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Ward v Concrete Structures (NZ) Limited (Auckland) [2018] NZERA 350; [2018] NZERA Auckland 350 (14 November 2018)

Last Updated: 19 November 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND		
		[2018] NZERA Auckland 350
		3028353
	BETWEEN	SAM WARD Applicant
	AND	CONCRETE STRUCTURES (NZ) LIMITED Respondent
Member of Authority:	Jenni-Maree Trotman	
Representatives:	Greg Bennett, Advocate for the Applicant	
	Kevin Badcock, Counsel for the Respondent	
Investigation Meeting:	31 October 2018	
Submissions received:	02 November 2018 from Applicant	
	01 November 2018 from Respondent	
Determination:	14 November 2018	
DETERMINATION OF THE AUTHORITY		

Employment Relationship Problem

[1] Concrete Structures (NZ) Limited (CSL) is a manufacturing and civil engineering company, operating throughout New Zealand. It operates four pre-cast factories in Rotorua, Auckland, Hastings, and Christchurch as well as providing civil construction teams for major projects in other parts of New Zealand.

[2] Sam Ward was employed by CSL in early 2004 to work in its Rotorua factory. In 2008 he was promoted to site supervisor on various civil construction projects around New Zealand.

[3] On 7 November 2016 Mr Ward's employment came to an end. He claims he was unjustifiably dismissed. This is denied by CSL who claims Mr Ward was granted sabbatical leave. Mr Ward claims lost wages, compensation for humiliation, loss of dignity and injury to his feelings, and loss of a benefit.

[4] As permitted by 174E of the [Employment Relations Act 2000](#) (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has

not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

- a. Was Mr Ward's personal grievance raised within 90 days? If not, should leave be granted to him to raise this out of time?
- b. Was Mr Ward dismissed from his employment? If so, was this justified?
- c. If Mr Ward was unjustifiably dismissed what remedies should be awarded?
- d. Did Mr Ward contribute to the situation giving rise to his grievance?
- e. Does the Authority have jurisdiction to consider Mr Ward's claim for alleged entitlements under the CSL Employee Trust Fund?
- f. If so, did Mr Ward suffer a loss of benefit and, if so, what loss was suffered?
- g. Should either party contribute to the costs of representation of the other party?

Background against which issues are to be determined

[6] The parties' relationship was relatively harmonious until mid-2016. It was around this time that Mr Ward developed a medical condition that led to him regularly falling asleep at work.

The July 2016 meeting

[7] An informal meeting was held with Mr Ward on 11 July 2016 to discuss his sleep issues and how this was affecting his performance. Present at this meeting were Mr Ward, Christopher Mackie (CSL's Plant and Health and Safety Manager) and Michael Romanes (CSL's then General Manager).

[8] During the meeting, Mr Ward expressed unhappiness with the way things were going for him at CSL. However, he advised that he wasn't sure that he wanted to leave because he still felt loyalty towards the Company. In response Michael Romanes suggested that Mr Ward could take sabbatical leave and try something new or different. He said he would keep his job open and Mr Ward would not forfeit his employee trust entitlements. Mr Ward did not accept this offer.

Mr Ward's request to work closer to home

[9] At or about this time Mr Ward asked if CSL would allow him to work only on civil sites that were close to his home so that he could travel daily to them. His wife had recently had their first child and he wanted to be home each night to help care for their child.

[10] CSL did not have any full-time civil contracts within daily commuting distance of Mr Ward's home. However, it was able to offer him some work at its Rotorua Factory.

[11] Between June 2016 and 7 November 2016, Mr Ward predominantly worked at CSL's Rotorua factory although he did attend to some offsite work during this period.

The offer of work away from home

[12] In October 2016, Concrete Structures secured a new project in Auckland. By email dated 21 October 2016 Mr Ward was asked to be the site supervisor on this project. This email came from Paul Romanes. Paul Romanes is Michael Romanes' son. Due to Michael Romanes becoming seriously ill, Paul Romanes had taken over as General Manager. For the purposes of this determination I shall hereafter refer to him as Mr Romanes.

[13] Mr Romanes advised Mr Ward to "think about it over the weekend and come back to me on Monday".

[14] Mr Ward did not reply. Mr Romanes phoned him and then sent him the following email on 28 October 2016:

Confirming our discussions today,

I had not had a response from you re the email below so called you to enquire.

Although you offered to start the ... Project for a couple of months for various reasons you cannot commit to this project 100% for the duration

Concrete Structures needs to have someone at your level (site supervisor on up to 10m value projects) on this site from start to finish for continuity for the client and our own personal/works so starting the project is not an option.

This is the only project suitable/available for you at this time.

You are quite keen to find some work closer to home and be at home every night, I can understand this but we simply don't have any work at your level within daily commuting distance now

Concrete Structures respects the effort you have put in over the last 10+ years and recognises that you have some entitlements from this, should you wish to submit a leave form I will approve it from today till end of 2017 which means you can take some time away from Concrete Structures to find work closer to home and still retain your existing entitlements; should an opportunity arise for you to return to Concrete Structures on or before 10th Jan 2018.

Sounds like you are heading to Gisborne on Monday for a couple of days to finish that job, it would be great if you could do this.

If you want to take the rest of the week off to make some plans that's fine, we will pay you the standard 9hrs a day for the rest of the week. (this won't use any holiday pay owed)

If you want to work the following week we will find something for you to do somewhere, we should draw a line and say your last day will be on or before Friday 11th November.

