

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 199
3300099

BETWEEN BRANDON BARRETT
Applicant

AND BPD CONSTRUCTION
LIMITED
Respondent

Member of Authority: Shane Kinley

Representatives: Kelly Coley, advocate for the applicant
Saadi Radcliffe, counsel for the respondent

Investigation Meeting: 19 November 2024 in Palmerston North

Submissions and further Up to 23 January 2025
information:

Determination: 10 April 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Brandon Barrett was employed by BPD Construction Limited (BPD) as an apprentice builder from 15 February 2021 until his employment ended in August 2023. Mr Barrett raises a claim he was unjustifiably dismissed.

[2] BPD says Mr Barrett voluntarily left his employment and as such no remedies are available in relation to his unjustified dismissal claim. BPD counter-claimed Mr Barrett had taken and been paid for annual holidays and sick leave in advance of entitlements being due, and sought repayment of amounts paid in advance and interest.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged by Mr Barrett and his mother Melissa Sleeman, and for BPD by James Raue, BPD's director and main shareholder, Chris Sue, a contractor to BPD, and Peter Nimarota, an employee of BPD. Mr Barrett, Mrs Sleeman, Mr Raue, Mr Sue and Mr Nimarota answered questions, under affirmation, from me and from the representatives.

[4] Following the investigation meeting the representatives provided written submissions in accordance with timetable directions made at the conclusion of the investigation meeting, including addressing a number of points I identified which I considered it would be helpful for submissions to cover.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination are:

- (a) Was Mr Barrett unjustifiably dismissed by BPD?
- (b) If BPD's actions were not justified (in respect of dismissal) what remedies should be awarded, considering:
 - (i) compensation under s 123(1)(c)(i) of the Act; and
 - (ii) lost wages under ss 123(1)(b) and 128 of the Act?
- (c) Was Mr Barrett paid annual holidays in advance and sick leave in advance by BPD?
- (d) If so, should Mr Barrett be required to repay any sums paid in advance and interest on those sums under the Interest on Money Claims Act 2016?
- (e) Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mr Barrett that contributed to the situation giving rise to his grievance?
- (f) Should either party contribute to the costs of representation of the other party?

Was Mr Barrett unjustifiably dismissed by BPD?

Relevant law

[7] In relation to Mr Barrett’s claim he was unjustifiably dismissed by BPD I need to determine whether his employment ended voluntarily or he was dismissed. The Court in *Kang v Saena Company Ltd* said in dismissal cases “the termination of employment must be at the initiative of the employer” and “the test is an objective one. The issue is whether it was reasonable for somebody in the employee's position to have considered that his or her employment has been terminated.”¹

[8] There is a material difference between the evidence of Mr Barrett and Mr Raue as to what happened at a meeting on 24 July 2023, specifically whether Mr Barrett was dismissed or voluntarily resigned. Given this conflict in evidence, I must decide which evidence I prefer based on an assessment of credibility. To do so I rely on the guidance provided by Judge Harding in the District Court in *R v Biddle* that was cited with approval on appeal to the High Court² and guidance from the Employment Court in *Lawson v New Zealand Transport Agency* and *Cornish Truck & Van Limited v Gildenhuis*.³

[9] The key aspects of this guidance for this case are consistency of the witnesses’ evidence, how plausible the evidence of each witness is and whether there are elements of confirmation bias evident.

[10] If I find Mr Barrett was dismissed, then I need to determine whether BPD’s actions were justified in terms of the test of justification under s 103A of the Act, being whether BPD’s actions, and how BPD acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[11] In reaching my conclusions about whether BPD’s actions were justified, I must consider:

- a. having regards to the resources available to it, did BPD sufficiently investigate before taking action;

¹ *Kang v Saena Company Ltd* [2022] NZEmpC 151 at [15] and [16] citing *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 103, *Cornish Truck & Van Ltd v Gildenhuis* [2019] NZEmpC 6 at [45] and *Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 219 at [28] – [29].

² *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21].

³ *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165; and *Cornish Truck & Van Limited v Gildenhuis* [2019] NZEmpC 6.

