IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 246
3026714

	BETWEEN	PETER DALEBROOK Applicant
	AND	SCHUCK HOLDINGS LIMITED Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Melony Lowe, for the Applicant Respondent in person
Investigation Meeting:	03 August 2018
Determination:	08 August 2018

DETERMINATION OF THE AUTHORITY

A. Peter Dalebrook did not suffer an unjustified disadvantage to one or more of the conditions of his employment with Schuck Holdings Limited.

B. Peter Dalebrook was unjustifiably dismissed.

C. Peter Dalebrook contributed to his personal grievance by 60%.

D. Schuck Holdings Limited is ordered to pay to Peter Dalebrook the following amounts within 28 days of the date of this determination:

a. The sum of $4,227.60 gross for monies lost as a result of his personal grievance (such sum taking into account a 60% reduction for contribution);

b. The sum of $3,200 under s 123(1)(c)(i) of the Employment Relations Act 2000 (such sum taking into account a 60% reduction for contribution);

E. Schuck Holdings Limited breached its duty of good faith but no penalty is payable.

F. Schuck Holdings Limited did not breach the terms of Mr Dalebrook's individual employment agreement.

G. Costs are reserved.

Employment Relationship Problem

[1] Peter Dalebrook was employed by Schuck Holdings Limited on 4 September 2017 as a wood and pre-cast concrete worker. On 10 October 2017 Mr Dalebrook left work and did not return. The reason is in dispute. Mr Dalebrook alleges he was unjustifiably dismissed by Schuck Holdings on 11 October 2017. Schuck Holdings says he resigned.

[2] Mr Dalebrook further claims he suffered an unjustified disadvantage to his employment due to Schuck Holdings' failure to provide him with a safe workplace, and that Schuck Holdings breached its duty of good faith and the terms of his individual employment agreement. He claims reimbursement of lost wages, compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), penalties and costs. Schuck Holdings denies Mr Dalebrook's claims.

[3] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[4] The issues requiring investigation and determination are:

a) Did Mr Dalebrook suffer an unjustified disadvantage to his employment as a result of an alleged failure to provide a safe workplace?

b) Was Mr Dalebrook dismissed?

c) If so, was this justified?

d) If Mr Dalebrook was unjustifiably dismissed, or suffered an unjustifiable disadvantage, what remedies should be awarded?

e) If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Dalebrook that contributed to the situation giving rise to his grievance?

f) Did Schuck Holdings breach its duty of good faith? If so, should a penalty be awarded?

g) Did Schuck Holdings breach Mr Dalebrook's individual employment agreement? If so, should a penalty be awarded?

h) Should either party contribute to the costs of representation of the other party?

Relevant Background Facts

[5] Schuck Holdings Limited trades as Hunua Park Furniture. It makes park furniture and rubbish bins. It is managed by its owners, Alex Schuck and Jenny Shuck. At material times it employed two workers in its wood workshop and three employees in its steel workshop. Mr Dalebrook was employed to work in the wood workshop alongside Brian Pook.

[6] Prior to commencing his employment, Mr Dalebrook was provided with an individual employment agreement (IEA). He did not sign this however the material terms are not in dispute.

Health and Safety Concerns

[7] After commencing work for Schuck Holdings, Mr Dalebrook became concerned that it was not complying with its health and safety obligations under the Health and Safety at Work Act 2015. He was particularly concerned about incidents that occurred on 12 September 2017, 4 October 2017 and 6 October 2017. The first two instances involved other Schuck Holdings' workers. I shall return to discuss these injuries later in my determination.

[8] On Friday 6 October 2017 Mr Dalebrook was asked to paint two lengths of flat board. Each board measured 3.5 metres in length and was 50 mm wide and 10 mm thick. This was the first time he had undertaken any painting work for Schuck Holdings. After completing this work Mr Dalebrook said he suffered dizziness and a

headache. He also recalled his arm having a burning sensation but could not recall at what point he felt this. He went home and immediately had a shower.

9 October 2017

[9] On Monday 9 October 2017 Mr Dalebrook reported his reaction to Mr Schuck. Mr Schuck told Mr Dalebrook that he would not be required to finish the job and he would do it himself, after hours, so as to avoid any further adverse reaction to Mr Dalebrook.

