

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 53
3138841

BETWEEN

DARREN HEALEY
Applicant

AND

BUSINESS DISTRIBUTORS
LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Paul Mathews, advocate for the Applicant

Anna Oberndorfer, advocate for the Respondent

Investigation Meeting: 8 and 9 February 2022 in Christchurch

Submissions Received: 9 February 2022 from the applicant
9 February 2022 from the respondent

Date of Determination: 25 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Darren Healey was employed by Business Distributors Limited (BD Ltd.) in Christchurch as a delivery driver from early 2017 and then from May 2018, as an Operations Specialist until 24 December 2020 when he resigned in disputed circumstances.

[2] Mr Healey is claiming his resignation was prompted by his employer preventing him from returning to work after a period of sick leave that he says resulted from distress caused

by his employer in failing to promptly address complaints he made about co-workers. Mr Healey claims he was constructively dismissed and/or disadvantaged by the actions and omissions of BD Ltd. in failing to address his concerns. In addition, Mr Healey claims he was disadvantaged by BD Ltd. during the 2020 Covid-19 lockdown period when his salary was temporarily but unilaterally reduced by ten percent. As remedies, Mr Healey is claiming compensation for hurt and humiliation, wage arrears and legal costs.

[3] By contrast, BD Ltd. contest the degree of unreasonable treatment alleged and maintain they investigated Mr Healey's identified concerns and were willing to engage with Mr Healey, but he failed to reciprocate and then he voluntarily resigned after obtaining alternative employment. On the reduction in Mr Healey's salary, BD Ltd. claim the reduction was tacitly consented to by Mr Healey during extraordinary circumstances.

[4] The parties have attended mediation but the matter remained unresolved.

The Authority's investigation

[5] Pursuant to s 174E of the Employment Relations Act 2000 (the Act), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders, but I do not record all evidence. I, likewise, have carefully considered the helpful submissions received from both parties and refer to them where appropriate and relevant.

[6] Darren Healey and his son Jamie Healy provided briefs of evidence and attended the investigation meeting as did Garth Huston (Managing Director), Ben Huston (Dealer Principal) and Penny Huston (Operations Manager) for BD limited.

[7] **Issues**

[8] The issues to be decided are:

- (a) Did BD Ltd. breach any terms of employment or duties owed to Mr Healey and if so, was it reasonably foreseeable that Mr Healey would resign and the ending of the employment relationship be categorised as a constructive dismissal rather than a resignation?

- (b) Prior to resigning, was Mr Healey the subject of employer actions and/or omissions that caused him detriment sufficient to establish a disadvantage grievance including a question of whether BD Ltd., upon being apprised of Mr Healey's concerns, undertook a sufficiently fair and properly conducted investigation?
- (c) Did BD Ltd. unilaterally reduce Mr Healey's salary during the 2020 Covid lockdown period?
- (d) If an unjustified dismissal, unjustified disadvantage and/or wage arrears owed actions are established what remedies should be awarded?
- (e) If Mr Healey is successful in all or any element of his personal grievances, should the Authority reduce any remedies granted because of any contributory conduct?
- (f) An assessment of whether either party should contribute to the incurred costs of representation.

What caused the employment relationship problem?

[9] BD Ltd. is a well-established family owned and operated Christchurch based company that sells, services and supplies, photocopying and printing equipment. The company operates in seven locations in Aotearoa/New Zealand and has up to forty employees.

[10] Mr Healey's job entailed the assembly and installation of photocopiers and liaison with clients over the life cycle of such machines and latterly from August 2020, he supervised a store person (a role he volunteered to undertake). Mr Healey described his job as autonomous within a small team and he reported to Ben and Penny Huston.

Covid-19 level 4 Lockdown

[11] From 25 March 2020 until 28 May 2020 as a non-essential service, BD Ltd. could not operate due to a government nationwide isolation edict. BD Ltd. obtained the government wage subsidy (initially for 12 weeks) and sought agreement from employees that their wages

be reduced. BD Ltd. set out information on the subsidy and foreshadowed a request for individual reductions in an email of 7 April 2020. In Mr Healey's case a pay reduction was proposed in an email to him from Penny Huston also of 7 April 2020 indicating:

Following up from my previous email we are asking you to agree to a 10% pay reduction in order to help us weather the impact of the Covid – 19 epidemic in NZ.

Please could you let me know by email if you agree to our proposal and if so, which pay date you could manage a reduction from.

[12] Mr Healey responded by email of the same day, setting out personal financial reasons countering the extent of the proposed reduction and he proposed an immediate five percent reduction indicating he “wouldn't want this to last more than six months”.

