

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 72
5572180

BETWEEN FERNANDO GARCIA
 Applicant

A N D CFJ CONSTRUCTION PTY
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Philippa Tucker, Counsel for Applicant
 Anna Oberndorfer, Advocate for Respondent

Investigation Meeting: 12 and 13 April 2016 at Christchurch

Submissions Received: 18 and 31 May 2016 for Applicant
 23 May 2016 for Respondent

Date of Determination: 3 June 2016

DETERMINATION OF THE AUTHORITY

- A. Mr Garcia was unjustifiably constructively dismissed by the respondent and is entitled to the remedies set out in this determination.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Garcia claims that he was unjustifiably constructively dismissed after having been demoted without his consent, and subjected to other alleged disadvantageous treatment by his employer, the respondent.

[2] The respondent denies that Mr Garcia was unjustifiably constructively dismissed. It asserts that Mr Garcia's demotion was by mutual agreement and it denies having treated him unfairly. Alternatively, the respondent asserts that Mr Garcia affirmed any breach.

[3] The respondent originally counterclaimed against Mr Garcia, seeking damages in relation to a toolbox and a phone charger which he failed to return and in respect of the excess on an insurance claim arising out of damages to a mobile telephone. At the start of the investigation meeting, the respondent dropped the claims in respect of the phone and charger. Mr Garcia also declared that the toolbox could be collected at any time. I therefore gave the parties the chance to agree the logistics of that collection.

Brief account of events leading to Mr Garcia's resignation

[4] The respondent is a small construction company operating in Christchurch. Mr Garcia is a Spanish national who started working for the respondent as a carpenter earning \$27 per hour on or about 22 September 2014. Mr Garcia was promoted to the position of leading hand, earning \$30 per hour, in December 2014 and was promoted to a foreman carpenter, earning \$32 per hour, on or around 11 February 2015. He was given a new employment agreement when he was promoted to leading hand, but not when he was promoted to foreman.

[5] It appears that the respondent was initially very pleased with Mr Garcia and, in particular, the quality of his work. Although evidence was given in briefs of evidence and heard orally about Mr Garcia complaining about a job that he and his colleagues had to carry out in January 2015 (the Cashel Street project), this does not appear to have prevented Mr Garcia from being promoted the following month, and so I do not regard this as being relevant to the issues that the Authority must consider.

[6] Indeed, the respondent was clearly particularly happy with Mr Garcia's work up to at least mid-May 2015, as is evidenced by text messages passing between Mr Garcia and Clayton O'Donoghue, the sole director of the respondent company. In one text, Mr O'Donoghue stated:

Thanks Fernando for doing such a great job its really appreciated!

The University of Canterbury project

[7] In April 2015, Mr Garcia started working at a site in the University of Canterbury and the Authority understands that it was in relation to his work that Mr O'Donoghue sent the appreciative text in mid-May. Mr Garcia fell out with the leading hand carpenter (known as Dingo) employed by the main contractor on the University project, as a result of which Mr Garcia shouted at this individual to *fire him*. It appears, however, that Mr O'Donoghue managed to smooth things over with the main contractor at the time and that it was not regarded by the respondent as a disciplinary matter at that point when it occurred. It was raised later though, as will be seen below.

The Rolleston project

[8] By June 2015, Mr Garcia was working in Rolleston and Mr Garcia says that he was required to work as a carpenter, which was below his competency and that he had all his management responsibilities removed from him without notice or agreement. He says that he had to work under the foreman employed by the main contractor, Calder Stewart. In his oral evidence, however, he agreed that he was still a foreman on paper, and that he was still being paid as a foreman.

[9] The respondent's explanation for this is that Calder Stewart requested two carpenters on a labour only hourly rate for the Rolleston job. Calder Stewart was a new client of the respondent and it wanted to make a good impression. As Mr Garcia and his colleague, Simon Williams, were seen as good workers, Mr O'Donoghue decided to have Mr Garcia and Mr Williams working together as a team of two carpenters.

8 June 2015

[10] Mr Garcia says that, while he was working at Rolleston, he would pick up the work crew in the company ute, beginning his journey at 6.30am. At the end of the working day he would then deliver the work crew back to their homes. On or around 8 June 2015 Mr Garcia texted the general manager of the respondent, Fiona O'Donoghue, asking if he was entitled to a 30 minute travel allowance every day while he was working in Rolleston. Apparently Mrs O'Donoghue replied that he was not entitled to such a payment as Rolleston was regarded as a suburb of Christchurch. That text was not seen by the Authority.

[11] Mr Garcia says that he did not agree with this response and wrote an email to Mrs O'Donoghue asking for a reconsideration of that decision, but that he did not receive any reply. Mr Garcia understands that one of the issues for which he was subsequently demoted related to him asking Mrs O'Donoghue to reconsider her refusal when he was accused of *failing to obey management orders*. It does not appear that this is denied by the respondent.

13 June 2015

[12] Mr Garcia says that the next significant incident that occurred was on Saturday 13 June 2015. He says that he had driven to Mr Williams' house, to take him to at the Rolleston site, but that Mr Williams did not appear. Mr Garcia spoke to him on the phone, and was told that he would not be coming to work that day. Mr Garcia then went to have some breakfast, and turned up at the site at 8.30am, which he conceded was late.

[13] However, Mr O'Donoghue and the other foreman, Thomas Zepackic, were at the site in relation to another project in the same area. Mr Garcia says that the worksite was otherwise totally empty, as no one else had showed up. He says that Mr O'Donoghue was aware of this but left the job site with Mr Zepackic, leaving Mr Garcia all alone *like a dog*. Mr Garcia says it was against health and safety regulations to be left on a site alone. He said he felt distressed and *without morale, demoted and ignored*. Mr Garcia therefore chose to leave the site.

