

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI A TARA ROHE**

[2025] NZERA 726  
3320080

BETWEEN

FABIO PATURY  
Applicant

AND

BRAD WATSON BUILDERS  
LIMITED  
Respondent

Member of Authority: Davinnia Tan

Representatives: Kerri Thomas, counsel for the Applicant  
John Unsworth, counsel for the Respondent

Investigation Meeting: 12 August 2025 in Whanganui

Submissions received: 15 and 28 August 2025 from the Applicant  
28 August 2025 from the Respondent

Determination: 12 November 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Fabio Patury was employed as a builder with Brad Watson Builders Limited (BWBL) from 14 January 2024 until 23 May 2024 when he was summarily dismissed. Mr Patury was paid an hourly wage of \$32 an hour and worked 44 hours a week.

[2] Mr Patury is claiming that he was unjustifiably dismissed and seeks compensation of \$30,000.00, loss of remuneration under s123(1)(b) and costs.

[3] Mr Brad Watson is the sole director and shareholder of BWBL.

[4] Mr Patury was on annual leave from 6 May 2024 to 21 May 2024 to celebrate his wedding. On 22 May 2024, he called Mr Watson to advise he was not well and took sick leave that day. During the phone call, Mr Watson advised Mr Patury that he wished to meet with him on 23 May 2024 at 8:00AM but did not say what the meeting would be about.

[5] On 23 May 2024 at 8:00AM, Mr Watson and Mr Patury met. At this meeting, Mr Watson terminated Mr Patury's employment.

[6] According to Mr Patury, Mr Watson blamed him for faulty work that was done on a house before Mr Patury went on annual leave. Mr Patury said that the house had passed a council inspection, but Mr Watson stated there had been faults with the house because the building plan was not followed, and as a result BWBL lost its contract with that company selling the homes BWBL was contracted to build. In addition, Mr Patury's mistakes meant BWBL had to compensate the company. Mr Patury said Mr Watson advised he had no other work for Mr Patury so he had to "let him go", and that because Mr Patury was in deficit for his annual leave and was paid while on annual leave in May 2024, Mr Watson said "we are square and I wont be paying you anything further."

[7] Mr Patury says that following the meeting he sent Mr Watson a text message asking about garden leave (whether to work 4 weeks or whether he would be paid 4 weeks). He stated that Mr Watson swore at him in response and that Mr Watson believed they had an agreement at the 23 May 2024 meeting, and that he could "go the long way if needed" and that Mr Patury would not get another building job in this town. Mr Patury requested the termination be put in writing.

[8] Mr Watson then emailed Mr Patury the letter later that evening on 23 May 2024. The covering email stated:

...As per our meeting this morning, please find attached the letter informing you of the termination of your employment.

As discussed this morning this is due to two serious breaches of your employment contract in regard to the work you carried out...

- Repeated failure to follow a reasonable instruction
- Actions that seriously damage the employers reputation

on top of the two serious breaches you have also had warnings on numerous occasions including[:]

- Damage to work property
- Failure to read plans causing faulty workmanship
- Incorrect soffit heights at Puriri street
- Incorrect installation of rondo at Puriri street
- Failed inspections due to incorrect fixings
- Poor roof farming causing extra costs of fascia installers
- Not working the hours agreed on in your contract – warnings for showing up to work late and repeatedly finishing early

The major breaches are in relation to the defective workmanship ...where your failure to read plans has caused a house to be built in the incorrect location.

This has seriously damaged the reputation of Brad Watson Builders Ltd by causing the loss of a major new housing contract...

As a licensed building practitioner you are liable for any work you do that is not up to code or does not meet consent requirements... includes the costs incurred to correct these.

You are currently in negative 41.47 hours of annual leave - \$1321

After an investigation we have come to the decision that there is no other option but to terminate your employment due to serious misconduct

The company has now lost trust and confidence that you can no longer continue in your role...

If you wish we can organise a meeting to discuss any further concerns you may have. You are welcome to bring a support person.

[9] The letter was dated 22 May 2024 and stated:

I regret to inform you that your employment...is terminated effective immediately. This decision follows a series of incidents where you have consistently failed to follow direct instructions and have delivered poor workmanship on multiple projects, including a major error which has significantly damaged the company's reputation.

Despite previous warnings and attempts to rectify these issues, there have been no improvements in your conduct. Specifically, the following breaches of your employment contract have been noted:

1. Repeated failure to follow a reasonable instruction
2. Actions that have led to serious reputational harm to Brad Watson Builders Ltd.

These actions are in direct violation of the terms ...in your contract, which stipulate adherence to company policies and the duty to uphold the company's reputation.

As per the terms of your contract, you will receive your final paycheck, which will include compensation for any time worked up until today...

[...]

[10] Mr Patury raised a personal grievance with BWBL the following day.

### **The Authority's investigation**

[11] For the Authority's investigation written witness statements were lodged from Mr Patury and his wife Heather Cooper. For BWBL, witness statements were lodged from Mr Watson, Damien Cotton, Connor Mill.

[12] There were several letters lodged prior to the investigation meeting on behalf of Mr Patury but as these were in the form of a character reference and were not directly relevant to the issues before the Authority nor provided in the form of an affidavit, I have not treated these letters as 'witness statements'. I further consider these character references to be of little significance to the issues before the Authority.

[13] Similarly, during the investigation meeting following my questions to Mr Patury, counsel for BWBL purported to present further statements from various individuals to rebut Mr Patury's character references and included former employers' feedback on Mr Patury's workmanship. I considered these statements irrelevant to the issues for determination and also considered it was inappropriate for counsel to question Mr Patury based on statements that had not been presented to the Authority or Mr Patury prior to the investigation meeting commencing. I adjourned the investigation meeting briefly for the parties and their representatives to discuss and review the new material tabled on behalf of BWBL. Following the adjournment, I expressed my view to parties at the investigation meeting that the material was not relevant to the legal issues as they were character references from Mr Patury's previous employment or contracted work, and would not assist the Authority in its investigation and determination of Mr Patury's claim for unjustified dismissal. I then redirected parties' attention to the legal issues for investigation and continued with the investigation meeting.

[14] Mr Patury, Ms Cooper, and Mr Watson answered questions under oath or affirmation from me and the parties' representatives. All material from the parties was fully considered. However as permitted by s 174E the Act, this determination has not recorded all evidence and submissions received.

### **The issues**

[15] The issues requiring investigation and determination were:

- (a) Whether Mr Patury was unjustifiably dismissed by BWBL;
- (b) If BWBL's actions were not justified, what remedies should be awarded, considering:
  - (i) Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - (ii) Compensation under s123(1)(c)(i) of the Act?
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Patury that contributed to the situation giving rise to his grievance?
- (d) Should either party contribute to the costs of representation of the other party.

### **Unjustified dismissal**

#### *Legal test*

[16] To determine the justification of a dismissal by the employer complained of under s 103(1)(a) of the Act the Authority applies the test in s 103A of the Act on an objective basis.

[17] The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. This means, I must consider whether:

- (a) Having regard to the resources available to BWBL, did it sufficiently investigate the allegations against Mr Patury before dismissing him;
- (b) BWBL raised the concerns that he had with Mr Patury before dismissing him;
- (c) BWBL gave Mr Patury a reasonable opportunity to respond to those concerns before dismissing him and
- (d) BWBL genuinely considered Mr Patury's explanations before dismissing him.

[18] I may also take into account any other factors I think are relevant.

[19] Section 103A(5) also provides that minor defects in the process followed by the employer cannot in and of themselves, render an action unjustifiable if the defects did not result in the employee being treated unfairly.

#### *Evidence*

[20] Mr Patury stated that issues about his performance had not been raised with him previously by Mr Watson. Mr Patury stated there were no formal one-on-one meetings regarding performance or conduct and on the contrary, text messages sent by Mr Watson to Mr Patury about previous jobs indicated Mr Watson was “pleased with my work at the Foxton site. I was unaware of any dissatisfaction.”

[21] In relation to the specific defect on the build Mr Patury was in charge of prior to going on annual leave, the meeting of 23 May 2024 where he was dismissed, was the first time Mr Patury was made aware by Mr Watson of the error.

[22] When I asked Mr Watson what constituted serious misconduct under the employment agreement, he stated it was Mr Patury’s “failure to follow reasonable instruction”. Mr Watson stated that this included previous instructions about Mr Patury’s work and failure to arrive at work on time.

[23] According to Mr Watson, he had previous meetings with Mr Patury about his poor performance. Mr Watson’s calendar showed that meetings took place on 8 February 2024 for Mr Patury arriving late for work, 9 February 2024 for “damaging work property” and on 14 March 2024 for other poor workmanship.

[24] Evidence given at the investigation meeting was that the 9 February 2024 meeting related to Mr Patury damaging work property, and the meeting on 8 February 2024 was about Mr Patury being late to work.

[25] On 14 March 2024 Mr Watson met with Mr Patury about a failed framing inspection in which he advised Mr Patury he needed to perform better.

[26] Mr Patury’s recollection of these meetings were vague.

[27] There was dispute between the parties as to the extent of Mr Patury’s mistakes at work.

[28] I sought clarification from both Mr Patury and Mr Watson as to whether the issues around Mr Patury's workmanship that were referred to in the termination letter had been discussed prior to the dismissal, and if so, what had those prior discussions entail.

[29] In relation to the "damage to work property", after some dispute as to the specific damage, it transpired that Mr Patury had been advised by Mr Watson about the damage to the sensor on a gate, when Mr Patury was returning a trailer to Mr Watson's property. Mr Patury accepted this was brought to his attention by Mr Watson at that time, but there was nothing further discussed other than that.

[30] The parties disputed whether a prior failure (as stated in the termination letter) to read plans had been raised previously.

[31] In relation to "incorrect soffit heights at Puriri street", Mr Patury accepted he had made this mistake, but noted he had called Mr Watson to troubleshoot his mistake at that time and that the mistake was rectified on the same day.

[32] In relation to "incorrect installation of rondo at Puriri street", Mr Patury also accepted he made this error, but stated that there was no discussion about it with Mr Watson prior to the dismissal from a 'performance management' perspective. The error, was simply pointed out to him.

[33] The parties also disputed whether there was discussion about the "failed inspections due to incorrect fixings".

[34] Finally, Mr Patury disputed that the "poor roof farming causing extra costs of fascia installers" was his error because he "had not seen the finish" before inspection.

[35] I did not find Mr Patury's evidence particularly helpful on the basis that he failed to acknowledge that Mr Watson did in fact raise issues with his previous workmanship but later accepted the fact; albeit with some minor disputed fact.

[36] Nevertheless, Mr Watson accepted that he never once raised dismissal as a possibility in these meetings; referring to the prior issues as relatively "minor issues". Therefore, despite raising some of the mistakes Mr Patury made previously, BWBL did not take action to properly address or manage Mr Patury's performance, or to explain

the potential consequences of continued mistakes in the context of his employment with BWBL.

[37] Mr Watson considered Mr Patury's final error to have been more than trivial, because BWBL had lost a major contract as a result of Mr Patury's error.

[38] Mr Watson stated that he believed Mr Patury agreed to leave BWBL on 23 May 2024 on the basis he did not have to repay his annual leave.

[39] Mr Patury disagreed and considered there was no investigation into this issue nor did he have a reasonable opportunity prior to dismissal to respond.

[40] During the investigation meeting, Mr Watson acknowledged that one of his learnings from the dispute is that he did not provide an opportunity for Mr Patury to seek legal advice prior to the dismissal, nor did he provide any prior indication that his job may be in jeopardy. He also acknowledged that prior to employing Mr Patury, he did not undertake independent work references.

### **Analysis**

[41] Having reviewed the evidence, I consider that Mr Patury has been unjustifiably dismissed. My reasons follow.

[42] There are situations where summary dismissal (dismissal without notice) may be appropriate under the Act. This is not one of those situations.

[43] Understandably, poor performance will give rise to concerns for an employer and may be considered serious misconduct in some circumstances. However simply stating that the "failure to follow reasonable instruction" constitutes "serious misconduct" in an employment agreement, does not automatically mean an employer can dismiss an employee who "failed to follow reasonable instruction" at will. Whether an employee's actions or inaction constitutes serious misconduct should not be an arbitrary assessment, but an objective assessment where "the seriousness of the conduct is so destructive" of the employer's trust in the employee that "no notice is warranted before dismissing."<sup>1</sup>

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<sup>1</sup> *Minchington & Ors v NJ Gill Limited* [2020] NZERA 312.

[44] In these circumstances, Mr Watson accepted that while he had raised some prior issues with Mr Patury, these were mostly related to minor issues and there was no form of performance management or steps taken to support Mr Patury avoid making similar mistakes in his work. Mr Watson also acknowledged he never raised with Mr Patury that dismissal was a possibility if the mistakes continued or escalated. Instead, Mr Patury was later left in charge of a build in which he failed to follow the building plan which led to a major defect. It was this major defect that led to BWBL's decision to dismiss Mr Patury.

[45] There was no dispute that this issue was only brought to Mr Patury's attention at the meeting of 23 May 2024 in which he was dismissed. It therefore cannot be said that Mr Patury was provided a reasonable opportunity to provide a response to the issues about this major defect that Mr Watson claimed had led to BWBL losing a major contract prior to dismissal.

[46] I was not persuaded that there was an agreement reached between Mr Watson and Mr Patury from that meeting that Mr Watson claims resulted in Mr Patury agreeing to resign, because the manner in which the discussion took place left no room for negotiation. In that meeting, Mr Watson relied on Mr Patury's faulty workmanship as the primary reason for having to "let him go", as well as saying there was no other work for him. The purpose of the meeting of 23 May 2024 was to dismiss Mr Patury. Furthermore, the letter of termination which was provided subsequent to the meeting was dated 22 May 2024. Although this alone is not determinative, Mr Watson did not deny that the letter was drafted the day before the meeting.

[47] The 'termination' letter that was provided to Mr Patury subsequent to this meeting expanded in reasoning for the termination, but as accepted by Mr Watson, at no point was dismissal raised in prior discussions, as a potential consequence of Mr Patury's performance prior to dismissal. Mr Watson himself acknowledged that he has learnt from this experience and should have offered Mr Patury a reasonable opportunity to seek legal advice prior to the dismissal and give prior notice that dismissal was a possibility. I commend him for reflecting on his actions in these circumstances.

[48] As set out under s103A of the Act, an employer must, in all circumstances, act fairly and reasonably before dismissing an employee or taking action. The steps set out

above provide a set of criteria that need to be met in order for a dismissal or an action to be considered justified.

[49] In these circumstances, I find that as Mr Patury's performance had not been properly addressed by BWBL nor was he made aware that certain or continued poor performance could lead to serious misconduct and potentially dismissal, I consider that there were more than minor defects in BWBL's process when it dismissed Mr Patury without notice which resulted in Mr Patury being treated unfairly by not being given a reasonable opportunity to respond to its concerns.

[50] Accordingly, Mr Patury's dismissal was unjustified.

## **Remedies**

### *Lost wages*

[51] With respect to wages, s 128(2) of the Act requires the payment of the lesser of a sum equal to lost remuneration or three months' ordinary time remuneration. The Authority may, in its discretion under s 128(3) of the Act, order payment of a greater sum by way of compensation for remuneration lost by that employee as a result of the personal grievance.

[52] Mr Patury stated that following the dismissal, he found employment but that new job ended after two weeks. He also found some contracted work following this period, but says that he only became an employed builder again in January 2025 after several attempts to find new employment. Submissions advanced for Mr Patury were that the Authority should exercise its discretion under s128(3) of the Act and award more than three months' wages.

[53] I do not consider that the discretion afforded under s128(3) is intended to extend to these circumstances. This is because the causal link between the unjustified dismissal and Mr Patury's unemployment has been broken.

[54] Although Mr Patury's new employment ceased after two weeks of work, I am not persuaded that the cause of that employment ending can be attributed to the unjustified dismissal other than that Mr Patury only sought new employment due to the dismissal.

[55] As such, I consider an appropriate award in these circumstances is three months' wages.

[56] Based on the employment agreement, Mr Patury's weekly wage was (calculated at \$32 an hour multiplied by 44 hours per week) \$1,408. As such, the sum of lost wages over three months is \$18,304.

*Compensation for humiliation, loss of dignity and injury to feelings*

[57] As Mr Patury's unjustifiable dismissal claim is made out, he is entitled to compensation for humiliation and injury to feelings pursuant to s 123(1)(c)(i) of the Act.

[58] Mr Patury gave evidence on the impact the unjustified dismissal had on his emotional and physical health, noting that it occurred following his wedding and took away from what should have been one of his "happiest years". Mr Patury stated that as he has children, the financial impact compounded matters.

[59] Although he has sought \$30,000 in compensation. I consider an award of \$10,000 appropriate in these circumstances having balanced the evidence against current trends in the Court<sup>2</sup>.

*Contributory conduct*

[60] I am required under s 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[61] Submissions advanced on behalf of BWBL were that "a dismissal would likely have still occurred", as Mr Patury had acknowledged his "wrongdoing" and that the "mistakes" he made were "significant".

[62] Consequently, BWBL holds the view that Mr Patury had significantly contributed to his employment ending and that this should result in a discount in remedies awarded.

[63] I agree that Mr Patury's continued poor performance contributed to the dismissal. Although Mr Patury's representative submitted that he may have continued

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<sup>2</sup> *Pyne v Invacare NZ Ltd* [2023] NZEmpC 179; *GF v Customs* [2023] NZEmpC 101; *Pact Group v Robinson* [2023] NZEmpC 173.

employment with BWBL had it “initiated a performance review” and therefore resulted in “improving his work”, this is speculative and does not obviate from Mr Patury’s mistakes at work.

[64] There was no dispute that Mr Patury’s work had been defective on several occasions and there was also no dispute that the build he was in charge of prior to going on annual leave was not a trivial defect.

[65] Section 124(a) 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 words “the situation that gave rise to” in a personal grievance therefore refer to relevant events which caused the employee to have been dismissed or disadvantaged unjustifiably. In this regard, as the Court identified in *Harris v The Warehouse Ltd*<sup>3</sup>, more than simple causation is required, there needs to be culpable action by the employee.

[66] In *Underhill v Coca-Cola Amatil (NZ) Ltd* in which the Court held a 25 per cent reduction in remedies was appropriate, after finding that there were substantial difficulties with the employees’ performance, balanced with the employer’s substantial procedural deficiencies in carrying out termination.<sup>4</sup>

[67] Similarly on the current facts and evidence before me, there were repeated flaws, including a major defect, for which Mr Patury was responsible for, and accepted, albeit reluctantly.

[68] As such, I find that Mr Patury’s actions contributed to the outcome of his employment.

[69] For these reasons, I consider a 25% deduction to the compensation award of \$10,000 appropriate.

## **Orders**

[70] For the reasons set out above, I consider that Mr Patury’s claim of unjustifiable dismissal has been made out. Accordingly, I order Brad Watson Builders Limited to pay Mr Fabio Patury within 28 days of the date of this determination:

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<sup>3</sup> *Harris v The Warehouse Ltd* [2014] NZEmpC 188, at para [178].

<sup>4</sup> *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017] NZEmpC 11.

- a. \$18,304 (lost wages) and
- b. \$7,500 (compensation after a 25% deduction).

## **Costs**

[71] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[72] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Patury may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Brad Watson Builder Limited will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[73] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>5</sup>

Davinnia Tan  
Member of the Employment Relations Authority

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<sup>5</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)