IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 205
3008972

	BETWEEN	CHRISTOPHER THOM Applicant
	AND	FLETCHER BUILDING LIMITED Respondent
Member of Authority:	Helen Doyle	
Representatives:	David Beck, Counsel for Applicant Blair Scotland, Counsel for Respondent	
Investigation Meeting:	28 September 2017	
Submissions received:	11 October 2017 from Applicant 20 October 2017 fromRespondent	
Determination:	28 November 2017	

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A Christopher Thom was not unjustifiably dismissed.

B Christopher Thom was unjustifiably disadvantaged. Fletcher Building Limited is ordered to pay to Christopher Thom:

(i) Reimbursement of lost wages in the sum of $12,923.10 gross.

(ii) Compensation in the sum of $3,200 without deduction.

C There is no award for a penalty.

D Costs are reserved and failing agreement a timetable for an exchange of submissions has been set.

Employment Relationship Problem

[1] Christopher Thom has been a qualified Chartered Accountant for 21 years. He was employed by Fletcher Building Limited (Fletcher Building) at Stronger Christchurch Infrastructure Rebuild Team (“SCIRT”) in the role of Commercial Business Analyst from December 2015. Mr Thom was party to a fixed term individual employment agreement (the employment agreement) dated 4 December 2015 that provided his employment would end on 23 December 2016 because of the finite duration of the Project.

[2] On 27 October 2016 Mr Thom received a single page variation letter from his employer providing the fixed term agreement has been extended to 31 March 2017 together with the reason why. The variation letter further provided that if Mr Thom agreed to the extension he was to sign a copy of the letter and return it.

[3] Mr Thom’s employment relationship problems arise after that point. He says when the offer to extend his fixed term agreement was withdrawn he was unjustifiably dismissed or alternatively unjustifiably disadvantaged and there has been a breach of the requirements of sections 4 and 63A of the Employment Relations Act 2000 (the Act).

[4] Mr Thom seeks compensation set out in final submissions in the sum of $15,000 under s 123(1)(c)(i) of the Act. He also seeks lost wages for the period between his employment ending on 23 December 2016 and when he obtained new employment on 6 June 2017 or alternatively lost wages for the period of the extension until 31 March 2017.

[5] Mr Thom also seeks a penalty for a breach of good faith under s 4A (b)(iii) and under s 63A(3) for a failure to bargain in good faith, together with costs

[6] Fletcher Building does not accept that Mr Thom was unjustifiably dismissed but says his employment ended on the date specified in the employment agreement of 23 December 2016. Further it does not accept that he has suffered an unjustified disadvantage in respect of his employment or a condition of his employment because his employment agreement stated there was no expectation of ongoing employment beyond the expiry date of the fixed term agreement.

[7] Fletcher Building denies breaching any obligations under sections 4, and 63A(3) of the Act and does not accept there should be a penalty awarded.

The issues

[8] The issues for determination are as follows:

(a) What did the employment agreement provide?

(b) What is the relationship between SCIRT and Fletcher Building?

(c) What led to the offer to extend the fixed term employment agreement and what did the offer provide?

(d) What took place between the extension offer and 8 December 2016 when that offer was withdrawn?

(e) Was Mr Thom dismissed from his employment when the offer was withdrawn?

(f) If Mr Thom was dismissed then was his dismissal unjustified?

(g) Alternatively were the actions of Fletcher Building unjustified in the circumstance in which the offer was withdrawn?

(h) If the actions were unjustified then was Mr Thom disadvantaged as a consequence?

(i) If there were breaches of duties in the Act to bargain in good faith should there be an award of a penalty?

(j) If Mr Thom is successful in his personal grievance claims then what remedy should be awarded and are there issues in mitigation and contribution?

(k) If the Authority determines a penalty should be awarded then should it order payment to the applicant or to the Crown?

What did the employment agreement provide?

[9] The employment agreement provided that Mr Thom's employment would end unless terminated earlier on 23 December 2016. Mr Beck seems to suggest in his submissions it is arguable that the employment agreement may be invalid under s 66 of the Act but that argument was neither in the statement of problem nor challenged in the evidence and will not be an issue for determination.

[10] The employment agreement provided:

> You accept that neither of us have an express or implied obligation to renew this agreement or enter into a subsequent agreement. Nothing in this agreement gives any expectation that this agreement will be renewed, or any subsequent agreement entered into.

