IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 62
5439983

	BETWEEN	PHILIP JONES Applicant
	AND	GBC SOUTH ISLAND LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Simon Graham, Counsel for the Applicant John Shingleton, Counsel for the Respondent
Investigation Meeting:	11 and 12 March 2015
Submissions received:	From the Applicant on 19 March 2015 From the Respondent on 25 March 2015
Further information received:	28 and 30 April and 11 May 2015
Determination:	13 May 2015

DETERMINATION OF THE AUTHORITY

A. Philip Jones was unjustifiably dismissed.

B. GBC South Island Limited must pay Philip Jones:

(i) $6,210 gross in lost wages; and

(ii) $3,000 compensation.

C. Costs are reserved.

Employment relationship problem

[1] Philip Jones worked at GBC South Island Limited (GBC) from 15 January 2013 until his resignation on 29 August 2013. Mr Jones claims he was unjustifiably disadvantaged during his employment and constructively dismissed. He also claims

that he should have had Kiwisaver deductions and the employer contribution made on his behalf while he was employed.

[2] By way of remedy Mr Jones claims lost wages, compensation and the payment of the employer Kiwisaver contribution for the period of his employment, as well as legal costs.

[3] GBC denies that Mr Jones was constructively dismissed and says he was never unjustifiably disadvantaged during his employment.

Issues

[4] The issues that the Authority needs to determine are:

(i) Was the Kiwisaver claim raised as a personal grievance within 90 days?

(ii) Alternatively, can remedies be awarded for a breach of contract being GBC not paying Kiwisaver for Mr Jones?

(iii) Did GBC consent to Mr Jones' personal grievance for disadvantage and for dismissal by way of constructive dismissal from a unilaterally imposed change in his duties being raised outside of 90 days?

(iv) Did GBC unjustifiably disadvantage Mr Jones' physical safety at work?

(v) Was Mr Jones subject to bullying and harassment in the workplace?

(vi) Did GBC make a substantial unilateral change to Mr Jones' work duties?

(vii) Did any of the GBC managers follow a course of conduct with the deliberate and dominant purpose of coercing Mr Jones to resign?

(viii) If not, was he otherwise constructively dismissed?

(ix) What are the appropriate remedies?

(x) Costs

Factual background

[5] Mr Jones started work with GBC on 15 January 2013. When he began he had about nine months experience as a saw-man and three years' experience as a polisher.

His primary work at GBC was as a saw-man. He operated the saw Monday to Friday and often worked overtime on Saturday.

[6] Mr Jones was not supplied with a written employment agreement or with any written policies, such as a health and safety policy.

[7] Three of GBC's four shareholders work as managers in the business. Paul Walton is the general manager and works, for the most part, in the office which is upstairs from the factory. John Cooper and Anthony Holland usually work on the factory floor.

[8] On 29 August 2013 Mr Jones resigned during a meeting he had called with his three managers.

Was the claim about Kiwisaver raised as a personal grievance within 90 days?

[9] In the letter dated 17 October 2013 Mr Graham notified GBC of:

> *A personal grievance claim on Mr Jones' behalf for unjustified actions causing disadvantage, a breach of the duty for good faith, and unjustified dismissal (constructive dismissal).* ***Mr Jones also has a claim for breach of contract for failure to pay his Kiwisaver***. [emphasis added]
>
> *...*
>
> *In our view you have failed to meet the obligations you owe to Mr Jones as follows:*
>
> *(a) Failed to provide a safe work environment free from harassment and intimidation.*
> *(b) Failed to provide any suitable equipment to help assist Mr Jones when lifting heavy objects.*
> *(c) Failed to provide any consultation with respect to termination of employment.*
> *(d) Failed to provide a written employment agreement.*
> *(e) Failed to comply with obligation* [sic] *under the Kiwisaver Act 2006.*

[10] In the Statement of Problem filed on 10 November 2014 both unjustified dismissal and unjustified actions causing disadvantage are pleaded. However, Kiwisaver is not specifically raised as being any of the pleaded disadvantages. The only mention of Kiwisaver is under the heading *Background*, in paragraph 3:

> *Mr Jones requested that he be joined to the Kiwisaver scheme at the commencement of his employment. This request was rejected by the respondent.*

[11] GBC's alleged refusal to pay Kiwisaver is not mentioned in the rest of the Statement of Problem and no remedy is requested.

[12] The Kiwisaver claim was characterised in the 17 October 2013 letter as a *breach of contract* only. It was not raised as a personal grievance within 90 days of the termination of Mr Jones' employment, at least by that letter.

