IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2013] NZERA Christchurch 94
5386293

	BETWEEN	BRADLEY MORRISON Applicant
	AND	DESIGN PLUS BUILD LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Peter van Keulen, Counsel for Applicant Linda Ryder, Counsel for Respondent
Investigation Meeting:	19 April 2013 at Christchurch
Submissions received:	1 May and 15 May 2013 from Applicant 8 May 2013 from Respondent
Determination:	30 May 2013

DETERMINATION OF THE AUTHORITY

A. The Applicant was unjustifiably constructively dismissed and disadvantaged in his employment.

B. Penalties are awarded against the respondent in respect of a breach of good faith and a breach of the Holidays Act 2008

C. Costs are reserved.

Employment relationship problem

[1] Mr Morrison claims that he was unjustifiably constructively dismissed from his employment on 16 May 2012, that he suffered an unjustified disadvantage in his employment and that penalties should be imposed against the respondent for breach of good faith, breach of the Holidays Act 2003 and failing to provide an employment agreement.

[2] The respondent denies these claims.

Brief account of the events leading to Mr Morrison's resignation

[3] The respondent is a building company based in Christchurch. Mr Morrison commenced working with its predecessor company as an apprentice carpenter in January 2008 and qualified as a carpenter in January 2011. His employment was transferred to that of the respondent in December 2011. He was asked to carry out site foreman duties before he qualified as a carpenter and, according to Mr Morrison, was promoted to a project manager and health and safety officer position, gradually taking on the responsibilities of this role from June 2011.

[4] The respondent denies that Mr Morrison was ever formally promoted to the position of project manager and health and safety officer but accepts that, from June 2011, he gradually took on more and more project management and health and safety responsibilities until, by the beginning of 2012, the majority of his work consisted of these duties. It was accepted by Mr Irving, a director of the respondent company, that in early 2012, Mr Morrison spent only around 10% of his time working *on the tools*; in other words, directly doing carpentry or other building work.

[5] In mid March 2012, Mr Morrison injured his arm outside of work, and had it in a temporary cast, pending further medical investigation by way of a scan due to take place on Monday, 2 April 2012. He initially carried on the performance of his duties despite the cast.

[6] A projects meeting was held on the morning of 29 March 2012 to discuss, amongst other things, the risk of a site foreman, Chris, leaving and how the company would cope with his absence. It was agreed at that meeting that Mr Morrison would take over as site foreman if Chris left. The parties differ in their evidence, however, as to whether it was agreed (as asserted by Mr Morison) that Mr Morrison would be site foreman on a temporary basis only, doing his project management and health and safety work at the same time. Mr Irving said in evidence that he did not recall Mr Morrison and he agreeing that Mr Morrison would be able to carry on with health and safety and project management work. It is my belief, given the credible and detailed way generally in which Mr Morrison gave his evidence, that Mr Morrison's evidence is accurate in this respect.

[7] Although Mr Irving and Mr Morrison (who are cousins) had had a couple of arguments in the past, until 30 March 2012 their working relationship had apparently

been without major incident. However, on 30 March 2012, they had an argument about Mr Morrison delivering some timber to a site at the request of the foreman Chris. In a nutshell, Mr Irving believed that Mr Morrison should have used his time more effectively and did not believe that Mr Morrison should have been complying with such a request from Chris. Mr Irving gave evidence that he had been having doubts about the performance of Chris at that time and had warned Chris that he would receive a written warning if certain performance concerns were not dealt with. It was this threat that had led to Chris threatening to leave.

[8] The argument on 30 March 2012 between Mr Morrison and Mr Irving ended with them shouting at each other, Mr Irving swearing at Mr Morrison and Mr Morrison, in his own words, *storming out*. Later on in the day, Mr Irving sent Mr Morrison a text message which included the following:

> *Storming out is childish and weak and does nothing for the things that are not getting done while your* [sic] *all bent out of shape. The first thing you can do when you come back is tidy your desk and then we can have a chat. Regards Lance*

[9] By way of an email sent in the evening of Friday, 30 March 2012, Mr Morrison informed Mr Irving of some of the things he had been doing during that day (to show, he said, that he had been working even though he had left the office) and informed Mr Irving that his doctor's appointment on Monday morning to investigate his injured arm had been changed to a morning slot. Mr Morrison then went on in his email to complain about the way that Mr Irving had spoken to him earlier in the day and explaining why he had delivered the timber. He finished his email by explaining that he intended to have the weekend off and he would be back in the morning at 7am, prior to going to his doctor's appointment.

[10] Mr Irving replied at 10pm the same day, basically accusing Mr Morrison of being the one who had been angry. This email also contained the following passages:

> *Again, while I pay the wages and ultimately the one that things fall back on if instructions and constructive criticism is not going to be accepted then they can simply move on. There are plenty of good project managers about still, along with good qualified carpenters.*
>
> *…*
>
> *Certainly will see you on Monday morning seeing as you are having the weekend off. I expect an indication of what you have planned for the week as over the next 4 to 5 weeks you will be slowly handing*

> *over communications to me and moving onto site as site Forman for Neave road.*
>
> *…*
>
> *You are removed from Bells road project managing effective immediately. Richard is virtually doing it now any way. And you and I will be working as I mentioned a little closer over the coming weeks until Neave road starts.*
>
> *…*
>
> *There is more to it. I will fill you in on the finer details on Monday.*
>
> *Regards,*
> *Lance*

[11] As a result of Mr Morrison's scan it turned out that he had fractured a bone in his wrist and received a medical certificate ARC18 which stated that he was to do light duties only for the following five weeks.

