

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 685
3254839

BETWEEN LYNDON BARLOW
Applicant

AND CBT SOUTH LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Dave Cain, advocate for the Applicant
Mary-Jane Thomas, counsel for the Respondent

Investigation Meeting: 4 September 2024 in Invercargill

Submissions Received: 5 September 2024 from the Applicant
9 September 2024 from the Respondent

Determination: 19 November 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Lyndon Barlow worked for fifteen years in construction before applying for a labourer role with CBT South Limited (CBT), in early 2023. Before commencing his employment with CBT Mr Barlow had been self employed as a roofer and was renovating his home.

[2] Mr Barlow's employment with CBT commenced on 27 February 2023. He was party to a written individual employment agreement (the employment agreement) with CBT. On 26 May 2023 Mr Barlow was dismissed from his employment during the first 90-days of his employment.

[3] Mr Barlow wants the Authority to resolve employment relationship problems that he says arose in his employment with CBT.

[4] He says that he was unjustifiably disadvantaged in his employment with CBT because the majority of the work he undertook was cladding and roofing which was not the agreement reached prior to commencing employment. Mr Barlow says that despite raising concerns about that matter with CBT no steps were taken to address the issue.

[5] Mr Barlow says that his dismissal was unjustified. He does not accept that the 90-day trial provision under ss. 67A and 67B of the Employment Relations Act 2000 (the Act) is valid primarily because he says that he did not sign the agreement until after he started work. He seeks remedies of compensation, reimbursement of lost wages, a penalty for breach of good faith and costs.

[6] CBT is a duly incorporated company carrying on the business of building and house construction. Its registered office is in Invercargill. The sole director of CBT is Aaron Schreurs.

[7] CBT does not accept that Mr Barlow was unjustifiably disadvantaged in his employment. It says that roofing and cladding comprised about 50 percent of the work Mr Barlow did but he also undertook other building work during the period he was employed. CBT does not accept that Mr Barlow raised concerns or voiced dissatisfaction about the work he was undertaking with Mr Schreurs.

[8] CBT says that it relied on a valid 90-day trial period in the employment agreement in dismissing Mr Barlow and he is not entitled to bring a personal grievance in respect of his dismissal.

[9] Further it says that if the Authority was to find that a personal grievance or personal grievances were made out the claims for compensation and three months lost wages are excessive and/or not linked to the loss that flows from any personal grievance. CBT does not accept a penalty is appropriate.

The Authority investigation

[10] The Authority held an investigation meeting in Invercargill on 4 September 2024 and heard evidence from Mr Barlow and Mr Schreurs. The Authority also heard evidence from a former employee of CBT who will be referred to as L. CBT provided a statement of evidence from another witness but as a result of Mr Barlow's evidence, the Authority did not need to hear from them. At the end of the evidence submissions were timetabled and these have now been received.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received from the parties, but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

The issues

[12] The Authority needs to determine the following issues in this matter:

- (a) What are the material provisions of the employment agreement?
- (b) Was there an action on the part of CBT that was unjustifiable and affected Mr Barlow's conditions of his employment to his disadvantage?
- (c) Does the 90-day trial provision in the employment agreement prevent Mr Barlow from bringing a personal grievance in respect of his dismissal?
- (d) The answer to this involves an assessment of the following:
 - (a) When did Mr Barlow sign his employment agreement?
 - (i) Were the notice requirements of the trial provision complied with?
- (e) If the trial provision is not valid then was the termination of the employment unjustified?
- (f) If the dismissal was unjustified what remedies should be awarded and are there issues as to establishing loss, mitigation, and contribution?
- (g) Should there be a penalty awarded for a breach of good faith?
- (h) Should costs be reserved?

What are the material provisions of the employment agreement?

[13] Clause 4 of the employment agreement provides for a 90-day trial period as follows:

4.1 The employee agrees to undertake a trial period for the first ninety (90) days of their employment as follows.

- (i) The trial period will be for the duration of 90 days beginning on the employee's first day of employment.
- (ii) During the trial period, the employer may dismiss the employee by giving one weeks' notice of termination, whether the termination takes effect before, at, or after the end of the trial period.

