Determination Number: AA 135/07
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An order prohibiting publication appears at
[81]

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Bruce Hardgrave
AND	CustomKit Buildings Limited
REPRESENTATIVES	Christine Meechan, counsel for Bruce Hardgrave Simon Dench, counsel for CustomKit Buildings Limited
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	28 and 29 November, 21 December 2006
DATE OF DETERMINATION	01 May 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] CustomKit Buildings Limited ("CustomKit") is in the business of selling kitset buildings. Most are barns and utility buildings, and are of timber construction with board and batten claddings. Standard designs are available for the various buildings. CustomKit supplies everything the builder needs to construct the building to a lock up, shell only stage. It employed Bruce Hardgrave as a project co-ordinator and scheduler, commencing 26 April 2005.

[2] Mr Hardgrave says CustomKit dismissed him constructively and unjustifiably on 9 February 2006. He also says he has a personal grievance arising from unjustified actions of the employer which affected his employment to his disadvantage, although the actions concerned were not expressly identified. He says, too, that the employer breached its duty of good faith in its dealings with him.

[3] CustomKit says Mr Hardgrave resigned prematurely when issues were raised about his performance and commitment, and denies any unjustified action on its part.

[4] CustomKit also counterclaimed in respect of loss it said it suffered as a result of Mr Hardgrave's mistakes, but withdrew the claim shortly before the end of the investigation. A second counterclaim was withdrawn much earlier, and is now being pursued elsewhere.

The events leading to Mr Hardgrave's resignation

[5] Mr Hardgrave had been a builder for many years, and was seeking a change in direction when he applied for the position at CustomKit. Scheduling comprised the substantial majority of the duties required. The related project co-ordination involved Mr Hardgrave in ordering materials, and liaising with CustomKit's factory and the builder to the point of delivery of materials to the construction site.

[6] Schedulers work from the detailed plans used for obtaining local body building consents and by the builder in the construction process.

[7] The scheduler's work at CustomKit involved:

(a) working through the plans to check the necessary information is present, then identifying, counting and listing all of the materials required for the relevant building. This exercise is known as doing a 'take off' of materials and is one with which builders are familiar. Since Mr Hardgrave had been a builder, the parties' mutual expectation was that he would have no difficulty with take offs, and his building experience was one of the reasons why he was employed; and

(b) transferring details of necessary materials and the required quantities to the appropriate computerised template, which was an Excel spreadsheet standardised for the relevant design. The completed spreadsheet was the 'schedule' for the building to be constructed.

[8] The completed schedule set out basic information such as the client's name, the design of the building to be constructed and the expected completion date at the top of each page. Below that, there was a column in which the required materials were named and identified precisely. Much of the latter information was already present in the template, especially when a standard

design was used, although it was accepted that variations and additions were required when a customer varied aspects of the design. There then followed a number of columns – usually 3 in the examples I was shown – in which further details such as, for example, 'cut', 'quantity' and 'code' were entered in respect of each of the materials.

[9] The completed schedule was passed to the builder, as well as being used as a source document for the ordering of materials and a timber cutting list for CustomKit's factory employees.

[10] Another employee, Craig Lipscombe, had been doing the scheduling when Mr Hardgrave was employed. Mr Lipscombe was to move into sales and management, and to train Mr Hardgrave to take over his duties.

[11] It was common ground that, during his interview for the position, Mr Hardgrave said he knew how to do take offs but had very few computer skills. Indeed in a written recruitment questionnaire which he completed, Mr Hardgrave said he had limited computer experience and had not used Excel. Mr Lipscombe and Michael Anselmi, CustomKit's owner and general manager, accepted that. Their intention was that Mr Hardgrave would learn on the job.

[12] To that end, Mr Hardgrave's training began with a general process of familiarisation, before Mr Lipscombe showed Mr Hardgrave how to complete a scheduling job and Mr Hardgrave spent some time on practice exercises himself. The exercises involved going over scheduling jobs Mr Lipscombe had already completed. In the early stages Mr Lipscombe and Mr Hardgrave would go through the exercises together, with Mr Hardgrave attempting to input the necessary information and the two men discussing any difficulties and repeating the exercise until it was correct. After some weeks, Mr Hardgrave would complete exercises on his own, then take the work to Mr Lipscombe for discussion. It was common ground that, as he worked through this process, Mr Hardgrave made fewer mistakes and was increasingly able to work on his own.

