New Zealand Employment Relations Authority Decisions

Stuart v Downer New Zealand Limited (Christchurch) [2012] NZERA 1222; [2012] NZERA Christchurch 222 (17 October 2012)

Last Updated: 18 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

[2012] NZERA Christchurch 222

5340213

BETWEEN ROBERT STUART Applicant

AND DOWNER NEW ZEALAND LIMITED

Respondent

Member of Authority: David Appleton

Representatives: Heather McKinnon, Counsel for Applicant

Bill Pepperell, Advocate for Respondent

Investigation Meeting: 17 and 18 July 2012 at Nelson

Submissions received: 17 September 2012 from Applicant

28 September 2012 from Respondent

Determination: 17 October 2012

DETERMINATION OF THE AUTHORITY

A. The Applicant was not unjustifiably dismissed and accordingly his personal grievance in that respect fails.

B. The Applicant did breach the duty of trust and confidence owed to the respondent, but no damages are awarded to the respondent due to the impossibility of justly quantifying the loss sustained by it.

C. Costs are reserved.

Employment relationship problem

[1] Mr Stuart raises a personal grievance of unjustifiable dismissal in relation to his summary dismissal for serious misconduct on 17 December 2010. He claims

$12,000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) as well as lost wages.

[2] The respondent denies that Mr Stuart was unjustifiably dismissed, saying that he committed serious misconduct by having falsified his timesheets. The respondent also counterclaims against Mr Stuart in respect of pay he received which the respondent asserts was dishonestly claimed through the false timesheets. This counterclaim was not raised by the respondent until its briefs of evidence were lodged and served, and Mr Stuart's counsel asserts it has been lodged out of time and that it is vexatious and frivolous. I will deal with those assertions below.

Brief account of events leading to the dismissal

[3] Mr Stuart was employed by the respondent company as a mobile patrolman undertaking maintenance duties in Nelson

city and surrounding areas between September 2006 and December 2010 when he was dismissed. As part of his duties, he was obliged to fill in daily job records (DJRs) which recorded his start time, his finish time, the total number of hours worked and hours worked on ordinary time and overtime. A bundle of these DJRs was disclosed to the Authority covering the period

1 June 2010 until 30 June 2010 and 1 November 2010 until 16 December 2010. The vast majority of these DJRs, which were effectively Mr Stuart's timesheets, recorded a start time of 6am, a finish time of 5pm, a total of 10.5 hours worked with 9 hours worked at ordinary time and 1.5 hours worked at time and a half. The DJRs also broke down Mr Stuart's daily activity into broad descriptions such as *inner city cleaning*, *NCC patrol*, and other miscellaneous descriptions.

[4] Mr Stuart's work truck was fitted with a GPS system which recorded, for each day, the times the engine started and stopped, the distance travelled between each engine start and stop, the *idling hours*, the average speed for each journey, the address at which the engine was started each time and the address at which the engine was stopped each time. The Authority accepts that the records produced showing this information for Mr Stuart's truck for the period 1 June to 13 December 2010 are likely to be materially accurate.

[5] In early December 2010, Mr Stuart's supervisor, Mr Walker, mentioned to his manager, Mr O'Donnell, that Mr Stuart was sometimes hard to contact towards the end of the day, and had requested that Mr O'Donnell review Mr Stuart's GPS records. When Mr O'Donnell did so, he found that there was often a mismatch between the time of the last engine stop (at Mr Stuart's home) shown in the GPS records and the finish time recorded in the DJRs (which was almost always 5pm). Mr O'Donnell

originally looked at the GPS records and DJRs for a two week period (29 November to 13 December 2010). Mr O'Donnell believed that these mismatches indicated that Mr Stuart may have been putting incorrect times down on his DJRs in relation to his actual working hours. Accordingly, he wrote a letter to Mr Stuart dated 14 December

2010 in the following terms:

Dear Bob,

Re: NOTICE OF FORMAL DISCIPLINARY MEETING

This letter is to advise you that your attendance is required at a formal disciplinary meeting which will be held on 15 December 2010 at 4pm. The meeting will be held in the Downer, Nelson board room.