- (iii) Where the employer dismisses the employee during the trial period, the employee acknowledges that:
 - (a) Despite anything else in this agreement, they are not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal; and
 - (b) The employer does not have to comply with a request that the employer provide a statement in writing of the reasons for their dismissal pursuant to s 120 of the Employment Relations Act 2000 (Act).
- (iv) The employer reserves the right to summarily dismiss the employee for serious misconduct.

[14] Clause 26.2 of the employment agreement provided that the agreement records the entire agreement between the parties.

[15] Appendix A to the employment agreement contains specific terms for Mr Barlow. The hours of work are recorded as normally 40 hours per week worked between 8.00am and 5.00pm with additional hours by agreement. The gross hourly rate is \$29 for each hour worked. Appendix A describes Mr Barlow's position as a carpenter/labourer but in Appendix B which contains the job description the position is referred to as a labourer. Neither party disputed that Mr Barlow was employed as a labourer.

[16] The job description in appendix B to the employment agreement does not set out with any degree of specificity the nature of the labouring activities to be undertaken. The purpose of the role is described as to "undertake labouring work, and general building work as required." The key task of labouring requires amongst other matters in Appendix B that labouring activities are to be carried out as directed. The employee is also required to utilise installation skills, knowledge, and experience to complete the work and eliminate any rework. The need to participate within a small project team to meet the project requirement is set out.

Unjustified disadvantage?

[17] Section 103(1)(b) of the Act defines an unjustified disadvantage grievance as below:

103 Personal grievance

- (1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—

(a) ...

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

...

[18] To fall within the scope of the definition an action by CBT needs to affect Mr Barlow's conditions of employment and result in him being disadvantaged. The action needs to be unjustifiable. Justification of an action is assessed by applying the test in s 103A of the Act whether CBT's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[19] Mr Barlow accepted the role with CBT on the understanding that he would have a range of construction duties and that an apprenticeship would follow after the first three months of employment. Mr Schreurs does not accept that he promised Mr Barlow a building apprenticeship after three months. Mr Schreurs said at the time Mr Barlow worked for CBT he already had two apprentices on site and no intention of taking on a third. Under questioning he agreed that an apprenticeship was talked about at interview as something that he may look at for Mr Barlow down the track.

[20] The Authority could not conclude from the evidence that an offer of an apprenticeship was made. There is no reference to an apprenticeship in the employment agreement that has, as set out earlier, an entire agreement clause.¹ It is more likely than not an apprenticeship was expressed as a possibility at some point in the future after a period of three months. That was the extent of the expectation that Mr Barlow could have in that respect.

[21] Mr Barlow says that he was deceived about the nature of the role and believed Mr Schreurs received the benefit of his roofing/cladding experience at a lower hourly rate. The evidence has not established any intent in that regard on the part of Mr Schreurs and Mr Barlow's hourly rate was the same as most of the other employees at CBT.

¹ Employment agreement clause 26.2.

[22] Mr Barlow does not accept that only 50 percent of his work was roofing and cladding and says that it was 76.92 percent. He did not take issue with Mr Schreurs evidence that 25 percent of the work undertaken by CBT is roofing and cladding exteriors. Mr Barlow said that after about two months he raised concerns about the nature of the work he was undertaking one or more times each week. He said that Mr Schreurs did not take any steps to resolve his concerns and he felt that Mr Schreurs began to ignore him when the concerns were raised. Mr Schreurs said that at no stage did Mr Barlow raise dissatisfaction about the nature of his work and bring concerns to his attention. His evidence was that it takes years to become an experienced tradesperson and three months viewed overall is a limited timeframe to focus on the type of work done and the absence of variety.

[23] Mr Barlow knew some of the work he would be undertaking at CBT would be roofing and cladding and that was the skill base he came to CBT with and the knowledge that he could impart to other employees. His concern was about the lack of variety in the work impeding his professional development. The job description in his employment agreement focussed on the carrying out of activities as directed and utilising skills, knowledge, and experience to complete the work. Had the relationship continued beyond 26 May 2023 the evidence suggested there were more projects. A greater variety of work could be expected to have been undertaken. The evidence supported other workers also had areas in which they were skilled; being framing, painting, and plumbing and there was sharing of knowledge around these different areas between the employees in the small business.

