

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 501
5414051**

BETWEEN HAKOPA WHAREWHITI
 Applicant

AND WESTERN PLUMBING &
 ROOFING LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Emma Miles, Advocate for Applicant
 Rose Alchin, Counsel for Respondent

Investigation Meeting: 9 October 2013 at Hamilton

Submissions received: 29 October 2013 from Applicant
 1 November 2013 from Respondent

Determination: 7 November 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Hakopa Wharewhiti, claims that he was unjustifiably dismissed on 5 November 2012 by the Respondent, Western Plumbing & Roofing Limited (Western Plumbing).

[2] Mr Wharewhiti further claims that Western Plumbing breached:

- the duty of good faith pursuant to s4(1A) of the Employment Relations Act 2000 (the Act) by failing to be: “*active and constructive in establishing and maintaining a productive employment relationship*” and not being: “*responsive and communicative*” and by failing to provide him with access to information and the opportunity to comment on it prior to making a decision to terminate his employment;

- section 64 of the Act by not retaining or providing Mr Wharewhiti with a signed copy of his individual employment agreement (the Employment Agreement).

[3] Western Plumbing claims that Mr Wharewhiti's employment was justifiably terminated following complaints about his performance.

[4] Western Plumbing denies that it did not act in good faith towards Mr Wharewhiti, claiming that Mr Wharewhiti failed to attend a disciplinary meeting and provide an explanation.

[5] Western Plumbing claims that Mr Wharewhiti had been provided with a copy of the Employment Agreement.

Issues

[6] The issues for determination are whether or not:

- Mr Wharewhiti was unjustifiably dismissed by Western Plumbing
- Western Plumbing breached the duty of good faith set out in s 4(1A) of the Act
- Western Plumbing breached s 64 of the Act by not providing Mr Wharewhiti with a copy of the Employment Agreement

Background Facts

[7] Western Plumbing carries out residential property maintenance work in addition to specific plumbing tasks under its trading name of F W Maintenance Services. The residential property maintenance work includes painting, building, and plumbing.

[8] Mr Wharewhiti said he had met Mr Les Port, Manager of F W Maintenance through Mr Shannon Faithfull, a computer consultant who had assisted Mr Port to set up IT support systems for Western Plumbing. After an initial interview with Mr Port there had been a second interview at which Mr Larry Evans, Director of Western Plumbing, was present.

[9] Mr Wharewhiti said he had told Mr Port and Mr Evans that he could carry out building work, but that his painting skills were limited and he was not confident about

carrying out that part of a job. Mr Wharewhiti said that Mr Port and Mr Evans had appeared to accept this statement.

[10] Mr Port agreed that Mr Wharewhiti had explained that he could carry out general building maintenance and plastering, and that whilst painting was not his favourite task, he could undertake it.

[11] Mr Evans confirmed that painting had been discussed at the second interview, and stated that Mr Wharewhiti's representation that he could carry out painting work had been an important factor in the decision to employ him as Western Plumbing had previously encountered difficulty in employing painters.

[12] Mr Wharewhiti said he had not been provided with an individual employment agreement (the Employment Agreement) by Western Plumbing and that he had not therefore signed the Employment Agreement which had been provided by Western Plumbing to the Authority, and he provided a graphologist report in evidence in support of this assertion.

[13] Mr Port said that he had engaged Mr Wharewhiti initially on a casual employment basis and had provided him with the Employment Agreement which they had both signed in Western Plumbing's office on 17 September 2012.

[14] Mr Evans said he had been in the office on 17 September 2012 and from the vantage point of his desk had seen Mr Wharewhiti and Mr Port both sign the Employment Agreement. He also confirmed that Mr Port had handed the signed Employment Agreement to him.

[15] Ms Bronwyn Fletcher, Director of Fletcher Management Ltd, a property management company based in the same building as Western Plumbing, explained that Fletcher Management Ltd had a contract with Western Plumbing under which it arranged and administered the wages, invoicing, PAYE and GST for Western Plumbing.