[13] However, even had the Kiwisaver issue been called a personal grievance in the 17 October 2013 letter I do not consider that it would have been sufficient to *raise* it as a personal grievance because s.114(1) of the Employment Relations Act 2003 (the Act) requires personal grievances to be raised:

> *…within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later…*

[14] The time at which GBC's alleged refusal to pay Kiwisaver for Mr Jones came to his notice was at the beginning of his employment in January 2013, when he says Mr Walton told him *we don't do that here* in response to his request to have payments made to Kiwisaver. Mr Walton denies telling Mr Jones that and says that Mr Jones decided of his own volition not to have Kiwisaver deductions made.

If the Kiwisaver claim is not a personal grievance has it been pleaded as a breach of contract claim in the Statement of Problem?

[15] In the 17 October 2013 letter GBC is alleged to have breached its contract with Mr Jones by not fulfilling its obligations under the Kiwisaver Act 2006. However, although the allegation that GBC had failed to pay Kiwisaver was repeated in the Statement of Problem it was not pleaded as a breach of contract, or as any other breach of GBC's obligations under the Kiwisaver Act 2006. The mention of Kiwisaver in the paragraph quoted above under the *Background* heading was not sufficient to put GBC or the Authority on notice that the claim would be relied on at the investigation meeting. The lack of any claim of remedy by way of Kiwisaver payments in the Statement of Problem served to reinforce the view that the Kiwisaver claim was not being pursued.

[16] At the investigation meeting and in submissions Mr Graham asked for leave to amend the Statement of Problem. However, that was simply too late so I do not consider the Kiwisaver claim for the reasons above.

[17] Because of that I do not have to consider GBC's submission that the Authority does not have jurisdiction to consider the alleged failure of the employer to comply with the Kiwisaver Act 2006. However, the Employment Court has made orders for remedies

relating to Kiwisaver entitlements under the Kiwisaver Act when an employee who had been making payments to Kiwisaver prior to dismissal was found to have been unjustifiably dismissed. The payment of the employer contribution to Kiwisaver was claimed under s.123(1)(c)(ii) of the Act as the loss of a benefit. For example, in *Gazeley v Oceania Group (NZ) Ltd*[1] Judge Perkins decided:

> *In addition, she should receive reimbursement of all benefits …. Oceania should also fully reinstate her Kiwisaver entitlements. That may require payment to the scheme of her individual contributions; employer and government subsidies and no doubt the scheme provider will need to have further funds from Oceania to compensate her for investment income lost during the period when she has been unemployed. Those are matters which should be capable of resolution between the parties and the scheme provider, but leave is reserved for further application to the Court to resolve any dispute should that arise.*

[18] I have no doubt that the Authority has similar jurisdiction to deal with a claim for Kiwisaver entitlements to be reimbursed. I appreciate that is not the same situation as that claimed by Mr Jones. Even so, if an employer did wrongly refuse to operate within the Kiwisaver Act and that was found to amount to a personal grievance, so long as the failure to pay Kiwisaver entitlements had been pleaded and a remedy sought, the Authority would have the jurisdiction to deal with it.

Did GBC consent to Mr Jones' personal grievance from a unilateral change in his duties being raised outside of 90 days?

[19] The statement of problem was lodged on 10 November 2014. Paragraphs [16] to [18] specifically alleged GBC did not consult Mr Jones on a change in his conditions of employment, his duties and a consequent reduction in his pay.

[20] The statement in reply, lodged on 24 November 2014, addressed paragraphs [16] to [18] and did not allege that the personal grievance was not raised within 90 days.

[21] Evidence filed by both parties prior to the investigation meeting included evidence relating to GBC's view Mr Jones was creating a bottle-neck in production, the engagement of a new saw man and Mr Jones' evidence of his reaction to that. This evidence was tested at the investigation meeting on 11 and 12 February 2015.

[1] [2013] ERNZ 727

[22] For the first time in written submissions filed on 25 March 2015 Mr Shingleton raised the argument that Mr Jones did not raise the personal grievance within 90 days. That was the first time that issue had been raised.

