

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 15
3203759

BETWEEN

AARON KEMBLE
Applicant

AND

BEN CABLE ELECTRICAL
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Javana Schiphorst, counsel for the Applicant
Stephen Langton and Jess Greenheld, counsel for the
Respondent

Investigation Meeting: 2, 3 and 11 August 2023 in Auckland

Submissions Received: 15 September, 9 and 13 October 2023 from the
Applicant
2 and 13 October 2023 from the Respondent

Determination: 12 January 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The parties

[1] Ben Cable Electrical Limited (“BCE”) is a small family-run electrical business. Mr Ben Young and his wife, Mrs Lorelle Young, own and operate the business. Mr Young works in the business. Mrs Young was employed elsewhere, but she also provides administrative support to BCE as required.

[2] At the material time, BCE employed Mr Kemble and two other electricians, none of whom still work for BCE. BCE also employed a young apprentice who worked closely with Mr Kemble. In addition to these employees BCE also engaged another electrician who worked for it as an independent contractor.

[3] Mr Kemble was employed by BCE as a full time electrician from 23 August 2021 until his resignation on 29 July 2022, which he claimed was a constructive dismissal.

Mr Kemble banned from client's worksite

[4] On the morning of 15 July 2022 one of BCE's clients called Mr Young to advise him that it had banned Mr Kemble from its worksite, after he had almost had an altercation with the client. Mr Young told Mr Kemble by phone that the client had banned him from its worksite, so he was instructed to leave that location immediately.

[5] BCE said this complaint followed a few other incidents that had occurred between Mr Kemble and the client in the lead up to the 15 July 2022 issues. Mr Kemble denied any previous issues had occurred. The Authority finds it more likely than not that there were previous issues involving Mr Kemble.

Meeting on afternoon of 15 July 2022

[6] Later that afternoon (on 15 July 2022) Mr Kemble met with Mr Young and BCE's independent contractor, Mr Ben Blyth, to discuss the client's complaint. There was also a discussion about there not being any work available for Mr Kemble to do on Monday 18 July 2022, because he could not return to the worksite the client had banned him from and there was no other work available for him to do.

[7] Amongst other things that were discussed, Mr Young told Mr Kemble the complaint would likely have to be addressed by a formal process. Mr Young also told Mr Kemble that the client had told him (Mr Young) that they would not recommend BCE to anyone if it continued to employ Mr Kemble.

The 'easy or hard way option' allegations

[8] Mr Kemble alleged that, after Mr Blyth left the meeting, Mr Young said that "the complaint could be dealt with the easy way or the hard way". Mr Young also allegedly asked Mr Kemble if he had ever thought about going out on his own as a contractor, because if he did that BCE would take him on as a contractor.

[9] Mr Young denied these allegations. Mr Young said it was Mr Kemble who had raised 'the easy way or hard way' conversation when he had asked what his exit would look like if he "took the easy way and resigned", because he had been thinking about

“going out on his own anyway.” Mr Kemble denied this. The Authority preferred Mr Kemble’s account of what had been discussed about these matters.

Written complaints about Mr Kemble

[10] On Saturday 16 July 2023, BCE received the first written complaint, via an email from the client, “DS”. A second written complaint was received on Sunday, 17 July 2022 from another BCE client, “MS”. A third complaint was received by email from BCE’s apprentice on Sunday 17 July 2022. A fourth written complaint was received from BCE’s client “ML” on Monday 18 July 2022.

Request to stay at home

[11] On Sunday 17 July 2022, Mrs Young sent Mr Kemble a text message that said, “We’d like you to stay home on full pay for the next two days while we work out what course of action needs to be taken.” Mr Kemble said this was a suspension, that unjustifiably disadvantaged him. BCE denied he had been suspended on 18 and 19 July 2022.

Call and text to Mr Kemble’s father

[12] Mr Young called Mr Kemble’s father on Monday, 18 July 2022. When Mr Kemble’s father refused to discuss anything with him, Mr Young sent him a text. Mr Kemble said that this call and text to his father unjustified disadvantaged him, because it was intended to get his father to pressure him to resign. Mr Young denied that, and said he contacted the father because he was concerned about his son’s welfare. The Authority did not accept that explanation.

19 July 2022 investigation meeting

[13] The parties met on 19 July 2022 to discuss the written complaints, copies of which were provided to Mr Kemble during the meeting. Mr Kemble secretly recorded this meeting and the Authority was provided with an agreed transcript of it. BCE also provided brief handwritten notes made by Mr Blyde of this meeting.

Sick leave

[14] There was no dispute that Mr Kemble was suspended on pay from 20 to 22 July 2022. On 21 July 2022 BCE informed Mr Kemble’s lawyer that it wanted him to return to work on Monday, 25 July 2022 as it had found some office based work he could do.

Mr Kemble's counsel replied that same day saying that he would be taking sick leave from 25 to 29 July 2022.

[15] During his sick leave Mr Kemble responded to Facebook advertisements, and provided quotes to, and booked in electrical work to do for, potential customers through his own company, Sambar Electrical Limited. Mr Kemble said he did not know that he would be paid while on sick leave so was taking steps to obtain income so he could pay his mortgage.

[16] BCE found out about this, and raised it with Mr Kemble, but did not take any disciplinary action about that matter.

Resignation

[17] On 29 July 2022 Mr Kemble resigned, and claimed he had been constructively dismissed. Mr Kemble alleged he had subjected to a "sham" investigation, during which he claimed to have been had been bullied and intimidated into resignation.

[18] Mr Kemble attributed that to the fact that BCE was unhappy that he would not sign off on electrical work that he alleged was illegal or non-compliant. The Authority did not accept Mr Kemble's view about that.

[19] At the time of the Authority's investigation meeting, no complaint has been lodged with the Electrical Workers Registration Board, which is the body responsible for investigating such matters. Nor did Mr Kemble raise any issues about that while employed by BCE.

Mr Kemble's claims

[20] Mr Kemble claimed that BCE had breached its good faith obligations to him and his employment agreement, and he sought that penalties be imposed on it for those breaches. He also claimed personal grievances for unjustified dismissal and unjustified disadvantage.

BCE's position

[21] BCE denied Mr Kemble's claims and allegations. It said it was investigating potentially serious complaints from customers and from the apprentice, which had compromised important business relationships, and which on the face of it appeared to have created a serious health and safety risk.

[22] BCE said it had a contractual right to suspend Mr Kemble, and denied his paid suspension had unjustifiably disadvantaged him. BCE also denied that Mr Kemble had been subjected to bullying or intimidation, and it said his resignation was voluntary. BCE denied breaching Mr Kemble's employment agreement or its good faith obligations to him, so said penalties should not be imposed.

Authority's investigation

[23] The Authority held an in-person investigation meeting in Auckland on 2, 3 and 11 August 2023.

[24] Mr Kemble gave evidence along with his brother, Sean Kemble, and their father, Bruce Kemble. Mr and Mrs Young, Mr Blyth, another electrician who had previously been employed by BCE but now works elsewhere and the apprentice, who still works for BCE, gave evidence in person on behalf of BCE.

[25] Both parties provided written submissions and they lodged a joint chronology after the investigation meeting.

Issues

[26] The following issues are to be determined:

- (a) Factual findings on material conflicts in the evidence;
- (b) Did BCE breach Mr Kemble's employment agreement?
- (c) Did BCE breach its good faith obligations to Mr Kemble?
- (d) Should penalties be imposed on BCE for any breaches of the employment agreement and/or good faith that have occurred?
- (e) Was Mr Kemble unjustifiably disadvantaged in his employment?
- (f) Was Mr Kemble's resignation a constructive dismissal?
- (g) If so, was his dismissal justified?
- (h) What if any remedies should Mr Kemble be awarded for any successful personal grievance claims he may have?
- (i) Should any remedies he may be awarded be reduced under s 124 of the Employment Relations Act 2000 ("the Act"), on the grounds of contribution?