What is the relationship between SCIRT and Fletchers?

[11] SCIRT was an unincorporated joint venture between five major construction companies and CERA (now part of the Department of Prime Minister and Cabinet), the Christchurch City Council and New Zealand Transport Authority. The joint venture was entered into to deliver major horizontal infrastructure projects in the Christchurch area after the 2011 Christchurch earthquake.

[12] SCIRT was managed through an integrated services team which provided head office co-ordination and reporting for programme of works.

[13] No-one was hired directly by SCIRT. SCIRT was made up of people employed by different companies. The majority of staff who worked on the SCIRT programme were employed by one of the eight participant organisations and were seconded from their employer (home organisation) as required into SCIRT or were employed on a fixed term basis working on the SCIRT programme. The importance about the structure for present purposes is the decision making process for employees who worked on the SCIRT programme.

[14] Mr Thom reported to Richard McDowell whose role was SCIRT Commercial Manager. Mr McDowell's duties included amongst other matters responsibility for all financial reporting of the programme and the estimating of all projects on the programme. Mr McDowell's employer was another of the five major construction companies, Downer New Zealand Limited.

[15] Mr McDowell is now working back in Australia for another company and he participated in the Authority investigation meeting by SKYPE. When he worked at SCIRT he was responsible for managing his team, including Mr Thom, and ensuring appropriate resources for the programme. Any extension of employment was managed by the human resource staff within SCIRT's integrated services team but the decision was ultimately "sanctioned" by the employee's employer.

[16] Mr McDowell's evidence was that the vast majority of tasks required to be performed by SCIRT had ceased by the end of December 2016 with only 18 projects out of 750 spilling over to 2017. Many staff had left to take up other opportunities.

What led to the offer to extend and what did that offer provide?

[17] The finance team that Mr McDowell managed included a Management Accountant, Lanean, and an Accounts payable/ receivable clerk Maree. Lanean and Maree were on fixed

term agreements due to end in March 2017. In or about September/October 2016 Lanean advised Mr McDowell and Mr Thom that he was looking to relocate to Australia with his family and wanted to explore finishing in December 2016 rather than March 2017. Maree left in November to take up another opportunity at that time as the work was winding down. Mr McDowell said that he gave consideration to Lanean training Mr Thom in his tasks and handling them over before he left because he said that it was clear only one person was required to carry out the finance-related work.

[18] Mr McDowell and Mr Thom recall they discussed Mr Thom taking on Lanean's functions. Mr Thom indicated that he was prepared to take on the functions. I accept from the evidence that the reason for the extension was for Mr Thom to cover Lanean's functions in light of the fact that he was looking to relocate to Australia before the end of his fixed term agreement. There was no evidence before the Authority to reach any other conclusion. Mr McDowell in his written evidence said that Lanean's functions were similar to Mr Thom's but Lanean had some more repetitive functions including monthly preparing of the GST returns and processing of credit card payment and supplier invoices. In his oral evidence he described Lanean's role as more junior to Mr Thom.

[19] Mr McDowell lodged a request with Linda Plower who at that time was based in SCIRT as Human Resources Co-ordinator (HR Co-ordinator) to co-ordinate with Mr Thom's employer, Fletcher Building, to offer him an extension to his fixed term employment. The Authority heard evidence from Ms Plower. Ms Plower's employer at that time was McConnell Dowell Constructors Limited.

[20] The offer of the extension to Mr Thom's employment agreement was in the form of a letter generated from a standard template. The signature of Kara Brown, National People & Performance Manager is at the bottom of the letter. The Authority heard evidence from Ms Brown. Ms Brown was employed at the material time by Fletcher Building and involved with SCIRT when employment issues arose or were escalated with Fletcher Building employees in SCIRT.

[21] The letter provided that Ms Brown was pleased to confirm the following variations to Mr Thom's employment agreement that the fixed term agreement has been extended to 31 March 2017. The reason for the fixed term extension was set out in the letter to support the SCIRT integrated services team in finishing the remaining construction and handover support work required. The variation letter provided that subject to termination or redundancy employment would continue until 31 March 2017 or when the work runs out, whichever comes first. It confirmed that all other terms and conditions of his existing employment not modified by the letter will remain the same.

[22] Mr Thom was told in the letter that if he agreed to the extension to sign a copy of the letter and return it to confirm his agreement.