[14] Mr O'Donoghue's version of this event is that on 13 June 2015 he and Mr Zepackic arrived at the Rolleston project to assess a separate project on the same site, as Mr Garcia says. However, upon arrival at 8.30am, they found that Mr Garcia was not present, despite Mr Garcia not having advised him that he would not be working that day. Mr O'Donoghue had been told that morning that Calder Stewart was not happy as they had a deadline on Monday for a Council inspection and Mr Garcia had assured them the previous day that he and Mr Williams would be there to ensure that the work was finished on time. Mr O'Donoghue says that he tried to call Mr Garcia but there was no answer.

[15] Shortly after that, according to Mr O'Donoghue, Mr Garcia arrived on site without his work uniform or personal protective equipment¹ and appeared surprised to see Mr O'Donoghue and Mr Zepackic present on the site. Mr O'Donoghue's evidence is that he asked Mr Garcia where he had been and Mr Garcia responded that he had had a sleep in. Mr O'Donoghue said that Mr Garcia seemed to be very agitated and aggressive about Mr Zepackic being there. Mr O'Donoghue's evidence was that he told Mr Garcia that he could not work there and that he had to leave the site. He says he saw Mr Garcia drive off, as he and Mr Zepackic were driving off.

[16] Mr O'Donoghue says that Mr Garcia was a working foreman, and that it was his responsibility to find another carpenter to assist him on the Rolleston site that day, rather than just driving off. Despite Mr O'Donoghue saying that he told Mr Garcia he had to leave the site, he also said in evidence that Mr Garcia should have telephoned another foreman who was working at another site and asked the foreman to let him have a worker to assist him. He says that there would have been no need for that worker to have been inducted into that site as he could have worked as a visitor. Mr Garcia denies this, saying that he would have been breaching health and safety laws to have done that. He also suggested that he had no power to ask for a worker to change sites, but that, if he did, he was not aware of that power.

[17] Mr O'Donoghue having driven away from the Rolleston site, Mr Zepackic left Mr O'Donoghue, who then went on to the University site for a meeting with the client site manager, which was starting at around 10am. Mr O'Donoghue says that, when he arrived at the University site and met up with the manager, they noticed Mr Garcia pulling in to the University. They saw him wandering around the site without any personal protective equipment, and not having signed in. Mr O'Donoghue said that Mr Garcia then got back into his ute and drove off. Mr O'Donoghue says that his client had seen this, and he had had to apologise for Mr Garcia's actions. Mr O'Donoghue also says that Mr Garcia had tried to telephone him several times, but that he was not in a position to answer. They eventually spoke that afternoon and it was agreed that they would meet later that day.

[18] Mr Garcia denies he was on site at the University, but says he was standing on a driveway, watching the progress of the work (as he had been working on it

¹ Mr Garcia denies this, saying he had all his PPE on when he arrived, apart from his hard hat, which he always kept in the container on site. It was when he returned from the container having fetched the hard hat that he found that he had been left alone.

previously, and there was a plan to do so again in a few months' time). He said he was also waiting for Mr O'Donoghue to approach him and talk to him but, after about 30 minutes, he gave up and left. This is also denied by Mr O'Donoghue, who says Mr Garcia drove off as soon as he spotted him.

[19] Mr Garcia says that the meeting he had asked for took place that afternoon and lasted from 4pm to 7.30pm. Mr Garcia says that they talked about his feelings about working beneath his capabilities, about how he felt he had been demoted, isolated and ignored. Mr Garcia says that Mr and Mrs O'Donoghue told him that he was working as a carpenter instead of a foreman because they had put him forward as the very best carpenter that the company had, together with his colleague.

[20] Mr Garcia says that they told him not to be selfish, and to think of the good of the company, and that he would soon have a project of his own to manage. Mr Garcia says that Mrs O'Donoghue did tell him he should not have emailed her about the travel allowance once she had told him he could not have one, and they also discussed his relationship with Dingo, when he was told he should be more diplomatic. Otherwise, there was no criticism of Mr Garcia, and they ended up having beers together. Mr Garcia says that he had felt better after that meeting.

[21] Mr O'Donoghue's recollection of the meeting is that they talked about Mr Garcia's responsibilities as a foreman and a representative of the company and that they reviewed all the problems that had been arising over the past, making clear that he could not simply fail to turn up and not tell anybody he was not coming or that he was running late. He says that they also made it clear that turning up at the University without permission and without any safety gear was a serious matter and they could not keep accepting *that sort of thing*. Mr O'Donoghue agreed that matters had essentially been resolved by the end of that meeting, and agreed they had drunk some beers together.

[22] It is Mrs O'Donoghue's evidence that they discussed the behaviour that they considered to be misconduct and emphasised how serious it was. This included their concerns about Mr Garcia smoking during work hours and the damage to the reputation of the business following *the altercations he had engaged in*.

[23] Mrs O'Donoghue says that they also talked about Mr Garcia's failure to notify either of them when he was not at work on 13 June, that it was a breach of the

employment agreement and that it was *deemed more serious because of the high position of responsibility he held as a foreman in the company.*

[24] The issue of smoking was the subject of much evidence in the respondent witnesses' briefs of evidence. In short, several witnesses said that Mr Garcia would regularly smoke in areas that were strictly non-smoking and would also take up to 15 minutes four times a day to take unscheduled smoking breaks whilst working at the University. Mr Garcia says that his smoking had never been mentioned prior to his demotion, and he never did smoke other than at designated areas and during smoko and lunch breaks.

[25] I am satisfied on the basis of evidence from independent witnesses that the timing of Mr Garcia's smoking breaks did cause the respondent and its clients concerns. However, it would appear that this meeting on 13 June 2015 was the first time that Mr Garcia had been told formally about concerns about his smoking.

