

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 35  
5549587

BETWEEN ROYDEN (ROY)  
HABERFIELD  
Applicant

AND RAPID DENSIFICATION NZ  
LIMITED  
Respondent

Member of Authority: Christine Hickey

Representatives: Ashley-Jane Lodge, Counsel for Applicant  
Robert Thompson, Advocate for the Respondent

Investigation meeting: 10 December 2015

Submissions received: At the investigation meeting from both parties  
Further evidence received 14 December 2015

Determination: 30 March 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. Rapid Densification NZ Limited constructively dismissed Royden Haberfield.**
- B. Within 28 days from the date of this determination Rapid Densification NZ Limited must pay Royden Haberfield:**
- (i) \$6,751.49 gross in lost wages, and**
  - (ii) \$4,000 in compensation for humiliation, loss of dignity and injury to his feelings.**
- C. Within 28 days from the date of this determination Rapid Densification NZ Limited must pay a penalty of \$2,000 to the Employment Relations Authority for transfer to the Crown Account.**

**Employment relationship problem**

[1] Roy Haberfield was employed by Rapid Densification NZ Limited (Rapid) from 24 March 2014 as the operator of a piling rig. In August 2014 Mr Haberfield was given a new individual employment agreement (IEA) and asked to sign it.

[2] Mr Haberfield resigned in writing on 25 September 2014. He told Rapid he resigned as a result of being forced to sign the new IEA.

[3] Mr Haberfield claims that Rapid unjustifiably constructively dismissed him. In the alternative, Mr Haberfield claims Rapid unjustifiably disadvantaged him in his employment. He also says Rapid breached its duty of good faith to him.

[4] By way of remedy Mr Haberfield claims lost wages, compensation for humiliation, loss of dignity and injury to his feelings, and a penalty for Rapid's breach of good faith, as well as legal costs.

[5] Rapid denies that Mr Haberfield was unjustifiably disadvantaged or constructively dismissed and denies that it breached its duty of good faith to Mr Haberfield.

[6] I have issued this determination outside the statutory period of three months after receiving the last submissions from the parties. I record that the Chief of the Authority has decided under section 174C(4) of the Employment Relations Act 2000 (the Act) that exceptional circumstances existed for providing this written determination of findings later than the latest date specified in s 174C(3) of the Act.

**Background facts***First written IEA and hours of work*

[7] Mr Haberfield began work as an RAP Operator on 24 March 2014. He and Rapid agreed he would work for a minimum of 50 hours per week. He worked 10 hours a day from Monday to Friday.

[8] The possibility of Saturday work was not clearly agreed. Mr Haberfield had made it clear he would rather not work Saturdays as he preferred to have family time on the weekend.

[9] Rapid did not give Mr Haberfield a written IEA. He asked for one. But Kerri Murphy, the only Rapid employee based in New Zealand <sup>1</sup>, was not aware New Zealand law requires a written IEA.

[10] Eventually Ms Murphy offered Mr Haberfield an IEA which he signed towards the end of June 2014, back dating its application to 24 March 2014.

[11] At the investigation meeting Ms Murphy confirmed that the company had intended to pay Mr Haberfield at ordinary time for the first 40 hours of his working week. For every hour after that it would pay him at time and a half rates. That is what happened and Mr Haberfield's pay slips reflect that.

[12] However, it is clear that the relevant clause actually said Mr Haberfield would be paid at ordinary time for all hours up to 50 hours a week:

*6.1 Full Time Hours with an obligation to perform overtime as necessary with an entitlement to extra pay*

***The Employee's normal hours of work shall be 50 hours per week, between the hours of 7:30AM-5:30PM on Monday-Friday. Saturdays will be worked only if and when needed and will be discussed and agreed upon between the Employee and the Employer in advance. The Employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties. Where extra hours are performed the Employee shall be entitled to an overtime payment as set out in the wages clause below.*** [emphasis added]

*The proposed new IEA*

[13] In August 2014 the machine that Mr Haberfield operated broke down. The crew foreman proposed sending Mr Haberfield home on no pay. Mr Haberfield pointed out he understood his IEA entitled him to a minimum of 50 hours paid work per week. However, he was happy to go home as he would be paid anyway. The foreman conveyed that to Ms Murphy. She was somewhat alarmed. Ms Murphy's evidence is that no other employee had that kind of guarantee in their IEA.

[14] Ms Murphy consulted with one of Rapid's directors based in Canada, Joseph Miller. They decided that they would offer all employees a standard IEA.