[24] Mr Barlow says that he raised concerns with Mr Schreurs about the type of work he was undertaking. If concerns were raised, which Mr Schreurs denies, the evidence supported it was at about the two month point of employment and only a few weeks before the relationship ended. Some time for a change to allocated tasks would be required. Mr Barlow was also on sick leave for eight to ten days in early May. The claim in those circumstances impresses as premature where the acquisition of knowledge and learning in the building industry takes years.

[25] If there was disadvantage for Mr Barlow, I am not satisfied that directing Mr Barlow to carry out work that was required, not inconsistent with his job description, his skills, and, at least to an extent, his expectations, was justified. It was what a fair

and reasonable employer could have done in all the circumstances for the first few months of employment.

[26] A personal grievance claim of unjustified disadvantage is not established.

Valid 90-day trial period?

The termination of employment

[27] On 26 May 2023 after a lengthy and, in all likelihood at times heated telephone conversation between Mr Barlow and Mr Schreurs about cladding of two cabins Mr Barlow received a text message terminating his employment that evening. It was followed up with an emailed letter dated 29 May 2023 with the same content.

Dear Lyndon

Your employment is terminated under the 90 day trial period as per the clause in your employment agreement. You are not required to work the notice period. Please return any equipment and property belonging to CBT South by Wednesday the 31 May 2023.

A final print out of pays will be issued via email, and your final pay will be presented on the 1st of June 2023 as per our normal pay period.

We wish you all the best in the future.

Regards,

Aaron Schreurs

CBT South Ltd

Section 67A of the Act

[28] At the material time s 67A of the Act provided

67A When employment agreement may contain provision for trial period for 90 days or less

(1) An employment agreement containing a trial provision may be entered into by a small-to-medium-sized employer and an employee who has not previously been employed by the small-to-medium-sized employer.

(2) For the purposes of this section and section 67B,—

small-to-medium-sized employer means an employer who employs fewer than 20 employees at the beginning of the day on which the employment agreement is entered into

trial provision means a written provision in an employment agreement that states, or is to the effect, that—

- (a) for a specified period (not exceeding 90 days), starting at the beginning of the employee's employment, the employee is to serve a trial period; and
- (b) during that period, the small-to-medium-sized employer may dismiss the employee; and
- (c) if the small-to-medium-sized employer does so, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

When was the employment agreement signed?

[29] Mr Barlow and Mr Schreurs signed the employment agreement in two separate places. The first was after the final clause in the body of the agreement and the second at the end of appendices A and B to the employment agreement. The date in both places alongside Mr Barlow's signature is 6 March 2023. The date alongside Mr Schreurs' signature is 16 March 2023. Each page of the employment agreement is initialled by Mr Barlow and Mr Schreurs.

[30] In his written statement of evidence Mr Schreurs wrote that Mr Barlow handed him a signed copy of his employment agreement the day he commenced work on 27 February 2023. In his oral evidence he said that Mr Barlow arrived a little late on 27 February 2023 and placed the employment agreement in the office. Mr Schreurs said that he did not look at the employment agreement and could not recall when he looked at it but thought he did so a week or so later.

[31] Mr Barlow does not accept that he signed his employment agreement before starting work on 27 February or placed it in the office on that day. His evidence was that he turned up on 27 February a little late between 7.10 and 7.15am and he was "almost straight into work." He said in evidence that Mr Schreurs was relaxed about the employment agreement. Mr Barlow's evidence was that he signed it on 8 March 2023 not 6 March 2023 after being "retrieved from the workshop" by the office person Belinda who only worked on Wednesday's.

[32] CBT places reliance on a text message from Mr Barlow to Mr Schreurs dated 25 February 2023 asking if he would like him to bring the contract with him on Monday [27 February] or earlier. Mr Schreurs responded by text message on the same day that he could just bring the contract on the Monday.

[33] The Authority accepts the text message exchanges could support the likelihood that Mr Barlow brought his employment agreement with him on 27 February 2023 to work. When the employment agreement was signed is unclear. The dates alongside Mr Barlow's signatures support it was signed after 27 February 2023. Mr Schreurs was not able to confirm in his evidence the agreement was signed before Mr Schreurs commenced employment. The Authority is unable to conclude from the evidence that the employment agreement was signed before Mr Barlow commenced his employment on 27 February 2023.