[13] Some two or three months into his employment, Mr Hardgrave began working on real (rather than practice) jobs on his own. Mr Lipscombe would still check the work, and it was again common ground that Mr Hardgrave's errors continued to reduce the more work he did. Mr Lipscombe said that, by about 6 months into the employment relationship, Mr Hardgrave could do the work well.

[14] Not only that, it was common ground that the employment relationship was going well until about December 2005. Mr Lipscombe said he considered Mr Hardgrave a mate, and Mr Hardgrave invited Mr Lipscombe and his family to his home in December.

[15] In those circumstances it is unfortunate that Mr Hardgrave now asserts that Mr Lipscombe was often rude, aggressive and confrontational towards him and that Mr Lipscombe's attitude created an unpleasant and intimidating work environment. In particular Mr Hardgrave says he was unable to approach Mr Lipscombe for the assistance he said he needed, because he was intimidated by Mr Lipscombe's tendency to say, for example, 'what the fuck do you want' when Mr Hardgrave sought to ask a question.

[16] Mr Lipscombe did not deny speaking like that to Mr Hardgrave and to other members of the staff from time to time, but the matter must be placed in its proper context.

[17] In particular the workplace was reasonably convivial and I do not accept that Mr Lipscombe was generally regarded as an unpleasant or intimidating person, including by Mr Hardgrave. When Mr Lipscombe gave the kind of response to which Mr Hardgrave referred it was often taken, and intended, lightly. If on occasion the statement was made in obvious irritation, it was in general understood to have been influenced by Mr Lipscombe's need to attend to his own work. If it caused Mr Hardgrave not to approach Mr Lipscombe on occasions when he might otherwise have sought to do so, there is no reason why Mr Hardgrave could not have made another attempt at a more convenient time.

[18] Secondly, I do not accept Mr Hardgrave received such a response all or most of the time he had a question. In addition I accept Mr Lipscombe's evidence that even when he gave such a response it did not stop Mr Hardgrave asking more questions.

[19] On 23 January 2006 Mr Hardgrave injured his knee and thereafter did not report again for work. There was a great deal of discussion about the matter during the investigation meeting but for present purposes the significance of the injury is that it raised a prospect of surgery for Mr Hardgrave, as well as a lengthy period off work during a busy time for CustomKit. I did not understand

an apparent suggestion that Mr Anselmi was motivated by the implications of Mr Hardgrave's ACC status to have been pursued.

[20] When Mr Anselmi became aware of the injury, he decided he would need to pick up Mr Hardgrave's workload at least in the short term. He began by looking at Mr Hargrave's current scheduling job. He found several mistakes, which he characterised as lack of attention to detail. That in turn caused him to look at Mr Hardgrave's two most recent completed jobs. He found serious mistakes in them. He characterised the mistakes overall as indicative of a lack of concentration.

[21] A great deal of time was devoted to the mistakes during the investigation meeting. There was a very large number of them. A significant proportion concerned failures to order the correct quantities of materials. Mr Hardgrave would use the wrong multiple for an individual item or set of items, leading to significant over ordering or under ordering. In some of these examples his worksheets would show he had tallied items correctly, but the result was not correctly entered on the completed schedule. Additional errors which led to over or under ordering were essentially arithmetical errors, although there were fewer of these.

[22] Other relatively frequently-occurring mistakes concerned the size or length of materials ordered. Some of the mistakes appeared inexplicable. Mr Anselmi acknowledged that others arose out of errors on the original plans, but he expected Mr Hardgrave to use his skills and experience as a builder to be alert to and address such errors.

[23] The third main set of mistakes concerned errors in the rendering the angles on panel drawings.

[24] Mr Anselmi was so concerned about the mistakes that, on Thursday 26 January, he telephoned Mr Hardgrave at home and said 'this ain't working, we need to talk about this situation'. He asked for a meeting the next day.

