

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 87
5348229

BETWEEN

CHRIS PATALANO
Applicant

A N D

NAVIGATION RESOURCES
LIMITED T/A MAP WORLD
Respondent

Member of Authority: D Appleton

Representatives: Jeff Goldstein, Counsel for Applicant
Phil Butler, Advocate for Respondent

Investigation Meeting: 15 March 2012, 2 April 2012 and 18 April at
Christchurch

Submissions Received: 18 April 2012 from Applicant
18 April 2012 from Respondent

Date of Determination: 10 May 2012

DETERMINATION OF THE AUTHORITY

- A. The Applicant fails in his arrears of salary claim.**
- B. The Applicant's overtime claim is unable to be quantified.**
- C. The Applicant fails in his unjustifiable constructive dismissal claim.**
- D. The Applicant partially succeeds in his unjustifiable disadvantage claim, and is awarded compensation pursuant to s. 123(1)(c)(i).**
- E. The breach of s 65 of the Employment Relations Act shall not attract a penalty against the respondents.**
- F. Costs are reserved.**

Employment relationship problem

[1] Mr Patalano claims that he was unjustifiably constructively dismissed on 22 June 2011 and that he was unjustifiably disadvantaged in his employment. He also claims that he is owed overtime payments for the period from 28 February 2011 to 22 June 2011, together with arrears of wages for the period from 7 April 2011 to 22 June 2011. He also claims that there was a breach of s.65 of the Employment Relations Act 2000.

Brief account of the events leading to the resignation

[2] Mr Patalano worked as a Sales Assistant in the Christchurch store known as Map World, which is owned by the respondent company. He was employed pursuant to an offer of employment dated 1 December 2008 which the respondent concedes did not comply with the requirements of s.65 of the Act.

[3] Following the major earthquake that occurred in Christchurch on 22 February 2011, the premises from which Map World traded became inaccessible. The staff started to work from 28 February at the house of the store's manager, Ms Madeleine Rayner. The owner of Map World, Mr Neville Jones, met with the staff, including Mr Patalano, on 1 March 2011 and during that meeting informed staff that prospects for the business were extremely uncertain and that staff either could leave the business or continue to work, subject to receiving a lower salary, equivalent to the \$500 per week subsidy that was being paid to affected employers by the government at that time.

[4] Mr Patalano's position is that he had no choice but to acquiesce to the reduced salary. It would appear that no direct discussion took place at the meeting on 1 March in relation to what would happen to the employees' salaries once the government subsidy would cease to be paid. Mr Patalano's evidence was that he understood that salaries would be paid again at the normal rate, with effect from the shop being *up and running*.

[5] By 7 April 2011, the store had started operating from temporary premises at 41 Moorhouse Avenue, prompting Mr Patalano to raise concerns in writing about when salaries might be restored to pre-earthquake levels.

[6] Meetings were held in the following weeks between Mr Jones and Mr Patalano and between Mr Jones and the staff in general, whilst Mr Jones and the staff were still taking steps to rebuild the business. The upshot of these meetings was that Mr Jones, having taken legal advice, embarked on a consultation process in relation to a proposed restructuring of the business which would enable it to diversify into two additional areas; the sale of kayaks and the sale of roof racks.

[7] Mr Patalano's position is that he had been told orally that he would be offered the position of manager of the proposed new roof rack business, and that this was his understanding when he went on leave to France on 13 May 2011. He had asked his wife, Ms Shorthouse, who had remained in New Zealand, to liaise with Mr Jones in relation to the proposals. Mr Jones says that Mr Patalano did not advise him before he went on leave that he had wished Mr Jones to deal with his wife.

[8] During this period while Mr Patalano was on leave, Mr Jones made a formal offer to Mr Patalano of the position of establishing a roof rack systems business via the latter's email address, which was shared with Ms Shorthouse. Ms Shorthouse replied by email asking Mr Jones for details of the position, including salary, job description and a copy of the proposed employment agreement. Mr Jones initially ignored Ms Shorthouse's request, which she repeated in two further emails, but eventually replied, declining to send these, saying that he preferred to wait until Mr Patalano was back from leave when he could discuss those matters with him face-to-face.

[9] While Mr Patalano had been on holiday, the respondent's accounts clerk, Ms Andrea Meier, had written to Mr Patalano by email advising him that Mr Jones had told her not to pay him his full holiday pay. Full holiday pay was eventually paid to Mr Patalano before his resignation, however.

[10] When Mr Patalano returned from leave on 8 June 2011, he requested a meeting with Mr Jones and, on 13 June, wrote a letter formally demanding payment of his full salary, arrears to 22 February 2012, holiday pay that was still owed at that point, *a job description for the new position of managing the roof rack business and a contract for the new position, outlining hours of work, pay structure, overlap between parts of the business and ways of working with you.* Mr Patalano stated that he wanted these issues resolved by close of play on 20 June 2011.

[11] Mr Jones and Mr Patalano met the following day, 14 June, but there was no resolution to the matter. By then both Mr Jones and Mr Patalano had each engaged their own legal advisers. In the meeting, Mr Patalano stated that he would not return to work until the issues that he had been complaining about had been sorted out. Mr Jones' position was that Mr Patalano had suddenly asked for back pay from 22 February despite a clear agreement reached on 1 March 2011 that his salary would reduce to \$500 a week. This was the main topic discussed at the meeting and the two men finished by exchanging details of their respective lawyers.

[12] Mr Patalano states that Mr Jones said to him during the 14 June meeting that he may not be able to do the roof rack business anymore and that things could be difficult for them in a working relationship. Mr Jones denies he said that. Mr Patalano did not return to work after that meeting.

[13] Mr Patalano's legal representative wrote to the respondent's representative on 17 June reiterating the demands in Mr Patalano's letter of 13 June. By way of an email dated 21 June 2011 the respondent's representative wrote to Mr Patalano's representative denying that his salary had been unilaterally reduced, but suggesting that the Employment Relations Authority be asked to resolve the matter, with the respondent paying the filing fee and preparing the application.