[23] I have considered that submission and it does appear, on the face of it, that the personal grievance was not raised within 90 days. However, that is not the end of the matter. Section 114 says that an employee must raise their personal grievance within 90 days *unless the employer consents to the personal grievance being raised after the expiration of that period.*

[24] Case law has examined whether an employer needs to expressly consent or can impliedly consent to the raising of a grievance outside of the 90-day period. In the Court of Appeal case *Commissioner of Police v Hawkins*[2] the Court affirmed that consent can be implied and affirmed the position taken in earlier cases that:

> *…whether what has occurred constitutes consent must be a matter of fact and degree.*[3] *…*
>
> *The real issue is not whether, in formal terms, the Commissioner "turned his mind" to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.*[4]

[25] In this case I consider that the respondent impliedly consented to the claim being raised outside of the 90-day period by its actions once the statement of problem was filed. GBC responded to the claim and did not raise the issue that the claim was raised outside of the statutory 90-day period until after the investigation meeting was concluded. Therefore, I can and will deal with the grievance.

The law on constructive dismissal

[26] Mr Jones submits that although he resigned he was put in the position where he felt that was his only option; that is, his resignation was forced by his employer's conduct.

[27] There are three different types of constructive dismissal[5]:

(i) An employee is given a choice between resigning and being dismissed;

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[2] [2009] 3 NZLR 381
[3] Ibid at paragraph [23]
[4] Ibid at paragraph [24]
[5] *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372

(ii) There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;

(iii) There has been a breach or breaches of duty by the employer which cause an employee to resign.

[28] There is no suggestion that Mr Jones was given the choice of resigning or being dismissed. Instead, Mr Graham submits that either:

- one or more of GBC's managers followed a course of conduct with the deliberate and dominant purpose of coercing Mr Jones to resign, or
- there was one or more breach of GBC's duty that caused Mr Jones to resign.

[29] In *Wellington Clerical Workers IUOW v Greenwich* [6] in describing the third category of constructive dismissal Justice Williamson observed:

> *It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have* ***crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct*** *reasonably sufficient to justify the termination of the employment relationship.*[7][emphasis added]

[30] Where an employee relies on a breach of an implied or express duty by the employer as cause for the resignation, the breach must be of such a character as to make the employee's resignation foreseeable.[8] However, it is not necessary to establish that the employer intended to repudiate the contract.[9]

[31] I need to consider whether there was deliberate conduct designed to coerce Mr Jones into resigning or whether there was such a serious breach or breaches of duty by GBC that it was reasonably foreseeable that Mr Jones would resign. I consider below each of the claimed unjustifiable disadvantages Mr Jones alleges and also assess them as potential breaches of GBC's duty.

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[6] [1983] ACJ 965
[7] Ibid, at [975]
[8] *Auckland Electric Power Board v Auckland Local Authorities Officers IUOW* [1994] 1 ERNZ 168 (CA)
[9] *Review Publishing Company Limited v Walker*[1996] 2 ERNZ 407

Did GBC unjustifiably disadvantage Mr Jones by failing to take all practicable steps to ensure his safety at work?

[32] Mr Jones' main work consisted of using templates to cut stone slabs to pre-determined shapes made to customers' requirements.

[33] The cutting produced a number of off-cuts. Mr Jones says that his health and safety was compromised in the way that he was expected to dispose of or move the off-cuts. He says he was required to carry them by hand or on a wheelbarrow outside to a skip that was too far away from the saw bench. He says that was particularly risky for him because he has a history of a back injury, which GBC was aware of. Mr Jones says some of the off-cuts weighed 20-30 kilograms. GBC denies ever being told that Mr Jones had a pre-existing back injury.

[34] Mr Jones' evidence was that the weight of the off-cuts and instability of the wheelbarrow caused stress and aggravation to his pre-existing back injury. He also said that at the end of a work day his back would sometimes be very stiff.

[35] Mr Jones' says that the off-cuts bin was never positioned near the saw bench in all the time he worked for GBC, but that it was away in another part of the factory. He says that the skip he took off-cuts to was situated quite far from the saw bench, certainly further away than shown in the photos attached to Mr Walton's witness statement.

[36] Mr Jones says the wheelbarrow was not adequate to move the larger off-cuts, which were kept up against a wall behind the saw bench. Mr Jones says one day he was asked to tidy up that area. He asked Mr Holland to provide a sack barrow to help him do that because he had to dispose of some of them into the skip outside. He says he thought that would have been safer for him but Mr Holland refused to obtain a sack barrow. Mr Jones says Mr Holland told him to *harden up*. Mr Holland denies he said that but agrees he did say he would not provide a sack barrow as he considered that would have been more risky than the methods GBC already had for moving off-cuts.

[37] GBC agrees that it did not have a formal written health and safety policy when Mr Jones was employed there. However, it denies that Mr Jones' health or safety was put at risk by a requirement that he single-handedly carry off-cuts that were too big and/or too heavy to the skip.

