

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 399
3080992

BETWEEN

MATTHEW CADIGAN
Applicant

AND

PAUL MCDONALD
EARTHMOVING LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Rachel Brazil, counsel for the Applicant
Diana Hudson and Jenny Guthrie, counsel for the Respondent

Investigation Meeting: 31 August 2020 in Dunedin

Submissions Received: 11 September 2020 from applicant
11 September from respondent

Date of Determination: 06 October 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Matthew Cadigan was employed by Paul McDonald Earthmoving Limited (“PMEL”) as a Machine Operator and latterly Supervisor, in Dunedin from early 2016 until his employment ended on 2 July 2019.

[2] In a statement of problem of 12 November 2019, Mr Cadigan claimed he was unjustifiably dismissed on 20 June 2019 or in the alternative that he had been constructively dismissed. Mr Cadigan also advanced a breach of privacy claim and sought a penalty for not initially being provided with an employment agreement.

[3] PMEL's response asserted that Mr Cadigan had voluntarily resigned and that he had not been dismissed, constructively or otherwise. PMEL indicated that an employment agreement had subsequently been provided but not signed by Mr Cadigan and conceded the privacy breach occurred but claimed that it was inadvertent.

[4] The parties attended mediation but the matter remained unresolved.

The Authority's investigation

[5] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have likewise, carefully considered the helpful submissions received from both parties and refer to them where appropriate and relevant.

[6] Matthew Cadigan, his partner Leah Haskell, and Paul McDonald sole director and shareholder of PMEL gave evidence at the investigation meeting together with a manager of a PMEL client company appearing in a personal capacity who I do not need to name. I also considered an uncontested written statement from PMEL's accountant.

Issues

[7] The issues to be decided are:

- (i) Was Mr Cadigan unjustifiably dismissed by PMEL on 20 June 2019?
- (ii) In the alternative, did PMEL breach Mr Cadigan's terms of employment or duties owed to him and if so, was it reasonably foreseeable that he would resign and establish a constructive dismissal?
- (iii) Did PMEL breach Mr Cadigan's privacy by disclosing personal information to a third party?

- (iv) Has Mr Cadigan a legitimate claim for an unpaid bonus payment and how should that be calculated?
- (v) Does PMEL's failure to provide an employment agreement at the time the employment commenced render them liable for a penalty under s 65(4) of the Act?
- (vi) If Mr Cadigan is successful in all or any element of his personal grievance should the Authority reduce any remedies granted as a result of any contributory conduct?
- (vii) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[8] PMEL is a small Dunedin based civil contracting company that engages in earthmoving work - it has at various times depending upon demand, employed around twenty workers.

[9] Mr Cadigan says he commenced working for PMEL in early 2016 as a 'Digger Operator'. Initially the work was casual and the engagement was informal with no employment agreement. Mr McDonald recalls having Mr Cadigan recommended by a friend and conceded at the time due to his business inexperience, he did not provide employment agreements to any of his workers including Mr Cadigan but he has recently rectified this situation.

[10] Mr Cadigan's employment progressed well as PMEL gained more ongoing contracts associated with flood remedial projects and telephone pole replacement work. His hours and responsibilities increased to the point that he was soon supervising projects and co-workers.

[11] By early 2018, Mr McDonald increasingly became aware that Mr Cadigan was critical to his business success and to retain him, after he had flagged an interest in leaving to explore a Christchurch business opportunity, a bonus arrangement was entered into. The arrangement was not initially recorded in writing but PMEL commenced paying a quarterly bonus from 1 April 2018 calculated as a percentage (7.5%) of PMEL's gross marginal profit.

[12] PMEL then, on their accountant's advice, got a lawyer to draft a: "Variation to Terms and Conditions of Employment" dated 29 June 2018. This purported to amend an individual employment agreement that unfortunately did not exist. In the event, whilst producing the unsigned variation, Mr McDonald could not recall providing a copy for Mr Cadigan who was adamant that he did not receive it. I preferred Mr Cadigan's evidence on this point.

[13] PMEL's accountant provided the Authority with an unchallenged statement outlining the circumstances of the bonus scheme, noting that:

The business performed extremely well through the initial period of the bonus scheme and far exceeded our predicted levels discussed with Paul and Matt at the commencement of the scheme. The bonus scheme was to be paid at the end of each four-month period, beginning 1 April 2018.

[14] The accountant recalled a concern that no employment agreement was in place and advising Mr McDonald of this being "legally necessary to protect him and the business". Accordingly, the accountant arranged for an employment agreement to be drawn up by a specialist employment law firm that also included a comprehensive restraint clause.

[15] The draft employment agreement was provided to the Authority with a 20 February 2019 cover letter - Mr McDonald was unclear on when this was presented to Mr Cadigan. Mr Cadigan says he did not receive the draft agreement until 20 May 2019 and this is supported by handwritten comments he made that refer to the date for the bonus scheme to be reviewed (1 April 2019) having expired and, an exclamation that: "it's now 20/5/19".

[16] Mr McDonald conceded the above timing and recalled Mr Cadigan's response but both parties inexplicably did not bargain further beyond a brief phone conversation. The agreement remained unsigned with the bonus payments continuing to be paid.