[34] The Employment Court in *Smith v Stokes Valley Pharmacy (2009) Ltd* has stated that ss. 67A and 67B of the Act should be strictly interpreted as they remove longstanding employee protections and access to courts and tribunals.² In *Smith* the employment agreement was not executed until after the employee had commenced employment. In those circumstances they were not an employee as defined in s 67A of the Act as they were an existing and not a new employee at the time the employment agreement was executed.

[35] The Employment Court in *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper* found a failure to have the employee sign the agreement before they started work was fatal.³ It was stated in *Senate* that an employment agreement is only a draft or proposed agreement until execution and this was consistent with amongst other matters the wording in that matter in the proposed agreement.⁴

[36] Mr Barlow acknowledged when he signed the employment agreement in clause 26 eight separate matters including that "he had read and understood the terms and conditions of employment and accepts the same." As in *Senate* this is consistent with the employment agreement being a draft or proposed agreement until it is signed.⁵

[37] CBT needed to ensure Mr Barlow had signed his employment agreement before he commenced his employment. The evidence did not enable the Authority to conclude that the employment agreement was executed before Mr Barlow commenced employment on 27 February 2023. The 90-day trial period cannot be relied on for this reason.

² *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253 at [48].

³ *Senate Investments Trust Through Crown Lease Trustees Ltd v Cooper* [2021] ERNZ 133 at [43].

⁴ Above n [3] at [43].

⁵ Above n [3].

Notice requirements complied with

[38] The 90-day trial provision in clause 4.1(ii) of the employment agreement provided that CBT may dismiss Mr Barlow by giving one weeks' notice of termination. Payment in lieu was permitted by clause 25.3 of the employment agreement that provided the employer may decide to pay the employee instead of the employee working the notice period.⁶ Mr Barlow was advised when he was dismissed that he was not required to work the notice period. It was not clearly stated in the text and email containing advice of termination that he would be paid in lieu of notice.

[39] The final pay slip did not show CBT paid Mr Barlow one week's payment in lieu of notice as his employment agreement permitted. The Authority questioned Mr Schreurs about this. He said that he left payment of employees to a pay organisation. The final pay slip shows payment for hours Mr Barlow had worked and holiday pay. It then shows a deduction for sick leave taken in advance and an extra PAYE deduction. The "Net (Take Home) Pay" shown on the payslip is negative \$312.24. It appeared from the final pay slip that Mr Barlow owes money to CBT. I am not satisfied from the payslip or the evidence that CBT gave one week's notice or paid Mr Barlow in lieu of working for the notice period as required by the employment agreement and s 67B of the Act.

[40] For both of these reasons Mr Barlow is not barred under s 67B(2) of the Act from bringing a personal grievance claim for unjustified dismissal.

Justification of the dismissal

[41] The justification of the dismissal falls to be considered under the test in s 103A of the Act. The Authority must objectively consider whether the actions of CBT and how it acted were what a fair and reasonable employer could have done in all the circumstances. The dismissal was summary in nature. The procedural fairness requirements in s 103A (3) of the Act were not satisfied. There was no investigation undertaken and concerns were not raised. Mr Barlow did not have a reasonable opportunity to respond to any concerns and have his response considered. These were not minor defects that did not cause unfairness. The dismissal was unjustified. It was not what a fair and reasonable employer could have done in all the circumstances.

⁶ *Ioan v Scott Technology NZ Limited* [2019] NZCA 386 (CA).

[42] Mr Barlow has established his grievance of unjustified dismissal and is entitled to consideration of remedies.

Remedies

Lost wages

[43] Mr Barlow seeks reimbursement of at least three months lost wages. The Authority may in settling a personal grievance provide for the reimbursement to the employee of a sum equal to the whole or any part of wages lost as a result of the grievance.⁷ There must be a link between the grievance and the loss suffered.

[44] Section 128 of the Act provides:

- (1) This section applies where the Authority or the Court determines, in respect of any employee,—
 - (a) that the employee has a personal grievance; and
 - (b) that the employee has lost remuneration as a result of the personal grievance.
- (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
- (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[45] Ms Thomas submits that it is not safe to infer that Mr Barlow has suffered loss and that lost remuneration must be established by evidence.⁸ She refers to Employment Court judgments and Authority determinations where a failure to mitigate loss has resulted in no remuneration being ordered.⁹ More recent judgments of the Employment Court need to be considered as to the current law about mitigation of loss.

