

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 238
3113595

BETWEEN	JORDAN VASILIE PATRICK CHURCHILL Applicant
AND	CITY ELECTRICIANS WELLINGTON LIMITED Respondent
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AND	JORDAN VASILIE PATRICK CHURCHILL Respondent

Member of Authority: Trish MacKinnon

Representatives: Phil Mitchell and Daniel Dowsett, counsel for the
Applicant
Paul McBride and Emma Rose Luxton, counsel for the
Respondent

Investigation Meeting: 5 and 6 July and 5 August 2021 at Wellington

Submissions [and further 9 August and 21 September 2021 from the Applicant
Information] Received: 21 August 2021 from the Respondent

Date of Determination: 7 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jordan Churchill raised a personal grievance for unjustifiable, constructive, dismissal on 22 June 2020. He resigned from his employment with City Electricians Wellington Limited

(CEWL) on that day following an incident at his home on 20 June 2020 during which he claims his employer fundamentally breached the employment relationship leaving him with no option but to resign.

[2] CEWL denies Mr Churchill's version of the incident on 20 June 2020 and counterclaims for losses it says arose from Mr Churchill's breaches of the employment agreement. It seeks damages and the imposition of penalties against Mr Churchill in relation to those breaches.

[3] Mr Churchill denies breaching the employment agreement as alleged by CEWL and claims compensation, lost wages and costs in relation to his personal grievance. He also asks the Authority to consider the imposition of a penalty on CEWL in relation to the behaviour of one of its directors on 20 June 2020.

The Authority's investigation

[4] I have not set out a record of all the evidence received, nor have I recorded all submissions made by the parties. I have set out the material facts and made findings on issues relevant to the determination of Mr Churchill and CEWL's claims against each other in accordance with s 174E of the Employment Relations Act 2000 (the Act).

[5] The determination has been issued outside the timeframe at s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Background

[6] Mr Churchill was employed by CEWL as an electrician in November 2017. There was no written employment agreement throughout the relationship, although the parties had some communication over such an agreement in 2020.

[7] In May 2020 Mr Churchill commenced ACC leave to have surgery required for a previous injury. His initial four weeks off work for recuperation was extended on medical advice to a return to work date of 1 July 2020.

[8] During Mr Churchill's leave, David Scott, one of two directors of CEWL, became concerned that Mr Churchill was undertaking work during his recuperation. Those concerns resulted in Mr Scott attempting to contact Mr Churchill on 17 June 2020 to advise him, amongst

other matters, that he required the return of the company vehicle, laptop and tablet that were in Mr Churchill's possession, to ensure he could not work until fully fit. There was some doubt whether Mr Churchill received Mr Scott's communication at that time or some days later.

[9] Mr Scott's concerns also resulted in his going to Mr Churchill's home on Saturday 20 June 2020 in an attempt to retrieve the work equipment. Mr Scott was accompanied by a friend, Mr Wayne Livingstone, whom he took with him as support and second driver.

[10] Mr Scott's arrival and admission into the house by a relative of Mr Churchill resulted in an incident, the details of which are hotly disputed by the key players. Mr Churchill and his father, Mr Darryl Churchill, accuse Mr Scott of aggressive behaviour, while Mr Scott maintains he acted calmly and the aggression was all from Mr Churchill.

[11] Mr Scott left the premises and he and Mr Livingstone, who had remained outside the property throughout, shortly thereafter departed. Mr Churchill had called the Police by this stage. Mr Scott and Mr Livingstone returned an hour later, as had been suggested to Mr Scott by Mr Darryl Churchill, but were again unsuccessful in retrieving the work vehicle and equipment.

[12] Mr Churchill returned the work tablet, laptop and vehicle to his employer that same afternoon, via the Police. Before doing so, Mr Churchill undertook a factory reset on the laptop, resulting in the deletion of all data on it, and he also deleted data from the tablet.

[13] CEWL asserts it had discovered Mr Churchill was undertaking work in his own right with one of its large clients while he was certified fully unfit for work and on ACC.

Issues

[14] The following issues require determination:

- (a) Whether Mr Churchill was unjustifiably, constructively, dismissed;
- (b) Whether he breached obligations to his employer under the unwritten employment agreement;
- (c) Whether remedies are appropriate; and
- (d) Whether a penalty or penalties should be imposed.