You will be required to respond to an allegation that:

Between 29 November 2010 and 13 December 2010 you have been recording false information on your Daily Job Record.

This is deemed a serious misconduct breach of the companies [sic]

Code of Conduct:

1. Falsifying your own or another employee's time

cards, time sheet or any Company documentation.

If at the conclusion of the meeting it is found that this allegation has substance, the most serious action that could be taken against you is summary dismissal.

We encourage you to bring a support person or union/legal representation with you to the meeting.

If you are unable to attend the meeting please advise us. Yours faithfully,

Mike O'Donnell

Operations Manager

[6] Although Mr Stuart denies that the letter was accompanied by the DJRs and GPS records for the period in question, I accept the evidence of the respondent that they were included. Otherwise, Mr Stuart would not have been able to explain his movements during the period at the meeting, which Mr Stuart accepts he did.

[7] Mr Stuart attended the disciplinary meeting with a union representative, Mr Thomas. Also at the meeting was Mr Henderson, the current South Island

commercial manager for the respondent. Mr Henderson was the acting manager for the Nelson operation at the time of the disciplinary process.

[8] A note of the meeting prepared by Mr O'Donnell showed that Mr Henderson showed to Mr Stuart the differences in the working hours recorded in the DJRs and those recorded in the company's GPS system. Mr Henderson explained that, if the allegation was correct, it would be a breach of the company's code of conduct which could result in dismissal. The note shows

that Mr Stuart confirmed that he understood the seriousness of the allegation. Although Mr Stuart could not remember ever having read the Code of Conduct during his employment, he confirmed during the Authority's investigation meeting that he had been aware during his employment that falsifying documents was treated as serious misconduct.

[9] It was common ground that, during the disciplinary meeting, Mr Stuart had explained that he kept work materials at home and regularly carried out work for the respondent at home in his own workshop. He claimed to carry out repairs to his work vehicle and listed for the disciplinary meeting the tasks he had completed in each of the days in question. Mr Stuart's evidence to the Authority was that he had been able to provide this information because he had kept a record himself of what he did on an A4 pad in his truck. He accepted, though, that the pad did not record every task he did while at his home during working hours.

[10] A further set of information was given to Mr Stuart at this meeting covering the period 15 to 26 November which also showed differences between the DJR finish times and GPS records. Mr Stuart was then stood down from work on pay to enable him to assess this new information and a further meeting was convened on

16 December, when he would be expected to explain those further discrepancies.

[11] The second meeting took place on 16 December 2010 with the same attendees as before, plus Mr Drummond, a representative of the REA. Mr Stuart gave explanations in respect of the further DJRs he had been given the day before. Again, he explained that, after he returned home, he would prepare for the next day's work, and complete paperwork that he was required to give to the company office. This paperwork included the DJRs, daily patrol records (which showed in more detail what he had been doing each day, but which did not comprehensively record the times) and, occasionally, vegetation reports which recorded occasions when he had cut back

vegetation and/or given letters to residents advising them that vegetat ion from their properties was impinging on public footpaths and highways.

[12] The respondent had also noticed from the GPS records over the two periods in question that Mr Stuart would often spend more than 30 minutes at his home during the middle part of the day. Mr Stuart was allowed 30 minutes for his lunch breaks, which were unpaid. Two witnesses for the respondent, Messrs Henderson and O'Donnell, assert that, during the conversation with Mr Stuart on 16 December about his lunchtime activities, Mr Stuart had admitted that he had been taking longer for his lunch breaks than he should have done. They took this as an admission by Mr Stuart that he had falsified his timesheets in respect of the length of time he took for lunch (although they agree that Mr Stuart did not use the word *falsified*).

[13] Mr Stuart denies that he made any such admission of falsification but agrees that he told Mr Henderson and Mr O'Donnell that he had spent longer than usual at home for about two weeks watching the news during the unfolding of the Pike River Mine disaster (which started on 19 November 2010). Mr Stuart explained that he had a friend who was involved in the disaster. The witnesses for the respondent, Mr Henderson and Mr O'Donnell, do not recall him mentioning Pike River but it was agreed between those witnesses and Mr Stuart that he had offered to make up the time that he had spent at lunchtimes over his 30 minutes by working for free on the Saturday. Mr Henderson's evidence was that the impression he had from what Mr Stuart had said as that he had been taking longer than he should have done in the recent past.