[12] In response to the email from Mr Irving sent at 10pm on 30 March 2012, Mr Morrison sent an email to Mr Irving on the morning of Monday, 2 April 2012 headed up *proposed week* and then set out what he proposed to do that day and for the rest of the week. Mr Morrison says that on the morning of Tuesday, 3 April 2012, he found a written note on his desk from Mr Irving which asked him to:

> *… make up a list of each job on the go at the moment!! and under each address make a list of the stage its at and the communications with those trades at that stage.*

[13] Mr Irving says that he left the note on Mr Morrison's desk the previous day, although its timing is not material. Mr Morrison responded to this request by way of an email dated Tuesday, 3 April.

[14] A meeting had been arranged for 11am on Tuesday, 3 April at which Mr Morrison's injury would be discussed and how it impacted on the work that was to be done. Mr Morrison says that he had asked if he could have someone present at the meeting and that Mr Irving had refused, as Mr Irving had not been given *warning* of that request. Mr Morrison's evidence is that Mr Irving insisted that he come to the meeting and walked off to the meeting room and that Mr Morrison then *nervously followed*. Mr Morrison's evidence was that he did not want another confrontation with Mr Irving and says that he told Mr Irving that he would leave if Mr Irving raised his voice. As it turns out, there were no raised voices.

[15] However, Mr Morrison's evidence is that he was told by Mr Irving that there were no light duties for him to carry out and that, as his arm was broken, he would have to go onto ACC. He says that it was only at this point that he realised that he was being completely pushed out of his role, on the spot, even though the list he had given to Mr Irving the day before had showed that there were many tasks that he could carry on with. Mr Morrison's evidence was that he was told to leave work and to hand in his telephone and redirect his email to Mr Irving.

[16] The Authority saw a note that had been written by Mr Irving which said the following:

> - *Arm is broken and 4→5 weeks with a cast on. 8 weeks probably in total.*
> - *Brad has emailed copy of ACC form to Lynn* [the office administrator] *in regards light duties.*
> - *Lance write up the role that is here now because of what's happened recently with staff @ Design + Build for brad to take to his doctor.*
>
> *Lance will come back to brad by 5pm with what work we do have here going forward from an admin perspective.*
>
> *Brad leaving work.*
>
> *Finish 11.19.*

[17] Mr Morrison's evidence is that he signed this note because of the agreement that Mr Irving would look for work that Mr Morrison could do, not involving working on the tools. Mr Morrison's evidence was that the list that he had prepared and sent to Mr Irving earlier showed plenty of health and safety and project management type work that he could do. He said that he had been doing this work up until 3 April with a cast on his arm in any event. However, he said Mr Irving rang him later that day and told him that there were no light duties that could be carried out.

[18] Mr Irving's evidence was that the reference in his note to *what's happened recently with staff* was that another staff member was off work on ACC and that Chris was wanting to step down from his role. Mr Irving also said that he felt that there were no light duties that Mr Morrison could do because most of the projects that were on the go were nearing completion and that he and another staff member were acting as project manager on them. In addition, whilst there were two big projects in the offing (Neave Road and Bells Road), Neave Road had not yet commenced.

[19] On 11 April 2012, while he was away from work on ACC, Mr Morrison wrote an email to Mr Irving and to the other director of the company, Mr Langdon, asking for a meeting to discuss *the current status of* [his] *position within Design + Build*. Mr Morrison suggested four different times for the meeting. Mr Langdon responded a few hours later asking him to ring him. It was clear from the email exchange that Mr Morrison tried to do so but that he could not get through. Later that day, Mr Langdon responded to Mr Morrison saying the following:

> *Hi Brad,*
>
> *I need all company files on your computer saved into our shared drive to allow us to run our business.*
>
> *I'm not sure what you're wanting to discuss with your intended meeting as I believe this was dealt with last week as per the notes that Lance took from your meeting.*
>
> *Happy to meet with you however don't just want to have a meeting for the sake of it. If you have some points to raise please let me know what you would like on the agenda so I can prepare if required.*
>
> *Kane*

[20] The same day, Mr Morrison responded to Mr Langdon as follows:

> *In reply to your latest email I am requesting a meeting as per advice from the Labour Department. I wish clarification around the following points:*
>
> - *What are the reasons behind my losing the role of Project Manager and Health & Safety Officer? I would like concise clarification on this.*
>
> - *I walked away from a meeting with Lance on Friday 30th March when Lance swore and yelled at me. I refuse to treated in this manner and left as there is no reasoning with Lance when he behaves like this (as also in October 2011, and other previous occasions). I am requesting you to be there in order to have a civil, calm meeting.*
>
> *Can you get back to me as requested with a time that is suitable as per previous email. Please note I will be bringing a support person to this meeting, which is why I have made some suggested times.*
>
> *Brad Morrison*