Unjustifiable constructive dismissal

[15] An employee may be constructively dismissed in situations where no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* identified the following three situations constituting constructive dismissal, while making clear it was not an exclusive list:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.¹

[16] Mr Churchill has the onus of establishing that his resignation was as a result of his employer's actions. If he establishes that, the employer's actions are then considered through the lens of the test of justification set out in s 103A of the Act which I will return to shortly.

[17] Counsel for Mr Churchill submits the employer's actions come within the third of the three categories above. In Mr Mitchell's submission, the actions of CEWL's director coming to the Applicant's home and acting in an abusive and aggressive manner on 20 June 2020 was a significant breach of the employer's duty to act in good faith and to uphold trust and confidence in the employment relationship. It was sufficiently serious to make Mr Churchill's resignation reasonably foreseeable by CEWL. Mr Mitchell submits Mr Churchill was left with no option other than to resign, which he did two days later.

[18] The employer's subsequent attempt to deflect attention from its own conduct towards Mr Churchill and to blame him for the events of 20 June 2020 was, in counsel's submission, not the action of a fair and reasonable employer. It constituted yet another breach of CEWL's duty not to engage in conduct that was likely to undermine the relationship of trust and confidence between employer and employee.

[19] Counsel for CEWL submits there was no action by the employer that could have comprised repudiation of employment. Mr McBride characterises Mr Scott's actions on 20 June 2020 as being reasonable: he was seeking to recover the employer's property for the remainder of Mr Churchill's ACC leave, after giving advance notification of his visit to Mr

¹ [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

Churchill's house. Mr Scott was invited into the house, but then set upon and physically manhandled by Mr Churchill, upon which he left.

[20] In CEWL's submission, Mr Churchill did not immediately resign as a result of the events of that day. He did so only after intervening events, including police involvement, a disciplinary investigation letter from Mr Scott and receiving legal advice.

[21] Having heard evidence from Mr Churchill, his father and Mr Scott who were the three key actors I have reached the following conclusions about the events of 20 June 2020. Mr Scott, rightly or wrongly, believed Mr Churchill had been undertaking work, while on ACC leave, for one of CEWL's major clients and was intending to undertake further work the following day. I do not see the need to identify the client and will refer to it as Client A in this determination.

[22] Mr Scott believed he had notified Mr Churchill by email on 17 June 2020 that he required the return of the company's vehicle, laptop and tablet. He attempted to give Mr Churchill advance warning on Saturday 20 June 2020 that he intended to visit his house that morning for the purpose of recovering those items. That would prevent Mr Churchill undertaking any further work until his leave had expired and he was fully fit to be back in the workplace. Mr Scott's phone call to Mr Churchill to advise him of his impending visit went unanswered and his voice mail message was apparently unheard. Mr Scott decided to proceed in any event.

[23] While Mr Scott described his demeanour as calm, I doubt that was an accurate description. He was concerned by the possibility of Mr Churchill undertaking work, while on ACC leave, for one of his company's major clients. He wanted to prevent the employee from undertaking further work. His concern would only have been heightened by seeing a vehicle belonging to Client A parked outside Mr Churchill's house.

[24] I also find it more likely than not that Mr Churchill's conduct and demeanour, which he portrayed as calm and measured, was anything but. His Saturday morning was disturbed by finding his employer in his house making demands upon him to return equipment including a computer that, according to Mr Scott, was visibly open on a desk in the office he had been taken to wait in. Mr Churchill told the Authority he was shocked at Mr Scott's presence and I infer he was also enraged.

[25] Mr Scott, by his own account, uses his hands when talking and acknowledged waving them around when talking to Mr Churchill, who interpreted the gestures as threatening. Mr Churchill was in no mood to cooperate with Mr Scott's demands for the return of the work vehicle and equipment and took immediate steps to expel Mr Scott from his house, including grasping Mr Scott's clothes in the region of his neck. Mr Scott did not resist and was propelled outside.

[26] There was a minor disturbance outside the house when Mr Livingstone claims to have been subjected to abuse by Mr Churchill who in turn accused Mr Livingstone of threatening to attack him with a rock. That part of the episode did not directly involve Mr Scott and, regardless of what happened, which was the subject of inconsistent evidence, could not be attributed to him.