[38] GBC says that it had an off-cuts bin specifically made for disposing of smaller off-cuts from the saw bench. GBC says for most of the time it was positioned just 2-3 feet away from the saw bench. It was able to be moved if necessary, such as if the crane or forklift needed to be used in that area. GBC says the saw bench and the bin were similar in height so that Mr Jones did not have to bend to lift any off-cuts.

[39] GBC says that Mr Jones was never expected to carry off-cuts that were too heavy and that he had a number of safe choices ranging from breaking up the off-cuts into manageable sizes with a hammer, using the wheelbarrow to take them to the skip outside, asking for assistance or using the forklift to take an off-cut to the skip outside or using the gantry crane to move it inside the factory.

[40] Mr Jones made a request of Mr Holland that he would like to use a sack barrow only once. I do not find it proved that Mr Holland told Mr Jones to *harden up* and I do not find it proved that the provision of a sack barrow would have been an improvement in Mr Jones' health and safety in his job.

[41] Mr Jones did not give evidence of having suffered any specific workplace injury.

[42] Apart from Mr Jones' slipping over at home and suffering a back injury there was no medical or other objective supporting evidence that Mr Jones' back condition was aggravated as a result of his working conditions. Mr Jones did not report any injury to his back because of stress or aggravation of his pre-existing injury caused through his work to GBC while he was employed there.

[43] Mr Jones had time off work in the week 19–23 August because of an injury to his back caused after he slipped on wet tiles at home on 18 August 2013. His doctor provided a medical certificate for Mr Jones to give to GBC, which he did. However, the doctor erroneously wrote that Mr Jones had slipped on wet tiles at work. Mr Walton, Mr Holland and Mr Cooper knew that Mr Jones' injury had not happened at work and knew he had not been at work on 18 August 2013, which was a Sunday. They thought the medical certificate was odd at best and Mr Cooper thought that Mr Jones was *playing a game* and had misrepresented his injury to his doctor and to ACC.

[44] I do not find it proved that GBC had inadequate and unsafe ways of dealing with the disposal of off-cuts from the saw bench. Mr Jones accepted that he could have broken the bigger off-cuts into chunks but that he decided not to do that and instead decided to carry off-cuts out in one piece to the skip outside. Likewise, I do not find proved that there were only inadequate or unsafe ways of moving the off-cuts that were kept behind the saw bench. Mr Jones did not tell Mr Holland on the day he asked for a sack barrow that the job he was doing was aggravating a pre-existing back injury or that he did not consider he could do the job single-handedly.

[45] I do not find it proved that the lack of a written health and safety policy amounted to a disadvantage to Mr Jones in his employment.

[46] I do not find it proved that Mr Jones suffered any disadvantage or breach of terms and conditions of employment relating to his physical health and safety during his time with GBC. This claim is dismissed.

Was Mr Jones subject to bullying and harassment?

From Mr Holland?

[47] Mr Jones' says that one day in July 2013 Mr Cooper approached him:

> *…to discuss the size of the cutting. John appeared to be quite irritable and spoke in a reasonably aggressive tone towards me. I tried to explain to him my views in terms of what the size of the cutting should be. John disagreed with me and became aggressive very quickly.*
>
> *After that I approached Anthony to discuss the matter and he told me that he would take me outside and put me on my arse if I did not listen to John or words to that effect. I was surprised by his comments and a couple of minutes later he said to go home and he would see me the next day.*
>
> *The abuse I received from John continued to escalate. I found myself subject to his inappropriate comments on a reasonably regular basis.*

[48] Mr Holland says he does remember telling Mr Jones to go home one day. However, he says that was because Mr Jones was mumbling about hitting someone and that he told him he thought he should *go home and come back tomorrow with a clearer head before someone takes you up on it and takes you outside*. He denies threatening Mr Jones at all although he agreed that he may have said that Mr Jones should listen to Mr Cooper.

[49] I do not find it proved that Mr Holland threatened Mr Jones with physical violence.

From Mr Cooper

[50] Mr Jones says that after the first three months Mr Cooper's attitude to him changed and from then on Mr Cooper made *inappropriate comments* to him which *escalated to abusive language and threatening behaviour*. GBC and Mr Cooper deny treating Mr Jones in that way.

[51] Mr Jones was not able to tell me many details about Mr Cooper's abuse and inappropriate comments towards him, which he says escalated, apart from the three incidents below. Mr Cooper denied having abused or harassed Mr Jones at all.