If you wish to finish before this date that is fine, you are not involved in any projects currently so 24hrs notice will be fine.

I will let you sort your Ute/Tools/Phone etc. with Chris

Thanks again for all of your efforts to date, I have thoroughly enjoyed working together.

Paul

[15] On 31 October Mr Ward replied (verbatim):

Hi that is not entirely how the phone call went i simply said i will not be able to guarantee i can do that job on the current deal I need to benefit a bit more than the current deal. On the previous email the job title was site manager as well as forman which is more workload and responsibilities so should work more in my favor as well as CS favor this way I would not need to source outside work on the week ends and be able to spend my time with my family. CS is obviously not prepared to do this however. There were no deadlines discussed this was a surprise. You said you don't want it to feel like you are pushing me out but with a final date now sounds a bit different...

[16] Mr Romanes did not reply. This left Mr Ward concerned that he was being fired. He engaged Anthony Harris to represent him and seek clarification on his employment status.

The deterioration of the relationship

[17] Mr Harris wrote to Paul Romanes on 3 November 2016:

We act for Mr Ward.

We understand you are purporting to terminate Mr Ward's employment. Mr Ward has not resigned.

Please urgently clarify Mr Ward's employment status.

[18] At the time Mr Romanes received this email he was overseas caring for Michael Romanes. He instructed a lawyer to represent CSL and to respond. This lawyer was Kevin Badcock. In addition, Mr Romanes engaged an IT person to forward a copy of all of Mr Ward's company emails to him and spoke with Mr Mackie. Mr Mackie had been tasked with attending to employment related matters in Mr Romanes' absence. Mr Romanes told Mr Mackie

that Mr Ward would no longer be working off site and would be working full-time from the Rotorua Factory. As such, he instructed him to request Mr Ward to return the company vehicle, mobile phone and tools. He also asked Mr Mackie to respond to Mr Harris' email.

[19] In accordance with these instructions, Mr Mackie wrote to Mr Harris on 4 November 2017.

As you are no longer working on site your company vehicle, company mobile phone and company tools are required for site projects.

I want to come over and pick these up this afternoon as they are required to go to site Monday morning. Please advise what time is convenient but I need this plant in Rotorua by 5.00pm today to get to site for Monday.

CSL acknowledge that you have not resigned and are still employed by CSL. Accordingly, and in accordance with your employment agreement, please report to work at the Rotorua factory at 0730 hrs on Monday 7 November 2016 and report to Paul Henderson. Paul will assign your duties for the immediate future.

[20] Thereafter there was an exchange of correspondence between Mr Harris and Mr Badcock. It is helpful to set this out in full:

- On 4/11/16, 12:54 pm Kevin

Your client cannot unilaterally change the terms of employment of Mr Ward.

He is entitled to and will retain his ute, tools and phone (which he has had for some ten years) for performance of his duties.

Your clients actions (in the recent past in terms of information provided to us by Mr Ward, this email, and its wide dissemination) are simply bullying and intimidation.

Mr Ward reserves all rights.

- On 4/11/16, 1.17 pm Dear Anthony,

CSL are not unilaterally changing anything; let alone terms of the employment agreement.

Your client has no entitlement to personal use of CSL's ute, tools and phone. These are provided for business purposes on CSL sites.

As your client is no longer working on CSL sites out of Rotorua he no longer requires these items of CSL's plant. CSL's request to have them returned is not unreasonable.

Any equipment that your client requires to perform his duties in the Rotorua factory will be assigned to him on Monday when he reports for duty.

If your client refuses to hand over CSL's plant it will be taken to be a refusal to comply with CSL's reasonable request and disciplinary action could follow.

There is no intimidation or bullying. Your client does not want to work out of town anymore and the only duties CSL has for him is in the Rotorua factory. This is what his employment agreement says.

I suggest that your client sensibly hand over CSL's plant as requested.

- On 4/11/16, 4 pm Kevin,

Mr Ward advises;

1. He is available for both onsite and offsite work and has neither expressed nor intimated that he is unavailable for offsite work
2. During the lengthy period of his employment he has conducted a mixture off onsite and offsite work.
3. The company vehicle provided to him has been provided continuously through the period of involvement of both onsite and offsite work.

4. The vehicle comprises a material portion of total remuneration. Equally the opportunity for additional earnings through working additional hours when engaged offsite is a further material component of overall remuneration.

As a consequence, your client is indeed seeking to unilaterally and fundamentally alter Mr Ward's terms of employment you will appreciate that there is a proper process should your client seek to renegotiate terms of employment. Pending any such discussion it is neither reasonable nor consistent with the employers' obligation of good faith to purport to require return of the vehicle, tools and telephone.

We reiterate our other comments in our preceding email. Regards

Anthony

- On 4/11/16, 4.45 pm Dear Anthony,
 1. I have forwarded you email to CSL for instructions.
 2. In the meantime, the vehicle, phone and tools are provided to your client to enable him to carry out site duties. They do not, and have never, formed part of his remuneration package as you suggest.
 3. CSL's vehicle can certainly not form part of your client's remuneration package. To the contrary, your client has signed a Vehicle Agreement with CSL that says any vehicle is for business use only.
 4. Your client's continued refusal to return CSL's plant, that are no longer required by your client to perform his duties given he is now working in the Rotorua factory, amount to a continued refusal to comply with CSL's reasonable request that they be returned.
 5. This continued refusal may lead to disciplinary action and/or the need to invoke recovery steps. This best seems avoided for all concerned.