[15] On 18 August 2014 Rapid wrote to Mr Haberfield enclosing the proposed IEA. The letter was headed *Updated Employment Agreement*. Mr Haberfield was

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<sup>1</sup> Ms Murphy was made a director of Rapid on 27 October 2015

asked to sign the agreement and return it to Ms Murphy by Monday, 25 August 2014. He was advised he was entitled to discuss the offer and seek advice.

[16] Ms Murphy ended the letter with:

*If you disagree with, do not understand or wish to clarify anything in this agreement, please contact me to discuss.*

*Thank you for your continued work and input.*

[17] The proposed IEA was different in the minimum number of hours; clause 4 stated Mr Haberfield's normal hours of work would be 40 per week. It also required Mr Haberfield to work every Saturday.

[18] In certain circumstances, the new clause 6 allowed Rapid to temporarily cease providing work for Mr Haberfield.

*Mr Haberfield's concerns about the new agreement*

[19] Mr Haberfield was worried that if he signed the proposed IEA Rapid could change his hours of work and thus reduce his income without his agreement.

[20] Mr Haberfield and Ms Murphy began negotiating. He asked for the requirement to work every Saturday to be changed to only working one Saturday in four. Rapid agreed to that.

[21] Mr Haberfield asked for the ability to work for another employer in the event that Rapid was temporarily unable to provide him with paid work. Rapid agreed to that change.

[22] However, Mr Haberfield remained concerned that the proposed IEA was less favourable to him than the one that he had already signed only two months before. He says he asked for a guarantee of a minimum 40 hours per week of work. In other words, he did not want to agree to Rapid being able to temporarily suspend its obligation to provide him with work and to pay him.

*Rapid's concern about guaranteeing a minimum of 40 hours*

[23] Ms Murphy says that she and Mr Miller always understood that Mr Haberfield was asking for a guarantee of 50 hours work per week. They did not believe the company would necessarily be able to provide that in the future.

*Rapid's response to the issue of 40 hours of guaranteed work*

[24] Ms Murphy consulted Mr Miller who told her the hours of work were non-negotiable. Rapid would not agree to guarantee a minimum of 40 or 50 hours per week every week. In other words, it wished to have the flexibility to be temporarily released from its obligation to provide work and pay to Mr Haberfield.

*Rapid's ultimatum*

[25] On 8 September 2014 Ms Murphy telephoned Mr Haberfield and told him Mr Miller had decided the hours of work issue was non-negotiable.

[26] She also told Mr Haberfield that if he chose not to sign the proposed IEA he could remain on his existing IEA. However, Rapid would strictly interpret clause 6.1 of the existing IEA to mean that he would need to work for 50 hours a week before he would be paid at time and a half rates.

[27] Ms Murphy said the arrangement to pay overtime rates only after 50 hours had been worked would be effective immediately, meaning it would apply to the fortnight Mr Haberfield had just worked.

*Mr Haberfield's resignation*

[28] Mr Haberfield said he understood Ms Murphy to be threatening to disadvantage him by changing the existing terms and conditions of his employment. That is, he had always been paid at time and a half rates for all hours over 40 per week. He had a discussion with Ms Murphy on the telephone about how it would be in his best interests to resign. He says that he told Ms Murphy that he would give Rapid a month to find someone to replace him.

[29] Ms Murphy denies that Mr Haberfield made a decision to resign on 8 September but says that he did raise his resignation as a possibility.

[30] On the morning of 9 September 2014 Mr Haberfield signed the proposed IEA. In the declaration on page 10, Mr Haberfield crossed out some words so that the declaration ended:

*I acknowledge I have been induced to enter into this Individual Agreement by oppressive means, undue influence or duress.*

[31] On page 11 Mr Haberfield signed and wrote:

*Signed under duress of wage payments being changed.*

[32] On 25 September 2014 Mr Haberfield emailed Ms Murphy:

*I am giving you notice of my resignation.*

*My last day of work will be Wednesday 8th October 2014.*

*My reason for resigning is from being forced to sign my contract.*

*I can no longer work under these conditions.*

[33] Later that day Ms Murphy emailed Mr Haberfield that she accepted his resignation.