[14] Mr Stuart's evidence was that there were other times when he had spent more than 30 minutes at his home during the lunchtime period but that he would be working during that period, either preparing for the afternoon shift, cleaning his truck or maintaining the equipment.

[15] A further set of information was given to Mr Stuart at the end of the meeting on 16 December which covered the period 1 to 30 June 2010. The respondent claims that this information also showed discrepancies between the DJR finish times and the finish times as shown by the GPS system. The meeting was further adjourned to give Mr Stuart the opportunity to consider the extra information and was reconvened at

8am the following day, Friday, 17 December.

[16] The notes for the meeting on 17 December, prepared by Mr O'Donnell, show that it lasted only 10 minutes. The meeting notes indicate that Mr O'Donnell had agreed to check a particularly large discrepancy of two hours 20 minutes between the DJRs and the GPS records for 21 June 2010, but that there appeared to be no explanation for it. During the Authority's investigation meeting, evidence was given by an acquaintance of Mr Stuart who recalled that he had seen Mr Stuart on or around

21 June 2010 doing vegetation work in the area where Mr Stuart lived. However, the

respondent's records did not record any vegetation work on or close to that date.

[17] The note for 17 December 2010 records that Mr Henderson stated that there appeared to be a systematic falsifying of timesheets and that, according to the code of conduct, constituted serious misconduct. The note records that Mr Henderson stated that Mr Stuart would therefore be dismissed with immediate effect and that he would be given a letter confirming this.

The letter of dismissal dated the same day refers to Mr Stuart admitting to falsifying his records in relation to lunch breaks and that his explanations for other irregularities in DJRs were not substantiated through further investigation.

[18] The respondent relies upon the admission, as it calls it, of Mr Stuart made during the 16 December 2010 meeting in relation to his lunch breaks, together with it not believing Mr Stuart's explanations that he would spend more than 15 minutes each day working on preparation and maintenance activities at his home. They believed that he regularly over-claimed his time and did not believe that it was possible for Mr Stuart to have spent so long almost every day maintaining his equipment and preparing for the following day.

[19] The evidence of Mr Walker, Mr Stuart's supervisor, was that he could not see how Mr Stuart would have legitimately taken more than half an hour, once or twice a week, doing maintenance work, plus around 15 minutes a day doing the paperwork.

[20] Mr Stuart asserts that the decision to dismiss him was overly harsh and that a warning would have been sufficient, especially given his 6½ years' service without any complaints. He also believes that the decision to dismiss him was pre-determined and that an insufficient investigation took place to discover exactly what Mr Stuart did whilst he was at home up until 5pm each day.

The law and the issues

[21] The test that the Authority must apply in considering whether Mr Stuart was unjustifiably dismissed is contained in s 103A of the Employment Relations Act 2000. As this dismissal occurred prior to 1 April 2011, when the test was amended, the test I must apply is as follows:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[22] The issues that the Authority must consider are as follows:

a. Did the respondent carry out a sufficient investigation into the allegations?

b. Were the respondent's conclusions reasonable?

c. Was the respondent decision to dismiss Mr Stuart predetermined?

d. Was the decision to dismiss Mr Stuart overly harsh?

e. Can the respondent recover a sum of money from Mr Stuart in respect of over-claim of time? If so, what should that sum be?

Did the respondent carry out a sufficient investigation into the allegations?

[23] Counsel for Mr Stuart argues that not enough was done by the respondent to check out whether Mr Stuart had been telling the truth when he had explained that he had been doing maintenance and other work related tasks at home. However, Mr Stuart worked alone much of the time, and was responsible for recording his activities. No-one else could have done that. Therefore, no-one else was in a position to be able to verify Mr Stuart's explanations during the disciplinary process as to what he had been doing during the periods he spent at his home each working day between

6am and 5pm.