Kevin Badcock

The Meeting on 7 November 2016

[21] On 7 November 2016 Mr Ward attended the meeting with Mr Mackie and Paul Henderson at the Rotorua Factory to assign his duties. Mr Henderson is CSL's Precast Manager.

[22] The evidence of the parties who attended this meeting revealed that their accounts of what happened on 7 November 2016 were in the most part the same although their understanding of Mr Ward's words differed.

[23] The conversation started with a brief discussion of Mr Ward's hours and days of work in the factory. This led to Mr Ward advising Mr Mackie and Mr Henderson that he was taking advice from Mr Harris and they should talk to him about this. Mr Ward said he then said words along the lines "Paul's email said I was finishing Friday". Mr Mackie and Mr Henderson understood he said words along the lines "I'm finishing as per Paul's email".

[24] Mr Mackie then asked Mr Ward to sign a copy of a file note he had prepared during the meeting. This stated:

7.30 am - 4 or 5 pm. 8hrs minimum. 5 days a week.

Sam says talk to Anthony not me. Gear & vehicle as of today.

Sam says finishing this Friday 11/11/16 Chris M

Anthony to sign for Sam?

[25] Mr Ward refused to sign the note. He took a photograph of it and emailed it to Mr Harris. He told Mr Mackie and Mr Henderson that if they wanted it signed they would have to get Mr Harris to do this.

[26] Mr Mackie then collected Mr Ward's work tools, company vehicle and phone and took him home. He told him that he could take the rest of the week off. He then went back to the office and completed a final pay check list that recorded Mr Ward's last day of work as 7 November 2016 at 12 pm.

The events that followed

[27] Later that morning Mr Harris wrote to Mr Badcock. This email primarily responded to the earlier

correspondence between the parties regarding the use of the vehicle and whether it formed part of the terms of Mr Ward's employment. The email went on to reference the meeting that morning and to the minute that Mr Ward had refused to sign. It concluded by stating:

CSL have clearly attempted to bully Mr Ward into resignation and in the interim have unilaterally removed part of his employment.

CSL are required to immediately restore use of the ute, phone and email.

[28] On 8 November 2016 at 6:21am Mr Badcock replied to the matters raised by Mr Harris. This included reference to Mr Mackie's email of 4 November 2016 where CSL had acknowledged that Mr Ward had not resigned and had asked him to attend a meeting on 7 November to discuss his duties. The letter went on to state

5. My client has not attempted in any way to bully your client into resignation and has not unilaterally removed part of your client's employment. On 4 November 2016 my client acknowledged that your client had not resigned and was still employed by CSL, and in accordance with your client's employment agreement requested your client report to work at the Rotorua factory at 0730 hrs on Monday 7 November 2016 and report to Paul Henderson to be assigned his duties.
6. Your client voluntarily attended a meeting yesterday morning so to allocate his duties by my client's Rotorua factory manager. Your client was presented with some brief minutes of the meeting which he refused to sign.
7. At that meeting your client advised my client that he would be finishing with my client on Friday 11 November 2016. He said this was in accordance with my client's email of 28 October 2016.
8. My client has elected to pay out your client to 11 November 2016 in lieu of notice and accordingly transported your client back to Tauranga.
9. Your client's final and holiday pay will be deposited to his bank account next week.

[29] On 30 November 2016 Mr Ward replied advising that he had been unjustifiably dismissed and setting out a proposal for settlement.

[30] On 2 December 2016 CSL replied. It advised that Mr Ward had not been dismissed and that it was confused. It sought clarification as to whether Mr Ward was now saying he did not want to take the sabbatical that was offered in Mr Romanes' email of 28 October or what was the position.

[31] That same day Mr Harris replied advising that Mr Ward did not say he would be finishing on 11 November, he was not offered a sabbatical, and if he was offered a sabbatical he was not interested. The email went on to advise that in the absence of an offer by the close of business that day then Mr Ward "will raise a personal grievance. As that now appears inevitable please advise if your client will attend MBIE mediation".

[32] On 8 December 2016 CSL replied. It reiterated its previous advice that it had not dismissed Mr Ward and its understanding that he was taking the sabbatical leave offered to him in Mr Romanes' email of 28 October. It went on to state that if Mr Ward did not want to accept the offer of a sabbatical then he could continue to work at the factory as was intended on 7 November. CSL pointed out that the Christmas break was imminent, but Mr Ward could report to the Rotorua factory on 8 January 2017 where he would be assigned his duties.

[33] On 20 December 2016 CSL agreed to attend mediation.

Issue One: The raising of a personal grievance

[34] I understand that CSL no longer takes issue with Mr Ward's personal grievance not being raised within time. In the event that I am wrong, I am satisfied in any case that Mr Ward's personal grievance was raised within time.

[35] Section 114 (1) of the Act states:

Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[36] Section 114(2) of the Act provides that a personal grievance is raised with an employer as soon as:

... the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employer wants to address.

[37] To raise a grievance, the Employment Court stated in *Creedy v Commissioner of Police*.¹

[36] ... it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ...

[37] ... an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

1 *Creedy v Commissioner of Police* [2006] NZEmpC 43; [2006] ERNZ 517 (EmpC).