[14] In addition, the email asked for Mr Patalano to return to work at 8.30am the next day, confirming that he would be on *full pay* and offering him the position of *Roof Rack Salesperson*. The email stated that the respondent hoped to have the offer, including salary and job description, to Mr Patalano by the following day. It asked for Mr Patalano to advise whether he intended to take up the position by 5pm Thursday, 23 June, but that if he required more time to obtain legal advice then that could be arranged. The email concluded that, if Mr Patalano did not accept the offer, then the parties would need to meet to discuss his options.

[15] Mr Patalano's adviser replied on 22 June, at 11.46am, stating that the terms were not acceptable to Mr Patalano and that he would resign that day. Mr Patalano resigned later that day, by way of a letter emailed by his lawyer to the respondent's representatives at 2.31pm. The text of the resignation letter was as follows:

Dear Neville,

As a result of your failure to address my ongoing concerns about:-

- *The payment of my wages.*
- *Expecting me to work long hours.*
- *Increasing my hours without consultation.*
- *Refusing to pay my holiday pay.*
- *Failing to pay wages arrears (which you accept are due and owing).*
- *Failing to provide me with a job description for the roof rack manager position and now degrading the offer by offering me the role of roof rack sales person.*

I feel I have no other option but to resign with immediate effect.

I hereby raise a constructive dismissal claim as a result of your actions.

*Yours sincerely
Chris Patalano*

Issues to be considered

[16] The following issues need to be determined:

- (a) Whether there had been a binding agreement between Mr Patalano and the respondent on 1 March 2011 that he would be paid a reduced salary equivalent to the government earthquake subsidy;
- (b) If there had been such an agreement, whether the reduction had been intended to be temporary or permanent;
- (c) If the reduction had been intended to have been temporary, what the trigger would be for Mr Patalano's salary to be increased;
- (d) Whether Mr Patalano had been contractually entitled to overtime and whether, if so, he worked overtime hours for the period claimed and what they were;
- (e) Whether the respondent's actions had amounted to a repudiatory breach of the employment agreement between Mr Patalano and the respondent justifying Mr Patalano to accept that breach by resigning and whether they had been actions amounting to an unjustified disadvantage in Mr Patalano's employment; and

- (f) Whether the respondent's admitted breach of s.65 of the Employment Relations Act 2000 should attract a penalty.

Whether there had been an agreement between Mr Patalano and the respondent that he would be paid a reduced salary equivalent to the government earthquake subsidy

[17] The only written record of the meeting on 1 March 2011, when the issue of the business being restored and salaries being reduced had been discussed, had been made by Ms Rayner. This note, which Ms Rayner says she wrote 3 or 4 days after the 1 March meeting, contains the following reference:

We talked about the subsidy the government has offered for businesses. Neville had previously asked Andrea and Madeleine to investigate. This would enable the company to continue paying some wages (subsidy only: \$500 for full-time; \$300 for part-time) whilst Neville and the staff figure out if the business is viable, and if Neville is willing to start over again. The understanding is that the 4 full-time employees (Neville, Madeleine, John and Chris) and the 2 part-time employees (Andrea and Sam) would be paid the subsidy for as long as it continues. Neville pointed out that reestablishing the business is by no means certain and staff members are free to take any other employment options available. At this time, no one indicated any interest in leaving and every one seems keen to accept the subsidy as a means of having some income whilst we work on re-establishing.

[18] Mr Patalano's evidence was that, on 1 March 2011, he had not *agreed* to a reduction in his gross salary to \$500 a week, but that he had *accepted* it or *acquiesced* to it because he had had no choice in the matter. He told the Authority that, at the staff meeting on 1 March 2011, he was being told that if the business was to carry on, there would be a reduction in salary. Otherwise, the business would be abandoned, and no-one would have a job. Upon questioning Mr Patalano, it is clear to me that, whilst the choice he had been presented with on 1 March had been unpalatable to him, it had been a genuine choice and he had been free to reject the proposal that his salary be reduced and effectively be made redundant so that he could try his luck elsewhere.

[19] This is certainly not a case where Mr Patalano had his salary reduced and he immediately protested about it, saying he had not agreed to such a reduction. The evidence from Mr Patalano was that, whilst he had been very unhappy that he had had to face the choice of losing his job or face a reduction in salary, he had accepted the choice, chose a reduction in salary and had worked hard to get the business up and running so that he could quickly get back onto his normal salary.

[20] Therefore, I do not accept that Mr Patalano's salary had been unilaterally reduced by the respondent. I find that Mr Patalano had reached a binding agreement that his salary would be reduced to the equivalent of the earthquake subsidy.

[21] Mr Patalano's counsel has sought to argue that the reduction in salaries of all the staff had been unlawful under the Wages Protection Act 1983 because their written consent had not been obtained. Section 4 of that Act provides that, subject to sections 5(1) and 6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction. Section 5(1) provides that an employer may, for any lawful purpose, make deductions from wages payable to that worker, with the written consent of a worker; or on the written request of a worker. Section 6(2) deals with overpayments.

[22] Counsel for the respondent argued that this was not a deduction in wages or salary, but an agreed variation in the term of Mr Patalano's employment agreement relating to his salary.

[23] I prefer the view of counsel for the respondent on this point. In my view, the reduction of Mr Patalano's weekly pay had not been as a result of a weekly deduction from Mr Patalano's existing contractual salary, but had arisen from an agreed variation of the term of the employment agreement which had defined his salary.

If there had been an agreement to reduce salary, whether the reduction was meant to be temporary or permanent

[24] The next question to consider is the nature of the agreement that had been reached between the parties in respect of how long the reduction in salaries would last. Mr Patalano was not clear on exactly what had been stated at the 1 March meeting in this respect, saying that Mr Jones *may* have said that salaries could be restored to pre-earthquake levels when the company was *up and running again*. Mr Patalano was sure that Mr Jones had not said that the staff would only be paid full salary again when the company was *profitable* because questions would have been asked about that.

[25] Mr Jones was unable to remember what had been agreed as to what the trigger would be for putting staff salaries back to their pre-earthquake levels, stating that there had been *a swirl of uncertainty*. Ms Rayner said that there had been no discussion about what would happen after the government stopped paying the

subsidy. The note that she had prepared of the 1 March meeting records that the staff *would be paid the subsidy for as long as it continues.*

[26] It appears that it is probable that it had simply not been discussed at the 1 March meeting as to how long the salaries would be paid at a reduced level. It is probable that this failure had been as a result of the *swirl of uncertainty* that had prevailed in Christchurch in the early days after the 22 February earthquake and I accept that, in those very early days after the earthquake, it could not have been certain whether the respondent's business could be restored.