Wrong cut incident

[52] Mr Jones says that one day, the day after he had a day off, Mr Cooper approached him and said *what the fuck are you doing?* Mr Cooper approached him again later and said *don't worry, you didn't cut it*.

[53] Mr Cooper denies having said that and says *we don't swear at our workers; we don't abuse them*.

[54] If this did happen, I do not consider it amounted to bullying or harassment. That is partly because even on Mr Jones' evidence alone Mr Cooper later told Mr Jones he had been wrong to assume Mr Jones cut the piece of stone he was concerned about.

Dust incident

[55] Mr Jones says that one day when he was sweeping the floor with a broom in the factory Mr Cooper told him he was making too much dust and to use the Karcher machine. The machine is specifically designed to remove dust without causing it to fly up into the air. Mr Jones told Mr Cooper he would keep using the broom and says that was because the Karcher machine did not fit under the A-frames with the slabs on them. However, Mr Cooper insisted he use the Karcher machine and not a broom. Mr Jones says that Mr Cooper then went outside and using a hand-held machine started cutting stone which caused dust to *spew* through the door. Mr Jones felt that Mr Cooper did that to antagonise him.

[56] Mr Cooper remembered the sweeping incident. He says Mr Jones was not sweeping anywhere near the A-frames when he told him to use the Karcher machine. He denied having spoken inappropriately to Mr Jones and remembered Mr Jones refusing to use the Karcher machine. He denies that he deliberately set up the cutting task outside so that dust would blow into the factory.

26 August incident

[57] On Monday, 26 August 2013 Mr Jones was sweeping the floor when Nigel Farrell, GBC's templator, asked him how things were going. Mr Jones says he told Mr Farrell that:

> *I had had enough of this place and that I was ready to punch John for the way I was being treated.*

[58] Mr Farrell went upstairs and reported what Mr Jones had said to Mr Walton and Mr Holland. A little later Mr Farrell also told Mr Cooper (John) what Mr Jones had said.

[59] Mr Jones says that on 26 August Mr Cooper came up behind him and stood very close and said *I hear you want to punch my lights out*. Mr Jones denied having said anything like that. They both agree that Mr Cooper then said *you wouldn't have the balls anyway* and walked away.

[60] However, Mr Jones says that Mr Cooper *got right up into my face and taunted me to hit him.* He also says that after Mr Cooper said *you wouldn't have the balls anyway* he added *because you are a gutless c**t or similar such words*.

[61] Mr Cooper denies getting up into Mr Jones' face, taunting him to hit him or calling him *a gutless c**t* or using any other abusive or offensive language.

[62] After questioning about what Mr Cooper said that Mr Jones took to be *taunting me to hit him* Mr Jones agreed that Mr Cooper did not say anything inviting him to hit him or anything threatening but says that was how he interpreted Mr Cooper's body language and tone.

[63] Tony Palmer gave evidence that he was in the factory and heard the conversation on 26 August when Mr Cooper went over to speak to Mr Jones. He said there was no

shouting and were no raised voices and that neither of the men got *into each other's face or the like*. He denied that Mr Cooper called Mr Jones a gutless c**t.

[64] He also said he:

> *…stopped to observe because I'd never seen that in the factory before. It was confrontational what John said Phil had said – I stopped in my tracks and thought Oh, what's going on here?*
>
> *I'd never seen John fired up like that anyway or heard him say anything like that to anyone.*

[65] Mr Jones left work after his encounter with Mr Cooper and went to see his doctor who gave him a medical certificate to be off work until Thursday, 29 August 2013. His doctor wrote *he was seen regarding work stress and was in a distressed state*.

[66] Neither Mr Holland nor Mr Walton knew that Mr Cooper intended to confront Mr Jones about what he had said to Mr Farrell. In fact, Mr Walton decided that he would not tell Mr Cooper what Mr Farrell had said. Mr Walton and Mr Holland said that they did not take what Mr Jones had said as a threat to hit Mr Cooper, but as a way of Mr Jones letting off steam.

[67] Mr Cooper and Mr Walton agree that Mr Walton is generally in charge of employee related issues. Mr Cooper says he did not discuss his intention to confront Mr Jones about what he had said with Mr Walton or Mr Holland. He said that he did not really think Mr Jones would hit him but:

> *I felt I had to say something to him as I was working with a guy who was potentially going to clobber me. I didn't really think about it. I wasn't trying to start a fight. I really just wanted to clear the air and find out if that's what he really said. It wasn't about picking on him or intimidating him. I wanted to find out what the trouble was.*[10]

[68] In response to my questioning Mr Cooper agreed that he did not think about whether he was acting as Mr Jones' employer when he confronted Mr Jones but dealt with it more personally in a man-to-man fashion. However, obviously, because Mr Cooper was Mr Jones' employer he was acting as his employer.