[16] Ms Fletcher explained that she had instructed all the administration staff at Fletcher Management Ltd to sight the Western Plumbing's employees' employment agreements and confirm it had been signed before entering their details on the payroll.

[17] Ms Fletcher said she had met Mr Wharewhiti when he had given her his bank account details in order for him to be entered on the Western Plumbing payroll, and that she had personally entered his details on the payroll system. Ms Fletcher stated that she had seen the Employment Agreement at that time, and confirmed that it had been signed.

[18] Ms Fletcher said Mr Wharewhiti had talked to her about the jobs he had carried out, and she recalled him stating that he could do all building associated tasks including painting, which she had noted as she was aware that painters were difficult to recruit at that time.

[19] Mr Wharewhiti commenced employment with Western Plumbing on 11 September 2012 and worked on several different jobs prior to the job at Ohaupo which he commenced in mid-November 2012.

[20] One of the jobs he had worked on prior to the job in Ohaupo was based at Sims Street in Ngaruawahia (the Sims Street job) which included painting; however Mr Wharewhiti said he had painted only undercoats and that another employee had painted the topcoats.

[21] Mr Port disagreed with this statement and said that Mr Wharewhiti had undertaken all the plastering and painting work at the Sims Street job.

[22] Mr Evans said that he had visited the Sims Street job on 27 September 2012 to check the plumbing work required and had spoken to Mr Wharewhiti who had been plastering at the time.

[23] Mr Evans said he had spoken to Mr Wharewhiti and when he had asked who was carrying out the painting on the property, he (Mr Wharewhiti) had replied that it was him. Mr Evans said he had observed at that time that the property was in a good condition and there was no mess.

[24] During the period prior to mid-November 2012 Mr Wharewhiti said he had received positive feedback about his work from Mr Port and Mr Evans. Mr Port and Mr Evans confirmed that they had been satisfied with the standard of Mr Wharewhiti's work including the painting he had carried out, and as a result Mr Port said he had had been confident that Mr Wharewhiti could undertake a project based in Ohaupo.

Project in Ohaupo

[25] Mr Port explained that the project in Ohaupo (the Site) which involved painting the interior of two small apartments had been commissioned by Ms Fletcher.

[26] Mr Port said that he had instructed Mr Wharewhiti and another employee, Mr Leyton Rowe, to carry out the painting work required, and had supplied materials and tools to complete the job.

[27] Mr Wharewhiti said he had asked Mr Port who would be doing the painting required at the apartments at the Site, and Mr Port had advised that it would be him. Mr Wharewhiti

said he had not voiced any concern about this to Mr Port as he had not believed he would be working alone.

[28] Mr Wharewhiti said that when they had arrived at the Site, Mr Port had shown him how to load, use and clean a spray gun to be used for the painting, and had then left. Mr Wharewhiti said he had never used a spray gun previously; however Mr Port said Mr Wharewhiti had appeared able to use the spray gun to an acceptable standard.

[29] Mr Wharewhiti said that Mr Port had worked with him and Mr Rowe for the first two days and thereafter his attendance at the Site had been sporadic, and that Mr Rowe had only been at the Site for 3 of the 12 days during which the work had been carried out.

[30] Mr Port agreed that Mr Rowe had not been at the Site for all 12 days as he had had to take him with him on occasion to other jobs, however he had been working at the Site for the majority of the time when Mr Wharewhiti had been working there, and had only been assigned to another job towards the end of the 12 day period.

[31] Mr Port further advised that he had also attended the Site to assist on several occasions, however although the job was progressing satisfactorily initially, he had become concerned that the job was taking longer than anticipated, and that the Site was becoming very untidy so that he started to have concern about the quality of the work undertaken.

[32] Mr Port said he had addressed the state of the Site with Mr Wharewhiti and Mr Rowe on one of his visits, and had helped to tidy and clean up materials and tools on the Site.