[27] What seems clear from Mr Patalano's conduct from 7 April, when he had written a letter to Mr Jones expressing his frustration at how slowly things were progressing and that staff were still on a reduced salary, is that he had never intended by his agreement on 1 March for his salary to go on being paid at a reduced level indefinitely. This makes sense in the context of the overall situation that had prevailed on 1 March when Mr Patalano had agreed to the reduction in salary. Mr Jones and the staff were going to try to revive the business and it seems likely that the mutual intention was that the reduced salaries would be paid while the parties attempted to do so. If the business could not be revived, no wages costs would have been incurred.

[28] Therefore, in light of these factors, I am satisfied that the intention of the parties had not been for the reduced salaries to be paid permanently.

If the reduction had been intended to have been temporary, what the trigger was to be for Mr Patalano's salary to revert to his pre-earthquake level

[29] Not only had the meeting on 1 March not expressly addressed when salaries would revert to pre-earthquake levels, the staff and Mr Jones had also not discussed whether salaries would revert to pre-earthquake levels all in one go, or whether there would be a gradual return. This is important given that many staff (but not Mr Patalano) were given increased salaries in mid May 2011, but not at the same level as before the earthquake.

[30] There had also been no discussion on 1 March as to whether the respondent would eventually repay the shortfall between pre-earthquake salaries and the \$500 a week gross salaries they were receiving. Again, this is an important issue because Mr Patalano was later to put in a claim to his employer for back pay from 22 February

2011 and, in these proceedings, does so from 7 April 2011. The original back pay claim features in the discussion of Mr Patalano's constructive dismissal claim below.

[31] Addressing the trigger point for when salaries would increase, different arguments have been put forward. One that was not advanced, but which needs to be addressed, relates to Ms Rayner's note of the 1 March meeting which indicates that everyone at the meeting had agreed to receive the government earthquake support subsidy and that it would be paid *for as long as it continues*. The government subsidy was ultimately made available for 12 weeks from 22 February 2011. This included a lower level of support which later became available, and the respondent continued to pay this to its staff, topping up the amount to \$500 a week. Therefore, adopting this measure as indicated by Ms Rayner's note, it is arguable that the agreement had been that the reduced salaries would be payable until 16 May 2011, 12 weeks after the subsidies began. I am mindful, though, that the reference in the note could equally have indicated that the respondent intended to try to make the business work for as long as the subsidy existed, so that the staff would have a guarantee of a job for at least that long. The reference cannot, therefore, on its face, be said to show clearly that there had been an intention to increase salaries once the subsidy ceased to be available.

[32] Another possible measure of when Mr Patalano's salary would be increased was when the business was *up and running* again, as has been advanced by Mr Patalano. Mr Patalano's evidence to the Authority was that that *may* have been what Mr Jones had said on 1 March. Mr Patalano certainly consistently conducted himself from 7 April, when he wrote his first letter to Mr Jones, as if this had been his belief at the time. Although Mr Patalano does not specifically refer to that test of the respondent being *up and running* in the 7 April letter, the context of the letter does indicate that he believed that steps needed to be taken to get the company in a position so that pay could be got *back on track*.

[33] This letter of 7 April is relied upon by Mr Patalano to support his arrears of pay claim. He argues that he should be paid arrears of pay calculated by reference to his pre-earthquake level from 7 April until his resignation, because 7 April was when he first demanded that his pay should be *back on track*. Counsel for Mr Patalano asserts that it was in this letter that Mr Patalano withdrew his consent to be paid less.

[34] However, I do not agree with that submission. The wording used by Mr Patalano in his letter of 7 April includes the following:

I'd like you to have spoken to all your staff individually by close of play on Friday.Hopefully you have worked out a budget and can give some facts and figures to a discussion of getting pay back on track.

[35] These words do not indicate a demand for pay from the date of the letter, nor a withdrawal of consent. Nor does it indicate that Mr Patalano believed that the respondent was *up and running* by that date. It does indicate that he thought that salaries should be increased when the company was up and running but that not enough was being done to get it to a position of being up and running. Hence the reference to the budget. However, for reasons I articulate below, I do not accept this was the correct measure or trigger in accordance with which the parties had agreed to increase salaries from the subsidy level.

[36] Another possible indication of when Mr Patalano's pay would be increased arises from a conversation between Mr Patalano and Mr Jones on 7 April following Mr Jones' receipt of Mr Patalano's letter of the same date. Mr Jones told the Authority that he had told Mr Patalano during this meeting that he was working as hard as possible to restore people's salaries to \$40,000 per annum but that they would be increased to \$35,000 first, and stay on that amount for around three months. Mr Jones's evidence was that he had said that he intended to increase salaries to \$35,000 once the business had relocated to its new permanent premises at 35 Moorhouse Avenue.

[37] Within a few days of the meeting with Mr Patalano on 7 April, Mr Jones held a meeting with all staff. From hand written notes that Mr Jones had produced to the Authority, it shows that he had announced at the meeting that he had been intending to consult with staff individually about a restructure of the business. Mr Jones' evidence is that he had stated to the staff that he could not guarantee them their jobs, pay or hours.

[38] It would appear that, although Mr Jones had made reference to pay increasing to \$35,000 per annum once the business was in 35 Moorhouse Avenue, increasing to \$40,000 after about three months, this was dependant upon the proposed restructure of the business. I do not believe that Mr Jones had made a binding promise to

Mr Patalano that his salary would increase to \$35,000 once the business was operating from 35 Moorhouse Avenue.

[39] Another possible measure of when Mr Patalano's pay would be increased, that has been advanced by Mr Patalano, derives from an alleged promise that had been made by Mr Jones to Mr Patalano on 28 April, that his salary would be increased by the following Friday, 6 May 2011. This meeting had been covertly recorded by Mr Patalano and a transcript prepared of the recording. The relevant extract of the transcript, which runs to 19 pages, reads as follows, (*C* refers to Mr Patalano, *N* to Mr Jones):

C I'm just saying that the people who are here and are on to it are not getting paid

N Well, what we need to do is to set a date where...