⁷ Employment Relations Act 2000 section 123(1)(b).

⁸ *Peden v Tingeys Ltd* [1985] ACJ 471.

⁹ *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EC); *Argosy Imports Ltd v Lineham* [1998] 3 ERNZ 976 (EC); *Wilson v Geovert Ltd* (2015) NZERA 24 and *Knight v Printek Supplies Ltd t/a Datatek Pacific* [2014] NZERA Auckland 470.

[46] In *Maddigan v Director-General of Conservation* the Chief Judge of the Employment Court observed:¹⁰

It is well established that in ordinary breach of contract cases a plaintiff is under no duty to mitigate their losses. No positive duty emerges from the wording of the Act. The key question is not whether a legal duty exists but what prerequisites for reimbursement are. The asserted duty on employees to mitigate their losses, which has become a well engrained mantra in this jurisdiction, tends to be used as an unhelpful shorthand which focusses the inquiry on steps taken, or not taken, by an employee rather than what - if anything - might reasonably have been expected in the particular circumstances.

[47] This approach has been adopted in subsequent Employment Court cases.¹¹

[48] Mr Barlow's evidence was that he did not want to give someone power and authority again and therefore did not want to be a wage worker. He may have been open to a role that assured him a building apprenticeship but at that time those opportunities were very limited.

[49] Mr Barlow reached out to a previous employer in or about mid June 2023 to let them know he was available. They were not in a position to offer work to him but he asked them to spread the word he was looking for work. The evidence supported that it is likely he did not accept a role in Christchurch however I do not conclude that was unreasonable given that he lived in the Invercargill area with his young family. Mr Barlow said that he undertook about three or four cash jobs around the June 2023 time frame to meet his overheads. His evidence when questioned about the value of this work was that it was about \$4,200.

[50] A person I shall refer to as Bill contacted Mr Schreurs at CBT to see if he knew someone suitable to do some cladding on farm buildings in June 2023. Mr Schreurs gave Bill the contact details for Mr Barlow and was likely complimentary about Mr Barlow's roofing and cladding abilities. Mr Barlow did not take the offer of work up. He advised Bill that he was renovating his house. One of the reasons Mr Barlow said he did not accept this work was because Bill had told him that he was a friend of Mr Schreurs and his evidence was that he did not have "full trust/faith it was not a set up."

[51] The failure to take up the work offer needs to be seen in the context of events that occurred on 29 May 2023. After advice about his termination of employment on

¹⁰ *Maddigan v Director-General of Conservation* [2019] ERNZ 550.

¹¹ *Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 219 and *Keighran v Kensington Tavern Ltd* [2024] NZEmpC 28.

Friday 26 May 2023 Mr Barlow attended at the premises of CBT on Monday 29 May. He returned his uniform and company equipment and wanted an explanation why his employment had been terminated because he said he had made sacrifices to go to work for CBT. Mr Schreurs put it in his written evidence that Mr Barlow “insisted on an explanation for his termination.”

[52] Mr Schreurs advised Mr Barlow he did not have to give reasons for the termination because of the trial provision. He said that Mr Barlow then became extremely aggressive and refused to leave the premises. Mr Barlow does not accept that he was aggressive and said that it was Mr Schreurs who was aggressive and abusive which Mr Schreurs denies. Mr Barlow said that when he told Mr Schreurs he would not leave without an explanation Mr Schreurs immediately went to telephone the Police. Mr Barlow said he went and sat in his car until the Police arrived. He was given a trespass notice and did not return again to the site.

[53] Mr Schreurs was likely well intentioned in referring Bill to Mr Barlow. It is understandable however given the events on 29 May 2023 that Mr Barlow would be cautious about a work offer from someone referred by Mr Schreurs. I do not conclude a refusal by Mr Barlow to take up the offer of the work from Bill was unreasonable in the circumstances.

[54] Ms Thomas submits that the IR income summary document from 26 May 2023 to 17 July 2024 which shows only earnings from CBT does not reflect Mr Barlow’s true financial position. She submits that the Authority has no credible evidence that Mr Barlow lost any income whatsoever and it is not credible to believe he stayed at home and only undertook the three or four jobs he said he did. The Authority does not have any credible evidence to support that Mr Barlow undertook more work than what he disclosed in his evidence.