[27] While it was unwise of Mr Scott to have arrived at Mr Churchill's house on a Saturday morning while Mr Churchill was on ACC leave, apparently unannounced, I do not find his actions such as to justify Mr Churchill's resignation two days later. Mr Scott had reason for concern about Mr Churchill's activities at a time when he was supposedly having a complete break from work activities while recuperating from surgery. He had made an attempt to forewarn Mr Churchill of his intention to visit.

[28] Although it may have been wiser for him to persist in those efforts, he chose to travel to Mr Churchill's family home, where he was met at the door by a family member and invited in. He was then escorted to a home office close to the front door to await Mr Churchill's arrival. There is nothing to suggest Mr Scott forced his way into the house or was abusive and aggressive to the family member who admitted him.

[29] After weighing the evidence of the witnesses, I find it more likely Mr Scott became agitated as Mr Churchill came up the stairs to meet him in a state of outrage at his employer having come to his home on a Saturday morning. I also find it more likely that Mr Churchill was the aggressive party rather than Mr Scott: his focus was on bundling his employer out of his house as quickly as possible, and on not returning his employer's equipment at that time.

[30] The test of justifiability, to which I have alluded above, is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. I find that, as noted, Mr Scott could have taken a different approach which did not entail arriving unannounced at

his employee's house on a Saturday morning while the employee was on ACC leave. Nonetheless, there was nothing inherently wrong in seeking to talk face to face with Mr Churchill, having failed to reach him by phone and having genuine concerns that the employee was working when he should be recuperating.

[31] Mr Churchill could have made it clear to his employer in a non-aggressive manner that he did not wish to discuss these matters in his home at that time. Instead he chose to elevate the situation by seizing Mr Scott's clothing and manhandling him in an attempt to remove him from the premises.

[32] I do not find Mr Scott's actions were sufficient to cause Mr Churchill's resignation and nor do I find it foreseeable that Mr Scott's visit would prompt that action. The fact that Mr Churchill decided to resign two days later may have been for a number of reasons, including the knowledge he had by that stage that his employer was embarking on a disciplinary investigation into his actions. I find his resignation was not a reasonable or foreseeable response to Mr Scott's visit or conduct on 20 June 2020.

[33] Mr Churchill's claim to have been constructively dismissed fails.

Did Mr Churchill breach the terms of his employment?

[34] CEWL's counterclaim is for losses it alleges it suffered from Mr Churchill's breaches of the employment agreement. These relate to the employer's inability to access information on the laptop, which had had a factory reset, and the tablet, which had been passworded and from which an attempt appeared to have been made to delete data. They also relate to the costs CEWL incurred in engaging a digital forensic expert to recover deleted information, and provide evidence to the Authority; and loss of at least one client, Client A, attributed to solicitation by Mr Churchill.

[35] Mr Churchill denied maliciously deleting any computer files owned by CEWL. He acknowledged, however, in the course of the Authority's investigation that he had performed a factory reset on his work laptop computer before returning it to his employer. Mr Churchill said his purpose was to protect his personal data on the laptop, including banking information and social media accounts. When it was put to him in cross examination that his actions had deleted business data and software belonging to his employer, Mr Churchill said that was not

necessarily his understanding. He said he did not trust Mr Scott and wanted to ensure his personal data on the computer was inaccessible to him.

[36] With regard to the tablet, Mr Churchill said he had made the password available to his employer on 24 June 2020 in a text message.

[37] Mr Ian Donovan, a computer forensics analyst with InPhySec Security New Zealand Ltd (InPhySec), gave evidence for CEWL of his examination and preliminary triage report regarding deletion of data and/or applications from the HP Laptop and a Samsung Tablet provided to him by Mr Scott, being the equipment returned by Mr Churchill. When asked how a person could protect personal data on the laptop without harming the device, as the factory reset had done, Mr Donovan's evidence was that the information could simply be deleted and the recycle compartment emptied. While it might still be possible to retrieve that information, it would require forensic reinstatement which would be a costly and time-consuming exercise.

[38] Mr Donovan's preliminary triage report showed that some files that had been removed were irrecoverable as a result of the factory reset performed on the HP Laptop. He confirmed to the Authority that the Samsung Tablet was functional and that it had proved possible to retrieve material from it.

