

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2020] NZERA 89
3062892

BETWEEN

CARLOS DELGADO
GUEVARA
Applicant

AND

ELECTROTEC ELECTRICAL
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Andrea Kelleher, advocate for the Applicant
Eska Hartdegen, counsel for the Respondent

Investigation Meeting: 26 and 27 November 2019

Determination: 26 February 2020

DETERMINATION OF THE AUTHORITY

- A. Electrotec Engineering Limited (EEL) constructively dismissed Carlos Delgado Guevara.**
- B. In settlement of Mr Delgado Guevara's personal grievance for unjustified dismissal EEL must pay him the following sums within 28 days of the date of this determination:**
- (i) \$6,336, less any applicable tax, in reimbursement of lost wages; and**
 - (ii) \$14,000, without deduction, as compensation for humiliation, loss of dignity and injury to his feelings.**
- C. Costs are reserved with a timetable set for memoranda to be lodged if an Authority determination of costs is needed.**

Employment Relationship Problem

[1] Carlos Delgado Guevara resigned from his job as an electrical apprentice with Electrotec Engineering Limited (EEL) on 26 February 2019. He had not attended work since 22 January 2019. On 21 January EEL director John van der Spuy told Mr Delgado Guevara he could no longer use a work vehicle he was given to use for getting to and from work. Mr Van der Spuy's decision was based on concerns he had about Mr Delgado Guevara's recent absence from work on sick leave and his attitude on the most recent previous days he had attended work, 10 and 11 January.

[2] The two men had different accounts of what Mr Van der Spuy said in conveying his decision to Mr Delgado Guevara. Mr Delgado Guevara said Mr Van der Spuy called him aside at the end of a work meeting and told him: "You fucked up, you didn't come to work to help when I asked you last week. I don't give a shit about your medical certificate. I would pay you for that but you messed it up now and you gonna pay now".

[3] Mr Van der Spuy denied that account. He said Mr Delgado Guevara had returned to work in mid-January after three weeks' leave and that other staff had complained about Mr Delgado Guevara's uncooperative attitude at work during 10 and 11 January. On 13 January Mr Delgado Guevara had sent Mr Van der Spuy a medical certificate with an email message explaining that he had been diagnosed with pneumonia and prescribed antibiotics. The medical certificate said he was unfit to work for the following seven days. He had not responded to an email message Mr Van der Spuy sent him on 15 January. The message said a job at one site needed to be finished and asked Mr Delgado Guevara to come to work if he was "feeling up to it".

[4] Mr Van der Spuy regarded use of the work vehicle as a privilege which Mr Delgado Guevara had forfeited. His version of events was that, at the end of a work meeting on the morning of 21 January, he called Mr Delgado Guevara aside and said to him: "Listen mate, you stuffed up. You came back with a lousy attitude. I am taking the vehicle away from you". There was no further conversation between them and Mr Delgado Guevara then travelled with another employee to work for the remainder of the day.

[5] The following day, 22 January, Mr Delgado Guevara used a car he had borrowed from his mother-in-law to travel to a construction site to which he was assigned to work that day. Another employee, Paul van Achterbergh, was also at the same worksite early in the day but left during the morning to work elsewhere. Mr Delgado Guevara remained at the site working alone.

[6] Around midday Mr Delgado Guevara experienced what he called a breakdown and rang his wife, Chantal Choromanski, in tears. Ms Choromanski was concerned for her husband's welfare and immediately booked him an appointment with his doctor. Mr Delgado Guevara then left the workplace and drove to the doctor's surgery to wait for his appointment later in the afternoon.

[7] His doctor provided Mr Delgado Guevara with a medical certificate saying he was unfit to attend work for the next seven days. Mr Delgado Guevara sent the certificate by email to Mr Van der Spuy later that evening. He had not responded to calls during the late afternoon and early evening from Mr Van der Spuy and Mr Van Achterbergh. Mr Van der Spuy later told Mr Delgado Guevara that they had tried to contact him because a fire drill had been held at the work site and he was not accounted for.

[8] At 7.09am the next morning, and before he had seen the email that Mr Delgado Guevara sent the previous evening, Mr Van der Spuy sent him this text message: "You are not responding to anyone calls. You have abandoned your job which means instant dismissal". Soon after sending that text Mr Van der Spuy read Mr Delgado Guevara's earlier email. He then sent a reply email saying Mr Delgado Guevara's medical certificate did not state what was wrong with him and his employment agreement required Mr Delgado Guevara to "verbally inform" Mr Van der Spuy if he was sick. Mr Van der Spuy's email also repeated his earlier text comment about assuming Mr Delgado Guevara had "abandoned" his position because he had not answered phone calls.

[9] The following day, on 24 January, Mr Delgado Guevara replied with a further email saying the reason for his medical certificate was that his GP had put him on stress leave due to "increased anxiety" after the incident on 21 January. He said he was humiliated by having his work vehicle taken away without any reason or notice.

He also said he had not abandoned his employment because he had sent the medical certificate explaining his absence on the evening of 22 January.

[10] Over the following days an increasingly fractious exchange of emails ensued. Mr Delgado Guevara and Ms Choromanski drafted his emails together. In an email on 25 January he asked Mr Van der Spuy to meet with him so Mr Van der Spuy could sign “on site paperwork” required as part of Mr Delgado Guevara’s apprenticeship studies. Those papers, described as on-site work units, recorded various types of work done. They had to be signed by a registered assessor in the workplace to confirm Mr Delgado Guevara had met certain standards of knowledge and quality in carrying out various aspects of an electrician’s work.

[11] Mr Delgado Guevara told Mr Van der Spuy that he had met with a manager from Skills NZ, the trades training organisation responsible for overseeing his apprenticeship, who wanted to be present when the papers were signed off. He said he would also bring a support person to such a meeting as he did not feel “safe or mentally stable” in Mr Van der Spuy’s presence.

[12] Mr Van der Spuy responded by asking how Mr Delgado Guevara was able to meet with him to get his units signed but not able to work. Mr Delgado Guevara responded that he was well enough to have a reasonable conversation with Mr Van der Spuy, in the presence of a support person and a Skills NZ representative, to resolve sign off of his unit standards. He said he needed the papers signed so he could continue his enrolment in his apprenticeship and because resolving that matter was “a contributing factor of the workplace stress experienced”.

[13] Mr Delgado Guevara had completed unit standards assessed by Polytech tutors as part of his apprenticeship studies but had, at that point, no workplace assessments signed off over the previous two years. Both parties had different views on why that was so.

[14] At the beginning of his employment Mr Delgado Guevara’s supervisor was Chris West. Mr West was a registered electrician and was the registered workplace assessor for apprentices employed by EEL. Mr Delgado Guevara said he had asked Mr West to sign his on-site papers in 2017 but Mr West told him to accumulate the units and he would sign them when he thought Mr Delgado Guevara was ready. Mr West subsequently left EEL for another job out of Auckland in late 2017. Mr Van der

Spuy said he had later reminded Mr Delgado Guevara to get his units updated but he had not done so.

[15] In late January 2019 Mr Van der Spuy telephoned a relative of Ms Choromanski to ask whether he could help resolve the situation that had developed between him and Mr Delgado Guevara. The relative was someone Mr Van der Spuy knew through a work connection. He had approached Mr Van der Spuy some years earlier about the prospects for Mr Delgado Guevara getting a job as an electrical apprentice in Mr Van der Spuy's business. The relative said he would not get involved in the matter but told Ms Choromanski's father about this conversation. In turn Mr Choromanski told his son-in-law. Mr Delgado Guevara then became upset that matters concerning his personal work issues were being discussed with someone who was part of his wife's wider family.

[16] Meanwhile, after seeking legal advice, Mr Van der Spuy asked again to meet with Mr Delgado Guevara "to further understand what your medical prognosis is, what support you may need, and when you will be able to return to work". Further exchanges of email followed with both men disputing the account given by the other of what had happened to date. These included Mr Van der Spuy writing that he was disappointed Mr Delgado Guevara had rejected his offer of "an olive branch", by seeking to meet with him, and Mr Delgado Guevara recalling a previous incident when he said he was "reprimanded ... and insulted ... for having taken legitimate sick leave". He referred to a situation in early 2018 when he said Mr Van der Spuy had suggested Mr Delgado Guevara took sick leave to get a longer holiday in January 2018. Mr Delgado's account of events was that he had been off work at the time because he had sprained his toe in a social soccer game and had to wear a 'moon boot'. He said he could not work while wearing the boot and had provided a medical certificate for his absence.

[17] Further dispute then ensued about arranging a time for a meeting to sign off Mr Delgado Guevara's papers. Eventually a Skills NZ manager visited Mr Van der Spuy alone on 19 February 2019 and provided him with Mr Delgado Guevara's papers for assessment. Mr Van der Spuy signed off some of those papers but refused to sign two units. One unit concerned communication skills. Mr Van der Spuy decided there was insufficient evidence Mr Delgado Guevara had demonstrated those skills.

[18] After further medical appointments in early February 2019 Mr Delgado Guevara's doctor diagnosed him as suffering "reactive depression" and prescribed anti-depressant medication.

[19] On 26 February 2019 Mr Delgado Guevara gave written notice of resignation. The reasons he gave in his letter included what he described as suspicion expressed about his medical condition, referring to his earlier illness with pneumonia; unspecified breaches of his privacy and his employment agreement; and breaching his apprenticeship agreement by not having proper procedures in place for sign off of his on-job unit standards.

[20] By email on 28 February 2019 Mr Van der Spuy asked Mr Delgado Guevara to reconsider his resignation. Mr Delgado Guevara declined to do so and sent a medical certificate saying he was unfit to work during his two week notice period. Mr Van der Spuy responded with a further request to meet, saying it was his preference to try and resolve the situation.

[21] On 11 March 2019 Mr Delgado Guevara, through his advocate, raised a personal grievance for constructive dismissal. In June 2019 he applied to the Authority for an investigation of that grievance. In its reply to his application EEL denied Mr Delgado Guevara's dismissal amounted to a constructive dismissal. It denied removing the "privilege" of use of a work vehicle was a breach of his employment agreement. It also said Mr Delgado Guevara was responsible for presenting his work records to be signed off and he had failed to do so.

The Authority's investigation

[22] Mr Delgado Guevara, Ms Choromanski, Mr Van der Spuy, Mr West, Mr Van Achterbergh and one other EEL employee, Mankirat Singh, provided written witness statements for the Authority investigation. Under oath or affirmation, they each answered questions from me and the representatives at the investigation meeting. The representatives also provided oral closing submissions on the issues for determination.

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

The issues

[24] The issues requiring determination were:

- (i) Did EEL breach terms of employment or duties owed to Mr Delgado Guevara and, if so, was it reasonably foreseeable that he would resign in those circumstances so that his employment should be seen as having ended by constructive dismissal rather than resignation?
- (ii) If Mr Delgado Guevara's employment did end by such unjustified actions by EEL, what remedies should be awarded to him, considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
 - (b) Compensation under s123(1)(c)(i) of the Act?
- (iii) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Delgado Guevara that contributed to the situation giving rise to his grievance?
- (iv) Should either party contribute to the costs of representation of the other party?

Constructive dismissal

[25] The doctrine of constructive dismissal concerns situations where an employer's conduct compels a worker to resign. Such a resignation may be held, in employment law, to be as much a dismissal as where an employer has actually dismissed the worker.

[26] One recognised category of constructive dismissal is where the resignation is caused by the employer's breach of duties owed to that worker. The resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee that a worker would resign rather than put up with such breaches.

[27] Mr Delgado Guevara alleged EEL committed such breaches, through what Mr Van der Spuy did or decided, in three ways: firstly, taking away his work vehicle on 21 January and the reasons Mr Van der Spuy gave for doing so; secondly, by having inadequate arrangements for supervising and approving his on-site assessments; and, thirdly, breaching his privacy by contacting his wife's relative over his work issues.

(i) Taking the work vehicle off him on 21 January 2019

[28] An employer's actions will be a breach of duty where they breach a specific term of a worker's employment agreement or breach implied terms, such as the duty of fair treatment. Such actions must meet the statutory test of justification – that is, what the employer did, and how the employer acted, must be what a fair and reasonable employer could have done in all the circumstances at the time.¹

[29] The statutory test of justification describes some steps that the Authority should look for in considering whether an employer has acted fairly and reasonably. Where an employer has concerns about a worker's conduct or performance, the employer should raise those concerns with the worker before taking any action adverse to that worker. The worker must be given a reasonable opportunity to respond and the employer must consider any explanation given before deciding what to do. If defects in the process followed by the employer are more than minor, and result in the worker being treated unfairly, the employer's actions may be found to be unjustified.²

[30] Mr Van der Spuy's evidence disclosed multiple failures of fairness in how and why he decided to take the work vehicle of Mr Delgado Guevara on 21 January 2019.

[31] Mr Delgado Guevara's employment agreement, signed in 2016, included a term stating EEL would provide him with a vehicle for the performance of his duties. The term did not state the vehicle would be available, at EEL's expense, for travel to and from work. The use he had of a work vehicle for that purpose was either a matter of policy or an individual term of his employment. However, even if the provision of such a vehicle was in any way linked to satisfactory performance of his duties, EEL had to act justifiably in making any changes to that arrangement.

[32] The rationale Mr Van der Spuy gave for what he did, and how he acted, on 21 January did not withstand scrutiny when he answered questions about it at the Authority investigation meeting.

[33] Firstly, Mr Van der Spuy had initially said his decision to take the vehicle off Mr Delgado Guevara was because of complaints by other staff about Mr Delgado

¹ Employment Relations Act 2000, s 103A(2).

² Employment Relations Act 2000, s 103A(3) and (5).

Guevara's "lousy attitude" at work on 11 and 12 January. As established in Mr Van der Spuy's oral evidence, however, no other employee of EEL had complained to him about Mr Delgado Guevara's work on those days. Rather, Mr Van der Spuy had talked to the supervisor of the construction site where Mr Van Achterbergh and Mr Delgado Guevara were sent to work on those two days. Mr Van der Spuy had visited the site on 11 June because the site supervisor had complained to him that the work EEL employees were sent there to do was behind schedule. Mr Van der Spuy said the supervisor told him that "your guy is not pulling his weight, I see him standing around and not doing much". The supervisor did not say which of the two workers he was talking about. Mr Van der Spuy said he assumed it was Mr Delgado Guevara. Neither worker was at the site when Mr Van der Spuy visited and he did not contact them, at that time, to discuss the supervisor's concerns.

[34] When he spoke to Mr Delgado Guevara on 21 January Mr Van der Spuy did not tell him about the supervisor's comments or give him any opportunity to explain what had happened or why such comments might have been made.

[35] When Mr Delgado Guevara was away from work from 13 January, having provided a medical certificate and the explanation that he had pneumonia, Mr Van der Spuy said he had the idea that this was part of a pattern and Mr Delgado Guevara needed "motivation".

[36] Again, in speaking to Mr Delgado Guevara on 21 January, Mr Van der Spuy did not say he believed Mr Delgado Guevara was misusing or overusing sick leave. It was clear from the content and overall tenor of his evidence that this was Mr Van der Spuy's view but he did not fairly put it to Mr Delgado Guevara, then or later, so he had no real opportunity to give any explanation or further information that might have addressed Mr Van der Spuy's concerns.

[37] Those failures by Mr Van der Spuy to properly disclose the basis of his concerns and to give Mr Delgado Guevara a fair opportunity to comment were more than minor defects in EEL's process. They resulted in Mr Delgado Guevara being treated unfairly. He established a breach of duty owed to him by EEL on that account.

(ii) *Inadequate arrangements for supervising and signing off unit standards*

[38] As well as a written employment agreement, Mr Delgado and Mr Van der Spuy on EEL's behalf had also signed a training agreement for his apprenticeship. The agreement, in a standard form provided by Skills NZ, stated that the obligations between the two parties formed part of their employment agreement.

[39] Four specific obligations of EEL recorded in this agreement were relevant. Firstly, EEL agreed to "facilitate and actively encourage" Mr Delgado Guevara's participation in all learning needs assessments. Secondly, EEL agreed to supervise him during training carried out under the training programme. Thirdly, EEL agreed to ensure that any on-job assessment was carried out by a Skills' registered or contract workplace assessor. Fourthly, EEL agreed to notify the appropriate licensing authority when the supervisor on record was no longer responsible for supervision of the trainee.

[40] The registered assessor is usually the apprentice's supervisor or employer. Skills' code of practice for registered assessors requires an assessor to advise Skills NZ if their employment details change and they no longer available to assess an apprentice. Guidelines issued for assessors say trainees should bring their assessors an assessment "around every 3-4 months" and, if the apprentice does not regularly submit assessments, the assessor should check with the apprentice.

[41] It was important to have those assessments carried out regularly as the work being assessed had to have been done within the previous 12 months. If left longer, the work had to be re-done and the assessment paperwork updated before being submitted for approval.

[42] Mr West, who held a current practicing licence as an electrician, was the supervisor identified in Mr Delgado Guevara's training agreement. Mr West had signed an undertaking in the agreement to ensure Mr Delgado Guevara was supervised in accordance with Electrical Workers Registration Board procedures. Mr West was also registered with Skills NZ as an assessor. He left EEL's employment in November 2017.

[43] Mr West and Mr Van der Spuy confirmed in their oral evidence that neither man had advised Skills NZ that Mr West was no longer working at EEL and was no

longer available to act as the supervisor of Mr Delgado Guevara under his training agreement or as the assessor of his on-site assessments.

[44] Mr Van der Spuy's evidence also established that he had made no satisfactory arrangements for anyone else to be the assessor of Mr Delgado Guevara's on-site assessments after Mr West left the business.

[45] Mr Van der Spuy was a registered electrician and had previously been registered with Skills NZ as an assessor. During the period Mr West had carried out the assessor role with Mr Delgado Guevara, and other apprentices employed by EEL, Mr Van der Spuy's registration as an assessor had lapsed. Mr Van der Spuy said he had not realised this was so until he had contact with a Skills NZ manager over signing Mr Delgado Guevara's assessments in February 2019. Even if Mr Van der Spuy was correct about having reminded Mr Delgado Guevara sometime during the previous year about the need to bring his assessment material to him for sign off, Mr Van der Spuy lacked the necessary registration to properly do so. Once he had signed some of Mr Delgado Guevara's assessments on 19 February 2019, there was a further delay in completing that paperwork as Skills NZ had to arrange for Mr Van der Spuy to be registered again as an assessor.

[46] Mr Van der Spuy said that at the time Mr West left he was talking with another registered electrician with his own business about joining EEL's business and that person would have been the assessor for the apprentices. Although that plan did not work out, the person still did work on projects with EEL. Mr Van der Spuy said, in his eyes, that person was "available" as an assessor. However, on looking at the training agreement in the investigation meeting, he conceded he could now see he was wrong about that.

[47] Against that background it was clear that EEL breached various aspects of its duty to facilitate Mr Delgado Guevara's training, including by ensuring on-job assessments were carried out by a Skills registered assessor.

(iii) Breaching his privacy by contacting a relative of his wife

[48] Mr Delgado Guevara was also, technically, correct that Mr Van der Spuy's telephone call to Ms Choromanski's relative in late January 2019 had breached a reasonable expectation that his employer would treat any work difficulties between

them as a matter for confidential discussion with him only, not people outside the workplace. While informal and well-meant means of seeking to resolve problems may sometimes be worth trying, Mr Van der Spuy's call to that relative went too far in the circumstances at the time.

[49] By contrast, Mr Van der Spuy later had a direct invitation from Mr Delgado Guevara's wife, Ms Choromanski, to contact her directly if he wanted to raise any further concerns. Ms Choromanski had written to Mr Van der Spuy in early March 2019, shortly after Mr Delgado Guevara submitted his notice of resignation. This was during the notice period so Mr Delgado Guevara was still EEL's employee. She asked Mr Van der Spuy not to contact Mr Delgado Guevara directly due to his depressive state. No criticism could fairly have been made, on the grounds of breaching Mr Delgado Guevara's privacy or confidentiality, if Mr Van der Spuy had acted on her invitation and contacted Ms Choromanski to talk about Mr Delgado Guevara and his work issues.

[50] In relation to what had happened earlier during January 2019, however, EEL's duty was to be active and constructive in communication over its employment relationship with Mr Delgado Guevara.³ Generally this means communication between the employer and the worker themselves only, unless either party has authorised a representative to engage on their behalf or otherwise agreed to have usually private or confidential work matters discussed with people outside the workplace.

[51] Mr Delgado Guevara had, according to his own evidence, already talked with his parents-in-law about his work problems. He went to their house on the evening of 21 January. The car he used to get to work the next day was his mother-in-law's car. However, this was information about his work circumstances that he chose to share with close family members. Mr Van der Spuy's action of contacting a member of Ms Choromanski's wider family was well beyond that scope. A fair and reasonable employer could not have done so without, at least, first talking with the worker about the notion of getting a member of their wider family involved in the discussion about the workplace problems. It was, therefore, a breach of a duty EEL owed to Mr Delgado Guevara.

³ Employment Relations Act 2000, s 4(1A)(b).

Sufficiently serious breaches to cause resignation

[52] Having established those breaches of duty owed to Mr Delgado Guevara, the question turned to whether they were, individually or taken together, sufficiently serious to make it reasonably foreseeable that an employee would not be prepared to keep working under such conditions. This determination has already set out an examination of the facts of what happened. As EEL's counsel submitted in closing submissions Mr Van der Spuy had "run the business by instinct, not in line with the law" and there were "a myriad of technical breaches of the training agreement and the employment agreement".

[53] Mr Van der Spuy had acted arbitrarily in removing the work vehicle from Mr Delgado Guevara on the basis of an opinion about his use of sick leave and his attitude to work. Those concerns were not fairly put to him and, on further enquiry in the Authority investigation, were found to lack a reasonable factual foundation. At the time Mr Delgado Guevara submitted his resignation, he could reasonably believe Mr Van der Spuy would continue to act in that way. The failures to make proper arrangements for assessment of on-job unit standards supported that belief.