[33] On a visit to the Site in the week prior to 5 November 2012, Mr Port said he had spoken to Mr Wharewhiti about the lack of progress which concerned him, and the state of the Site which was not up to an acceptable standard.

[34] Mr Wharewhiti confirmed that Mr Port had spoken to him about the state of the Site, and had instructed him and Mr Rowe to put any rubbish in the middle of a room or at the side of a room; however he had no broom or a vehicle in which to transport any rubbish to a disposal site.

[35] Mr Port said that there had been cleaning implements at the Site, and both Mr Rowe and Mr Wharewhiti had his mobile telephone number on which they could contact him should they require any thing further. Mr Port said he had intended to collect the rubbish which he had expected it to be placed in a tidy pile.

[36] Mr Wharewhiti said he had become concerned about the timescale allowed to complete work at the Site, and had asked Mr Port for assistance, however none had been

provided and he had therefore asked his partner, Ms Rachel Nesbitt, to assist him to complete the work on 5 November 2012.

[37] Mr Port said he had sent a text message to Mr Wharewhiti at 7.27 a.m. on 5 November 2012 stating: *“Les-Hey Bro. Can you finish off Ohaupo rd today please?”* to which Mr Wharewhiti responded at 9.04 a.m. : *“Hakopa-Hay bro I finished out heas bro, wea to next ...”*.

[38] Mr Evans said that on 5 November 2012 he had been asked by Ms Fletcher how work at the Site was progressing, and he had telephoned Mr Port to enquire. Mr Port said that as Mr Wharewhiti had told him that he had completed the work at the Site, he had confirmed this to Mr Evans, who had in turn informed Ms Fletcher..

[39] Mr Port said he had understood when informed by Mr Wharewhiti that the job at the Site had been completed that the work had been completed to a satisfactory standard, and the Site left in a clean and tidy condition.

[40] Ms Fletcher said she had arranged to take prospective tenants to view the apartments at the Site on 5 November 2012 as she had been informed that the work was completed, however when they had arrived at the Site at approximately 3 p.m. she had been shocked and embarrassed at what she had found there.

[41] On arrival at the Site Ms Fletcher said she found all the painting gear had been left in the middle of the rooms, the curtain tracks had been taken down and bent so that they could not be reused, and all the curtains had been used as drop sheets and were covered in paint.

[42] Ms Fletcher said that the paint work was appalling, paint had been sprayed all over the windows, over the light switches, there had been no sanding back, and the Site had been in an appalling mess. In addition, she had found a threat written in dust on a mirror in one of the bedrooms at the Site.

[43] Ms Fletcher said that it had been the worst job she had encountered in over 30 years of property management and she had telephoned Mr Evans in a distressed state to demand the return of the deposit which had been paid, and to inform him that she would engage another painter at Western Plumbing’s expense to rectify the work carried out at the Site.

[44] Mr Evans said he had been embarrassed and very concerned by Ms Fletcher’s telephone call, and he had immediately visited the Site. On arrival he had discovered the Site was in an appalling state with paint splattered on the floors and windows, and in other areas where no paint ought to have been. There had also been an offensive message written in dust on a mirror.

[45] Mr Evans said he had been extremely angry at what he had found, and he had telephoned Mr Port, who had then also visited the Site.

[46] Mr Port said he had taken photographs at the Site during his visit on 5 November 2012, which were submitted in evidence to the Authority. Mr Wharewhiti accepted when questioned at the Investigation Meeting that the photographs gave an accurate representation of the state of the Site.

Communications between the parties 5 November 2012

[47] Mr Port said he had sent a text message to Mr Wharewhiti at 6.02 p.m. on 5 November 2012 asking why the Site had been left in such a state, to which Mr Wharewhiti responded that he had no turpentine left and no good painting brush to do the finer painting work.