[21] Mr Morrison received no response to this email and so sent a chasing email on 15 April 2012. In the chasing email he suggested further times and dates when he would be able to meet. On 17 April 2012, Mr Morrison sent another email to

Mr Langdon and Mr Irving saying that he had still received no word from them with respect to a meeting. His email stated as follows:

> *Kane/Lance,*
>
> *I have still received no word on an in-house meeting to discuss a) why my role as Project Manager, and, Health & Safety Officer have been taken away from my responsibilities which have forced me onto ACC, and, b) discussing where to re Lance' ill-treatment of me.*
>
> *I believe 6 days has been more than sufficient time to at least respond to me re your availability around my suggested times, as discussed via email and on Thursday morning last week at 11.35am on the 12th of April with Kane..*
>
> *I am offering an invitation to Lance for Mediation with the Department of Labour. Please let me know by midday the 19th of April if you accept this invitation, and I will arrange this and get them to get in contact with you. Equally if you wish to still have an in-house meeting let me also know by midday the 19th of April.*
>
> *While Lance made it clear he didn't want to talk about these issues at the meeting I had with him at 11am on Tuesday the 3rd of March, these issues need to be addressed sooner rather than later.*
>
> *Brad*

[22] Mr Langdon responded to this email the same day saying the following:

> *Brad,*
>
> *Thank you for your emails.*
>
> *As you are currently off work on a non-work related injury, I believe it is best to defer any meeting until you are fit to return to work.*
>
> *We will then be in a position to assess what project work is available at that time. The company has not taken any roles off you. Your role has not changed.*
>
> *Regards,*
> *Kane*

[23] Mr Morrison responded the following day with a reasonably lengthy email noting, in a nutshell, that:

(a) Mr Irving had told him he was being removed from the Bells Road project and would be moving into a site foreman role for Neave Road;

(b) Mr Irving had told Mr Morrison on 3 April that he (Mr Irving) would take over responsibility for the items on the list that Mr Morrison had prepared;

(c) There were active jobs on the go that he could carry out;

(d) There were health and safety duties that he could do but which he was told were unavailable to him;

(e) A message had been left for him by Mr Irving on the afternoon of 11 April asking for health and safety related documents;

(f) Reiterating that he was fit to continue working normal hours in the light duties capacity which his role as project manager and health and safety officer was;

(g) Asking them to contact his ACC case manager to tell her that his role had not changed so that he could be reinstated back as project manager and health and safety officer;

(h) Reiterating the need for a meeting either with the assistance of mediation from the Department of Labour or without.

[24] Mr Morrison's email stated that:

> *This meeting needs to happen as* [sic] *the soonest possible moment so we can resolve these issues and move on!*

[25] No response was received to this email and Mr Morrison instructed Cavell Leitch to write to the respondent on 2 May 2012 raising a personal grievance.

[26] A series of letters was then exchanged between Cavell Leitch and the respondent's solicitors, Goldstein Ryder McClelland. In the first letter from Goldstein Ryder McClelland it was stated that Mr Morrison had not been promoted to the role of project manager but that he had always been employed as a carpenter with delegated additional responsibilities in recent times due to the increasing number of jobs that the company had on the go at one time.

[27] On 3 May 2012, Mr Morrison received a further ARC18 medical certificate which stated that he should still only be on light duties and that he could do sedentary

work for another week and then a graded return as his wrist pain allowed. It was stated that he should be back to full work in a further two weeks.

[28] On 16 May 2012, Mr Morrison sent an email to Mr Irving and Mr Langdon stating that he would be returning to normal duties two weeks from the date of the medical certificate, which was the following morning, 17 May. He stated that he would be at the office at 7.30am that day.

[29] Mr Morrison says that, at around 4.32pm that same afternoon (16 May), he received a call from Mr Irving. He disclosed to the Authority a copy of an email that he had sent to his counsel around 30 minutes later recording the conversation he had with Mr Irving. This email states as follows:

> *Lance called me at 4:32pm a short time ago today (16 May 2012) in what appeared to be in response to my email I sent earlier today about turning up at the office at 7.30am tomorrow to carry on my duties with my company.*
>
> *He asked how I was. I said "good". He then told me that tomorrow I would be starting later (than my usual start time of 7.30am) at 9:00am at a job on Lincoln Road (55 Lincoln Road at the Caltex Station from memory). I asked "why I was going there". He said "that's where the work's at". I said "what work". He said about work on the tools. I said to him that that's not my job and that he couldn't just change my job. He said "yes it is, you are employed as a carpenter". I said "no I'm not". He said again that I was a carpenter. I said "I will have to get back to you". He said "well that's fine".*
>
> *I hung up.*

[30] Mr Irving's recollection of the conversation was that it did go along those lines save that Mr Irving stated that he had also said the following (this having been recorded in an email that he sent to Mr Langdon at 8.26am the following morning):

> *Brad it has been made very clear to you that you are employed with Design + Build as a carpenter, since you have been rehabilitated we have had to get on and keep the business running at the moment the company requires you to get in and help set a site up on the tools so we have forward work, its all hands to the pump, just like I have been lately and in the past we have to roll our sleeves up and get on the tools when required.*

[31] In his evidence, Mr Morrison denied that Mr Irving had said those words to him. I accept Mr Morrison's evidence, primarily because Mr Morrison wrote his note of the conversation almost immediately after it had taken place. Mr Irving's email to his fellow director also appears a little contrived.