19 June 2015

[26] Mr Garcia says that, on Friday, 19 June 2015, as he was driving home, Mr O'Donoghue called him to tell him that he had had *awesome feedback from Calder Stewart management about you and Simon. Thank you very much, I really appreciate it.* Mr Garcia said that he also had feedback directly from Calder Stewart on three occasions and each time the feedback was very good, the company expressing its admiration for the quality and performance of the work carried out by Mr Garcia and Simon.

20 June 2015

[27] Mr Garcia says that, on Saturday, 20 June 2015, he had been vomiting, and had diarrhoea and a headache, and so he was unable to attend work that morning. He says that he called his colleague, Mr Williams, early in the morning saying that he was not going to work because he was sick. He says that he had been working every Saturday and some Sundays since November 2014. During his oral evidence he conceded that he had made a mistake and should have called Mr O'Donoghue instead of, or as well as Mr Williams. However, in her evidence, Mrs O'Donoghue conceded that Mr Garcia may not have seen the HR policies in which the sickness reporting policies were set out requiring employees to report to Mr or Mrs O'Donoghue. The Authority did not see these policies.

[28] Mr Garcia says that Mr O'Donoghue called him at 10.30 that morning. Although Mr Garcia told him that he was sick, Mr O'Donoghue told Mr Garcia that *my behaviour was unacceptable as a foreman and that Simon could not be left alone as it put him at risk*. Mr Garcia says that this conversation caused him some concern, because he was apparently being regarded as a foreman even though he was not a foreman on that particular job.

[29] Mr O'Donoghue says that he did not know that Mr Garcia was sick until later in the day, when he eventually spoke to him by telephone. He says that Mr Williams had told him that Mr Garcia would be in later. He agreed that he had been angry with Mr Garcia for letting Mr Williams work alone.

22 June 2015

[30] Mr Garcia says that he started work at 5am the following Monday, 22 June 2015 and received a text halfway through the day from Mrs O'Donoghue summoning him to a meeting at 5.30pm. He had no idea what the meeting was about, but knew it was not going to be good, because of the conversation Mr O'Donoghue had had with him on the Saturday.

[31] Mr Garcia says that, when he arrived at Mr and Mrs O'Donoghue's house at 5.30pm, he was told by Mrs O'Donoghue that Mr O'Donoghue was running late, and that he had to wait in the car until Mr O'Donoghue eventually turned up at 6.20pm. He says that, by this time, he had been away from home for 13 hours and he was freezing and physically and mentally exhausted.

[32] Mr Garcia says that the meeting started at 6.45pm and that he was told that, due to his performance and behaviour, he was being demoted to carpenter. He says that they were speaking angrily to him and that he was feeling panicked because he had been applying to Immigration New Zealand for residency on the basis of him being a foreman and had also been thinking of travelling to Spain to see his children.

[33] Mr Garcia says that Mr and Mrs O'Donoghue then asked for the keys to the car and, at that point, he protested because he did not have another car. He said that Mrs O'Donoghue told him that he had to accept this or be fired on the spot. Mr Garcia says that he started to cry openly in front of them (this is not contested by Mr and Mrs O'Donoghue) and that, after a few minutes of silence, Mr O'Donoghue

told him that he could keep the car and the phone. Mrs O'Donoghue then gave him an envelope with a letter in it which he did not open until later.

[34] The contents of the letter, although reasonably long, are worth replicating in full in this determination as the demotion is the start of the chain of key events that led to Mr Garcia resigning and claiming constructive dismissal. The letter reads as follows:

22 June 2015

Dear Fernando,

***DEMOTION OF POSITION – FOREMAN AND FINAL WARNING
SERIOUS MISCONDUCT AND POOR PERFORMANCE***

I am writing to you about the Demotion as Foreman and Final Warning Notice with CFJ Constructions Pty Limited trading as CFJ Contracting effective immediately.

I refer to our meeting dated the 13th June 2015, which was attended by you, Fiona O'Donoghue and myself, Clayton O'Donoghue. During the meeting and other meetings on site we discussed your actions pertaining to numerous incidents of serious misconduct and poor performance.

During the meeting and on several occasions onsite we discussed:

- *Actions which Seriously Damaged the Employer's Reputation*
 - *University Project – Inability to communicate effectively and co-operate with client.*
 - *University Project – Direct argument with client – “Just fire me, Just fire me”.*
 - *University Project – Smoking during working hours – Time or hours falsification due to number of smoke breaks during work hours (non smoking site length of time taken per smoke estimated at 10-15 minutes per smoke) These actions resulted in poor client interrelations and the client making a direct complaint [sic] to CFJ Director.*
 - *University Project – Conducting an onsite visit without instruction or request from CFJ Director or Client.*
- *No Adherence to Health and Safety*
 - *University Project – During onsite visit without instruction or request from CFJ Director or Client your [sic] entered the construction site without wearing any mandatory PPE (hi vis, hard hat, glasses).*
 - *Calder Stewart – Smoking on site (construction site strictly non-smoking as advised during site induction). Serious cause – possible contamination of product and serious deliberate action damaging the Employer's Reputation for non-compliance.*
 - *Calder Stewart – Non-attendance at work leaving one person to work alone without notification to CFJ Director or Management – non-compliance with OHS*

procedures causing serious risk in the event of an accident or incident.

- *Poor Performance and Misconduct*
 - *University and Calder Stewart Travel Allowance – Inability to accept instruction given directly by Senior Management.*
 - *Calder Stewart – Non-attendance at work when you have communicated to the client that you will be attending with deadlines to meet.*
 - *Calder Stewart – Non-attendance without notification to the CFJ Director of your absence.*
 - *University Project – Inability to communicate effectively and co-operate with client.*

As discussed, your conduct has been unsatisfactory we have given you many opportunities and guidance to improve or rectify some of these actions to no avail. The serious implications that your actions as a senior manager and leader have damaged our reputation as a company result in loss of potential further loss of clients.