[48] Mr Port had responded at 6.16 p.m. with a text message stating: “... *Sorry mate but youre just not up to the standard that I require, ill make up your hours and give you a letter of termination. Its just not good enough*”.

[49] At 6.17 p.m. Mr Wharewhiti had responded with a text stating: “*Wot I told you im not a painter bro that aint right bro n u no it bro tht is ur bad not mine*” and at 6.34 p.m. with: “*This is unfair dismissalas I clearly stated to both you and Larry my lack of painting skills. I will be contacting the department of labour as soon as I get home.*”

[50] At 6.40 p.m. Mr Port responded:

Ive already rung them and informed them, I am having a meeting in the morning. You made a hell of a mess I showed you the standard you didn't even sand the filler in the walls. I cant wait to meet your representative, its unfair on my company now we have a hell of a mess to clean up and its taken way too long.

[51] At 6.43 p.m. Mr Port texted: “*All further communication with you will be through a lawyer. You have lied to me. I asked you before you started if you could paint and plaster and you said yes. Goodbye.*”, and at 8.00 p.m. Mr Port sent a text stating: “*Return the company property, the dewalt drill. Police have been notified, you have 24 hours.*”

[52] Mr Port said he had been angry during the period when the text messages were being exchanged, however he had returned to the Western Plumbing offices that night as he had

realised that he did not have the authority to dismiss Mr Wharewhiti, and he had written a letter to him. The letter which was dated 5 November 2012 stated:

To Hakopa Richard Wharewhiti,

On behalf of FW Maintenance Services, I am notifying you that as per the terms of you (sic) Casual Employee Contract with our company, you are being stood down from work, pending a disciplinary meeting, which will be held at the office, 39 Mahana Rd, Te Rapa, this Friday the 9th of November.

You are being stood down on grounds of misconduct, and following this, wilful damage to company property, and are under investigation for other matters.

The purpose of this meeting is to make clear to you why we are taking this action, and to take what we believe is appropriate action to protect the reputation and future of this company.

You are entitled to bring a representative.

Accessing of Western Plumbing's Computer System without Authorization

[53] Western Plumbing had installed an online exchange email accounts and Microsoft 365 software system to manage its business. The system had been set up by Mr Faithfull and was used to email clients/customers and schedule work for employees on an online calendar system.

[54] Mr Faithfull said he had set up an administration account within the environment for Mr Evans, Mr Port and Mr Wharewhiti to use to communicate work information via email.

[55] He had issued Mr Wharewhiti with a user name and password unique to the portal used and also confirmed that Mr Wharewhiti was sufficiently computer literate to access and use the system satisfactorily.

[56] During the evening of 5 November 2012 Mr Port said he had been using his mobile telephone at approximately 10 p.m. when the screen had gone blank and he had realised that it had been remotely wiped.

[57] The following morning, 6 November 2012, Mr Evans said he had realised that when he had switched on his mobile telephone the information held on the computer administration account used by him, Mr Port, and Mr Wharewhiti had been wiped blank. After he and Mr Port had discussed what had occurred, it had been decided to report the incident to the Police, and a complaint alleging theft had been lodged dated that day.

[58] Following discussion with Mr Port, Mr Evans had approved the letter dated 5 November 2012, which Mr Port had written to Mr Wharewhiti and Mr Port said he had hand-delivered it by putting it in Mr Wharewhiti's letterbox at his home on 6 November 2012.

[59] Mr Wharewhiti said he had not found the letter until 7 November 2012 although he checked the letterbox every day. Mr Wharewhiti said he had not responded to the letter as he believed he had already been dismissed and he had informed Mr Port of this when Mr Port had telephoned him to check that he would be attending the scheduled meeting on 9 November 2012.

[60] Mr Wharewhiti said he had subsequently returned the relevant tools to the offices of Western Plumbing.