[10] Mr Schuck said he also told Mr Dalebrook that he would not be required to do any more painting in the future as they were in the process of finding someone to outsource their painting work to. Mr Dalebrook could not recall being told this.

10 October 2017

[11] On 10 October 2017 Mr Dalebrook attended work. The events of that day are partially in dispute. Having heard from the parties I am satisfied the following events took place:

a. Mr Dalebrook wrote on the whiteboard that he wanted Schuck Holdings to purchase mixing and measuring containers.

b. Mrs Schuck viewed him doing this and asked him why he was putting these on the board when they had told him he wasn't going to have to do any more painting. She asked Mr Dalebrook to step into the office to have a talk with her and Mr Schuck.

c. The parties then discussed the reaction Mr Dalebrook had to the paint. Mr Dalebrook told them that the mixing and measuring of the paint should have been done in a booth with extraction because of the level of vapour and it was not safe to do otherwise.

d. Mr and Mrs Schuck disagreed. They pointed out that WorkSafe had been through their business several months before and had looked at their handling of dust and paint fumes. They advised Mr Dalebrook that WorkSafe had informed them that they were satisfied that they were working safely and appropriately. In addition, they were informed that

they did not need any specialist extraction as the workshop was well ventilated.

e. Mr Dalebrook told Mr and Mrs Schuck that he did not believe them and considered they were making this up to avoid putting in a booth. This offended Mr and Mrs Schuck. All parties were agitated. Mr Schuck asked Mr Dalebrook to leave his office or he was "going to lose it".

f. Mr Dalebrook then left the office and went to his car to calm down. He had a cigarette and then phoned his partner and explained what had happened. He said although he was not told he was fired he felt that he was unwelcome. He went back into the workshop, packed up all of his tools and other items and put them into his car. Approximately 45 minutes later he went to speak with Mr Schuck.

g. Mr Dalebrook reiterated why he thought a booth was necessary. Mr Schuck repeated that a booth was not necessary and told him that he could phone Brian Pook, another Hunua employee, if he wanted as he had talked with WorkSafe. This made Mr Dalebrook visibly frustrated.

h. Mr Dalebrook told Mr Schuck *"I am leaving"*. Mr Schuck asked him if he was sure but Mr Dalebrook did not hear him say this.

i. Mr Dalebrook then left and went home. This was at approximately 9.40 am.

11 October 2017

[12] On Wednesday 11 October 2017 Mr Dalebrook did not attend work. He did not phone or call Schuck Holdings.

[13] At 12.27 pm that day Mr Dalebrook emailed Mrs Schuck. The email advised:

> I'm an experienced painter of many years. I am happy to do painting for you so long as you provide the appropriate health and safety requirements, which you have not.
>
> I will not return to work until the workplace is safe to do so.
>
> Here are some examples to do with the painting.

> In my experience, for the solvent based and 2 pot paints which you use you require a designated spray area with extraction. Filling a workshop with flammable vapour is not safe. Filling a workshop with chemical vapour is not safe.
>
> The appropriate personal protective equipment has not been provided, but work has been asked to be done regardless.
>
> I have raised my concerns with you. The angry and dismissive response I have received is surprising and in my mind absolutely inappropriate.

[14] Mrs Schuck replied at 1.38 pm that day.

> Alex and I are disappointed that things did not work out as we had hoped but we accept your decision and wish you every success in the future.
>
> I have the MSDS sheets for all chemicals we use and I follow the safe handling instructions given by the manufacturer. For Armourcote 220 Base and Hardener, as well as #12 thinners, the PPE is gloves, boots, cotton overalls, half-face respirator with appropriate filters (full-face for bearded operators) and safety glasses with splash guards.
>
> Paint booths need to be used in work environments where this amount of PPE is unable to keep exposure levels below the recommended Workplace Exposure Standard. This is measured in parts per willion over time. A WorkSafe consultant is able to carry out an assessment of workplace exposure by taking samples multiple times at different times of the day and in different areas of the workshop. The WorkSafe consultant who visited us said that if our painting was sporadic (you were asked to paint once for 30 minutes), the PPE we showed him was adequate. Frequency and duration of exposure is central to calculating what sort of extra safety measures may be required in workplaces where painting is part of the core business, and the WES is exceeded frequently for extended periods of time.
>
> To be told by someone who does not know me, that I am lying about a conversation with a WorkSafe consultant in order to avoid having to implement safety measures, is insulting to say the least. The reaction you got from Alex and myself was an indication of the seriousness with which we view that allegation.