[32] Mr Morrison chose to resign the same day by email sent to Mr Irving and Mr Langdon at 5.41pm in the following terms:

> *Dear Lance and Kane,*
>
> *As you both know I was ready to return to work tomorrow morning and informed you of this earlier today. In response to this I have been told to turn up to work at 9:00am on a site on Lincoln Road as I will be working on the tools. You (Lance) clarified this by stating I am currently employed as a carpenter and the work at Lincoln Road is the work to be done.*
>
> *It seems clear to me from this conversation and the recent letter from your lawyer that you have decided to persist with removing me from the role of Project Manager and believe you can justify this unilateral decision by claiming that I have always been employed as a carpenter. This is simply not correct. To compound this problem you are not prepared to even attempt to listen to what I have to say and discuss this with me but rather you continue to make decisions and simply tell me the outcome.*
>
> *As such your actions amount to a continuing and further breach of the duties you owe to me and I believe this is now being done with the deliberate intention of forcing me to resign. In these circumstances I cannot continue to work for you and I give you notice of my resignation to take effect immediately.*

[33] It was of interest to the Authority that a signed letter from Mr Langdon addressed to Mr Morrison and dated 16 May 2012 was disclosed which enclosed a copy of a new individual employment agreement. The letter asked Mr Morrison to read the agreement carefully and to seek independent advice if he wished. The individual employment agreement contained, as schedules, reference to Mr Morrison being a carpenter, together with a carpenter's job description.

[34] Mr Morrison said that he did not see this letter and the attached employment agreement until well after he had resigned, when it was disclosed as part of the disclosure process in preparation for the investigation meeting. Mr Langdon's evidence was that every member of staff, save for the quantity surveyor, the apprentices and the admin staff were described as carpenters in their employment agreements and that other staff had signed their employment agreements in April and May 2012.

[35] Mr Morrison had previously been sent an employment agreement to look over in February 2012, in respect of which he made numerous comments, and raised various questions, but this document did not have the schedules filled in and had not identified his role as *carpenter*. It appears to me, from its timing, that the later

employment agreement was prepared in order to bolster the position that the respondent was making that Mr Morrison's role was that of a carpenter alone.

Issues

[36] The following issues need to be determined by the Authority:

(a) Was Mr Morrison constructively dismissed?

(b) Did Mr Morrison suffer disadvantage in his employment in relation to the treatment of which he complains?

(c) Should penalties be imposed upon the respondent?

Was Mr Morrison constructively dismissed?

[37] The law in relation to constructive dismissals in New Zealand is well settled. Constructive dismissal can arise in one of three ways: (*Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372).

a. The employer gives the employee a choice between resigning or being dismissed;

b. The employer has followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or

c. There is a breach of duty by the employer which leads the employee to resign.

[38] The essential questions to be addressed in constructive dismissal cases are:

a. What were the terms of the contract?

b. Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

See *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich & Associates Employment Agency v Complete Fitness Centre*) [1983] ERNZ SEL CAS 95 (AC).

[39] A typical constructive dismissal scenario occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to

destroy or seriously damage the relationship of trust and confidence. In such a case, it is not necessary to show that the employer intended any repudiation of the contract (*Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407).

[40] To found a claim for constructive dismissal the breach of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable (*Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140).

[41] It is not my view that there was a deliberate intention on the part of the respondent to cause Mr Morrison to resign. Mr Irving gave evidence, which I largely accept, that he was dissatisfied with Mr Morrison's performance because he found that he was inefficient in the way that he managed his work. The incident involving the delivery of the timber which caused the argument, in my view, irritated Mr Irving because he saw it as a further example of what he saw was Mr Morrison's failure to work efficiently. To make matters worse for Mr Irving, the delivery of the timber involved the other staff member, Chris, who Mr Irving found to have performance deficiencies as well.

[42] I make no findings as to whether or not Mr Morrison's performance was in need of improvement as no substantive evidence was adduced on that matter. Certainly, there does not appear to have been any considered performance improvement programme embarked upon. However, it would appear that Mr Morrison and Mr Irving had different ways of working and that Mr Irving was impatient to run his company the way that he preferred.

[43] Despite this, I do not believe that Mr Irving and Mr Langdon set out on a course of action to cause Mr Morrison to leave. More likely, on a balance of probabilities, is that Mr Irving believed that Mr Morrison was not carrying out the project manager role very well and so he simply determined, unilaterally, to take those duties away from him. The catalysts were the incident involving delivery of the timber, Mr Morrison's subsequent walking away from Mr Irving during the argument on 30 March and Mr Morrison's subsequent lengthy email effectively ticking Mr Irving off. I do not believe that Mr Morrison acted in bad faith when he walked away from the argument on 30 March.