[69] I accept that Mr Cooper was angry and agitated when he approached Mr Jones, as Mr Cooper admitted and Mr Palmer's evidence supports. However, I am unable to

[10] Mr Cooper's oral evidence at the investigation meeting.

conclude he called Mr Jones a c**t or called him any other offensive or abusive name. Mr Cooper's level of anger was sufficient to unsettle Mr Jones but part of the distress experienced by Mr Jones was to do with the fact that he had been found out by Mr Cooper for saying he was about ready to hit him.

[70] Although Mr Cooper's approach to Mr Jones was not an ideal way to deal with what Mr Jones had said I do not find that by itself it crossed the line separating inconsiderate conduct causing some unhappiness or resentment to Mr Jones from dismissive or repudiatory conduct that breached the essential trust and confidence required in the employment relationship. It was a robust exchange but not one that could, on its own, objectively lead Mr Jones to be physically fearful of Mr Cooper or to fear for his job. There was not a breach of GBC's duty to Mr Jones in the way Mr Cooper treated him. Similarly, Mr Holland's behaviour did not breach any GBC duty to Mr Jones.

[71] Apart from twice saying that he was ready to hit someone, once to Mr Holland and once to Mr Farrell when he specifically mentioned Mr Cooper, Mr Jones did not complain directly about Mr Cooper's treatment of him while he worked at GBC.

[72] I do not consider any of the three incidents involving Mr Cooper to amount to bullying or harassment of Mr Jones. Mr Jones was not disadvantaged in his employment by Mr Holland's or Mr Cooper's treatment of him.

Did one of more of GBC's managers follow a course of conduct with the deliberate and dominant propose of coercing Mr Jones to resign?

[73] Given my conclusions about Mr Holland's and Mr Cooper's behaviour above I do not find that either or both of them followed a course of conduct deliberately with the dominant purpose of coercing Mr Jones to resign; nor did Mr Walton.

[74] That leaves a consideration of whether GBC substantially and unilaterally changed Mr Jones' duties.

Was there a substantial unilateral change in Mr Jones' duties?

[75] Any unjustified substantial unilateral change in Mr Jones' duties could amount to an unjustified disadvantage and could also amount to a repudiatory breach by GBC of its duty to Mr Jones.

GBC's concerns about Mr Jones' work and the employment of another saw man

[76] Mr Holland says:

> *Phil struggled to run the saw and keep up with production as he could not understand templates or work out joints on certain jobs … this created a bottleneck.*

[77] Mr Cooper and Mr Holland say that Mr Jones did not react well to criticism. Mr Holland says:

> *Phil did not like being pulled up on his mistakes and would almost take it personally*.

[78] At some stage during Mr Jones' employment GBC purchased a second-hand Thibaut machine, to polish bench and basin tops, which it hoped that Mr Jones would operate. However, the machine was not up and running by the time Mr Jones left GBC and there was no timetable in place for it to start being used by Mr Jones.

[79] In late July or early August GBC employed a second saw man, who worked Monday to Thursday. He was more experienced than Mr Jones and was employed because:

> *Phil was slow creating a bottleneck in production*, [the new man] *could train Phil … we told [Phil] immediately about our plans as we didn't want him to worry or to get the wrong picture*. …
> *We explained to Phil that he would be assisting* [the new man] *and* [the new man] *would train him. Also* [the new man] *doesn't work Fridays so Phil would run the saw on Fridays and Saturdays as required.*

[80] Mr Walton accepted that the conversation he had with Mr Jones was an informal one of the factory floor once the new man had been employed.

[81] Mr Farrell gave evidence at the investigation meeting that he had overheard:

> *… a couple of conversations about mistakes and Phil possibly not being fast enough at his job from Anthony, Paul and Coops* [John Cooper]. *I think they were unhappy with Phil.*

[82] Mr Jones says, and GBC agrees, he was told that he would not be operating the saw bench Monday to Thursday only after the new man had been employed. He says his job was significantly altered as the new man was operating the saw then and therefore he could not be doing so at the same time.

[83] Mr Jones says that once the new man was employed he did not have enough work to do and his work was largely limited to *meaningless tasks*, such as sweeping up and making coffee. He says his overtime stopped altogether and so his pay reduced. He felt dejected.