After further investigation and consideration, your serious misconduct and performance is [sic] based on the following:

- *Your actions and deliberate behaviour is inconsistent with the continuation of your contract as Foreman.*
- *Your actions caused a serious and imminent risk to the reputation, viability or profitability of the Employer's business.*
- *No Adherence to Health and Safety – Serious breaches.*
- *Direct and deliberate behaviour with regards to smoking on non-smoking construction site.*
- *Repetitive and Continual Inability to communicate effectively and positively with clients.*

We consider that your actions constitute serious misconduct and poor performance. Due to the above mentioned actions, CFJ Management is implementing effective immediately "Disciplinary Action" in the form of Demotion from Foreman to Carpenter, additionally this notice being your final warning before termination.

Effective immediately you [sic] position will return to Carpenter with all entitlement as foreman withdrawn. These being:

- *Wages Deduction to Carpenter - \$28 per hour*
- *Motor Vehicle – A company vehicle is not included in Carpentry Entitlements.*
- *Mobile Phone – A mobile phone is not included in Carpentry Entitlements.*
- *Fuel Card – A fuel card is not included in Carpentry Entitlements.*
- *Tools – All company tools are to be returned immediately to the Company Warehouse – Holding of Company Tools is not included in Carpentry Entitlements.*

As your employer, we have completed a full investigation into these matters, a fair and reasonable process and consider although CFJ has grounds for immediate dismissal we offer a further duty of good faith in the position of reinstatement as Carpenter.

Due to your serious misconduct, your performance as a Carpenter will continue to be under review for the next 3 months. During this time, CFJ senior management will continue to assess your performance and conduct to prevent and [sic] further misconduct or poor performance.

*Yours sincerely,
Fiona O'Donoghue
General Manager
CFJ Constructions Pty Limited*

[35] Mr O'Donoghue's evidence about the meeting on 22 June 2015 is that Mrs O'Donoghue went through the contents of the letter with him and that Mr Garcia agreed with most of what they were saying to him, although he took exception to the allegation that he had falsified time records, which was an allegation related to him taking breaks to smoke. Mr O'Donoghue says that they suggested demotion to him as a means of addressing the problem and relieving Mr Garcia's pressure, and that Mr Garcia accepted it. At one point Mr Garcia said, according to Mr O'Donoghue, *thank you, I thought I was going to lose my job*. Mr O'Donoghue said in his evidence that they were happy to let him keep the phone and the car.

[36] Mrs O'Donoghue conceded in her oral evidence that she had not forewarned Mr Garcia what the meeting was to be about, nor that he may be dismissed or demoted as a result of the meeting and that she had not told him he could have a support person with him. She also conceded that she had written the demotion letter before the meeting had taken place, and that the employment agreement Mr Garcia was employed under did not provide for demotion as a disciplinary outcome, although she said she had done some internet based research which had suggested to her that demotion may be a possible disciplinary sanction.

23 June 2015

[37] Mr Garcia said that he had to go to the doctor the following day to get anxiety and stress medication and that, although the doctor said that he should take a few days off sick, he refused as he was afraid of Mr and Mrs O'Donoghue's reprisals. Mr Garcia said that the doctor had urged him to get legal advice. Mrs O'Donoghue says that, on 23 June 2015, Mr Garcia told her that he had been very upset and had not been sleeping as he had recently found out that his father in Spain was very ill with cancer. However, Mr Garcia said that he had known about his father's cancer before he had started work with the respondent.

[38] Mr Garcia returned to work on 24 June 2015 but says that he was ignored by Mr O'Donoghue, which Mr O'Donoghue denied. Mr Garcia continued to attend work for the next two weeks or so.

9 July 2015

[39] On 9 July 2015, Mr Garcia parked the company ute (which he had been allowed to retain, although the respondent maintains he had refused to give it back) beside Mr O'Donoghue's. Mr O'Donoghue spotted a scratch on the front bumper and that the bumper had been displaced. Mr Garcia says that Mr O'Donoghue asked him if he had had an accident, and he replied that he had not, but believed that the damage, which he had not noticed, might have happened in the carpark of the Westland Milk Company where he had been parked during the Rolleston work. He says that he tried to explain this to Mr O'Donoghue but that Mr O'Donoghue ignored him. This is denied by Mr O'Donoghue.

[40] Mr Garcia says that, the same day, one of the senior carpenters was dismissed on the spot for failing his trial period. This had upset Mr Garcia, especially as Mr O'Donoghue had not acknowledged the carpenter, or said good bye. This is denied by Mr O'Donoghue. Mr Garcia then got a call from Mrs O'Donoghue telling him to return the car so it could be assessed by insurers. Mr Garcia returned the car that evening, when he was also told that he needed to return the fuel card and the telephone. Mr Garcia says that Mr O'Donoghue allowed him to keep the phone for a few more days to retrieve all the photos and personal information on it. Mr O'Donoghue's evidence was that Mr Garcia was hostile and so he did not want to argue with him about the phone, which he did not regard as very important. *I didn't care; it was just a phone* he said in his oral evidence.

[41] On the evening of 9 July 2015, Mrs O'Donoghue sent an email to Mr Garcia saying that Mr O'Donoghue would transport Mr Garcia to site the following morning but that the company was not required to transport anybody to and from their work location. She also stated in the email that Mr Garcia had not, or had refused to return, the mobile phone and that it had to be returned the following day without any exceptions. She also required the return of the company toolbox and any other company items he may have had in his possession.

10 July 2015

[42] Mr Garcia attended his doctor the following day and was told to have some time off for stress and anxiety. On the same day, Mr Garcia sent an email to Mrs O'Donoghue in the following terms:

Hi Fiona,

I have never been through this kind of situations and I want to put and end to this as soon as possible because all of this is harming my health, the doctor told me I must stop working for a week, I will send you the report.

As our contract states I want to solve all with a fair agreement between you and me before going to employment relationships.