C yes

Nand what do you think the appropriate date is?

C what do I think? Well, I could say yesterday or I could...

N well, is it next Friday or something – I could try and have this made up....

C Yeah, I think a week is reasonable.

N yeah, right so...

[40] The respondent argues that the transcript, which was supplied by Mr Patalano, was not accurate and that the words Mr Jones actually said were as follows:

N well, is it next Friday or something like that – I could try and have this wound up.....

Having heard this point of the tape, I agree that the tape reflects that wording rather than what the transcript records.

[41] The respondent argues that the context of the conversation makes clear that Mr Jones was not agreeing to increase Mr Patalano's salary by Friday 6 May but was agreeing to get consultation done by that date in relation to the proposed restructure of the business and the posts. I prefer this interpretation. Whilst I believe that Mr Patalano honestly believed that Mr Jones was agreeing to increase his salary by the following Friday, I do not believe this is what Mr Jones had meant by his words. Given that he was proposing to make changes to the content of certain jobs, it would

have made no sense for Mr Jones to have agreed to increase Mr Patalano's salary at that point, prior to any agreement having been reached with Mr Patalano about the proposed new role.

[42] Standing back from the detail of these different propositions, it appears to me that the correct approach for determining when Mr Patalano's salary would be increased, is to go back to the original meeting on 1 March. Assessing all the evidence, I believe that no discussion actually took place at that meeting as to when salaries would be increased again, and what level they would be increased to. There was also no agreement that back pay to 22 February (or any date) would eventually be paid. Therefore, applying basic principles of contract law, once we accept that Mr Patalano had agreed to a reduction in his salary by way of variation, in the absence of an express agreement as to the length of time for that variation to take effect, the level it would be restored to and that back pay would be eventually paid, it must be the case that the reduced salary was to continue until a new express agreement be reached between the respondent and Mr Patalano in respect of those issues.

[43] This view is supported by the fact that Mr Jones did reach such individual agreements with Ms Rayner, and two other staff members (Ms Meier and a staff member called John) as part of the restructure, following consultation with those staff. The individual agreement with Ms Rayner did not restore her salary to her pre-earthquake salary (and Mr Jones's salary was also not restored to that level). Ms Meier's salary was restored to the pre-earthquake level, but on fewer hours a week. John's salary was also restored to his pre-earthquake level, but only during his notice period, following his position having been made redundant as part of the restructure.

[44] Taking these factors into account, as no agreement had been reached between Mr Patalano and the respondent as to when his salary would increase, to what level it would be increased to and that back pay would be paid, I am unable to award any arrears of salary to Mr Patalano as I find he had agreed to the reduction in salary and had not reached any subsequent agreement with the respondent as to when it would be increased or restored to pre-earthquake levels.

[45] In addition, it is for this reason that I do not agree with Mr Patalano's counsel when he submits that Mr Patalano withdrew his consent to be paid less on 7 April

2011. Mr Patalano was not able to withdraw his consent, as he had reached a binding agreement with Mr Jones, which he could not vary unilaterally.

Whether Mr Patalano had been contractually entitled to overtime and whether, if so, he had worked overtime hours for the period claimed and what they were.

[46] There was a fundamental disagreement between the parties as to whether Mr Patalano had been entitled to be paid overtime or take time off in lieu for having worked over and above his core hours or whether he had not been entitled to any additional recognition for working overtime above his core hours. Mr Jones' position is that he had put Mr Patalano on a salary, and that salaried staff worked such hours as were required without extra payment or time off in lieu. Mr Patalano's position is that he had taken time off in lieu on several occasions, and had recorded this on a spread sheet which had been available for Mr Jones and Ms Rayner to see.

[47] This confusion has been created because Mr Patalano had not been given a proper employment agreement when he had started and because Mr Jones had attempted to modify a document that had been intended for another staff member. Although he had crossed out the word *wages*, and written in the word *salary*, he had not crossed out the words *Overtime will be paid at ordinary rate of pay*. Mr Jones sought to argue that by writing in the word *salary* it was clear that no overtime would be payable. I do not accept that. The onus was on the respondent to ensure that the terms were clear, and by leaving in the words relating to overtime, clearly suggests that overtime would be payable. It was not for Mr Patalano to infer from Mr Jones' inadequate annotations what Mr Jones' intentions had been.

[48] Furthermore, Mr Patalano openly recorded his hours and his accrual of time off in lieu on a spreadsheet that was available to his employer, without challenge throughout his employment. He also took time off in lieu without challenge. This indicates that, even if the respondent had not originally intended Mr Patalano to be entitled to overtime, he became entitled to it by conduct. It is too late for the employer now to claim that he had taken time off in lieu without authorisation.

[49] However, Mr Patalano did not record his hours after the earthquake, and nor did the respondent. It is therefore impossible to assess how much overtime he may have worked given that the hours of the staff fluctuated significantly after the earthquake, and so it is impossible to quantify in monetary terms what he was owed.

Therefore, as Mr Patalano cannot prove to any satisfactory standard a critical part of his claim, I decline to award anything in respect of it.

Whether the actions of the respondent had amounted to a repudiatory breach entitling Mr Patalano to resign and claim constructive dismissal, and whether they had been actions amounting to an unjustified disadvantage in Mr Patalano's employment

[50] The accepted position within New Zealand in respect of a successful constructive dismissal claim is that there must have been a course of conduct by the respondent which either had the dominant purpose of forcing the employee to resign or which cumulatively amounted to a breach of duty sufficiently serious that it would be reasonably foreseeable that the employee would have no choice but to resign.

[51] In order to examine this question, it is necessary to examine the alleged breaches relied on by Mr Patalano both separately, and in the round. Usefully, Mr Patalano's resignation letter sets out the alleged breaches that he relies upon. I also examine whether each alleged breach amounted to an unjustifiable action by the respondent which affected Mr Patalano employment to his disadvantage. (Section 103 (1) (b) of the Employment Relations Act 2000). In considering each alleged action, I take into account the test of justifiability in s 103A of the Act.