[38] The Court provided further detail in *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*:²

[58] The level of information required to raise a grievance is not an end in itself. The grievance process is designed to deal speedily and informally with the employment relationship problems. The merits of these, rather than technical compliance with a process, are to prevail. In getting to the merits, an employer must know sufficiently of the complaint to be able to begin to address it promptly and informally and with a view to resolving it. Such a resolution mechanism almost invariably includes a discussion or discussions and not simply a formal exchange of correspondence. Details or uncertainties can be raised and dealt with during the course of such discussions. It is unnecessary for every “i” to be dotted and “t” to be crossed by an employee raising a grievance. What the cases say is that written or oral advice alone, such as “I have a personal grievance” or “I have been unjustifiably disadvantaged and want compensation and an apology” will usually be insufficient...

[39] In *Idea Services Ltd v Barker* the Employment Court reiterated that the “grievance process is designed to be informal and accessible”. Raising a grievance does not require the same level of detail as would be required in a statement of problem or statement of claim. The Court stated that the ultimate issue is: ³

whether an employee has done enough to inform his/her employer of the nature of the alleged grievance that he/she wants addressed will be objectively determined having regard to the facts of each case. This may be reflected in a number of communications, and there is no requirement that it be reduced to writing. Nor is there a requirement for the level of detail that might be expected in, for example, a statement of problem.

Analysis

[40] I am satisfied that Mr Ward raised his personal grievance for unjustified dismissal within 90 days of the grievance arising.

[41] Between 30 November 2016 and 20 December 2016 the parties exchanged communication that, when viewed in totality, was sufficient to let CSL know sufficiently of the complaint that was being made by Mr Ward so as to enable it to address the grievance and to “respond to it on its merits with a view to resolving it soon and informally”.⁴

2 [2008] ERNZ 139 (EmpC).

3 [2012] NZEmpC 112; [2012] ERNZ 454 at [40].

4 *Creedy v Commissioner of Police* [2006] NZEmpC 43; [2006] ERNZ 517 (EmpC) at [35], *Philips v Net Tel Communications* [2002] NZEmpC 138; [2002] 2 ERNZ 340 (EmpC) at [28].

[42] CSL was aware that Mr Ward was alleging he was unjustifiably dismissed, the reasons why this was the case, and how he wished his problem to be resolved. In addition, at all material times, CSL was represented by an experienced lawyer. It is more likely than not that a request would have been made for more information before the mediation if it was felt that there was insufficient information to address Mr Ward’s problem.

[43] I find Mr Ward raised a personal grievance for unjustified dismissal within time.

Issue Two: Dismissal

[44] The Statement of Problem pleads that the problem Mr Ward wishes the Authority to resolve is whether he was unjustifiably dismissed or alternatively, whether he was constructively dismissed. However, in the course of the investigation meeting Mr Ward confirmed that his position was that he was unjustifiably dismissed. This is the basis upon which submissions were presented.

Did Mr Ward resign or take sabbatical leave?

[45] I accept Mr Ward's evidence that, in his own mind, he did not intend to take sabbatical leave on 7 November 2016. However, as Chief Judge Goddard said in *Sadd v Iwi Transition Agency*:⁵

In matters affecting contractual relationships, it is not only what the parties intend but also what they say to each other about their intentions that has an influence on the creation and termination of such relationships.

[46] For the following reasons I find on balance that Mr Ward's words and actions on 7 November 2016 were not sufficiently clear so as to signal to CSL that he was taking sabbatical leave or that he was resigning. CSL had good reason to doubt whether Mr Ward genuinely wished to go on leave or to end the employment relationship.

[47] Firstly, due to the correspondence that preceded the meeting. CSL could have been under no doubt prior to the meeting that Mr Ward was not open to the offer of sabbatical leave made in Mr Romanes' email of 28 October 2016. The

⁵ [\[1991\] 1 ERNZ 438](#) at 443 and cited with approval in *Taylor v Milburn Limited Ltd* [\[2011\] NZEmpC 164](#)

at [20].

correspondence it received from Mr Ward and Mr Harris recorded that Mr Ward felt he was being pushed out, that he had not resigned and that he felt he was being bullied and intimidated.

[48] Secondly, due to the events at the meeting.

- a. Mr Ward did not expressly or impliedly state he was taking sabbatical leave. He said words along the lines either that "Paul's email said I was finishing on Friday" or "I'm finishing as per Paul's email".
- b. Mr Henderson's evidence was that he was confused by Mr Ward's words. He said he didn't know if Mr Ward was resigning or whether he was taking the sabbatical leave that had been offered in Mr Romanes' email.
- c. During the meeting on 7 November Mr Ward indicated that he wished CSL to discuss his hours with Mr Harris. This is inconsistent with him wanting to take sabbatical leave or resigning.
- d. At the conclusion of the meeting Mr Ward refused to sign the minutes that stated "Sam says finishing this Friday 11/11/16". This is consistent with his evidence that he did not say he was finishing but rather that "Paul's email said I was finishing on Friday".

[49] Thirdly, due to the correspondence received from Mr Harris shortly after the meeting. Mr Harris' email of 7 November reiterated Mr Ward's view that "CSL have clearly attempted to bully Mr Ward into resignation and in the interim have unilaterally removed part of his employment." The email spoke of the return of the vehicle, mobile phone and company tools. The contents of this email, and the request for the return of these items, were inconsistent with an intention to take sabbatical leave and/or resign.

[50] Lastly, it is noteworthy that Mr Romanes' email of 28 October 2016 contained an expectation that, if Mr Ward wanted to take leave, he would complete a leave form. No leave form was completed by Mr Ward or provided to him after the meeting on 7 November.