[25] A meeting between Mr Anselmi and Mr Hardgrave duly went ahead on 27 January. Mr Anselmi went over with Mr Hardgrave the mistakes he had found, with particular reference to incorrect ordering and incorrect measuring, and sought to identify the reasons for them. Mr Anselmi also asked why the mistakes were occurring. The nature of the mistakes as he saw them meant Mr

Anselmi asked some quite personal questions, aimed at identifying the reason for the apparent lack of concentration. Mr Hardgrave accepted that questions of that kind were asked.

[26] According to a note Mr Hardgrave prepared at about the time of that meeting, Mr Hardgrave acknowledged he had made 'a few errors to do with the measurements' and said he needed to have more training. According to the note, Mr Anselmi replied that he would speak to Mr Lipscombe about making more time available, discussed the difficulty Mr Hardgrave was experiencing with Mr Lipscombe's response to requests for help, and acknowledged Mr Hardgrave was uncomfortable about seeking assistance from Mr Lipscombe when he needed it. Mr Hardgrave noted that he said repeatedly that he did not have enough training and Mr Anslemi agreed. Mr Hardgrave referred, too, to errors in the templates for some of the schedules, and complained that he had no training as a draftsperson so could not be expected to identify errors in the detail of plans.

[27] Mr Hardgrave and his wife gave evidence that the note was prepared that night, with Mr Hardgrave recounting what happened and Mrs Hardgrave typing as he spoke. However although the note refers to the 27 January meeting and some of the discussion during its course, I do not accept that it is a full and accurate account of the meeting or that its content concerns only the discussions at the meeting. Some passages, such as a bullet point concerning Mr Hardgrave's request for a wage review, were clearly additional commentary. Secondly, Mr Anselmi denied there was discussion of the reasons for Mr Hardgrave's difficulties in the detail set out in the note, and I accept that denial.

[28] In particular I do not accept that, had the discussion with Mr Anselmi been as Mr Hardgrave noted, the rest of the employment relationship would have unfolded as it did. The existence of such a detailed discussion at such an early stage of the deterioration is not consistent with the parties' accounts of what happened next. Accordingly while the detail may have come into Mr Hardgrave's mind after the meeting, I do not accept that he raised any of it during the meeting. I consider it likely that the comments and explanations were articulated in discussion with Mrs Hardgrave later, rather than with Mr Anselmi at the time.

[29] Mr Hardgrave should have raised those explanations with Mr Anselmi when he was asked about the mistakes. His not doing so left Mr Anselmi with reasonable grounds for considering him unresponsive and unapologetic. Since Mr

Anselmi felt unable to identify the nature of the problem, he also felt unable to fix it. For that reason he concluded he could not allow Mr Hardgrave to continue scheduling, and that there was no other position to which he could move Mr Hardgrave. He discussed this with Mr Hardgrave and advised that he believed Mr Hardgrave should consider resigning. Mr Hardgrave was to consider the matter over the weekend.

[30] There was a further conversation on 31 January. Mr Hardgrave told Mr Anselmi he liked his job and wanted to keep it. His proposal for how the problem with his performance might be addressed was merely to suggest more training.

[31] Mr Anselmi admitted he was irritable and frustrated. He told Mr Hardgrave that he could not teach him to count and transfer data accurately, and pointed out that Mr Hardgrave had been employed because of his experience as a builder. He made a number of angry statements to the effect that he could employ a school leaver on $25 – $30,000 a year rather than Mr Hardgrave on $52,000, that he had no confidence in Mr Hardgrave, that there was no way Mr Hardgrave was continuing in his employment and that Mr Anselmi would have to 'retrench' Mr Hardgrave. Mr Anselmi threatened to 'restructure' if he had to. He told Mr Hardgrave to come back to work, but that he would not be given any scheduling. He asked Mr Hardgrave again to consider what he would do.

[32] Mr Hardgrave spoke to Mr Anselmi again on 1 February, and requested another meeting. Mr Anselmi told him he was wasting his time, and that Mr Anselmi would now have to speak to his employment lawyer. Mr Anselmi admitted in evidence that he was frustrated and was probably thinking that he wanted Mr Hardgrave 'gone'. During a further conversation on 2 February a meeting was arranged for 9 February.