[55] Ms Thomas submits that the relationship would have ended in any event because Mr Barlow refused to do work and believed Mr Schreurs was immoral. Mr Barlow said that he did not do the work on 26 May 2023 because he believed that there could be rotting of the framing timber. The comments, including the use of the word immoral, were related to the duties associated with that. The Authority cannot conclude with certainty the relationship would have ended within a three-month period.

[56] There is a link between the personal grievance established of unjustified dismissal and the lost remuneration. Actual loss of remuneration is greater than three months loss of wages and it is the lesser amount of three months loss that is to be awarded. The Authority is not in the circumstances prepared to exercise its discretion and make an award in excess of three months.

[57] Mr Cain has calculated three months lost wages on the basis of the hours Mr Barlow usually worked of 50 hours per week. The employment agreement in appendix A provides hours of work are normally 40 per week but the employee may be asked to work outside of these hours to meet the needs of the business by agreement.

[58] It is appropriate to calculate three months ordinary time remuneration lost on the basis of 40 hours per week as set out in the employment agreement.

[59] Subject to any issues of contribution Mr Barlow is entitled to be reimbursed three months lost wages calculated on the basis of 40 hours per week multiplied by \$29 per hour which is \$1160 per week. That sum is then multiplied by 13 weeks to arrive at the amount of \$15,080.00 gross.

Compensation

[60] There is a claim under this head for a compensatory award between \$15,000 and \$20,000. Mr Barlow gave evidence about the impact on him of his dismissal. He described the financial difficulties that were caused as a result and the need to use money saved for renovations to meet overheads. When Mr Barlow obtained his role at CBT he did not have time to do the home renovations he had been doing and took out a \$10,000 loan to pay people to undertake the renovations. He had debt to service when dismissed that he would not have had but for his employment with CBT. He was not able to afford some of his children's extra-curricular activities or family outings for a time. There was no cushion for Mr Barlow to reduce the sudden impact of being without income from notice or a payment in lieu thereof or holiday pay.

[61] Mr Barlow said that he had made significant sacrifices to take up the role with CBT and was happy to do this because he thought he would obtain an apprenticeship but was then dismissed. I take into account in assessing compensation that I have found the evidence established any apprenticeship was something to be considered after three months of employment, but the evidence was not to the extent it supported an offer per se.

[62] Although Mr Barlow concluded the dismissal was linked in some way to the telephone discussion on 26 May 2023, he said that the lack of a real explanation, and being trespassed left him devastated. The lack of an explanation I accept did cause distress as that was particularly important to Mr Barlow. He also spoke of the humiliation of being made to look like an aggressor and a danger in front of other people. Ms Thomas submits that it was Mr Barlow's own actions in being aggressive and not leaving when asked that resulted in the Police being called and the trespass order. Mr Barlow denies he was the aggressor during the face-to-face discussion on 29 May 2023. Mr Barlow could however have left the site when asked. That would have avoided a situation where the Police were called and the embarrassment that flowed from that and is taken into account when assessing a compensatory award.

[63] The Authority concludes there was an impact on Mr Barlow from the dismissal. Considering all matters, and where the harm to Mr Barlow sits with similar cases, an appropriate award is in the lower end of the mid range in the sum of \$15,000 subject to contribution.

Contribution

[64] Section 124 of the Employment Relations Act 2000 requires the Authority in deciding the nature and extent of the remedies to be provided to consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance. If the actions require the Authority will reduce the remedies that would otherwise have been awarded.

[65] The Authority needs to be satisfied that the alleged conduct on the part of Mr Barlow was blameworthy. There needs to be a causal link between the actions of the employee and the situation that gave rise to the personal grievance. The Authority needs to then assess the extent of the contribution and how the reduction should be applied.