I have really enjoyed to work for you and Clayton, working with you I have spent The best moments in nz, there is no hatred in me towards you, I just want to keep in my mind the good moments in CFJ.

I ask you for a meeting to finish our contract in a good way for all of us.

I am pretty sure it's going to be very easy, because all of us are good and practical people.

Looking forward to your answer.

[43] Mrs O'Donoghue replied that they would have a meeting in the office to discuss the matter further when he returned to work. In reply to that email, Mr Garcia sent an email as follows:

Hi Fiona,

I just want to point out I am not looking for money compensations, I have very strong work ethics and loyalty to my companies, never ever I have taken a sick leave at my company expenses and I even fell bad for being pay without working, I just want to solve this as soon as posible, you know my issue with my father plus this employment situation is harming my health seriously,, I real like and admire Claynton and sympathise with both of you, I know how hard it is to run a company and the stress it brings, I really want to finish this stage of my career with Claynton and you shaking hands and wishing all the best for you.

[44] Mr Garcia said that, when he sent this email, he had no idea that he could resign and claim constructive dismissal as such a concept was foreign to him. It was only after he had obtained legal advice, around 17 July, that he learned about constructive dismissal as a concept.

15 July 2015

[45] On 15 July 2015, Mrs O'Donoghue sent an email to Mr Garcia during his absence on sick leave stating that, on his return from sick leave, they would need to hold a meeting to discuss some serious allegations of misconduct. Attached to the email from Mrs O'Donoghue was a letter bearing the same date in the following terms:

Dear Fernando,

Alleged Serious Misconduct – Notice

I am writing to inform you of the following allegations of serious misconduct. On your return from sick leave we will have a meeting. An investigation into these allegations will commence and you will have the opportunity to raise your views and discuss these allegations in detail during the meeting on your return from sick leave.

The allegations are as follows:

1. *Failure to follow lawful instruction – disclosure of substantial damage to company assets being Hilux Ute.*
 - (a) *The damage was not disclosed, but was noticed by the Company Director. When asked how this happened, you responded “I don't know”. The company policy is stated and has been addressed during previous vehicle accidents and repairs.*
2. *Failure to follow lawful instruction – return company assets being mobile phone after numerous verbal and written instruction.*
 - (a) *Your refusal to return company asset at the request of CFJ Business Manager, Fiona O'Donoghue and Director Clayton O'Donoghue. It should be further noted that the return of this asset was agreed between yourself and CFJ upon your demotion from Foreman to Carpenter on 22/6/2015.*

Please be advised that this action is precautionary to allow a fair and impartial investigation to take place and will not prejudice the outcome of any subsequent action. We hold a meeting on your return of sick leave.

If the investigation determines that an act (or acts) of serious misconduct or lesser misconduct have occurred then you will be notified in writing of such outcome which may lead to disciplinary action or termination of employment.

During this investigation time we give you the opportunity to seek legal advice and have a support person.

If the allegations are not substantiated then you will be re-instated and returned to work as quickly as possible, with our gratitude of your cooperation.

If you have any further questions please do not hesitate to contact me.

*Regards,
Fiona O'Donoghue
CFJ Contracting, General Manager*

20 July 2015

[46] On 20 July 2015, Mr Garcia's legal representatives wrote a letter to the legal representatives of the respondent raising a personal grievance and stating that: *Our client is resigning on the grounds of constructive dismissal.* This letter is lengthy and it is not necessary to replicate the whole text in this determination. However, the following sheds some light on the reason for Mr Garcia resigning:

... Our client is resigning on the grounds of constructive dismissal. The breach of the implied term of trust and confidence has been so significant that our client has been left with no option but to resign. Breaches are substantial. They include:

1. *Demotion without consent from a position of foreman having been promoted from carpenter, to leading hand, to foreman, without any substantive reason and despite promises it was a one off event due to a contract and despite assurances his pay would not be effected [sic].*
2. *Being required to return a company vehicle and fuel card without any good reason, having been asked simply to bring the ute to work to check a possible damage issue.*
3. *Being required to return a company cell phone without any good reason.*
4. *Being required to return the tool box and tools without any good reason.*
5. *Reduction in wages pursuant to demotion from foreman to carpenter, not even to leading hand.*
6. *Disciplinary action for misconduct for being sick for one day on a Saturday.*

There is an extraordinary pattern of behaviour by the employer culminating in a unilateral action against our client to his detriment.

[47] There then ensued between the parties' representatives various emails and correspondence, including about the attempted uplifting of the toolbox, which is, apparently, very heavy and needed a special vehicle and several men to collect. At the time of the Authority's investigation meeting I directed the parties to agree on the logistics of collection.

The overall credibility of the witnesses

[48] Perhaps not surprisingly, Mrs O'Donoghue's written evidence is very similar to that of Mr O'Donoghue. However, during the Authority's investigation meeting, there were several aspects of her husband's oral evidence that Mrs O'Donoghue said she did not agree with. It is not necessary to set those out here. However, I will say that I found Mr O'Donoghue to be a credible witness.

[49] Mr Garcia was also a credible witness on the whole, readily conceding mistakes he made, although I believe he tended to get carried away with his evidence at times.

The issues

[50] The following issues need to be determined:

- a. Was Mr Garcia unjustifiably constructively dismissed?
- b. Did Mr Garcia suffer financial loss as a result of a unilateral variation of his employment agreement when he was demoted?

Was Mr Garcia unjustifiably constructively dismissed?

[51] The fundamental legal principles relating to the law on constructive dismissal were enunciated in the Court of Appeal case of *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*², which set out three non-exhaustive categories of constructive dismissal:

- (1) Where the employee is given a choice of resignation or dismissal;
- (2) Where the employer has followed a course of conduct with a deliberate and common purpose of coercing an employee to resign;
- (3) Where a breach of duty by the employer leads a worker to resign.