[24] Mr Stuart called two witnesses during the Authority's investigation meeting, one of whom attested to Mr Stuart working during the days between 4pm and 5pm at his home. The other witness gave evidence in relation to 21 June 2010. However,

Mr Stuart did not call or refer to these two witnesses during his disciplinary meetings, and the respondent could not reasonably have been expected to have known of their existence when it was investigating the apparent misconduct.

[25] Mr Stuart seemingly found it hard to account for all of his time during t he disciplinary meetings, and the paperwork which he had did not have enough details to assist him. However, upon exploring the paperwork that may have been available to assist him, Mr Stuart explained that he already had his pad of paper on which he recorded his activities, for later transcribing onto the daily patrol records. Therefore, although the daily patrol records (as opposed to the DJRs) were not shown to Mr Stuart during the disciplinary process, on Mr Stuart's evidence they would not have had more information on than the pad he used to answer the respondent's questions. In addition, they did not record the times he carried out his activities other than very occasionally.

[26] Mr Stuart had also been given copies of very detailed GPS printouts and his DJRs during the disciplinary process. The GPS records showed precisely where he had been at each engine stop. This would have been an aide memoire for Mr Stuart in my

view, at least as far as the November and December dates were concerned. Mr Stuart's problem was, though, that he spent a lot of time at his home during his working hours and he rarely recorded what he was doing during those periods.

[27] There was a lot of evidence given about vegetation work that Mr Stuart carried out and that this was occasionally around his home area, so could have accounted for some of the times shown in the GPS records of when he was at home. In addition, doing vegetation work would have meant that he had to clean his *WeedWacker* and sharpen his chain saw each time, which he said he would do at home and which could have taken some time. However, the respondent gave evidence that it lost the vegetation contract with effect from 1 November 2010, which led to a sharp decrease in this kind of work. It is therefore unlikely that he spent much time cleaning and maintaining these vegetation tools after 1 November 2010.

[28] Mr Stuart also called his former manager, Ms Keoghan, who explained the background to the contract with the city council, and that she had given Mr Stuart flexibility in the way that he worked. The respondent was criticised for not having sought information from Ms Keoghan about this flexibility. However, Ms Keoghan had ceased to be Mr Stuart's manager 18 months before he had been dismissed, and at

least two other managers had joined and left during that period. I do not think the respondent can be criticised for having failed to contact Ms Keoghan therefore. More to the point, Mr Stuart admitted that he had never mentioned Ms Keoghan to the respondent during his disciplinary meetings. He also did not mention any special arrangement he had reached with Ms Keoghan to be flexible in his work methods either.

[29] I accept that, if a manager tells an employee how to work, he cannot be criticised for continuing to do so even after that manager leaves, unless he is subsequently told to work differently. I also accept that Mr Stuart was not told by his new managers to work differently. However, Mr Stuart never explained to the respondent during the disciplinary investigation that he had been working *flexibly* because he had agreed with his former manager that he could. I do not accept that the respondent can be criticised for not knowing about a special arrangement made between a former manager and a single employee. For this reason, I believe that *Bushell v Secretary of State* [1980] UKHL 1; [1980] 2 All ER 608 and *Air New Zealand Ltd v Minister of Transport* [2008] NZCA 26, relied upon by Ms McKinnon in her submissions, can be distinguished. If Mr Stuart had explained his special arrangement, the respondent would have been bound to have investigated it. However, he did not.

[30] There is one area that I believe the respondent can be criticised for, although I

do not find it adversely prejudiced Mr Stuart. During the final meeting, on 17

December, it does not appear that Mr Stuart was given much of a chance to explain the discrepancies that arose out of the June 2010 information that had been given to him the previous day. I conclude this from the respondent's own note of the meeting which states that it lasted 10 minutes in its entirety. However, this information relating to June appears to have been given to Mr Stuart to illustrate a long term trend of discrepancies rather than because the respondent wanted him to account for each day in June in which a discrepancy occurred, which would probably have been impossible.

[31] Mr Henderson's evidence was that the admission by Mr Stuart on 16

December that he had taken longer than was allowed during his lunch breaks was enough to justify dismissal. Therefore, I do not find that the June information was crucial in the decision by the respondent to dismiss Mr Stuart, and so it follows that

the fact that he was not given much time to explain it did not materially prejudice him. Mr Stuart and his representative did not ask for more time either.

[32] Finally, Mr Stuart said in evidence that he was sure that, if he had asked for some further information, it would have been given to him by the respondent. This strongly implies that he accepts that the investigation was fair and reasonable in this respect.

[33] Overall, I believe that a sufficient and fair investigation was carried out by the respondent.

Were the respondent's conclusions reasonable?

[34] Mr Stuart admitted during his evidence that he and his representative had said little during the disciplinary meetings. In fact, Mr Stuart said on several occasions during the Authority's investigation that he had not raised certain points during the disciplinary process. At one point he said that the company should have known how he worked, but also conceded that Mr Henderson and Mr O'Donnell would not have known. Mr Stuart also admitted during the Authority's investigation that he had *shabby paperwork*, meaning it lacked detail.

[35] Mr Henderson explained in evidence how he had designed the concept of a self sufficient patrol truck and had put together the Nelson bid for the city council's work. He therefore had a very good grasp of how the patrol job was supposed to be done. Mr Stuart seemingly had done his work as a patrol man a little differently from other Downer's patrol men in New Zealand (although not all such jobs were carried out in identical ways it seemed). It had therefore been important for Mr

Stuart to have explained in sufficient detail during the disciplinary process his particular working methods, and how they arose. I am not persuaded that he had either taken the opportunity that had been afforded to him, or had the information he needed to do so. However, such information (about what he got up to at home during working hours) could only have been created by him, and was not available to the respondent.

[36] In the absence of such explanations and information, given Mr Henderson's understanding of how the job should be carried out, and given Mr St uart's admission of having spent too long at lunch times, I do not believe that it was unreasonable for Mr Henderson to have concluded that Mr Stuart had been falsely claiming that he had worked longer than he had in fact done. Whilst I am prepared to believe that

Mr Stuart did in fact spend time at home doing maintenance and preparatory work, I come to that conclusion only after having heard evidence that has been carefully marshalled and articulated with the help of Mr Stuart's legal adviser and which he has had 18 months to think about. However, on his own admission, Mr Stuart *did not say much* during the disciplinary meetings and the respondent cannot be blamed for that, provided it gave him a reasonable opportunity to do so. I am satisfied that it did.

[37] Mr Stuart stated during his evidence that his *biggest mistake had been trusting the union*. Whilst I do not comment on the reasonableness or otherwise of that remark, it does imply that Mr Stuart accepts that he and his representative did not give the respondent enough information to persuade it that, what appeared to be prima facie evidence of falsification of his timesheets was explicable in more innocent terms.

[38] Ms McKinnon submits that Mr Stuart was badly served by his union and that the union's failure to act in the interests of Mr Stuart had a prejudicial effect on him in respect of the respondent's process and decision. I believe that the union's somewhat diffident approach during the disciplinary process did play a part in persuading Mr Henderson that Mr Stuart had no material answers to his questions. However, I do not believe that the union's conduct was so egregiously unfair towards Mr Stuart that the respondent should have been alerted to a failing in the rules of natural justice or significant prejudice to Mr Stuart. Only under such extreme circumstances would I expect the respondent to have been obliged to suspend the process and enquire as to whether Mr Stuart was in a position properly to address its concerns.

[39] In conclusion, I find that the respondent's conclusions were reasonable.

Was the respondent decision to dismiss Mr Stuart predetermined?

[40] Mr Stuart said that the body language displayed during the disciplinary process persuades him that the decision was predetermined. When quest ioned during the Authority's investigation, Mr Stuart said that this view comes from the body language of Mr O'Donnell, who had a *smug grin on his face*. Mr Stuart specifically said that Mr Henderson did not display such body language.