[54] How Mr Van der Spuy had dealt with those matters crossed the line from being inconsiderate conduct, causing Mr Delgado Guevara some unhappiness and resentment, to being repudiatory conduct. It was reasonably foreseeable he would resign rather than tolerate such conduct. In those circumstances, his resignation was caused by what EEL did, so this was really a case of constructive dismissal rather than merely a resignation.⁴

Remedies

[55] Having established his employment ended by constructive dismissal, which is a form of unjustified dismissal, Mr Delgado Guevara was entitled to an assessment of remedies for his personal grievance.

Lost wages

[56] Mr Delgado Guevara's employment with EEL ended in mid-March and he began work in a new job in mid-May 2019. He sought an order for eight weeks' wages, being the amount he lost between jobs.

⁴ *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cases 95 at 104.

[57] By having gained new employment relatively quickly, after a short period in which his job search was delayed by his health issues, Mr Delgado Guevara had made reasonable endeavours to mitigate his loss.

[58] In those circumstances the Authority must order the lesser of a sum equal to the lost remuneration or three months ordinary pay.⁵ In Mr Delgado Guevara's case this is the eight weeks' wages he claimed. For his ordinary weekly hours of 44 at the rate of \$18 an hour he was paid, the gross sum due for the eight week period was \$6,336. Subject to any deductions for applicable tax, this is the amount EEL must pay Mr Delgado Guevara as lost wages within 28 days of the date of this determination.

Compensation for humiliation, loss of dignity and injury to feelings

[59] Mr Delgado's evidence established he was humiliated by how he was unfairly treated over his use of sick leave and the sudden withdrawal of the use of a work vehicle and was distressed by the problems caused by the shortcomings in EEL's arrangements to assess his on-site apprenticeship assignments. Involving wider family members heightened his upset. The situation damaged his health.

[60] Ms Choromanski said it took some months before her husband became "a happy person again". Mr Delgado Guevara said things were "really good" after he started his new job in May 2019 and he and his wife were now focussed on the birth of their child due in early 2020.

[61] Considering the distress experienced by Mr Delgado around the time leading up to his resignation, the evidence of no ongoing effects on him and the general range of awards in similar cases, an appropriate award of compensation under s 123(1)(c)(i) of the Act was \$14,000. This is the amount EEL must pay Mr Delgado Guevara, without deduction and within 28 days of the date of this determination, as compensation for humiliation, loss of dignity and injury to his feelings.

No reduction for contribution

[62] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance.

⁵ Employment Relations Act 2000, s 123(1)(b) and s 128(2).

[63] In this case two aspects of Mr Delgado Guevara's conduct contributed to the situation.

[64] Firstly, the failure in arrangements over assessments was not an entirely one-sided story. The apprentice is expected to take the initiative in preparing and presenting assessments to the workplace assessor. Mr Delgado Guevara knew as long ago as February 2018 that the arrangements in place at EEL were inadequate. This was clear because he sent an email to the Skills NZ manager asking what to do about getting his assessments signed because his supervisor had left the company. The manager replied, incorrectly as it turned out, that Mr Delgado Guevara's "boss" should be able to do it. Mr Delgado Guevara said he subsequently asked Mr Van der Spuy many times to look at his work assessments but was repeatedly rebuffed. His evidence of having done so was, however, strenuously denied by Mr Van der Spuy and was otherwise uncorroborated.

[65] Secondly, Mr Delgado Guevara could have done more in response to Mr Van der Spuy's request in February 2019 to meet and discuss resolving their employment issues. The good faith obligation to be active and constructive in communicating with one another applied to both parties. The tone and content of the emails Mr Delgado Guevara and Ms Choromanski drafted together and sent to Mr Van der Spuy was overly combative.

[66] However, while less than satisfactory, neither aspect of what Mr Delgado Guevara did or did not do was sufficiently blameworthy to require a reduction of the remedies awarded for his grievance. Accordingly no reduction in remedies is required.

Costs

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

[68] If they are not able to do so and an Authority determination on costs is needed Mr Delgado Guevara may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum EEL 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.

[69] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate for a two day investigation meeting, that is \$8,000 unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶ On such factor would be if EEL had made a reasonable offer before the investigation meeting to settle the matter for amounts greater than awarded in this determination.

Robin Arthur
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].