The payment of my wages

[52] Mr Patalano is referring here to his belief that he should have been paid his salary at the pre-earthquake level. I have already examined this claim in detail in determining the arrears claim. I have found that Mr Patalano had validly agreed on 1 March 2011 to the reduction in salary but had never reached an agreement with the respondent as to when he would be paid again at the pre-earthquake level. Therefore, the respondent has not committed a breach of contract in respect of this aspect of Mr Patalano's claim. In turn, this in itself is not sufficient justification for Mr Patalano to have resigned.

[53] Furthermore, for the same reason, I do not find that the respondent's failure to pay Mr Patalano a salary at the level of his pre-earthquake salary before he resigned constitutes an unjustifiable disadvantage.

Expecting me to work long hours

[54] I believe that this aspect of his claim must also fail. Whilst Mr Patalano gave evidence that he had worked long hours after the earthquake to help establish the respondent's business, I am not convinced that this was done anything other than willingly because of Mr Patalano's desire to rebuild the business. Mr Jones gave evidence that Mr Patalano had seemed to have been energised by the earthquake and the challenges it brought, and that he had been very useful in keeping people's spirits up and doing all the things that needed to be done to re-establish the business. I cannot see from the evidence that Mr Patalano had been forced to work long hours. Whilst it is clear that Mr Patalano had become frustrated at how slowly he perceived Mr Jones to be achieving progress in rebuilding the business, whilst he had been working hard at a lower salary, this does not show that the respondent had acted in breach of the agreement between the parties, or had acted so unreasonably to have breached the implied term of trust and confidence.

[55] In addition, for the same reasons, I do not find that Mr Patalano's employment has been affected to his disadvantage by him working long hours.

Increasing my hours without consultation

[56] This refers to a decision made by Ms Rayner to roster staff on to work in the shop one Saturday in three. Mr Patalano had become aware of it when he had seen a roster for the coming weeks. He had ended up working one weekend, and although Mr Jones had stated in his evidence that Mr Patalano had been originally engaged on hours that would include weekends, Mr Patalano had not done so in practice. The inadequate terms of employment between the respondent and Mr Patalano made no mention of weekend work. The store had been open weekends before the earthquake however.

[57] I believe that a change had been made to Mr Patalano's terms of employment in this respect without consultation. However, it had applied to all staff, and it had occurred several weeks before Mr Patalano's resignation. In a letter that Mr Patalano had written to Mr Jones on 13 June, he had made a number of demands but had not demanded that he should not have to work weekends. I do not believe that this requirement without consultation to work one weekend in three, on its own, was one that Mr Patalano regarded as amounting to a repudiatory breach of contract.

[58] However, I do find that the change in the days he had to work without prior consultation did constitute a disadvantage in Mr Patalano's employment. I also find that the failure to consult with Mr Patalano before the change was implemented was unjustified as I do not believe that this was an action that a fair and reasonable employer could have done in all the circumstances at the time it occurred.

Refusing to pay my holiday pay

[59] On 30 May, while Mr Patalano was on holiday in Europe, he received an email from Ms Meier, which stated the following:

Hi Chris

I hope you both enjoy your holiday.

Neville doesn't allow me to pay you your holiday entitlement for some reason. Yours has to stay on \$500. I paid Friday 13 May as a holiday. This pay has already gone through and I can't reverse it of course. You better not mention this to him.

You must discuss this matter with him on your return.

[60] Mr Patalano had not seen this email immediately as his wife had opened the email and she had not wanted to stress him by telling him. Mr Patalano stated in his evidence though that he had been owed leave from before the earthquake and that the withholding of his holiday pay had caused him to have to get his friends to help him out while he was away.

[61] Mr Jones' evidence was that he had made an error about Mr Patalano's entitlement and that he regretted it and had apologised for it. Mr Patalano was paid all outstanding holiday pay before his resignation once Mr Jones had had advice about what holiday pay was owed.

[62] I believe that this event did cause Mr Patalano distress and humiliation. Ms Meier was not available at the investigation meeting and so I was unable to question her on what Mr Jones had said to her in instructing her not to pay Mr Patalano's holiday pay. The tenor of the email she sent to Mr Patalano is that she did not agree with the decision.

[63] Whilst this issue had been resolved by the time of the resignation, and so non payment of holiday pay cannot amount to a repudiatory breach justifying resignation,

the fact of the instruction to Ms Meier does weigh in the overall treatment afforded to Mr Patalano which I shall consider below.

[64] I must also consider whether the temporary withholding of holiday pay amounts to an unjustifiable disadvantage. Whilst I accept that the decision to withhold Mr Patalano's holiday was based on an error, the unjustifiable disadvantage arises, in my view, from Mr Jones failing to tell Mr Patalano that he had reached the decision that it should not be paid. This had caused Mr Patalano embarrassment while he was on holiday. Ms Meier's email to Mr Patalano seems clearly to indicate that she had elected to tell him unofficially, without instruction from Mr Jones. As I do not believe that Mr Jones' failure to tell Mr Patalano of the withholding of holiday pay was the action that a fair and reasonable employer could have taken in all the circumstances, I agree that this amounts to an unjustifiable disadvantage.

Failing to pay wages arrears (which you accept are due and owing)

[65] I have already analysed in detail in this determination the right of Mr Patalano to demand arrears of wages, and I have found that he was not owed any arrears, for the reasons set out above. It is not entirely clear what is meant by Mr Patalano's comment in his resignation letter that Mr Jones accepted that arrears were due and owing, as I have seen no evidence that persuades me that Mr Jones has ever accepted that arrears or back pay were owing.

[66] In view of this, I cannot find that the respondent breached its contractual obligations to Mr Patalano by failing to pay back pay, and so it follows that this cannot be a justifiable reason for Mr Patalano resigning and claiming constructive dismissal.

[67] For the same reason, I do not find that this constitutes an unjustifiable disadvantage in Mr Patalano's employment.

Failing to provide me with a job description for the roof rack manager position

[68] It is necessary to examine a time line of events in relation to the offer of a roof rack position to Mr Patalano and the way that Mr Jones dealt with Mr Patalano's requests for a copy of the job description (and other documentation).

[69] Mr Jones and Mr Patalano had had many discussions about the business and opportunities that existed for it to diversify. These discussions led to it being loosely agreed that Mr Patalano would be involved in running a roof rack business for the company. On 12 May, the day before Mr Patalano went on leave for a trip to France, Mr Jones wrote to him advising him of two positions that were available under the restructure about which Mr Jones had been consulting with staff, one of which was *The position of "Roof Racks sales, backing up kayak sales"*. Mr Jones told Mr Patalano before he left for his holiday that he would be offering him the roof rack position at a salary of \$35,000, increasing eventually to \$40,000, together with a commission arrangement to be negotiated. Mr Jones says that Mr Patalano had been happy with this indication.

[70] After Mr Patalano had departed for his holiday, Mr Jones emailed Mr Patalano saying the following:

I have made the decisions I need to on the positions available in the new Navigation Resources.

I am please [sic] to offer you a position establishing a roof rack systems business, and backing up the kayak business we are establishing.

The terms would be as we discussed, and will be built in to an employment contract.

I hope you can start on your return from Europe and the UK, all refreshed and ready to go.

Please advise your acceptance or otherwise.

[71] Later the same day, Mr Patalano's wife replied to Mr Jones via a different email address, which indicated that it was shared between her and Mr Patalano, saying that she was sure that Mr Patalano would be pleased with this news, and asking if he had a copy of the *job description, salary/package offer and a copy of the contract* that she could pass to him so he could review it in one sitting and come back with a formal answer. Mr Jones did not reply to Ms Shorthouse, and so she chased for an answer by email on 22 May. By 1 June Mr Jones had still not replied, and Ms Shorthouse emailed again, saying that she had left him a couple of telephone messages as well. She asked again for the *job description, salary/package offer and a copy of the contract* for Mr Patalano to look at before he got back to work. She also referred to Ms Meier's email stating that no holiday was being paid.

[72] Mr Jones' explanation for him ignoring Ms Shorthouse's emails to him was that he had not been told by Mr Patalano that he had wanted Mr Jones to deal with Ms Shorthouse in his absence overseas. Whilst I believe that Mr Jones could have replied to Ms Shorthouse sooner, as his concerns about dealing with Ms Shorthouse were overly cautious, given that she had been emailing from an email address shared with her husband, the delay did not impact adversely upon Mr Patalano as he had not been checking his emails in any event at that point. It was probably frustrating for Ms Shorthouse, but she is not a party to these proceedings.

[73] On 2 June 2011, Mr Jones replied to Mr Patalano on the shared email address, as follows:

Its [sic] been a continuously stressful time here and there are nowhere near enough hours in the day to do everything that that needs to be done.

re. employment. The offer is as we discussed, subject to direct negotiation and agreement with you. I have a draft contract from our retained employment law specialists.

As you aware [sic] the position I have offered you has some cross over with the kayak operation. This will need some additional discussion with you. Hence its [sic] not feasible to email these to you and do this remotely. It can be done when you return.

[74] Mr Patalano replied personally by email on 9 June asking for a meeting with Mr Jones on Monday 13 June. Mr Jones replied on 13 June explaining that he had been away but offered a meeting on Tuesday 14 June. Mr Patalano replied on 13 June agreeing to that, and enclosing a letter to Mr Jones.

[75] This letter started by stating that he looked forward to speaking soon to discuss the proposed roof rack role and that they needed to agree the contract, job description and remuneration before he was able to start in the role. The letter went on to state that he wanted back pay to 22 February, as well as holiday pay. It ended as follows:

I would therefore like the following resolved by close of play on 20th June 2011:

- *A job description for the new position of managing the roof rack business*
- *A contract for the new position of managing the roof rack business agreed by both of us, outlining hours of work, pay structure, overlap between parts of the business and ways of working with you and Mapworld*
- *Back pay owed from 22nd February*

- *Holiday pay owed*

[76] Mr Jones gave evidence that when he and Mr Patalano had met on 14 June, the meeting had been dominated by Mr Patalano's demand for back pay, which Mr Jones had felt was unmerited and contrary to their agreement on 1 March. He said that this had prevented him from giving Mr Patalano a copy of the employment agreement and a bullet point job description that he had had with him.

[77] It emerged during the investigation meeting that Mr Jones had had a copy of a draft, untailored employment agreement from his legal advisers as early as 15 April 2011, but had possibly not filled in the details until around 16 June, which is the date of an offer letter that had been produced to the Authority. However, a copy of a job description had also been produced which was dated 13 June. Mr Jones' evidence was that this was not the same bullet pointed job description that he had had available at the 14 June meeting, and that he could not account for how this document bore the date of 13 June.

[78] The job description and draft employment agreement never were produced to Mr Patalano. By way of an email dated 21 June, the respondent's legal advisers wrote to Mr Patalano's advisers stating:

We further advise that as a result of the recent restructure, your client has been offered the position of Roof Rack salesperson. We hope to have the offer including salary and job description to him by tomorrow. We ask that he advise whether he intends to take up this position by 5pm Thursday 23 June. If he requires more time to obtain legal advice on the offer then that can be arranged. If he does not accept the offer then we will need to meet to discuss his options.

[79] Mr Patalano's advisers replied the following day stating that the terms were not acceptable but not explaining why (although they stated that they would explain why in a more detailed letter, which has not been put before the Authority). The resignation letter followed less than three hours later.

[80] Taking into account this timeline relating to the non provision of the job description (and other information relating to the new position), it is certainly the case that Mr Jones could have made available to Mr Patalano copies of the draft job description and employment agreement earlier than 22 June. However, it was not until 13 June when Mr Patalano had demanded the job description and contract that Mr Jones will have known that Mr Patalano had been placing great importance on the provision of these documents (as well as the back pay). It was at this same meeting

that Mr Patalano had told Mr Jones that he would not be attending work until his concerns had been resolved. The two men had exchanged the names of their lawyers, with the clear implication that further communications between them would be via those channels. In other words, the normal relationship between Mr Patalano and his employer had become coloured by the threat of legal action and it had been reasonable for Mr Jones to seek legal advice himself on the position that Mr Patalano was taking. Under those circumstances, in my view it had been reasonable for Mr Jones to have held back from handing over the documentation relating to the proposed new position until the issue of back pay, which Mr Jones described as *the elephant that was in the room* at the meeting of 14 June, had been resolved one way or the other, as it had clearly become a potential game changer in the employment relationship.

[81] I also note that the documentation had been offered to Mr Patalano via the respondent's solicitor on 21 June, but that the offer of the new post had been rejected by Mr Patalano's solicitor without Mr Patalano having seen the documentation.

[82] Taking all this into account, I am not convinced that Mr Jones' failure to provide the documentation amounted to a repudiatory breach of contract by the respondent, in itself. It is important in this analysis that, at the date of the resignation, Mr Patalano already knew what the proposed salary for the new position was to be, what the broad outline of the role was to be, and that the documentation had been promised on 21 June by the following day.

[83] For the same reasons, I do not believe that Mr Jones' failing to give Mr Patalano the documentation was an unjustifiable disadvantage. Whilst it was certainly the cause of frustration to Mr Patalano, and so was a disadvantage in that sense, I believe, as explained above, that Mr Jones' decision not to send the documentation to Mr Patalano when it had been requested, was based in a rational reason which was fair and reasonable. Therefore, the disadvantage was not unjustified.

Now degrading the offer by offering me the role of roof rack sales person

[84] I do not believe that there is any cogent evidence that Mr Jones had described the roof rack position as a managerial position to Mr Patalano. Mr Patalano was unable to remember when the position was so described in his evidence at the

investigation meeting. Mr Jones did, however, refer to the post as *establishing a roof rack systems business* in his email to Mr Patalano dated 18 May.

[85] In his brief of evidence, Mr Patalano states that he had felt betrayed when, in an impromptu meeting the day before he went on holiday, Mr Jones had described the role as a *roof rack sales person*. However, I do not believe that this can be true. When Mr Jones had emailed Mr Patalano a few days later, saying *I am please [sic] to offer you a position establishing a roof rack systems business, and backing up the kayak business we are establishing*, Mr Patalano's wife responded saying *I am sure Chris will be pleased with this news*. I believe that Mr Patalano did not feel betrayed, and prefer the evidence of Mr Jones that Mr Patalano had *responded positively to this proposal and seemed happy with the outcome*.

[86] I believe that Mr Patalano's allegation that the position had been downgraded derives from the email from the respondent's legal adviser, sent on 21 June and cited in part above, when the role was described as *Roof Rack salesperson*. If Mr Patalano had waited for the job description promised to him by way of the email dated 21 June from the respondent's legal adviser, he may have seen that the description of *Roof Rack salesperson* did not betoken a demotion. In particular, in the job description dated 13 June that was put before the Authority, it contains, under the heading *Performance Measures*, the following sentence:

Establish the roof rack operation as a profitable cost centre in the business.

[87] This broadly matches the description in Mr Jones' email dated 18 May, and Mr Patalano had never complained about the description of the role in that email. There is no reason for me to believe that the job description dated 13 June was not the one that was to be sent to Mr Patalano on 22 June. Therefore, if Mr Patalano had waited for the job description to have been furnished, it is likely that he would not have seen it as a demotion. I cannot therefore agree that the role had been *demoted* and that the respondent had thereby committed a repudiatory act.

[88] For the same reason, I do not accept that this was an unjustifiable disadvantage in Mr Patalano's employment.

The overall picture

[89] Having examined each individual alleged reason for the resignation, as described in the resignation letter, and found that none of them separately amounted to a repudiatory breach, I must step back and consider whether the conduct by the respondent as a whole amounted to a course of conduct by the respondent which either had the dominant purpose of forcing Mr Patalano to resign or which cumulatively amounted to a breach of duty sufficiently serious that it would be reasonably foreseeable that Mr Patalano would have no choice but to resign.

[90] There is no doubt that Mr Patalano experienced increasing frustration with the respondent as time went on, being first manifested in writing in his letter dated 7 April. This frustration was initially in relation to the speed at which he saw progress being made to get the business trading again, so that salaries could be increased above the level of the government subsidy. This particular frustration continued throughout the remainder of the employment and was made worse in Mr Patalano's mind by his perception that he was working harder, and longer hours, for less pay. This was exacerbated by the requirement to work weekends from time to time.

[91] A further source of frustration was the failure of the respondent to give Mr Patalano copies of the documentation he had been seeking in relation to the proposed new role. Mr Patalano insisted in his evidence that no offer had been made, because it had not been in writing. From a strict contractual point of view, this is not correct, but Mr Patalano had felt he could not accept an offer from the respondent until he had more evidence of what the role involved.

[92] Further cause for frustration and annoyance for Mr Patalano arose from the issue of the unpaid holiday pay, which Mr Patalano had described in his evidence as *the icing on the cake*.

[93] There was one other factor that Mr Patalano relied on in his evidence, which was not mentioned in the resignation letter. During the meeting with Mr Jones on 14 June, Mr Patalano alleges that Mr Jones had said to him that *he might not want to do it* [the roof rack business] *any more* and that *things could be difficult for us in a working relationship*. Mr Jones denied having said this. On balance, I prefer the evidence of Mr Patalano and do believe that Mr Jones said this, or words to that effect.

[94] Although Mr Jones denied saying these words, they should be seen in the context of a conversation where Mr Patalano had made a claim for back pay which Mr Jones believed was wholly unmerited. Therefore, although these words had the potential, in other circumstances, to indicate that an employer no longer wanted to employ the employee, in this case, they may have been the manifestation of despair at the employee making a claim that Mr Jones felt was undeserved. This is speculation, as Mr Jones denied saying the words at all, but I make the point to illustrate that the context in which the words were said have to be borne in mind. I do not accept, though, that these words were what prompted Mr Patalano to resign, as they are not mentioned in the letter of resignation, which is otherwise comprehensive in cataloguing his dissatisfaction. Therefore, they cannot have been a repudiatory breach which had been accepted by Mr Patalano.

[95] As to whether Mr Jones' saying these words constituted an unjustifiable action by the employer that affected Mr Patalano's employment to his disadvantage, I believe that the words were said by Mr Jones when he had heard that Mr Patalano was refusing to come to work until he was paid back pay from 22 February. It is reasonable to infer that Mr Jones believed that this demand, backed by the refusal to work, did make it likely to be impossible for the two men to work together in the future. Whereas Mr Patalano no doubt felt that the words created a disadvantage for him, in his employment, as it was largely due to his own creation, by way of his demand for back pay, I am not satisfied that the action creating the disadvantage was unjustifiable.

[96] Looking at the respondent's conduct in the round, I believe that the respondent came close to having acted in such a way as to make it foreseeable that the employee would resign. The respondent's decision not to pay Mr Patalano his holiday pay without first telling Mr Patalano that this was his decision, was an example of the respondent failing to be active and constructive in maintaining a productive employment relationship in which the parties were, amongst other things, responsive and communicative. (Section 4 (1A) (b) of the Employment Relations Act 2000).

[97] However, the principal source of Mr Patalano's dissatisfaction derived from his misapprehension of the law. He had believed that the respondent had unilaterally reduced his salary and that he had not agreed to the reduction because he had been given a choice between two unpalatable options he did not like. However, these were

the only two options realistically open to the respondent after the 22 February 2011 earthquake, through no fault of the respondent.

[98] Taking everything into account, I am not satisfied that Mr Patalano can show that there had been a breach of duty by the respondent which amounted to a repudiation of his employment agreement, either singularly, or cumulatively.

[99] If I am wrong in that, I believe that Mr Patalano had resigned at a point when the respondent had made written commitments to him which had substantially addressed or came close to addressing most of his concerns. I set out below the salient passages from an email sent to Mr Patalano's legal advisers by the respondent's legal advisers, on 21 June.

Our client understands that Chris disputes that he ever agreed to his pay being reduced. In short there appears to be a dispute between the parties over one of the terms and conditions of the employment agreement. As you will appreciate the Employment Relations Act 2011 [sic] provides a process for resolving these disputes. My client advises that he would prefer to have the matter determined by the Employment Relations Authority and would be willing to prepare the application and meet the filing fee. Please advise whether your client agrees to this? Should your client wish to seek urgency then we would support an application for this, although we doubt that this would be granted. To avoid your client making a claim for arrears of wages, our client has advised us that should the application be determined in your client's favour he undertakes now to pay any monies owing and any interest at the current rate awarded by the Authority within 14 days of the date of the determination.

...

We have a difficult situation to raise concerning your client's refusal to attend work until the back-payment of wages matter is attended to. Your client's refusal is tantamount to a strike which under the Act is unlawful. Our client does not wish to be compelled to address this matter and accordingly would appreciate you arranging for your client to return to work at 8.30 am tomorrow. We can confirm that he will be on full pay.

We further advise that as a result of the recent restructure, your client has been offered the position of Roof Rack salesperson. We hope to have the offer including salary and job description to him by tomorrow. We ask that he advise whether he intends to take up this position by 5pm Thursday 23 June. If he requires more time to obtain legal advice on the offer then that can be arranged. If he does not accept the offer then we will need to meet to discuss his options.

[100] The legal adviser for Mr Patalano responded the following morning stating:

Thank you for your email yesterday. The terms are not acceptable to my client. I will provide a more detailed letter setting out the reasons. I understand that a letter of resignation will be provided by my client today.

The letter of resignation followed within three hours.

[101] The email from the respondent's legal advisers appears to be an attempt in good faith to resolve the issues raised by Mr Patalano up to that point. Mr Jones indicated in his evidence to the Authority that he did not know what had been meant by *full pay* in the email from the respondent's legal adviser, but would have been guided by her. Mr Patalano, when asked what had prompted his resignation at that point, had replied that the advice from his lawyer had done so, because he was being accused of being on strike.

[102] Although it appears that the pursuit of the parties' respective interests had been taken over by this point by their respective legal teams, they still owed each other the same duties as employer and employee. As the respondent's legal adviser was stating that it would take steps to honour those duties, it was incumbent upon Mr Patalano to consider those statements in good faith. By rejecting the overtures and resigning when he did without considering them, I believe that he had acted prematurely.

[103] In summary, I cannot accept Mr Patalano's claim that he was unjustifiably, constructively dismissed.

Remedies

[104] I have found that Mr Patalano had been unjustifiably disadvantaged in his employment. Section 123 (1) of the Act provides that, where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

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

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

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

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

[105] The first unjustified action was changing Mr Patalano's days of work without consultation. This did not cause Mr Patalano any monetary loss, but I am satisfied that it caused him injury to feelings. I believe that a modest award is appropriate, and I fix it at \$1,000.

[106] The second unjustified action was withholding Mr Patalano's holiday pay without first telling him of that decision. This did not ultimately cause Mr Patalano any monetary loss, but did, I believe, cause Mr Patalano humiliation, loss of dignity, and injury to his feelings, because it left him unexpectedly short of money while he was on holiday, causing him to have to fall on the good will of his friends. For that unjustified disadvantage, I award the sum of \$4,000.

[107] Section 124 of the Act requires me to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I am satisfied that Mr Patalano did not contribute in any way to the changing of his days of work without consultation, nor to the withholding of his holiday pay without prior warning. I therefore do not reduce the awards.

Penalty

[108] Section 135 (5) of the Employment Relations Act 2000 states that an action for the recovery of a penalty under the Act must be commenced within 12 months after the earlier of the date when the cause of action first became known to the person bringing the action or the date when the cause of action should reasonably have become known to the person bringing the action.

[109] I am in agreement with counsel for the respondent when he submits that the breach of s 65 of the Act by the respondent either was known to Mr Patalano at the time he signed the agreement, or should reasonably have been known to him at that time. A failure to know the law and its requirements does not equate with the cause of action not being known. The cause of action is known when the material facts giving rise to the breach are known. These material facts were known to Mr Patalano when he signed the offer of employment.

[110] Therefore, I decline to award a penalty against the respondent.

Orders

[111] I order the respondent to pay to Mr Patalano the total sum of \$5,000 pursuant to s 123 (1)(c)(i) of the Act.

Costs

[112] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days of this determination with replies to be lodged and served within a further 28 days.

David Appleton
Member of the Employment Relations Authority