(j) What costs and disbursements should the successful party be awarded?

[27] Mr Kemble in his submissions lodged after the investigation meeting raised new claims that were not in his Statement of Problem. These were:

- (a) A claim he was owed unpaid wages, because he had been paid less than his agreed hourly rate;
- (b) A penalty claim for alleged breaches of sections 5 and 5A of the Wages Protection Act 1983 (“the WPA”).

Factual findings on material conflicts in the evidence

[28] There have been multiple material conflicts in the evidence in this matter. The same disputed evidence has also been used to support multiple claims. The Authority’s findings on the material disputed facts are set out below.

Hourly rate allegations

[29] Mr Kemble received a \$2.00 per hour pay rise in July 2022. There was a significant conflict between the parties about the circumstances of the raise and the amount of the pay rise.

[30] Mr Kemble used his version of events to support his wage arrears and penalty for breach the WPA claims, his claims for breaches of good faith and of his employment agreement, and his unjustified disadvantage and constructive dismissal personal grievance claims.

[31] Mr Kemble alleged that during the week of 1 May 2022 Mr Young offered him either a one off lump sum payment of \$10,000 to put towards his house deposit, or alternatively an equivalent pay rise from \$32 an hour, to \$36.80 gross per hour, which was the equivalent to \$10,000 gross per annum.

[32] Mr Kemble said he had elected the hourly pay rise. His position was therefore that he had reached a verbal agreement with BCE in May 2022 that his hourly rate would increase by the equivalent of \$10,000 per year. However, when he received his pay from 5 July 2022 onwards he saw he had only been paid \$34 gross per hour, which was a \$2.00 per hour pay rise.

[33] Mr Kemble said he had discussed the shortfall with his father and they decided not to raise an issue about it, because he had just purchased his first home and “did not

want to cause trouble”. His father advised him to bring it up with BCE in six months or so.

[34] BCE denied Mr Kemble’s allegations about his pay rise. Mr Young said Mr Kemble was never offered either a \$10,000 one off payment and/or the equivalent increase to his hourly rate.

[35] Mr Young said he told BCE’s employees in a group conversation that he would give them a pay rise to help them out when they purchased a house, because when he was a young employee his then employer had done that for him.

[36] Mr Young said he honoured that advice by increasing Mr Kemble’s pay rate by \$2.00 per hour after he had purchased a house, which he noted Mr Kemble had never complained about while employed.

[37] The Authority did not find Mr Kemble’s account of the pay rise issues to be credible. What he claimed to have occurred was not documented and he did not raise any issue regarding the shortfall in his pay increase at the relevant time. That fundamental omission undermined his allegations about what he claimed had been agreed.

[38] If there had been a verbal agreement reached that BCE would pay him \$36.08 per hour then it would not have “caused trouble” for Mr Kemble to have pointed out to Mr Young that he had been paid was less than what the parties had agreed he would be paid.

[39] Mr Kemble presented during the investigation meeting as someone who has a very strong personality and who can forcefully advocate for himself. His failure to make any comment on the alleged underpayment shortfall indicated to the Authority that BCE had not agreed to pay him \$36.80 per hour. The fact Mr Kemble had referred to a \$5 per hour pay increase in his Statement of Problem also undermined his evidence about what had been agreed.

[40] The Authority considered it unlikely BCE would had agreed to have paid Mr Kemble a lump sum payment of \$10,000, or the cash equivalent to be paid out over a one year period, without that being recorded in writing.

[41] Mr Kemble's account of his pay rise was not accepted by the Authority, on the basis it lacked the necessary clarity and was also inherently unlikely. The Authority preferred BCE's evidence that Mr Kemble was given a \$2.00 per hour pay rise in July 2022.

[42] Accordingly, Mr Kemble's claims that he had been underpaid and that a penalty for a breach of the WPA should be imposed on BCE did not succeed.

Text request on Sunday to stay at home

[43] There is a dispute between the parties about whether or not Mr Kemble was suspended on 18 and 19 July 2022. He was paid as normal but did not undertake any of his usual work duties on those two days, because Mrs Young asked him in a text message to stay home. BCE said it was a request he complied with, so it was not a suspension.

[44] The Authority was satisfied that Mr Kemble was ready willing and able to attend work as usual on Monday, 18 July 2022. He only stayed home because he had been 'asked' to do so via Mrs Young's text that had been sent to him on 17 July 2022.

[45] It was reasonable for an employee in Mr Kemble's position to view the text as an instruction to stay home as opposed to a request to voluntarily stay home. It was not put to him as a choice he could make. He also did not have any real choice as there was no work available for him to do, because he had been banned from the client's worksite he had been working on.

[46] In a recorded phone call on 18 July 2022 Mr Kemble asked Mr Young if his suspension would end the next day, meaning he could return to work on Wednesday 20 July 2022. Mr Young did not correct Mr Kemble to say he was not "suspended", which indicated BCE did consider Mr Kemble was on a paid suspension and not on voluntary leave. During the call Mr Young also said to Mr Kemble "you're on this suspension", which also supported the Authority's suspension finding.

[47] The Authority finds that Mr Kemble was suspended on pay on 18 and 19 July 2022.

Communications with Mr Kemble's father

[48] The reasons for Mr Young's phone call, and follow up text message sent shortly after the phone call, to Mr Kemble's father on 18 July 2022 were disputed. Mr Young said it was a welfare call made out of concern for Mr Kemble. Mr Kemble and his father believed it was done as an attempt to get Mr Kemble's father to exert pressure on him to resign.

[49] Mr Kemble's father was aware of his son's employment issues, so did not want to speak to Mr Young. Bruce Kemble told Mr Young "you have fucked up badly" and he also told him "do not ring or contact me again." Mr Young sent Bruce Kemble a text message after that.

[50] Mr Young's evidence about the reason for his phone call to Mr Kemble's father on 18 July 2022 was not accepted. Mr Kemble had not said or done anything that would have reasonably caused BCE to be concerned about his wellbeing. Mr Kemble had not provided BCE with his father's phone number and his father was not listed as an emergency contact for him. Mr Young obtained to from a google search.

[51] Mr Young's excuse was he was concerned because Mr Kemble had not agreed to come to a meeting, was not accepted as it did not withstand scrutiny. Mr Kemble did agree to meet and he had pushed for an earlier meeting, but it was BCE who was not ready to meet until 19 July 2022. Mr Young and Mr Kemble were in ongoing phone contact on 18 July 2022.

[52] The content of the text Mr Young sent Mr Kemble's father after he had refused to discuss his son with Mr Young does not read as if it related to a wellbeing check. Mr Kemble's wife could have been contacted and/or someone could have visited Mr Kemble at his home if BCE was concerned about his wellbeing. Mr Young also never expressed concern to Mr Kemble about his wellbeing during their phone calls on 18 July 2022.

[53] Although the text Mr Young sent Mr Kemble's father records concern about Aaron, the focus of the text was on the fact that Mr Young had been trying to set up a meeting for the following day which Aaron had refused, which was not the case.

[54] Mr Young's text referred to Aaron Kemble having been banned from two separate sites and it also said electrical hazards had been found on site by a builder and another electrician and that bullying allegations had been made against Aaron.

[55] The content of the text therefore supports the interpretation that Mr Kemble and his father had about the situation, namely that Mr Young was indirectly encouraging Mr Kemble's father to get his son to take the 'easy option' by resigning.