### **Issues**

[34] The issues I need to consider to determine Mr Haberfield's claims are:

- (a) Whether Rapid breached a duty or duties it owed to him.
- (b) If so, whether the breach caused Mr Haberfield to resign.
- (c) Whether the breach was serious enough to make it reasonably foreseeable there was a risk of Mr Haberfield resigning.
- (d) If not, did Rapid's actions unjustifiably disadvantage Mr Haberfield?
- (e) Did Rapid breach its duty of good faith to Mr Haberfield?
- (f) Should Rapid pay Mr Haberfield any remedies?
- (g) Should I impose a penalty on Rapid?
- (h) Should legal costs be awarded?

## Determination

### *Legal principles of constructive dismissal*

[35] A constructive dismissal is one where the employee resigns but does so effectively because the employer has caused them to do so. Mr Haberfield must satisfy me that his resignation was in reality a dismissal.

[36] The legal principles applying to constructive dismissals are well established. In *Auckland Shop Employees Union v Woolworths NZ Limited*<sup>2</sup> the Court of Appeal decided there are three main circumstances where a constructive dismissal may arise:

- (a) When an employer gives an employee an option of resigning or being dismissed;
- (b) When an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;
- (c) When a breach of an implied or express duty, or duties, by the employer leads an employee to resign.

[37] Mr Haberfield's claim fits within the third of these categories. That is what I will examine to decide whether Rapid constructively dismissed him.

### *Did Rapid breach a duty or duties it owed to Mr Haberfield?*

[38] In June 2014 Rapid and Mr Haberfield entered into a written IEA in which their intentions were not accurately recorded in clause 6. They made a mutual mistake when rendering the existing agreement into writing. They both understood that Mr Haberfield would work 50 hours a week on an ongoing basis but that after he worked 40 hours per week he would be paid overtime rates of time and a half. That is what Rapid intended, it happened from the time Mr Haberfield was employed and he understood it would continue that way.

[39] Rapid presented Mr Haberfield with a proposed IEA that introduced terms and conditions less favourable to him. The parties were in negotiation about the proposed IEA when Rapid delivered Mr Haberfield an ultimatum that unless he accepted the

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<sup>2</sup> [1985] ACJ 963

proposed IEA it would rely on the written words in clause 6 of the first IEA. That was a significant change.

[40] The ultimatum, especially Rapid's insistence on applying it to the previous fortnight, was a breach of its implied duty to maintain Mr Haberfield's trust and confidence. He expected his employer to stick to the agreement it had made with him to pay him overtime after he had worked 40 hours a week. He was entitled to keep expecting that, unless he agreed to something different.

[41] Rapid breached its duty to Mr Haberfield however I view it. I prefer not to view it as duress, as Ms Lodge submits. However, it can be seen as Rapid unilaterally altering a fundamental agreed, although unwritten, term of Mr Haberfield's employment. Equally, I consider Rapid was estopped from enforcing the written terms of clause 6 of the first IEA since by its actions it led Mr Haberfield to understand it would not require him to work 50 hours a week before overtime would be paid.

[42] In addition, in requiring Mr Haberfield to sign the new IEA Rapid unilaterally imposed its desire to be able to suspend his work and pay temporarily. That was a fundamental change going to the heart of the employment relationship.

[43] Ms Lodge submits that Rapid failed to adequately consult with Mr Haberfield over the proposed changes. I accept that was the case once the ultimatum was delivered. However, I do not see that as a separate breach to that I have already found.

[44] Ms Lodge also submits that Rapid should have engaged further with Mr Haberfield after he signed the new IEA having made it clear that he was only signing it under pressure. Perhaps it would have been prudent for Rapid to continue to negotiate with Mr Haberfield but I do not consider Rapid's failure to do so adds a further breach of its duty to that I have already found.

*Did that breach or those breaches seriously damage the trust and confidence that Mr Haberfield needed to have in Rapid?*

[45] It is clear that Rapid's breach seriously damaged the trust and confidence Mr Haberfield ought to have been able to rely on.

*Was Rapid's breach so serious it ought to have foreseen that Mr Haberfield might resign?*

[46] Rapid's breach was so significant it was foreseeable that Mr Haberfield might decide to resign over it.

*Did the breach cause Mr Haberfield's resignation?*

[47] Mr Thompson submitted that Mr Haberfield resigned because he had a new job to go to and therefore the cause of his resignation was not Rapid's ultimatum to him on 8 September.

[48] I am satisfied Mr Haberfield finished work on Wednesday, 8 October 2014. The following day he attended a football tournament his daughter was competing in. He had earlier signalled to Ms Murphy that he would want that day off. On Friday, Mr Haberfield spoke with a friend who mentioned that Fulton Hogan was looking for drivers. Mr Haberfield had an interview with Fulton Hogan which offered him a job as a portable loader operator that day, 11 October. He accepted the offer of employment and started work on Monday, 13 October 2014.

[49] The cause of Mr Haberfield's resignation was the breach by Rapid. He first signalled his potential resignation to Ms Murphy over the telephone on 8 September. Mr Haberfield's conduct after that, including the way he signed and notated the second IEA and his resignation letter are consistent with the cause of his resignation being Rapid's breach.

### **Conclusion on constructive dismissal**

[50] Rapid constructively dismissed Mr Haberfield.

### **Did Rapid unjustifiably disadvantage Mr Haberfield?**

[51] Rapid's actions could also been seen as an unjustifiable disadvantage to Mr Haberfield. However, this claim was made in the alternative and I do not need to consider it.

### **Did Rapid breach its duty of good faith?**

[52] Mr Thompson submits that Rapid was communicative and responsive. He cites Rapid's willingness to change two aspects of the proposed IEA Mr Haberfield

was unhappy with as evidence of Rapid's good faith behaviour. In other words, Rapid considers it did not breach its duty of good faith.

[53] Rapid was under a duty to maintain Mr Haberfield's trust and confidence and in order to do so had to act in good faith towards him. Good faith generally required Rapid to be active and constructive in establishing and maintaining a productive employment relationship<sup>3</sup> with him.

[54] I consider Rapid's actions, which threatened to go back on an established understanding and gave Mr Haberfield no real option but to sign the new IEA were in breach of its duty of good faith.

**Should Rapid pay a penalty, and, if so, in what amount?**

[55] In his Statement of Problem Mr Haberfield claimed that Rapid should pay a penalty for its breach of the duty of good faith. Ms Lodge submits that any penalty should be paid to Mr Haberfield.

[56] Section 4A of the Act provides that a party who fails to comply with its duty of good faith in section 4(1) is liable to a penalty if the failure was deliberate, serious and sustained or intended to undermine bargaining for an employment agreement or relationship.

[57] Ms Lodge submits that Rapid's breach of good faith was deliberate, serious and sustained and warrants a penalty.

[58] Mr Thompson submits that the circumstances do not warrant a penalty because there is no evidence of deliberate and wilful conduct by the employer.

[59] The Authority's power to order a penalty is discretionary. In *Xu v McIntosh*<sup>4</sup> the Employment Court provided guidance for the Authority. It made the following observations:

*A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?*

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<sup>3</sup> Section 4(1A) of the Act.

<sup>4</sup> [2004] 2 ERNZ 448

*The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.<sup>5</sup>*

[60] I also need to consider other factors such as Rapid's remorse and the range of penalties imposed in other comparable cases.<sup>6</sup>

[61] I consider that the breach was deliberate. The ultimatum was delivered in the knowledge that unless Mr Haberfield agreed to the new IEA he would be disadvantaged for the period of two weeks that he had worked but not yet been paid for.

[62] Rapid's breach of good faith was aimed at undermining Mr Haberfield's ongoing bargaining with it about the proposed IEA. Its ultimatum caused Rapid's desired result, being for Mr Haberfield to accept the new IEA, which was more favourable to Rapid and less favourable to Mr Haberfield. It is the kind of wrongdoing that should be penalised.

[63] Rapid has showed no remorse and has argued that its actions did not breach any of its duties to Mr Haberfield.

[64] I have had regard to penalties awarded in other cases in which a company has breached its duty of good faith. I have not found any directly comparable cases. In all the circumstances, I consider a penalty of \$2,000 to be appropriate. The main purpose of the penalty is to signal to other employers that such tactics are not legitimate. It is appropriate that Rapid pays the penalty to the Crown.

## **Remedies**

### *Lost wages*

[65] Mr Haberfield found new employment within a week after his last day at Rapid. He clearly mitigated his loss. However, now he earns less than he did at Rapid. He earned \$29 per hour for every hour up to 40 at Rapid. With Fulton Hogan, he earned \$22.17 per hour for every hour up to 40 in his first 90 days. From then on, he has been on an ordinary time hourly rate of \$23.07.

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<sup>5</sup> Ibid, Paragraphs [47] and [48].

<sup>6</sup> *Tan v Zhang* [2014] NZEmpC 65, at paragraph [32].

[66] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Rapid of the whole or any part of wages Mr Haberfield lost as a result of his grievance.