[39] Mr Mitchell submits Mr Churchill was justified in taking the action he did with the laptop to ensure his personal files had been completely wiped from it. He submits that CEWL could have recovered the data it owned on the laptop from the cloud-based storage that Mr Churchill had arranged, or through Mr Donovan recovering it.

[40] I am not persuaded by that submission. It was clear from Mr Churchill's evidence that he is technically astute and would have known the difficulty he was causing his employer by wiping all data from the laptop. There was an alternative method he could have taken but he chose to act in a way that deprived CEWL of access to its data unless it incurred significant cost and inconvenience.

[41] Nor do I accept the submission that the employer could have accessed its data from the One Drive cloud-based storage Mr Churchill had set up. Mr Churchill acknowledged in the course of the Authority's investigation that that he did not know what happened when he stopped paying for that storage on 21 or 22 June 2020. While he thought the company could

have accessed the data if it had paid the bill for the cloud-based storage, it was clear Mr Churchill had not advised his employer of this.

[42] The duty of good faith is a statutory one set out in s 4 of the Act. For purposes of the current employment situation, I summarise the obligations as being a requirement that the parties deal with each other in good faith; not do anything to mislead or deceive each other, or that is likely to mislead or deceive the other; and to be active and constructive in establishing and maintaining a productive employment relationship, including being responsive and communicative.

[43] Section 4(4)(bb) specifies that the duty applies to any matter arising under or in relation to an individual employment agreement (IEA) while the IEA is in force.

[44] Mr Churchill had not signed a written IEA during his employment with CEWL but the terms of his unwritten IEA comprised the key agreements reached by the parties over such matters as remuneration, hours of work, place of work, and duties, and also incorporated statutory obligations and entitlements, such as leave and holidays, and the mutual obligations of good faith.

[45] I find Mr Churchill breached his obligation of good faith to his employer in the action he took in relation to his work laptop.

[46] CEWL seeks damages in relation to the costs it incurred in engaging the services of Mr Donovan to prepare a preliminary report on Mr Churchill's work devices and provide evidence to the Authority. It also seeks the imposition of a penalty on him which I will return to shortly.

[47] I find an award of special damages to be appropriate in this instance to recompense CEWL, in part, for the expense it incurred in engaging the services of InPhySec. The award will be a contribution rather than cover the full expense of the forensic computer company's engagement as it appeared from Mr Donovan's oral evidence that the Samsung Tablet, which was also the subject of his preliminary triage report, had some functionality. Mr Churchill had provided his employer with the password for the tablet on 24 June 2020, several days before Mr Donovan's engagement by, or on behalf of, CEWL. The third device examined by Mr Donovan was Mr Churchill's work computer which had not been used for some months. I find an award of special damages, amounting to 30 percent of the expense incurred by CEWL in engaging InPhySec, to be appropriate.

[48] CEWL further seeks recompense for loss of work from Client A. By its evidence it has not undertaken work for that client since 20 June 2020 and it attributes the loss of work, and resulting revenue, to Mr Churchill. Mr Scott's oral evidence was that the work had benefitted CEWL in the amount of \$15,000 gross per month, of which he calculated 50 percent to be profit. No documentary evidence was provided to support the claim.

[49] Mr Scott's evidence that Mr Churchill had direct liaison with CEWL clients, including Client A, was not denied by Mr Churchill who acknowledged he was the face of CEWL as far as that client was concerned. However, he said he was not the only employee in the company who carried out the client's work and he was not responsible for the client choosing to move its work to another business.

[50] I find there is insufficient evidence to support the allegation that Mr Churchill was responsible for Client A moving its business from CEWL.

[51] While there was some evidence to suggest Mr Churchill may have carried out, or arranged other employees to carry out, work for that client during the period in which he was on paid ACC leave, it was not sufficient to establish on the balance of probabilities that he did or that, if he had, CEWL incurred any loss as a result.

[52] I was not persuaded by Mr Scott's oral evidence of having encountered, and spoken to, Mr Churchill on a work site related to Client A sometime between 13 May and 10 June 2020. Three reasons inclined me to discount his evidence: the first being the lack of certainty over the date the encounter allegedly occurred. The second reason is that Mr Scott did not find the event sufficiently important to refer to it in his written brief of evidence, other than in an oblique reference to having heard "*through word of mouth.....(Mr Churchill) was ... on 9 June 2020, on site doing work for (the client)*". The third and final reason is that, despite Mr Scott having referred in oral evidence to two of his other employees being present at the time of the encounter, he did not call either of those employees to give evidence that could support his claim.

[53] Other factors I have considered are Mr Churchill's acknowledgement that, while he had taken some telephone calls from clients while on ACC leave and had passed on messages to CEWL employees to facilitate client relationships, his undisputed evidence was that no clients were charged for his input. I also note Mr Scott's acknowledgement in the course of

the Authority's investigation that there was no contract between CEWL and Client A, whose work it had gained through a third party.

[54] I find no evidence that Mr Churchill took any active steps to persuade the client away from CEWL: rather it seems the client was impressed with the competence and workmanship he, as the "face" of CEWL had demonstrated, and chose to move its business to Mr Churchill's next employer.

[55] CEWL's counterclaim with regard to Client A fails. As CEWL provided no evidence of loss of any other client that it attributed to Mr Churchill, its general counterclaim in that regard fails in its entirety.

Remedies

[56] I have found Mr Churchill was not constructively dismissed and no remedies are available to him.

[57] I have found Mr Churchill's action in factory resetting his work laptop without the consent of his employer, and in the knowledge that it would render the employer-owned data inaccessible without the input of significant time and forensic computer expertise, breached his contractual and statutory obligation of good faith to CEWL and merits an award of special damages.

[58] I am satisfied it is reasonable to award CEWL a contribution of 30 percent of the expense it incurred in obtaining forensic computer services from InPhySec. While no copy of the InPhySec invoice was produced to the Authority, I accept Mr Donovan's evidence that it was \$6,500.

An order for special damages will be made below.

Penalties

[59] CEWL seeks the imposition of penalties on Mr Churchill in relation to the various breaches it alleges.

[60] I have upheld only one of those breaches in finding Mr Churchill carried out a factory reset on his laptop computer without the consent of his employer and in the knowledge that it

would entail difficulties of access to data for his employer. Mr Churchill is liable to a penalty for that breach.

[61] Not all breaches will result in the imposition of a penalty and it is relevant to ascertain how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it.²

[62] Section 133A of the Act sets out factors the Authority and Court are to take into account when considering penalties. They are (summarised):

- (a) the object of the Act; and
- (b) the nature and extent of the breach; and
- (c) whether it was intentional, inadvertent, or negligent; and
- (d) the nature and extent of loss or damage suffered by any person, or gains made or losses avoided by the person in breach, due to the breach; and
- (e) whether the person in breach has paid any compensation, reparation or restitution or taken other steps to mitigate any adverse effects, actual or potential; and
- (f) the circumstances in which the breach occurred, including the vulnerability of the employee; and
- (g) whether the person in breach has been found by the Authority or court, in proceedings under this or any other Act, to have previously engaged in similar conduct.

[63] A full court of the Employment Court provided guidance over the application and weighting of those factors in *Borsboom (Labour Inspector) v Preet PVT Limited*³ and further refinements have been subsequently made by the Court, including in *Nicholson and Ford*.⁴

[64] Counsel for Mr Churchill submits there is no case for the imposition of a penalty. I disagree. Taking into account the statutory factors set out above, and the circumstances of the case, I consider the imposition of a modest penalty is warranted. Of particular concern is that Mr Churchill undertook the factory reset of his work laptop knowing the harm it would cause the employer in accessing its data and software but proceeding in any event. The breach was

² *Xu v McIntosh* [2004] 2ERNZ 448 at 464.

³ [2016] NZEmpC Christchurch 143.

⁴ [2018] NZEmpC 132.

intentional and CEWL was put to the cost of engaging computer forensic expertise to ascertain what had been lost, when it had been lost, and whether it could be retrieved.

[65] The maximum penalty that can be imposed on an individual is \$10,000. After taking all matters into account, including no apparent previous breaches by Mr Churchill, and the proportionality of any penalty, I find the imposition of a penalty of \$500 to be warranted.

Orders

[66] Mr Churchill is ordered to pay special damages of \$2,166.67 to CEWL.

[67] He is also ordered to pay a penalty of \$500 within 28 days of the date of this determination. Payment is to be made to the Employment Relations Authority for payment by the Authority into the Crown account.

Costs

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

[69] If they are not able to do so and an Authority determination is needed, CEWL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Churchill would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[70] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Trish MacKinnon
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].