[56] Had it truly been a welfare check, then the Authority would have expected to have seen reference to the behaviour which had given rise to the concern instead of a recitation of all the complaints Aaron was facing.

Phone call Sean Kemble allegedly overheard

[57] There was a dispute between the parties about whether Sean Kemble was at Aaron's house on the afternoon of 18 July 2022 to be able to overhear part of an unrecorded phone call Aaron had apparently put on speaker phone. It was alleged that Sean overheard Mr Young on speakerphone telling Aaron he could deal with the complaints the 'easy way or the hard way'. Mr Young denied he had said that.

[58] After carefully assessing the detailed evidence that was given about this during the investigation meeting, the Authority considered it more likely than not that they were mistaken about this, on the basis that it was unlikely Sean was at Aaron's place when the call with Mr Young had occurred.

[59] Sean Kemble was closely questioned about his movements on the afternoon of 18 July 2022. He had been working alongside his father when Mr Young's phone call had come through, so Sean heard his father's part the very short exchange he had with Mr Young. That call occurred around 3pm. The follow up text message being sent by Mr Young to Bruce Kemble at 3.18pm on 18 July 2022.

[60] Sean then subsequently drove across town to do some work on Aaron's house later that day. The phone call Sean partly overheard apparently occurred around 2.30pm on 18 July 2022. Therefore the timing does not work.

[61] Based on Sean's evidence about the activities he did on the afternoon of 18 July 2022 and the timing of his movements after he left his father after to the call from

Mr Young, the Authority did not accept his ‘easy or hard way’ evidence about the 18 July 2022 phone call he said he had partially overheard.

Secret recordings

[62] Mr Kemble had previously secretly recorded a former employer, so he also did that with BCE. However, he did not secretly record every telephone call, conversation or meeting. That led BCE to claim that Mr Kemble was picking and choosing from his secret recordings to gather unhelpful evidence against it.

[63] Mr Kemble sought to rely on secretly recorded phone calls he had made when he had spoken to Mr Young on 18 July 2022 (this did not include the phone call that he said his brother Sean had partially overheard that day, as that was not recorded) and of the meeting they had on 19 July 2022. Mr Kemble also secretly recorded phone calls with his then co-workers.

[64] The Authority allowed transcripts of the secret recordings to be produced by Mr Kemble because they were relevant to the issues to be determined. However, they were assessed with caution in the knowledge that by secretly recording only some communications Mr Kemble was able to raise issues and/or direct the discussion in a way that presented himself in the best possible light and created evidence that was potentially adverse to BCE. He could also have elected to not produce recordings that were unhelpful to him.

[65] The Authority’s factual findings on the ‘easy or hard way’ discussions relied on transcripts of the recordings, but considerable caution was also applied to them. That said, the Authority was satisfied that Mr Young did make the various comments attributed to him in the transcripts. It was therefore necessary to carefully assess the context within which they were made, and to consider the lead up to such comments being made, in order to assess the effect these comments had on Mr Kemble.

Discussions about ‘the easy or hard way option’

[66] The Authority heard a lot of evidence about ‘the easy way or hard way option’ because it was critical to Mr Kemble’s various claims. There was considerable dispute between the parties about who said what to whom and why regarding ‘the easy or hard way option’, because not all of the alleged conversations about it had been recorded.

[67] Mr Kemble said Mr Young raised it with him on 15 July 2022, which Mr Young denied. He said it was Mr Kemble who brought it up. Mr Kemble also claimed his brother overheard part of a phone call that had not been recorded in which Mr Young again raised ‘the easy or hard way’ option.

[68] There is a record of ‘the easy or hard way option’ being discussed during a recorded phone call Mr Kemble and Mr Young had on 18 July 2022 and during the 19 July 2022 meeting, which was secretly recorded by Mr Kemble.

(a) 15 July 2022 discussion

[69] The Authority accepted Mr Kemble’s evidence that it was Mr Young who first raised the ‘easy way or hard way’ option and that he did so on the afternoon of 15 July 2022 after Mr Blyth had left.

[70] Mr Young’s evidence that it was Mr Kemble who raised a possible exit was not accepted. Mr Kemble had just purchased a house and needed his income from BCE to service his mortgage. His own electrical business could not have supported him to pay his mortgage.

[71] Mr Kemble also considered the client’s complaints on 15 July 2022 were without merit and he believed Mr Young had agreed with him about that, meaning from Mr Kemble’s perspective the complaint had been resolved, meaning there would have been no reason for him to suggest a resignation.

[72] The Authority accepted Mr Kemble’s evidence that he did not want to resign so would not have raised that possibility, especially when he believed he had not done anything wrong. That can be compared to the situation where Mr Young had been told the client did not want Mr Kemble back on the worksite and that it would not recommend BCE if Mr Kemble remained employed.

[73] Mr Young had a history of taking an avoidant approach to workplace problems, by not formally raising concerns that arose. He also did not want the hassle of dealing with the complaint, so the Authority considered it more likely than not that it was Mr Young who first raised the possibility of an agreed exit because that would have best met his own needs.

(b) 18 July 2022 phone calls

[74] The evidence about the unrecorded phone call on 18 July 2022 that Sean said he had partially overheard was not accepted. However, there were other phone calls between Mr Kemble and Mr Young on 18 July 2022.

[75] There was a 2.32pm call on 18 July 2022 from Mr Young to Mr Kemble that was recorded. The transcript records that it was Mr Young who brought up the ‘easy way or hard way option’ again. Mr Young said he had spoken to his “lawyer” (who turned out to be an HR Advisor, not a lawyer) and Mr Young reported that she had told him:

[W]e can pretty much do it the easy way or the hard way sort of thing, so I mean we’re just gonna (sic) have to go through the process now if that’s what you want to do. Essentially.

[76] That indicated ‘the easy way or hard way option’ was something Mr Young was actively considering and had sought legal advice on. Mr Kemble asked later in their conversation what Mr Young meant by ‘the easy way and the hard way option’. That query supported the Authority’s earlier conclusion that it was Mr Young who had first raised that option, because Mr Kemble didn’t know what it meant so was unlikely to have raised it first.

[77] Mr Young responded to Mr Kemble’s query as follows:

Well it’s not, it’s not that, it was, there’s no easy way, it’s, I was just, I’m trying to, Aaron I’m not trying to be the bad guy here, I’m trying to be the frickin’ nice guy. I’m trying to work out either you do it easy and I give you a nice review and, it’s that way, or it goes, it goes through all this. (sic)

[78] Mr Kemble then clarified:

So I’m just wanting to double check, so, that what you’re wanting is for me to resign and you give me two weeks and then you’ll reckon that’ll just be easier for everyone and you’ll give me a good review?

[79] Mr Young responded:

Well, that’s, it’s, it’s, at the end of the day, it’s, it’s not exactly that. It’s the fact that you know, I, I, I, I don’t really feel like dealing with this crap and, at the end of the day it’s, it, it can’t continue Aaron. I’ve got, it’s just, I’ve talked to, you know, too many people and unfortunately now all the stuff it’s, it’s gonna involve, you know, other work colleagues and people and builders on site and that. Like [S], I’ve spoken to [S] and [T] and they don’t even, I mean, ahh yeah, they just don’t want to deal with it, they’re just like I just don’t

wanna deal with it, don't want him here anymore, that's it, we've had enough of all this sort of shit and this and that, so that's it. (sic)

[80] [S] and [T] are BCE clients, but they did not make a formal written complaint as others had. Mr Young told the Authority during the investigation meeting that the reference to not wanting to deal with “this crap” was that Mr Kemble’s problems with customers and staff needed to be addressed because his behaviours could not continue.