[61] Mr Wharewhiti had received a letter dated 13 November 2012 advising him that a decision had been made to summarily dismiss him from the employment of Western Plumbing for serious misconduct which was stated to be:

In leaving the site in which you were working in an untidy, and unprofessional state, which is not only damaging to the reputation of this business, but a health and safety concern to others working with you, and in not completing this job to a satisfactory standard, you have damaged the reputation of this company.

You have further compounded the matter, by deliberately attempting to erase computer software from two mobile devices, belonging to the company management system, through the company email account you were given access to.

[62] On 19 March 2013 Mr Wharewhiti filed a Statement of Problem with the Authority. The parties subsequently attended mediation; however this failed to resolve the issues between the parties.

Determination

Was Mr Wharewhiti unjustifiably dismissed by Western Plumbing?

[63] Mr Wharewhiti had been dismissed summarily by Western Plumbing on 13 November 2012. The test of justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

(a) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(b) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[64] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Western Plumbing must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[65] In accordance with s 103A (3) of the Act the Authority must also consider whether:

(a) ... the employer sufficiently investigated the allegations against the employee ...

(b) ... the employer raised the concerns that the employer had with the employee ...

(c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...

(d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[66] Mr Port had been angry at what he had found at the Site on 5 November 2012. Mr Port's discovery had been preceded by Mr Evans's telephone call to him. Mr Evans confirmed that he had been extremely angry at what had occurred and the situation that it had

caused with Ms Fletcher, and that he had expressed this anger during his conversation with Mr Port on 5 November 2012.

[67] I accept that Mr Port's anger towards Mr Wharewhiti whom he saw as being responsible for the situation which had arisen and on whose assurance that work at the Site had been completed he had relied upon, resulted in the angry tone of the text messages which he had sent to Mr Wharewhiti on the night of 5 November 2012.

[68] However, this did not lessen the statutory requirements on the employer to act in a fair and reasonable manner. The texts sent by Mr Port at 6.16 p.m. informing Mr Wharewhiti that he would be given a letter of termination, and at 8.00 p.m. informing Mr Wharewhiti that he had to return company property and that the police had been informed, I find to have had the effect of destroying the trust and confidence between Mr Wharewhiti and Western Plumbing that is essential in an employment relationship and thus of terminating that relationship.

[69] Whilst Mr Port said that he had, some time later that evening, realised that he did not have the authority to dismiss Mr Wharewhiti, it is clear from the subsequent text messages sent by Mr Wharewhiti that he considered that Mr Port did have this authority.

[70] In *Nelson v Porirua Community Law Resource Centre Incorporated*¹ the then Chief Judge Goddard set down the test to be applied in a situation in which there is an issue regarding ostensible authority:²

“Ostensible means overt. The test is how did it look to the applicant? How would it have looked to any reasonable person in the same situation? ... The fact that as between them and the respondent there is a limitation of authority unknown to the applicant cannot be allowed to affect his position. It was up to the respondent to notify him of the existence of the limit.”

[71] There is no evidence to indicate that Mr Wharewhiti knew that Mr Port acting alone did not have the authority to make the decision to dismiss him. It had been Mr Port who had interviewed Mr Wharewhiti for employment on both occasions, Mr Port who had signed the Employment Agreement, and Mr Port who had been responsible for assigning to, and directing Mr Wharewhiti in, his work.

[72] I consider that any reasonable person in the position of Mr Wharewhiti would have believed that Mr Port had the authority to terminate his employment.

¹ [1993] 2 ERNZ 1109 (WEC39/93)

² Ibid at page 17

[73] Mr Port subsequently wrote and sent the letter dated 5 November 2012 to Mr Wharewhiti. The letter effectively suspended Mr Wharewhiti.

Suspension

[74] There are several leading judgments which establish the law on justification for suspension. In this case there is no reference in the Employment Agreement to an express contractual term providing Western Plumbing with the power to suspend Mr Wharewhiti.

