2017 which is two weeks short of six months. I have then stood back and considered whether the relationship would have lasted for that period of time. The main reason Mr Gamlen said that there was a loss of trust and confidence in Mr de Buyzer was that his curriculum vitae were incomplete and incorrect. This was not a situation however where Mr de Buyzer had overstated his skills or where he could not perform the role. The concern was more about trust, relationship issues and a concern that Mr de Buyzer had a history of negotiated exit packages.

[82] Had the concerns about the resume been put to Mr de Buyzer I cannot be satisfied it was inevitable that his employment would have ended. He needed to have an opportunity to explain what had occurred including what had been said to and by those at the recruitment agency and his knowledge of that. There are always two sides to any personality clash and it cannot simply be concluded that Mr de Buyzer was to blame without needing to hear from him.

[83] I am further not satisfied that the relationship between Mr de Buyzer and the Council with some work and an apology to T could not have been rebuilt. Mr de Buyzer also needed to have an opportunity to understand the concern about email communication and be given time to improve.

[84] I do not therefore conclude that an award of three months lost wages should not be made.

[85] Subject to contribution Mr de Buyzer is entitled to an award of three months lost wages in the sum of \$23,749.97.

#### *Compensation*

[86] Mr de Buyzer said that he “felt gutted” to be dismissed and did not consider he had done anything wrong except by the way he talked to T. He said that he had never been dismissed and it caused a “financial crisis and issues in the relationship with his wife. A café he owned with his wife had to be sold although there was no other evidence about that to satisfy me that the sole cause of that was the dismissal.

[87] I find that Mr de Buyzer was impacted by the dismissal. It was sudden and unexpected. He considered he was dismissed for his interaction with T but after termination there were concerns raised about his resume. I have weighed that he had a business in which he could increase his earnings because he was not working however his income dropped quite significantly and lead to financial issues.

[88] Although \$20,000 is claimed under this head I find subject to contribution a suitable award for compensation is the sum of \$15,000.

#### *Contribution*

[89] Under s 124 of the Act where the Authority determines that an employee has a personal grievance it must, in deciding the nature and extent of remedies, consider whether the actions of the employee contributed and if required reduce the remedies that would otherwise have been awarded.

[90] I find on the balance of probabilities that Mr de Buyzer knew the company he had a personality issue with would not be referred to in his employment history, at least by name. It was something I find on the balance of probabilities that Mr de Buyzer did not want disclosed. I cannot be satisfied on the evidence that Mr de Buyzer was aware what was on his resume about the length of the employment with the Council.

[91] Mr Gamlen came to hear that Mr de Buyzer had worked for a construction company that he had not mentioned on his employment history. This created trust issues for him and in turn I find caused him to terminate the employment agreement with Mr de Buyzer.

[92] I find that there is a causal connection between the incorrect employment history and the situation that gave rise to the dismissal. The failure to disclose that in circumstances where I have found Mr de Buyzer had knowledge was an action that may be described as blameworthy.

[93] I find that the remedies should be reduced by 25%.

### **Orders made**

[94] I order that Watts & Hughes Construction Limited pay to Philip de Buyzer the following, taking contribution into account:

- (a) Reimbursement of lost wages under s 123(1)(b) of the Act in the sum of \$17,812.48 gross.
- (b) Compensation under s 123(1)(c)(i) in the sum of \$11,250 without deduction.

### **Costs**

[97] I reserve the issue of costs. Mr Cahill has until 6 November 2018 to lodge and serve submissions as to costs and Ms Mathieson has until 20 November 2018 to lodge and serve submissions in response.

Helen Doyle  
Member of the Employment Relations Authority