[44] In any event, my finding is that Mr Irving decided to remove Mr Morrison's duties as project manager, whether on a permanent or temporary basis is unclear, but that he reached his decision without any meaningful consultation with Mr Morrison. If Mr Irving had had concerns about the way that Mr Morrison carried out his role, the legally correct approach would have been for him to have spoken to Mr Morrison, with a support person present, and explained his concerns, giving Mr Morrison the opportunity to improve, and, in the absence of improvement, giving him a warning.

[45] Mr Irving gave evidence that his intention when he told Mr Morrison by email that he was to start as the site foreman on Neave Road in the near future was to give Mr Morrison the opportunity to learn, as the Neave Road job was a very big one, worth a significant sum of money. I am unclear whether this was in Mr Irving's mind at the time when he sent his email to Mr Morrison on 30 March telling him that he was to become the site foreman of Neave Road or whether this is a post hoc justification of his action. Either way, this was certainly not explained in any way to Mr Morrison before his resignation. The wording of the email of 30 March in which Mr Irving told Mr Morrison that he would be *slowly handing over communications to* [Mr Irving] *and moving onto site as site foreman for Neave Road* strongly suggested, as Mr Morrison reasonably inferred, that he was having his project management responsibilities stripped from him.

[46] This action by Mr Irving, together with his action on 3 April 2012 in refusing to allow Mr Morrison to carry out any of the duties that he had been carrying out up to that point, therefore forcing him to go onto ACC funded sick leave, led Mr Morrison to conclude that there was in train a deliberate ploy to demote him. I believe that this was an entirely reasonable conclusion for Mr Morrison to have taken.

[47] Mr Morrison's conclusions were justified in his mind when, on 16 May, he received a telephone call from Mr Irving telling him that he was to report at 9am to Lincoln Road to work on the tools, *because he was employed as a carpenter*.

[48] Whilst I accept the evidence of Mr Irving that Mr Morrison had never been formally promoted to the position of project manager, it was absolutely clear to me that this was the role that Mr Morrison was in at the point when he was put on sick leave on ACC. The Authority saw examples of the timesheets that Mr Morrison filled out during the early months of 2012 and, despite the best efforts of respondent's counsel to try to show that Mr Morrison was actually working on the tools quite

frequently, it is clear that this is not the case and that the majority of his work was of a project manager and health and safety officer nature.

[49] Therefore, and given that Mr Morrison had received a pay rise in late 2011 or early 2012, in recognition of his work, it is disingenuous to try to argue that he was basically a carpenter who was being allowed to carry out what were, in effect, much more senior tasks for the vast majority of his time over several months. It is my firm conclusion that Mr Morrison's role had evolved primarily into that of a project manager and health and safety officer for the respondent by the time that he was forced onto ACC by the company, with a residual duty to undertake carpentry work from time to time as and when required.

[50] Whilst I do not believe that there was a deliberate ploy by the respondent to force Mr Morrison to resign, I do believe that the conduct of the respondent towards Mr Morrison, when considered over the period from 30 March to 16 May 2012, amounted to a breach of the duty of good faith and a further breach of the duty of trust and confidence owed by the respondent to Mr Morrison. In particular, I identify the following as significant failings by the respondent:

(a) Shouting and swearing at Mr Morrison on 30 March;

(b) Sending a text message to Mr Morrison the same day accusing him of being childish and weak for walking away from the argument;

(c) Advising Mr Morrison that he was to be stripped of his project management role on Bells Road immediately and was to slowly hand over communications to Mr Irving over the following four to five weeks and to become site foreman for Neave Road, without any explanation as to the reason for these actions;

(d) Making the changes at (c) above without consultation;

(e) Refusing to allow Mr Morrison to carry out any of the duties that he had been carrying out up until 3 April 2011, which would have constituted light duties, thereby forcing Mr Morrison to go onto ACC;

(f) Refusing to meet with Mr Morrison or to engage in mediation in respect of Mr Morrison's very clearly articulated concerns about his

being demoted and the treatment which he received from Mr Irving on 30 March; and

(g) Being told on 16 May that he was employed as a carpenter.

[51] I must also record that I have reached the conclusion that there was a cynical attempt by the company to designate Mr Morrison's role as that of carpenter when it intended to send to Mr Morrison on 16 May, after it had discovered that he was fit to return to work the following day, an employment agreement which stated that he was a carpenter and which made no reference whatever to the project management and health and safety officer roles which he had been carrying out for several months until April 2012. It is accepted that this did not form part of Mr Morrison's decision to resign as he was unaware of it.

[52] It is my firmly held view that the failings by the respondent as identified above cumulatively amount to repudiatory breaches of Mr Morrison's employment agreement. Being told on 16 May 2012 that he was employed as a carpenter, without any acknowledgment of his concerns, was the final straw when viewed against the respondent's preceding actions, and Mr Morrison's particular concerns at having his project management and health and safety duties taken away from him. Mr Morrison chose to accept those breaches, rather than to affirm the contract, and resigned on the same day. I do not accept, as has been submitted by counsel for the respondent, that the only reason Mr Morrison resigned was because he objected to the title of *carpenter*. It was clear from Mr Morrison's evidence overall that he objected strongly to having his duties as project manager (and arguably also as health and safety officer) taken away from him. It was not the title of carpenter that he objected to; it was his role and duties being narrowed and reduced to those of a carpenter alone.