- b. did BPD raise concerns that it had with Mr Barrett before taking action;
- c. did Mr Barrett have a reasonable opportunity to respond; and
- d. did BPD genuinely consider Mr Barrett's explanation or comments.

[12] I may also take into account any other factors I think are appropriate. I must not determine a dismissal to be unjustifiable where there were defects in BPD's process that were minor and did not result in Mr Barrett being treated unfairly.

Submissions of the parties

[13] Mr Barrett says he reasonably believed he had been dismissed at a meeting with Mr Raue on 24 July 2023 at a worksite when they were the only two people present. Mr Barrett acknowledges the words "you are dismissed" were not used but claims Mr Raue's actions were a sending away which amounted to a dismissal, supported by the raising of performance concerns in the days leading up to the alleged dismissal.

[14] While accepting performance concerns can justify a dismissal, in this case Mr Barrett says BPD's decision was not substantively justified and there was no evidence of a process to raise concerns and address these through a performance improvement process.

[15] BPD says Mr Barrett voluntarily left his employment, having "achieved less than minimal progress" during the two years of his apprenticeship and following discussion about poor work performance between Mr Barrett and Mr Raue on 17 July 2023. BPD said the discussion between Mr Barrett and Mr Raue on 24 July 2023 was about a lack of progress on that worksite with Mr Barrett saying he was going to find another job, which Mr Raue said he was OK with, before Mr Barrett "left amicably".

[16] BPD also raised concerns Mr Barrett had been selective in the communications he had provided and had made a number of false statements, which should be taken into account in relation to issues of credibility. Text messages contemporaneous with the ending of employment involved Mr Barrett requesting a reference, which Mr Raue agreed to provide, which was said to be consistent with Mr Barrett leaving employment voluntarily and on good terms. BPD invited a credibility finding and application of the objective test to conclude there was "a voluntary departure from employment".

[17] In reply Mr Barrett says there was no record of an resignation or notice of termination, with Mr Raue "strangely" aware he could place Mr Barrett on gardening

leave under his employment agreement, but unaware notice was required in writing. Mr Barrett points to an acknowledgement by Mr Raue that he told him he was not suited to building work, before saying general references by Mr Barrett in prior conversations with others to working in Australia were “speculative at best and unpersuasive”. Mr Barrett also says his request for a reference was because he was worried about getting this reference and this was not evidence that he left employment voluntarily.

Mr Barrett was dismissed by BPD

[18] Because BPD denies that Mr Barrett was dismissed, he bears the onus of proof of establishing on the balance of probabilities that he was in fact dismissed.

[19] I find that Mr Barrett has discharged that onus. I find on a balance of probabilities Mr Barrett was more likely than not dismissed by Mr Raue, acting on behalf of BPD, notwithstanding the absence of clear use of words unequivocally denoting a dismissal. In reaching this finding, I prefer Mr Barrett’s account of the meeting on 24 July 2023 and consider his evidence is more consistent and his account is more plausible than Mr Raue’s account of what happened at that meeting.

[20] Mr Raue was clear he had concerns prior to the meeting on 24 July 2023 about Mr Barrett’s performance the week before, including not being able to complete tasks he should have been able to, given the time he had been an apprentice. Mr Raue said he raised issues verbally with Mr Barrett on multiple occasions. Building and Construction Industry Training Organisation (BCITO) records about Mr Barrett’s apprenticeship progress provided some support for this, including showing he was still working under supervision with limited progress. Mr Raue also said in response to questions at the investigation meeting he needed to be “careful picking holes if someone was in a vulnerable state”, referring to BCITO notes which said assessments would be tried again when Mr Barrett was feeling better.

[21] Mr Barrett acknowledged in response to questions at the investigation meeting his progress with his apprenticeship over more than two years had been poor. This may well have justified Mr Raue’s concerns about Mr Barrett’s capability and have warranted a performance discussion, however, there was no evidence of any formal raising of concerns by Mr Raue.