[84] GBC agrees that although it intended Mr Jones to learn from the new man it did not implement a training programme of any kind for him. Instead, it intended him to observe and learn from the new man.

[85] Although Mr Walton disagrees that Mr Jones was engaged as a saw man and says he intended him to be a more general factory worker I am satisfied that Mr Jones principal role from January to at least late July 2013 was as a saw man. Therefore, the new man's engagement meant a substantial alteration to Mr Jones' job.

[86] The managers had concerns about Mr Jones' performance, even Mr Farrell knew that, but GBC did not address those clearly and openly with Mr Jones. Although GBC hoped that its engagement of Dave would assist Mr Jones to get to the level it required of him as a saw man and also hoped that he would be able to operate the Thibaut machine, it did not go about dealing with that in a fair and reasonable way. Instead, Mr Jones felt that from the time of the engagement of the new man without any prior warning, and possibly combined with what he perceived of Mr Cooper's attitude towards him, he was not valued by GBC.

[87] GBC was not entitled to simply engage a new saw man and unilaterally change Mr Jones' main role without any consultation with Mr Jones and without his agreement to the arrangement.

The final meeting

[88] On Thursday, 29 August 2013 when Mr Jones returned to work he asked Mr Holland to arrange a meeting for him and the three managers. They all agree that Mr Jones did not tell them what the meeting was to be about. The meeting took place about 20 minutes later in the upstairs office with Mr Jones, Mr Cooper, Mr Holland and Mr Walton all present.

[89] Mr Jones says that when he walked in to the meeting he walked towards Mr Cooper and told him that he was a bully but he didn't think GBC would do

anything about that. Mr Cooper denies that and Mr Holland and Mr Walton did not hear it being said.

[90] Mr Walton asked what the purpose of the meeting was and Mr Jones said he was not happy and felt like he was being pushed out of his job.

[91] More than once Mr Walton assured Mr Jones GBC did not want to get rid of him and told him they thought he could learn from the new man on the saw and that they wanted him to use the Thibaut machine. Mr Walton asked Mr Jones what he would need to make him happy.

[92] Mr Jones did not feel reassured of his future with GBC and told the managers again that he felt unhappy there and as if they were pushing him out of his job.

[93] Mr Jones did not raise his concern about Mr Cooper's attitude towards him as something that needed to be addressed. Since that was apparently a contributing factor to his feeling as if he needed to resign he should have done so.

[94] There is a dispute about whether Mr Jones was asked by Mr Walton if he wanted to go back and start working or wanted to leave. Mr Jones says those were the options that were put to him and he decided he had no real option but to resign. Mr Walton says he said something like that but did not mean it as an ultimatum. He says he did not know what else he could do to persuade Mr Jones GBC wanted to keep him on.

[95] Mr Walton says Mr Jones asked how much pay he would have owing to him and so Mr Walton looked up the computer system and was able to tell Mr Jones how much his final pay would be if he decided to leave.

[96] Mr Walton asked Mr Jones if he was sure he wanted to leave and when Mr Jones said that he was Mr Walton asked for his resignation in writing and gave him a pen and paper. Mr Walton wrote him out a cheque for his final pay and Mr Jones left.

Was there a constructive dismissal?

[97] GBC's evidence is that they hoped to retain Mr Jones' skills. However, there was a fundamental disconnection between GBC unilaterally engaging a new man and

its expressed wish for Mr Jones to be 'upskilled' on the saw and to operate the Thibaut machine without any consultation with Mr Jones. The new man had been there for at least three weeks when Mr Jones called the meeting and there had been no training plan put in place and there was no timetable for Mr Jones to begin operating the Thibaut machine.

[98] When an employer has concerns about an employee's performance the duty of good faith to be active and constructive in maintaining a productive employment relationship means that it has to address those concerns directly with the employee. It did not do so and therefore did not give Mr Jones a chance to improve before it engaged the new man. GBC also spoke about its performance concerns about Mr Jones in front of another employee without addressing the concerns directly with Mr Jones. It should have ensured its concerns remained confidential between the managers and Mr Jones. Even once GBC hired another saw man it did not clarify with Mr Jones what performance level GBC desired from him and exactly how he was to achieve that.

[99] I accept that GBC did not intend to repudiate its contract with Mr Jones. It did what it thought was right for its business. However, what is a good decision for a business can still amount to a breach of good faith to an employee. GBC's substantial and unilateral change in Mr Jones' duties, which did operate to downgrade his position, amounted to a repudiation of the contract of employment. Mr Jones did not have to accept that and ultimately did not when he tendered his resignation.