[53] I am also satisfied that Mr Morrison's resignation was foreseeable in light of the very clearly articulated concerns that he expressed in his written communications with his employer. To take away the more senior parts of someone's job against their will would lead any reasonable employer to be alert to the possibility of that employee resigning in protest. Counsel for the respondent submits that Mr Morrison did not give the respondent an opportunity to respond to his concerns about his job title. However, that misses the point that Mr Morrison did not have concerns about his job title. Mr Morrison did give the respondent plenty of opportunity in his written communications to respond about his concerns about his role being changed.

[54] I also do not accept the submission of the respondent that Mr Morrison unilaterally decided that he was only going to undertake selected aspects of his role. My finding is that he had been undertaking carpentry and other work *on the tools* throughout his employment, and I saw no evidence to suggest that he was rejecting such work in the future.

[55] Therefore, I accept that Mr Morrison was constructively dismissed. It is not a significant step further to conclude that Mr Morrison's resignation amounted to a constructive dismissal that was unjustified. In applying s.103A of the Act (as enacted after the 1 April 2011 amendment to that section), I conclude that the respondent's actions, and how the respondent acted, as described in paragraph 50 above, were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[56] Therefore, I accept that Mr Morrison was unjustifiably constructively dismissed.

Has Mr Morrison suffered disadvantage in his employment?

[57] I am satisfied that each of the actions described in paragraph 50 above, for each of which Mr Morrison raised personal grievances, unjustifiably affected Mr Morrison's employment to his disadvantage when the s. 103A test is applied. This is evident from the fact that they cumulatively amounted to a set of circumstances entitling Mr Morrison to resign.

[58] However, as they cumulatively led to his constructive dismissal, which I have found was an unjustified dismissal, and for which remedies will be awarded, I do not believe that it is appropriate to award Mr Morrison separate remedies in respect of the unjustified acts, either individually or when taken together.

Should penalties be imposed on the respondent?

[59] Mr Morrison seeks that penalties be imposed upon the respondent in respect of the following:

a. Breaching s. 4(1) of the Act, pursuant to s. 4A of the Act;

b. Breaching the Holidays Act 2003; and

c. Failing to provide an employment agreement.

Breach of s. 4(1) of the Act

[60] Section 4A of the Employment Relations Act 2000 (the Act) provides as follows:

> ***Penalty for certain breaches of duty of good faith***
>
> *A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—*
>
> *(a) the failure was deliberate, serious and sustained; or*
> *(b) the failure was intended to undermine—*
> *...*
> *(ii) an individual employment agreement or a collective agreement; or*
> *(iii) an employment relationship;*
> *...*

[61] The duty of good faith in s.4(1) of the Act is expressed as follows:

> *(1) The parties to an employment relationship specified in sub-section (2)—*
>
> *(a) must deal with each other in good faith; and*
> *(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
> *(i) to mislead or deceive each other; or*
> *(ii) that is likely to mislead or deceive each other.*
>
> *(1A) The duty of good faith in subsection (1)—*
>
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;*
> *...*

[62] I have found that Mr Morrison was constructively dismissed, and that this arose out of actions by the respondent which amounted collectively to a breach of the duty of good faith. I must now decide whether the failure was deliberate, serious and sustained. The actions identified in paragraph 50 above were all deliberate in my view. They were not accidental or inadvertent. As each action which cumulatively

amounted to a breach of good faith was deliberate, the overall failure to comply with the duty was also deliberate.

[63] Cumulatively, I believe that the failure was also serious. This must be the case when I have found that the actions constituting the failure cumulatively amounted to a repudiation of the employment relationship which entitled Mr Morrison to resign.

[64] Finally, I find that the failure was sustained. The failure was made up of a number of actions by the respondent taking place between 30 March and 16 May 2012. This is not an insignificant period, and it was the respondent's failure to engage constructively with Mr Morrison once he had raised his concerns which prolonged that period.

[65] In summary, therefore, I find that the first limb of section 4A has been satisfied, and that a penalty for breaching the duty of good faith should be imposed. I do not believe that the respondent deliberately set out to breach the duty of good faith, nor to force Mr Morrison to resign. I believe, therefore, that the penalty should be relatively modest. I set the penalty at $2,000, payable to Mr Morrison in its entirety.

Breach of the Holidays Act 2003

[66] In respect of the alleged breach of the Holidays Act, Mr Morrison argues that a penalty should be imposed because the respondent unlawfully withheld Mr Morrison's holiday pay, initially in its entirety, and latterly withholding the balance of $1,632.50, which it erroneously believed it was entitled to withhold in respect of training fees incurred by it on behalf of Mr Morrison. This latter portion of pay was eventually paid on 20 September 2012. The dates and details of payment were not the subject of sworn evidence, and have been set out in Mr van Keulen' submissions, but have not been denied by the respondent in its submissions, although liability for a penalty is resisted.

[67] Section 75 of the Holidays Act 2003 provides as follows:

Penalty for non-compliance

(1) An employer who fails to comply with any of the provisions listed in subsection (2) is liable,—

(a) if the employer is an individual, to a penalty not exceeding $10,000:

(b) if the employer is a company or other body corporate, to a penalty not exceeding $20,000.

(2) The provisions are—

> *(a) section 16 and sections 21 to 28 (which relate to an employee's entitlement to, and payment for, annual holidays):*
> *…*

[68] The respondent appears (from email correspondence seen by the Authority) to have decided to withhold the holiday pay as leverage over Mr Morrison, to encourage him to return his uniform, keys and to copy computer files held on his personal laptop. This decision was despite the respondent having no lawful right to withhold the holiday pay and also despite it being advised by highly competent, experienced and specialist counsel by that time. I have little doubt that the legal advice the respondent would have received was that the respondent did not have the right to withhold the holiday pay properly due to Mr Morrison. In any event, Mr van Keulen wrote on behalf of Mr Morrison to Ms Ryder in clear and unequivocal terms on 6 June 2012 stating that the continued withholding of the holiday pay was unlawful. Part of the holiday pay due was paid the following day, but Mr Morrison was not paid the balance due for another 15 weeks.

[69] As in the Authority's determination cited by Mr van Keulen (*Leanne Cooke v JKL Entertainment Limited* [2012] NZERA Christchurch 134) the respondent continued to withhold payment of a sum lawfully due despite being advised that it had no right to do so. In this case, it did so despite being legally advised. I can only conclude that the continued withholding of the pay was deliberate, for tactical reasons.

[70] Such action, whilst possibly having tactical merit in a contentious litigation situation is, in my view, unacceptable in an employment context and amounts to a cynical disregard of the law. This action, therefore, is a prime example of a situation where a penalty should be imposed, both as a punishment for an unlawful action, and as a deterrent, because it was almost certainly done in <u>wilful</u> disregard of the law.

[71] In *Leanne Cooke* the Authority imposed a penalty of $1,000 against the respondent. The extant case is worse, however, in my view, because of the much longer period for which the monies were withheld, because of the greater amount involved, and because of the wilful nature of the withholding. The maximum amount that may be imposed under the Holidays Act against a respondent is $20,000. I believe that a penalty in the sum of $5,000 is an appropriate sum, 50% of which is to be paid to Mr Morrison, the balance to the Crown.

Failing to provide an employment agreement

[72] I am not persuaded that a penalty should be imposed in respect of this failing. Although tardy in providing an employment agreement, the respondent did provide Mr Morison with a draft for comment. There was at least a willingness to comply with the Act's requirements. I therefore decline to impose a penalty for this breach.

Remedies

[73] Having established that Mr Morrison was unjustifiably constructively dismissed, it is necessary to consider what remedies he is entitled to. Mr Morrison seeks reimbursement of wages and other monies lost as a result of his unjustified dismissal, together with compensation for humiliation, loss of dignity and injury to his feelings.

Reimbursement of lost wages

[74] Mr Morrison is entitled to lost wages pursuant to s 123(1)(b) of the Act. Sub section 128(2) provides that, subject to subsection (3) and s. 124 of the Act, 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. Section 124 deals with contribution, which will be examined below. Subsection 128(3) provides:

> *(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.*

[75] The Authority must be satisfied that Mr Morrison made reasonable efforts to mitigate his loss of employment. He did obtain temporary work in the four weeks period from his resignation, and then obtained permanent work on 20 June 2012. Although the respondent submits that there was plenty of work for builders in Christchurch in the period after his resignation, and that he should have found a job very quickly, no evidence was adduced to support just how easy it was at that time, and given Mr Morrison's skill base. The Authority does not have the specialist knowledge to be able to judge this without such evidence. In any event, I am satisfied

from the evidence I have heard that Mr Morrison did make reasonable efforts to find new employment.

[76] Between 17 May 2012 and 20 June 2012 Mr Morrison would have earned a total of $6,480 gross if he had remained employed by the respondent. Between these dates he earned $2,194.72 gross and so he made a net loss of $4,285.28 before tax.

[77] Mr Morrison gained permanent employment on 20 June 2012, earning $2.50 gross less an hour than he earned with the respondent. For the period between 20 June 2012 and the end of the period of three months from his resignation (a period of 40 working days) Mr Morrison would have earned an extra $900 gross. He is entitled to be reimbursed this sum also.

[78] Mr Morrison also asks for reimbursement of the continuing loss between the end of the initial three month period and the date of the investigation meeting, pursuant to s. 128(3) of the Act. That would be a total of 43 weeks further loss. I am not inclined to grant this, on the basis that the date of the investigation meeting is an arguably arbitrary date which is dependant upon a number of factors, not all of which are within the control of the parties. Whilst Mr Morrison does earn less than he did when in the respondent's employment, it may be that his work for the respondent carried more responsibility compared to that of his current position. The Authority did not hear sufficient evidence to be able to judge accurately why Mr Morrison's current earning are less than what he earned previously, and so I am not in a position to exercise the discretion asked of me.