[52] It is not clear which category Mr Garcia is relying upon, although there is no evidence to suggest that the first category is relevant. I also believe that there is little cogent evidence to support a contention that the second category applies. I therefore focus on the third category.

² [1985] 2 NZLR 372 (CA) at 374-375

[53] There is no doubt that the process followed by the respondent in respect of the meeting in which Mr Garcia was demoted was wholly unsatisfactory, and quite unfair. He was effectively ambushed. The unfairness included:

- a. Not warning him in advance that he was to attend a disciplinary meeting;
- b. Not warning him in advance what concerns were to be discussed at that meeting;
- c. Not warning him in advance that he faced demotion (and potentially, according to Mrs O'Donoghue's demotion letter, *immediate dismissal*);
- d. Not offering him a support person;
- e. Not investigating the concerns with him, but rather confronting him with them as already proven facts;
- f. Relying on issues which Mr Garcia reasonably concluded had been fully resolved in the 13 June meeting, such as his falling out with Dingo;
- g. Characterising as misconduct issues which could not reasonably be so characterised, such as calling Mr Williams instead of Mr O'Donoghue when he was sick, in the absence of a clear sickness reporting policy, and asking Mrs O'Donoghue to reconsider, in polite terms, her refusal to pay a travel allowance when he was driving to and from Rolleston;
- h. Failing to take into account the inherent confusion between Mr Garcia's position as foreman on paper and his actual position at the Rolleston site of carpenter, and the effect this confusion may have had on Mr Garcia's actions;
- i. Relying on witness evidence (as evidenced by Mrs O'Donoghue's email of 9 July 2015) which was never put to him;
- j. Finding that Mr Garcia's actions had damaged the respondent's reputation and caused loss of clients, when there was no proof of either result at all;

- k. Determining in advance of the meeting that he was to be demoted (as is evidenced by the pre-prepared letter);
- l. Requiring him to attend a disciplinary meeting when he had already been at work a significant number of hours; and
- m. Not paying him for attending that meeting.

[54] In addition, demoting Mr Garcia without having the express contractual right to do so was also a fundamental breach of contract. This demonstrates the danger of employers relying upon the internet to find out their rights and responsibilities. Mrs O'Donoghue would have been better off consulting a legal adviser or the Ministry of Business, Innovation and Employment's Contact Centre.

[55] Mr Garcia does not bring an unjustified disadvantage claim but, if he had, the actions of the respondent would have plainly been unjustified, as no fair and reasonable employer could have acted in the way that this respondent acted in all the circumstances³. As it is, though, these actions form the background to the unjustified constructive dismissal claim.

[56] On the face of it, these actions are so serious that I can conclude without hesitation that they are capable of constituting a breach of trust and confidence and of good faith, as well as a breach of the express terms of Mr Garcia's employment agreement. Furthermore, those breaches were so serious that they would, in the ordinary course of events, amount to a repudiation of the employment contract which any fair and reasonable employer could foresee led to a substantial risk of the employee resigning⁴.

[57] However, Ms Oberndorfer submits that Mr Garcia accepted the demotion, and was even grateful that he had not been dismissed. This raises two issues:

- a. That the resignation could not have been reasonably foreseeable; and
- b. there would not be a breach, but rather an agreed variation of the employment agreement.

³ Section 103A of the Act.

⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc.* [1994] 2 NZLR 415 (CA) at [172].

[58] When I step back and consider the evidence that was given by the main witnesses to the meeting on 22 June 2015, I accept that Mr Garcia said *thank you, I thought I was going to lose my job* and that he was pleased to be demoted instead of dismissed. However, that statement must be viewed in the context in which it occurred.

- a. He was taken by surprise at being confronted by a disciplinary meeting;
- b. He was exhausted, having started work at 5am that morning;
- c. He was unsure of his legal rights, being a migrant for whom English is not his first language; and
- d. He was feeling (and was in fact) very vulnerable as he was legally in New Zealand only on the basis of his work visa with the respondent.

[59] Against this context, it is no wonder that Mr Garcia was grateful not to have been dismissed. That does not mean, however, that he accepted a demotion of his own free will. My analysis is that he was effectively given no choice at all. Even if Mrs O'Donoghue did not say he would be dismissed if he did not accept the demotion (and, on balance, I believe she did) Mr Garcia was told that he had committed serious misconduct, and that would naturally lead any employee to conclude that he could be dismissed.

[60] I therefore do not accept that Mr Garcia agreed to a variation of his contract on 22 June 2015 so that he would be demoted and have his pay rate cut with immediate effect. Therefore, with respect, the submissions in relation to foreseeability do not hold water.

[61] I also do not accept, as submitted by Ms Oberndorfer, that Mr Garcia resigned because of mere unhappiness. Mr Garcia was certainly unhappy at the end of his employment, but I attribute that unhappiness to being demoted, and the actions of the respondent that followed.

Did Mr Garcia affirm the breach?

[62] The next issue to examine is whether Mr Garcia affirmed the breach by working during the following 18 days, until 10 July when he sent an email to

Mrs O'Donoghue saying he wanted to *finish our contract*. Affirmation refers to the concept of an employee effectively waiving a breach by his employer by actions or words which he could otherwise have relied on to resign and claim constructive dismissal.

[63] An employee is not obliged to resign immediately in the face of a repudiatory breach. The Employment Court in *Premier Events Group Limited and others v Malcolm James Beattie and others*⁵ cited with approval a passage from a UK Employment Appeal Tribunal judgement in *WE Cox Turner (International) Ltd v Crook*⁶. This passage was as follows:

Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence with the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his right to accept the repudiation ... such further performance does not prejudice his right subsequently to accept the repudiation.