What took place between the offer to vary the extension and the time it was withdrawn?

[23] I will set out the material exchanges that took place before the offer was withdrawn.

28 October 2016 –Mr Thom requests review of role description, job title and salary

[24] The day after receiving the variation letter Mr Thom met with Belinda de Zwart who was at that time SCIRT Human Resources Manager for a stay commitment interview. This was put in place to support employees working on the project in appreciation of its limited lifespan. The meetings were held monthly or bi-monthly to assess commitment to SCIRT and help employees plan for their future when the project came to an end. It was Ms de Zwart's responsibility to undertake Mr Thom's stay commitment interview.

[25] As part of the interview at this meeting Mr Thom said that he wanted his role title and his salary reviewed. There is a typed record of the stay commitment interview. In respect of these matters it records that he would like a review of his job title "Commercial Analyst" as he does not feel it fits what he does. The reason for wanting this Mr Thom explained in his evidence was with future employment in mind.

[26] The notes provide that the review was to be undertaken by Mr McDowell and Mr Tolerton and they were to report back to him. The time frame for doing so is recorded as November 2016. The notes record that Mr Thom is to review his job description and make mark-ups as to what he see is missing or inaccurate and send that to Mr McDowell and Mr Tolerton. Mr Thom said that he took from the interview agreement from Ms de Zwart that a job description review and salary review would be undertaken and he was told the process for this. The record of the interview also records under notes about how SCIRT and the home organisation can support him "see actions below pertaining to clarity around role title, remuneration and SCIRT end requirement relating to Financial Accounts".

[27] The Authority heard from Mr Tolerton but not from Ms de Zwart. Mr Tolerton said that it was not Ms de Zwart's role to agree a review as she was an employee of Fulton Hogan Limited. Mr Tolerton said that it would be Fletcher Building that would have to agree to any review or change based on Mr McDowell's recommendation as manager and that Ms de Zwart would have understood that. Further he says that the notes of the interview do not reflect that formal agreement by Ms de Zwart.

[28] I accept that it is not clear from the notes that Ms de Zwart made a commitment to a review but Mr Thom was I find at least entitled to expect some feedback.

7 November 2016

[29] On 7 November 2016 Mr Thom in an email to Mr Tolerton of the same date attached a copy of his role description and noted that he had reviewed and corrected it as requested by Ms de Zwart. He said in the email that he had removed any reference to previous job titles as that is prejudicial to an accurate title. He noted the focus has been on key deliveries and suggested touching base that day if Mr Tolerton was available.

8 November 2016

[30] On 8 November 2016 Mr Tolerton forwarded by email a copy of the role description Mr Thom had provided to Mr McDowell and asked that he review it and provide feedback to him and Mr Thom. Mr Tolerton stated this also relates to his proposed title change and was an action from his stay commitment meeting. There was no written response from Mr McDowell about that and these matters were not discussed directly with Mr Thom until a meeting on 7 December 2016.

Training from Lanean in November 2016

[31] Mr Thom said that he could recall two occasions in November 2016 when Mr McDowell asked him whether he was still okay to work until the end of March 2017 and Mr Thom responded that he was. Mr Thom also received training primarily to enable him to cover Lanean's role.

23 November 2016 – Mr Thom proposes being a contractor

[32] On 23 November 2016 Mr Thom sent an email to Mr McDowell that advised he had reviewed the proposed contract offer from Fletchers, which he recorded was unsigned, and given feedback principally to Ms de Zwart.

[33] He proposed the best way to achieve the closing out of SCIRT in a timely professional manner would be for him to contract on an hourly basis to SCIRT. He set out that this would suit both SCIRT and himself better than a Fletcher's secondment and the reasons why. Mr Thom noted that he would charge for sick leave, Institute of Chartered Accountants fees and training, holiday leave and public holidays and that he has a GST registered company which he has used on a contract basis with other organisations.

5 December 2016 response from Mr McDowell

[34] Mr McDowell responded to Mr Thom by email dated 5 December 2016 and advised that he had thought about the proposal but with the short duration through to the end of March would be staying with the current employment relationship. He advised that if Mr Thom wanted to discuss further to let him know.

7 December 2016 email to Mr McDowell

[35] Mr Thom duly responded to Mr McDowell and said that they needed to discuss the matter. He noted that with Mr Tolerton leaving (on 2 December 2016) the job title review and salary review appeared not to have progressed at all.