[67] Section 128(2) of the Act provides that I must order Rapid to pay Mr Haberfield the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration. Since Mr Haberfield obtained work in the three months after his dismissal, I need to award him his actual lost remuneration for the three months after his dismissal.

[68] Based on the evidence of both parties I find that if Mr Haberfield had stayed at Rapid he would have continued to work 80 hours at ordinary time and an average of 21.5 hours of overtime for the first three months after his dismissal. I appreciate that includes a period over Christmas and New Year when Rapid was closed. However, if still employed Mr Haberfield would have been paid for annual leave and statutory holidays over that time.

[69] Mr Haberfield's average earnings over his employment with Rapid were \$1,595 per week gross. Over three months, or thirteen weeks, Mr Haberfield would have earned \$20,735 gross with Rapid had he not been constructively dismissed.

[70] Over the same period with Fulton Hogan Mr Haberfield earned an average of \$1,401.04 per week, which over 13 weeks is \$18,213.51. Based on those averages the difference between what he would have earned and what he did earn over that period is \$2,251.49 gross.

[71] Rapid must pay Mr Haberfield the sum of \$2,251.49 gross being the sum of his actual lost remuneration in the three months after his dismissal.

#### **Lost wages beyond the first three months**

[72] Section 128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s 128(2).

[73] Ms Lodge submits that I should exercise this discretion to award Mr Haberfield lost remuneration either up to 29 November 2015 or for three years after his dismissal. She submits that Mr Haberfield was a valued employee and that

there is nothing to suggest he would have been dismissed or voluntarily left Rapid over those periods.

[74] In deciding whether or not to award lost remuneration for more than three months I need to undertake a counter-factual analysis.<sup>7</sup> I need to take account of many contingencies.

[75] Ms Lodge submits that I need to take into account that an employee of Rapid who did not sign the proposed new IEA was still working for Rapid at the date of the investigation meeting. She submits that Mr Haberfield was likely to have stayed that long too but for Rapid's behaviour towards him.

[76] Ms Murphy says Rapid considered Mr Haberfield its best operator. That suggests that he would not have been dismissed within a year, barring some serious misconduct, for example.

[77] Another issue I need to consider is that overtime work with Rapid may have greatly reduced or dried up. Mr Thompson made a submission to that effect.

[78] I do not consider it is possible to make an award on the basis of three years post-dismissal because of the number of unknown factors including whether or not the specialist work done by Rapid will last that long. For example, Mr Haberfield may have a change in his circumstances or those of his family over that time. He may not have remained at Rapid for three years.

[79] I consider it is fair to award Mr Haberfield some loss of income beyond three months. Taking into account my counter-factual analysis I consider the fairest starting point is to consider loss of income over a 12 month period. However, I do so on the basis that overtime hours with Rapid are likely to have reduced. I also recognise that I have already awarded actual lost income for the first thirteen weeks of the year leaving 39 weeks to consider. I consider that Rapid must pay Mr Haberfield an additional \$4,500 in lost remuneration making the total payable \$6,751.49 gross.

### *Compensation*

[80] Ms Lodge submits that compensation of \$15,000 is appropriate for Mr Haberfield's humiliation, loss of dignity and injury to his feelings.

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<sup>7</sup> *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315

[81] Mr Haberfield said that he felt angry because he considered Rapid was bullying him. He felt that he had no choice but to resign so that Rapid could not get away with its bullying of him. Mr Haberfield says he was frustrated in the time after he signed the new IEA that Rapid did not initiate discussions with him about how they could resolve issues without him resigning as he signalled to Ms Murphy he was likely to do.

[82] Mr Haberfield and his wife, Ms Chambers, gave evidence that he was fairly confident he could eventually get a new job in his field. However, they both say that he was embarrassed to be out of work and to be receiving a lower hourly rate than he had earned since 1994.

[83] Mr Haberfield is also upset that he was not able to provide as much income for his family as he had been doing while at Rapid.

[84] Mr Haberfield suffered moderate humiliation, loss of dignity and injury to his feelings for a limited amount of time. That was largely because he got a new job so quickly after Rapid's breach caused his resignation. However, he did suffer some ill effects and Rapid must compensate for those by paying him \$4,000.

### **Costs**

[85] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[86] I invite the parties to agree on costs. I can indicate that the Authority is likely to adopt its notional daily tariff-based approach to costs. The daily tariff is \$3,500. The investigation meeting lasted about  $\frac{3}{4}$  of a full day.

[87] If the parties cannot reach an agreement the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.