[13] Ms Huston by email of 8 April responded to Mr Healey's counter offer initially setting out her perception of the perilous trading situation facing BD Ltd. Ms Huston then reiterated the rationale behind seeking staff salary reductions including citing that BD managers had reduced pay by 20% or more.

[14] Further Ms Huston noted; “All staff but 1 other have been incredibly supportive” and understood the measure was to save jobs going into an uncertain future. Ms Huston also indicated: “If significant numbers of customers fail to pay their bills for 20Th April, then further reductions may have to be made”. Ms Huston then in somewhat contradictory terms acknowledged BD Ltd. had to ask staff to “officially agree to show they understand what we are doing and why” but that: “It wasn't an opening negotiation on the amount of reduction being offered”. Impliedly this was an oblique reference to Mr Healey's counter proposal.

[15] In concluding the email, Ms Huston stated the reduction described as Plan A (Plan B being not applying for the wage subsidy) “stands for all the staff, with 27 out of 29 having agreed readily” but with a concession that the reduction would be deferred until 22 April.

[16] I observe that the above was a unilateral variation albeit temporary of Mr Healey's employment agreement without any attempt to negotiate. The variation was not recorded in writing. Mr Healey says he did not concur, but he did not object further, believing such to be pointless.

[17] Ms Huston, in a further email of 28 May 2020, provided a fairly comprehensive and relatively optimistic update of information on how BD Ltd. was faring during the lockdown. It concluded: “So in relation to our pay levels, we will be able to return to full pay when we can see we are reliably generating enough revenue to meet our outgoings” but “its hard to predict exactly when that will be”.

[18] The ten percent pay reduction was discontinued from 17 June 2020 as lockdown restrictions eased and Mr Healey was able to return to the workplace.

[19] Mr Healey in mid-August 2020 raised concerns about the performance of a co-worker (the store person) and the stressful impact on himself. This led to a mutually agreed solution of Mr Healey being promoted to Store Supervisor and a pay increase effective from 31 August.

17 September 2020 meeting

[20] On Thursday 17 September Mr Healey attended a meeting with Penny and Ben Huston at 11 am. The meeting was informally convened by Ms Huston with no warning to Mr Healey of the subject matter or who would be participating. Ms Huston led the meeting and initially raised concerns about Mr Healey’s interactions with co-workers using pejorative language (it was established Ms Huston said six staff had complained Mr Healey was being an “arsehole” toward them).

[21] Consensus of evidence was that Mr Healey overreacted in response and brought the meeting to an abrupt end by taking off his work shirt and placing it on the desk then leaving the room. Mr Huston caught up with Mr Healey shortly thereafter and suggested they reconvene the following morning at 11 am giving Mr Healey the opportunity to arrange a support person. Mr Healey then left the workplace leaving his work vehicle key stating he did this as he was distressed and may not have felt up to coming in the next day. Mr Healey disclosed that he then sought his advocate’s advice that was to eschew using a support person and go to the meeting alone whilst recording such.

18 September meeting

[22] At the second meeting, Garth Huston took Ben Huston's place alongside Penny Huston. Mr Healey attended alone and openly recorded the meeting but did not disclose, despite being requested to do so, a copy of the recording until the Authority proceedings commenced. The meeting was of thirty minutes duration.

[23] Upon reviewing the recording (and an uncontested transcript) it was plain that Mr Healey firmly set the agenda from the outset of the meeting and dominated the conversation. Mr Healey opened the meeting with a broad allegation that:

There's a culture of bullying within BDL whether you want to accept it or not and it starts at the top and goes down and that's never ever been addressed here in my time.

[24] Mr Healey then made various allegations about co-workers that from his perspective, explained his stressed state and recent negative interactions with co-workers and a contractor. These included in summary, that:

- one male co-worker (who Mr Healey described as an "arsehole") constantly acted unprofessionally including engaging in misogynist discourse and constant sexual innuendo with a female co-worker and he had viewed and shared objectionable pornographic images in the workplace on three occasions;
- Ben Huston had humiliated him in front of co-workers via an email and easily overheard telephone conversation;
- a contractor was actively ignoring him despite a requirement that he (Mr Healey) maintain a positive relationship with that contractor;
- tension with the identified contractor had strained unresolved relations with a female co-worker;
- another identified co-worker was treating him disrespectfully;

- despite being apprised of such, Penny Huston had failed to address Mr Healey's ongoing stress and tended to be biased against him in failing to properly resolve ongoing relationship difficulties.

[25] In general, Mr Healey emphasised he felt there was a lack of respect for his contribution to BD Ltd. and he felt unsupported with his stress not being recognised.