[33] Having by then sought legal advice, by letter of the same date Mr Anselmi wrote to raise his concerns about Mr Hardgrave's mistakes. He also raised concerns about Mr Hardgrave's availability to work extra hours when the company workload increased - believing that Mr Hardgrave was making himself unavailable to do so despite the hours of work provision in the employment agreement and Mr Hardgrave's positive indications in the recruitment questionnaire. Finally, Mr Anselmi wanted to know when Mr Hardgrave would be back at work following the injury to his knee.

[34] The meeting went ahead on 9 February, with Mr Hardgrave's solicitor (who did not act as counsel in the Authority) in attendance.

[35] The solicitor gave evidence and produced his handwritten meeting notes. I treat the notes as a reasonably full and accurate account of what occurred at the meeting, although I also accept that it is impossible for the solicitor to have recorded everything that occurred.

[36] Mr Anselmi had compiled a detailed account of the errors made in the scheduling for 6 buildings he identified. The document Mr Anselmi prepared also noted the concern that: 'Bruce was aware of the fact that he was falling behind in the scheduling but made no voluntary effort to do any extra hours to try and keep up with the work.' The document went on to note Mr Hardgrave's indication at the time of recruitment of his willingness to work outside standard hours when the workload required. With reference to the effect of Mr Hardgrave's absence following his knee injury, the document said: 'The company is not [in] a position where it can keep such a position open indefinitely as it is a critical part of the company process.'

[37] The meeting began with Mr Anselmi producing his document and saying he needed to discuss the concerns. He said again that Mr Hardgrave had 'not worked out'. Mr Hardgrave raised his concern about training, and Mr Anselmi asked what sort of training was required. Mr Hardgrave responded by saying he needed training on the use of the computer. Mr Anselmi repeated his view that the errors were simple counting errors, and that training was not required to address them.

[38] Mr Hardgrave then raised his concern about inaccurate templates. He also explained that he had not had time at the end of the previous year to do his usual checks on his schedules. Earlier in the year his jobs had been more accurate because he had time to check them. Finally, he said that when he asked for help it was not provided, rather he was sworn at.

[39] Mr Anselmi repeated his view that someone with Mr Hardgrave's building experience should have been able to do the work. He moved on to his concern about Mr Hardgrave's availability to work extra hours, before again expressing his view that the employment relationship had 'not worked out'. He said he did not

believe training could overcome this, that Mr Hardgrave should consider whether he could commit himself to the company, and if not he should 'move on.'

[40] The solicitor asked Mr Anselmi if he sought Mr Hardgrave's responses to the itemised errors. Mr Anselmi replied that he had said all he wanted to say. The solicitor then asked whether Mr Anselmi had said what he was alleged to have said on 26 and 27 January regarding Mr Hardgrave's continued employment, and Mr Anselmi acknowledged he had said 'words to that effect'.

[41] Finally the solicitor asked whether Mr Anselmi wanted to comment on an allegation that 'before Christmas' he had 'assaulted' Mr Hardgrave by clipping him around the ear while Mr Hardgrave was seated at his computer. Mr Anselmi declined to comment at the time and denied the allegation at the investigation meeting. I am not persuaded an incident of the kind Mr Hardgrave alleged occurred. I take that matter no further.

[42] A final aspect of the conversation, not recorded in the solicitor's notes but discussed in the oral evidence, concerned the prospect of Mr Hardgrave returning to work for a trial period with his work to be monitored. Mr Anselmi made that offer, and indicated he was prepared to try to make the relationship work. He did not wish to waste the training Mr Hardgrave had already received. He said in evidence that he believed there was an understanding that Mr Hardgrave would be returning to work. Mr Hardgrave's knee injury meant the date was to be confirmed once a specialist had been consulted. At the time there was a prospect of surgery, although no surgery went ahead.

[43] Mr Hardgrave said in evidence he did not wish to come back to work in circumstances where 'there was a sword hanging over [my] head'. However he acknowledged that aspect was not talked about at the time. He also said in his view the employment relationship was already over.

[44] In a letter dated 14 February 2006 Mr Hardgrave's solicitors advised that, individually and cumulatively, the company's actions were not those of a fair and reasonable employer and had irreparably damaged the employment relationship. Mr Hardgrave would not be returning to work.