Was Mr Ward dismissed?

[51] Mr Ward bears the onus of establishing on the balance of probabilities that his employment ended because he was dismissed.

[52] Dismissal involves an ending of an employee's employment at the initiative of the employer. An employer does not have to use the words "*you are dismissed*" or "*we are terminating (or ending) your employment*" for there to be a dismissal in law. If the employment ends at the employer's initiative (as a result of acts or omissions taken by the employer) then that may amount to a dismissal.

[53] I have already found, on balance, that Mr Ward's words and actions on 7 November 2016 were not sufficiently clear so as to signal to CSL that he was taking sabbatical leave or that he was resigning. I am satisfied in the circumstances that Mr Ward's employment came to an end at the initiative of CSL.

[54] Even though it was in doubt as to his intentions, CSL did not seek to clarify Mr Ward's intentions on 7 November before ending his employment. The good faith requirements prescribed by the Act in s 4(1A)(b) require an employer, where doubt exists as to an employee's intentions, to make further inquiries and to ensure that its response is based on the employee's actual intentions.

Put another way, where there is doubt, a fair and reasonable employer will ensure that its response is based on the employee's actual intentions rather than on what might be inferred from equivocal words and conduct.⁶

[55] Instead, CSL told Mr Ward that it would not require him to work out the week and required him to return his vehicle, mobile phone and work tools. Following receipt of Mr Harris' email of that day, which clearly showed no intention on Mr Ward's part to resign; CSL also stopped Mr Ward's access to his work emails, and completed a final checklist to enable his final pay to be paid to him. This checklist recorded Mr Ward's last day of work as 7 November 2016 at 12 pm. Mr Mackie acknowledged this form was to be completed at the end of employment and not when an employee was taking leave. The reason for leaving was left blank.

6 *Taylor v Milburn Limited Ltd* [2011] NZEmpC 164 at [32].

[56] While I acknowledge CSL did send an email on 8 December, this did not seek clarification as to whether Mr Ward was taking sabbatical leave or resigning or intended something else by his words.

[57] I find Mr Ward was dismissed by CSL.

Was the dismissal justified?

[58] The onus falls upon CSL to prove that its actions in dismissing Mr Ward were justified.

[59] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of CSL, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[60] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[61] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.⁷

[62] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

Analysis

[63] I am satisfied the test of justification was not satisfied.

7 Section 103A(5), [Employment Relations Act 2000](#).

[64] It is more likely than not that CSL seized on the opportunity afforded to it by Mr Ward to bring his employment to an end. Its decision to do so was more likely than not based on performance and other concerns that it had. These concerns came to light during the investigation meeting. They involved:

- a. Ongoing issues with Mr Ward falling asleep on the job. Mr Mackie said that after CSL's informal meeting with Mr Ward in July 2016 he continued to fall asleep on the job. This included falling asleep while operating the crane and on one occasion while driving the company vehicle. He said this was affecting his performance and he was not getting his work done.
- b. Concerns that Mr Ward was not willing to work at sites away from home. Mr Romanes said CSL did not have any work available for him on sites close to his home and working in the Rotorua Factory was not an efficient use of his time especially due to the salary he was being paid. While CSL was willing to allow Mr Ward to work in the Rotorua Factory on a temporary basis, if nothing came up they would have "leaned on him more".
- c. An affair involving family members of Mr Ward and Mr Romanes.

[65] There was no investigation or rising of any of CSL's performance or other concerns with Mr Ward before dismissal. Nor was there any reasonable opportunity afforded to Mr Ward to respond to CSL's concerns before dismissal. These defects were not minor and did result in Mr Ward being treated unfairly.

Finding on Issue Two

[66] I am satisfied that CSL's decision to dismiss Mr Ward did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[67] I find Mr Ward was unjustifiably dismissed.

Issue Three: Remedies

Lost wages

[68] [Section 123\(1\)\(b\)](#) of the Act provides for the reimbursement by CSL of the whole or any part of wages lost by Mr Ward as a result of his personal grievance. [Section 128\(2\)](#) provides that I must order CSL to pay Mr Ward the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.⁸

[69] The Statement of Problem pleads recovery of wages as follows:

- a. Lost wages of six weeks being \$14,464.00;
- b. Lost wage of 13 weeks after the six-week period at the rate of \$1,257 per week;
- c. Lost wages after the 13-week period at the rate of \$1,257 per week.

[70] By minute dated 29 May 2018 I directed Mr Ward to provide the Authority with evidence as to the lost remuneration that he claimed as well as evidence of his attempts to mitigate his loss. Mr Ward failed to comply with this direction. His failure formed a pattern of breaches of the Authority's timetable directions that obstructed the Authority's investigation and will form the subject of a separate determination.

[71] Mr Ward filed an affidavit for the purposes of the investigation. This affidavit deposed:

After I had been fired from CSL I obtained work with a friend of my partners that enabled us to keep the mortgage going and we relied upon family and friends to assist us in other ways so that we could survive.

[72] Email correspondence I have viewed from Mr Harris to Mr Badcock dated 30 November 2016 records that Mr Ward had "found alternative short term employment however remuneration is well below what he enjoyed at CSL".

⁸ [S 128\(3\)](#).

[73] During the investigation meeting Mr Ward said he was unsure when he started work and he didn't know how

much he was paid. He said all money he received was paid in cash and this was neither banked nor declared to IRD. He acknowledged that he would have received at least the amount of his mortgage which was \$600 per week.