Meeting 7 December 2016

[36] On that same day a meeting took place between Mr Thom and Mr McDowell. There was some discussion about reviewing the role and the salary. Mr McDowell's view was that the period being negotiated was only three months and the role title had worked for almost 12 months. Mr McDowell made it clear he did not want anything to change and it was clear I find to Mr Thom that the variation was not negotiable.

[37] It is likely that Mr Thom reminded Mr McDowell he had not signed the variation for the extension. Mr McDowell denied that he said to Mr Thom "So I can take that as your resignation." Mr Thom said he made it clear that was not what he was saying. Mr Thom accepted as stated in Mr McDowell's written evidence that he could have said that he could get better money than he was getting working somewhere else. Mr Thom said that he felt Mr McDowell became angry at the meeting although Mr McDowell did not accept that as he said that is not his personality to become angry.

[38] The main area of dispute aside from Mr McDowell not accepting that he became angry or annoyed during the exchange was whether Mr McDowell made it clear that the offer could be withdrawn. There seems agreement that Mr Thom wanted to think about the offer

and Mr McDowell also said that he wanted to think about the offer and I think it likely that he indicated he wanted to talk to human resources. I find it more likely than not that Mr McDowell said something along the line that the offer may not always be there.

Email sent on 7 December to Ms Plower

[39] That is consistent with what Ms Plower recalls Mr McDowell advising her that day and it is not inconsistent with an email Mr McDowell sent to Ms Plower at 1.22pm. In that email he writes the following:

> Hi Linda
>
> Further to our discussions today regarding Chris and his unsigned contract.
>
> And also after my meeting with him at 10am this morning in which he made it clear that I should be aware that he has not signed his contract and as it stands he will finish up on the 23rd December.
>
> I too mentioned to him that I would be reviewing the contract extension offer as whether I want it to stand.
>
> I now formally request that we/ Fletchers withdraw the offer made to Chris so that I can move on. …

[40] Mr McDowell said that he was aware that Lanean may have some flexibility and decided on that basis it would be best to retain Lanean's existing agreement. Mr McDowell said he discussed the matter with HR Co-ordinator Ms Plower as well as Fletcher Building Operations Manager Ian Jonkers who approved it. Mr McDowell said in his written evidence that he discussed the issue with Mr Tolerton as well but I could not be satisfied of that.

[41] Ms Plower understood that Mr McDowell wanted to resolve his staffing for the period from 23 December 2016.

Ms Plower talks to Ms Brown

[42] Ms Plower then contacted Fletcher Building and spoke to Ms Brown. Ms Brown said in her evidence that Ms Plower had provided her with a summary of what had occurred. She

understood that there had been some back and forth discussion about a change to a contracting relationship. There was some understanding about a salary review but she was less sure she knew about a job review. She said that it was getting to the point that Mr McDowell needed to make a decision about resourcing the team and that Mr Thom had had the variation document for over a month. Ms Brown said that she was comfortable with the approach taken given the operational needs of SCIRT and Ms Brown confirmed her agreement that the offer would be withdrawn. She did not have any direct involvement after that point but understood that Mr Thom would be advised shortly that the offer was withdrawn.

8 December 2016

[43] Mr Thom was invited by Mr McDowell to meet in his office. I accept he did not know what he was being asked to meet about. Ms Plower was present in Mr McDowell's office. Mr Thom said that Mr McDowell looked smug and pleased with himself. Mr McDowell did not accept that. Ms Plower made a note of the meeting and Mr Thom accepted the start of that note accurately reflected the start of the discussion.

[44] The notes reflect that Mr McDowell started the meeting by bringing up the conversation he had had with Mr Thom the previous day and that he advised Mr Thom that his current contract would end on 23 December 2016 and that is when Mr Thom would be finishing. Mr Thom said "ok" but asked if they were revoking the offer and Ms Plower confirmed that was so. Mr McDowell recalled Mr Thom appeared somewhat surprised however did not protest the decision to withdraw the offer or express any anger. Mr Thom said that he believed he had more time after 7 December to consider the offer and he did not know what to do in the meeting. Mr Thom asked Mr McDowell if he could get a reference and Mr McDowell responded he would give an "honest reference". Mr Thom was advised that he could take paid time off between that date and Christmas to look for new work. Mr Thom was asked to make a list of what he was currently working on.

[45] Having heard the evidence I do not find that Mr Thom was given any particular timeframe within which to sign the offer on 7 December 2016 before it would be withdrawn.

I find it more likely that he concluded he had some time and the withdrawal of the offer the following day took him by surprise.

What happened then

[46] Mr Thom carried on working until the expiration of the employment agreement on 23 December 2016.

The test of justification

[47] If the Authority finds that Mr Thom was dismissed when the offer was withdrawn it is required to then determine whether that dismissal was unjustifiable. Alternatively the Authority is asked to determine whether the actions of Fletcher Building were unjustified and if it finds they were whether Mr Thom was disadvantaged as a result.

[48] The Authority is required to apply the justification test which is set out in s 103A of the Act. The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of Fletcher Building and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the action or dismissal.

[49] There must be consideration of the four procedural fairness factors set out in s 103A (3) of the Act. Fletcher Building could also be expected to comply as a fair and reasonable employer with the good faith obligations set out in s 4 of the Act.

Was Mr Thom dismissed from his employment when the offer was withdrawn?

[50] Mr Beck in his submission states that Mr Thom was dismissed when the offer to extend his fixed term agreement was withdrawn for an undisclosed reason and given no opportunity to address the decision maker.

[51] Dismissal is, I accept, a word with a wide meaning.[1] Notwithstanding I do not find that the facts of this matter support a sending away or forth. I find that the relationship ended on 23 December 2016 in accordance with the fixed term employment agreement.

Alternatively then was Mr Thom disadvantaged by an unjustified action of Fletcher Building?

[52] Section 103(1)(b) of the Act provides for a personal grievance as follows

> That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[53] Mr Scotland in his submission states that Mr Thom as an experienced chartered accountant is clearly aware that an offer not accepted can be withdrawn at any time. He further submits that an argument to the contrary cannot succeed as it would be a fundamental change in the law. I accept that an offer can be withdrawn before it is accepted.

[54] The actions of Fletcher Building in withdrawing the offer on 8 December 2016 however have to be considered with the fact that Mr Thom was in an employment relationship when the offer was made and the framework of the Act. Section 3 provides the object of the Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship. This includes recognition that the employment relationship is not only built on the implied mutual obligations of trust and confidence but also on legislative requirements for good faith behaviour. The duty of good faith includes bargaining for an individual employment agreement or for a variation of one.

[55] The duty of good faith in s 4(1) provides that the parties in an employment relationship must deal with each other in good faith and must not directly or indirectly do

[1] *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC) at 973

anything to mislead or deceive each other or that is likely to mislead or deceive each other. The duty in s 4(1A) is expressed as wider in scope that the implied mutual obligations of trust and confidence and requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative. Without limiting that if an employer proposes to make a decision that will, or is likely to, have an adverse effect on the continuation of employment the employee should be provided with access to information relevant to continuation of employment and an opportunity to comment on that information.

[56] I find the action that is to be assessed in accordance with the test in s 103A is the justification of the withdrawal of the offer by Fletcher Building on 8 December 2016. Although the reviews of role, title and salary could have been dealt with more appropriately they were not raised as a separate grievance but rather part of the factual background to alleged unfair bargaining and a breach of the good faith obligations.

[57] At the only meeting to discuss the matter on 7 December 2016 Mr McDowell knew that there would be no change to the variation offered by way of job review, role or any increase in salary. Mr Thom did not sign the variation and was to think about it as was Mr McDowell. It is likely that Mr McDowell may have said something along the lines the offer may not be there forever but objectively assessed it was not clear to Mr Thom that the offer would be withdrawn the next day. Mr Thom did not say he would not sign the variation. Within hours of that meeting Mr McDowell had requested that Fletcher Building withdraw the offer and that request was approved. At a meeting with Mr Thom on 8 December 2016 the offer was withdrawn.

[58] Conditions of employment in s 103(1)(b) have been held by the Employment Court to include all the rights, benefits and obligations arising out of the employment relationship.

The concept is recognised as necessarily wider than the terms of an employment agreement.[2] The procedural factors set out in s 103A of the Act do not altogether fit with the circumstances and the action that occurred. I do conclude there were quite extensive resources available to Fletcher Building and Mr McDowell. It could have been expected that Mr McDowell would have been advised about a good faith approach.

[59] Whilst accepting that there was a need for SCIRT to have certainty about resourcing after 23 December 2016 I do not find that in the circumstances the withdrawal of the offer was the action of a fair and reasonable employer acting in good faith. A fair and reasonable employer could, and should, have advised Mr Thom that it intended to withdraw the offer within a certain time frame, even a very short period. Mr Thom would then have had an opportunity in that knowledge to sign and accept the offer or not. That would have been consistent with being active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative particularly in circumstances likely to have an adverse effect on the continuation of Mr Thom's employment. Mr Thom's conditions of employment were affected to his disadvantage because he lost an opportunity to sign the variation and extend his fixed term agreement.

[60] A dismissal that does not comply with good faith obligations will not be justifiable.[3] I find that can apply to an action taken that disadvantages an employee.

[61] I find that Fletcher Building did not act in withdrawing the offer according to what a fair and reasonable employer could have done in all the circumstances at the time. Mr Thom has a personal grievance that his employment or one or more conditions of employment was affected to his disadvantage by an unjustifiable action of Flectcher Building. He is entitled to consideration of remedies.

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[2] *Spotless Facility Services NZ Limited v Anne Mackay* [2017] NZEmpC 15 at 27 referring to *Tranz Rail Ltd v Rail and Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (CA) at [26] and *ANZ National Bank v Doidge* [2005] ERNZ 518 (EmpC)

[3] *Jinkinson v Oceana Gold (NZ) Limited* [2010] NZEmpC 102 at [42]

Remedies

Lost wages

[62] Mr Thom seeks lost wages between the date his employment ended and the date when he obtained new employment on 6 June 2017. Mr Scotland said that Lanean remained working at SCIRT so there was no expectation of ongoing employment after 23 December 2016. Lanean was, Mr McDowell said in his evidence, only approached to stay on after the offer was withdrawn although I accept there was some pre-existing knowledge that he had some flexibility. I have recorded in response to a question put by the Authority to Mr McDowell his evidence that Lanean stayed on until 31 March 2017. I accept that evidence.

[63] Section 128 provides for reimbursement of lost wages and applies when the Authority determines an employee has a personal grievance and that there has been lost remuneration as a result. There has been a determination that Mr Thom has a personal grievance. The next question is whether Mr Thom has lost wages as a result. What he lost in the circumstances was an opportunity to sign the variation to extend his fixed term agreement until 31 March 2017. I am not persuaded that there was work beyond that period.

[64] I find that it is appropriate to approach an assessment of loss on the basis of a loss of a chance. Such an approach takes into account that I am simply unable to conclude with any certainty whether if Mr Thom had been given an opportunity to sign the variation before it was withdrawn he would have signed it. The Authority will be able to make an allowance for the fact that even if there had been fairness and good faith behaviour Mr Thom may not have signed the variation and his employment would still have ended on 23 December 2016. There was I find an adequate attempt to mitigate loss.

[65] The period between 23 December 2016 and 31 March 2017 is 14 weeks. I conclude an appropriate award is 50% of lost wages for the period from 23 December 2016 to 31 March 2017 which is 7 weeks. Mr Thom was on a salary of $120,000 per annum. Subject

to any conclusion reached about contribution the weekly gross salary is that annual amount divided by 52 weeks. That is $2,307.70 gross which multiplied by 7 weeks is $16,153.85 gross.

Compensation

[66] Mr Beck submits the award under this head should be $15,000. I accept Mr Scotland's submission that any compensation should be confined to the humiliation and loss of dignity stemming from the grievance found. The grievance is an unjustified action causing disadvantage because there was a failure to act in accordance with good faith obligations when withdrawing the offer. There was the loss of an opportunity to sign the variation extending the fixed term agreement for a further period. Mr McDowell and Ms Plower in their evidence said Mr Thom did not seem shocked or humiliated at the meeting on 8 December 2016.

[67] Mr Thom did not protest but said that he felt it was embarrassing to have the offer withdrawn with Ms Plower present. He said that he thought he had time and he was humiliated. I have placed some weight on the fact that he stood up to go when it was confirmed the variation offer was being withdrawn but was called back. Mr McDowell did accept that Mr Thom seemed surprised. Mr Thom felt Mr McDowell was smug at the meeting although Mr McDowell denies that and I cannot be satisfied about that. I accept however that he lost an element of trust in Mr McDowell.