[22] Both Mr Barrett and Mr Raue described a conversation about whether Mr Barrett was meeting expectations in relation to cutting a piece of wood on 17 July 2023,

although accounts of what followed differed. Text messages show Mr Barrett was upset about the feedback or the way it was provided, and Mr Raue appeared frustrated by Mr Barrett's level of performance and response to the feedback. Both Mr Barrett and Mr Raue said the other man hung up when discussing whether Mr Barrett would work the following day. I do not consider it necessary to make a finding about who hung up on who, as I consider the key event in relation to whether there was a dismissal was the meeting on 24 July 2023. Mr Barrett did not work on either 18 or 19 July 2023 but returned to work on 20 and 21 July 2023.

[23] Mr Raue confirmed in response to questions at the investigation meeting that he had arranged for Mr Barrett to be present at one worksite on 24 July 2024, while other workers were elsewhere and he didn't "want to hit him up re work progress in front of the other guys". Mr Raue says there was an amicable discussion for about 30 minutes with Mr Barrett's response to concerns about limited progress being made at the worksite being to say "I don't care, I'm going to find a new job". Mr Raue said he accepted this and said he didn't think building was for Mr Barrett anyway, before they discussed other options including Australia, then hugged before Mr Barrett left. Mr Raue also said he didn't insist on Mr Barrett working out his notice and when he asked for a reference this was consistent with him having resigned, rather than having been dismissed.

[24] Mr Barrett said at this meeting Mr Raue "blindsided me with a dismissal in person and I was again sent home" also claiming Mr Raue said "You have done a shit job here so its best that you find another job". In response to questions at the investigation meeting Mr Barrett said the meeting only ended in a hug as Mr Raue "came in for a hug". He also insisted he did not resign and denied responding as Mr Raue said he did (quoted in paragraph [23] above), although accepted other work options such as an office job were discussed.

[25] In the following two days Mr Raue raised an issue about Mr Barrett being "over on leave about 5k" (which is addressed as BPD's counterclaim in paragraphs [57] to [73] below) and sought agreement for the return of tools to settle this amount. After Mr Barrett replied asking for the agreement to be emailed through so he could sign it, Mr Raue responded with the following text message:

Answer your phone ya [expletive] I'm not going to send that through Il [sic] still pay you 2 weeks cos itl [sic] fuck ya and we shouldn't of let it go so far over. Just tools back to cover the 5

[26] Mr Raue said BPD paid Mr Barrett two weeks' notice "because we wanted to help him out". Mr Raue said in response to questions at the investigation meeting there had been a decision during or following the meeting with Mr Barrett on 24 July 2023 that "if he is leaving pay him out and not make him work".

[27] BPD's statement in reply and a letter sent on BPD's behalf by counsel on 22 August 2023 referred to BPD paying Mr Barrett two weeks' notice.

[28] Both Mr Barrett and Mr Raue's evidence in their witness statements and at the investigation were consistent with their descriptions of what occurred on 24 July 2024 as reflected in the letter raising Mr Barrett's unjustified dismissal sent on 14 August 2023 and BPD's response sent on 22 August 2023. I do not consider Mr Barrett's subsequent request for a reference was inconsistent with his evidence he was dismissed and accept his evidence he was concerned to promptly obtain a reference.

[29] As a consequence, I do not consider consistency assists me in determining whether Mr Barrett or Mr Raue's account is more credible.

[30] I consider BPD and Mr Raue's references to paying two weeks' notice are more consistent with Mr Barrett having been sent away or dismissed, with no plausible explanation provided by Mr Raue why BPD would pay notice when he claimed Mr Barrett "didn't give any notice at all and left that morning". I consider it more plausible that BPD paid this amount on the basis Mr Raue had effectively sent Mr Barrett away and Mr Raue's text message at paragraph [25] above is more consistent with being concerned with the financial impacts on Mr Barrett of having been dismissed than him having voluntarily resigned. I also consider Mr Raue having arranged for just himself and Mr Barrett to be present is more consistent and plausible with Mr Barrett's account of what occurred, being that there was a dismissal.

[31] For completeness, I do not consider either Mr Barrett and Mr Raue's evidence materially demonstrated confirmation bias.

Mr Barrett's dismissal was unjustified

[32] Having found Mr Barrett was dismissed, the onus passes to BPD to establish, on the balance of probabilities, that his dismissal was procedurally and substantively justified, applying the test of justification under s 103A of the Act as outlined at paragraphs [10] to [12] above. I am required to assess whether BPD's actions, and how

BPD acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[33] While Mr Raue described having raised verbal performance concerns including in the week prior to the meeting on 24 July 2023, I find BPD did not comply with the procedural fairness requirements in s 103A(3) of the Act, reflected in paragraph [11] above. Mr Barrett did not know that his ongoing employment was in jeopardy prior to the meeting on 24 July 2023, and he did not have an opportunity to take advice or to respond to the matters of concern which I find were not fully or fairly put to him by BPD.

[34] I also consider it is more plausible than not Mr Raue arranged to not have other workers on site at the time of the meeting on 24 July 2023 so he could raise performance concerns with Mr Barrett. Mr Raue's text message arranging for Mr Barrett to be at the worksite, sent the evening prior, was brief and said "I [sic] meet you at [the worksite] tomorrow". Mr Barrett's response was "Sweetas", suggesting no understanding of the nature of the events which would unfold.

[35] I find that Mr Raue's actions in arranging work so this conversation could happen with Mr Barrett alone amounts to BPD not acting in good faith as required under s 4 of the Act. A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations in s 4 of the Act and the procedural fairness requirements in s 103A(3) of the Act. Failure to do so is likely to fundamentally undermine an employer's ability to justify a dismissal.

[36] A fair and proper process is more likely to lead to a substantively justified decision. However the lack of any process and the failure to comply with minimum good faith and procedural fairness obligations fundamentally undermines BPD's ability to establish it had a good reason, based on reasonable grounds, for dismissing Mr Barrett.

[37] Mr Raue acknowledged he had not had any training in dealing with performance issues and while he had discussed Mr Barrett's process with the BCITO assessor, he did not take any advice prior to the meeting on 24 July 2023. Had Mr Raue sought advice at this stage he may have been able to raise the performance concerns he clearly had in a manner consistent with the requirements of s 103A of the Act.

[38] I find that BPD has not discharged the onus of establishing its actions were justified in accordance with s 103A of the Act and as a result Mr Barrett's dismissal was unjustified.

What remedies should be awarded to Mr Barrett in relation to his unjustified dismissal?

[39] Having determined Mr Barrett was unjustifiably dismissed, I need to consider what remedies should follow. Mr Barrett sought three months' lost wages under s 123(1)(b) of the Act, quantified as \$13,572 gross, and unspecified compensation for hurt and humiliation under s 123(1)(c)(i) of the Act.

[40] Mr Barrett's lost wages claim was based on his hourly rate of \$24 per hour at the time of his employment ending and his contracted hours of work of 43.5 per week. He said his actual loss was over \$54,000 gross. Mr Barrett said he had applied for but been unable to obtain work and in response to questions at the investigation meeting said he had been on a jobseeker benefit since his employment with BPD ended, with benefit conditions requiring him to look for work regularly and to report on his efforts to do so. Mr Barrett did not provide any records or documentary evidence specifically detailing jobs he had applied for or when. Mr Barrett said he did not follow-up on one lead provided by Mr Nimarota as he did not think the company was a safe workplace.

[41] Mr Barrett said since he lost his job he had experienced lack of sleep, stress and feelings of worthlessness, lost hope for a while and had subsequently been diagnosed with ADHD. In response to questions at the investigation meeting Mr Barrett accepted his insomnia could have been consistent with his ADHD diagnosis. Mrs Sleeman provided supporting evidence of Mr Barrett being, in her view, depressed and saying he felt worthless, having trouble sleeping, losing motivation and reducing engagement with others. Submissions for Mr Barrett said his ADHD diagnosis resulted in treatment which alleviated sleep-related issues, meaning sleeplessness following his employment ending was attributable to his employment being terminated.

[42] Submissions for BPD said Mr Barrett's pre-existing and accepted mental health issues, and inconsistencies in evidence about impact particularly in relation to the connection between his ADHD diagnosis and sleeplessness meant "any loss is either insufficiently connected to the grievance or is weakly connected at most such that no compensation or only a low level of loss/damage is involved".

[43] BPD said Mr Barrett had not provided evidence of mitigation of loss, relying on the Court's statement in *Allen v Transpacific Industries Group Ltd (t/as Medismart Ltd)* that: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.

[44] BPD also said benefit payments Mr Barrett had received should be set-off to avoid double-dipping.

[45] Under ss 123(1)(b) and 128 of the Act I am required to consider Mr Barrett's actual loss resulting from his personal grievance.⁵ Subsection 128(2) of the Act requires, where a grievance has been established, that I "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". I am also required to consider whether I should exercise my discretion to order a greater amount and whether the employee has contributed to the situation giving rise to his grievance.⁶

[46] In this case Mr Barrett has not obtained new employment and claimed for three months' lost wages.

[47] I decline to reduce remedies based on BPD's submission Mr Barrett had not provided evidence of mitigation of loss. The Court said in *Pact Group v Robinson* that cases such as *Allen v Transpacific Industries* "now need to be read in light of more recent judgments of the Court, and do not (in my view) reflect the law as it presently stands".⁷ The Court cited *Maddigan v Director-General of Conservation* which said:⁸

It is well established that in ordinary breach of contract cases a plaintiff is under no duty to mitigate their losses. And no positive duty emerges from the wording of the Act. The key question is not whether a legal duty exists but what the 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.

⁴ *Allen v Transpacific Industries Group Ltd (t/as Medismart Ltd)* (2009) 6 NZELR 530 at [78].

⁵ See also *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 at [81] and *Board of Trustees of Southland Boys High School v Jackson* [2022] NZEmpC 136 at [51] and [52].

⁶ Sections 128(3) and 124 of the Act.

⁷ *Pact Group v Robinson* [2023] NZEmpC 173 at [55].

⁸ *Maddigan v Director-General of Conservation* [2019] NZEmpC 190 at [62]

[48] In these circumstances I consider there are no reasons to reduce the three-month period claimed by Mr Barrett and accept his calculation of this amount as \$13,572 gross. I was not asked to exercise my discretion under s 128(3) of the Act to award more than three months' lost wages and there was no evidence which would lead me to consider it would have been appropriate.

[49] Mr Barrett's evidence was he received benefit payments. The Court in *Judea Tavern Limited v Jesson* said that liability to pay wages or compensation for wages rests with the employer and other compensation in the nature of benefits, does not displace this liability, with "any question of reimbursement of such payments [falling] on the particular organisation and the individual concerned".⁹ Consequently, the appropriate approach is to put any question of repayment of benefits to one side in terms of my assessment of an appropriate award under s 123(1)(b) and I decline to make any deduction from my calculation of lost remuneration for benefits in this case.

[50] Determining compensation in this matter is challenging as Mr Barrett referred to in his reply witness statement to his insomnia being related to his ADHD diagnosis, but submissions said sleeplessness following his employment ending was attributable to his employment being terminated. No medical evidence was provided addressing causation or separating impacts on Mr Barrett of his employment ending compared to his ADHD diagnosis, neither was any evidence provided about Mr Barrett's acknowledged mental health issues prior to his employment ending.

[51] Mr Barrett did, however, describe the impact his dismissal had on him in relatively general terms, with supporting evidence from Mrs Sleeman, which I would characterise as relatively moderate.

[52] Based on Mr Barrett's evidence of the impacts of BPD's unjustified dismissal of him, taking into account comparable cases, I consider an award of compensation of \$12,000 under s 123(1)(c)(i) of the Act is appropriate, before considering contribution.

⁹ *Judea Tavern Limited v Jesson* [2017] NZEmpC 82 at [40].

Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mr Barrett that contributed to the situation giving rise to his grievance?

[53] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mr Barrett that contributed to the situation giving rise to his grievance.

[54] BPD said Mr Barrett's contribution was "appreciable" referring to its claim he had walked out on his employment, had not acted in good faith during his employment, had made limited progress in his apprenticeship, had ongoing performance issues and openly discussed his intentions to leave BPD.

[55] While BPD had performance concerns about Mr Barrett, I do not consider those were raised formally or clearly with him. I have found at paragraph [19] above on a balance of probabilities Mr Barrett was more likely than not dismissed by Mr Raue, acting on behalf of BPD, rather than voluntarily resigning his employment. I do not consider Mr Barrett was responsible in any blameworthy way for BPD's procedural failings in relation to his dismissal, as described in paragraphs [33] to [36] above.

[56] No reduction is made for contribution accordingly.

BPD's counterclaim

[57] Two issues were identified in relation to BPD's counterclaim, which are approached in a combined manner for reasons which will become apparent, being:

- (a) Was Mr Barrett paid annual holidays in advance and sick leave in advance by BPD?
- (b) If so, should Mr Barrett be required to repay any sums paid in advance and interest on those sums under the Interest on Money Claims Act 2016?

Submissions of the parties

[58] BPD said Mr Barrett has conceded receiving annual holidays in advance and sick leave payments in advance, which BPD is entitled to recover. BPD said annual holidays taken in advance amounted to 4.74 weeks in three periods in April 2021, across the Christmas break 2021 and across the Christmas break 2022 – 2023, which was taken in accordance with s 28A of the Holidays Act 2003 (HA2003). BPD disputed Mr Barrett's "debt" was waived by his return of BPD's tools, says there was no agreement to a compromise and even if there was such an agreement part payment of a debt does not satisfy the obligation to repay the full debt.

[59] Mr Barrett said any liability was discharged by his return of tools owned by BPD, in accordance with the arrangement made when BPD first raised the alleged overpayment with Mr Barrett. While acknowledging there was a delay in returning the tools, Mr Barrett says there was no time limit specified to do so, and the offer made by the respondent to waive any debt was never retracted.

[60] Mr Barrett also said sick leave in advance was not recoverable, any remaining debt could have been recovered from his final pay, including as a deduction in accordance with the Wages Protection Act 1983, and insufficient records had been provided to support the claim. Mr Barrett said to the extent annual leave was taken to top up wages, this was in breach of s 28A of the HA2003 which restricts the cashing up of holidays entitlements. Mr Barrett submitted the counter-claim should be dismissed in accordance with the Authority's equity and good conscience jurisdiction.

Mr Barrett took annual holidays in advance

[61] Mr Barrett accepted he asked Mrs Raue, who was responsible for BPD's payroll, for annual holidays to be added to his regular pay, saying he would "just ask [her], give her hours, ask if want some on top". Facebook messages which had been provided between Mrs Raue and Mr Barrett supported this occurring on a regular basis, with Mr Barrett appearing to take annual holidays when he had worked reduced hours or had additional bills.

[62] The first evidence provided of Mr Barrett being told his annual holidays were in negative appears to have been in a Facebook message from Mrs Raue on 7 July 2023, where she said he was "-224 hours but should only be -160, it's confusing but I've over paid accrued leave". Mr Barrett said in response to questions at the investigation meeting he had not been aware of being in negative leave balance prior to this. He also acknowledged he "did ask for a lot of annual leave" for a range of reasons, including being in debt and constantly needing to meet his bills.

[63] Mr Raue said he was not really involved in payroll arrangements for BPD but had some awareness of Mrs Raue processing annual holidays in advance, although not the detail of what was being done. He said he only really became aware of the extent of Mr Barrett's leave taken in advance three to four months before the end of his employment. He also acknowledged telling Mrs Raue to pay annual holidays in advance after this, as he thought Mr Barrett would build his balance back up.

Mr Barrett was paid annual holidays and sick leave in advance

[64] BPD provided an annotated MYOB report which it said showed the overall amount of annual holidays and sick leave which Mr Barrett had taken in advance, as well as records of when annual holidays and sick leave were taken by Mr Barrett. The transaction records show Mr Barrett being paid for 13.76 weeks of annual holidays and 25 days of sick leave. Facebook messages between Mr Barrett and Mrs Raue support Mr Barrett requesting annual holiday payments as top-ups to his pay on nine occasions, with another 26 occasions where annual holidays were paid with no supporting Facebook messages.

[65] The first of the annual holiday payments was made in April 2021, after approximately two months of employment, with a regular pattern of what could only have been annual holidays taken in advance, given Mr Barrett would only have had an annual holiday entitlement after one year of employment.

[66] Submissions for BPD signalled out three specific payments of annual holidays out of 35 as being paid annual holidays in advance. One of the identified payments was supported by Facebook messages showing Mrs Raue offering to pay out accrued annual holidays at the Christmas break 2021 while another substantial payment identified was for the Christmas break 2022 – 2023, although this was not supported by Facebook messages.

[67] I accept the pay transaction records support Mr Barrett having been paid for 13.76 weeks of annual holidays and 25 days of sick leave. Based on Mr Barrett's employment commencing on 15 February 2021 and ending, taking into account the two weeks' notice paid, in August 2023, he would have been entitled to eight weeks of annual holidays and payment on the end of his employment for annual holiday pay under s 25 of the HA2003, as well as having been entitled to 20 days of sick leave during his employment.

[68] I find the pay records provided support Mr Barrett having been paid annual holidays in advance and the quantum of the calculations made by BPD.

BPD offered to waive any debt for overpaid annual holidays taken in advance

[69] Mr Raue clearly made offers in two text messages on 26 July 2023 to waive any debt if Mr Barrett returned tools which were said to be the property of BPD. Mr Barrett

requested Mr Raue email the agreement to waive this amount by reply text message which said:

Can you email this to me so I can print it out and sign it etc and get it back to you with all the tools

[70] Mr Raue's response was the message quoted at paragraph [25] above, which refused to provide the agreement for signature and reiterated the offer to cover any debt by the return of tools.

[71] While Mr Barrett did not return the tools until October 2023, after mediation had occurred, no evidence was provided of Mr Raue's offer being expressly retracted. Mr Raue said in response to questions at the investigation meeting this was because the matter "went to lawyers", as well as saying he did not think there was an agreement as he never emailed the offer, it was only on text and he was waiting to discuss it with Mr Barrett.

[72] I consider Mr Barrett was clearly seeking to agree to the offer Mr Raue made and if BPD wished to retract the offer it was incumbent on it to expressly do so. No evidence was provided of it doing so. While not expressly argued as estoppel, I consider submissions for Mr Barrett that the counter-claim be dismissed "In equity and good conscience" have merit.

Counter-claim is not successful

[73] In light of the un-retracted offer by Mr Raue to waive any over-payments of annual holiday pay if Mr Barrett returned tools, which he eventually did, and the Authority's role under s 157(3) of the Act to "act as it thinks fit in equity and good conscience", I decline to make any findings or orders in relation to BPD's counter-claim.

Sick leave taken in advance is not recoverable

[74] BYOD documents attached to BPD's statement in reply set out the basis of how it calculated the amounts it said Mr Barrett owed for annual holidays and sick leave taken in advance.

[75] Mr Barrett's employment agreement states in the annual leave section "Any unearned leave taken in advance must be repaid if the employee stops working for the employer". While there is provision for sick leave to be taken in advance, Mr Barrett's

employment agreement does not say this must be repaid if employment ends with a negative sick leave balance.

[76] No evidence was provided of there being an express agreement Mr Barrett would repay sick leave taken in advance and no submissions were provided on the basis for this claim. I would have disregarded this element of the counter-claim on this basis, had I made orders in relation to BPD's counter-claim.

Orders

[77] For the above reasons I order BPD Construction Limited to pay Brandon Barrett within 28 days of the date of this determination:

- a. \$13,572 in lost wages under s 123(1)(b) of the Employment Relations Act (the Act); and
- b. \$12,000 in compensation under s 123(1)(c)(i) of the Act.

Costs

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

[79] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Barrett 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 BPD 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.

[80] 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.¹⁰ As the investigation meeting for this matter took most of a full day, my preliminary view is the notional daily rate for one day is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1