[100] In addition to the change in his duties imposed by GBC both Mr Jones and Mr Cooper knew, as a result of the exchange between them on 26 August, there had been deterioration in their working relationship. Mr Jones did not raise the 26 August confrontation with Mr Cooper as a problem but neither did Mr Cooper despite his evidence that by the time of the meeting he thought *the relationship was breaking down* and *there was ill feeling between us*. He also said in relation to Mr Jones' injury, wrongly categorised as work injury, *we knew Phil was playing some sort of game.*

[101] GBC had a duty of good faith to raise its concerns about those two things with Mr Jones and seek to resolve them. It did not do so. It is not surprising Mr Jones did not feel completely reassured by Mr Walton's words in the meeting when there were

underlying unresolved issues with Mr Cooper, which Mr Cooper did not raise. There was also an unaddressed issue about Mr Jones' ACC claim that none of the managers raised. However, Mr Jones had a corresponding duty of good faith to raise his concerns about Mr Cooper's working relationship with him.

[102] GBC breached its duty to Mr Jones by unilaterally imposing a substantial change in his duties, that breach caused him to resign and was sufficiently serious that it would have been foreseeable that Mr Jones may not have accepted the change and might resign. Therefore, Mr Jones was constructively dismissed.

Remedies

[103] Mr Jones has claimed lost wages of $5,800 for the first three months (equivalent to 13 weeks) after his dismissal. He also claims between $12,500 and $15,000 compensation for humiliation, loss of dignity and injury to his feelings.

Lost income

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

[105] Mr Jones obtained work with Tyre Retreaders within three months after his dismissal. However, his evidence is that he was not paid as much as he had been at GBC, partly because he had fewer hours of work.

[106] Mr Jones' first payslip from Tyre Retreaders is for the fortnight to the end of 14 September 2013. He worked 33 hours that fortnight. Mr Jones' evidence is that his confidence was shaken so much in his ability as a saw man that he did not feel confident applying for jobs in that industry. I am satisfied Mr Jones adequately mitigated his loss.

[107] Mr Jones' weekly pay from GBC was for a minimum of $1,000 per week, presumably if no overtime was worked. That is the fairest amount to use to calculate what he would have earned if he had remained employed at GBC for three months (or 13 weeks) after 29 August; $13,000. However, I need to deduct what he earned from Tyre Retreaders up until the end of November 2013. The IRD summary of earnings

to the end of March 2014 shows Mr Jones earned a total of $6,790 from Tyre Retreaders for September, October and November. There is a difference of $6,210.

[108] Mr Jones has claimed $5,800 in lost wages. However, I am satisfied that my calculations are correct and s.128(2) of the Act means I am obliged to order GBC to reimburse Mr Jones the sum equal to his lost remuneration. Therefore, GBC must pay Mr Jones $6,210 gross in lost wages.

Compensation

[109] Mr Jones has claimed that an appropriate award for his humiliation, loss of dignity and injury to his feelings is between $12,500 and $15,000. However, those amounts are claimed for an aggregate of all Mr Jones' claims. I have found that GBC did not breach his workplace health and safety and that he was not bullied and harassed at work. What remains is a finding of constructive dismissal from a unilateral variation in Mr Jones' terms and conditions of employment. I cannot take what Mr Jones says was the result of the other claimed grievances into account.

[110] Mr Jones' evidence is that the loss of his job caused financial stress and stress in his relationship. He says his sleep was affected and his confidence in his ability to work in the stone masonry industry has remained low. In all the circumstances I consider an award of $3,000 to be reasonable compensation.

Contribution

[111] Section 124 of the Act requires me to consider whether the remedies should be reduced because of Mr Jones' contribution to the situation leading to his grievance. Given that the only breach of GBC's duty that has resulted in the proved grievance was the unilaterally imposed change in Mr Jones' duties I do not find that Mr Jones' actions gave rise to the situation that gave rise to his personal grievance.

[112] Mr Jones' skill level may have been lower than that desired by GBC but that cannot be considered to be contribution to the situation giving rise to his constructive dismissal. Even if it was Mr Jones' behaviour was not blameworthy. There is no suggestion that he was not working to the best of his ability.

[113] There is to be no reduction in the remedies ordered.

Costs

[114] Generally, the successful party is entitled to a reasonable contribution towards their actual legal costs. The parties are encouraged to resolve costs themselves. However, if that is not possible, then the party seeking costs has 28 days within which to file a costs memorandum and the other party has 14 days within which to respond.

[115] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The daily tariff is currently $3,500. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority