

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2025] NZERA 104
3259140

BETWEEN	FRANK RESINK Applicant
AND	EMPLOYMENT SERVICES LIMITED Respondent

Member of Authority:	Antoinette Baker
Representatives:	Paul Mathews, representative for the Applicant Paul Brown, counsel for the Respondent
Investigation Meeting:	21 November 2024
Submissions received:	On the day
Final information received:	22 November 2024
Determination:	Monday 24 February 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Resink was employed as a recruitment consultant by the respondent (ES) for about two years. The sole director for ES is Mr Mathew Jones. Mr Resink's employment ended in June 2023. There is a dispute about how his employment ended. ES operates a labour hire business through the trade name 'Canstaff' by placing employees into jobs with its clients but maintaining the role as employer of the placed employees. ES has prospective client employers 'on their books' and seek to find more. Mr Resink's role included cold calling for new clients who were looking for labour as

well as working on the process of placing and dealing with prospective 'candidate' employees.

[2] Mr Resink says he was disadvantaged in his employment due to the actions of ES from when it commenced a disciplinary process without being clear about all that was being investigated and then not providing information to him about this when requested. Mr Resink says that these actions culminated with an allegedly unannounced removal of a company vehicle from his residence to be used by his alleged 'replacement' while he remained on sick leave. On the same actions Mr Resink says the removal of his company vehicle amounted to a 'sending away' by ES that constituted a direct dismissal that was not justified. Alternatively, Mr Resink says that he was unjustifiably constructively dismissed because either ES breached a duty to him that was serious enough that ES ought to have foreseen he would resign; or alternatively there was a course of conduct aimed at getting him to resign.

[3] Mr Resink claims compensation and lost earnings for the grievance(s), and a contribution to his costs.

[4] ES denies the claims and says that any investigation process it began was reasonable for it to do which it says could not conclude because Mr Resink went on sick leave and then by his own choice resigned. It disputes Mr Resink's version of events that led to his resignation including that it was entitled to ask for the company vehicle and collect it, and it disputes Mr Resink's version about how the vehicle was collected and what was said at that time.

The Authority's Investigation process

[5] This matter was lodged in late October 2023 and a phone conference call scheduled for December 2023. Due to Mr Resink's representative's phone issues this was abandoned on the day and the representatives were offered rescheduled dates in December 2023 or January 2024. A phone conference call was held on 19 January 2024

during which issues, evidence and timetabling was discussed. I issued directions¹ that confirmed these things as well as setting an investigation meeting for May 2024. Just before this meeting Mr Resink through his representative asked the Authority about summoning a further witness, Mr Blair Mullen. Mr Mullen is a former ES employee who had been present when the vehicle was retrieved from Mr Resink. I deferred a consideration of this until after the May 2024 investigation meeting given the close timing of the request and my ability to further investigate by questioning this witness if I considered it relevant after I had heard and considered the evidence from the parties in the May 2024 investigation meeting.²

[6] Unfortunately, due to unforeseen and unavoidable circumstances of illness, the Authority had to adjourn the May 2024 scheduled investigation meeting and propose multiple new dates to the parties' representatives which were dates from July 2024 onwards. The parties' representatives were unable to agree on their joint availability until 21 November 2024 which was when I conducted a meeting across a day concluding at approximately 3.00pm.

[7] The parties had lodged and served evidence and documentation prior to the first scheduled May 2024 investigation meeting. Both parties continued unexpectedly to provide material up to the point of the investigation meeting. In particular, Mr Mathews provided a sequence of emails for Mr Resink that were not objected to by Mr Brown. All material that was put forward I have considered.

[8] By the time of the November 2024 investigation meeting and given that more time had become available to do so, I granted a renewed request from Mr Mathews to summons Mr Blair Mullen as a witness. At the investigation meeting I heard from Mr Resink and accepted (with the parties' consent) as read, a statement of evidence from his wife Ms Resink because she was unable to be present. I heard from Mr Mathew Jones for ES. I also heard (by AVL) from the summonsed Mr Mullen. Representatives had the opportunity to ask questions of all witnesses.

¹ Directions of the Authority dated 19 January 2024.

² Employment Relations Act 2000, s160(1)(a) and (c).

[9] At the end of the investigation meeting, I heard oral submissions from both representatives. I sought further information after the investigation meeting and received this on 22 November 2024 being a final payslip from ES and confirmation from Mr Resink that he agreed that the employer entity was ES. The latter resulted in a change of respondent name by consent from Canstaff Christchurch Limited to ES, the entity showing on the IRD records and individual employment agreement for Mr Resink. This was not a matter I had identified earlier. The Authority file notes show that service had originally been accepted by Mr Brown for 'Canstaff Christchurch Limited' the original respondent party named. However, it appeared that the representatives had previously communicated about the correct employer entity.

[10] I reserved my determination on 22 November 2024.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings and expressed conclusions as necessary to dispose of the matter and make appropriate orders. It has not recorded all evidence and submissions received.

The issues

[12] The issues requiring investigation and determination are:

- a. Was Mr Resink dismissed in that there was a 'sending away' dismissal by ES when Mr Jones came to collect a work vehicle from him?
- b. If so, was the dismissal justified?
- c. If not a 'sending away' dismissal as above, was Mr Resink in the alternative constructively dismissed as a result of either a breach of his terms of employment so serious that ES ought to have foreseen a resignation, or a course of conduct intended to have him resign?
- d. If so, was the dismissal justified?
- e. If Mr Resink was not constructively dismissed, was he disadvantaged in his employment and if so how?

- f. Depending on the above what if any compensation and lost earnings are to be awarded?
- g. Are costs one to the other to be ordered?

Further background

Invitation to a disciplinary meeting and information provided about what was alleged

[13] On 27 April 2023 at 2.25pm Mr Resink was invited by ES to a ‘disciplinary meeting’ scheduled for the next day at 3.00pm. The email from Mr Jones said that he and his wife Ms Jones (who also worked for ES) would attend.

[14] The above email included:

- a. The purpose of the meeting was: ‘... in regard to you not following a lawful command and failing that you [sic] have potentially deceived the company as to your daily activities.’
- b. The ‘lawful command’ was specified as being ‘requested’ by Ms Jones on the ‘18 February at 9.30am’ to ‘promote [a prospective employee placement I will call AB³] to all companies advertising for staff in the South Island which you did not do. You advised me that you had spoken to “40” companies in an effort to place [AB] in March. These breaches, if correct, are considered “serious misconduct” and this meeting is directly related to your employment which could result in immediate termination.’
- c. Mr Resink was invited to bring a support person and to provide something in writing prior to the meeting or at the meeting.
- d. Mr Jones indicated that no decision would be made at the meeting because he had ‘not formed any views on the outcome of this process and cannot do so until I have received all the necessary information from you, however I feel there is no choice but to undertake this formal process with you.’
- e. Mr Jones ended with inviting questions or otherwise meeting Mr Resink the following day.

³ Randomly connected letters that bear no reference to the person’s name or identity.

[15] The person for placement referred to in the email (AB) was subject to visa requirements and his employment ended after being 'let go' with the previous employer that he was placed with by ES. There was pressure in relation to visa requirements to find a replacement client for AB. AB had been working in a particular industry. That industry was one that I accept Mr Resink had not historically dealt with for placements, but I accept it was reasonable for ES to ask him to work on getting the person placed.

28 April 2023 disciplinary meeting

[16] The disciplinary meeting occurred on a Friday afternoon after the invitation to meet the day before. The Joneses and Mr Resink attended. ES has provided typed notes of the meeting. The meeting is recorded as lasting approximately 11 minutes. Mr Resink in his oral evidence said the notes did not accurately cover everything in the meeting and he could not be clear that he had been shown them to check for accuracy. As I understand his evidence, Mr Resink says the notes miss what he says derailed him at the start of the meeting. This was that he says that he explained he had replied by email to Ms Jones's '18 February at 9.30am' email request to place AB and that she denied receiving this response email. Emails eventually produced by ES by the time of the investigation meeting show that Mr Resink did respond in email to Ms Jones saying he tried to place AB in the industry that he had been 'let go' from and this was not successful. Those emails show Ms Jones then emailed back and asked Mr Resink to expand the search in a different industry (retail sector) by looking at job vacancies on various sites. I did not hear from Ms Jones, but I find generally that the notes are likely the closest representation of what was discussed at the meeting that I have. They do not largely depart from Mr Resink's position about what happened although I will return below to the dispute about whether the meeting became heated. Mr Resink says it did. Mr Jones says it did not.

[17] Mr Jones is recorded in the notes as starting the meeting with:

I have some concerns about trust, and we are not seeing the level of performance we have in the past. You stated in the Monday morning 17 April meeting you made 40 Phone calls in an effort to place [AB] also I have concerns about the outstanding sales calls and a drop off in your KPIs. Tracey emailed you on 18 April to find a position for [AB].

[18] Mr Resink then is recorded as replying he contacted '14' prospective clients to place AB and not '40'. Mr Jones' response is recorded as 'Oh right well that makes some sense then', that '[Ms Jones] had been looking through phone records this week and didn't see that level of calls to represent the 40 calls you made'.

[19] Mr Resink is then quoted in the notes as saying, 'Now I understand why we are having this meeting' and repeats that he had made 14 calls and recites seven of the specific industry businesses he had called about placing AB. He repeats the same thing he had said to Ms Jones in the above email exchange that there were problems placing AB because he had been 'let go' from a workplace in that industry. There is nothing then recorded about Ms Jones asking in a further email to Mr Resink to look at placement opportunities in the retail sector through various job vacancy websites. I find this lack of discussion recorded is likely given that ES's position, until these emails came to light during the investigation meeting, was that Mr Resink simply did not respond to Ms Jones after the 9.30am email that she sent to him, hence the allegation about Mr Resink not obeying a 'lawful command'.

[20] The meeting notes do not record anything further about there being discussion about Mr Resink's efforts at placing AB. There is then a change in the meeting to Mr Jones saying to Mr Resink that he was not performing against KPIs and specifically that calls to prospective clients had 'fallen off' and that Mr Resink was not meeting the '10 by 10'. The latter is a reference to a performance measure recorded in Mr Resink's IEA⁴ that requires ten calls to be made to prospective work placement clients from ES's database before 10am each morning.

⁴ Schedule Five, IEA Frank Resink and Employment Services Limited dated and signed 12 April 2021.

[21] The notes then record that Mr Resink explained that he used an application on his laptop (VoIP)⁵ to make calls straight from the ES database of prospective clients through the internet rather than phone connection which enabled him to make notes at the same time. Mr Jones's recorded response is to say that he did not know that this could be done and that 'we should be looking into it.' Mr Jones is then recorded as changing to asking Mr Resink about his out of office time. When Mr Resink explained these were client visits in a specific industry Mr Jones says that they are not recorded and that, 'But Frank you know company policy is if it is not in [recorded in the ES system] it hasn't been done.' Mr Resink's response is recorded as 'you say that.' Then Mr Jones asks again what Mr Resink is doing when out of office and Mr Resink gives an explanation about having to spend '3.5 days' with a placement employee candidate from overseas who was young and needed to be put into different accommodation. This is something Mr Resink has also put into his written evidence. Mr Jones' response is recorded as 'That's fine' but 'what about your overall activity' saying again that this had 'fallen off and your KPI's have dropped off in the last couple of months, what is going on?'

[22] It is at this point that Mr Resink is recorded as saying he was not comfortable to continue, and Mr Jones proposed returning to meet at 8.00am on Monday. Mr Resink is recorded as saying 'Yes that's fine' and the meeting was recorded as finishing at 3.11pm. The notes end with 'By Matt Jones'. However, it has been clarified that Ms Jones took the notes at the meeting. No information was provided to Mr Resink at this point about why Mr Jones was saying his KPI's had fallen off, or that there were no records of visits, or as the second allegation in the invitation letter states, that Mr Resink had 'potentially deceived the company as to your daily activities.' Nothing is recorded in the notes about the basis on which the meeting would reconvene at 8.00am on Monday.

⁵ 'Voice over Internet Protocol' which allows voice calls through internet connection rather than a phone line.

After the 28 April 2023 meeting

[23] Mr Jones did not in fact return to work for ES after the above meeting and a further meeting was never held. His evidence is that he became stressed and anxious during the weekend (this is supported by Ms Resink's statement) about the way the meeting went. He says that this was why he went off sick on the Monday and provided ES with a medical certificate saying he has been advised to take stress leave from 2 May 20223 to 12 May 2023. This was continued through a further medical certificate on 18 May 2023 although by the time of 12 May 2023 Mr Resink had exhausted his sick leave entitlement and was on unpaid leave until the end of his employment on 9 June 2023.

[24] On Wednesday 3 May 2023 with Mr Resink by then on sick leave until 12 May 2023 there was then an email sequence starting at 11.06am when Mr Jones emailed Mr Resink directly even though by this time Mr Resink had representation as did ES:

As you are on leave we will collect the laptop and phone today or you could get it returned to the office so that we can continue to manage your workload.

[25] Mr Resink forwarded the email to his representative at 11.18am asking 'what do I do with this?' and then emailed Mr Jones at 11.28am asking that he communicate with his representative.

[26] At 11.52am Mr Jones emailed Mr Resink again directly:

Please confirm whether the laptop and phone will be dropped off today or we need to collect it today.

[27] In response Mr Resink's representative communicates with Mr Jones noting that he is aware that Mr Resink is represented and to make the request through ES's representative to which Mr Jones replies, 'I don't need to.' And asked for a reply.

[28] The above continued to be a disputed issue playing out in communications between instructed representatives. This included Mr Resink challenging the reason for asking for the phone, laptop and passwords and then Mr Jones sending someone from the company to Mr Resink's home and when the door was not answered ES formed the conclusion that Mr Resink deliberately did not answer the door, and this would also be investigated as serious misconduct. ES instructed their representative to say this was serious because it was 'obstructing' its investigation about Mr Resink's work activities. Hence Mr Resink then formed the view and communicated through his representative that Mr Jones was saying two different things about why he wanted to retrieve the cell phone and laptop, the second reason being to continue an investigation.

[29] During the representative communications ES maintained its position that it had been clear about what was being investigated at the 28 April 2023 meeting. Mr Resink through his representative claimed otherwise by repeating that the issue about whether he had contacted 40 or 14 businesses had been dealt with at the above referred meeting and continued to ask what else was being investigated and what other information ES had relied on to have called the disciplinary meeting about this on the 28 April 2023.

[30] On 11 May 2023 Mr Resink provided the laptop, cell phone and passwords to ES. At the same time through his representative, he questioned ES's motives for asking for the items and asked how much paid sick leave was remaining.

[29] ES instructed a response to the above by confirming Mr Resink's sick leave expired on 12 May 2023 and that he was by then on unpaid sick leave. There was a repeat of the previous position and also that ES had by then had the laptop examined by an 'IT specialist' whose 'report' confirmed that [Mr Resink] had deleted 'company information'. It was stated that this may be because Mr Resink was trying to hide evidence that he has not been fulfilling his duties. 'As [Mr Resink] is well aware, these were the concerns raised with him in the initial disciplinary meeting.' The response indicates an investigation is ongoing, that the employer does not view it as minor and

that, 'Should your client wish to return to work then we will need to have a disciplinary meeting before [he] can recommence his duties.' ES noted that mediation was at this stage scheduled but not until 4 July 2023. ES continued to say that it would not provide information to Mr Resink until its investigation was complete.

[31] On 21 May 2023 through his representative, Mr Resink communicated that ES's continued 'vague allegations' were damaging the employment relationship further and that he was unlikely to improve his health while ES 'held over his head' an investigation into unspecified serious allegations. ES was asked for the report from the IT specialist that ES instructed its representative to refer to in the above 18 May 2023 email. A further email from Mr Resink's representative ten days later sought to follow up on this request and claimed that not to provide it was a breach of good faith. It was suggested that the conduct of ES 'seems pointed at eliciting' Mr Resink's resignation. Paid leave was requested for stress. The response on 31 May 2023 from ES through its representative was to deny paid leave and deny the claims that further investigations were not reasonable and said that information would be provided to Mr Resink when the investigation was completed.

[32] Mr Resink emailed his representative on 5 June 2023 saying that 'apparently [ES] have employed a guy called 'Blair', but he was unsure about his job title. Mr Resink's oral evidence was to explain that a person he knew told him about this.

Events on 9 June 2023 when Mr Resink's company vehicle was retrieved from his home.

[33] On 8 June 2023 in the afternoon while Mr Resink was still on sick leave, Mr Jones and Mr Mullen went to Mr Resink's home with the aim to collect the company vehicle he had. Mr Mullen's evidence was that Mr Jones told him he would wait in the car and parked a couple of houses along from Mr Resink's home and Mr Mullen was to go to the door to retrieve the keys and vehicle. Mr Mullen says he understood they were going to collect the 'vehicle coming my way' from 'my predecessor'. Mr Mullen confirmed twice in his oral evidenced that he told Mr Resink if he did not get the keys

the police would be called. He says his approach was 'robust' but not aggressive and he was doing what he was asked to do. I accept this was likely and that Mr Mullen should not by the determination be held responsible for the actions of ES asking him to become involved in this matter. While there is a dispute about the tone of the interactions and what Mr Jones may or may not have 'yelled' from his position sitting in the vehicle about getting the car back, it is not disputed that the vehicle was retrieved and driven away by Mr Mullen after Mr Resink handed over the keys.

Resignation and constructive dismissal raised

[34] As noted above already, Mr Resink resigned and raised grievances on 9 June 2023 which set out Mr Resink's version of events which included that the vehicle was collected from him the day before unexpectedly at his home by Mr Jones and Mr Mullen; that when Mr Resink asked why Mr Mullen wanted the car he said 'because it is my truck now'; that there was a level of verbal aggression from Mr Jones yelling from his car saying he wanted his 'fucking truck back now, otherwise I will call the police. The grievance letter put forward on Mr Resink's behalf that this appeared to be a dismissal but 'if not' then Mr Resink tendered his resignation stating 'This behaviour by your client is outrageous and was the final straw for [Mr Resink].' The response from ES through its representative denied the grievance stating that ES was entitled to retrieve the vehicle while Mr Resink was on sick leave, that the version of events was disputed, and that the collection of the company vehicle was neither 'outrageous nor a repudiation of an employment relationship'.

Was Mr Resink dismissed in that there was a 'sending away' when Mr Jones came to collect a work vehicle from him?

[35] Section 103A of the Act sets out a list of factors relating to the test of whether an employer was justified in dismissing an employee. First however I must determine the dispute about whether or not Mr Resink was dismissed by ES.

[36] A dismissal is the unilateral act by an employer of ‘sending away’ an employee.⁶ If there are clear words or documentation this may be a perfunctory step not disputed. Here there were no words said or documented that said ES dismissed Mr Resink. It is submitted for Mr Resink that it was the employer’s action through its director Mr Jones of retrieving a work vehicle from him to give to a replacement in Mr Resink’s role when he was on sick leave that amounted to a ‘sending away.’ I have been referred to two Authority Determinations⁷ but find neither fit the facts here albeit they reference retrieving property. I am also tasked with considering the dispute of facts before me.

[37] Mr Resink says the vehicle was retrieved for Mr Mullen as Mr Resink’s replacement in Mr Resink’s role and as such he was dismissed from his role. ES says the vehicle was retrieved because Mr Resink was on extended sick leave and either the vehicle was required to perform Mr Resink’s role given he was not at work or as more latterly stated by Mr Jones in his oral evidence that he wanted to check updates on the vehicles warrant, registration and general maintenance.

[38] Mr Resink’s evidence is that he had listened to someone who told him he thought that he had been replaced. I accept he emailed his representative about this notion relating to a ‘Blair’ on 5 June 2023 three days before the vehicle was collected. I found this evidence including Mr Resink’s oral evidence lacked detail and was more of an assumption. While Mr Jones has said Mr Mullen was only a ‘volunteer’ at the time, Mr Mullen clarified he was on a ‘work trial’ as part of an ACC return to work and was being paid by ACC. Mr Jones has said further that Mr Mullen was not employed by ES until 1 July 2023.

[39] Mr Mullen was a summonsed witness who the Authority could not be certain was going to appear until close to the time of the investigation meeting. I am satisfied that Mr Mullen was not likely aware of evidence from either party before he appeared in the meeting through AVL. He appeared to me to be fairly basic, straight forward and careful with his answers in terms of what he could recall. I find that given he thought

⁶ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

⁷ *Britton v Mulching Crushing & Screening Limited* [2015] NZERA Wellington 92; *Wright v La Hood Electrical Limited* [2023] NZERA 696.

the vehicle was going to be his for a job with ES he likely did say to Mr Resink when they met at Mr Resink's front door for the first time that he was there to pick up 'his truck'. Given the events that had been unfolding about Mr Resink's employment before this, including Mr Resink (as I will find below) finding the uncertainty of what was being investigated by ES stressful, I can understand why Mr Resink would have felt he was having to provide his work vehicle to Mr Mullen as his 'replacement'. However, Mr Resink's impression and Mr Mullen's impression do not get me to a point where I can be satisfied I could make a finding that the retrieval of the vehicle was unequivocally ES directly dismissing Mr Resink by way of a sending away. It could also have meant that ES wanted the vehicle to complete work in its business (as Mr Jones mostly said with some inconsistency) given Mr Resink had gone on extended unpaid sick leave. I will therefore now deal with this matter under the next issue relating to constructive dismissal because I do not find Mr Resink was directly dismissed by ES through 'sending away'.

Was Mr Resink constructively unjustifiably dismissed as a result of the actions of ES culminating in a breach of duty which ES ought to have foreseen would result in dismissal or due to a course of conduct designed to get him to resign?

[40] The Court of Appeal⁸ has listed three non-exhaustive situations where constructive dismissal might occur:

- Where the employee is given a choice of resignation or dismissal
- Where the employer has followed a course of conduct with the deliberate and dominant purpose or coercing an employee to resign
- Where a breach of duty by the employer leads a worker to resign

[41] The Court of Appeal⁹ has held that the correct approach in determining a constructive dismissal where there is an apparent resignation is to determine whether the resignation was caused by the breach of duty on the part of the employer considering

⁸ Cooke J in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited* (1985) 2 NZLR372 (CA) at 374 following an approach previously taken in the former Arbitration Court in NZ.

⁹ *Auckland Electric Power Board v Auckland Provincial District Local Authority Officers IUOW Inc* (1994) 2 NZLR 415 (CA) at 419 later endorsed in *Business Distributors Ltd v Patel* (2001) 1 ERNZ 124 (CA).

all the circumstances of the resignation. Secondly, to ask whether the breach of duty is of sufficient seriousness that a substantial risk of resignation was *reasonably foreseeable*.

[42] The Employment Court¹⁰ has considered the situation where an employer may be saying it does not intend to terminate the relationship but has breached a fundamental aspect of it:

Because of the nature of a constructive dismissal, it may be that the employer does not intend the employment relationship to end and may, as here, so advise the employee. But if the employer in doing so acts in continued fundamental breach of the contract or evinces an intention not to be bound by the fundamental aspects of it, that may nevertheless give the employee grounds to treat the position as a constructive dismissal even though it may appear to be the antithesis of an actual dismissal.

Course of conduct

[43] While I note that on Mr Resink's behalf it was suggested before he resigned that ES in its conduct appeared to be 'eliciting' Mr Resink's resignation, I am not satisfied after hearing from Mr Jones and considering what happened as set out above that Mr Resink has proven what is quite a high threshold to show 'deliberateness' and 'coercion' that one might consider more likely for an unrepresented employee.

Was there a breach by ES that caused Mr Resink to resign?

[44] It is submitted for ES that it was clear about what it was investigating from the invitation to the disciplinary meeting set out above in late April 2023. It is submitted for Mr Resink that matters causing Mr Resink's dismissal began from this stage when ES started an unfair disciplinary process. I agree with the submission for Mr Resink for the following reasons.

¹⁰ *Hwang v Boyne Co Ltd (t/a Goodday Newspaper)* (2004) 2 ERNZ 412 (EmpC) at (23)

[45] As noted above, the invitation to meet was headed ‘disciplinary meeting’ despite Mr Jones’ inconsistent oral evidence that it was not a disciplinary meeting at that stage. The invite included a clear allegation of something any employee or employer could reasonably take to be very serious. It was expressed in the one sentence ‘... in regard to you not following a lawful command and failing that you [sic] have potentially deceived the company as to your daily activities.’ A fair and reasonable employer in my view would explain such a serious allegation particularly in relation to a claim of ‘deception’ before conducting a disciplinary meeting that was to be the opportunity for the employee to give feedback. The only explanation ES gave in the invitation to meet was in the next sentence when it said Mr Resink contacted 40 companies in relation to getting AB placed in a job. The notes support that at the meeting this is likely what Mr Resink thought he was addressing in relation to the ‘deception’ about his work activities. Instead, after what appears as recorded in the ES notes to be acceptance of the ‘40-14’ explanation (‘that explains it’ from Mr Jones), Mr Jones then starts to cast a wide net about performance issues and what Mr Resink was doing with his time outside of the office.

[46] I am not surprised that after approximately 11 minutes Mr Resink called halt because the meeting became for him, as was recorded in the ES notes, ‘uncomfortable.’ He must have been on the back foot to start answering questions that he was not prepared for when having been told in the invitation to meet letter that the disciplinary process could end in instant dismissal. In this context I accept Mr Resink’s evidence as more plausible than Mr Jones’ evidence that the meeting became heated. I find that the disciplinary process to that point included a breach of the duty under s 4(1A) of the Act which requires an employer proposing to make a decision adverse to the continuation of employment to provide information for the employee to give feedback on.

[47] The duty of good faith also incorporates the mutual obligations of trust and confidence¹¹ and includes the duty to communicate constructively to maintain the employment relationship.¹² That ES then through its representative continued to assert

¹¹ Employment Relations Act 2000, s4(1A)(a).

¹² As above, s4(1A)(b).

Mr Resink had a clear understanding of what was being investigated while claiming further allegations such as Mr Resink deleting company material from his laptop without providing the information it based this on was in my view a continued breach of good faith.

[48] I find a further continuing breach of the same duty of good faith when on the 18 May 2023 communication about the 'IT specialist' having found 'deleted company material' and suggesting Mr Resink was hiding something, ES instructed its representative to communicate that 'should [Mr Resink] wish to return to work we will need to have a disciplinary meeting before [he] can.' This then appears to have stepped matters into a form of suspension without any consultation, alongside ES continuing not to provide any information on which it was basing its serious allegations. It is by then not surprising that Mr Resink communicated through his representative that the trust he was having in his employment relationship was being undermined.¹³

[49] A report from the in house 'IT' person for ES was provided just before the investigation meeting and said that this person looked at the computer on 30 May 2023. I did not have an opportunity to ask questions of this person. As evidence it has limited weight in relation to its content which I take it ES through Mr Jones points to as justification in any event of the things ES says it was investigating. The observation I make is that had this report been available to Mr Resink when he clearly asked for it before he left his employment, this matter may have more constructively been dealt with in terms of the concerns that ES had. I do not accept the report is definitive as to support allegations about deception so far after the employment ended.

[50] I come then to the 8 June 2023 when the vehicle was retrieved. I find that the incident very likely and understandably left Mr Resink feeling intimidated as his evidence says. I find this was exacerbated by the events that preceded and the employer's continued breach of good faith. I find it not a stretch by this stage that Mr Resink would have considered the relationship of trust and confidence had irretrievably broken down, that this was the 'last straw'.

¹³ Email Paul Mathews to Paul Brown dated 9 May 2024.

[51] That Mr Resink had been on sick leave for stress was understandable. That both parties were represented gave an opportunity for ES to have corrected any deficiency in its lack of initial articulation about what it was basing its initial very serious allegation of deception about work activities on. It did not do so. Mr Jones' evidence attaches data sheets that he says support the concerns that caused ES to invite Mr Resink to the disciplinary meeting. These were never provided to Mr Resink in relation to the performance issues that blindsided him at the disciplinary meeting. This is not cured by saying the meeting was cut short because the material could have been provided when asked for through Mr Resink's representative. ES as a recruitment for employment company that Mr Jones explained has been in business for some time remained represented. It ought to have understood this deficiency was a serious breach of good faith that continued. I find that it was reasonably foreseeable for ES to have concluded that Mr Resink would resign due to the seriousness of the ongoing breach of its duty of good faith to him.

If Mr Resink was not constructively dismissed, was he disadvantaged in his employment?

[52] I consider that the same events are claimed as disadvantage and so have already dealt with the problem under the grievance of constructive dismissal.

Depending on the above what compensation, lost earnings and costs are to be awarded?

Compensation

[53] Mr Resink claims \$25,000.00 for compensation. This is based on an assertion of 'severe depression' without medical records to support this. Compensation is for 'humiliation, loss of dignity, and injury to the feelings of the employee.' I accept that based on Mr Resink's evidence and that of his wife that Mr Resink likely suffered from human effects of the dismissal. However, Mr Resink also acknowledged that other

things were also happening in his life. To that end I am satisfied that the grievance contributed and award \$15,000.00 to Mr Resink under section 123(1)(c)(i) of the Act.

Lost wages

[54] It is submitted for Mr Resink that I consider five months lost earnings after his employment ended due to the grievance. This is because while he looked for jobs he did not secure employment until November 2023.

[55] I am not satisfied I have reason to exercise my discretion to award a sum of up to five-months. I find an appropriate award for lost earnings taking into account attempts to get further employment is the three months claimed under s128 of the Act being \$17,500.08 gross.

Are any grievance remedies to be reduced under s 124 of the Act for employee contribution to the actions that gave rise to the grievance?

[56] I must consider contribution under s 124 of the Act. I pause to consider whether Mr Resink in delaying the return of his phone and laptop top and passwords contributed to the facts that gave rise to the grievance. However, I find Mr Resink consulted his representative about his response and followed this which in the end resulted in ES changing its reason for asking for these items to an aggressive claim that Mr Resink had obstructed its serious misconduct investigation stating this as a further thing it would investigate in itself. In these circumstances I do not find Mr Resink contributed to the grievance.

Summary of outcome

[57] Employment Services Limited is to pay Frank Resink the following:

- a. Compensation of \$15,000.00 gross under s 123(1)(c)(i) of the Act
- b. Lost wages of \$17,500.08 gross under s 123(1)(b) of the Act

Costs

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

[59] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Resink 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 ES will then have 14 days to lodge any reply to memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[60] 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.¹⁴

Antoinette Baker
Member of the Employment Relations Authority

¹⁴ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1