[15] Mr Dalebrook took from Mrs Schuck's letter that Schuck Holdings thought he had resigned. He did not correct Mrs Schuck's understanding. He said he had sought legal advice and had been advised by his representative not to respond.

[16] On 12 October 2017 Mr Dalebrook was paid his final pay for the period up to 11 October 2017.

[17] On 16 October 2017 Mr Dalebrook posted a letter to Schuck Holdings to advise he had not resigned. This letter also enclosed his work keys.

[18] The letter was received by Schuck Holdings on 19 October 2017. On this day Mrs Schuck emailed Mr Dalebrook:

> I have today received your letter with the return of our keys. Thank you for that.
>
> In your letter you say that you have not resigned. However, walking out of work at 9.40 am on a Tuesday morning, taking all your things with you, gave every appearance of someone who was not happy with their new job after a month.
>
> You then did not come into work the following day but did send an email around midday stating that you considered our painting conditions were unsafe and that you would not return to work unless we provided you with a paint booth. I replied to you the same day explaining in detail how our work conditions are entirely compliant with the Health and Safety at Work Act, and reiterating that we had been found to be compliant in our paint operation by a WorkSafe consultant. I also made clear at that time that we understood and accepted that you had made a decision not to return to work (given that we would not be constructing a paint booth).
>
> You did not respond to this email on 11/10/17 and we did not hear from you subsequently until receiving your letter today. If you believed that I was mistaken in accepting your decision not to return to work on 11/10/17, it strikes me as odd that you did not say so by return email at that time. In fact it took you a week to communicate to us that you had not resigned. Moreover returning your keys at the same time as saying you have not resigned is rather contradictory. It seems more likely that you have had a change of heart after a week of consideration.
>
> Clearly we cannot be expected to operate a business in this way. Once again, I'm sorry that things did not work out as we had hoped and we wish you well.

Issue 1: Unjustified Disadvantage

[19] Under s 103(1)(b) an employee may commence a personal grievance claim while still employed or after the employment has terminated, if one or more of the conditions of employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[20] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[21] Mr Dalebrook alleges he suffered an unjustified disadvantage to his employment by Schuck Holdings' failure to provide a safe work place.

[22] The Court of Appeal in *AG v Gilbert*[1] discussed the nature of the duty to provide a safe work place as follows:

> The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of "all practicable steps". What is "reasonably practicable" requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee … The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[23] The requirement to take all practicable steps to ensure an employee's safety only arises where an employer knows, or ought reasonably to know, about the circumstances giving rise to the risk of harm.

> While an employer cannot absolve itself of responsibility to take all practicable steps simply because its employees have not raised an issue, the alternative threshold of reasonable foreseeability must nevertheless be negotiated if a claim is to be successfully made out.[2]

Did Schuck Holdings fail to provide Mr Dalebrook with a safe workplace?

[24] Mr Dalebrook points to three incidents which he says demonstrated a culture of unsafe work practices at Schuck Holdings' workshops. For the reasons that shall follow I am satisfied that Schuck Holdings did not fail to provide Mr Dalebrook with a safe workplace. He did not suffer a disadvantage to one or more of his conditions of employment.

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[1] [2002] 1 ERNZ 1 at [83].
[2] *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC 99.

12 September 2017

[25] On 12 September 2017 Mr Dalebrook was working off site with two other Schuck Holdings' employees as well as Mr Schuck. Before commencing work they had a "toolbox meeting" where site activity, safe work practices, and safe observations were reviewed and discussed.

[26] The men were in the process of raising a wooden pedestrian bridge to bring it level with the concrete. Mr Schuck and Mr Dalebrook were levering the bridge timber with a steel pry bar. Mr Nicholls had a straight edge meter and was crouched on the bridge. The timber cracked and the pry bar connected with Mr Nicholls hard hat, knocking it off. Mr Nicholls carried on working.

[27] Mr Dalebrook said Mr Nicholls was not wearing a hard hat and he was injured. Mr Nicholls denied this. He said he was wearing a hard hat and he was not injured. Having heard from both men, I prefer the evidence of Mr Nicholls.

[28] I am satisfied that this accident did not disadvantage any of Mr Dalebrook's conditions of employment. Schuck Holdings took all reasonable and practicable steps to safeguard its employees on this occasion by having its toolbox meeting and requiring its staff to wear hard hats.

