

IN THE EMPLOYMENT COURT
AUCKLAND REGISTRY

IN THE MATTER of an appeal against a decision
of the Employment Tribunal

BETWEEN 121 Marine Centre Limited

Appellant

AND Glenn Allen Benjamin

Respondent

Court: Palmer J

Hearing: Auckland
1 March 2002

Appearances: Mr C Eggleston, Counsel for Appellant
Ms F Bolwell, Counsel for Respondent

Judgment: 27 June 2002

JUDGMENT OF PALMER J

Table of Contents

Introductory	1
The present appeal	11
The determination by the Tribunal	12
The opposing submissions	14
Argument for the appellant	14
Argument for the respondent	18
My determination of this appeal	19
My order	20
Costs	20
Final remarks	21

Introductory

1 Mr Allen Benjamin was employed by 121 Marine Centre Limited (subsequently referred to as such, or the company or simply as the appellant) until 29 August 2000.

2 Mr Benjamin had worked for 121 Marine Centre since it came into being during 1992, when its corporate predecessor, Lusty & Blundell, ceased to trade, as such.

3 The respondent who was, and is, a trade qualified motor mechanic, had sought and obtained employment during 1985 with Wairau Marine Limited ("Wairau Marine"), a marine business which then undertook quite a comprehensive range of wholesale and retail functions in the marine industry.

4 Mr Benjamin was then employed by Mr John Blundell, the Managing Director at Wairau Marine which included among its shareholders, one of the remaining two directors of the company and certain other Blundell family members. In 1985 the company was a family business headed by Mr John Blundell.

5 Following the sharemarket crash in late 1987 Wairau Marine merged with Ken Lusty Ltd and the new corporate entity was called Lusty & Blundell Ltd. The new business operated from the same business premises from which Wairau Marine Supplies had traded. Ken Lusty Ltd, in the course of its business, imported – and continued to import following its merger – big marine items including hydraulic steering mechanisms, water makers, generators, and the like.

6 This merged business subsequently separated in or about 1992. The Blundell Family Trust owned the building in which the business operated. The Blundell arm of the previously merged business changed its corporate name to 121 Marine Centre Limited.

7 The new company (121 Marine Centre) encompassed an electrical product manufacturing division. Lusty & Blundell Ltd ceased, of course, to have any ongoing involvement whatsoever in the management of 121 Marine Centre. This new company employed Mr Benjamin on the same terms and conditions as he had been employed by Lusty & Blundell Ltd. He was then paid a salary of \$36,000 and given the use of a company car.

8 During 1996, the directors associated with the electrical products manufacturing division of 121 Marine Centre, elected to formally separate from a merged commercial operation with and in 121 Marine Centre and to establish their own separate business in Albany, on the North Shore.

9 Suffice for me to now say that, at this particular time, Mr Tony Lundon and the respondent (Mr Benjamin) purchased shares in the new company (121 Marine Centre). They each purchased, by arrangement with Mr John Blundell, 7,500 shares comprising respectively a 15 percent shareholding, at the same price which Mr Blundell contended he was then purchasing the shares for. Mr Lundon and Mr Benjamin each agreed to pay \$20,000 for their respective shareholdings in 121 Marine Centre.

10 Mr Lundon and Mr Benjamin, because of their situations as shareholders and employees of the company, were appointed as directors and each received increased salaries of \$45,000 per annum in lieu of their prior annual salaries of \$36,000.

11 When the individual share price in 121 Marine Centre was eventually established as comprising \$2.34 per share, both Mr Lundon and Mr Benjamin had surpluses accruing to them of \$2,500 (approximately, each), given that they had each paid \$20,000 for the 7,500 shares which had been respectively allotted to them in the company. It was agreed, I now confirm, that these particular residual sums would be left available to the company as interest bearing loans which the company would pay interest to, respectively, Mr Lundon and Mr Benjamin in the sum of 10 percent per annum.

12 In fact, the sum owing to Mr Benjamin, together with all interest owing, was paid by the company, and was completely paid off at an accelerated rate when the respondent required them to be so paid, in or about mid-1999.

13 For differing impacting reasons, 121 Marine Centre did not prosper following its further significant restructuring in 1996.

14 The appellant began making significant losses. Mr John Blundell confirmed in his evidence that this ongoing commercial performance by the company commencing in 1996 continued during 1997, 1998, and 1999, causing 121 Marine Centre to be accepted by the Inland Revenue Department as a loss qualifying company. Consequentially, the shareholders received some tax relief from the department.

15 For the financial year ending 31 March 2000 the appellant achieved a small profit of \$20,000 following its deficit trading in recent preceding years.

16 Mr Benjamin, during early 2000, had been absent from work for about 5 to 6 weeks following knee surgery on his right knee through a work-related accident which occurred in September 1999, before returning to work upon, progressively, a part time and then a full time basis. It will suffice for me to say that there were complications inherent in Mr Benjamin's knee condition which required, following surgery, a degree of ongoing evaluative oversight.

17 During Mr Benjamin's absence from work, Mr Blundell arranged for his son in law (who is also a trade qualified mechanic) to work in the business as a temporary replacement for Mr Benjamin, and then on an ongoing basis. Mr Blundell accepted that it was necessary in the workforce employed by 121 Marine Centre that a person should be available to the

business on an ongoing basis with an informed trade qualified mechanical background so that such an employee could deal with particular inquiries by customers requiring a degree of specialised mechanical insight. Mr Benjamin, of course, had fulfilled this role for 15 years during his employment by the appellant and its corporate predecessors.

18 At this particular time Mr Blundell had discussed the outcome of the respondent's knee surgery with him. He, Mr Blundell, understood from these discussions that there was "a distinct possibility" that future surgery might become necessary affecting the respondent's same knee. In this event, Mr Blundell acknowledged under cross-examination by Ms Bolwell that, protectively of the company's goodwill and customer base, he wanted to have his son in law familiar with and working in the business "in case it turns out Allen has to have further surgery down the track". This particular concern, I remark, was only part of Mr Blundell's forward protective planning.

19 He explained that, given he was approaching retiring age (he was aged 64 years during 2000), he was purposefully considering the future of the company. He acknowledged that he initially considered selling it as a going concern but, because of its poor trading performance during the last few years, he recognised the difficulties inherent in such a sale. He explained that he then decided to employ his son in law in the business so that he could take over a considerable amount of the work Mr Blundell performed, and would acquire the informed insights he needed to progressively manage the business "with a view to keeping the business in the family" (briefed evidence, Mr Blundell, para 8).

20 A further factor was materially exercising Mr Blundell's mind. He contended in paragraph 11 of his briefed evidence that he "had not been happy for some time with Allen's attitude to work, ...". It will suffice for me to now simply remark that certain "tensions" – as I choose to describe them – had developed between Mr Blundell and Mr Benjamin because of Mr Blundell's adverse perception concerning the respondent's work performance and commitment. It was common ground at the Tribunal hearing that Mr Blundell strongly rebuked Mr Benjamin at work on 1 August 2000 concerning an aspect of his work performance at that time. According to Mr Blundell, in paragraph 9 of his briefed evidence –

What prompted the discussion was a habit that Allen had adopted of buying the Trade and Exchange on a Thursday morning and then spending a large part of Thursday and Friday reading it and making telephone calls.

Mr Blundell said that the respondent "accepted that he had not been pulling his weight at work and that his attitude required improvement".

21 Essentially, Mr Benjamin acknowledged Mr Blundell's account which I have immediately traversed. At p18 of the transcript the following exchange occurred between Mr Eggleston and Mr Benjamin –

EGGLESTON *And I understand that you accepted that your work performance needed improving?*

ALLEN BENJAMIN *I think that right throughout our life we go through highs and lows and occasionally we need a kick in the bum, and John gave me a kick in the bum if I can say that, am I allowed to say that Sir and I think that one it was going through a very, very quiet time and sometimes in the morning we had caught up on all of our work and there were other staff members that would come in and sit down and read the paper as well and nothing was said about them. I think that John, you know, well I don't know. John asked me about that and I put that right.*

Having acknowledged that he was strongly rebuked – and justifiably rebuked – by Mr Blundell in his working situation on 1 August 2000, Mr Benjamin contended however at p19 of the transcript that –

... generally I thought John and I got on reasonably well up until a period of time closer to the end.

22 Mr Blundell acknowledged under cross-examination by Ms Bolwell at p49 of the transcript that, while he was considering the introduction into the company of his son in law (Reg) with his specialised mechanic's insights as a permanent employee, the company "*certainly had no need for two quite senior employees with that kind of training in April 2000*". He, Mr Blundell, said in substance that he believed at that particular time that a successful outcome to Mr Benjamin's surgery was quite uncertain and in that event he "*didn't want to be caught short if you like without someone who had the [specialised mechanical] knowledge [which the business required for its customers on a day to day basis]*".

23 Mr Blundell decided to purchase back the shares held by Mr Lundon and Mr Benjamin, and to obtain their agreement to them respectively ceasing their employment with the company upon the respective purchase of their shareholdings by him. He acknowledged to Ms Bolwell that, having thought about the issues "*carefully*", he decided to "*tie*" together "*the purchase of the [respondent's] shares*" with his agreement to leave the company's employment immediately. The following exchanges occurred under cross-examination by Ms Bolwell at p51 of the transcript –

BOLWELL *So you felt well you don't think the shares are worth much, in fact the minority shareholder in a private company is always in a difficult situation, correct?*

JOHN BLUNDELL: *Correct.*

BOLWELL *So if I offer him a bit of money, and I will be able to ensure that I force him to leave at the same time, would that be correct?*
 JOHN BLUNDELL *It became a condition of the share buy out yes.*
 BOLWELL *I am talking about commercially Mr Blundell, that is what you thought isn't it? I will tie the two of them together and I will get myself into a situation which I want to get into namely looking towards retirement, Reg in place to run the business.*
 JOHN BLUNDELL *And seeing the company future flourish if you like a bit more than what it had been.*

24 Having decided that he would seek to gain the mutual termination of the employment of Mr Lundon and Mr Benjamin – albeit for differing reasons affecting them – upon the agreed purchase in each case of their respective shareholdings in the appellant, Mr Blundell said he sought to determine a fair price for the shares.

25 The focus of my immediate attention in the present appeal is upon what materially occurred between 121 Marine Centre and Mr Benjamin, notwithstanding that the evidence established that Mr Lundon sold his shares to the company apparently before Mr Benjamin did, and terminated his employment with the company upon an agreed period of notice following his sale of the shares.

26 According to Mr Blundell, he personally prepared a handwritten summary of his proposed share purchase offer to Mr Benjamin, in advance of purposefully meeting him on Monday, 28 August 2000. This handwritten offer comprising annexure C, which Mr Blundell both discussed and made available to Mr Benjamin on 28 August 2000, provided:

22/8/2000

121 MARINE CENTRE LTD

BUY-OUT OF 7500 SHARES OF ALLEN BENJAMIN.

I HAVE DECIDED ON THE FOLLOWING COURSE OF ACTION TO PROCEED WITH THE BUY-OUT:-

- ① SHARES WERE PURCHASED ORIGINALLY FOR \$2.34 EACH & TOTAL WAS \$17550.00.
- ② I.R.D. REFUNDS AS RESULT OF COMPANY LOSSES PAID TO ALLEN - APPROX \$9500.00
- ③ DIFFERENCE TO MAKE UP IS \$8050.00
- ④ CURRENT VALUE OF SHARES IS NIL DUE TO NEGATIVE BALANCE SHOWING IN LATEST ACCOUNTS.
- ⑤ I WILL PAY \$1.20 PER SHARE (\$9000.00)
- ⑥ ALLAN TO RETIRE FROM 121 MARINE AT EARLIEST AFTER COMPLETION OF SHARE TRANSFER DOCUMENTS ETC.

J H Blundell
 DIRECTOR

27 The adjudicator, in the course of his decision, materially summarised Mr Blundell's evidence leading up to 28 August 2000, and beyond that date, at pp5-6 thus –

Mr Blundell said that he discussed the matter with his wife and gave some consideration as to what would constitute a fair price. The company's accountant advised him that the shares were essentially worthless given the company's trading results.

He said in his evidence that as he had not been happy for some time with Mr Benjamin's attitude to work, he considered what would be a fair offer to purchase his shares and which would also form the basis for a mutual termination of his employment. He said he was still anxious to offer a fair price but was aware that Mr Benjamin had received approximately \$9,000 back from the IRD and he accordingly calculated a price of \$5,000 for the shares based upon 7,500 shares at 66 cents each. He said he calculated that a further \$4,000 would be more than sufficient to cover Allen's entitlement to unpaid holiday pay.

On Monday 28 August 2000 Mr Blundell said he asked Allen Benjamin to come into his office and explain to him that the shares were essentially worthless but that he wouldn't like to see him out of pocket. He explained, he said, that he had come up with an offer of \$9,000 being \$5,000 for the shares and \$4,000 as his entitlement to unpaid holiday pay. He said he then handed Mr Benjamin a hand-written breakdown of the offer to take away and consider overnight – see exhibit "C" - and explained, he said, that the employment would cease if the offer was acceptable to him and he would finish work as soon as the share transfer had been completed.

Mr Blundell said that when he now looked at that document he accepts that the \$9,000 offered for the shares appears to have been calculated on the basis of \$1.20 per share and not 66 cents as he had stated earlier. He did say, however, that he specifically recalled discussing the breakdown with Mr Benjamin and was sure that he was in no doubt as to what the offer constituted. Further, he said, he confirmed that Allen was to retire from the company at the earliest after completion of the share transfer documents.

The following day Mr Blundell said he was advised that Mr Benjamin was prepared to accept the offer and there was some brief discussion as to whether he would be prepared to take the company car instead of the money. This matter, however, was not taken any further and so they proceeded to get the share transfers signed. Mr Blundell said when that was done he then advised Mr Benjamin that "he might as well finish up today as they had discussed."

It was then he said the question of holiday pay came up and he reminded Mr Benjamin that the price paid included his holiday pay and was based on \$5,000 for his shares and \$4,000 for the holiday pay.

Mr Blundell told the Tribunal that in the afternoon he gave Mr Benjamin a personal cheque for \$9,000 and that the cheque was banked on that same day. He said that unfortunately at 5pm he had been tied up with a customer and was not able to farewell Allen personally. He did, however, he said phone him the next morning to apologise for this and wished him well for the future. He said that at no time did Allen Benjamin raise any objection with him about the circumstances of his termination or give any indication that he was unhappy.

He went on in his evidence to say that he believed that he and Mr Benjamin had reached an agreement over the terms of the sale and the termination of his employment and he was surprised that it is now being claimed that Mr Benjamin was unfairly dismissed.

28 The adjudicator, in the course of his decision, briefly summarised material aspects of the evidence of Mr Benjamin and his wife (Mrs Kay Benjamin) concerning Mr Benjamin's sale of his shares in 121 Marine Centre to Mr Blundell on 29 August 2000 and the material events that allegedly occurred beyond that date. The respondent and his wife were the only witnesses who gave evidence in support of Mr Benjamin's case.

29 Mr Benjamin contended that, following his return to work to the company upon a full time basis following his knee surgery, Mr Blundell asked him if he would be prepared to sell his shares to him. The adjudicator materially summarised from this point onwards Mr Benjamin's evidence at p3 of his decision thus:

The company, Mr Benjamin said, had made a profit in the year ending March 2000 and so he asked if there was going to be a dividend paid. Mr Blundell advised him that, "No, as there was not sufficient money in the kitty" and accordingly Mr Benjamin said he felt that there was not much use in holding on to the shares and so he asked Mr Blundell to make him an offer.

Mr Benjamin said he was given a written offer to buy his shares dated 22 August 2000 – see exhibit "2" and was given a day to think about it. The document he was given, he said, commenced, "I have decided on the following course of action to proceed with the buy-out." Mr Benjamin said he was given no opportunity to negotiate the sale and he felt he was in a hopeless bargaining position. Mr Benjamin said that when Mr Blundell came in the next day, he asked him whether he had accepted the share offer and Mr Benjamin replied, "Yes" and as he was about to say that he did not accept paragraph 6, Mr Blundell chimed in and said, "You can leave now." Mr Benjamin said that he has a bit of a stutter and cannot always get words out quickly.

He said that he was somewhat stunned by this as he could not believe that after 15 years of loyal work Mr Blundell was treating him like this. He said he found the clearing out of his desk and the sudden ceasing of any income very humiliating and he took a long time to deal with what had happened. He said it really shook his confidence and his self-esteem.

Mr Blundell said that it took five months to get another job and believed that he had been treated very badly.

30 In his brief summary of Mrs Benjamin's evidence, the Tribunal observed at pp3-4 of that decision that:

Mrs Benjamin gave evidence in support of her husband and told the Tribunal that she was a District Nurse and had been a Nurse for a period of 30 years and was currently employed by the Wāitemata District Health Board.

She said that the termination of Mr Benjamin's employment had a devastating effect on him and after 15 years of employment with John Blundell, did not expect that he would ever be treated in the way he was. She went on that Mr Benjamin was normally a happy and outgoing person. However, after this experience he became withdrawn and quiet and could not sleep. She said he lost his appetite and ate little and would simply wander about the house.

She said that he became depressed and found it difficult to motivate himself. He had always been a confident person and she said he had the right personality for a salesman as he related well to people but he lost that confidence and self esteem and felt very embarrassed about having his employment terminated. Mrs Benjamin said that he had always prided himself on being a good, loyal and hard-working employee and he now found himself with no job and no references.

Mrs Benjamin said that it took about four months for Mr Benjamin to deal emotionally with his termination and she encouraged him to set goals and seek some references from customers, which she said they gave willingly.

Those references restored some of his confidence but it was nevertheless a terrible time for him and she felt that the worst part was that he believed he had been betrayed by someone he had worked for for so long and given such loyal service.

31 I shall subsequently address further material aspects of the evidence which are germane to the present appeal.

32 Mr Benjamin contended he was unjustifiably dismissed from his employment by the company on 29 August 2000.

33 121 Marine Centre contested this from the outset. The company's contention consistently was that Mr Benjamin's contract of employment was terminated by mutual consent of the parties to it – that is to say, Mr Benjamin and the company – on 29 August 2000.

34 Mr Benjamin promptly formulated his contended grievance and related employment claims to the company through his Henderson solicitor, Mr David Jury, by letter dated 6 September 2000. He contended that the respondent was unjustifiably constructively dismissed from his employment – rather than actually dismissed – on 29 August 2000. Mr Jury also formulated claims for.–

- unpaid holiday pay in the sum of \$4,038.46;
- payment in lieu of 3 months' notice of termination of employment which the employer had not paid to Mr Benjamin, that is to say the sum of \$11,250 (gross); and
- a substantial claim for contended redundancy compensation based upon a formula – there being no redundancy agreement between the parties to this effect – of 6×2 ; the advanced aggregate of this claim, which was later not proceeded with, was \$17,307.69.

35 The formulated grievance claim was wholly rejected by the company through Mr Eggleston, counsel's letter being dated 14 September 2000.

36 The contested proceedings, still founded primarily in Mr Benjamin's statement of claim for his contended constructive unjustifiable dismissal, were commenced in the Employment Tribunal, Auckland, on 14 November 2000. The statement of claim did not include – nor could it sustainably include – a claim for redundancy compensation against and affecting the company. Mr Benjamin, then the applicant, sought -

- an award of compensation for his contended humiliation, loss of dignity, and injury to his feelings of \$15,000;
- a payment of 3 months' salary "*in lieu of notice*" of the termination of his employment, that is say in the sum of \$11,250;
- an award of holiday pay allegedly owing to him by the company in the sum of \$4,038.46;
- claims for quantified interest upon the award of holiday pay sought and the award of 3 months' salary in lieu of notice, such interest to run from 29 August 2000;
- a claim for a penalty of \$2,000 for contended breach by the company of Mr Benjamin's employment contract;
- and a claim for costs.

37 Significantly, I remark, notwithstanding the claim for contended constructive unjustifiable dismissal, the statement of claim also pleads in the third cause of action, claims allegedly founded in a grievance setting – that is to say the applicant's contention that he was simply unjustifiably dismissed on 29 August 2000, without notice, and in so proceeding the company was also in breach of an implied term of Mr Benjamin's employment contract rendering the dismissal unjustifiable, and that such action also amounted to a breach by the company of its employment contract with Mr Benjamin.

38 The contested proceedings were duly heard by the Employment Tribunal (Mr T E Skinner) on 24 May 2001 and his reserved decision was delivered to the parties on 10 September 2001.

39 The adjudicator upheld the grievance of contended unjustifiable dismissal and made the following awards in favour of Mr Benjamin against and affecting 121 Marine Centre, namely –

- (i) a compensation award of \$5,000 pursuant to s40(1)(c)(i) of the Employment Contracts Act 1991;

- (ii) a wage reimbursement award of \$11,250 pursuant to s40(1)(a) of the Employment Contracts Act 1991 *"which is the equivalent of 3 months' lost salary"*;
- (iii) an award for unpaid holiday pay quantified in the sum of \$4,000; and
- (iv) an award of costs would obviously have been made by the adjudicator in favour of Mr Benjamin against and affecting the company, but the parties, with the assistance of counsel, were afforded the opportunity of settling costs issues between them within a specified timeframe or, failing such settlement, to each file a memorandum concerning costs and expenses, thus enabling the adjudicator to determine the issues upon the papers so filed. The filing of an initiating memorandum by counsel for Mr Benjamin and a memorandum in reply by counsel for the company was timetabled by the Tribunal. I infer that the costs issues have not been dealt with between the parties, given the pending appeal by 121 Marine Centre.

The present appeal

40 The company's appeal to this Court is confined to the following sole ground, that is to say –

"(1) Given the Tribunal's specific finding that the respondent had not made any attempt to mitigate his loss, the Tribunal was wrong to award the respondent 3 months' lost wages.

41 There are certain aspects of the appeal which I now conveniently address. First, the wage loss award was specifically made by the adjudicator under s40(1)(a) of the Employment Contracts Act 1991. This particular subparagraph expressly empowered the Employment Tribunal upon its determination that the particular employee in the case before it has a personal grievance against and affecting the particular employer –

... in settling the grievance, provide for any one or more of the following remedies:
 (a) *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:*

42 This particular award obviously was not, I hold, an ordered payment contractually, of a common law character, in lieu of 3 months' notice which the company did not give Mr Benjamin upon the termination of his employment on 29 August 2000. The award was, I hold, a payment ordered in the exercise of a grievance jurisdiction of the Tribunal pursuant to s40(1)(a) of the Employment Contracts Act 1991, just as the adjudicator could have made the payment pursuant to s41(1)(b) of the Employment Contracts Act 1991.

43 The adjudicator confined this particular award to a salary loss of 3 months only, notwithstanding that Mr Benjamin's case was, in a salary loss setting, that he was out of work for a period of 5 months before he commenced alternate employment in February 2001 with Anzor Fasteners.

44 Irrespective of precisely how and why this 3 months wage loss was ordered by the adjudicator, the appellant, through Mr Eggleston, submits that the contended persisted-in failure by Mr Benjamin to diligently mitigate his salary loss by conscientiously seeking out alternate employment, led to a situation where no salary reimbursement award should justly be made in favour of Mr Benjamin, whether pursuant to s40(1)(a) and/or s41(1)(b) of the Employment Contracts Act 1991.

45 This advanced view of the situation is, I immediately emphasise, absolutely rejected by Mr Benjamin through Ms Bolwell.

46 I shall address these contested issues in a mitigation of loss setting in due course.

The determination by the Tribunal

47 There has, I now re-emphasise, been no appeal against the Tribunal's decision, except in the material aspects addressed in the company's appeal concerned with the wage reimbursement award of \$11,250. Furthermore, there has been no cross-appeal by Mr Benjamin concerning any aspect of the Tribunal's decision.

48 The adjudicator at p6 materially found that Mr Benjamin was unjustifiably dismissed by the company on 29 August 2000, and that what then occurred did not comprise a mutually agreed termination of the parties' employment relationship. The adjudicator succinctly then held:

The first matter to be considered by the Tribunal is whether there was a mutual agreement to end the employment relationship or was there in fact a sending away, which resulted in an unjustified dismissal.

I have carefully considered clause 6 of the document headed "Buy-Out of 7,500 shares of Allen Benjamin" (exhibit "C") which states: "Allen to retire from 121 Marine at earliest after completion of share transfer documents etc."

In his evidence Mr Benjamin said that whilst he accepted the purchase arrangement in regard to his shares, he was about to object to clause 6 when Mr Blundell cut him off and said, "You can go now."

I have carefully considered the wording of that clause and have reached the conclusion that if the retirement is to take place at earliest after completion of share transfer documents, what does earliest mean? Was it intended by the parties that Mr

Blundell would decide what was earliest or is Mr Benjamin entitled to have some discussion to establish what would be convenient for him?

I notice that the document is not signed by Mr Benjamin and that in his evidence Mr Blundell agreed that Mr Benjamin did indicate to him that the parting of the ways as it were was not mutual even though Mr Benjamin had accepted the offer with regard to shares.

Under cross-examination Mr Blundell also agreed that Mr London had not been required to leave the company straight away but had worked out some notice period when he had agreed to sell his shares back to the company.

Mr Benjamin was entitled to have some input into the timing of his departure from the company and he was denied this by the actions of Mr Blundell and it is therefore my view after careful consideration that there was a sending away rather than a mutual agreement and this resulted in an unjustified dismissal.

49 In so holding, the adjudicator brought fully to account the content of Exhibit C, and especially the prefatory recital inserted by Mr Blundell, that is to say:

I have decided on the following course of action to proceed with the buy-out.

There was nothing that was “mutual” in that recital, in the Tribunal’s concluded view. He held that this contended agreement only refers “to the wishes of one party and was not signed by Mr Benjamin as being agreed to and so it cannot in my view stand as a mutual agreement between two or more parties”.

50 The Tribunal explained at p7 of its decision, how and why it rejected Mr Blundell’s contention that the sum of \$9,000 paid to Mr Benjamin for his shares allegedly included a sum of \$4,000 to cover holiday pay. In short, Mr Blundell in his briefed evidence had contended that he calculated the price of \$5,000 for the shares at a unit value of .66 cents each and included a further sum of \$4,000 as being more than sufficient to cover any entitlement which Mr Benjamin had for unpaid holiday pay. The adjudicator, however, cogently held that Exhibit C, which was handwritten by Mr Blundell and which sets out the terms of the proposed sale by Mr Benjamin of his shares, “makes no reference whatsoever to that [that is to say, the briefed account of Mr Blundell] being the basis on which Mr Benjamin was to sell his shares. What Exhibit C concerns and states with unmistakable clarity was, as the adjudicator held, “that Mr Blundell will pay a sum of \$1.20 per share making a total of \$9,000.” (p7 Tribunal decision). Furthermore, in the Tribunal’s expressed view, it was most unlikely, given that Mr Blundell was obviously an experienced businessman, that he, in drafting Exhibit C, would make such fundamental errors. These errors concerned, the adjudicator stressed, the unit price being offered by Mr Blundell to Mr Benjamin for his shareholding of 7,500 shares – that is to say, \$1.20 for each share

rather than the .66 cents referred to in Mr Blundell's briefed evidence – and also the aggregate price for the shares – that is to say, \$9,000 for Mr Benjamin's shareholding of 7,500 shares.

51 I now re-emphasise that in making a salary loss award of \$11,250 (gross) in favour of the applicant being the declared "*equivalent of three months' lost salary*", the adjudicator did not explain precisely why he so quantified this award in favour of Mr Benjamin.

52 The adjudicator, having determined the salary loss award which he made in favour of Mr Benjamin, then immediately addressed the compensation award (refer to s40(1)(c)(i) of the Employment Contracts Act 1991) for humiliation, loss of dignity, and injury to feelings which the grievant had experienced through his unjustifiable dismissal.

53 Significantly in this setting the Tribunal acknowledged that he had "*considered carefully*" the material evidence of Mrs Benjamin who, the adjudicator recognised, was "*a qualified and experienced Nurse*". She gave evidence concerning the significant extent of the emotional upset which Mr Benjamin experienced through the termination of his employment. The adjudicator then materially remarked at p7 of his decision –

During the next five months, however, there is no evidence to suggest he [Mr Benjamin] sought any counselling other than the advice and support given him by his wife and nor did he make any effort to mitigate his loss during that period.
[The emphasis is mine.]

54 Accordingly, this accepted ongoing failure by Mr Benjamin to mitigate his loss during the acknowledged 5-month period he remained out of work was expressly brought to adverse account against him by the adjudicator in this immediate setting, but was not expressly so brought to account in a salary loss setting.

55 I recognise that there are a number of "ifs" and "buts" which may explain why the adjudicator elected to proceed as he did.

56 I now turn to the developed arguments of counsel.

The opposing submissions

Argument for the appellant

57 Mr Eggleston has submitted that the wage reimbursement award made in Mr Benjamin's favour in the gross sum of \$11,250 should justly be wholly set aside. In

support of his argument, counsel has significantly relied upon the Tribunal's determination in a compensation setting that Mr Benjamin did not make any effort to mitigate his loss during the 5-month period he remained out of work following the termination of his employment by the appellant on 29 August 2000.

58 Counsel has also referred to material evidence given by the respondent and his wife concerning the consequences of Mr Benjamin accepting the share purchase offer which Mr Blundell had made to him. As counsel submitted in paragraph 12 of his prepared argument, Mr and Mrs Benjamin knew – as they acknowledged under cross-examination – that acceptance of the share offer “*would necessarily entail the termination of the respondent's employment.*” They acknowledged, counsel correctly submitted, that the termination of the respondent's employment was simply one of the matters that they brought to account before deciding to accept the offer. Their appreciation of the position was that the termination of the respondent's employment would not occur immediately but within a period of 1 to 3 months' time.

59 In this immediate setting at p4 of the transcript the following exchanges occurred between counsel and Mrs Benjamin concerning the discussion which she had had with her husband on the evening of 28 August 2000 about the share purchase offer he had received that day from Mr Blundell, namely:

<i>EGGLESTON</i>	<i>The night that he came home with the offer about the \$9,000, did he discuss that with you?</i>
<i>KAY BENJAMIN</i>	<i>Just that he had had an offer for the shares yes.</i>
<i>EGGLESTON</i>	<i>And did he explain to you that if he accepted the offer it meant that he would be leaving his work?</i>
<i>KAY BENJAMIN</i>	<i>He thought that that looked as though John Blundell wanted him to leave, yes.</i>
<i>EGGLESTON</i>	<i>So you would have discussed whether that was the right thing to do?</i>
<i>KAY BENJAMIN</i>	<i>Well I said to him that if he wanted to sell the shares and he didn't feel that they were paying as we had expected that they would pay, that that was reasonable, but I said to him you do have to go back and negotiate what he means by believing [sic] [be leaving] because how long do you think that that means, how long are you expecting to work and Allen said to me well I am paid on a monthly contract so would expect that I would have to at least work out a month, and since we are going into the busy time he said I expect that I will work probably until Christmas but there will probably be no job after that. So I said well if you feel that that is a reasonable thing to do then that will be fine, because there was now an unpleasant atmosphere between them.</i>
<i>EGGLESTON</i>	<i>So as you recall it, Allen was thinking it would be anywhere between a month an[d] perhaps Christmas?</i>
<i>KAY BENJAMIN</i>	<i>Yes.</i>

60 Counsel submitted, in the material circumstances of this case, that Mr Benjamin so failed to mitigate his salary loss through failing to diligently seek out alternate employment,

and that no wage reimbursing award should have been made in his favour by the Tribunal. Within the context of his developed argument, Mr Eggleston relied on *Pascoe v Covic Motors Ltd* [1994] 2 ERNZ 152; *Argosy Imports Ltd v Lineham* [1998] 3 ERNZ 976; and *Ter Haar v Eliot-Cotton Associates* [1993] 1 ERNZ 371.

61 Mr Eggleston submitted that an evaluation of how and why Mr Benjamin did not conscientiously seek out alternate work demonstrates that his ongoing failure/deferment to do so comprised his deliberate choice. In these circumstances, Mr Eggleston submitted in paragraph 3 of his structured argument that *"the Tribunal acted in error when it awarded three months' lost salary, after specifically concluding that the respondent had failed to make any attempts to mitigate his lost earnings during that period."*

62 Mr Benjamin (*inter alia*) stated that, before realistically he could actively begin looking for work, he sought to obtain references from customers/clients whom he knew at 121 Marine Centre. Counsel has emphasised, however, in paragraph 18 of his prepared argument that, of the four references actually obtained by the respondent, the first is dated 22 November 2000 and the final reference is dated 6 December 2000. Accordingly, the obtaining of references – which counsel described aptly as a simple exercise – took Mr Benjamin over 3 months to accomplish. In counsel's contention, a delay of this magnitude demonstrates that Mr Benjamin *"was not taking steps or sufficiently effective steps to mitigate his loss"* (argument, paragraph 18).

63 Mr Benjamin strongly criticised his employer for not supplying him with a reference, contending that it was extremely difficult to satisfactorily explain to prospective employers that he had worked for the appellant for 15 years but had no reference concerning his employment. Under cross-examination, however, the respondent acknowledged that he had not sought a reference from Mr Blundell, although he accepted that he could quite simply have done so on 30 August 2000 when Mr Blundell telephoned him (transcript, p29). Furthermore, Mr Blundell acknowledged under cross-examination by Ms Bolwell at p41 and p58 of the transcript that, had Mr Benjamin expressly asked him for a reference, then he would have provided him with one and, furthermore, provided him with a favourable reference commenting (*inter alia*) *"on his long and loyal service"*.

64 I shall not now traverse every argument advanced by Mr Eggleston in the mitigation of loss setting. It is sufficient to confirm that I have brought counsel's submissions fully to account. He has correctly submitted that Mr Benjamin did not actively seek employment until just prior to Christmas 2000. Mr Benjamin said that he needed a break and was uncertain whether this break would take a week or a month or 2 months. He said at p29 of

the transcript that he *"just needed time out, I just needed a break"*. He confirmed when asked by Mr Eggleston how many advertisements he answered for retail sales positions, that he did not answer any such advertisements. When he was asked further by counsel at p31 of the transcript whether he saw any retail sales positions advertised, he responded *"There is always plenty of work out there, I said that, yes, no, the answer is no."* Counsel then asked him whether he used the time available to him to do jobs around the house, to which Mr Benjamin responded that he did such jobs and *"... yes, that would be correct"*.

65 Mr Eggleston strongly submitted in paragraph 25 of his prepared argument that, where the respondent – as occurred here – had made *"a conscious decision to have a break rather than seeking employment"*, then his former employer should not be held accountable for any remuneration lost because of a result of that particular decision to defer seeking out alternate employment by, instead, having a break from ongoing employment.

66 Counsel acknowledged that, in an appropriate case where an employee has suffered significant trauma because of the manner of his dismissal and the emotional consequences have impaired the employee's capacity and ability to obtain alternate employment, this Court has ruled that the affected employee should not face a reduction in remedies. This approach has been taken in such a case upon the basis that the employee's failure to mitigate his loss is attributable to the employer's culpable conduct.

67 Mr Eggleston acknowledged that both the respondent and his wife had given evidence concerning the highly adverse effects that the termination of his employment on 29 August 2000 allegedly had upon Mr Benjamin's confidence and self-esteem. Counsel submitted in paragraphs 28-31 (inclusive) of his prepared argument how and why, in his contention, this was not a case where Mr Benjamin should be excused from his ongoing sustained default in failing to mitigate his accruing losses.

68 Mr Eggleston submitted that the Tribunal failed to give appropriate consideration to the consequences of Mr Benjamin's failing to diligently mitigate his loss but deciding instead to have a break from paid employment and to purposefully occupy himself undertaking outstanding work associated with his own property. Counsel submitted that this decision which Mr Benjamin made interrupted the chain of causation rendering the respondent's continuing loss of remuneration and out-of-employment situation no longer a consequence of his unjustifiable employment termination by the appellant on 29 August 2000.

69 Notwithstanding all that Ms Bolwell has urged upon me to the contrary in her structured argument, there is I consider considerable force in this particular appeal concerning material aspects of Mr Eggleston's argument.

Argument for the respondent

70 Ms Bolwell has submitted that, in quantifying the 3-month salary loss as a just wage reimbursement award, this award was almost certainly made pursuant to s41(1)(b) of the Employment Contracts Act 1991 (see paragraph 2 of Ms Bolwell's prepared submissions).

71 In counsel's prepared argument, whether the adjudicator made this award under the subsection immediately cited or pursuant to s40(1)(a) of the Employment Contracts Act 1991, then in either event the Tribunal – Ms Bolwell has submitted – “*properly exercised its discretion in coming to the decision that it did*” (paragraph 3 of her argument). Ms Bolwell has strongly submitted that this Court, in its principled appellate role, should not interfere with the Tribunal's exercise of its discretion. To so proceed, the appellant must show, counsel has submitted, that the adjudicator made an error of principle or the wage reimbursement award was “*plainly wrong*”. Counsel relied in this particular setting upon the principled approach outlined by the Court of Appeal in *Pay v Pay* [1968] NZLR 140 at 147 (lines 46-51).

72 In paragraph 5 of her prepared argument, Ms Bolwell has also relied upon the principled cited remarks of Justice Sinclair in *Blair v Blair* (1980) 4 MPC 19. Furthermore, counsel has relied on the well established principled reluctance by an appellate court to interfere with a discretionary determination made by the trial Judge where the decision impugned upon appeal is based, in part, “*upon the observation of viva voce witnesses*” (paragraph 6 of counsel's prepared argument).

73 Ms Bolwell further submitted how and why, in her view, given the contended scheme of the Employment Contracts Act 1991 concerning discretionary awards in favour of a successful grievant – and especially a wage reimbursement award when the loss of remuneration has been sustained as a result of a personal grievance – that this Court in its appellate role should be especially reluctant in its principled approach to revisit such awards.

74 Counsel has purposefully relied upon the principled remarks made by Chief Judge Goddard in *Trotter v Telecom Corp of NZ* [1993] 2 ERNZ 659 at 693; and the principled observations made by Justice McGrath in delivering the judgment of the Court of Appeal in *Ark Aviation Ltd v Newton* [2001] ERNZ 133 at 143 who then remarked in paragraph 41 that

the underlying policy encompassed in s26(d) and the broad discretionary scope of the remedies addressed in the Employment Contracts Act 1991 confirmed that –

The purpose of the direction to assess the nature and extent of remedies, including sums which in general must be awarded to reimburse lost wages according to what is thought just and equitable, is to enable the Tribunal and the Employment Court to do justice to the overall situation that is proved at the hearing of the grievance. That is ultimately done when determining remedies. The statutory provisions should be interpreted to give them full effect, consistent with this statutory purpose.

75 Ms Bolwell, in her prepared argument, addressed how and why in her submitted view the unjustifiable dismissal of Mr Benjamin in this particular case was of an aggravated character, and amply justified upon a compensatory basis the wage reimbursement award made by the adjudicator. I am now referring to counsel's structured submissions in paragraphs 9 to 19 (inclusive) of her prepared argument.

76 As to the mitigation of loss argument advanced by the appellant upon this appeal, Ms Bolwell submitted in paragraph 20 that the obligation to mitigate must, of course, be considered having regard to all the circumstances of the particular personal grievance and dismissal in contention in a particular case.

77 Counsel submitted in paragraph 20 of her prepared argument that the adjudicator brought fully to account in his exercisable discretion the circumstances of this case at p7 of his decision, and determined the wage reimbursement award with an insightful understanding of what was justly called for.

78 Ms Bolwell, in paragraphs 20 to 21 of her prepared argument, has submitted how and why in her contended view it would be unjust for this Court in the particular circumstances of this case, as clearly established by the evidence, to rescind or reduce the wage reimbursement award made by the Tribunal upon the basis that Mr Benjamin had not discharged his obligations to mitigate his wage loss/es by diligently making reasonable endeavours to purposefully obtain alternate employment.

My determination of this appeal

79 At the outset, I now re-emphasise my awareness, that notwithstanding that Mr Benjamin was out of work for a period of 5 months following his unjustifiable dismissal on 29 August 2000, the adjudicator in the material circumstances of this case, as he discerned

those circumstances, made (*inter alia*) a wage reimbursement award quantified for a 3-month gross wage loss only.

80 In my considered view, Mr Benjamin certainly failed to mitigate his earnings loss/es following the termination of his employment by the appellant, by failing to diligently and purposefully seek out alternate employment. I recognise – as, I hold, that the adjudicator did – that, to an extent, Mr Benjamin was emotionally incapacitated by the circumstances in which his employment with 121 Marine Centre was terminated on 29 August 2000. If that degree of capacitation had been, in my view, appropriately brought to account to the extent that it should have been so brought to account, in a mitigation of loss setting, then a just award for wage reimbursement could not, I consider, reasonably have exceeded half of that awarded by the adjudicator.

81 I am of the concluded view that, in the principled exercise of his discretion in the material circumstances of this case, the adjudicator, in the wage reimbursement award which he ordered in favour of Mr Benjamin on the basis of a salary loss for 3 months, doubled, with respect, what would have been a justly appropriate award.

82 I hold that the salary loss award should have been \$5,625 only, comprising a gross salary loss for 6 and a half weeks only beyond 29 August 2000. In so concluding, I confirm that I have brought fully to just account all of the submitted arguments addressed to me by opposing counsel.

My order

83 I now formally allow the appeal by 121 Marine Centre Limited, to the extent that I substitute for the salary loss award made by the Employment Tribunal in the sum of \$11,250 (gross) in favour of Glenn Allen Benjamin, a reduced salary loss award in favour of the respondent in the sum of \$5,625 (gross). This substituted salary loss award shall, I order, be now forthwith paid by 121 Marine Centre Limited to Glenn Allen Benjamin.

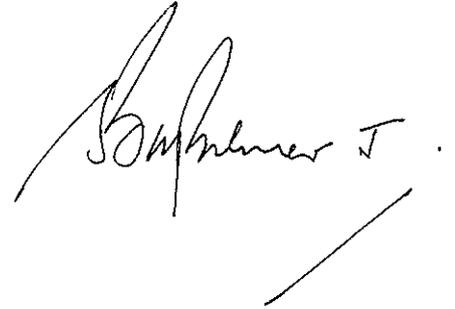
Costs

84 I now order that Mr Eggleston shall forthwith submit a memorandum concerning costs and expenses associated with the appeal to this Court, and shall copy that memorandum to Ms Bolwell on behalf of the respondent. Ms Bolwell, upon receipt of Mr Eggleston's memorandum, shall forthwith submit a memorandum concerning costs and expenses in reply, and shall copy that memorandum to Mr Eggleston. Given the outcome of this appeal, nothing is to be inferred from the particular order in which I have required memoranda to be submitted. I shall, in due course, deal with costs upon the papers.

Final remarks

85 I had anticipated that I would have delivered this decision to the parties at an earlier date. I regret that I have been unable to do so, because of priority that I have attached to the delivery of judgments in unrelated cases having, in my view, greater degrees of urgency than this case.

86 At the commencement of the Tribunal hearing, Mr Benjamin's full name was corrected by Ms Bolwell and notified to the adjudicator. No formal change of name of the applicant was ordered by the adjudicator and, for the avoidance of doubt, I now make that order, the intituling in the case reflecting the correct position.

A handwritten signature in black ink, appearing to read "Benjamin J.", with a long horizontal stroke extending to the right below the signature.