[41] Mr Henderson confirmed that he had been the sole decision maker, and that Mr O'Donnell had carried out the analysis of the data. The Authority and Ms McKinnon were unable to question Mr O'Donnell about whether he had had a

smug grin, as he had to give evidence first, and then departed, although it is unlikely that he would have agreed. In any event, as Mr Henderson was the sole decision maker, I do not believe that Mr O'Donnell's body language can reasonably indicate any predetermination on the part of Mr Henderson on the decision to dismiss.

[42] Furthermore, the process followed by the respondent does show that Mr Stuart and his representative were given the chance to comment on the November and December data. Indeed, neither of them asked for more time to analyse the data and Mr Thomas even asked for the 16 December meeting to be brought forward by two hours to give a union official to attend as well. I have seen no evidence to suggest that the process followed by the respondent over three days was a sham. Therefore, I decline to find that the decision to dismiss was predetermined.

Was the decision to dismiss Mr Stuart overly harsh?

[43] Mr Stuart referred to his six and a half years of service with no complaints against him and also asserted that the real issue was that he didn't keep detailed enough records rather than falsifying his timesheets.

[44] Mr Henderson says that he did take into account Mr Stuart's work record, but that he was mindful of the fact that Mr Stuart worked alone, and therefore had trust placed on him to be truthful in his time records. Mr Henderson referred to a request which Mr Stuart had made to work free on a Saturday to make up the extra time he had admitted to spending during his lunchtimes. Mr Henderson said that he had considered this offer but had concluded that it would set a bad precedent for the other staff.

[45] Mr Henderson also said that the Code of Conduct expressly referred to the falsification of timesheets as serious misconduct, as the first item on the list. He said that he had viewed this as *stealing time* and that Mr Stuart had effectively said that he had been caught stealing, but that it would be alright if he paid the company back. Mr Henderson did not accept that.

[46] Mr Henderson also explained how he put together bids on behalf of the company but that he relied on the company records to be accurate as to the cost of running a contract. If staff members were mis-recording time, it meant the records were not accurate which would impact upon the company's profit margins. This, in turn, could put jobs at risk.

[47] The respondent's analysis of the discrepancies between the GPS records and the DJRs showed that between 1 June and mid December 2010, Mr Stuart had spent a total of 17 hours and 30 minutes at home in excess of 30 minutes during his lunch times. In addition, he had spent a total of nearly 46 hours at home at the end of the day before 5pm. This analysis took into account an estimated 15 minutes each day for Mr Stuart to complete his paperwork.

[48] The evidence of Mr Henderson was that the patrol truck was designed to be self sufficient, and so Mr Stuart did not need to be constantly going back to his home, even if Mr Stuart did store work materials there. In addition, in his opinion and experience, Mr Stuart did not need to spend as much time as he had said he did doing maintenance and preparation work during the mid and end parts of each day. In short, Mr Henderson did not believe Mr Stuart, as Mr Stuart's explanations were not credible to him taking into account his long experience in the company. On balance, I believe that this conclusion by Mr Henderson was justifiable. Mr Henderson could not judge the veracity of Mr Stuart's explanations other than by using his own experience (as no other evidence of what Mr Stuart got up to at home was readily available).

[49] Furthermore, Mr Henderson had heard an admission by Mr Stuart that he had been taking longer than he should have been for his lunch breaks.

[50] Given that:

a. Mr Stuart had been employed in a position of trust, working alone;

b. Falsifying timesheets was treated as serious misconduct in the

respondent's Code of Conduct;

c. The respondent relies on accurate time records in order to calculate its costs for the purposes of placing its bids; and

d. The discrepancies were not minor in nature, and added up to a considerable amount of time over the period of six months.

I am satisfied that the conclusion of the respondent that dismissal was appropriate and one which a fair and reasonable employer would have reached in all the circumstances at the time the dismissal occurred.

The counterclaim

[51] The respondent counterclaims in respect of two separate breaches of his employment agreement that it says Mr Stuart committed in the period from 1 June

2010 to 13 December 2010:

a. the time that Mr Stuart spent at his home in excess of 30 minutes during his lunch breaks, amounting to $284.37; and

b. the time at the end of each day spent at his home until 5pm, less a nominal 15 minutes a day for the completion of paperwork, amounting to $1,119.80.