[64] Mr Garcia said that he had wanted to leave with effect from 22 June, the night he was demoted. However, he was very worried about his immigration status, and his income. In particular, he had been planning a trip to Spain in July to see his children and, I understand, he was anxious about taking the trip if he resigned⁷. He also says that his partner told him that he could not just be demoted unilaterally, *as this was New Zealand*⁸. He was also not sure whether he was actually going to suffer a reduction in pay until he received a payslip in or around 2 July.

[65] It is a fact that Mr Garcia did continue working during this period, but he said he did not even want to take any days off sick, despite being very stressed, because of the fear of being dismissed. An important indicator of him not accepting the demotion, though, was his keeping the ute and the mobile phone. He says he

⁵ [2014] NZEmpC 231

⁶ [1981] ICR 823 (EAT)

⁷ Although I believe he did not take the trip in any event because of the drop in pay.

⁸ She had actually said *this is New Zealand, not X*, naming another country. However, as that comment could be seen as a slur on the people of that country, some of whom live in New Zealand as law abiding citizens, it is not necessary to identify it in this determination.

protested and insisted on keeping them. Mr O'Donoghue said he agreed he could keep them (although this is something Mrs O'Donoghue did not accept). I believe that this was more than simply a matter of practicality as Ms Oberndorfer submits.

[66] However, the pre-prepared demotion letter makes clear that Mrs O'Donoghue expected him to return the ute and the mobile phone (and fuel card and tools) immediately, on 22 June. I therefore prefer Mr Garcia's evidence that he insisted on keeping them, which is a strong indicator that he did not accept his demotion to carpenter, and that he asserted that refusal to accept it throughout the following 18 days by keeping them. This is further strengthened by the fact that, the day after he was required to return the ute on 9 July, purportedly for insurance and repair reasons, he sent his email saying he wanted to *finish the contract*.

[67] In order to determine whether Mr Garcia affirmed the contract, it is necessary to step back and look at the overall context. Quite apart from him keeping the ute and mobile telephone during the period between 22 June and 9 July, Mr Garcia was not in a position to simply walk out, given his work visa⁹, and his financial need. He was looking for work before he resigned, and from that can be inferred that he was not able to leave until he had secured alternative work. That does not mean, though, that he resigned on the grounds of having found alternative work. It was the finding of alternative work which allowed him to accept the breach.

[68] Mr Garcia also did not know initially that resigning as a result of the demotion was a legal option. Whilst ignorance of the law is generally no excuse, in this context, Mr Garcia did not agree with the demotion; he simply did not know what he could do about it. I do not accept that that situation amounts to an affirmation. I also do not accept, as submitted by Ms Oberndorfer, that it amounts to a breach of good faith by Mr Garcia.

[69] Mr Garcia continuing to work, therefore, does not amount to an affirmation of the respondent's breach in my view.

[70] If I am wrong in regard to affirmation, it is my view that the employer committed another breach of Mr Garcia's employment when it sent a letter to him on 15 July alleging serious misconduct in respect of not disclosing *substantial damage to*

⁹ Mr Garcia asked Mrs O'Donoghue to fill out an immigration form stating his position to be carpenter. However, I do not accept that this action was an acceptance of his demotion. It was rather a practical necessity to ensure he was not in breach of his visa requirements.

company assets (namely, the car) and *refusal to return company asset* (namely, the mobile phone). Whilst in the ordinary course of events it is not a breach of contractual or statutory duty to send a letter to an employee advising him that the employer wishes to investigate potential serious misconduct, the following context should be taken into account:

- a. The unilateral demotion that had occurred on 22 June;
- b. The letter being sent while Mr Garcia was absent on sick leave;
- c. The characterisation of Mr Garcia saying he did not know the ute had been damaged as potential serious misconduct; and
- d. The characterisation of Mr Garcia keeping the telephone as potential serious misconduct when Mr O'Donoghue had expressly allowed him to do so on 9 July.

[71] In this context, on balance, I am of the view that the letter was sent to Mr Garcia by Mrs O'Donoghue in order to put pressure on him, and to punish him further. Even if Mrs O'Donoghue had not known about Mr O'Donoghue agreeing to him keeping the telephone on 9 July, it was the respondent's duty, as Mr Garcia's employer, to treat him fairly. It is not Mr Garcia's fault if Mr and Mrs O'Donoghue had not liaised with one another about the appropriate steps to take in all the circumstances.

[72] In the light of the previous serious breach, this letter would have been sufficient to have entitled Mr Garcia to treat his contract as repudiated, and as at an end. Such a conclusion would have been foreseeable by any fair and reasonable employer. Therefore, even if Mr Garcia had affirmed the earlier breach (which I do not believe he had) he was entitled to resign in the light of this letter, in the circumstances in which it was sent.

Conclusion

[73] It is my conclusion that the respondent breached both express¹⁰ and implied¹¹ terms of Mr Garcia's employment agreement by the fact and manner in which it demoted him, and that those breaches amounted to a repudiation of that agreement. I

¹⁰ Relating to Mr Garcia's role as foreman.

¹¹ The duties of good faith and trust and confidence.

further find that a reasonable employer would have foreseen that this action would result in Mr Garcia resigning. I find that Mr Garcia did not willingly accept the demotion, and that he had no choice but to carry on working despite it. He therefore did not affirm the repudiatory breach.

[74] When Mr Garcia did resign, through the agency of his lawyer, he was putting into effect an intention he had had since 22 June. By 21 July his immigration situation had been explained to him¹² and he had obtained legal advice as to his employment rights¹³.

[75] Mr Garcia's resignation was a constructive dismissal. As it arose from actions that no fair and reasonable employer could have taken in all the circumstances, his constructive dismissal was unjustified, both procedurally and substantively.

Did Mr Garcia suffer financial loss as a result of a unilateral variation of his employment agreement when he was demoted?

[76] It is my conclusion that he did. He lost wages as a result of the unilateral, unlawful demotion, in the gross sum of \$4 an hour. Mr Garcia claims a gross loss of \$717, based on the hours he worked at the lower rate after the demotion. This figure is not contested by the respondent, and I accept it. In addition, he is entitled to holiday pay calculated at 8% of that sum, which amounts to a further gross sum of \$57.36.

[77] After 9 July, Mr Garcia also lost the use of his work vehicle, which he was contractually entitled to. However, clause 7.5 of the employment agreement allowed him to use the work vehicle for work purposes and home to work travel. He was not contractually entitled to use it for other personal use. As Mr Garcia was off work sick from 10 July, he did not require the vehicle to travel to and from work in any event. Therefore, he sustained no loss in that regard.

Remedies

[78] Sub-section 123(1)(a) to (c) of the Act provides as follows:

¹² Namely, that he was granted an interim work visa.

¹³ Around 17 July.

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[79] Section 128 of the Act states as follows:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, 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.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[80] Mr Garcia claims lost wages for the period 20 to 27 July 2015, which amounts to \$1,440 at the pre-demotion rate of \$32 an hour. From this is to be deducted the earnings Mr Garcia received during this period. Unfortunately, only the net sum has been disclosed, which is \$211.32. Grossing up this figure by 33% produces, roughly, \$280. Deducting this sum from \$1,440 amounts to \$1,160 gross.

[81] Mr Garcia also claims continuing loss, as his post resignation permanent employment was as a carpenter, earning \$28 an hour, at 40 hours a week. Mr Garcia therefore claims a continuing loss for 13 weeks. I accept that this is an appropriate claim, as this is money lost as a result of the grievance, although a calculation over 12 weeks is more appropriate as Mr Garcia is already being compensated for loss of earnings in the first week after his resignation.

[82] The claimed loss comprises two parts:

- a. five fewer hours per week, and
- b. \$4 less per hour worked.

[83] Part (a) results in a gross loss of \$1,920 over 12 weeks, and part (b) in a gross loss of \$1,920. This amounts to a total loss of \$3,840. Holiday pay has not been claimed in respect of this loss.

[84] Mr Garcia also claims loss of pay during three meetings he was obliged to attend. It is not clear which three meetings he refers to, apart from the meeting on 13 June 2015 and the meeting on 22 June 2015. It is not clear how long these meetings lasted, but Mr Garcia claims for two hours each. The respondent does not contest that attendance at the meeting should have been paid, and I accept the claim in respect of the two meetings referred to. Therefore, Mr Garcia is entitled to a gross payment of \$128 in respect of them. Holiday pay has not been claimed in respect of this loss.

[85] Mr Garcia also claims \$3,720 in respect of him driving colleagues to and from work. However, no objective evidence has been adduced to show how long he took doing this each day, and the figure claimed is no more than an estimation I believe. Also, he has not taken into account, I believe, the time he would have taken to get to work himself, in any event, for which he clearly would not be entitled to claim arrears of wages. As these issues create too much uncertainty, it would not be just to award the loss claimed.

Compensation for humiliation, loss of dignity, and injury to Mr Garcia's feelings

[86] I now turn to compensation for humiliation, loss of dignity, and injury to Mr Garcia's feelings. Mr Garcia claims \$33,000, which is the maximum sum referred to in *Hall v Dionex Pty Ltd*¹⁴. Mr Garcia says that his stress and anxiety was extreme and that he found it hard to speak English, as he was so stressed. His partner, Kirstin Dingwall, also gave evidence about the effect on him of the events from the demotion, which was credible. She said that he was stressed after the demotion, as he was worried about visiting Spain to see his children and about his visa. She also said that he did not sleep on the following night and that he was *really distressed*. He went to

¹⁴ [2015] NZEmpC 29

see his GP and was told to take time off, which he refused. He was prescribed sleeping tablets though.

[87] Ms Dingwall said that she was concerned about Mr Garcia's mental health, and wondered if he needed depression medication. She was herself given leave by her employer so she could support Mr Garcia. The Authority also saw GPs' consultation notes that supported the evidence he and Ms Dingwall gave.

[88] I accept that Mr Garcia did suffer humiliation, loss of dignity, and injury to his feelings which could be assessed as falling towards the lower end of severe or the upper end of moderate. However, I do not accept that \$33,000 is an appropriate sum to compensate him, as that indicates a very severe effect. I assess as just a level of compensation at \$20,000.

Contribution

[89] 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 and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[90] I have found that Mr Garcia did smoke at inappropriate times. However, that did not contribute to the situation giving rise to the personal grievance because that situation was caused by the demotion which relied unjustifiably on, inter alia, smoking, as the smoking was a stale issue that it was not appropriate to bring up by that point. The same applies to him arguing with Dingo.

[91] The only legitimate issue potentially to take into account was the failure to advise Mr or Mrs O'Donoghue that he was off sick on 20 June. However, I am not satisfied that Mr Garcia's failure was blameworthy as he had not been given clear instruction as to the respondent's policy.

[92] For these reasons, I decline to reduce the remedies awarded.

Orders

[93] I order the respondent to make the following payments to Mr Garcia:

- a. The gross sum of \$717 in relation to post demotion earnings;
- b. Holiday pay on (a) in the gross sum of \$57.36;
- c. Lost wages for the period 20 to 27 July in the gross sum of \$1,160;
- d. Lost wages for a further 12 weeks in the gross sum of \$3,840;
- e. Arrears of pay for attendance at two meetings in the gross sum of \$128; and
- f. Compensation under s123(1)(c)(i) of the Act in the sum of \$20,000.

Costs

[94] I reserve costs. The parties are to seek to agree how costs are to be dealt with between them. If they are unable to agree within 14 days of the date of this determination, Ms Tucker may serve and lodge a memorandum of costs within a further 14 days, setting out what contribution Mr Garcia seeks, and the basis of that. Ms Oberndorfer will then have a further 14 days within which to serve and lodge a response.

David Appleton
Member of the Employment Relations Authority