4 October 2017

[29] On 4 October 2017 Mr Dalebrook was working alongside Brian Pook. Mr Pook is Schuck Holdings' most experienced worker. He has worked for Schuck Holdings for 8 years but has been in the carpentry industry for approximately 50 years. He presented as a knowledgeable and credible witness.

[30] On this day the two men were feeding timber through a rip saw. Mr Pook was feeding the timber at one end of the saw bench using a push stick. Mr Dalebrook was at the other end pulling the timber through. Mr Dalebrook was pulling the pieces of timber too fast. Mr Pook asked him twice to slow down so he could get his end under control with the push stick. Mr Dalebrook failed to slow down. Mr Pook lost contact with the wood and the push stick made contact with the saw blade, kicking back and breaking his wrist. Mr Pook was off work for a period of 6 weeks.

[31] I am satisfied that this accident did not disadvantage any of Mr Dalebrook's conditions of employment. The evidence was that there was nothing Schuck Holdings could have done to prevent the accident.

6 October 2017

[32] On 6 October 2017 Mr Dalebrook was asked to paint two lengths of flat board. This was the first time Mr Dalebrook had undertaken painting work for Schuck Holdings. However, he had an extensive history undertaking painting work for other entities.

[33] Mr Dalebrook said he was not provided with the appropriate equipment for personal protection. This led, he said, to him suffering from dizziness, a headache and a burning sensation in his arm. These effects lasted for several hours after completion of the work.

[34] The painting work Mr Dalebrook was required to undertake used three materials. A base, a hardener and a thinner. I have viewed the safety data sheets for each of these materials. The data sheets set out the exposure controls that should be put in place for personal protection. I am satisfied that Schuck Holdings complied with these requirements and took all reasonable and practicable steps to safeguard Mr Dalebrook.

[35] I am fortified in this finding by the following evidence:

a. Schuck Holdings provided Mr Dalebrook with cotton overalls and nitrile rubber gloves. While I acknowledge these gloves are not suitable for use with thinners, I accept that Mr Dalebrook was only required to use thinners for cleaning the spray gun. When doing so he used a brush to avoid any contact with his hands thereby minimising any exposure.

b. Mr Dalebrook used his own respirator for the painting work but Schuck Holdings supplied him with the appropriate cartridges to protect him from breathing in the vapours. The respirator used was Type A and full faced.

c. There was no evidence of the level of vapours in the air during the period when Mr Dalebrook was painting. However, on balance, I am satisfied the levels of vapour Mr Dalebrook would have been subjected to whilst

painting were within the time waited average levels (TWA) specified in the occupational exposure limits set out in the Safety Data Sheets. The TWA is the average exposure to a contaminant to which workers may be exposed without adverse effect over a period such as in an 8-hour day or 40-hour week. The Safety Data Sheets record the TWA on the ingredients as 150 ppm for Methyl Ethyl Ketone and 50 ppm for Toluene. Methyl Ethyl Ketone is detectable at 2 ppm. At 5 ppm it is recognisable, and at 25 ppm it is easily recognisable. Toluene is detectable at 0.16-6.7 ppm and recognisable at 1.9-69 ppm. Mr Dalebrook did not detect any vapour.

d. Mr Dalebrook was unable to explain why a spray booth was required when working with the products he used. I am satisfied a fair and reasonable employer in Schuck Holdings' position could have concluded that a spray booth was not necessary in circumstances where:

   i. Mr Dalebrook was required to paint for a period lasting no more than 30 minutes. During this period the wood workshop was well-ventilated by a roller door and a fan.

   ii. WorkSafe had visited the wood workshop prior to 6 October 2017 and had inspected Schuck Holdings' painting process. It did not have any issues with this process.

   iii. The manufacturer's Safety Data Sheets did not require a spray booth.

e. WorkSafe inspected Schuck Holdings' wood workshop following Mr Dalebrook reporting the events of 6 October 2017. WorkSafe concluded that there were no issues with the health and safety system Schuck Holdings had in place.

[36] I am satisfied the conditions of Mr Dalebrook's employment were not disadvantaged by the events that took place on 6 October 2017. Schuck Holdings took all reasonable and practicable steps to ensure Mr Dalebrook was safe when undertaking the painting works.