[26] In response, at around the half-way stage of the meeting and after patiently listening to Mr Healey's concerns, Garth Huston engaged in the following exchange (from the transcript):

Garth: "What do you want Darren?"

Darren: "Well I think we're past that now Garth".

Garth: "Right"

Darren: "I think I have been publicly shamed within the company itself".

Garth: "ok"

Darren: "By the way that I've been spoken to. And I feel that I've lost all respect from anybody else that I work for and I don't think...".

Garth: "So now you want some compensation?"

Darren: "What I'm going to do Garth is I am going to take the next week off on sick leave for stress. If you want a medical certificate for it, you can pay for it" and "on stress to evaluate my situation of how the humiliation I've felt the loss of respect".

[27] There was then a protracted exchange between Penny Huston and Mr Healey where she sought to clarify what the purpose of Mr Healey taking stress leave was, with Mr Healey eventually responding: "Well it gives you time to go away and investigate what I have brought to your attention". After further terse exchanges, Ms Huston conceded "... we can investigate these things, certainly. What happens then?"

[28] Further inconclusive and at times acrimonious exchanges then occurred with Ms Huston referencing Mr Healey's behaviour at the 17 September meeting and her perception of his failure to address the co-worker concerns she had obliquely alluded to and

her right to raise such ‘informally’ (including recalling Mr Healey having brought informal concerns to her attention within the last two weeks and on other occasions).

[29] The meeting then descended into exchanges led by the Hustons into the feasibility of an investigation and what it would achieve. At one point Ms Huston asserted that Mr Healey had in the past spoken to her in a ‘rude and condescending’ manner and that other staff had experienced the same approach.

[30] Ms Huston then opined “what you are asking me to open up here is going to be a very big can of worms also for you” and then after pressing Mr Healey to “think through” his request for an investigation, Ms Huston concluded “tell us what you expect us to do because I know the kind of things that people have reported to me about you. Okay, I already know”.

[31] The meeting concluded with Mr Huston indicating an investigation would proceed: “We will do that and then we will see you in five days”. Mr Healey then left the workplace.

[32] By email later on 18 September, Ms Huston indicated to Mr Healey that BD Ltd. had recognised he had laid formal complaints against co-workers and management and terms of reference for the investigation were being drafted and would be circulated to Mr Healey and “the Staff member involved in the investigation on Monday”. Ms Huston also provided EAP workplace support contact details and encouraged Mr Healey to utilise available counselling.

The investigation

[33] Ms Huston without obtaining legal advice other than guidance from the internet, decided to embark upon an investigation. The initial step Ms Huston took that is on the face of it appropriate, was to forward Mr Healey by email at around noon on 21 September, a “Draft Terms of Reference for Complaint Investigation” for him to “review” and she asked him can you: “Please come back to us with anything to be added before the end of business today”. The email also asked Mr Healey to “provide dates & any further particulars of the incidents”.

[34] My initial observation is that emails latterly disclosed to the Authority show that instead of awaiting Mr Healey’s feedback on the draft terms that in any case set an unrealistic

response time, Ms Huston immediately commenced the investigation by exchanging emails with some of those implicated before the close of 21 September (including Ben Huston).

[35] Mr Healey says he had insufficient time to seek advice on the disclosed draft terms, but he did respond by the deadline in the form of adding some details and dates to how his concerns were phrased and some comment including that he was unaware of BD Ltd.'s cited: "House Rules".

[36] Mr Healey did not raise any objection to the investigation being conducted by Penny and Garth Huston. As it transpired Ms Huston solely conducted the investigation but apprised both Garth and Ben Huston of its progress. Objectively viewed, I observe this was wholly inappropriate as Ms Huston was investigating complaints that she had already expressed an opinion on during the 18 September meeting and, she was a person subject of a complaint. This is apart from the fact Ms Huston was investigating her brother's actions. All these factors are indicative of apparent or actual bias being at issue. Ms Huston, in answering questions during the investigation, did not appear to have any appreciation of the concept of bias when for example she was pressed on the appropriateness of determining an issue involving her brother.

[37] Notwithstanding, whilst describing the approach as a "preliminary investigation", Ms Huston did not initially interview Mr Healey to properly document his concerns and relied on his emotive discourse at the 18 September meeting as the basis of his complaints. It was also not clear as no contemporaneous notes were produced, whether Ms Huston went beyond the step of emailing each of the identified persons (and some co-workers not identified by Mr Healey) and seeking their written feedback before drafting concluding notes that objectively viewed, appear to reject Mr Healey's recollection of events universally and uncritically.