[74] In the absence of evidence of the date Mr Ward was employed, and the quantum of any earnings received by Mr Ward following his dismissal, I cannot be satisfied that he has lost any wages beyond the date of Mr Harris' email of 30 November 2016 as a result of his grievance.

[75] Mr Ward was paid wages up until 13 November 2016. Between that date and 30 November there are 17 days. I have viewed Mr Ward's wage records for the three years prior to his termination. For the duration of this period, the wage records show Mr Ward was paid sick and holiday pay based on a 9 hour day. At his hourly rate of

\$30 this equals a daily rate of \$270 gross.

[76] Multiplying the daily sum of \$270 by 17 days I reach a figure for lost wages of

\$4,590 gross.

[Section 123\(1\)\(c\)\(i\) Compensation](#)

[77] Mr Ward claims compensation for humiliation, loss of dignity and injury to feelings pursuant to [s 123\(1\)\(c\)\(i\)](#).

[78] Mr Ward, and his father, gave compelling evidence of the effects that the dismissal had on him. Mr Ward said he suffered a mental breakdown. He lost confidence in himself and he felt useless. He suffered relationship problems with his partner and his father. He said his financial difficulties led to him having to rent out the family home and relocate his family to his partner's parents' home. He also had to borrow money from family and friends. This was deeply humiliating for him.

[79] Mr Ward Senior spoke of Mr Ward's love for his job. Mr Ward had worked for CSL since he had left school. They had supported and trained him. He had been close friends with Paul Romanes since they were 3 years old and Michael Romanes was like a second father to him. To find himself without a job left Mr Ward visibly devastated. He became distant and non-communicative. Mr Ward Senior explained it

was only in the last 2-3 months that Mr Ward had started to come out of his shell and start to trust again.

[80] Taking into account this evidence, together with the lengthy duration of Mr Ward's employment, his reasonable expectation of ongoing employment and the circumstances of his dismissal, I am satisfied that the evidence warrants an award of compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act in the sum of \$18,000.

Issue Four: Contribution

[81] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded. 9

[82] Mr Ward said in response to questioning about hours of work, he told CSL that "Paul's email said I was finishing on Friday". He said he thought he had been fired by Paul's email, and the meeting was just a way of "booting down the door". He was therefore confused why Mr Mackie and Mr Henderson wanted to talk about hours of work and duties.

[83] It is difficult to reconcile Mr Ward's confusion with CSL's email of 4 November 2016. This email made it clear that CSL considered Mr Ward had not resigned and that he was still employed by CSL. It had asked him to attend a meeting on 7 November 2016 to allocate his duties. There was no dispute that Mr Ward had seen this email before he attended this meeting.

[84] If Mr Ward was genuinely confused about what was happening, and whether he was being fired or not, then the appropriate course of action would have been to make enquiries of Mr Mackie or Mr Henderson to clarify the

situation. The duty to deal in good faith is a mutual one. Employees have the same duties as employers to be active and constructive in maintaining the employment relationship. Employees must also be responsive and communicative.

9 [S 124](#).

[85] Mr Ward could have clarified the situation either during the meeting, when he was asked to sign the minute of the meeting, or when he received CSL's email of 8 November 2016. By not doing so he contributed to the situation that gave rise to his personal grievance.

Finding on Issue Four

[86] I am satisfied Mr Ward's conduct warrants a contribution finding of 40%.

[87] Taking into account the 40% reduction for Mr Ward's contributory conduct I order Concrete Structures to pay to Mr Ward the following sums within 28 days of the date of this determination.

- a. The sum of \$2,754 gross for lost wages.
- b. The sum of \$10,800 gross as compensation for humiliation, loss of dignity and injury to Mr Ward's feelings pursuant to [s 123\(1\)\(c\)\(i\)](#).

Issue Five: Does the Authority have jurisdiction to consider Mr Ward's claim for alleged entitlements under CS Employee Trust Fund?

The claim

[88] Mr Ward alleges that he has lost benefits as a result of being unjustifiably dismissed. The loss of benefits relate to alleged entitlements under a trust known as the CS Employee Trust Fund (the Trust). He has not pleaded whether his claim is under 123(1)(b) or [s 123\(1\)\(c\)\(ii\)](#) of the Act.

[89] CSL maintains that the Authority does not have jurisdiction to hear this claim. This is because any entitlements that Mr Ward may have had under the Trust did not form part of the terms of his employment with CSL. The Trust is a separate legal entity to CSL and CSL has no control or interest in the Trust.

The relevant facts

[90] On or about 23 May 2008 Michael Romanes established the Trust. Pursuant to a Deed of Trust dated that same day the New Zealand Guardian Trust Company Limited was appointed as the sole Trustee of the Trust, CSL was appointed as the employer and Ian Dawson was appointed as the investment advisor and the advisory trustee.

[91] The purpose of the Trust was to establish a trust fund under which employees of CSL, that had completed five years of continuous full-time employment, were entitled to share in the maturity value of specified investment pools. The Trust was intended to reward and incentivise long standing employees of CSL.