[81] However, the Authority considered that Mr Young’s “this crap” comment more likely referred to Mr Young not wanting to go through a formal investigation process regarding the complaints BCE had received. It was in his interests and BCE’s interests for Mr Kemble to resign without the need for a formal process.

[82] Mr Young’s references to the ‘easy way and hard way option’ were therefore more likely than not subtle attempts to encourage Mr Kemble to resign.

(c) Meeting on 19 July 2022

[83] The transcript of the 19 July 2022 meeting attended by Mr Kemble, Mr Young and Mr Blyth recorded Mr Kemble saying that Mr Young had told him the previous day that “the easiest option would basically be to resign with two weeks’ pay plus a good review.”

[84] Mr Young did not deny he had said that. However, he went on to refer to advice his HR Advisor (who he referred to as his lawyer) had given him that indicated he knew that he should not be talking to Mr Kemble about the ‘easy or hard way’ to deal with the complaints that had been made. Mr Young’s response to Mr Kemble’s query was:

Yeah well that was sort of what she said to me. She said you can't go and tell him that but at the end of the day, it's like I'm just trying to be, this is, if this keeps going and. Like , if [the apprentice] decides he wants to proceed any further, I mean I'm obligated to then, I have to do something now unfortunately.

[85] Mr Kemble then asked Mr Young not to “sugar coat it” and Mr Young replied:

I know but I'm also saying the other thing that I was saying to you is that, well she said it would be obviously, we can't go and tell you that but, umm, yeah at the end of the day it is, it's, it's really. (sic)

[86] The evidence established that the discussions about the ‘easy or hard way option’ were initiated and pursued by Mr Young, likely in an attempt to encourage Mr

Kemble to resign without requiring BCE to go to the time and cost of undertaking a formal investigation into the complaints it had received.

Threat of unpaid suspension

[87] Mr Kemble alleged that he was ‘threatened’ with unpaid suspension. BCE denied that and said it had just identified unpaid suspension as an option in the employment agreement.

[88] The transcript of the 19 July 2022 meeting records that Mr Young told Mr Kemble that if the matter was not resolved by the end of that week (i.e. by 22 July 2022) then his suspension would be unpaid. Mr Kemble clarified that is what Mr Young had intended to say, and Mr Young confirmed that was correct.

[89] The threat of an unpaid suspension was therefore established on the evidence. The Authority recognised an unpaid suspension did not actually occur, because Mr Kemble took five days’ paid sick leave from 25 to 29 July 2022 and then resigned on 29 July 2022.

[90] The Authority also noted that had Mr Kemble not been on sick leave, then BCE had found alternative office based work for him to do that week, so he still would have been paid. However, that did not change the fact that Mr Kemble was told that if the matter (meaning the complaints) was not resolved by 22 July 2022 the Mr Kemble’s suspension would become unpaid.

Medical certificate

[91] There was a dispute between the parties as to whether or not BCE had genuine and legitimate concerns about the content of the medical certificate Mr Kemble had provided on 22 July 2022.

[92] Mr Kemble had provided an undated medical certificate that had also failed to refer to an examination date. As it turned out, he had a phone consultation on 20 July 2022 during which he was signed off work from 25-29 July 2022.

[93] The medical certificate he provided did not meet the Medical Council New Zealand Guidelines regarding the content of a medical certificate, so BCE cannot be criticised for raising legitimate questions about it. The Authority agreed with BCE’s position about the medical certificate.

Mr Kemble's electrical company

[94] Mr Kemble registered his own electrical company, of which he is the sole director and is an 80 percent shareholder (his wife is the other 20 percent shareholder) on 22 February 2022. Although Mr Kemble claimed BCE knew about it, Mr Young denied that.

[95] The Authority preferred Mr Young's evidence, so finds that BCE was not aware that Mr Kemble had set up his own electrical company so that he could undertake electrical work for his own financial benefit outside of his normal working hours with BCE. Mr Kemble's decision to set up his own electrical company while employed by BCE, without BCE's knowledge or approval was a breach of the duty of fidelity he owed it.

[96] The Authority accepted Mr Young's evidence that he only discovered Mr Kemble had his own electrical company when Mr Kemble used it to seek work and provide quotes to potential new clients while he was on paid sick leave from BCE during the week commencing 25 July 2022.

[97] Mr Young did not want BCE's workers doing 'off the books' work for friends and family in their own time, so he had put in place a system where that work could be done by workers using BCE's equipment and resources for a significantly discounted rate. The aim of that was to encourage the electricians to bring their friends and family to BCE instead of undertaking "homies" or "cashies" in their own time.

Did BCE breach Mr Kemble's employment agreement?*Mr Kemble's claims*

[98] Mr Kemble claimed the following breaches of his employment agreement:

- (a) He said he had been suspended without notice or consultation;
- (b) BCE threatened to not pay him while he was suspended;
- (c) He was not provided with copies of the written complaints BCE had received over the weekend until the meeting held on Tuesday 19 July 2022;

- (d) BCE asked him to again provide the names of people to interview on 22 July 2022, when he had already given it that information during the 19 July 2022 meeting; and
- (e) BCE failed to pay him \$36.80 gross per hour from 5 July 2022.

Suspension related claims in the SoP

[99] Only one breach of contract (meaning breach of employment agreement) claim is recorded by Mr Kemble in his Statement of Problem (“SoP”). That claim alleged BCE had breached Mr Kemble’s employment agreement by:

- (a) Not adhering to the requirements of the suspension clause; and
- (b) Failing to investigate the complaints about him adequately/sufficiently before suspending him.

Suspension clause in the IEA

[100] The suspension clause in Mr Kemble’s employment agreement stated:

The employer may decide to suspend the employee on pay while investigating allegations against the employee, e.g. for serious misconduct, or if a condition, illness or injury means the employee imposes an immediate threat to themselves and/or others.

If an investigation is delayed because the employer refuses to take part, or because of other reasons beyond the employer’s control, e.g. waiting for a criminal trial to end, the employer may decide any time further on suspension will be unpaid.

Finding on suspension related claims

[101] In terms of the SoP suspension claims, BCE had a contractual right to suspend Mr Kemble while investigating allegations against him. It also had a contractual right to suspend him without pay if the investigation was delayed for reasons beyond the employer’s control.

[102] Mr Kemble’s breach of employment agreement claim regarding his suspension related claims did not succeed. BCE was not required to investigate the complaints made about him before it suspended Mr Kemble, because the purpose of suspending him was to give it an opportunity to do so.

[103] The complaint about Mr Kemble and his banning by the client from the worksite was discussed with Mr Kemble on Friday, 15 July 2022. He had also been verbally put on notice on Friday afternoon that there was no work for him to do on Monday because

he could not return to the worksite he had been banned from. Mrs Young's suspension text has to be seen in that context.

[104] The employment agreement does not specify consultation requirements, and that issue will be dealt with later in this determination as part of the unjustified disadvantage grievance claim, as will the threat of unpaid suspension if the matter was not concluded by 22 July 2022.

[105] The requirements of the suspension clause were met because allegations had been made about Mr Kemble which were being investigated by BCE. He was also paid from 18 July to 22 July 2022, so a period of unpaid suspension never actually occurred.

[106] There was another unpleaded breach of contract claim referred to by Mr Kemble during the Authority's investigation meeting. He alleged that he had been put on an unpaid suspension after 22 July 2022, however the evidence contradicted that. It was clear that Mr Kemble was on paid sick leave from 22 July until he resigned on 29 July 2022. His lawyer was advised of that before he resigned.

Phone call and text to father

[107] A second unpleaded breach of employment agreement claim that arose during the course of the investigation meeting was an allegation by Mr Kemble that Mr Young's phone call to his father on 18 July 2022 breached his privacy, so was therefore a breach of contract. That claim did not succeed.

[108] There was no term in the employment agreement that BCE must comply with the Privacy Act, which is a statutory duty. The Authority does not have jurisdiction over a breach of the Privacy Act 2020 claim. This allegation has also been raised as part of the constructive dismissal, unjustified disadvantage and breach of good faith claims. It was a factor that was considered as part of the factual matrix of the dismissal claim but it did not give rise to a stand-alone cause of action.

Request for names of people to interview

[109] Mr Kemble's claim that BCE's second request on 22 July 2022 for the names of people he wanted interviewed, when he had already provided them on 19 July 2022, was a breach of his employment agreement did not succeed.

Underpayment claim

[110] Mr Kemble's claim that he should have been paid \$36.80 per hour from 5 July 2022 did not succeed. The Authority was satisfied that Mr Kemble was paid correctly.

Outcome of breach of employment agreement claims

[111] Mr Kemble's breach of employment agreement (breach of contract) claims did not succeed.

Did BCE breach its good faith obligations to Mr Kemble?*Statutory good faith obligations*

[112] Section 4(1) of the Employment Relations Act 2000 (the Act) requires parties in an employment relationship to deal with each other in good faith. That includes not misleading or deceiving each other or engaging in conduct that is likely to do so.¹

[113] Section 4(1A) of the Act provides that the duty of good faith is wider than the implied mutual obligations of trust and confidence.² It requires parties to be active and constructive in establishing and maintaining productive employment relationships in which they are, among other things, responsive and communicative.³

[114] Section 4(1A)(c) of the Act imposes obligations on an employer who is proposing to make a decision that may adversely affect the ongoing employment of an employee to provide them with access to relevant information and an opportunity to comment on it before a final decision is made.

Alleged breaches of good faith

[115] Mr Kemble claimed that BCE had breached its good faith obligations in s 4(1)(b)(i) and 4(1A) of the Act.

[116] Mr Kemble's claim this applied to him did not succeed as no disciplinary allegations had been made by BCE before he resigned.

[117] Mr Kemble's breach of employment agreement claims were also pursued by him as breaches of good faith claims. The same findings already made in respect to

¹ Section 4(1)(b)(i) of the Act.

² Section 4(1A)(a) of the Act.

³ Section 4(1A)(b) of the Act.

those issues also applied to the alleged breaches of good faith. Accordingly, none of the allegations made concerning the breach of employment agreement claims amounted to breaches of good faith.

[118] Other good faith complaints Mr Kemble made during the investigation meeting and in his submissions were not established on the evidence, with the one exception discussed below.

Changes to the number of complaints referred to

[119] Mr Kemble's claim that Mr Young falsely increased the number of alleged complaints about him to fifteen, when there were only four written complaints made about him, succeeded.

[120] Mr Young's denial that he had told Mr Kemble on 15 July 2022 that BCE had received fifteen complaints about him was not accepted. Mr Kemble stated on two occasions during a recorded phone call with Mr Young on Monday 18 July 2022 that he had been told on Friday that there were fifteen complaints. Mr Young did not deny that. Instead he just responded by saying that the four written complaints were the only people that put their concerns in writing.

[121] The Authority accepted that there was evidence of other concerns being expressed to BCE about Mr Kemble that had not been recorded, because not everyone who had raised concerns wanted to become involved in making a formal written complaint.

[122] However, there was no evidence to support the "fifteen" figure that Mr Young had referred to on 15 July 2022. That was likely an overly inflated figure, so was misleading. Such conduct breached BCE's good faith obligations in s 4(1)(b)(ii) of the Act, because it misled Mr Kemble about the extent of the concerns BCE had received about him.

[123] Mr Kemble's allegations that BCE had breached its good faith obligations by bullying and harassing him did not succeed.

Allegation that BCE's investigation was a sham

[124] Mr Kemble's allegation that BCE's investigation into the complaints and allegations that had been made by others about him was "a sham" and/or that the allegations were "baseless" was not accepted.

[125] Mr Kemble's view that these issues had been completely resolved as a result of his discussion with Mr Young on the afternoon of 15 July 2022 was also unrealistic. The Authority considered that Mr Kemble had inappropriately trivialised the complaints that had been made about him.

[126] Serious concerns had been raised which needed to be properly investigated. The transcript of the meeting held on 19 July 2022 showed that BCE took care to raise each of the concerns with Mr Kemble, so it knew what his response was before it decided on what if any next steps needed to be taken.

[127] An employer is entitled to investigate matters where genuine allegations involve potential misconduct, and it is not a breach of duty or repudiatory conduct to do so.⁴

[128] BCE could not have ignored the matters that were drawn to its attention by its clients and the apprentice. On the face of it, these matters were potentially serious and warranted a formal investigation. The complaints were not "baseless", nor was BCE's investigation of them a "sham".

Alleged bullying and intimidatory behaviour by BCE

[129] WorkSafe defines workplace bullying as "repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm".

[130] 'Repeated' means that the behaviour is persistent, and has occurred more than once. 'Unreasonable behaviour' means actions that a reasonable person would see as unreasonable and includes victimising, humiliating, intimidating or threatening a person.

[131] Mr Kemble identified the following actions as bullying and intimidation of him:

⁴ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA); and *Bradley v Ngāti APA Ki Te Ra To Charitable Trust* [2019] NZEmpC 167 at [65].

- (a) His suspension;
- (b) Raising “the easy way or hard way option”;
- (c) The phone call to his father on 18 July 2022;
- (d) Delaying meeting with him until 19 July 2022;
- (e) Referring to BCE’s HR Adviser as “a lawyer”;
- (f) BCE’s querying of the undated medical certificate;
- (g) Raising additional concerns about Mr Kemble’s workmanship;
- (h) Sending Mr Kemble a text screenshot of his employment agreement circling examples of serious misconduct in the serious misconduct section in it;
- (i) Raising the resolved Mr [L] and DS (unlawful electrical work) issues; and
- (j) Falsely alleging more complaints had been received than had been received.

[132] The bullying and intimidation claims were not established on the evidence to the required standard of proof. The Authority was satisfied that none of this alleged conduct either individually or taken together met the WorkSafe definition of bullying. Accordingly, Mr Kemble’s allegations of workplace bullying, harassment or intimidation did not succeed.

[133] The references to ‘the easy and hard way option’ did not amount to bullying but have been considered in more detail in the assessment of the dismissal claim.

Should a penalty be imposed on BCE?

[134] Section 4A of the Act provides that a penalty may be imposed for certain breaches of good faith. The breach of s 4(1)(b) of the Act that occurred was minor, and did not reach the threshold set out in s 4A of the Act for a penalty to be imposed.

[135] Accordingly, Mr Kemble’s penalty claim did not succeed.

Was the Applicant unjustifiably disadvantaged in his employment?

Relevant law

[136] Section 103(1)(b) of the Act provides that an unjustifiable disadvantage occurs where:

the employee’s employment, or one or more conditions of the employee’s employment [...] is or are or was [..] affected to the employee’s disadvantage by some unjustifiable action by the employer.

[137] Mr Kemble bears the onus of establishing that his employment or conditions of employment were affected to his disadvantage by BCE. Once he has established that, then the onus switches to BCE to justify its actions in accordance with the justification test in s 103A of the Act.

[138] The justification test in s 103A(2) of the Act requires the Authority to objectively assess whether BCE’s actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.⁵

[139] In *Wilson-Grange Investments v Guerra*, Chief Judge Inglis explained justification as a “target”:⁶

The bullseye of the target is “employer best practice” and the outer circles of the target comprise “acceptable action”. Towards the outer edges of the target lie the danger zones. Anything off the target is not what a fair and reasonable employer could have done. The size of the target will depend on “all of the circumstances at the time”.

[140] The Authority and Court have recognised that the resources available to an employer will inform what is fair and reasonable in the particular circumstances:⁷

[...] the degree of adherence to standards will depend upon the resources reasonably available to the employer to do so. A large well-resourced employer can be expected to apply its human, financial, and other resources to the investigation and determination of allegations of misconduct to an extent that a small employer without a human resources department or access to more than rudimentary advice should be expected to do.

⁵ Section 103A(2) of the Act.

⁶ [2023] NZEmpC 39 at [41].

⁷ *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [30].

[141] Section 103A(5) of the Act provides that the Authority must not determine a dismissal or an action to be unjustified solely because of minor process defects that did not result in the employee being treated unfairly.

Mr Kemble's claims

[142] To the extent that Mr Kemble repeated his breach of employment agreement and breach of good faith claims as unjustified disadvantage grievance claims, then they did not succeed for the reasons already given.

[143] In short, BCE received genuine and potentially serious complaints about Mr Kemble that it was required to investigate. It was contractually entitled to suspend him on pay while it did so. BCE raised the concerns it had with Mr Kemble and gave him an opportunity to respond before it decided on whether a formal disciplinary process was required. However, it never got as far as disciplinary allegations being put to Mr Kemble because he resigned before that had occurred.

[144] While Mr Kemble made many complaints about things BCE had or had not done while it was investigating the complaints it had received, the Authority was either not satisfied the matters relied on by Mr Kemble had disadvantaged him or if he had been disadvantaged, that any disadvantage he may have suffered was unjustified in all the circumstances.

Findings on the suspension related alleged disadvantage grievances

[145] Normally a fair and reasonable employer is expected to consult with an employee before placing them on suspension. The purpose of consultation is to give the employee an opportunity to be heard before a final decision is made about whether or not to suspend them. That is not an immutable rule, but is generally what should occur.⁸

[146] In terms of the suspension by text message on Sunday 17 July 2022 that had occurred without adequate consultation, BCE had good reasons for suspending Mr Kemble and it was contractually entitled to do so. He was also suspended on pay, so did not suffer any loss.

⁸ *Graham v Airways Corporation of New Zealand Limited* [2005] ERNZ 587.

[147] While Mrs Young should have consulted Mr Kemble about his suspension, that had not been practical in the circumstances, because she was out of town and in an area with poor reception. That made communication more difficult than it would normally have been.

[148] The Authority considered that the failure to appropriately consult with Mr Kemble on Sunday about his suspension amounted to a minor process error in these particular circumstances.

[149] The complaint had already been discussed with him by phone and in person on Friday 15 July 2022. At that same time he had also been put on notice that, because he had been banned from the worksite, there was no work available for him to do. So the text on Sunday should not have been surprising to him.

[150] Mr Kemble did not object to his suspension when he was asked to stay home on pay on Sunday. He also did not identify any available work he could have done had he reported to work on Monday. Nor did not object to his paid suspension during the various phone calls he had with Mr Young on Monday 18 July 2022. He was given an opportunity to address his suspension in the meeting on 19 July 2022, and again raised no objection to it.

[151] The Authority was therefore not satisfied that Mr Kemble was disadvantaged, as a suspension is neutral, it is not disciplinary action. However, even if the Authority was wrong about that, s 103A(5) of the Act would apply.

Section 103A(5) of the Act

[152] Section 103A(5) of the Act applied to the process defects that occurred regarding the failure to consult with Mr Kemble before he was asked on the evening of Sunday 17 July 2022 to remain home on pay for two days. This was a minor process defect, that did not result in any actual unfairness to Mr Kemble.

[153] Section 103A(5) of the Act therefore prevented the Authority from determining that Mr Kemble's paid suspension on 18 and 19 July 2022 was an unjustified disadvantage grievance in all of the circumstances.

Outcome of unjustified disadvantage grievance claims

[154] None of Mr Kemble's unjustified disadvantage personal grievance claims succeeded.

Was Mr Kemble's resignation a constructive dismissal?*Relevant law*

[155] A dismissal is a sending away that occurs at the initiative of the employer. A resignation can therefore amount to a dismissal, even if the employer did not intend for the employee to resign.

[156] The leading case on constructive dismissal is the Court of Appeal decision in *Auckland Shop Employees IUOW v Woolworths (NZ) Limited* in which three (non-exhaustive) situations were identified where a constructive dismissal might occur:⁹

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

[157] The Court of Appeal in *Auckland Electric Power Board v Auckland Provisional District Local Authority Offices IUOW (Inc.)* held that a 'breach of duty' constructive dismissal claim involved two stages of inquiry.¹⁰ Firstly, had the resignation had been caused by a breach of duty on the part of the employer? Secondly, was there a substantial risk of resignation, that was reasonably foreseeable, having regard to the seriousness of the breach.

[158] Not all breaches of duty will give rise to a constructive dismissal claim. The breach must be a serious breach. That point was noted by the Employment Court in *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Limited*:¹¹

[...] There must be a breach of contractual term and it must be a breach of sufficiently serious nature to bring a reasonable employee to the conclusion

⁹ [1985] 2 NZLR 372.

¹⁰ [1994] 2 NZLR 415.

¹¹ (1990) ERNZ Sel Cas 791 at 803.

that the employer does not intend to be bound by the contract and, therefore, cannot be relied upon to perform it fully or consistently in the future.

Did the initiative for Mr Kemble's resignation come from BCE?

[159] The Authority finds that BCE followed a course of conduct with a deliberate or dominant purpose of coercing Mr Kemble to leave his employment. It was that pressure that more likely than not resulted in him resigning. In such circumstances, this meant it was not a free or voluntary resignation, but in fact amounted in law to a dismissal.

[160] Mr Young immediately misled Mr Kemble on Friday 15 July 2022 about the number of complaints that had been received about him. This significantly overstated the extent of the problems Mr Kemble faced, so was likely done to encourage him to resign so that BCE could avoid having to investigate the complaint it had received from MS.

[161] It was Mr Young who raised 'the easy or hard way option' and he did so within the context of significantly overstating the number of complaints he said Mr Kemble was facing. At the same time (on Friday 15 July 2022) Mr Young also encouraged Mr Kemble to become a contractor, and attempted to entice him into that option by saying BCE would give him contracting work.

[162] These actions indicated that Mr Young likely wanted a quick and easy parting of the ways, as the contracting option was unlikely to be attractive to Mr Kemble who was relying on his salary from BCE to pay his new mortgage.

[163] The reference to 'the easy way' referred to a resignation. The reference to 'the hard way' referred to a formal investigation and likely disciplinary action for serious misconduct. The reference to 'the hard way option' reasonably implied to Mr Kemble that he would likely face adverse consequences, which he interpreted as a dismissal, if he did not take the easy way option.

[164] Mr Young also inappropriately pressured Mr Kemble by saying that no clients would have him on their worksite, not just MS who had banned him from his worksite on 15 July 2022. Based on the evidence the Authority heard that was likely another overstatement.

[165] Mr Kemble challenged Mr Young about that during a phone call on 18 July 2022. Mr Kemble said [S] had told him that what Mr Young had conveyed to Mr

Kemble was “lies” and that he (S) hadn’t complained. Mr Young then acknowledged that S had “never exactly said anything direct” and “couldn’t be bothered dealing with all this other stuff [...]”. Mr Young had therefore provided incorrect information about S’s position regarding Mr Kemble, which made his situation look worse than it was.

[166] There was no legitimate reason for Mr Young to have called Mr Kemble’s father. The Authority considered that call and subsequent text was likely an attempt to get Bruce Kemble to pressure Aaron into accepting the ‘easy way option’.

[167] This view was based on what was communicated in the text, which emphasised how serious the situation Aaron was facing was. This was therefore another pressure lever that was inappropriately exerted by BCE on Mr Kemble.

[168] Mr Young sent Mr Kemble an extract of the serious misconduct clause in his employment agreement with three of the examples given in the clause that had been circled. He also told Mr Kemble during one of their phone calls on 18 July 2022 that BCE had evidence of each of the serious misconduct example he had circled.

[169] Although disciplinary allegations had not been put to Mr Kemble, this information from Mr Young indicated BCE considered serious misconduct had likely occurred. That was also reflected in a draft disciplinary letter BCE had prepared but had not given Mr Kemble before he had resigned.

[170] Mr Young also discussed ‘the easy and hard way options’ with his HR Advisor, who he described as his lawyer. That again showed an exit was at the forefront of his mind from the outset of the MS complaint.

[171] During a recorded phone call on 18 July 2022 Mr Young painted himself as “the good guy” by offering Mr Kemble ‘the easy option’. At the same time Mr Young said he didn’t “want to deal with all this crap.” This indicated Mr Young considered it was in his and BCE’s interests for Mr Kemble to leave before an investigation occurred.

[172] Mr Kemble was also told on 19 July 2022 that if the matter had not been concluded by the end of the week then he would be put on unpaid suspension the following week. That put him under stress as he worried about how he would pay his new mortgage if he did not receive his salary.

[173] Although that did not happen because BCE lifted the suspension after it had identified some office based work Mr Kemble could do, and Mr Kemble also took sick leave that week, what is significant is that BCE did not take any steps to conclude its investigation that week.

[174] Mr Kemble had identified on 19 July 2022 who he wanted BCE to speak to and it did not do that. BCE had still not spoken to those people he had identified nine days later when Mr Kemble resigned.

[175] The following factors combined to create a situation where Mr Kemble was led to believe ‘the writing was on the wall’ because if he did not resign he would probably be dismissed:

- (a) The advice that one of BCE’s important new clients would not refer any business to it if Mr Kemble remained employed;
- (b) The suggestion Mr Kemble should become a contractor, and if he did BCE would give him work;
- (c) The repeated raising by Mr Young of the ‘easy way or hard way option’;
- (d) Mr Young’s stated view that “he didn’t want to deal with this crap”;
- (e) Significant overstatement of the number of complaints BCE had received (fifteen versus four);
- (f) Incorrect information was given to Mr Kemble about S’s position regarding him;
- (g) Advice that BCE had evidence of serious misconduct, that under the terms of his employment agreement he could be dismissed for;
- (h) The phone call and text message to Mr Kemble’s father overemphasised how serious the situation Aaron was facing was, because at that point no disciplinary allegations had been put to him. The purpose of this communication was likely to get Aaron’s father to encourage him to take the ‘easy way option’ by resigning;
- (i) The failure to take adequate notes of Mr Kemble’s explanation during the 19 July 2022 meeting because at that time BCE did not know that Mr Kemble had been secretly recording the meeting. This failure caused Mr Kemble to conclude that BCE was merely ‘going through the motions’

as it had already decided to dismiss him if he didn't resign because it did not even fully record his various explanations.

[176] The evidence from Mr Kemble, his brother and father clearly established that the situation he had faced in the lead up to his resignation had a very detrimental effect on him. Mr Kemble also had to take five days' sick leave in the week before his resignation, which he attributed to the stress the situation was causing him.

[177] The power imbalance between the parties also had to be considered when the impact of the combination of all of the above factors on Mr Kemble was assessed. The Authority was satisfied that BCE had created a situation by its words and inactions that reasonably caused Mr Kemble to conclude that if he did not resign then he would be dismissed.

[178] The Authority found considerable support for that view in the lengthy draft disciplinary allegations letter that BCE's HR Advisor had drafted. The letter included (among other allegations) claims of "gross negligence" regarding the standard and quality of his electrical work. This suggested the matter was indeed headed in the direction that Mr Kemble had perceived it was (i.e. towards his exit from BCE).

[179] Although BCE was vague about the circumstances associated with the creation of this letter, which was provided to Mr Kemble at his lawyer's request after his employment had ended, it contained details information that could only have been provided by BCE. It was therefore responsible for it, even though it had been drafted by a previous advisor.

Other claims Mr Kemble has made

[180] The Authority acknowledges that Mr Kemble raised lots of other concerns and allegations that he claimed made his resignation a dismissal. However, these were not accepted by the Authority, so have not been discussed in detail.

Finding

[181] Mr Kemble's resignation was a constructive dismissal.

Was Mr Kemble's dismissal justified?*Justification test*

[182] Justification is to be assessed in accordance with the statutory justification test in s 103A of the Act. This requires the Authority to objectively assess whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Kemble was dismissed.¹²

[183] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith requirements in s 4(1A)(c) and the four procedural fairness tests in s 103A(3) of the Act, which set out minimum procedural fairness requirements. Failure to do so is likely to undermine an employer's ability to justify its actions or a dismissal.

Finding

[184] Because BCE did not consider it had dismissed Mr Kemble, it was unable to meet the minimum good faith or procedural fairness requirements in the Act. BCE was therefore unable to establish that its dismissal of Mr Kemble was justified under s 103A(2) of the Act.

[185] Accordingly, Mr Kemble's dismissal was unjustified and he is entitled to remedies.

What remedies should Mr Kemble be awarded?*Mitigation*

[186] The Authority was satisfied that Mr Kemble took appropriate steps to mitigate his loss. He had set up his own electrical business in February 2022 while still employed by BCE. Although it was not operating at the time he was dismissed, he has been working hard since then to establish the business.

[187] Mr Kemble provided the Authority with copies of unsuccessful estimates which he had quoted for potential customers of his electrical company in the three months' period following the ending of his employment with BCE. Although customers did not

¹² Section 103A(2) of the Act.

proceed with the quotes he had provided, it is evidence that he attempted to obtain electrical work during the period for which he is seeking lost remuneration.

[188] Because his own business was not making money, Mr Kemble also worked part-time as a labourer, on an independent contractor basis, at his father's landscaping business.

[189] The Authority finds that Mr Kemble took appropriate steps to mitigate his loss during the three month period following his unjustified dismissal by BCE.

Lost remuneration

[190] Mr Kemble sought 13 weeks' lost remuneration, plus accrued annual leave and KiwiSaver entitlements and interest.

[191] The Authority considered it unlikely that Mr Kemble's employment would have continued for more than 13 weeks, so that is the upper limit of what he can recover. He had engaged in conduct (bullying of the apprentice) that could have been viewed by a fair and reasonable employer as serious misconduct.

[192] Mr Kemble had also demonstrated a dismissive attitude to the concerns that had been raised with him, so was unlikely to have self-corrected his conduct as a result of the complaints that had been made about him.

[193] Mr Kemble had an annual salary that worked out at \$34 gross per hour for 40 hours per week, amounting to \$70,720 gross per annum. This was inclusive of his KiwiSaver contributions, so he earned \$1,360 per week. He would therefore have earned \$17,680 in the 13 weeks' after his dismissal.

[194] However, the money he received over that same 13 weeks period must be deducted from the lost remuneration he is awarded. Mr Kemble earned \$6,074.58 working as a casual contractor for his father's business and his electrical business earned \$8,740.98.

[195] The difference between what he would have received in the 13 weeks after his dismissal less what he did in fact receive due to the mitigation of his loss is \$2,864.44 (being \$17,680 minus \$6,074.58 earnings from his father's business and minus \$8,740.98 which his own business earned).

[196] BCE is ordered to pay Mr Kemble \$2,864.44 gross under s 128(2) of the Act to compensate him for the remuneration he lost in the 13 weeks' period after his unjustified dismissal.

Annual leave entitlements

[197] BCE is ordered to pay Mr Kemble \$229.16 being eight percent of his award of lost remuneration to compensate him for the annual holiday pay he would have earned on that salary had he not been unjustifiably dismissed.

Interest claim

[198] Mr Kemble's claim for interest on his award of lost remuneration did not succeed, because that entitlement has only crystallised as a result of this determination.

KiwiSaver

[199] No separate award of KiwiSaver contributions is made as Mr Kemble's employment agreement records that he is paid on a "total remuneration" basis, meaning KiwiSaver contributions are already included salary he was paid.

[200] However, BCE is ordered to deduct the appropriate KiwiSaver contributions from the lost remuneration that Mr Kemble has been awarded and remit those amounts for his benefit to the IRD to pass on to his KiwiSaver account.

Distress compensation

[201] Mr Kemble, his father and brother gave evidence to the Authority about the harm, distress and humiliation Mr Kemble had suffered as a result of his unjustified dismissal. In particular, Mr Kemble's father and brother were worried about his welfare to the extent that they had to take steps as a family to address that. Mr Kemble also required medical assistance.

[202] Mr Kemble described how his dismissal caused him stress and anxiety. It affected his self-worth and confidence in a detrimental way and he described struggling with "bad anxiety and paranoia as a direct result of this".

[203] Mr Kemble also described the stress he and his partner were under as a result of losing his job. He had to obtain financial assistance from his parents because he used all of his savings to cover expenses while he was without an income.

[204] Mr Kemble described the situation of his dismissal as having “completely wrecked and changed me”. He described how he struggled to trust people, both professionally and personally, and how that had adversely affected his relationships.

[205] Mr Kemble was clearly still affected during the Authority’s investigation meeting, becoming agitated or distressed at various points during the investigation meeting to the extent that at one point he had to leave the room.

[206] BCE is ordered to pay Mr Kemble \$25,000 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he suffered as a result of his unjustified dismissal.

Should Mr Kemble’s remedies be reduced on the grounds of contribution?

[207] Having established an unjustified dismissal personal grievance claim, the Authority is required by s 124 of the Act to consider the extent to which Mr Kemble’s actions contributed to the situation that gave rise to his dismissal grievance, and if appropriate, to reduce his remedies accordingly.

[208] Contribution denotes blameworthy conduct that has been established on the balance of probability. In this case Mr Kemble has engaged in the following blameworthy conduct which the Authority finds was proven to the required standard of proof:

- (a) He almost had an altercation with the client (MS) on 15 July 2022;
- (b) He conducted himself in such a manner on the worksite on 15 July 2022 that the client banned him from the worksite;
- (c) Prior to 15 July 2022 Mr Kemble had also previously conducted himself in such a way that had caused others to make informal complaints about him;
- (d) He set up his own electrical company in competition with his employer;
- (e) He quoted for jobs for his own electrical company while on paid sick leave with BCE;
- (f) He secretly recorded conversations with Mr Young and co-workers, which was a breach of good faith;

- (g) He engaged in conduct towards the apprentice that met the WorkSafe definition of bullying; and
- (h) He minimised and dismissed legitimate concerns about his conduct and behaviour.

[209] Accordingly, Mr Kemble's award of distress compensation should be reduced by 20 percent under s 124 of the Act to reflect his contributory conduct. His award of \$25,000 distress compensation is therefore reduced by \$5,000 to make it \$20,000.

Outcome

[210] The Authority makes the following findings:

- (a) Mr Kemble's evidence about the alleged \$10,000 pay increase he said he was given around May/June 2022 was not accepted.
- (b) Mr Kemble's wage arrears, breach of contract and penalty claims based on an alleged underpayment of his hourly rate did not succeed.
- (c) Mr Kemble was suspended on pay on 18 and 19 July 2023.
- (d) Mr Kemble's suspension on 18 and 19 July 2022 was substantively justified but there was inadequate consultation with him about that decision before he was advised not to attend work on 18 and 19 July 2022.
- (e) The procedural errors regarding Mr Kemble's suspension by text on 17 July 2022 were minor and did not result in unfairness to him, so s 103A(5) of the Act applied.
- (f) Mr Kemble's paid suspension from 20 to 22 July 2022 was procedurally and substantively justified.
- (g) BCE did not bully, harass or intimidate Mr Kemble.
- (h) Mr Kemble's unjustified disadvantage personal grievance claims did not succeed.
- (i) The complaints that were made about Mr Kemble were potentially serious and needed to be formally investigated by BCE.
- (j) Mr Kemble's breach of good faith claims did not succeed, except for the one exception below.

- (k) It was a breach of good faith for BCE to have advised Mr Kemble that it had received many more complaints about him than it actually had.
- (l) This one breach of good faith did not meet the threshold required by s 4A of the Act for a penalty to be imposed on BCE.
- (m) Mr Kemble's breach of employment agreement and associated penalty claims did not succeed.
- (n) Mr Kemble's resignation was a constructive dismissal, because the initiative for the ending of the employment relationship had come from BCE. It was not a free or voluntary resignation, because Mr Kemble had been pressured into resigning to avoid being dismissed.
- (o) BCE failed to justify Mr Kemble's constructive dismissal in accordance with the justification test in s 103A(2) of the Act.
- (p) Mr Kemble contributed to the situation that gave rise to his dismissal grievance, so his award of distress compensation is to be reduced under s 124 of the Act by \$5,000 to reflect his contribution.
- (q) Within 28 days of the date of this determination, BCE is ordered to pay Mr Kemble \$23,093.60 gross, consisting of:
 - (i) \$2,864.44 lost remuneration under s 128(2) of the Act;
 - (ii) \$20,000 distress compensation under s 123(1)(c)(i) of the Act;
 - (iii) \$229.16 annual holiday pay entitlements;
- (r) BCE must deduct and remit to IRD the legally required PAYE and KiwiSaver deductions from the lost remuneration and annual holiday pay Mr Kemble has been awarded in this determination.
- (s) Mr Kemble's claim for an award of interest on the lost remuneration he has been awarded did not succeed.
- (t) As the successful party, Mr Kemble is entitled to a contribution towards his legal costs.

What costs and disbursements should be awarded?

[211] Mr Kemble as the successful party is entitled to a contribution towards his actual legal costs. The parties are encouraged to resolve costs by agreement. If that is not possible then the following timetable for the exchange of costs submission will apply.

[212] Mr Kemble has 14 working days to lodge and serve his costs submissions and BCE has 14 working days from receipt of his costs submissions within which to lodge and serve its costs submissions. No submissions will be accepted outside of this timetable without the prior leave of the Authority.

[213] If a costs determination is required, then because this matter involved a three day investigation meeting the notional starting tariff for assessing costs is \$11,500, being \$4,500 for the first day of the investigation meeting and \$3,500 for each subsequent day.

[214] That notional starting tariff may then be adjusted to reflect the particular circumstances of this case. The parties are therefore invited to identify any factors they say should result in adjustments being made to the notional starting tariff.

Rachel Larmer
Member of the Employment Relations Authority