[38] Ms Huston claimed she also interviewed the co-workers identified except Ben Huston in the week or so, following 21 September. It was envisaged at this point by BD Ltd. and communicated, that they would meet with Mr Healey on 25 September to discuss the 'findings' of Ms Huston's investigation.

The first personal grievance

[39] Mr Healey, utilising his advocate by email of 24 September, raised a personal grievance for an unjustified disadvantage and breach of the Wages Protection Act in relation to the temporary ten percent reduction in his pay during the Covid-19 lockdown period. The grievance raised made no mention of the extant investigation or any concerns about the conduct of such.

[40] Inexplicably, Ms Huston on 24 September circulated to all staff an email identifying the existence of Mr Healey's personal grievance and indicated it related to her conduct and "the grievance is not related to any staff or any of the formal personal complaints and allegations he has made previously". In evidence, Ms Huston acknowledged her error and that the circulation of the email was an act done without any legal advice.

[41] In addition Ms Huston, indicating she did so on advice from BD Ltd.'s advocate, texted Mr Healey on the afternoon of 24 September (copying in Mr Healey's advocate) indicating:

In light of your Personal Grievance as notified by email, our meeting planned for tomorrow to follow up on your other series of complaints & the investigation we have undertaken at your request, can no longer take place.

Future correspondence on any matters will be through our solicitor.

[42] On 24 September, Mr Healey furnished a medical certificate without any diagnostic detail, indicating he would be unfit until 5 October. In the event, Mr Healey remained on sick leave until he was cleared fit to return on 21 December 2020. During this period the only general information disclosed was a further open ended medical certificate of 6 October that had no review date and a view expressed by the GP that "I do not believe he would be fit to return to his current workplace as that will likely exacerbate his condition".

24 September – 18 December (second personal grievance)

[43] From this point in time up until the weekend commencing 18 December, both parties entrusted correspondence to their advocates with apparent free rein on the content of exchanges. I will not extensively traverse the correspondence between the advocates in detail as some of it does not assist my investigation.

[44] The parties attended an unsuccessful mediation on 17 December (originally scheduled for 23 November) and on that day, Mr Healey's advocate emailed a second personal grievance for unjustified disadvantage citing a belief that BD Ltd. had failed to complete the investigation of Mr Healey's complaints in a timely manner or if they had done so, there was a failure to disclose the results of such and this was preventing Mr Healey from returning to a safe working environment. A workplace for which Mr Healey had been absent on mostly unpaid leave for three months. Mr Healey's advocate also asserted that BD Ltd.'s actions in advising staff of the existence of his first grievance "undermined his standing in the workplace and severely weakened his sense of job security".

[45] A significant problem for Mr Healey establishing his constructive dismissal claim, is that by 16 December he had applied for and accepted an alternative full-time job at a comparable pay rate that commenced on 19 January 2021. A position Mr Healey still occupied at the time of the investigation meeting. Mr Healey did not fully disclose this fact (i.e., the timing of his acceptance of the new job) until the investigation meeting and then only after being directed to do so by the Authority.

[46] Mr Healey's brief of evidence said it was not until after he had been sent home on 21 December (see below) that he "started looking for jobs elsewhere". In evidence Mr Healey suggested he was just keeping his options open and wanted to explore whether it was viable to continue working at BD Ltd.

[47] Despite the above, and an assertion from Mr Healey's advocate on 14 December that his medical advice was he would not be able to return to work "unless the work situation changed", Mr Healey provided through his advocate a medical clearance on the afternoon of 17 December with an accompanying message that the outstanding grievances would be filed with the Employment Relations Authority "either tomorrow or Monday".

[48] The next medical certificate provided to BD Ltd. contained no diagnostic detail and stated Mr Healey had been examined on 17 December and was fit to resume work on 21 December.

Attempt to return to work on 21 December

[49] On Monday 21 December, Mr Healey arrived at BD Ltd.'s premises and after a short period, Ms Huston called him to a meeting and gave him a letter dated 18 December that Mr Healey had not yet viewed, as it had been emailed to his advocate at around 5pm the previous Friday. The letter, which Mr Healey had to quickly comprehend, discursively reiterated BD Ltd.'s view that the preliminary investigation they had completed could not be shared due to Mr Healey being on sick leave. BD Ltd.'s advocate then contended an incongruity between the last two sick leave certificates provided and posited that further medical information was required to meet her client's health and safety concerns of reintegrating Mr Healey back into the workplace after a lengthy absence. In support of this stance BD Ltd.'s advocate referenced s 68(4)(a) of the Holidays Act 2003 and concluded further medical information provision was necessary before Mr Healey could return to work and; "Then the parties can turn to the investigation".

[50] Mr Healey was then asked to leave the work premises and he did so. Ms Huston followed up the same day with an email to Mr Healey that expressed sorrow that Mr Healey's advocate had failed to provide the 18 December letter and asked whether, given the Christmas closedown period was a few days away, Mr Healey wanted to have his annual leave paid out over this period (23 December to 10 January). I observe this to be an unnecessary request as Mr Healey's employment agreement specified that he was required to utilise his entitlements over the closedown period.

22 – 24 December exchanges

[51] Further terse exchanges between the advocates resulted in Mr Healey providing the requested additional medical certificate of 23 December. In this certificate the GP indicated Mr Healey had been a patient of the medical practice for nine years, that his work situation and absence due to stress had contributed to his "recent elevated blood pressure" which had now returned to a normal level. The GP concluded Mr Healey was fit to recommence work without any health and safety risk to his employer.

[52] BD Ltd.'s advocate responded by email of 24 December at 2:22 pm. This response relevantly stated:

Thank you for sending the further information. Our client can now take that into consideration for Mr Healey's return after closedown.

Our client would like to meet with Mr Healey upon re-opening on 11 January 2021 at 2pm, or some other time in the afternoon as agreed.

Our client would like to discuss the information that has arisen from the investigation, his length of absence and how these might affect his return to work.

The resignation

[53] By an email response of 3:14 pm 24 December, Mr Healey's advocate communicated his resignation alluding to the lack of progress on the investigation of Mr Healey's concerns and lack of disclosure of the preliminary investigation and concluded that:

Your client's decision to prevent my client from working this week, despite providing medical clearance last week, along with the complete uncertainty as to whether he will be able to return to work in the new year and the refusal to pay my client for this week has left him with no choice but to resign.

And:

He now needs to resign so he can seek paid employment elsewhere.

[54] Mr Healey's advocate indicated Mr Healey was willing to work out his notice period "and has a right to do so" and concluded the email with "You can also take this as a personal grievance for unjustified dismissal by way of constructive dismissal".

[55] Further emails between BD Ltd.'s advocate and Mr Healey of 13 January 2021, sought confirmation of his resignation and culminated in BDL Ltd. accepting the resignation dated 24 December, inclusive of the notice period. Mr Healey's last day for final pay purposes was set as 7 January 2021. No issue of Mr Healey working his notice period arose as BD Ltd. was closed until 11 January.

Was this a constructive dismissal?

[56] A 'constructive dismissal' can be found if an employer's conduct compels an employee to resign in circumstances where although on the surface the employee appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this doctrine is where the resignation is caused by a breach of a duty owed to the employee

and the employer could reasonably foresee that rather than put up with the breach, the employee resigns – effectively the employee signalling a belief that their employment agreement has been repudiated. The Court of Appeal has stated the legal test as:

In such a case as this we consider that 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 or other communication whereby the employee has tendered the resignation. 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. ¹

[57] The overarching and well recognised duty that is now statutorily recognised as a component of ‘good faith’ ² is that an employer should not, without proper cause, act in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the parties to the employment relationship. ³

Mr Healey’s claim regarding a potential breach of duty

[58] In submissions, Mr Healey’s advocate essentially asserted that a series of actions or omissions that BD Ltd. engaged in, eroded then destroyed Mr Healey’s trust and confidence in his then employer. These included the handling of workplace conflict issues from 17 September onwards and then a failure to disclose the results of the preliminary investigation findings in the face of Mr Healey’s expressed ongoing stressed state. The metaphorical ‘final straw’ was suggested to occur in the week of 21 December and included Mr Healey being prevented from returning to work and then BD Ltd. providing no guarantee of his return on 12 January 2021.

BD Ltd.’s perspective

¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

² Section 4 (1A)(a) and s 4(1A)(b).

³ *Auckland Shop Employees Union v Woolworths (NZ) Ltd.* [1985] 2 NZLR 372

[59] By contrast, BD Ltd.'s advocate submission suggested Mr Healey was aware of his employer's commitment to investigate his concerns raised only after they had tried to address co-worker issues with Mr Healey and that BD Ltd. had been constrained from engaging with Mr Healey whilst he was on extended sick leave. BD Ltd. claimed in retrospect, this stance was vindicated when they latterly discovered Mr Healey had issues with elevated blood pressure.

[60] BD Ltd.'s advocate stressed that their 24 December invite to meet was a genuine attempt to discuss a return to work and that this was spurned by Mr Healey "less than one hour after receiving the proposed date and time to meet". Referencing *Woolworths*, BD Ltd.'s advocate submission suggested:

There was no course of conduct embarked upon by the Respondent – it was the Applicant who removed himself from the workplace and the Respondent took all reasonable steps to manage the issues with the Applicant.

It undertook an investigation into the Applicant's complaints, it sought information on the Applicant's health, it did not try to prevent a return to work but only sought to do that safely and it sought to meet with the Applicant upon re-opening the business.

[61] BD Ltd.'s advocate concluded that Mr Healey chose to resign of his own volition after securing alternative employment due to pre-existing unhappiness about his working environment.

Assessment

[62] In considering the events that unfolded, I do not consider that Mr Healey has established a sufficient level of a threshold breach. This is because I consider that BD Ltd. acted reasonably in initially abandoning concerns co-workers had raised about Mr Healey, they had the right to deal with such informally and then they undertook to investigate Mr Healey's concerns that were raised in a challenging manner.

[63] Whilst I will deal with concerns around the quality of the preliminary investigation undertaken in assessing the allied disadvantage claim, it was apparent that Mr Healey disengaged from his employer and it was not unreasonable in the circumstances, that BD Ltd. sought to be cautious about engaging with Mr Healey after he had proclaimed he was going on 'stress leave'.

[64] A further factor I have assessed, is whilst Mr Healey's advocate foreshadowed his possible resignation, it was apparent that Mr Healey had no intention of returning to the workplace when he accepted a new job on 16 December 2020. Whilst I accept it is not an absolute good faith requirement to disclose to an employer an intention to leave, this was a situation where Mr Healey inexplicably sought to confront his employer for a brief return to work at a time when he had decided not to continue with the employment relationship. He maintained the fiction that the employment relationship would be continuing.

[65] As discussed above, a significant problem for both parties in this instance, has been entrenching themselves behind their respective advocates and relying upon advice that at times, in my view of correspondence, appeared to lose sight of the core employment relationship including both advocates failing to properly disclose relevant material in a timely fashion to assist my investigation. I stress this negative observation is only based upon the correspondence.

Finding

[66] I find that no threshold breach is established in that in all the circumstances BD Ltd. acted fairly and reasonably and, to the best of their ability, sought to preserve the employment of Mr Healey in difficult circumstances. I find that Mr Healey, whilst being genuinely distressed about his working environment, chose not to continue to explore potential solutions by engaging, as suggested, over the results of his employer's preliminary investigation, because he resigned to take up an alternative role.

Unjustified disadvantage claim

[67] Having not found a breach sufficient to allow Mr Healey to legitimately claim his employment agreement was repudiated I examine whether the actions BD Ltd. took after Mr Healey apprised them of his concerns were justified.

Assessment

[68] The test I must apply objectively is to examine how BD Ltd. approached the situation when Mr Healey signalled his concerns, the context of how those concerns arose and, then I have to assess if BD Ltd.'s actions or omissions "were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred".⁴

[69] As outlined, whilst I have found BD Ltd.'s decision to informally deal with the initial co-worker complaints against Mr Healey to be legitimate and objectively good practice, it was evident that the way Ms Huston presented the concerns on 17 September was unwise and it understandably upset Mr Healey. By contrast, Mr Healey appears to have overreacted by abruptly leaving the meeting and the workplace. BD Ltd. to their credit, did not seize upon Mr Healey's actions as manifesting misconduct or unwarranted aggressiveness but recognised he needed to calm down, seek support (a preference Mr Healey had expressed) and then meet again.

[70] At the second meeting of 18 September, Mr Healey chose not to be represented (after getting advice) or seek to explore the concerns that BD Ltd. had albeit clumsily foreshadowed about him, but instead he dominated the meeting using at times pejorative language about co-workers and the company and essentially vented on a wide range of matters that from his perspective, were stressors. These included some significantly serious allegations that objectively should have been raised at the time they occurred. One prime example was the allegation that a co-worker had viewed and shared objectionable pornographic images that Mr Healey claimed greatly discomforted him on an ongoing basis. I did not get the impression from Mr Healey that he lacked the confidence to be able to raise such issues in a timely fashion or that he was reticent in challenging his employer at times.

[71] I have also found significant communication actions omissions above that potentially caused Mr Healey to be disadvantaged by how his concerns were handled. To recap and expand these included:

⁴ Section 103A(2) Employment Relations Act 2000.

- A failure to specify the purpose of the first and second meetings in writing and a consequent failure to set out what BD Ltd.'s concerns were, as Ms Huston frankly disclosed at the second meeting that she had experienced less than ideal exchanges with Mr Healey.
- The language and approach used at the first meeting.
- Some of the responses during the second meeting that tended to pre-suppose that the employment relationship was beyond saving and attempts at dissuading Mr Healey from pursuing his complaints. I balance this up against the obvious surprise that Penny and Garth Huston must have experienced at the meeting purpose being 'turned around' on them and objectively from listening to the recording, how much Mr Healey dominated the conversation.
- Ms Huston's abject failure to spot that she was not the appropriate person to conduct the preliminary investigation despite her genuine efforts to get the 'process' right. I find BD Ltd. had the resources to engage an independent and skilled investigator and in the context of how controversial the claims Mr Healey had made were this would have been sensible.
- A failure to properly document and check Mr Healey's complaint before embarking on the investigation.
- The inexplicable decision to call off the 25 September meeting because Mr Healey had raised an unrelated personal grievance and the unnecessary breach of Mr Healey's privacy in circulating the fact of his PG to all staff. This omission was a golden opportunity missed to resolve matters in a timely fashion. It also places the later expressed caution of not wanting to meet with Mr Healey or share information because he was on sick leave, in doubt. Ms Huston then made the mistake of handing over sole communication responsibility to BD Ltd.'s advocate.
- The privacy breach in circulating the fact of the PG caused Mr Healey understandable distress and unfortunately it caused a misconception on his part due

to a staff member wrongly communicating to Mr Healey that Ms Huston had told staff he was not going to return to the workplace.

- A failure to properly document and disclose the investigation results to Mr Healey's advocate up until the investigation proceedings.
- Unnecessary and/or objectively unreasonable insistence on the provision of additional medical information and how this was communicated before Mr Healey could return to work (although I acknowledge the absence was lengthy and the timing of Mr Healey seeking to return was not ideal). This led to the unfortunate circumstance of Mr Healey being sent home from the workplace without pay in the week leading up to Christmas.
- A lack of clarity in BD Ltd.'s correspondence of 24 December that could have simply accepted Mr Healey had provided sufficient medical evidence of a return to work and confirmed he was welcome to do so, and that BD Ltd. would meet soon after his return to discuss the results of Ms Huston's investigation and that the documentation on such would be released beforehand to give him enough time to assess such before any meeting.

Finding

[72] Taking the above factors into account I find that Mr Healey has established a claim of unjustified disadvantage and suffered detriment and distress because of BD Ltd.'s identified actions and omissions. Mr Healey is entitled to consideration of remedies.

The reduction of Mr Healey's salary during covid lockdown: disadvantage and/or breach claim

[73] BD Ltd.'s advocate, after traversing correspondence between the parties, advanced a submission that consultation had occurred on the salary reduction and that generally that the extraordinary circumstances prevailing necessitated the reduction. It was suggested Mr Healey had consented by conduct (failing to protest about it for 22 weeks) to the reduction and had raised his personal grievance claiming he had been disadvantaged out of time and

that during the investigation meeting he led no evidence on the distress the reduction had caused him.

[74] Mr Healey's advocate contended the reduction had not been consented to as evidenced by Mr Healey's counter proposal and it was a unilateral breach of contract and a deduction not permitted by the Wages Protection Act 1983.

[75] Notwithstanding the above factors, cl 6.2 of the individual employment agreement pertaining to Mr Healey detailed an explicit obligation that the employer had to pay an agreed salary amount on a fortnightly basis.

[76] CJ Inglis initially pointed to the following threshold question and then the "widely understood common law rule" in *Gate Gourmet v Sandu* that:

The relevant question is not whether the employee is actually performing work at the particular point in time a claimed unlawful deduction is made, but rather whether their terms and conditions would have them do so; and

.... where there are agreed hours of work cancelled by the employer, wages remain "payable" provided that the employee was ready and willing to work those hours.⁵

[77] Mr Healey gave evidence that he did not concur with only being paid 90% of his agreed remuneration and a unilateral variation of an employment agreement is only permitted by s 63(2) of the Act by "mutual agreement" - here none was evidenced. The latter commonly understood provision is reinforced by cl 29.2 of Mr Healey's employment agreement that provided "This agreement may be varied or amend at any time by written agreement between the parties".

[78] Section 4 Wages Protection Act 1983 (WPA) also provides that where wages become payable the entire amount must be paid to the worker without deduction. Section 5 of the WPA provides deductions are permitted only by mutual consent.

Finding

⁵ *Gate Gourmet v Sandu* [2020] ERNZ 561 at [57] and [60].

[79] I find the reduction of Mr Healey's salary to a level of 90% was a breach of both his employment agreement and the WPA and that he is entitled to recover a portion of his salary owed as a remedy for this breach. I find that no consideration of further compensation for any claimed distress is available as a remedy because the disadvantage grievance was lodged on 24 September 2020 outside of 90 days from the time it came to Mr Healey's attention (8 April 2020).

Remedies

Compensation for humiliation, loss of dignity and injury to feelings

[80] Mr Healey and his son gave evidence on the stressful impact upon him during the period his concerns were supposedly under investigation. This included worry about his financial situation and his negative perception that his employer would not treat him fairly (exacerbated by the circulation to staff disclosing his PG).

[81] In essence, whilst he was on sick leave Mr Healey dwelt on his situation and I have found that BD Ltd. wasted a golden opportunity to resolve matters in a timely manner by unreasonably cancelling the 25 September meeting. Mr Healey described being isolated with no contact from BD Ltd. to inquire of his health. He attended counselling and said he found it difficult to stay positive. Mr Healey says he became depressed, but he refused an offer of medication from his GP.

[82] Whilst I accept Mr Healey was genuinely distressed by BD Ltd.'s handling of his complaints he led no detailed medical evidence to support this premise other than a reference from his GP to elevated blood pressure levels. I have however, found that the failure to deal with Mr Healey's concerns in a timely and fair manner caused him to be absent from the workplace.

[83] In assessing compensation for the distress BD Ltd caused by their actions and omissions I consider, as advanced by Mr Healey's advocate, that this be assessed at a reasonably moderate level that I fix at \$8,000.

Finding

[84] Taking into account the evidence proffered and awards made by the Authority and Court in similar situations I consider that Mr Healey's evidence warrants the upper level of compensation his advocate sought, being \$8,000 under s 123(1)(c)(i) of the Act.⁶

Lost wages

[85] Having found that Mr Healey's employment ended due to his voluntary resignation to take up alternative employment no reimbursement of consequent lost wages falls due under s 123(1)(b) of the Act.

[86] Mr Healey also claimed for lost wages resulting from unpaid sick leave on the basis that his continued absence was caused by his employer not progressing the investigation of his concerns in a timely manner. In this regard, I have found a causative connection in a finding that Mr Healey was successful in his unjustified disadvantage grievance, but I am not convinced the period of absence amounting to three months was wholly due to BD Ltd.

[87] Taking all the factors into account and exercising discretion on an equitable basis, I award under s 123(1)(b) of the Act, one month's lost wages in the amount of \$4,125 gross on the basis that had the investigation progressed in a timely manner it was likely that Mr Healey would have been back at work earlier.

[88] I also find that arrears of wages are due for the period of ten weeks when Mr Healey's salary was unilaterally reduced by 10%. This by my calculation (on a pay rate of \$49,500 pa) amounts to \$952 gross.

Contribution

[89] Section 124 of the Act states that I must assess the extent to which, if any, Mr Healey's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy

⁶ See summary of compensatory approaches in comparable cases in *Richora Group Ltd. v Cheng* [2018] ERNZ 337 at [65] – [66].

should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*⁷.

[90] I find that Mr Healey's approach to both the 17 and 18 September 2020 meetings was less than ideal. This involved Mr Healey's overreaction at the first meeting and his failure to appreciate the tolerant, informal approach BD Ltd. took after receiving complaints from Mr Healey's co-workers. At the second meeting, Mr Healey used equally inappropriate language about his co-workers that he was complaining about and, with some of his more serious complaints he was under a duty of fidelity to bring them to his employer's attention at an earlier stage. Whilst I appreciate Mr Healey was agitated, he did not approach either meeting in an open and constructive fashion which essentially 'shut down' BD Ltd.'s efforts to resolve matters as close to source as possible.

[91] In the circumstances, I consider it is equitable to reduce Mr Healey's compensatory remedy by 20%.

Summary

[92] I have found that:

- (a) Darren Healey was not constructively dismissed by Business Distributors Limited.
- (b) Darren Healey was unjustifiably disadvantaged by how his expressed concerns about his working environment were investigated.
- (c) Daren Healey had his individual employment agreement unilaterally altered without his consent.
- (d) In the circumstances, Business Distributors Limited must pay Darren Healey:
 - (i) \$6,400 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.
 - (ii) \$5,077 (gross) combined lost wages pursuant to s 123(1)(b) Employment Relations Act 2000.

Costs

⁷ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

[93] Costs are at the discretion of the Authority and are reserved. The parties are encouraged to make an agreement on costs that needs to consider that the Authority, whilst having discretion to assess costs, must be persuaded circumstances exist to depart from the normal application of daily tariff-based costs.

[94] If no agreement is achieved, Darren Healey has fourteen days following the date of this determination, to make a written submission on costs and Business Distributors Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David G Beck

Member of the Employment Relations Authority