[68] Mr Thom carried on with his work after the meeting on 8 December until the expiry of the fixed term employment agreement on 23 December 2016. He was given paid time off to look for other work. He said that there was some embarrassment because he had to tell Lanean and another person he worked with that he would not be staying on. He said that he felt something was not right at the time but "he was not a lawyer."

[69] I formed the view that much of the stress Mr Thom suffered was because he struggled to find other employment and that had financial consequences. That however has to be

considered against the nature of the grievance found. Responsibility for that does not completely fall to Fletcher Building. I have addressed that loss of an opportunity in part through an award of lost wages based on the loss of a chance. Mr Thom was concerned he was not provided with a reference but I could not however be satisfied that he asked for and was refused a reference.

[70] I accept that there was a level of humiliation, loss of dignity and injury to feelings to Mr Thom by the loss of the opportunity but the nature of the evidence and grievance is such that it should only attract a moderate award.

[71] In all the circumstances and subject to any issue of contribution an appropriate award under this head is $4000.

Contribution

[72] The Authority must where it has found a personal grievance in deciding the nature and extent of the remedies to be provided consider the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance and if required reduce the remedies that would otherwise have been awarded.

[73] Some regard has to be had to the fact that although Mr Thom wanted reviews of salary, role and title SCIRT was a project with a very limited lifespan. What Mr Thom was offered was a variation for a 14 week extension to his existing fixed term agreement.

[74] I accept that Mr Thom was waiting for the review for most of the period of 41 days within which the variation remained unsigned. At the 7 December meeting Mr Thom understood that the offer was not going to change. He knew Fletcher Building did not want a contracting relationship with him. He told Mr McDowell that he could get more money elsewhere. What was said left a real doubt in Mr McDowell's mind about his intentions that I find was causative of Mr McDowell taking the steps he did which led to the offer being withdrawn.

[75] There is a real question as to why Mr Thom held off from saying that he would sign the offer or actually taking a step to do so even if it involved asking for a copy of the variation or printing one off. This has to be considered with the very limited nature of the variation and the limited life span of SCIRT. I find that this could be considered in the round blameworthy and a reduction is required.

[76] I do not consider that a reduction of the level Mr Scotland submits is required. Rather the remedies above should be reduced by 20%.

Orders

[77] Taking contribution into account I order Fletcher Building Limited to pay to Christopher Thom for reimbursement of lost wages under s 123 (1)(b) of the Act $12,923.10 gross.

[78] Taking contribution into account I order Fletcher Building Limited to pay to Christopher Thom compensation under s 123 (1)(c)(i) in the sum of $3,200 without deduction.

Penalty

[79] Mr Beck seeks a penalty on grounds clarified in final submissions. Firstly a penalty is sought for a breach of good faith under s 4A(b)(iii) of the Act which attracts liability for a penalty if the failure was intended to undermine an employment relationship. Secondly a penalty is sought under s 63A(3) of the Act for a failure to bargain in good faith because Fletcher Building did not consider issues Mr Thom raised and did not respond to them under s 63A(2)(d).

[80] I have found a breach of the obligations to act in good faith. I need to be satisfied that such breach was intended under s 4A of the Act to undermine the employment relationship. I accept Mr Scotland's submission that it was more inadvertence and a decision made in the context of a complicated structure. Further I accept that Mr Thom was not in a vulnerable position. I make no award for a penalty under s 4A(b)(iii) of the Act.

[81] Issues were raised by Mr Thom about his salary, role and title. He also wanted the relationship to be other than one of employment. Mr McDowell did consider these matters. He did not agree to them and responded accordingly. The basis for not agreeing a review of salary, title and role Mr McDowell said was the limited nature of the extension and that he did not consider Lanean's functions to justify a salary increase. I accept that needs to be assessed with what occurred. It was a limited variation for an extension of an additional 14 weeks employment on the same terms and conditions. I am not satisfied in considering all matters that there was a breach or if there was that it was such so as to result in the imposition of a penalty.

[82] I make no award for a penalty.

Costs

[83] I reserve the issue of costs. With the Christmas holiday season rapidly approaching I will set a reasonably tight timeframe if agreement cannot be reached. Mr Beck is to lodge and serve submissions as to costs by 6 December 2017 and Mr Scotland is to lodge and serve submissions in reply by 20 December 2017.

Helen Doyle
Member of the Employment Relations Authority