[75] Even had there been a contractual entitlement to suspend, the Employment Court in *Tawhiwhirangi v Attorney-General in respect of Chief Executive Department of Justice* established that there is nonetheless a requirement to apply the rules of natural justice to a decision involving suspension³.

[76] Additionally there is a legislative requirement that that parties to an employment relationship deal with each other in good faith as set out in s4 of the Act:

S4(1A)The duty of good faith in subsection (1)-

- (a) *requires the parties in an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
- (b) *without limiting paragraph (a), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-*
 - (i) *access to information, relevant to the continuation of the employees' employment; about the decision; and*
 - (ii) *an opportunity to comment on the information to their employer before the decision is made.*

[77] Mr Wharewhiti had been suspended pending a disciplinary meeting into potentially serious misconduct that might, and in fact did, have an adverse effect on his continuation of employment. Mr Wharewhiti should have been provided with access to pertinent information about the decision to suspend him, and the opportunity to comment on this information prior to the decision to suspend him being made by Western Plumbing.

³ [1993] 2 ERNZ 546

[78] I find that with regard to the matter of suspension, Mr Wharewhiti was in effect presented with a *fait accompli* in the letter dated 5 November 2012 which made it quite clear that he had been suspended, without having been provided with any opportunity to comment on alternatives to suspension.

[79] Moreover, I find that by the time the letter dated 5 November 2012 had been written, which Mr Port said had been late that night, Mr Wharewhiti's employment with Western Plumbing had already been terminated by way of the text messages sent earlier that evening.

Subsequent Notification of Dismissal

[80] Mr Wharewhiti was invited to the meeting to be held on 9 November 2012. However by the date of receipt of this letter Mr Wharewhiti said he had understood that his employment had already been terminated and therefore could see no purpose in attending the proposed meeting.

[81] I find that Mr Wharewhiti's employment had been terminated with effect from 6.16 p.m. on 5 November 2012 when the text had been sent advising him that he was not up to the required standard, his hours would be made up, and he would be provided with a letter of termination.

[82] Although I find that on the evidence provided to the Authority Mr Wharewhiti was responsible for the accessing, wiping and deletion of Western Plumbing's computer system without authorisation I find that this had taken place sometime after Mr Port had sent the text message effectively dismissing Mr Wharewhiti at 6.16 p.m. As such it cannot be held to have affected the decision to terminate Mr Wharewhiti's employment.

[83] I find that Western Plumbing at the time of making the decision to terminate Mr Wharewhiti's employment did not comply with either the basic tenets of natural justice or with the statutory good faith obligations. The decision by Western Plumbing to dismiss Mr Wharewhiti on 5 November 2012 was not a decision an employer acting fairly and reasonably could have made in all the circumstances.

[84] I determine that Mr Wharewhiti has been unjustifiably dismissed.

Did Western Plumbing breach the duty of good faith set out in s 4(1A) of the Act?

[85] As set out in the preceding paragraphs, I find that Western Plumbing did breach the duty of good faith set out in s. 4(1A) of the Act.

Did Western Plumbing breach s 64 of the Act by not proving Mr Wharewhiti with a copy of the Employment Agreement?

[86] Mr Wharewhiti disputed that he had been provided with the Employment Agreement. Whilst the graphologist report supports Mr Wharewhiti's evidence on this point in that it concludes that it is: "*highly probable that the signature on Q1 is a simulation*", I note that it is not conclusive.

[87] Mr Port stated that Mr Wharewhiti had been engaged as a casual employee initially and that they had signed the Employment Agreement on 17 September 2012, an action Mr Evans confirmed had taken place.

[88] Ms Fletcher stated that it was Fletcher Management Ltd policy not to enter a Western Plumbing employee on the payroll until their signed employment agreement had been sighted first. Ms Fletcher confirmed that she had sighted Mr Wharewhiti's Employment Agreement and it had been signed, following which Mr Wharewhiti had been entered on the Western Plumbing payroll.