[17] Mr Cadigan suggested by this point in time (late May 2019), that he became increasingly frustrated at Mr McDonald spending less time in the business, being hard to contact, equipment breakdowns, staffing issues and long working hours.

[18] Mr McDonald said he left all operational matters to Mr Cadigan, he had personal issues intruding and he had taken two overseas holidays including one in mid-June 2019 when he went to Australia and had failed to inform Mr Cadigan of his whereabouts but he claimed that he remained in phone contact and was accessing emails.

[19] Mr Cadigan says he became increasingly stressed about not being able to get Mr McDonald to respond and he described how that was impacting upon his personal and family life, including sleeping patterns and that he was becoming short with co-workers. As a result, he emailed Mr McDonald in the early evening of 17 June 2019. The email in summary, bluntly indicated concerns that:

- (i) His commitment and part in growing the business was underappreciated.
- (ii) Plant and equipment investment was required.
- (iii) Staffing inexperience, turnover and competence was at issue.
- (iv) Mr McDonald was inexplicably losing trust in him and this was causing Mr Cadigan to negatively react.
- (v) The employment agreement issue remained unresolved.
- (vi) He was working excessive hours including weekends.

[20] The email sent from Mr Cadigan's iPhone concluded:

So in a nut shell mate I've had enough of it all and I cannot carry on! I've always said I wouldn't up and leave without giving you the chance to replace me. So unless everything gets addressed and sorted I'm sorry to say but I will be leaving on 20th of December 2019. There's 6 months notice weather you choose to accept it or sort it is up to you.

I would appreciate a response via email please [sic].

[21] On 20 June, having received no response, he sent a curt iPhone email of 5:46pm:

Paul

I sent you an email earlier in the week and I have had no response! You would have been on your emails so I'm unsure if your playing dumb or forgot but it's not impressing me one little bit. I would like a response via an email please in the next 24hrs! [sic]

Cheers Matt

[22] What occurred next was the subject of the following, at times conflicting evidence provided prior to and during the investigation meeting from Mr Cadigan, Lea Haskell (his partner) and Mr McDonald.

20 June 2019 encounter at Mr Cadigan's house

[23] Mr McDonald said he first accessed the emails on the evening of 20 June and then he phoned Mr Cadigan twice. Upon getting no response he said he was panicked by the prospect of the proposed resignation, so he drove to Mr Cadigan's house, arriving around 7:30 pm. He recalled Ms Haskell was present during the subsequent conversation. Mr McDonald says that he first discussed the emails and broadly acknowledged valid points about his absences but he then quickly indicated that he had a wider concern and that was that he had heard from a third party, that Mr Cadigan was "doing drugs" and that if he did have an issue with drugs then he should be upfront and "we would work through it".

[24] Mr McDonald says that Mr Cadigan reacted very angrily and demanded to know who made the drug allegations and because he could see how angry he was getting: "[I] did not want to give him this information, and that appeared to make him even angrier".

[25] In oral evidence, Mr McDonald conceded that he had no intention of revealing the source of the allegation at any stage. Mr McDonald's written evidence then says Mr Cadigan stood up and loudly said: "you've got 2 seconds to tell me or take the keys to the ute and I quit. If you are not going to tell me get off my property" and then he said Mr Cadigan threw the work vehicle keys at him.

[26] Mr McDonald says he then went outside and Mr Cadigan followed him and they both had a smoke as he tried to calm the situation by discussing his concerns about the business and that he intended to spend more time in it. He then said Mr Cadigan removed his personal property from the work utility vehicle and Mr McDonald drove it across the road to park it on the grass verge where it remained for two days before he returned to collect it. When pressed in cross-examination on why he took the work vehicle, Mr McDonald first

claimed that it was because he needed it for a job the next day and then when pressed further said Mr Cadigan had said he would quit if he was not informed who made the drug allegations against him.

[27] Mr McDonald did not impress as a witness, at times he was vague and contradictory in his recall of events and explanation of his motivation in raising the drug issue. I do note that his written recollection of the 20 June evening events was 'word for word' consistent with notes his counsel took the following day of a consultation but I also need to consider that this was relayed after text exchanges between Mr Cadigan and Mr McDonald immediately after he visited Mr Cadigan's property on the evening of 20 June.

[28] Whilst Mr McDonald emphasised his response to the 17 and 20 June emails was that he desperately did not want Mr Cadigan to leave, he could not 'square' this with the timing of his decision to raise the drug taking allegation, the removal of the work vehicle and his inappropriate disclosure of the 20 June exchange the next day to a third party.

The aftermath

[29] On the latter issue, on 21 June Mr McDonald briefed a senior manager of one of his major clients who gave evidence that Mr McDonald told him that Mr Cadigan would not be working for him anymore as he had "been doing drugs and selling them to other workers". The manager gave a written statement and oral evidence at the Authority and was a convincing witness. He emphasised that he was a friend of both parties and did not wish to get involved. He said on 21 June, Mr McDonald related the conversation of the evening before and when he advised him that perhaps a drug test would clear matters up, Mr McDonald said he didn't need to insist on a test as he knew "the truth".

[30] The manager recalls being shocked by the allegation as he knew Mr Cadigan had a strong anti-drug stance and to reinforce his ongoing confidence in Mr Cadigan I note his firm is now engaging Mr Cadigan in favour of PMEL. He also recalled Mr Cadigan calling him

later on 21 June, indicating that Mr McDonald had fired him after coming round to his house and accusing him of taking drugs.

[31] Mr McDonald in his written brief, conceded that he had spoken to the client manager but claimed it was only to advise that Mr Cadigan was not going to be working that day and that he had made no specific drug allegation as claimed and then somewhat contradictorily that:

Information shared about the Matt and potential drug involvement was provided on the basis that it was gossip between friends, not any formal advice nor any intention to discredit Matt [sic].

[32] When pressed, Mr McDonald conceded that he had gone further and told the client manager that Mr Cadigan was 'dealing' drugs in the workplace and he made a claim without any evidential foundation, that a drug test would not detect the type of drug he was convinced Mr Cadigan was taking.

[33] I find that objectively, this extended allegation disclosure was likely to discredit Mr Cadigan regardless of any perception that it may not go any further and infer from his disclosure to the manager that Mr McDonald on 21 June considered the employment relationship to have ended. I remain unconvinced when analysing Mr McDonald's actions, that they were wholly conciliatory as claimed. It is objectively very difficult to reconcile his approach with someone wishing to retain an employee. Further, Mr McDonald claimed that he had previously dismissed employees for drug use after testing and he claimed he had a 'zero-tolerance' drug policy but it was not documented. On questioning, it transpired that the 'informal' policy was limited to testing workers only after a health and safety incident and appeared to be solely driven by what clients' required for safe work sites.

[34] By contrast, Mr Cadigan's written evidence describing the 20 June evening, asserted that after Mr McDonald accused him of taking drugs and would not reveal his source of the information or any details, he got angry and offered to do a drug test and that:

Paul fired me at the house that night. Paul said it, and he said to me he would step back into the business and his partner would do the admin. He then said I could go

back to digger driving if I wanted but I would not get a bonus anymore. Paul also said he was taking the ute.

[35] Mr Cadigan says it was Mr McDonald who took the vehicle keys, he also confirmed that they went outside and continued a heated exchange in which they swore at each other and then Mr McDonald reversed the vehicle out the driveway and parked it across the street.

[36] On being questioned, Mr Cadigan recalled Mr McDonald arriving and saying he had got his email and stating: “what the hell is going on”. He then recalled Mr McDonald discussing some valid points about his absences but this was only briefly as he said Mr McDonald soon thereafter, launched into the drug issue saying he had heard he had “been on drugs”. Mr Cadigan conceded Mr McDonald said “we can work through this”. He says, they then discussed the source of the allegation but Mr McDonald refused to disclose such which Mr Cadigan said made him angry enough to order him out of his house and he followed him outside for a further exchange. Mr Cadigan conceded that he took his personal belongings out of the vehicle claiming this was because “he told me my employment was over”.

[37] In questioning, Mr Cadigan did not mention the claimed exchange of being relegated to driving the digger or losing his bonus and he said Mr McDonald had told him he would get back into the business if he needed help. Mr Cadigan recalls the overall exchange was around ten minutes and he recollects afterwards getting a text within the next thirty minutes.

[38] Leah Haskell claimed Mr McDonald said: “he had heard he was a druggie and selling drugs and taking them” and when Mr Cadigan asked angrily who the source of the information was, she says Mr McDonald said “it didn’t matter who told him about the drugs and he was sacked”. When pressed in cross examination Ms Haskell was adamant the term ‘sacked’ had been used by Mr McDonald – a term not referred to by Mr Cadigan. Ms Haskell says Mr Cadigan offered to take a drug test and Mr McDonald said it was not necessary. Ms Haskell did partially corroborate Mr McDonald’s recollection that Mr Cadigan told him you can either tell me who made the allegation or leave the house and that was when she recalled that Mr McDonald took the vehicle keys and went outside.

The Texts

[39] A series of texts were then exchanged: commencing with Mr McDonald's of 7:53 pm (he said he pulled over his car before arriving home) and then consecutive responses as follows:

Hi Mat. Think is best u have a good think about your decision when your head is clear. Either way please email me your decision tmrow afternoon. III grab the ute tonight since you have already got the keys so will use it tomorrow on a job. Paid leave tmrow until you have made up your mind and emailed me [sic].

[40] Mr Cadigan:

Excuse me you showed up to my house unannounced or invited accused me of being on drugs and the rest. You told me my employment and job role is not the same anymore. You took the key and I asked you to leave my property! There is nothing to think about on my behalf as you've said nothing but thrown wild accusations at me. Cheers.

[41] Mr McDonald:

Mat as an employer i have a duty to follow up on these types of things that had been told to me regardless of how factual they are just wanted to know your side of the story the same as I would if was anyone else. Its tough having to ask u but would expected you to do the same in in my shoes like you have had to do similar types things when in charge when I have been overseas. Anyway let me know tomorrow i realise it was a big thing to have asked you therefore adequate time for u to think and not make ershional decisions [sic].

[42] Mr Cadigan:

The worst thing is I offered to do a random drug test immediately and you declined which is weird due to the circumstances! As you said I've run your company while you've been away a number of times. You've been that professional there is nothing in my eyes to decide over Paul you took my ute and stripped my job title/role so therefore you have terminated my contract.

And I've never accused anyone of being on drugs while your away it was always post incident which is policy!

[43] Mr McDonald at 10:37 pm:

I wasnt referring u to accusing anyone of drugs i was referring to that you have been in my position and had to ask staff big questions hence me trying to explain tonight I had a hard question to ask u. If I hear something it is my duty to follow up

on it. If your offering to do a drug test I accept. I'm not taking your resignation tonight as believe u need time to clear your head. Either way email me in 24 hours what you want to do. Paid leave until then. Fyi I didn't ask for your keys u said to me who was that told me or take my keys I quit. That's hardly fair [sic].

[44] Mr Cadigan:

Your twisting some words there pal remember I had a witness!

Why not do the drug test an hr ago when I offered?

[45] Mr McDonald 21 June 11:53 am:

Matt, As I said last night I do not except your resignation. I want to have a meeting as soon as possible .. can we do that next wensday morning at 10 am [sic].

[46] Mr Cadigan 1:04pm:

Voluntary (cause your being professional I organised it myself) full drug test not a swab either done so you can chew your accusations from last night!!

[47] Mr McDonald:

That's good thanks for getting that done.

[48] Mr Cadigan provided the Authority with results of a urine based drug test taken on 21 June 2019 that was negative and two previous negative test results during his employment - one random and one a post-incident test.

[49] On being questioned, Mr McDonald said that he sought legal advice on the morning of 21 June (as did Mr Cadigan) and then texted Mr Cadigan offering to meet the following Wednesday but due to counsels' availability this did not occur until Monday 1 July. In the interim, Mr Cadigan did not return to work but PMEL continued paying him.

Assessment: did a dismissal occur on 20 June?

[50] Given the differences in accounts of the 20 June meeting and poor or partial recall by both parties, I discuss first what their separate perceptions were of what had occurred.

[51] From Mr Cadigan's perspective he was dismissed during the discussion at his house on 20 June believing Mr McDonald had wrongly accused him of drug taking activities in order to provoke him to resign earlier than his signalled six months' notice. Mr Cadigan perceived Mr McDonald was not interested in resolving the operational and investment issues he had raised. Regardless, after the interchange and subsequent texts in which Mr Cadigan believed Mr MacDonald was trying to resile from his stance of dismissing him, there was no way back for Mr Cadigan – he said he had decided that his employment was at an end and trust was destroyed.

[52] Mr McDonald's perspective was that he did not want Mr Cadigan to resign and he approached the 20 June meeting with the purpose of trying to persuade him otherwise but he felt compelled to raise his concerns about what a co-worker had informed him about but he was not intending to make this a disciplinary issue – he wanted to try and work with Mr Cadigan to resolve it, hence his 'informal' approach.

[53] The only seemingly objective evidence is the texts but they are also capable of being read to support either party's perspective. On the one hand, Mr McDonald's opening text appears to be responding to Mr Cadigan's anger and a 'cooling off' period is being offered. One could however, consider that Mr McDonald failed to appreciate just how inappropriate the manner in which he presented the very serious allegation was and in not mentioning this in his text, he further riled Mr Cadigan.

[54] Mr Cadigan's immediate texted response could be read as relating contemporaneously that he believed Mr McDonald had gone further than the allegations and had told him his "employment and job role is not the same anymore" which is arguably consistent with Mr Cadigan being told that he would go back to driving the digger and get no bonus (although not explicitly stated back to Mr Cadigan).

[55] Rather than outright deny that he had effectively dismissed Mr Cadigan, Mr McDonald's next response returns to the drug allegation and tries to justify his somewhat

awkward approach to raising it - then he implores Mr Cadigan to not make an irrational decision to resign based on the allegation being put to him.

[56] Mr Cadigan then explicitly repeats his belief that he has been sacked by stating: “Paul you took my ute and stripped my job title/role so therefore you have terminated my contract!”

[57] Mr McDonald then responds studiously or otherwise, ignoring Mr Cadigan’s reference to having been dismissed and refers to not accepting his ‘resignation’ and asking him to reconsider whilst accepting his offer to take a drug test.

[58] At this point in the text exchanges, it is not clear whether Mr McDonald wanted Mr Cadigan to continue in employment – at the hearing Mr McDonald was unwavering in his view that Mr Cadigan was taking and dealing drugs and he repeated this assertion to the client manager the next day. However, he still ostensibly appeared by the tone of the texts to want Mr Cadigan to just carry on working for him as if he had not broached the allegations.

Finding

[59] I reasonably conclude that Mr McDonald was naïve to think that the 20 June interchange would not have an impact upon their working relationship.

[60] I also conclude that Mr Cadigan took such offence to the allegations that he decided that it was untenable to continue working for Mr McDonald – the question is: did he seize upon an indication that he was effectively dismissed or did Mr Cadigan just later resign earlier than he had intended.

[61] Being unable to determine which account is accurate, I infer from the evidence and correspondence provided, that it is more likely than not, that Mr McDonald did not clearly communicate a dismissal on the evening of 20 June and/or that this was not his intent.

[62] However I find that Mr McDonald's method of communication could reasonably be viewed as bringing the employment to an end in a constructive manner and that Mr Cadigan's later 'restated' resignation was foreseeable. The 'die had been cast' after the allegations were put, the manner by which they were presented and the text exchanges before the parties met with counsel present, reinforces this conclusion.

1 July meeting with counsel

[63] Mr Cadigan gave evidence that prior to the 1 July meeting he had made his mind up that he was not going to return to work - he said no way was he going to discuss retracting his resignation - he said "the coffin was sealed". In his mind he was only going to the meeting to sort out his final pay and bonus but his counsel sensibly advised he should go along and listen to Mr McDonald's perspective of the situation.

[64] By this point in time, Mr Cadigan claimed that the drug allegations were being circulated and friends were ringing him up asking what was going on but he conceded this may have been coming from sources other than Mr McDonald and the manager of their major client (who credibly stated that he did not discuss with anyone other than Mr Cadigan what Mr McDonald had told him). I surmise speculation may have also been rife in the workplace due to Mr Cadigan's unexplained absence after 20 June.

[65] As a clear indication of his intent not to return, Mr Cadigan began to set up and incorporate a contracting company as sole director with some assistance from a Christchurch contact and Ms Haskell. Mr Cadigan said that Ms Haskell placed photos advertising the business on Facebook on 1 July and his company was registered on 2 July (Companies Office records confirm this).

[66] Mr Cadigan recalled at the 1 July meeting, not being impressed that Mr McDonald would not apologise for making the drug allegation but Mr Cadigan did confirm Mr McDonald saying he had discussed the matter with their mutual friend (the client manager) but without confiding the extent of this disclosure.

[67] Mr Cadigan recalls his counsel asserting during the 1 July meeting that he had been dismissed and Mr McDonald's counsel claiming he had not been dismissed.

[68] What was clear regardless of the disputation of whether he had been dismissed or not, was that Mr Cadigan felt the conduct of Mr McDonald had effectively repudiated the employment agreement and that he had lost all trust in his employer and could not contemplate returning to work.

[69] The 1 July meeting ended without agreement including on the quantification of Mr Cadigan's final bonus payment due.

[70] The next day, PMEL's counsel raised a concern that Mr Cadigan was using PMEL client photos in Facebook advertising of his new company. On 3 July PMEL's counsel emailed Mr Cadigan's counsel indicating that his employment had "ended on 2 July 2019" but did not set out any reasoning for such.

[71] In evidence given by Mr McDonald and in submissions, PMEL claimed that at the 1 July meeting PMEL accepted Mr Cadigan's resignation and 2 July was mutually agreed as an end date to the employment being consistent with the pay cycle. This was disputed by Mr Cadigan who recalled that he simply maintained at the meeting that he would not return to work considering how he had been treated including raising the issue of rumours already going around on the drug allegation issue.

Were PMEL's actions justified?

[72] Setting aside whether this may be deemed a constructive dismissal, s 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time. Employer actions must also be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[73] Section 103A details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner - summarised as relevant in these circumstances are:

- (i) whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;
- (ii) did the employer raise the issues of concern with the employee with a degree of specificity;
- (iii) was the employee afforded a reasonable opportunity to respond to identified concerns;
- (iv) did the employer genuinely consider any explanation provided by the employee before concluding on such; and
- (v) any other contextual factor the Authority regards as appropriate to consider.

Applying factors identified by the Act

[74] Overall, there is a question of what brought the employment to an end and at what point did this occur.

[75] Mr Cadigan's email of 17 June was not an explicit resignation – it was conditional. He indicated that he was contemplating resigning at a future date six months hence, unless PMEL addressed a number of issues that ironically Mr McDonald accepted had some foundation. I accept that at the point of writing the email, Mr Cadigan although he may have long term been contemplating such, took no steps to set up in business on his own account – he claimed that he was not confident to do so as he had never run a business so, he signalled six months' notice to buy time with income certainty whilst he considered his options.

[76] What I then must consider is, was Mr McDonald's response to the concerns being raised by Mr Cadigan reasonable in the circumstances or did he embark upon a course deliberate or otherwise, that either destroyed the employment relationship and the trust Mr Cadigan was entitled to repose in PMEL and if so, did Mr McDonald go as far as actively inducing Mr Cadigan to resign earlier than he had indicated he was contemplating.

[77] In the alternative, I have to consider whether Mr Cadigan unreasonably overreacted to the allegations made and then voluntarily resigned without further engaging after Mr McDonald had clarified he did not wish him to resign and kept remunerating him during the ostensible ‘cooling off’ period between 20 June and 1 July.

[78] In applying s 103A and good faith obligations identified above I find:

- (i) Although a small employer with no ‘in house’ HR capability, PMEL still had a reasonable opportunity and resources to seek legal advice and had done so in the past around Mr Cadigan’s employment agreement and used a lawyer in dealing with the aftermath of Mr McDonald’s presentation of the allegations to Mr Cadigan.
- (ii) I saw no evidence of PMEL having conducted an investigation into the bare allegations presented to Mr Cadigan.
- (iii) Mr McDonald effectively ‘ambushed’ Mr Cadigan on 20 June in presenting serious allegations when he was not represented.
- (iv) Prior to 20 June, Mr McDonald failed to specifically set out the concerns he had in a manner that allowed Mr Cadigan the opportunity to seek advice and respond (in itself a breach of s 4 (1A)(c) of the Act).¹
- (v) Mr McDonald had clearly pre-determined the matter before he presented his allegations (a stance he continued to adopt during the investigation meeting despite Mr Cadigan voluntarily undertaking and providing the results of a negative drug test and Mr McDonald not providing any evidence to support his allegations).
- (vi) Mr McDonald in spite of being advised of the drug test result, confided his negative view of Mr Cadigan to a major and influential client’s manager in a manner likely to damage his reputation.
- (vii) Mr Cadigan overreacted but it was not clear that he resigned on 20 June and he later did engage with Mr McDonald by text and at a meeting albeit with a closed mind to the prospect of returning to work – he thus took ten days to not communicate further his repudiation in response to

¹ Section 4(1A)(c) Employment Relations Act 2000, requires that an employee: *who is proposing to make a decision that will or is likely to, have an adverse effect on the continuation of the employees’ employment to provide to the employees affected- (i) access to information, relevant to the continuation of the employees’ employment, about the decision; and (ii) an opportunity to comment on the information to their employer before the decision is made.*

PMEL's explicit breach action. Likewise, PMEL had ten days to set out a conciliatory approach and remained silent whilst being legally represented.

Finding of constructive dismissal

[79] Having concluded that it was unclear whether Mr McDonald explicitly dismissed Mr Cadigan on 20 June, I find in the alternative, that overall and cumulatively, Mr McDonald's actions and omissions had brought the employment of Mr McDonald to an end in a constructive manner by 1 July 2019 and he took no active steps in the interim period beyond the disputed texts and the 1 July meeting to try and restore Mr Cadigan's confidence in PMEL.

[80] After above applying the s 103A test, I also find the constructive dismissal was unjustified as what Mr McDonald did and how he did it and what he omitted to do, were not what a fair and reasonable employer could have done in all of the circumstances.²

[81] Put simply, in law a 'constructive dismissal' can be found if an employer's conduct compels an employee to resign and in such circumstances although on the surface the employee has voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this doctrine is where the resignation is caused by a breach of a duty owed to the employee and the employer could reasonably foresee that rather than put up with the breach, the employee resigns - effectively signalling a belief that their employment agreement has been repudiated by the employer.

[82] The overarching and well recognised duty that is now statutorily recognised as a component of 'good faith'³ is that an employer should not without proper cause, act in a

² See *McIvor v Saad* [2015] NZEmpC 145 at [48].

³ Section 4 (1A)(a) and s 4(1A)(b).

manner calculated to or likely to, destroy or seriously damage the relationship of trust and confidence.⁴

Reasoning

[83] I base a finding that Mr Cadigan was constructively dismissed on the manner by which Mr McDonald addressed the drug allegations. His approach significantly breached good faith obligations and it was procedurally deficient to a degree that had PMEL dismissed Mr Cadigan in reliance on the bare allegations, I would have found the dismissal to be unjustified. Then, Mr McDonald compounded matters by disclosing private information to an influential client's manager. His failure to subsequently resile from the drug allegations including during the investigation meeting (despite advancing no documentary or witness evidence), reinforces my finding of constructive dismissal. Objectively viewed, these were not the actions of an employer wishing to maintain a trusting, ongoing employment relationship.

[84] Counsel for PMEL drew my attention to the Court of Appeal case of *Business Distributors Ltd v Patel*⁵ as authority for the notion that even significant breaches may not amount to constructive dismissal. I am not persuaded by this authority as the actual breach in *Patel* was not sufficiently analysed as the Court found that Mr Patel had not raised the breach in his resignation letter and therefore grounds of causation were not made out. I also accept that whilst *Patel* could be construed to argue that even a significant breach may not amount to a constructive dismissal (pressure to change a remuneration system that Mr Patel resisted) cases are fact specific and the overlay of s 103A and good faith provisions now prevail.

[85] Notwithstanding, I consider the breaches involved here to be of a fundamentally significant and aggravated magnitude that destroyed the essential element of trust Mr Cadigan was entitled to place in his employer.

⁴ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 and *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

⁵ *Business Distributors v Patel* [2001] ERNZ 124, (2000) 1 NZELR 351.

[86] I do accept that Mr McDonald may have genuinely wanted ‘in theory’ for the situation to remain ‘as was’ with Mr Cadigan taking on the responsibility to run his business and he did provide a paid ‘cooling off’ period but he failed to pick up on the explicit messaging that Mr Cadigan had had enough of his business neglect and wanted more focus and investment in plant and human resources from Mr McDonald to alleviate his stress.

[87] Whilst Mr McDonald had initially communicated variously that he had not dismissed Mr Cadigan on 20 June (a point that was immediately disputed by Mr Cadigan), that he did not accept his resignation and that he wanted to meet with counsel present, what he did not do in the interim period - was make any discernible effort to restore the employment relationship or explain what he would be doing about the drug allegations.

[88] Whilst Mr Cadigan did not back down following the 20 June meeting, I find that this was not an unreasonable position, exacerbated by Mr McDonald breaching his privacy by informing a major client of what at this point were unsupported allegations made at a time when Mr McDonald was supposedly trying to reconcile with Mr Cadigan.

[89] In the circumstances, it should have been reasonably foreseeable to PMEL that Mr Cadigan would resign. Mr Cadigan gave Mr McDonald an opportunity to address his concerns about the deteriorating state of the employment relationship but in response Mr McDonald however unwittingly, set upon a course of action that completely destroyed the trust and confidence Mr Cadigan had in PMEL.

Breach of privacy

[90] Mr Cadigan identified a breach of privacy in his claim but sought no specific remedy for such. I do conclude that a breach occurred.

[91] In applying s 103A of the Act, I find that the disclosure of Mr McDonald to a third party of serious allegations did have a potential to cause reputational damage and hurt to Mr Cadigan – this disclosure was not the action of a fair and reasonable employer and I have

considered such as being a significant factor in my finding that Mr Cadigan was constructively dismissed. As such, I deem this to be an aggravating factor in the constructive dismissal context as the breach occurred during the employment relationship and was not I find, as Mr McDonald misleadingly claimed, inadvertent.⁶

The outstanding bonus payment claim

[92] As confirmed in evidence by PMEL's accountant, the parties concluded discussion and agreed on a bonus scheme of a share of gross profit of 7.5% that took effect from a first payment made on 1 April 2018 that was reduced to writing both in a 29 June 2018 proposed variation and contained in a draft employment agreement dated 20 February 2019. Whilst neither of the aforementioned documents was executed, bonus payments continued to be paid on a four monthly basis up to a last payment made on 31 March 2019. What is in dispute is at the ending of the employment relationship PMEL did not pay Mr Cadigan his final bonus payment due as of 2 July 2019.

[93] PMEL contends no outstanding payments are due on two grounds:

- 1) That the document detailing the scheme indicate that it was a trial and only remained in place until 31 March 2019 and
- 2) Without an employment agreement being signed Mr Cadigan "was not contractually entitled to the bonus payment".

Assessment

[94] Dealing with the first issue, Mr Cadigan denies that he agreed to the bonus arrangement being trialled. PMEL's accountant did not mention that during the discussion putting the bonus in place, that it was agreed to be limited to one year but he does recall

⁶ Judge Christina Inglis. "Privacy and Employment Don't diss the boss on Facebook (and other useful homilies)" (paper prepared for guest lecture Auckland University, June 2016) concluded a personal view that I have adopted in this determination which is: [W]hile non-compliance with the Privacy Act will not automatically translate into the employment jurisdiction in terms of supporting a personal grievance claim, the principles underpinning the Act and privacy interest considerations more generally may assist in informing an assessment of whether what the employer did and how they did it was what a fair and reasonable employer could have done in all of the circumstances.

instructing an employment lawyer to draw up the arrangement with “the option to review the arrangement after a year”.

[95] The wording used in both the variation and draft employment agreement after detailing the calculation methodology, was “The above scheme will remain in place until 31 March 2019 at which point it may be reviewed and amended by the director”.

[96] In the event, neither document was signed by Mr Cadigan - the first one not provided to him and the second draft employment agreement not provided until 20 May 2019. I heard no evidence to suggest that PMEL’s director, Mr McDonald had reviewed the scheme at or after 31 March 2019. On this ground, as of 2 July 2019, the scheme was still operative. I also observe the wording only refers to the possibility of the scheme being “amended” rather than terminated – this was not an agreement with a ‘sunset’ clause.

[97] On the second issue it is a well-established contract law principle that oral agreements are enforceable where the terms of such are clear and have taken effect according to its terms. In *Warwick Henderson Gallery Ltd v Weston*⁷ the Court of Appeal recognised that although s 65(1)(a) of the Act must be in writing it does not specify that an oral agreement is unenforceable.

Finding

[98] I find that Mr Cadigan is entitled to be paid the outstanding bonus payment due (on a pro rata basis) and I direct PMEL to provide the relevant information on gross margin profit for the period 1 April 2019 – 2 July 2019.

⁷ *Warwick Henderson Gallery Ltd v Weston* [2006] 2 NZLR 145, (2006) 7 NZELC 98, 115 (2005) 2 NZELR 661.

Non provision of employment agreement

[99] Although failing to provide an individual employment agreement at the commencement of the employment was in breach of s 63A (2) of the Act, PMEL did seek to rectify this by providing Mr Cadigan with a draft agreement on 20 May 2019.

Finding

[100] As such, I do not find in applying considerations set out in s 133A of the Act⁸ that the breach was sufficiently serious or sustained to warrant imposition of a sanction on an inexperienced employer and accordingly I decline to order a penalty.

Conclusion

[101] Having obtained a finding of constructive and therefore unjustified dismissal exacerbated by the privacy breach, Mr Cadigan has been successful in his personal grievance and is entitled to remedies.

Remedies

Lost wages

[102] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Cadigan should I find that he has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[103] Here, I find that Mr Cadigan took immediate steps to mitigate his loss of income by setting himself up in business and that it was likely that this would have occurred anyway at some point as the relationship may not have lasted longer than beyond December 2019.

⁸ Section 133A Employment Relations Act 2000.

[104] Mr Cadigan's accountant provided an income summary and company balance sheet information for the company Mr Cadigan established post PMEL that showed he did not start taking a wage from that company until October 2019 and that up until that point he lived off drawings of \$14,000 as the company in the initial 3-4 months period made a modest profit and he incurred significant initial operating costs in setting the business up including equipment hire costs, advertising and ongoing vehicle running expenses.

[105] To calculate lost wages I am persuaded by Mr Cadigan's counsel that an average of 44.65 hours per week should be used as a divisor on an hourly rate of \$27.50 that amounts to a total of \$14,744.50 gross and deducting the \$14,000 Mr Cadigan earned in that period leaves lost wages as being \$744.50.

Finding

[106] Given the above and reflecting the circumstances of the ending of the employment relationship, I consider that overall justice and equity is served by awarding Mr Cadigan lost wages of 3 months in accord with s 128(2) of the Act less what he had drawn from his newly formed company in the interim.

Compensation for hurt and Humiliation

[107] Mr Cadigan gave evidence of the significant impact of how his employment ended given his commitment to PMEL and the distressing circumstances of having his reputation challenged and privacy breached and the anger and upset this caused him. He described a negative impact on his relationship with his partner and family and the financial stress caused by him having to immediately set up a business and forego a regular income.

[108] Lea Haskell described the impact upon her partner's general mental well-being including difficulty sleeping, changed eating patterns, anxiety, angry mood swings and worry about family finances.

[109] I am convinced that at the time, Mr Cadigan suffered significant hurt, ongoing humiliation, loss of dignity and injury to feelings and he found it very hard to reconcile how he was treated given his committed contribution to his former employer.

[110] I found Mr Cadigan to be a reasonably robust and determined character and proud of the fact that he is now doing well in business on his own account so the distress caused was of a temporary nature and he has now ‘moved on’ from the events that led to his constructive dismissal.

Finding

[111] Taking into account the evidence proffered and awards made by the Authority and Court in similar situations and surveying cases brought to my attention in submissions, I consider Mr Cadigan’s evidence warrants compensation of \$18,000 under s 123(1)(c)(i) of the Act.⁹

Contribution

[112] Section 124 of the Act states that I must assess the extent to what, if any, Mr Cadigan’s actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*¹⁰.

[113] I find that Mr Cadigan, whilst stressed, still engaged in a degree of reactive blameworthy behaviour by the immoderate tone of his written communication and verbal interchanges at the 20 June meeting and its aftermath. I however, have to balance this consideration up with my finding that Mr McDonald’s inappropriate approach to presenting what were serious allegations, amounted to a breach of duty sufficient to establish a

⁹ See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

¹⁰ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

constructive dismissal. Mr Cadigan cannot be blamed for these deficiencies that robbed him of the time to adopt a different and more reflective approach.

[114] Counsel for PMEL in seeking a reduction in remedies for contribution, suggested that the duty to respond to Mr Cadigan's concerns had been fulfilled immediately but that misses the point that the manner by which Mr McDonald approached the concerns was causative of further issues that I have found formed part of my finding of a constructive dismissal.

[115] I have also considered that Mr Cadigan's action of using photographs of client work he had undertaken to promote his new business breached his implied duty of fidelity and that this breach did occur during a period that he was still being remunerated by PMEL. Given that Mr Cadigan had no employment agreement however, and that he rectified the breach immediately it was brought to his attention, I do not consider it to be blameworthy conduct that contributed to the situation that gave rise to the personal grievance (it occurred after the breaches).

Finding

[116] On balance, given PMEL's ineptitude in handling the allegations and extent of the aggravated privacy breach, I do not consider Mr Cadigan's reactive responses warrant any reduction in the remedies I have awarded.

Summary

[117] I have found that:

- (a) Matthew Cadigan was constructively and therefore unjustifiably dismissed.
- (b) Paul McDonald Earthmoving Limited failed to adhere to good faith obligations including disclosing the detail of unfounded allegations to a third party.

- (c) In the circumstances Paul McDonald Earthmoving Limited must pay Matthew Madigan the sums below:
 - (i) \$744.50 gross lost wages pursuant to s 123(1)(b) of the Act; and
 - (ii) \$18,000 compensation pursuant to s 123(1)(c)(i) of the Act.
 - (iii) Paul McDonald Earth Moving Limited is to pay Matthew Cadigan his outstanding bonus payment of 7.5% of gross profit margin on terms previously agreed for the period 1 April 2019 to 2 July 2019 by disclosing their accounts to Mr Cadigan covering the period in dispute and outlining the calculation methodology used.

Costs

[118] Costs are at the discretion of the Authority but here Mr Cadigan established his predominant claim that he was constructively and unjustifiably dismissed and has obtained compensatory remedies in an investigation meeting that took just under a day with timetabled legal submissions thereafter.

[119] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs.

[120] If no agreement is achieved, Mr Cadigan has fourteen days following the date of this determination to make a written submission on costs and Paul McDonald Earthmoving Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck
Member of the Employment Relations Authority