[92] The initial investment pool was set up with a \$200,000 transfer from CSL. Particular employees were named by CSL as qualifying under that pool. Thereafter, the terms of the Trust provided for a new investment pool to be created each year with the amount applied being at CSL's discretion.¹⁰

[93] At the time of making payment of the annual investment pool to the Trust, CSL was required to provide it with a list of all beneficiaries who qualified in respect of that pool and their percentage or unit entitlement. ¹¹

[94] To remain eligible to receive any distribution, an employee must still be employed on the expiry of ten years from the date when the investment pool was established.¹² Clause 1.1(7) of the Trust Deed provides:

If any Beneficiary ceases to be an employee of the Employer [CSL] within the Trust Period for a particular investment pool [ten years] that Beneficiary will lose all his or her entitlement of that Investment Pool. That entitlement thus forfeited will then be allocated, at the Employer's direction to a Beneficiary or Beneficiaries of that Investment Pool or any other Investment Pool. If allocation is made to more than one Beneficiary, the Employer may allocate in equal or unequal proportions. The Employer's decision will be final and binding on all Beneficiaries.

[95] Consistent with the terms of the Trust Deed, on 14 April 2009, having completed five years' continuous

employment, Mr Ward was advised by letter that he qualified as a beneficiary of the second investment pool of the Trust. That second investment pool was established on or about 1 April 2009.

[96] The letter of eligibility was written by Ian Dawson, on CSL letterhead. His position was listed as Management Representative. As well as notifying Mr Ward of his eligibility, the letter also confirmed the terms set out in Clause 1.1(7) of the Trust Deed.

10 Trust Deed, Clauses 1.1(1) and (2).

11 Trust Deed, Clause 1.1(3).

12 Trust Deed, Clauses 1.1(5) and 1.1(7).

[97] Thereafter, Mr Ward became eligible for investment pools three through to investment pool nine.

[98] Following Mr Ward's employment with CSL ending, the Trustees notified Mr Ward that, as he had left the employment of CSL prior to the ten year anniversary of the establishment of the Trust's second investment pool, he was no longer eligible to receive any distribution from the Trust in relation to that pool or the investment pools that were formed subsequently.

Analysis

[99] The Authority has jurisdiction to address a claim for loss of benefits by virtue of [sections 123\(1\)\(c\)\(ii\)](#) and [s 123\(1\)\(b\)](#) of the Act.

[100] Pursuant to [s 123\(1\)\(c\)\(ii\)](#) of the Act, where the Authority determines that an employee has a personal grievance, as is the case here, it may in settling the grievance, order an employer to pay an employee for the loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.

[101] This section does not contain any express or implied limitation that compensation payable by the employer is limited to any loss arising from a benefit that arises from an employment agreement. If, but for the personal grievance of unjustified dismissal, the employee would reasonably have expected to obtain a benefit, then its value is a lost benefit for which the Authority may compensate the dismissed employee.¹³

[102] Similarly, recovery under [s 123\(1\)\(b\)](#) is not limited to contractual entitlements. This section allows the Authority or the Court to award, by way of compensation, "the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance".

[103] In *Hjorth v Onesource Ltd* Judge Shaw allowed compensation "for interest payments on the loan taken out by the grievant, because of financial difficulties caused by the grievance." This was said to have been an appropriate exercise of the Court's discretion "because the purpose of compensation is to put an unjustifiably

13 *McKendry v Jansen* [2010] NZEmpC 128 at [68].

dismissed employee back into the position he would have been in if there had been no legal wrong." Judge Shaw reasoned:

[55] Under [s 123\(1\)\(a\)](#) [sic] - the Judge must have been intending to refer to [s 123\(1\)\(b\)](#) an employee is entitled to a sum equal to money lost as a result of the grievance. The [Employment Relations Act 2000](#) does not limit these losses to loss of contractually defined income.

[56] In this case, I am satisfied that Mr Hjorth lost the money which he had to pay in interest on the loan that, but for his dismissal, he would not have had to incur. The parties are agreed on the quantum of \$3,966.21 which is awarded."

[104] In *McKendry v Jansen*, Chief Judge Colgen accepted that *Hjorth* is not only authority for the proposition that compensable losses should not be restricted to contractual losses but also that such losses may be compensable under [s 123\(1\)\(b\)](#) as "other money lost".¹⁴

Finding on Issue Five

[105] The Authority has jurisdiction to consider Mr Ward's claim for loss of benefits by virtue of [s 123\(1\)\(c\)\(ii\)](#) and [s 123\(1\)\(b\)](#) of the Act.

Issue Six: Has or will Mr Ward suffer a loss of benefit and, if so, what loss was suffered?

[106] The issue of lost benefits was considered by the Court in *Trotter v Telecom Corp of NZ*.¹⁵ The Court confirmed that an inquiry into the benefits that an employee could reasonably have expected but for the personal grievance involves:

... making assumptions as to various contingencies, including the possibility that even if treated properly the applicant may have found opportunities elsewhere or become disenchanted with working for the respondent. A resignation would have deprived him of his entitlement to participation beyond the termination of employment by that means. The respondent suggested that this was a matter between the applicant and the trustee and hinted darkly that the trustee could wish to relitigate the matter of the justification for the applicant's dismissal, and that should this go to arbitration the respondent might be entitled to be a party to that arbitration.

This may be an approximately correct description of what happens in the event of a dispute between an employee and the trustee under the trust deed. However, my concern is not with that but, as I have said, with the question of the benefits that the applicant can reasonably expect to have derived from his employment if it had not been terminated unjustifiably. The respondent had

14 [\[2005\] NZEmpC 91](#); [\[2005\] ERNZ 618](#) at [\[72\]](#) and [\[77\]](#).

15 2 ERNZ 659 at 698.

to fund or provide the trustee with the necessary shares to which its employees might become entitled under the scheme. If it is possible to do so, I see no reason to leave the matter to the doubts and anxieties that often beset disputes under trust deeds and to the possibility of litigation so protracted that it will exhaust the fund. I think that instead the Court should, if it can, make an assessment of the benefits that the applicant would have received from this part of his employment package if it had not been discontinued...

[107] Pursuant to the provisions of the Trust Deed, had Mr Ward remained employed by CSL, the earliest any benefit will arise will be on 1 April 2019. Thereafter, had Mr Ward remained employed with Concrete Structures he would have received further annual distributions from the Trust from 1 April 2020 to 1 April 2026.

Entitlement to Pool 2

[108] It is more likely than not that Mr Ward would have remained working for CSL until 1 April 2019 had he not been dismissed. I am fortified in this finding by the following evidence:

- a. Mr Ward said that he had no intention of resigning from CSL. Before being dismissed he had looked forward to a long and stable employment with the company.
- b. At the time of his dismissal Mr Ward had worked for the company for 12 years.
- c. No warnings or disciplinary action had been taken against Mr Ward by CSL during his employment.
- d. While Mr Ward had expressed some unhappiness in July 2016, he also confirmed he was loyal to the Company.
- e. Offers made by CSL in July and October 2016 for him to take sabbatical leave, were declined.
- f. Mr Ward had just had his first child, had a mortgage to pay and was solely supporting the family. His position with CSL was remunerated well and

he had a close bond with the Company. Positions at his level and close to his home were difficult to come by.¹⁶

[109] At that time Mr Ward would have become entitled to receive an entitlement under Pool 2 of the Trust. According to the documentation I have been provided with, Mr Ward held 8.37 units in investment Pool 2 that had an opening value of \$8,372.13. By 9 May 2015 the value had increased to \$14,387.28. On or about 23 February 2016 the shareholdings of Pool 2 were sold and the proceeds invested into a term deposit. I am unaware at this time of the current value of Mr Ward's 8.37 units in Pool 2 but this information should be able to be easily obtained from the Trustee.

[110] Mr Ward has lost a benefit under Pool 2 of the CSL Employees Trust Fund that he would reasonably have expected to have obtained but for his personal grievance arising.

[111] I order CSL to pay Mr Ward the monetary value of 8.37 units in Pool 2 of the CSL Employees Trust Fund as at the date of this determination less 40% for contributory conduct. Payment of this sum is to be paid to Mr Ward within 28 days.

[112] Should any difficulty arise in relation to calculating Mr Ward's entitlements, then leave is granted to the parties to return to the Authority within 28 days for a determination on quantum.

Pools 3-9

[113] I find any claim for recovery of loss of benefits from Pools 3-9, that would have become due to Mr Ward from 1 April 2020 to 1 April 2026 had he remained employed by CSL, to be too uncertain so as to be a recoverable loss of benefit. Unlike Pool 2, where the shareholdings have been sold and the value quantified and held on term deposit, the value of Pools 3-9 depend on the fluctuating share market. This makes it difficult to say with confidence that Mr Ward would have received a benefit under these pools if his personal grievance had not arisen.

16 Mr Ward was unable to find full-time employment following his dismissal until July 2017.

Issue Six: Costs

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

[115] If they are not able to do so and an Authority determination on costs is needed Mr Ward may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum CSL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[116] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁷

Other issue: Penalty

[117] During the course of this investigation there were multiple breaches of the timetable directions by Mr Ward and his representative, Mr Bennett. These breaches obstructed and delayed my investigation.

[118] By Minutes dated 6 July 2018 and 12 July 2018 I indicated that the Authority would consider a penalty against Mr Ward and/or Mr Bennett. I advised that I intended to address this issue after I had dealt with the substantive matter and following receipt of submissions from the parties.

[119] In accordance with that direction:

- a. CSL is to make any submissions in support of its application for a penalty within 14 days of the date of this determination.
- b. Within 14 days thereafter Mr Ward and Mr Bennett are to provide any submissions in opposition.
- c. Within 7 days thereafter CSL is to provide any reply to the matters raised by Mr Ward and Mr Bennett.

¹⁷ *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]- [108].

[120] Pending receipt of the parties' submissions my determination on penalties is reserved.

Outcome

[121] The overall outcome is:

- a. Mr Ward was unjustifiably dismissed from his employment with CSL.
- b. CSL is ordered to pay Mr Ward the following amounts within 28 days of the date of this determination. These sums take into account Mr Ward's contributory conduct:
 - i. The sum of \$2,754 gross for lost wages;
 - ii. The sum of \$10,800 under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#).
- c. The Authority has jurisdiction to consider Mr Ward's claim against CSL for loss of benefits he would have become entitled to under the CS Employees Trust Fund.
- d. Mr Ward has lost a benefit under Pool 2 of the CS Employees Trust Fund that he might reasonably have expected to obtain if the personal grievance had not arisen but has not suffered a loss of benefit under Pools 3-9.
- e. CSL is ordered to pay to Mr Ward the monetary value of 8.37 units in Pool 2 of the CS Employees Trust Fund as at the date of this determination less 40% for contributory conduct. Payment of this sum is to be paid to Mr Ward within 28 days.
- f. Costs are reserved pending receipt of memoranda from the parties.
- g. Penalties are reserved pending receipt of memoranda from the parties.

Jenni-Maree Trotman

Member of the Employment Relations Authority

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