[89] I find that, having considered all the evidence, Mr Wharewhiti had been provided with the Employment Agreement.

[90] I determine that Western Plumbing did not breach s 64 of the Act.

Remedies

[91] Mr Wharewhiti has been unjustifiably dismissed and he is entitled to remedies.

Outstanding Wages and Holiday Pay

[92] Mr Wharewhiti was summarily dismissed. Mr Wharewhiti was entitled to two weeks' notice in respect of the termination of his employment pursuant to clause 12.2 of the Employment Agreement.

[93] I order that Western Plumbing pay Mr Wharewhiti 4 days' wages in respect of days worked and not paid in addition to any outstanding annual holiday payment.

[94] I order that Western Plumbing pay Mr Wharewhiti 2 weeks' wages in respect of notice entitlement which he did not receive. From that amount is to be deducted the increased amount of the Carer's Benefit awarded during that two week period.

[95] I anticipate that the parties can resolve the amounts owed between them, if not leave is reserved for the parties to revert to the Authority.

Lost wages

[96] Mr Wharewhiti when questioned by the Authority at the Investigation Meeting confirmed that he had taken no steps to look for alternative employment until late December 2012 or early January 2013. Although Mr Wharewhiti claimed that he had lost the confidence to look or apply for alternative positions, he did not supply any medical evidence to substantiate that he was medically unfit to apply for work.

[97] Employees are under a duty to mitigate their loss and in this case there was insufficient evidence presented to the Authority to support the fact that Mr Wharewhiti had made a real effort to mitigate his loss. As Chief Judge Colgan made clear in *Allen v Transpacific Industries Group Ltd (t/a "Mediasmart Ltd")*⁴:

... dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.

[98] I also note that as soon as Mr Wharewhiti commenced a search for alternative employment, he obtained a position.

[99] Taking all these circumstances into consideration, I award no compensation for lost wages to Mr Wharewhiti.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[100] Mr Wharewhiti is entitled to compensation for humiliation and distress. I find that in respect of the unjustifiable dismissal, Mr Wharewhiti suffered distress as a result of the dismissal.

[101] I order Western Plumbing to pay Mr Wharewhiti the sum of \$4,000.00, pursuant to s 123(1) (c) (i) of the Act.

⁴ (2009) 6 NZELR 530, par 78

Contribution

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

[103] The decision to terminate Mr Wharewhiti's employment made on 5 November 2012 had lacked any procedural justification. Mr Wharewhiti had subsequently chosen not to attend the scheduled meeting on 9 November 2012 as he considered his employment had already been terminated.

[104] Mr Wharewhiti accepted that the photographs submitted in evidence were a fair representation of the state of the Site which Western Plumbing had found to be totally unacceptable and which had resulted in embarrassment and additional costs to it.

[105] Although the wiping of part of the Western Plumbing's computer system did not occur until after the effective termination of Mr Wharewhiti's employment, Mr Faithfull's evidence was unequivocal that it had been Mr Wharewhiti who had initiated the remote device wipe on 5 November 2012.

[106] I accept that had, but for the unjustifiable dismissal, Western Plumbing followed a fair procedure, based on the unsatisfactory state of the workmanship at the Site, and on the remote device wipe which I find to have been deliberate and malicious, Western Plumbing would have reached the conclusion that Mr Wharewhiti has been guilty of committing serious misconduct⁵. In that situation I find that dismissal could have been an outcome available to Western Plumbing.

[107] I find that the remedies must reflect what I have found to be contributory fault on the part of Mr Wharewhiti and I therefore reduce the amount awarded by way of compensation by 90%.

Costs

[108] Costs are reserved. Given the extent to which both parties have been successful I am of a mind that costs should lie where they fall, however in the event that costs are sought, the parties are encouraged to resolve that question between themselves.

[109] If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days

⁵ *Waitakere City Council v Iaone* [2004] 2 ERNZ 194

from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority