IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 314
3199659

	BETWEEN	BRAD CAPPER Applicant
	AND	CJS CONSTRUCTION LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Kirsten Westwood, advocate for the Applicant Kylie Hudson, advocate for the Respondent
Investigation Meeting:	14 March 2023
Determination:	16 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority has investigated a personal grievance of unjustified dismissal raised by the applicant Brad Capper. It has also examined complaints by him that his employer, the respondent CJS Construction Ltd (CJS), did not give him a written employment agreement and did not observe the duty of good faith owed to him.

[2] Mr Capper is a carpenter and CJS is a small construction company specialising in residential building work. Their employment relationship lasted barely one month before it ended on or about 11 August 2022.

[3] Mr Capper's employment relationship problems were not resolved in mediation undertaken by him with CJS.

[4] At an investigation meeting Mr Capper gave evidence and was questioned by the parties' advocates Ms Westwood and Ms Hudson, and by the Authority. Callum Sheridan a director and owner of CJS, and members of his staff, also gave evidence and were questioned. The advocates presented submissions at the end of the meeting.

[5] This determination is given in accordance with s 174E of the Employment Relations Act 2000 (the ER Act) and does not therefore fully record all the evidence or information considered by the Authority, or submissions received.

Mr Sheridan rings Mr Capper

[6] In the short time the employment relationship existed, Mr Sheridan became dissatisfied with the performance and conduct of Mr Capper but had taken no steps towards disciplinary action.

[7] Mr Capper had been absent from work for a few days when Mr Sheridan rang him on 9 August 2022. During the phone conversation Mr Capper claims he was dismissed without warning or notice of any kind. He raised a grievance soon afterwards and his advocate Ms Westwood confirmed it on 24 August by letter.

[8] Mr Sheridan claims that Mr Capper abandoned his employment or resigned from it.

[9] The Authority must determine, objectively, what message if any was imparted by Mr Sheridan to Mr Capper during their phone conversation and later when there was an exchange of emails.

[10] When contacted and spoken to by Mr Sheridan, over the phone Mr Capper had retorted that Mr Sheridan was dismissing him by what he was saying. In emails sent soon afterwards he complained he had been dismissed.

[11] The respective accounts given by Mr Sheridan and Mr Capper of their phone conversation on 9 August were as follows.

Mr Sheridan

[12] He made the phone call because Mr Capper had been away from work since 1 August and had not communicated directly with Mr Sheridan or any other appropriate staff member to report his absence. Mr Capper had told some of the people he worked with at CJS that Covid was responsible for his absence.

[13] Mr Sheridan rang him several times before reaching Mr Capper in the afternoon. Mr Sheridan told the Authority he had expressed his dissatisfaction with Mr Capper who became angry and defensive. Mr Sheridan's evidence is he then said to Mr Capper;

> this doesn't seem to be working for you or us Brad, maybe we should consider going our separate ways if this is how you feel.

[14] Mr Capper responded by yelling that Mr Sheridan could not 'sack him' and questioning, 'is that it?' before abruptly hanging up. Mr Sheridan did not try contacting Mr Capper again. He acknowledged to the Authority that he and Mr Capper had not communicated well.

Mr Capper

[15] Mr Capper said he received a call from Mr Sheridan on 9 August terminating his employment, which action he viewed as being taken 'under the 90-day trial clause'. He said he was told not to come back to work.

Emails

[16] Mr Capper sent an email to Mr Sheridan just over a day later, at 9.38 am. on 11 August 2022.

[17] In the email he said his employment had been terminated by Mr Sheridan immediately and without notice during the phone call on 9 August. He said that a 90-day trial had not been in force at the commencement of the employment because an employment agreement had not been signed by him at that time. He said he was seeking

advice about unfair dismissal and breach of minimum employment terms and requirements.

[18] About 20 minutes later Mr Capper followed up his first email with another of similar content. He invited discussion from Mr Sheridan in writing before an 'application' was placed, meaning, presumably, in the Authority.

[19] Mr Sheridan responded by email to Mr Capper on 11 August in the afternoon. He did not expressly deny Mr Capper's claim that he had been dismissed but strongly criticised Mr Capper for poor work habits and lack of honesty. He threatened Police involvement if CJS property was not returned immediately.

[20] The clear acknowledgement in the email of Mr Sheridan is that the employment had terminated during or after the 9 August phone call. Silence by the employer in the face of the employee's claim of having been dismissed, could be taken as confirmation.

Termination of the employment was by dismissal

[21] The Authority does not consider that on any objective view Mr Capper resigned, either by words or conduct. Mr Sheridan could not reasonably have thought he had resigned or abandoned his job. A clear and emphatic rejection by an employee of an employer's attempt to communicate with the employee, could in some circumstances amount to a termination at the initiative of the employee, or a resignation. In this case Mr Sheridan had some idea why Mr Capper was not at work and where he was, and he knew Mr Capper could sometimes lose his temper. He knew that Mr Capper appeared to think he was being dismissed rather than resigning or abandoning his job.

[22] It was only a short time later, just over a day on 11 August, before Mr Capper made contact again and asserted that he had been dismissed. He invited a reply from CJS. Under s 4 of the ER Act, employee and employer have a good faith duty to be responsive and communicative. This was an opportunity for Mr Sheridan to correct any misunderstanding Mr Capper could be perceived to have had, by firmly denying there had been any dismissal. It was an opportunity to instruct Mr Capper to return to work or provide a medical certificate for any continuing absence, and to advise him that a disciplinary process might be commenced when he returned, to enquire into his absence.

[23] The Authority concludes that Mr Sheridan's silence in the face of the assertion there had been a dismissal, amounted to confirmation of dismissal by him. Termination was therefore at the initiative of CJS. When it had the opportunity to speak up and tell Mr Capper he had not been dismissed, CJS remained silent although it had a duty of good faith at s 4 of the ER Act to be responsive and communicative.

Dismissal was not justified

[24] On behalf of CJS it is accepted that a dismissal of Mr Capper, if found by the Authority to have occurred, could not be determined to be a justified dismissal. It is accepted by the Authority that Mr Sheridan did not understand that in the circumstances there had been a dismissal. He had given no thought to following any proper procedure to investigate any perceived performance or conduct shortcomings of Mr Capper. This was not the rare kind of situation where instant dismissal without requiring any process to be followed, could have been justified.

Mr Capper has a personal grievance

[25] For the reasons given, the Authority finds that Mr Capper has a personal grievance and is entitled under the ER Act to have consideration given to the remedies claimed by him from CJS.

[26] He seeks compensation of $25,000 under s 123(1)(c)(i) of the ER Act for humiliation, loss of dignity and injury to feelings. He also seeks the reimbursement of three months lost wages at ordinary time under s 123(1)(b), and payment of one week's wages' in lieu of notice. The latter may be regarded as a benefit Mr Capper could have expected to obtain if his grievance had not arisen. Compensation for the loss of such a benefit may be claimed under s 123(1)(c)(ii) of the ER Act.

Contribution

[27] The Authority is required to consider the extent, if any, to which Mr Capper contributed to the situation that gave rise to his grievance. The remedies otherwise to be awarded to him may be reduced if he was to partly to blame for what happened.

[28] Remedy reduction is not a substitute for disciplinary process being applied, where there has been conduct or performance problems with an employee. Using a suitable disciplinary process was an option available to CJS in response to its adverse views of Mr Capper's conduct and performance and alleged misrepresentation of his skills and experience. His neglect to report in during his absence could also have been enquired into and, if warranted, met with an appropriate disciplinary response.

[29] The Authority considers that Mr Capper did contribute significantly to the situation giving rise to his grievance. He unreasonably and without good cause, cut off communication his employer was entitled to have, and was required by s 4 of the ER Act to have, with an employee. By doing so Mr Capper denied himself the opportunity to learn in full what message Mr Sheridan had wanted to give him before ending the call. He did not allow Mr Sheridan the opportunity to clear up any misunderstanding as to whether he was being dismissed or whether Mr Sheridan wanted to explore with him the idea of a termination by mutual agreement, as an alternative to dismissal or other action.

[30] The degree of contribution calls for a commensurate reduction in remedies, which the Authority assesses to be 50%.

The written employment agreement and a 90-day trial period

[31] Mr Capper assumed his dismissal was under a 90-day trial period, although he accepted he had no basis for thinking that. The Authority is satisfied that CJS did not at any time purport to invoke a trial period clause in the employment agreement, because on 9 August when he rang Mr Capper, Mr Sheridan did not have any intention of dismissing him.

[32] Also, it is arguable that a trial period, although CJS had intended to include one, did not become a term of the employment agreement because an agreement had not been entered into at the time the employment started.

[33] Although there was a claim in the statement of problem for a penalty for the alleged failure to have a copy of the written employment agreement, it was not pursued at the investigation meeting. It appears that an employment agreement had not been signed when the employment commenced, but it also seems that both parties have some

responsibility for that. It is a common enough situation where a draft agreement is provided by an employer for consideration by the employee and then time is left to go by before anything is done about signing and returning it to the employer. A penalty will be more appropriate where the employer makes no attempt to provide an agreement, which was not the case here.

Breach of s 4 of the ER Act – good faith

[34] Where there has been any breach of good faith, under s 4A of the ER Act a penalty can be imposed only where the failure is 'deliberate, serious and sustained' or where the breach was 'intended' to undermine an employment agreement or employment relationship.

[35] The Authority is satisfied that CJS lacked the requisite intention to undermine the employment agreement or employment relationship, in acting as it did. Its activity or inactivity was also not deliberate. The Authority finds that Mr Sheridan just did not realise that his overture to Mr Capper about a mutual parting of the ways would be reacted to in the way it was, leaving him unable to finish the discussion he intended to have before Mr Capper abruptly terminated it.

[36] A breach of s 4 was not a claim made in the statement of problem and was only raised in submissions. A penalty is therefore unavailable and, in any event, would not have been warranted in the circumstances.

Lost wages - duty to mitigate

[37] Mr Capper was under a duty from the time of his dismissal in August 2022 to mitigate his loss of wages, by obtaining or trying to obtain other employment or paid work.

[38] His evidence about that is unsatisfactory. The Authority agrees with the authors of Brookers Employment Law, that 'evidence of mitigation should include a detailed account of efforts made to obtain other employment, including dates, places, names, copies of correspondence and the like'[1]. No such evidence has been provided.

[1] Brookers Employment Law at ER128.05

[39] It also appears Mr Capper was not well enough to work for some or all of the three months after his dismissal, and from what he told the Authority there were other things impeding his ability to work.

[40] In the circumstances the Authority must decline to make an award to Mr Capper for wages lost as a result of his unjustified dismissal.

Compensation

[41] The Authority agrees with submissions for CJS that the harm suffered by Mr Capper from being unjustifiably dismissed falls within the band below $10,000, where harm is less serious.

[42] The employment was of very short duration. The evidence before the Authority indicated that it was unlikely to continue for many more weeks, because of Mr Capper's general lack of application to the job he had been employed to do and his skill level appearing to be below that of a carpenter having the experience claimed by him.

[43] From a starting point of $8,000, after applying contribution of 50%, the award of the Authority is $4,000. CJS is ordered to pay that amount to Mr Capper under s 123(1)(c)(i) of the ER Act.

Wages in lieu of notice

[44] Mr Capper received no notice of dismissal and was not paid in lieu of notice. There were two written agreements in consideration, although neither was signed and returned by Mr Capper to Mr Sheridan. One provided for two weeks' notice during a 90-day trial period and the other for one week. CJS had not purported to invoke a trial period provision, if there was one.

[45] Mr Capper's claim is for payment of one week in lieu of notice. He would have been entitled to recover that under an implied term of notice, if the terms of a written agreement remained unsettled.

[46] Treated as a wage recovery claim rather than a grievance remedy, it is not subject deduction for contribution.

[47] Accordingly, CJS is ordered to pay Mr Capper without deduction the sum of $1,520, under s 131 of the ER Act.

Set off

[48] In written evidence and in submissions, a quantified claim of 'set off' was addressed. It was based on alleged sub-standard workmanship of Mr Capper and the cost of correcting that. In total $28,740 was sought.

[49] The remedies the Authority has awarded Mr Capper are monetary remedies for a personal grievance. Mr Capper's workmanship, if it was below standard, was not on the facts of this case a matter of contribution that could provide a basis for reduction of the awards. The contributory conduct was Mr Capper's unreasonable failure to engage with his employer about his future as an employee of CJS.

[50] Arguably, awards of penalties or compensation, lost wages or expected entitlements under s 123 of the ER Act, are not amenable to set off.

[51] The set off was only quantified and some details of it given, a week before the investigation meeting through the witness statement provided by Mr Sheridan. It was not a claim made in the statement in reply or an amended statement in reply at any earlier time. The statement in reply merely intimated that CJS might try and recover unspecified costs of redoing some of Mr Capper's work. Mr Capper was entitled to have notice of such a claim, the breach of contract it was based on and particulars of his alleged fault and the damage caused. Claims for damages or other remedies for alleged breach by an employee, should preferably be brought as a separate claim.

[52] In the circumstances the Authority declines to give a determination of the set off claim.

Misrepresentation

[53] For CJS it was argued that Mr Capper had engaged in egregious conduct, thereby disentitling himself to any remedies for his personal grievance. In particular Mr Sheridan pointed to a statement by Mr Capper in his written evidence that he had been employed as a carpenter by an Albany firm for seven years. An email from that

firm, sent to CJS after the dismissal, was produced to show the employment had only been for three years.

[54] Material misrepresentation inducing a contract can amount to egregious conduct, as the Authority found in the circumstances of *Smith v Muir*[2]. Although Mr Capper's evidence to the Authority may have been untrue, that evidence was given by him after entry into the employment agreement and therefore did not induce the offer of employment CJS made.

[55] It was also claimed that Mr Capper had acted egregiously by holding himself out to be an experienced builder of 15 years. CJS formed the view from his performance that his standard of work indicated much less experience. Mr Capper possibly held too high an opinion of his level of proficiency in carpentry, but CJS had had the ability to make closer checks on his background before engaging him. It cannot complain if it did not check his CV as well as it might have done, to confirm the details.

[56] In the circumstances the Authority declines to further reduce the remedies beyond 50%, a substantial reduction in itself.

Costs

[57] Although the result of this case may suggest that costs should lie where they fall, the parties are not prevented from making a costs application if they wish.

[58] Any application by either party is to be made within 14 days of the date of this determination, and any reply is to be made within a further 14 days of the application.

Alastair Dumbleton
Member of the Employment Relations Authority

[2] [2018] NZERA 205