Finding on Issue One

[37] I confirm the preliminary indication provided to the parties at the investigation meeting, namely that Mr Dalebrook did not suffer an unjustified disadvantage to his employment.

Issue 2: Was Mr Dalebrook dismissed?

[38] Shuck Holdings 'position is that, by his words and actions on 10 October 2017, Mr Dalebrook resigned. Mr Dalebrook denies this. He says he was dismissed.

The Law

[39] In *Boobyer v Good Health Wanganui Ltd* Chief Judge Goddard (as he was then) set out three distinct categories of cases where an employee is treated by an employer as having resigned.[3] These are:

a. Where the employee gave an unequivocal resignation and later sought to resile from it.

b. Where the events leading to the resignation were ambiguous and the employee learnt that the employer misunderstood the events as a resignation contrary to the employee's intention but did nothing to correct the employer's false impression.

c. Where an employer seized upon words not intended to amount to a resignation, nor reasonably capable of doing so, and the employee promptly made it plain that the employee's communication was not meant to be a resignation and should not be treated as if it were.

[40] The Court in *Taylor v Milburn Lime Limited* stated:[4]

> [29] In the years since the Chief Judge made his observations in *Boobyer*, the nature of the mutual obligations which underpin the employment relationship has changed significantly. The longstanding obligations of trust and confidence have been supplemented by the mutual obligation of good faith. Since the 2004 amendments to the *Employment Relations Act 2000*, the obligation of good faith specifically "requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other

[3] EMC Wellington WEC3/94.
[4] [2011] NZEmpC 164 at [29].

> things, responsive and communicative". Guided by the test of justifiability in s 103A, employers must now ensure that, in taking any step which may disadvantage an employee, they do what a fair and reasonable employer would do in all the circumstances.
>
> [30] Taking those factors into account, the first question must now be whether a fair and reasonable employer in the circumstances in which Mr Mahan found himself on 23 October 2008 would have responded the way he did. In particular, the question must be whether it was appropriate to send Mr Taylor the letter Mr Mahan sent and to do so without speaking to Mr Taylor or making further investigations.

Discussion

[41] I am satisfied that Mr Dalebrook's words "I'm leaving" on 6 October 2017 were ambiguous. However, when viewed with his actions in taking time out to talk with his partner, then collecting all of his tools and loading them into his vehicle, followed by his leaving work at 9.40 am in the morning and not returning, I am satisfied a fair and reasonable employer could have concluded he had resigned.

[42] However, before accepting Mr Dalebrook's resignation and organising his final pay, Schuck Holdings received his email of 11 October 2017. This email cast real doubt as to whether Mr Dalebrook wanted to end the employment relationship. It was apparent in the 24 hours since he had left that he had cooled down and reflected on matters.

[43] Where doubt about an employee's resignation exists, the good faith requirements prescribed by the Act in s 4(1A)(b) require an employer to make further inquiries and to ensure that its response is based on the employee's actual intentions.

[44] Schuck Holdings could have easily called or emailed Mr Dalebrook and arranged to meet or speak with him to ascertain whether or not he intended to resign. Its failure to do so was not what a fair and reasonable employer could have done in the circumstances and was unjustifiable. I find Mr Dalebrook was unjustifiably dismissed.

Issue Three: Contribution

[45] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions

of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded. [5]

[46] I am satisfied that Mr Dalebrook contributed significantly to the situation that gave rise to his personal grievance. The duty to deal in good faith is a mutual one. Employees have the same duties as employers to be active and constructive in maintaining the employment relationship. Employees must also be responsive and communicative. By waiting several days after receiving Mrs Schuck's letter before telling Schuck Holdings that he had not resigned, Mr Dalebrook failed in his duty of good faith.

[47] Had Mr Dalebrook been clear with Schuck Holdings then it is possible that he would have continued to be employed by them. Schuck Holdings gave evidence of the difficulties they experienced after Mr Dalebrook's employment came to an end due to their limited staff numbers. With Mr Pook away it was left with no workers in its wood workshop and had to reassign staff from its steel workshop to complete work.

[48] Mr Dalebrook's decision not to tell Schuck Holdings that he had not resigned was done following advice from his representative. This was poor advice that has seen both parties put in a situation that they might not otherwise have been. It sets this case apart from other similar cases where only a 50% contribution for contributory conduct has been made. I am satisfied Mr Dalebrook's conduct warrants a contribution of 60%.

[49] I confirm my preliminary indication provided to the parties that Mr Dalebrook's actions require the remedies I would otherwise have awarded to him to be reduced. I am satisfied this should be by 60%.

Issue Four: Remedies

Lost wages

[50] Section 123(1)(b) of the Act provides for the reimbursement by Schuck Holdings of the whole or any part of wages lost by Mr Dalebrook as a result of his personal grievance. Section 128(2) provides that I must order Schuck Holdings to pay

[5] S 124.

Mr Dalebrook the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.[6]

[51] Mr Dalebrook claimed lost wages for a period of 13 weeks from 12 October 2017. However, the documentary evidence I viewed showed that Mr Dalebrook obtained regular employment from 27 December 2017.

[52] Between 12 October 2017 and 27 December 2017 there are 10 weeks and 4 days. This equates to a sum of $12,852 gross. From this sum must be deducted the sum of $2,283 gross for earnings received by Mr Dalebrook during the period 26 October 2017 and 8 November 2017. In total Mr Dalebrook lost wages in the sum of $10,569.

[53] Taking into account a 60% reduction for Mr Dalebrook's contributory conduct I order Schuck Holdings to pay to Mr Dalebrook the sum of $4,227.60 gross for lost wages. Payment of this sum must be made within 28 days of the date of this determination.

Section 123(1)(c)(i) Compensation

[54] Mr Dalebrook claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i).

[55] Mr Dalebrook, and his partner, gave evidence of the effects that the dismissal had on him. In addition, I spoke with his Counsellor who also provided limited evidence on the effects his dismissal had on him.

[56] Taking into account the short duration of Mr Dalebrook's employment, his ability to find work within a short period, and the circumstances of his dismissal, I am satisfied that the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of $8,000. When setting the sum payable I have been mindful of the need not to keep compensatory payments artificially low. Recent cases reflect a discernible upswing in the quantum of awards for compensation under s 123(1)(c)(i).[7]

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[6] S 128(3).
[7] *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [112].

[57] Taking into account a 60% reduction for Mr Dalebrook's contributory conduct I order Schuck Holdings to pay to Mr Dalebrook the sum of $3,200 gross pursuant to s 123(1)(c)(i). Payment must be made within 28 days of the date of this determination.

Issue Five: Breach of Good Faith

[58] The Statement of Problem pleaded that Schuck Holdings breached its statutory obligations of good faith contained at s 4 of the Act. No particulars were provided in the Statement of Problem or Mr Dalebrook's evidence to support this claim. Mr Dalebrook was unable to explain how Schuck Holdings had breached its duty of good faith.

[59] In the absence of any particulars of a breach I can only assume that the breach is the same as I have addressed in terms of Mr Dalebrook's dismissal. Namely, a failure by Schuck Holdings to be active and constructive in establishing and maintaining a productive employment relationship.

[60] Schuck Holdings breached s 4 of the Act but I do not find that breach was deliberate, serious, and sustained. No penalty is payable by Schuck Holdings for these reasons and also for the reason that the facts have contributed to my finding of unjustified dismissal.

Issue Six: Breach of the IEA

[61] The Statement of Problem pleaded that Schuck Holdings breached Clauses 6 (Employer's responsibilities to act as a good employer), 14 (Health and Safety), 18 (Notice on termination) and Clause 30 (manner in which employment problems are to be resolved). No particulars were provided in the Statement of Problem or Mr Dalebrook's evidence to support this claim.

[62] I am satisfied that Schuck Holdings did not breach the IEA. Aside from its actions in dismissing Mr Dalebrook, I consider at all material times Schuck Holdings acted as a good employer and complied with its health and safety obligations. While it did not provide notice on termination this was due to its misunderstanding that Mr Dalebrook had resigned.

Issue 7: Costs

[63] Costs are reserved.

[64] The parties have been equally successful in this matter. It is therefore likely that I will order that costs lie where they fall. However, if the parties do not agree then they are encouraged to resolve any issue of costs between themselves.

[65] If they are not able to do so, and an Authority determination on costs is needed, the parties may each file a memorandum on costs within 14 days of the date of issue of the written determination on this matter. Any reply memoranda are to be filed 14 days thereafter. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Jenni-Maree Trotman
Member of the Employment Relations Authority