[45] The actions in question centred on the events beginning on 26 January. The allegations of lack of training and assistance from Mr Lipscombe, and Mr Anselmi's clipping Mr Hardgrave around the ear, were also relied on.

Whether there was a dismissal

[46] In addressing this problem I apply the following:

> "… we consider the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice … . If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words whether a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breach. As to the duties of an employer …
>
> > '*In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*' [1]

[47] Mr Anselmi's conduct in late January and early February was the focus in the submissions on behalf of Mr Hardgrave. In particular, it was said that Mr Anselmi's conduct:

> "… crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship."[2]

[48] Mere discourtesy, in the absence of any unfairness or oppressive conduct, does not suffice. [3]

[49] I find on the facts here that Mr Anselmi went beyond merely expressing anger or frustration, or otherwise engaging in inconsiderate conduct. I accept that, when he first raised his concerns with Mr Hardgrave on 27 January, his mind was open to the possibility of an explanation. I accept, too, that Mr Hardgrave

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[1] **Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW** [1994]1 ERNZ 168, 172
[2] **Wellington Clerical etc IUOW v Greenwich** (1983) Sel Cas 95, 104
[3] **NZ Woollen Workers IUOW v Distinctive Knitwear NZ Limited** (1990) Sel Cas 791, 803

did not articulate his own concerns and was unresponsive. However Mr Anselmi moved too quickly to a conclusion that Mr Hardgrave could not remain on scheduling duties, and hence in employment. Although his concerns were serious he should have embarked on a formal performance management or disciplinary process and kept an open mind about the outcome. Instead he raised the prospect of Mr Hardgrave's resignation.

[50] The relationship could have been saved, or at least an unjustified dismissal averted, if Mr Anselmi had met the news of Mr Hardgrave's decision not to resign in an appropriate way. He did not do so. It was during the conversation of 31 January that Mr Anselmi went too far. He made it more than clear that he did not want Mr Hardgrave to remain in employment. That conduct was repudiatory of the employment relationship.

[51] Mr Anselmi then sought belatedly to embark on a disciplinary procedure. I consider it unlikely that, when the parties met on 9 February, Mr Anslemi's mind was fully open to the possibility of Mr Hardgrave's employment continuing. He still believed Mr Hardgrave had 'not worked out' and said so at the outset. Although he had gone to some trouble to prepare detailed information about Mr Hardgrave's mistakes, he had done so to demonstrate Mr Hardgrave's mistakes rather than to open up any wider discussion about them, or what could be done about them. When he was asked on 9 February whether he wanted to hear further comment on the mistakes he declined, relying instead on the reasons he had already given for not wishing the relationship to continue.

[52] I take into account that the parties discussed the prospect of Mr Hardgrave returning to work for a trial period for his work to be monitored. I consider it likely that Mr Anselmi and Mr Hardgrave's solicitor were the parties to that discussion, with Mr Hardgrave expressing the view probably only later that he did not wish to return under those circumstances. To some extent such a response reflects Mr Hardgrave's failure to take responsibility for his errors and a lack of any resolve to address them other than by allocating blame elsewhere. On balance, however, I conclude that Mr Anselmi's view that the employment relationship had no future had already been expressed so clearly that such a discussion was not sufficient to rescue the relationship. Mr Hardgrave was entitled to view the relationship as at an end.

[53] For these reasons I conclude Mr Hardgrave's resignation amounted to a constructive dismissal.

Justification for the dismissal

[54] When an employer considers an employee's performance to be unsatisfactory to the point that dismissal is a possibility, there are some procedures it must follow in the interests of fairness to the employee.[4] Of particular relevance here are the obligations to inform the employee of the nature of the performance concern, and to warn that continued lack of performance will place the employee's employment in jeopardy. In turn the employer is obliged to identify the nature of the improvement required and stipulate a reasonable time within which the improvement is to be shown. The employer is also expected to provide the employee with reasonable assistance, usually in the form of additional training or supervision or both.

[55] On the expiry of the period during which improvement is to be shown, the employer is expected to turn its mind to the question of whether the employee has achieved the required improvement. In the process it is obliged to put its views to the employee while keeping an open mind as to the final outcome, seek any response to or explanation of the matters identified, and consider any mitigating or aggravating factors before making a decision about whether to dismiss.

[56] On 26 January Mr Anselmi made a start in identifying and putting to Mr Hardgrave his concern about the extent of the errors Mr Hardgrave was making. He also acted appropriately in attempting to obtain an explanation from Mr Hardgrave. At that early point, however, he departed from the basic requirements of a fair procedure to the extent that his conduct was not that of a fair and reasonable employer and I find the dismissal unjustified on that ground.

[57] Accordingly Mr Hardgrave has a personal grievance.

[58] This finding means I do not consider it necessary to go further and address the broadly stated claims of lack of good faith, and that Mr Hardgrave's

[4] A series of questions aimed at ascertaining whether a fair procedure has been followed is found in **Trotter v Telecom Corporation of NZ Limited** [1993] 2 ERNZ 659

employment was affected to his disadvantage by unjustifiable actions of CustomKit's.

Remedies

1. Contributory fault

[59] Section 124 of the Employment Relations Act provides that, where the Authority finds an employee has a personal grievance, in deciding the nature and extent of the remedies to be provided it must consider the extent to which the employee's actions contributed to the circumstances of the grievance, and if appropriate reduce the remedies that would otherwise have been awarded.

[60] I have found the dismissal to be unjustified with reference to the serious flaws in the procedure used to effect it, but I now turn to Mr Hardgrave's work performance.

[61] Mr Hardgrave made a large number of apparently elementary errors on several pieces of work. He made a general attempt to blame a lack of or inadequate training, but I do not accept his training was inadequate. He blamed brusqueness on Mr Lipscombe's part, but I do not accept he was as sensitive to Mr Lipscombe's behaviour as he now says he was and nor do I accept the behaviour was as intimidating as he now attempts to portray it. He blamed a lack of training in the use of architectural packages as well as problems with inadequate templates, when he had not experienced difficulty with those matters earlier in his employment.

[62] At the investigation meeting he sought to blame his workload. While I accept the workload was increasing, I do not accept it had done so to the point where, by about November, a competent person could not reasonably be expected to keep up with it. Nor would I accept that Mr Lipscombe and Mr Anselmi had grounds to believe Mr Hardgrave was other than competent, or was facing a workload that was too much for him.

[63] On top of all of that, Mr Hardgrave himself said several times – despite the above complaints – that the relationship was going well up to December, and he even stated that he felt he had mastered the requirements. I might be prepared to accept that at the core of the problem lay Mr Hardgrave's need for extra time

to check his work, being time that was not available, but precisely why that was so has not been adequately explained. As I have said, I am unconvinced by the explanations that were offered. Moreover Mr Hardgrave was an experienced builder and it was reasonable to expect that he would not make the kinds of mistakes he did.

[64] What remains is the emergence of the large number of errors, with less than convincing explanations for them. I regard that level of performance as amounting to contributory fault and reduce the awards I would otherwise have made by a factor of 50%.

2. Reimbursement of remuneration lost as a result of the grievance

[65] Mr Hardgrave was employed on a salary of $52,000 per annum. An ACC medical certificate he provided stated he would be unable to resume any duties at work for 5 weeks from 15 February 2006 – 22 March 2006. Such remuneration as he had lost to that date was lost other than as a result of his personal grievance.

[66] Since then, Mr Hardgrave has received $3,000 for work he did with a friend, in or about August 2006. Otherwise he has not sought work. He says was advised not to go 'on the tools' because of his knee, has not seen any jobs advertised which could be suitable for him, and would not feel confident enough to apply for a suitable job anyway.

[67] As at the date of the investigation meeting Mr Hardgrave had been out of work for 9.5 months. I have no information to suggest he has since obtained work. Mr Hardgrave has done little to mitigate his loss, although part of the explanation for that is found in the effect of the dismissal to which I turn shortly. However I note, too, that there was no evidence that Mr Hardgrave was incapable of working as at the date of the investigation meeting.

[68] Counsel for CustomKit referred me to the decision of the Court of Appeal in **Telecom NZ Limited v Nutter**[5], and in particular to the question of how Mr Hardgrave would have been placed in the absence of the legal wrong in question. Counsel submitted that, given the quality of Mr Hardgrave's performance and his

[5] [2004] 1 ERNZ 315, [73] at p 329

inability to recognise his shortcomings, there was a real likelihood he would have lost his job justifiably within a month or two of his dismissal.

[69] I do not believe I can go as far as to make that finding. Mr Hardgrave's performance had been acceptable until late in 2005, and he has not given a convincing explanation of why things changed. His performance might, or might not, have returned to its earlier level, and Mr Hardgrave might, or might not, eventually have provided a more complete and honest appraisal of what went wrong than he has so far. That in turn might or might not have raised matters that were capable of being addressed. All of this is too speculative, so I take a different approach to assessing remedies.

[70] Weighing the medical matters to which I am about to turn, against: Mr Hardgrave's ability to do some work in August; his lack of any other attempt to mitigate his loss; the expectation that once certain medical problems were addressed an improvement in his mood was likely; and the lack of evidence that the circumstances of the grievance were causing an inability to work as at the date of the investigation meeting – I conclude 6 months is an appropriate starting point for assessing loss of remuneration.

[71] After applying a reduction of 50% for contributory conduct, I order CustomKit to reimburse Mr Hardgrave for the loss of 3 months' salary in the sum of $13,000.

3. Compensation for injury to feelings

[72] Mr Hardgrave sought $35,000 as compensation for the injury to his feelings resulting from his personal grievance. This is a relatively high amount and is based on the state of depression which Mr Hardgrave says he has suffered since his dismissal.

[73] There was evidence from a medical practitioner on behalf of Mr Hardgrave to the effect that – at least as at September 2006 – Mr Hardgrave was suffering from major clinical depression with associated anxiety and loss of confidence. For its part CustomKit engaged a psychiatrist who met with Mr Hardgrave in December 2006. The psychiatrist's diagnosis was of adjustment disorder with depressed mood.

[74] Thus there was a difference between the medically-qualified witnesses over Mr Hardgrave's condition, a difference which is essentially one of degree. I prefer the evidence of the psychiatrist on the point – not only was he a qualified specialist in any event but his approach to diagnosing Mr Hardgrave's condition was the more detailed.

[75] The evidence also raised a question over the extent to which Mr Hardgrave's condition was the result of his personal grievance. Clearly the grievance was a causative factor, but there are other factors I consider relevant.

[76] They concern a combination of Mr Hardgrave's difficulties in sleeping as well as certain problems with his medication, and the exacerbating effect those factors can have on symptoms of depression. Both doctors noted errors in Mr Hardgrave's medication and Mr Hardgrave himself acknowledged he had not been taking his medication as prescribed. The expectation was that correcting the medication should at least assist with the sleeping difficulties, and with the depressive symptoms. I regard those factors as contributory factors in Mr Hardgrave's state of health.

[77] Another factor identified in the medical evidence as contributing to Mr Hardgrave's anxiety was the existence of this and other litigation between the parties. However compensation is available only in respect of the grievance, and the effect on Mr Hardgrave of the underlying wrong done to him in association with the grievance.

[78] For these reasons I treat the injury to Mr Hardgrave's feelings as being at the medium rather than the severe end of the scale. Applying the 50% reduction in respect of contributory conduct, I order CustomKit to compensate him for injury to his feelings in the sum of $10,000.

[79] I was asked to make an order in respect of certain medical costs Mr Hardgrave incurred. While it is possible to address such an application in terms of the remedies available under s 123 of the Employment Relations Act, the sum involved was not large and I consider it appropriate to address the matter is a costs setting. I reserve the matter accordingly.

4. Summary of orders

[80] CustomKit is ordered to pay to Mr Hardgrave:

(a) $13,000 as reimbursement of remuneration lost as a result of his personal grievance; and
(b) $10,000 as compensation for injury to feelings as a result of the personal grievance.

[81] For completeness, aside from the references in this determination I order that no details of the medical practitioners' medical reports, covering letters, notes, or statements be published.

Costs

[82] Costs are reserved.

[83] The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they are to file and serve memoranda within 28 days of the date of this determination.

R A Monaghan
Member of Employment Relations Authority