Compensation under s. 123(1)(c)(i) of the Act

[79] I must now turn to the matter of compensation pursuant to s.123(1)(c)(i) of the Act. Mr Morrison does not seek any particular sum, but submits that the award should be high, citing *Strachan v Moodie* [2012] NZEMP 95. I understand that this case is cited because of the *very serious consequences to Ms Strachan of Mr Moodie's conduct towards her after dismissal which had the effect of aggravating the hurt and humiliation that she experienced as a result of it* (Paragraph [129]). Mr Morrison argues that his humiliation, loss of dignity and injury to his feelings were aggravated because of the delay in paying the holiday pay, and also in returning his pin gun.

[80] I am not convinced that the seriousness of the respondent's actions was in anyway comparable to that suffered by Ms Strachan in *Strachan v Moodie*. In addition, I have ordered that 50% of the penalty imposed upon the respondent under

the Holidays Act be directed to Mr Morrison, and I believe that that is sufficient compensation for the effects of the delay suffered in respect of that matter. As for the pin gun, whilst no doubt irritating to be deprived of the use of this for a period, I do not believe that it resulted in humiliation, loss of dignity or injury to his feelings.

[81] Mr Morrison gave evidence of the effects on him of the events that led to him resigning. I accept that the actions that led directly to his resignation did cause him humiliation, loss of dignity or injury to his feelings. I note that the events lasted several weeks, and accept that they had a cumulative effect upon Mr Morrison.

[82] I cannot take into account the fact that Mr Morrison has experienced problems with his mother, who is reportedly embarrassed by the situation as she is a friend and relative of Mr Irving's mother. Whilst I note that these problems upset Mr Morrison, they cannot be blamed on the respondent.

[83] However, I accept that Mr Morrison will have suffered more than a trivial level of humiliation, loss of dignity or injury to his feelings and am prepared to award a mid level sum to reflect this. I believe that the sum of $8,000 is an appropriate sum.

Contribution

[84] I must now consider the extent to which Mr Morrison's actions contributed towards the situation that gave rise to the personal grievance and whether I should reduce the remedies that I would otherwise award.

[85] Counsel for the respondent submits that Mr Morrison failed to meet his contractual obligations to work as directed, that he overreacted to the situation, was belligerent and sought legal advice at an early stage and escalated issues.

[86] Mr Morrison refused to attend a work site as a carpenter. However, this was because he viewed the respondent' statement that he was employed as a carpenter as an indication that he was no longer to carry out the other elements of his role. Instead of reporting for work, he resigned. As I have examined above, this action was his acceptance of the cumulative fundamental breach of contract by the respondent. It cannot, therefore, be viewed as a blameworthy act meriting a reduction in his remedies.

[87] I do not accept that Mr Morrison was belligerent. Indeed, he was patient in his attempts to get his employer to engage with him over his concerns. I do not accept that he overreacted to the situation, and I do not accept that his engagement of legal advice escalated the problem in a way for which he can carry any blame.

[88] All in all, I do not accept that Mr Morrison contributed towards the situation that gave rise to the personal grievance in any blameworthy way. Therefore, it would not be appropriate to reduce his remedies in any way.

Interest

[89] Mr Morrison seeks in counsel's submissions an award of interest on all wages awarded. The respondent does not address the specific issue of interest in its submissions. Clause 11 of Schedule 2 of the Act provides as follows:

> *(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.*
>
> *(2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.*
>
> *(3) Subclause (1) does not authorise the giving of interest upon interest.*

[90] This clause enables the Authority to award interest on wages recovered, including lost wages awarded under s.123(1)((b). The principle behind the award of interest on monetary remedies is primarily to compensate the winner for being deprived from the use of the money which should have been paid to him or her at the time it fell due to be paid. The clearest example of this is where arrears of wages are awarded.

[91] In the case of reimbursement of wages, the same principle applies. If Mr Morrison had not been unjustifiably constructively dismissed, he would have been in receipt of the lost wages awarded in this determination during the three months from his resignation.

[92] Of course, he would not have received this sum in its entirety until the end of the period of three months from his resignation, and I consider that the interest should therefore run from the day immediately following the end of the three month period. That day is 16 August 2012. The respondent must therefore pay Mr Morrison interest at 5% per annum on the sum of $5,185.28 starting on 15 August 2012 until this sum is paid to Mr Morrison in full.

Orders

[93] I order the respondent to pay the following:

a. A penalty in the sum of $2,000, to be paid to Mr Morrison pursuant to s. 136(2) of the Act;

b. A penalty in the sum of $5,000, $2,500 of which is to be paid into the Authority (which will then be paid by the Authority into a Crown Bank Account), and the balance of which is to be paid by the respondent to Mr Morrison pursuant to s. 136(2) of the Act;

c. Reimbursement of wages to Mr Morrison pursuant to s. 123(1)(b) of the Act in the gross sum of $5,185.28, together with interest at 5% per annum on the full sum calculated to start on 15 August 2012 until this sum is paid to Mr Morrison in full; and

d. Compensation to Mr Morrison pursuant to s. 123(1)(c)(i) of the Act in the sum of $8,000.

Costs

[94] The parties are to seek to agree how costs are to be dealt with. In the absence of agreement within 28 days of the date of this determination, counsel for Mr Morrison will serve and lodge a memorandum and counsel for the respondent will serve and lodge a memorandum in response within a further 14 days.

David Appleton
Member of the Employment Relations Authority