[52] Counsel for Mr Stuart asserts that the counterclaims, which were not made known until the lodging and service of the respondent's briefs of evidence, are both out of time and frivolous and vexatious.

[53] I do not accept that the counterclaims are out of time, and Ms McKinnon does not explain under which rule or statutory provision they can be held to be such. Section 142 makes clear that an action which is not a personal grievance can be commenced in the Authority within 6 years after the date on which the cause of action arose. The counterclaims are made pursuant to sections 161 and 162 of the Act and are judiciable claims. Furthermore, I do not accept that the counterclaims, although made known late in the day, were so late as to cause prejudice to Mr Stuart. All of the data upon which the counterclaims are based were made available during the discovery process, and all of the relevant facts well ventilated between the parties. Materially, no more work needed to be done by Mr Stuart's counsel to defend the counterclaims than had to be done in advancing his case in any event, in my view.

[54] I also do not accept that the claims are frivolous or vexatious based upon Mr Henderson avowed wish to recover costs in defending the personal grievance proceedings. Parties to litigation may have all sorts of underlying motives in pursuing their claims, and it is not for the Authority to look into their souls to determine whether they are pure of heart in doing so. The counterclaims are squarely based on alleged breaches of the duty of trust and confidence that Mr Stuart owed to the respondent. The respondent alleges that that duty was breached by Mr Stuart by him effectively claiming pay for work he did not do. The claim are therefore arguable and worthy of the Authority's serious attention.

[55] However, although the respondent has spent a considerable amount of effort analysing the data in order to quantify the

claims, they are still based on the assumption that Mr Stuart never legitimately worked at all while he was at home during the mid-day period and at the end of the day before 5pm (save for 15 minutes for the completion of paperwork). I do not accept that.

[56] There is no doubt in my mind that Mr Stuart did carry out maintenance and preparatory work while he was at home during working hours. It is impossible, however, to ascertain how much time he spent on such activities. Whilst I accept on a balance of probabilities that Mr Stuart did not always work when the DJRs indicated that he did, (if only because of his admission in relation to watching Pike River Mine news in November 2010) it would not be just to allow counterclaims which have been quantified on an assumption that no work was done. It is also not just to take a guess at what work Mr Stuart was likely to have done at home during working hours as the evidence shows that it varied considerably from day to day.

[57] Taking into account the period for which Mr Stuart admitted taking too long because he was watching Pike River Mine news from 19 November 2010, assuming that he did so for two weeks, on the data provided this would amount to him having spent a total of around 99 minutes in excess of his 30 minute daily allowance, which equates to an over payment to him of $26.80. However, it is not clear whether he also did some work during those lunch time periods, and so I decline to award any damages for this period.

[58] Therefore, whilst I find that Mr Stuart did breach the duty of trust and confidence owed to the respondent by misleading it in his DJRs, suggesting he worked a strict 6am to 5pm day, with one 30 minute lunch break, due to the uncertainty of what is appropriate to award against Mr Stuart in respect of those breaches, I decline to award any sum against him in respect of those breaches. I make this decision mindful, with the benefit of hindsight, of the likelihood that Mr Stuart's breaches were, in reality, cumulatively less serious as the respondent reasonably believed them to be at the time of its decision to dismiss.

Costs

[59] Costs are reserved. Mr Stuart is understood to be in receipt of legal aid. If the respondent intends to seek costs against Mr Stuart, it is reminded that Section 45(2) of

the Legal Services Act 2011, dealing with the liability of legally aided persons for costs, states that

No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

[60] In *Wadley v. Salon D'Orsay Ltd* [1998] 1 ERNZ 369, the Employment Court construed the expression *exceptional circumstances* as meaning *quite out of the ordinary*.

[61] The parties should seek to agree how costs should be dealt with between them. In the absence of such agreement, any claim for costs should be made by lodging and serving a memorandum within 28 days of the date of this determination. The responding party's memorandum will have a further 28 days to lodge and serve any reply.

David Appleton

Member of the Employment Relations Authority