[66] Ms Thomas relies on the exchanges during the telephone discussion on 26 May 2024 as blameworthy conduct. She refers to Mr Barlow's refusal to undertake a direction to do the cladding on the cabins that she says was reasonable and lawful. Further, that he called Mr Schreurs immoral and accused him of putting profits before ethical practices. Mr Schreurs said that Mr Barlow stated during the telephone discussion that he was responsible for him and his family contracting COVID-19 from

a senior staff member. Mr Schreurs said that he advised Mr Barlow that any liabilities would rest on CBT's shoulders and the company would take responsibility for the build. Mr Barlow responded that a number of senior employees were incompetent and that he had more experience and knowledge in the construction section than anyone else on site. Mr Schreurs, in his evidence, referred to the telephone discussion being the final straw and referred to a number of other incidents and concerns that he said confirmed Mr Barlow was not a team player.

[67] Mr Barlow denies that there was any culpable or blameworthy conduct on his part.

[68] Mr Barlow telephoned Mr Schreurs who was at his child's school camp about concerns with the cladding job on two cabins on 26 May 2023. Mr Schreurs did not accept that there were issues with the two structures. His evidence was supported by L. Mr Schreurs and L said that the concrete pad that the two buildings were placed on had a 1-100 fall or slope and that Mr Barlow failed to notice this and would not listen to a different view. It is more likely than not there was not in fact an issue with the cabins. The evidence was that after Mr Barlow's employment was terminated, the cabins were clad in the normal way.

[69] The evidence did not enable the Authority to conclude that Mr Barlow was not genuine in his view that there was an issue so as to conclude blameworthy conduct in not undertaking the work until Mr Schreurs returned to site. I cannot safely conclude as Mr Schreurs said in his evidence, that he was being set up by Mr Barlow.

[70] Productive relationships are built on good faith behaviour and a requirement for both parties to be active and constructive in maintaining a productive employment relationship. It is difficult to see how a discussion about the level of the cabins between two men experienced in the construction industry deteriorated to the extent that it did. It is likely, objectively assessed, that Mr Barlow refused to accept any possibility that he may be wrong to the extent that he told Mr Schreurs that he was putting profits before ethical practices. There were other comments made that were unhelpful.

[71] The conversation took place when Mr Schreurs was at a disadvantage because he was away from site. He was unable to show Mr Barlow why he considered the cabins were in alignment. A productive employment relationship is one in which the parties are able to from time-to-time raise issues and concerns. A comment that CBT

put profits before ethical practices is not constructive nor likely to contribute towards the maintenance of a productive employment relationship. The Authority is not satisfied however that Mr Barlow referred additionally to Mr Schreurs as immoral during the telephone call. Ms Thomas places some weight on a text message Mr Barlow sent to Mr Schreurs on 26 March 2023 in response to the text terminating his employment in which he indicated that he expected that his employment may be terminated. Ms Thomas submits that he knew that he had crossed a line. That conclusion is not clear from the text message that refers to a verbal threat about termination being given.

[72] I conclude some blameworthy conduct on the part of Mr Barlow during the telephone conversation on 26 May 2023 that contributed to the situation giving rise to his unjustified dismissal. Whilst there may have been other concerns the nature of the discussion on 26 May 2023 was what resulted in Mr Schreurs moving to terminate Mr Barlow's employment that day.

[73] Employment Court judgments have made it clear that a 25 percent reduction is of "particular significance."¹² I do not conclude there was blameworthy conduct of particular significance but the type of conduct for which a reduction of 10% is appropriate. That reduction is to be applied to the lost wages and compensation awards.

Penalty for a breach of good faith

[74] The failures in this matter arose because reliance was placed on a 90-day trial provision in the employment agreement. They were not deliberate, serious and sustained or intended to undermine the employment relationship in the circumstances.

[75] The Authority is not satisfied it is appropriate to award a penalty for a breach of good faith and declines to do so.

Summary of findings and orders made:

[76] Mr Barlow was not unjustifiably disadvantaged in his employment.

[77] Mr Barlow was unjustifiably dismissed from his employment by CBT.

¹² *Xtreme Dining Ltd (T/A Think Steel) v Dewar* [2016] ERNZ 628.

[78] Taking contribution into account CBT South Limited is ordered to pay:

- (i) Reimbursement of lost wages under s123(1)(b) of the Act in the sum of \$13,572 gross.
- (ii) Compensation under s123(1)(c)(i) in the sum of \$13,500 without deduction.

Costs

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

[80] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Cain may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms Thomas will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[81] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹³

Helen Doyle
Member of the Employment Relations Authority

¹³ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1