

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 86
3023551

BETWEEN BENJAMIN LIM
Applicant

A N D NETCON LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Rachelle Boulton, Counsel for Applicant
Amy Keir, Counsel for Respondent

Investigation Meeting: 17 and 18 May 2018 at Christchurch

Submissions Received: 18 May 2018 from Applicant and Respondent

Date of Determination: 11 June 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Lim was unjustifiably dismissed and is awarded the remedies set out in this determination at paragraph [113].**
- B. I decline to reinstate Mr Lim.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Lim claims that he was unjustifiably dismissed from his employment with the respondent on 16 August 2017. He seeks reinstatement, together with other remedies pursuant to s 123 of the Employment Relations Act 2000 (“the Act”). The respondent denies that Mr Lim was unjustifiably dismissed, arguing that it had no choice when a major client refused to allow Mr Lim to perform work and it had no other suitable alternative employment for him.

Background and material events leading to dismissal

[2] Mr Lim was employed by the respondent as an Electrical Inspector (Livening) Agent and Metering Electrician pursuant to the terms of a collective employment agreement.

[3] The respondent provides a wide range of professional services to distribution lines companies, the electricity industry and its consumers. It is wholly owned by Alpine Energy Limited, which owns the energy network in South Canterbury.

[4] The electricity industry is highly regulated and complex, and it is necessary to outline some of the contractual relationships and levels of approvals required in order to understand the events that led to Mr Lim’s dismissal.

[5] As part of its role, Alpine Energy Limited is a Metering Equipment Owner (MEO), owning smart meters on its network. These meters are operated by a Metering Equipment Provider (MEP). However the MEO and MEP are not permitted to perform work on the meters, this responsibility being contracted to an Authorised Test House (ATH) which is licensed by the Electricity Authority to perform work on meters.

[6] One of Alpine Energy’s MEP’s is Smart Co Limited, which in turn engages Vector Advance Metering Solutions (Vector AMS) to facilitate work which it is required to perform for Alpine Energy. One of the organisations contracted by Vector AMS to provide the necessary work is Wells Limited, which is an ATH.

[7] At the material time, Wells Limited contracted with the respondent, and one other local party, in South Canterbury to carry out work pursuant to its ATH authority on meters.

[8] An electrical inspector, who connects meters to the electricity supply, and a metering electrician, who performs regular work involving meters, must meet all the approval criteria imposed by the MEO, the MEP and the ATH together with any entity that those companies have contractual obligations to (in this case, Vector AMS). This is in addition to the standards imposed by the respondent itself and required by the statutory/regulatory regime.

[9] At the material time approximately 90% of the respondent's metering business was performed as a service provider to Wells Limited and all of that work required the respondent to work under Wells' ATH approval. Therefore, Wells Limited, and its key contract partner Vector AMS, held ultimate responsibility for who could perform the metering work. Alpine Energy could similarly prevent work being performed in this network by the respondent's employees.

[10] Mr Lim had previously been employed by Delta Utility Services Limited as a metering technician, which had previously operated as one of the ATHs across New Zealand, and was one of the respondent's clients. In March 2017 the ATH work was put out to competitive tender and Delta lost the contract to Wells.

[11] According to the evidence of Daniel Batchelor, General Manager, Operations of the respondent, Wells got about three weeks' notice that it had won the tender and there was "a real scramble to establish the networks necessary to keep the power on". Mr Batchelor says that, in the initial period, Wells was content to rely on prior ATH approvals, so that the respondent staff who had previously been approved by Delta were able to work under Wells' ATH, although this was before Mr Lim started with the respondent. Wells then set about re-examining all approvals and offering Wells training to the respondent's employees, including Mr Lim.

[12] Mr Batchelor says that, during the period of integration, the respondent received training in Wells' specific policies and safe work procedures which were extremely detailed, governing every job performed by Wells. Mr Batchelor says that, in addition, the Health and Safety at Work Act 2015, the Electricity Act 1992 and the overlaying regulation and rules imposed stringent and specific standards.

[13] Mr Batchelor says that the Electrical Workers Registration Board (the EWRB) is responsible for certifying people to work with electricity and had issued a relevant practising certificate to Mr Lim to allow him to perform work on electricity installations, (including meters) at inspector level. However, prior to being employed by the respondent, Mr Lim had not acted in that capacity before and so was in effect new to the role and its specific requirements. Therefore he needed a reasonable degree of training and support which the respondent was prepared to give.

[14] In addition, when Mr Lim commenced employment with the respondent, as well as not having experience in the area, he also did not have approval from Alpine Energy, Vector AMS or Wells Limited to allow electrical work to be connected to a supply of electricity ('livening'). Therefore, he still had to be trained and approved under Alpine Energy and Wells' criteria to perform work on their assets and equipment, and also required Vector AMS's approval.

[15] Until that time, Mr Lim was therefore required to work under direct supervision, meaning that he had to work with another employee approved by Wells and Alpine Energy at all times who effectively watched every step taken by Mr Lim in doing a job. That person (rather than Mr Lim) was responsible for all of the work. This is not unusual within the industry, and the respondent accepts that two technicians have to be employed on each job until the 'trainee' is assessed as fully competent, and able to work without direct supervision. This can take several weeks to achieve.

[16] Mr Batchelor says that, when Mr Lim commenced employment with the respondent, it was not able to arrange training through Wells, as Wells was inundated with training requests from all the new contractors brought on board following the award to Wells of the metering contract nationally. Therefore, Mr Batchelor authorised Mr Lim to undertake his Alpine Energy and NETcon competency training first, and to wait until Wells were in a position to provide the required specific training locally.

[17] At the time of his dismissal, Mr Lim had completed a number of theory unit standards and practical assessments relevant to his role but still had other field based assessments and other Alpine Energy Limited competencies to complete. Mr Batchelor says that the assessments and approvals provided by Alpine Energy Limited were different to those required by Wells and the two types of approval did not cross credit to each other.

[18] It is my understanding that Mr Lim does not disagree with any of the description provided by the respondent in respect of the statutory and regulatory requirements of carrying out his role, or with respect to what competencies he had achieved and still had to achieve prior to dismissal.

[19] Mr Lim says that, on 31 May 2017 he undertook a job for Wells, replacing a single phase KWHr meter, which Mr Lim describes as a “simple job”. Mr Lim was directly supervised by an employee of the respondent, and was observed by the regional manager for Wells Limited, Henry Borowicz, which constituted a live audit assessment of Mr Lim’s work in the field by Wells.

[20] Mr Lim says that there were no issues raised with his work at the time and nothing about the job was difficult or stood out in any way. According to Mr Borowicz, he had delivered classroom training to Mr Lim, amongst other employees of the respondent, on 27 April 2017 and had believed that Mr Lim had struggled in the classroom to get a good handle on the processes and procedures of Wells. However, he says he did not voice his concerns at the time and wondered whether his concerns may be related to “language or cultural

differences” (Mr Lim is a national of Malaysia whose English, whilst fluent, is spoken with an accent which is not a typical New Zealand one).

[21] Mr Borowicz said in evidence that the meter replacement job on 31 May 2017 was a relatively straightforward task for a person who is registered as an electrical inspector (as Mr Lim was) and he expected him to move through it quickly and efficiently. Mr Borowicz says that Mr Lim completed the majority of the task using the appropriate procedures but he failed to conduct accurate tests before disconnecting the cabling, so that he had to stop Mr Lim and instruct him on the appropriate safety procedure before he could start the work.

[22] Mr Borowicz said that he took notes of the assessment, and completed a Field Audit Competency Form and, making allowances for nerves, marked the audit as a pass. At the completion of his audit he submitted all the training and audit documentation to his general manager and to Vector AMS for consideration and possible final approval.

[23] Mr Borowicz says that he then had a conversation with Vector AMS and his general manager some weeks later in which he was made aware of concerns held by Vector from their prior association with Mr Lim via Delta.

[24] The Authority saw a copy of an email¹ from a Field Process manager at Vector AMS to Mr Borowicz dated 19 July 2017 in which she stated that Delta had expressed concern to her about Mr Lim’s BAU (business as usual) activities, and that he was removed from BAU activities and was moved to deployment² “where his attention to detail was not as robust as it should have been”. Mr Lim gave rebuttal evidence about his work at Delta, which I shall touch on below.

¹ Neither Mr Lim nor Mr Batchelor had seen this email until the Authority’s proceedings.

² Replacing legacy meters with smart meters.

[25] Vector AMS's email went on to say that Vector "would not, in this instance, be approving [Mr Lim] as a standard BAU technician" and "would not be approving him for work on MEP=ARC works orders given the issues he had previously had with the ARC PDA". I understand that "MEP=ARC" work relates to installation and other work on smart meters.

[26] Mr Borowicz said that, with that knowledge, and following discussion, Wells decided that Mr Lim would not be approved to carry out work under their Test House. In his oral evidence, Mr Borowicz said that, whilst Wells could discuss with Vector AMS its decision not to let someone work on their equipment, Wells could not override that decision.

[27] Mr Borowicz also said that around 200 people had had their approvals withheld by Vector and that he only knew of two cases where Wells had given intensive one-on-one training to staff to enable them to regain approval. He said that they had been direct employees of Wells, and that Wells had never done that for contractors.

[28] Mr Borowicz also said that, at the time Vector AMS withheld Mr Lim's approval, Wells did not have the resource to train and reassess Mr Lim directly. They were very stretched and had to deploy staff from the North Island to carry out training because of a shortage of suitable people in the Christchurch area.

[29] Around 18 July 2017 Mr Borowicz informed Mr Lim's direct supervisor (Tony Scott) of Wells' decision not to allow Mr Lim to carry out metering related work, including inspections, under their ATH. Mr Scott then informed Mr Batchelor.

[30] Mr Batchelor says that he tried and failed to speak to Mr Borowicz on the telephone and so, contacted him by email to get formal confirmation of Wells' concerns. He says he was not prepared to tell Mr Lim about what Mr Scott had been told until NETCon had received notification in writing. Mr Batchelor says that he received no response, and followed up with emails and phone calls to Mr Borowicz and to Mr Graham Wells, the CEO of Wells Limited over the following three days.

[31] Mr Batchelor wrote an email to Mr Wells on 21 July which the Authority saw a copy of, which sought confirmation that Mr Lim was not “allowed to perform work for AMS (Well’s) so we can address this with Benjamin and investigate his options elsewhere or outside of Netcon”. The email did not ask for the reasons, but did state “I understand this is related to safety issues from his previous work through Delta”. It also stated “We wholeheartedly support AMS and Wells’ in making a call based on safety and this is entirely at your discretion”.

[32] Mr Batchelor says that, on 24 July 2017 Mr Wells contacted him to arrange a telephone conference, which occurred the next day. He says that, during that telephone conference, Mr Wells had told him three things:

- a. Mr Borowicz had had some concerns when he observed Mr Lim;
- b. Vector AMS had spoken to someone at Delta who had worked with Mr Lim and had expressed some concerns about him; and
- c. Wells had made an application to Vector AMS seeking approval for Mr Lim to carry out work for Wells and Vector AMS had declined that approval.

[33] Mr Wells also emailed Mr Batchelor on 25 July in the following terms:

Hi Dan,

Thanks for taking the time to talk with me this morning.

As I discussed with you, for a number of reasons but primarily due to concerns related to both Health and Safety and Technical Competency Wells are not prepared to approve Benjamin Lim to carry out metering work under our Approved Test House (ATH).

Compliance with the Electrical Safety Regulations, the Health & Safety at Work Act and the relevant industry codes (particularly the EIPC)³ along with our moral obligations to do the right thing and keep people safe is an extremely high priority for our organisation, as I know it is for yourselves.

We would be prepared to reconsider this at a point in time in the future, with sufficient evidence and assurance could be provided that Benjamin’s approach and application has improved to a level which might be acceptable to us and to our MEP clients.

Graham.

³ Electricity Industry Participation Code 2010.

[34] Mr Lim was apparently informed of Wells' decision on 26 July 2017 and a copy of the email from Mr Wells provided to him. However, Mr Batchelor accepted that he had not told Mr Lim that Vector AMS had declined Wells' application for Mr Lim to work on their equipment.

[35] On 3 August 2017 Mr Steve McCoy, the Chief Executive Officer of the respondent, wrote a letter to Mr Lim referring to the decision of Wells not to allow him to carry out metering related work and stating that Mr Lim had undergone substantial training but could not undertake the full duties of an Inspector and Meter Installer until the respondent had gained Alpine Energy Network competencies and confirmation from Wells of their acceptance of him as an authorised contractor. The letter went on to say the following:

This decision from Wells means that you will not been [sic] able to carry out Wells related metering work independently and as a result this will limit you from performing significant parts of your job including:

1. Installation of meters.
2. Attending retailer driver faults responses.
3. Undertaking BAU metering service and repairs.
4. Undertaking electrical inspections.

Following receipt of the email from Graeme Wells of Wells Limited where they have stated they will not allow you to carry out metering related work under their Approved Test House (ATH) certification we now need to meet with you to discuss your ongoing position with NETcon.

Your inability to carry out the key objective of your job puts us in a situation where we must consider options including redeployment into a role you are authorised to undertake, or possibly termination of your employment for frustration.

Given the potential seriousness of the possible outcomes from this meeting I would suggest you may wish to be accompanied at the meeting by a representative or support person. Should you wish to avail yourself of this right then, it is your responsibility to make the necessary arrangements.

The meeting to discuss these issues will be with myself, Dan Batchelor, GM, Operations and Tania Crowe – HR adviser; at 2 pm Monday on 7 August 2017 in the NETcon Boardroom. If you or your representative are unable to make this time please let me know as soon as possible what times and dates may be suitable.

Benjamin, I have attached the following for your information:

1. Copy of email from Graham Wells (Wells) dated 25/07/2017 titled "NETcon – Benjamin Lim".

If there is any further information you believe you need to consider and respond to the issues raised please advise me of this as soon as possible. I have enclosed all documentation that I intend to refer too [sic].

Please confirm that the proposed meeting time is suitable for you as soon as possible.

Yours sincerely
Steve McCoy
Chief Executive Officer
NETcon Limited

[36] The meeting on 7 August was postponed at Mr Lim's request and, on 10 August 2017 Mr Lim, via his representative from the union E tū, John Gardner, asked the respondent to seek further information from Wells. Mr Batchelor did this on 12 August. In this email from Mr Batchelor to Mr Wells, Mr Batchelor stated the following:

Hi Graham,

We have advised Benjamin Lim of the notification from Wells of their decision not to allow Benjamin to carry out metering related work (including inspections) due to concerns related to both Health and Safety and Technical Competency, on that basis Wells are not prepared to approve him to carry out metering work under their Approved Test House (ATH) certification.

In response we have received the following questions from Benjamin:

- Can Wells please explain what the concerns are that they have about Health and Safety.
 - Specifically what is the basis of these concerns.
- What are the concerns about Technical Competency.
 - What is the basis for these concerns.
- What evidence and assurance could Wells require so that approval can be gained for Benjamin to work under Wells certification?

As you and I both know I need to ask these question [sic] in good faith on Benjamin's behalf, however we also appreciate that you are under no legal obligation to provide us with the answers.

From NETcon's side of things is there anything that we could do that would allow Wells to have Benjamin perform the work that he is currently restricted from doing.

I look forward to hearing from you.

Thanks and Best Regards.

Dan Batchelor
General Manager Operations

[37] Mr Batchelor did not receive a reply to this email until 18 August.

[38] On 14 August 2017 Mr Lim asked for information from his personal file, which was provided to him. Further information was provided to him on 15 August.

[39] On 14 August Mr Batchelor also wrote to Mr Wells saying that it was no longer in a position to undertake Wells' retailer metering work from the end of that week because of resourcing issues. These were that Mr Lim had been banned from undertaking Wells' work, another employee had been suspended by NETcon for safety reasons, and a third had resigned. These were the only full time staff employed by the respondent to carry out that work.

[40] On 16 August 2017 Mr Lim and Mr Gardner met with Mr Batchelor and Mr McCoy. Mr Batchelor says that they discussed the implications of Mr Lim's lack of approvals and the question of whether there were any options for retraining. Mr Batchelor says that Mr Wells' email of 25 July gave no clear indication of the areas of concern or the areas where further training or assessment was necessary and, in addition, the respondent was not responsible for the training of employees to Wells' metering technician requirements. He says that the respondent did not have metering trainers or assessors for the metering work within their business. Therefore, they were not in a position to do what was required to bring Mr Lim up to the Wells' standards.

[41] Mr Batchelor says that the respondent was not in a position to replicate Wells' training in-house or assess competency to their procedures but were only in a position to provide Mr Lim with practical experience, which they had done for four months. Mr Batchelor says that

Mr Wells' position in his email of 25 July gave no indication as to the likely timeline, and the respondent did not believe that there was any value in undertaking further practical experience as that would not replace the training and procedures of the required Wells' assessment.

[42] Mr Batchelor said that Wells' lack of flexibility was a key factor in the decision-making process and that he had already sought to discuss alternatives with Wells that would get Mr Lim to a position where he could work independently but that Wells was unwilling to compromise on that point. Wells was no longer willing to let Mr Lim work on their assets even under direct supervision.

[43] Mr Batchelor says that that decision of Wells effectively denied Mr Lim the opportunity to improve by training and experience and that, without exposure to Wells' equipment, he could never get the experience required to become competent and gain approval anyway. In his evidence Mr Borowicz accepted that, as Mr Lim was not permitted to work on Wells' work, it would have been "challenging for [Mr Lim] to be able to demonstrate competence to [his] satisfaction".

[44] Mr Batchelor also said that options for redeployment were also discussed at the meeting. He said that he had a list of current vacancies which he consulted but that there were no appropriate redeployment opportunities.

[45] Mr Lim says that during the meeting, he was told that he could "either resign or be fired". He said that this was not a without prejudice discussion and that it was his objective to remain employed by NETcon, so a without prejudice conversation would never have been called by him as he wished to retain his employment. He says that, approximately two hours after the meeting, he received a letter confirming that he had been terminated due to frustration of contract.

[46] Mr Batchelor says that there were no discussions at the meeting in which Mr Lim was pressurised to resign his employment but that Mr McCoy had considerable sympathy for Mr Lim and did offer to record the dismissal as a resignation if he felt that would make his re-

employment easier. He said that Mr Lim discussed the option with Mr Gardner and asked the respondent to proceed to make its decision.

[47] The letter of dismissal to Mr Lim recorded that his employment was being terminated immediately due to frustration of contract and that he would be paid two weeks' pay in lieu of notice. The letter said that the respondent had discussed Wells' concerns with Wells in some detail but that they were unwilling to approve him to do metering work. It also stated that they looked at redeployment options within NETcon Limited, and across the Alpine Group, but that there were no suitable alternative roles that could be considered for redeployment on a direct appointment basis. The letter stated that:

The roles that are available either require a selection process or are inappropriate because you do not hold the necessary qualifications (i.e. Electrical Engineering qualification).

[48] Two days after that dismissal letter, on 18 August, Mr Batchelor received an email from Mr Wells in reply to Mr Batchelor's previous email of 12 August. This email stated as follows:

Hi Dan

I apologise, I thought that I had sent this to you but just found it in my draft folder.

Benjamin Lim

We are not in the position to provide you with the specific answers to the questions which Benjamin has asked other than to say that:

- Benjamin applied to Wells for a position and upon evaluating his application we determined that we were not going to offer him employment as we did not feel that he was suitable for employment with the company.
- He was subsequently put forward by NETCom [sic] for training under our ATH and for a combination of reasons over the training and also the assessment process which were carried out there were concerns identified in relation to Benjamin's competency which, taking into account that he had been involved in similar work previously, was of concerned [sic] us.
- We also understand that there may have been issues with the standard of work which Benjamin previously undertook on similar metering work.

- The fact that Benjamin is a Registered Electrical Inspector, yet the above concerns still exist prompted Wells to make the decision that it would not approve him to carry work under our ATH.

As you are aware Dan, with the undertaking of electrical work there was a distinct inter-relationship between Technical Competency and Health & Safety. With revenue metering activities and the additional requirements involved in this type of work this is even more relevant.

Consequently, if we were to approve Benjamin and involve him in carrying work under our instruction and there was to be a serious H&S incident then we would be held responsible for the result of the incident for not having taken into account the issues that are outlined above.

We would need to discuss and agree further but – there is a possibility that if NETcam [sic] were to carry out additional training and its own evaluation of Benjamin’s competency and be prepared to provide relevant information to Wells along with an appropriate attestation of such then we could possibly reconsider approving him to operate under our test house approval.

Regards,
Graham

[49] Mr Lim’s evidence is that it is untrue that Wells had not offered him a job, and says that Wells had indeed offered him a job in January 2017 which he had turned down in favour of the respondent. This evidence has been proven to my satisfaction by a copy of an email from Mr Borowicz to Mr Lim dated 2 February 2017 which clearly offers him a role as an electrician.

[50] A personal grievance was raised on behalf of Mr Lim by Ms Boulton by way of a letter dated 31 August 2017.

The operative legal principles

[51] Dismissal at the behest of a third party has been considered by the Employment Court in a number of decisions. In *Allied Security v Guise*⁴ His Honour Judge Ford noted that a “tripartite employment relationship” does not relieve an employer from its statutory obligations under the Act. It points out that s 238 of the Act specifically prohibits any form of contracting out and that s 3(a) of the Act confirms the object of the Act is to “build productive

⁴ [2015] NZEmpC 181, paragraphs [50] to [53].

employment relationships for the promotion of good faith in all aspects of the employment environment and of the employment relationship”.

[52] Judge Ford refers also to s 3(a)(i) of the Act, which recognises that the employment relationship must be built on trust and confidence and good faith behaviour, and to s 3(a)(ii), which confirms that the Act acknowledges and addresses inequality of power in the employment relationship. Judge Ford states at paragraph 50:

That inherent imbalance in an employment relationship is even more pronounced in a tripartite employment situation...where the employer’s client is able to exclude the employee from the workplace without any accountability to the employee. In such a situation, the Court must take appropriate steps whenever necessary to safeguard the objects of the Act so as to preserve their integrity.

[53] In *Workforce Development Ltd v Hill*⁵ Her Honour Judge Inglis (as she was then) rejected the notion that, because an employment agreement had been effectively frustrated by the actions of a third party in a tripartite employment relationship there was no dismissal and s 103A of the Act had no application.

[54] In other words, the respondent owes the same duties under the Act to Mr Lim as it would if Wells had not made the decision that it had although, of course, the position that the respondent was put in by Wells’ decision must also be taken into account.

[55] The material part of s 4 of the Employment Relations Act 2000 (the Act) imposes a duty of good faith upon the parties to an employment relationship, as follows:

4 Parties to employment relationship to deal with each other in good faith

- (1) The parties to an employment relationship specified in subsection (2)—
 - (a) must deal with each other in good faith; and
 - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
 - (i) to mislead or deceive each other; or

⁵ [2014] NZEmpC 174, at [57].

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

[56] Section 103A sets out the test of justification that the Authority must apply when considering whether a dismissal was justified. Section 103A provides as follows:

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is 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 the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
- (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
- (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
 - (a) minor; and
 - (b) did not result in the employee being treated unfairly.

The issues

[57] In deciding whether the dismissal of Mr Lim was justified, it is necessary for the Authority to consider the following sub-issues:

- (a) Whether the respondent took sufficient steps to explore with Wells Limited details of its concerns;
- (b) Whether sufficient information was made available to Mr Lim prior to dismissal;
- (c) Whether the respondent should have advocated on behalf of Mr Lim for Wells to change its mind;
- (d) Whether the respondent should have waited until it had received a response from Wells Limited to its email of 12 August 2017 prior to dismissal; and
- (e) Whether the respondent could have provided suitable alternative employment for Mr Lim within its company or the wider group.

Did the respondent take sufficient steps to explore with Wells Limited details of its concerns?

[58] First, I believe that Mr Batchelor did take sufficient steps to seek to discover the reasons for Wells' decision. It did not simply take what Mr Borowicz had stated at face value. I accept Mr Batchelor's evidence that he tried to speak to Mr Borowicz (he never succeeded) and then escalated the matter by contacting Mr Wells, the owner of Wells

Limited. Mr Batchelor emailed Mr Wells on two separate occasions seeking substantial information from him about the decision of Wells Limited, and spoke to Mr Wells in between those two emails.

[59] Second, the information sought from Mr Wells was pertinent to understanding Wells Limited's reasons, at least in the second email of 12 August. I accept that Mr Batchelor was asking questions that he had been asked to, but nevertheless, he did ask them.

[60] Mr Batchelor did fail to ask Mr Wells for copies of audits, reports, tests or third party contracts, as Mr Gardener had requested, but I believe that, had Mr Wells answered the other questions fully, that omission would not have adversely affected Mr Lim's understanding of the concerns.

[61] All in all, I believe that the respondent did what a fair and reasonable employer could have done in all the circumstances in respect of seeking further information from Wells Limited.

Was sufficient information made available to Mr Lim prior to dismissal?

[62] The respondent did not fulfil its obligations in this aspect of the procedure in my view. Mr Batchelor said in evidence that he did not tell Mr Lim that Wells had made an application to Vector AMS seeking approval for Mr Lim to undertake work for Wells Limited, and that that had been declined. Mr Batchelor had been told this by Mr Wells on 25 July 2017 in a telephone conversation, and had had ample opportunity to tell Mr Lim this. I believe that Mr Batchelor also did not tell Mr Lim that he had been told that Vector AMS had been in touch with Mr Lim's former employer, Delta and had received unfavourable information.

[63] Second, Mr Batchelor did not tell Mr Lim that he had written to Mr Wells on 14 August saying that the respondent would no longer be providing retail driven metering work to Wells Limited with immediate effect. That decision clearly directly affected the work that Mr Lim had been doing, and even though he had been barred from working under Well's Test House, the respondent's decision was pertinent.

[64] Third, Mr Batchelor did not disclose to Mr Lim copies of job descriptions for the two vacancies that Mr Batchelor said Mr Lim was not suitable for. I shall address this in more detail below.

[65] I do not accept that these omissions on the part of the respondent were omissions that a fair and reasonable employer could have made in all the circumstances. Mr Lim was completely in the dark as to the details of the reasons why Wells Limited had withheld its permission to allow him to work under their ATH, and any pertinent information which the respondent had known needed to have been disclosed. This failing was also in breach of s 4(1A)(c) of the Act. It results in the dismissal being procedurally unjustified.

Should the respondent have advocated on behalf of Mr Lim for Wells to change its mind?

[66] In the Employment Court case of *Workforce Development Ltd v Hill*⁶, Judge Inglis rejected the submission that it had been part of the respondent's obligations as a good employer to advocate strongly for Mrs Hill's renewed access to the prison. However, this does not promote the notion that there is no obligation at all to advocate on behalf of the employee.

[67] In my view, the obligation to advocate for the employee arises when there is evidence before the employer to suggest that the third party's position is based upon false information, or is unlawful (because it is discriminatory, say) or is otherwise unjust. The employer cannot simply throw its arms in the air and unquestioningly accept the third party's position.

[68] In the present case, the respondent was not in a position to judge whether the positions of Wells and Vector AMS were based on false information, or were just or not, because it had not disclosed to Mr Lim all of the information that it had, and so had not had the benefit of Mr Lim's feedback. For example, had Mr Lim known that someone at Delta had told Vector it had concerns, he would have had the opportunity to have made enquiries of Delta himself.

⁶ Ibid, at [38]

[69] In other words, by not following a fair process with Mr Lim, the respondent had deprived itself of the opportunity to consider whether it should have advocated on behalf of Mr Lim.

Should the respondent have waited until it had received a response from Wells Limited to its email of 12 August 2017 prior to dismissal?

[70] In my view, the clear answer to this is yes. There was no urgency to dismiss Mr Lim. Mr Batchelor said that he did not believe that he would have had an answer from Mr Wells to his email of enquiry dated 12 August, or if he had, it would not have told him any more than he already knew.

[71] However, Mr Batchelor did not have any reasonable justification to believe that he would not hear back from Mr Wells. He said in evidence that he had had a conversation with Mr Wells in response to his email dated 14 August to him about withdrawing resources from retailer metering work, and that Mr Wells had said he would get back to him in response to his email of 12 August asking for more information about Mr Lim. Also, Mr Wells had previously proven to be responsive to him about Mr Lim.

[72] Furthermore, had he waited, he would have had the email on 18 August and he would have given that to Mr Lim to comment on. Mr Lim would then have been able to have proven to Mr Batchelor that Mr Wells was wrong when he said that Wells Limited had declined to offer him employment.

[73] Mr Lim would also have got wind of the fact from Mr Well's email that there were concerns about Mr Lim's work in his previous employment. He could have then made enquiries about that.

[74] It is my firm conclusion that no fair and reasonable employer could have failed to have waited for a response from Mr Wells in all the circumstances.

Could the respondent have provided suitable alternative employment for Mr Lim within its company or the wider group?

[75] It appears that there were two vacancies in existence at the material time within the respondent and an unspecified number within the wider group company. However, Mr Batchelor was unable to give evidence about the wider group vacancies as he was not privy to such information and Mr McCoy did not appear before the Authority to give evidence.

[76] However, the two vacancies within the respondent were Fleet Manager and Equipment Co-Ordinator. I accept from Mr Batchelor's evidence that Mr Lim would not have been able to have carried out the Fleet Manager role, which required a Class 5 Truck Licence and a knowledge of specialist heavy mobile plant.

[77] The Equipment Co-Ordinator role involved ensuring that several thousands of pieces of specialist equipment were tested and compliant within regulatory requirements. It was a heavily administrative role, quite unlike anything that Mr Lim had done before, and appears to be quite specialist.

[78] Mr Lim did not seek to seriously argue that he would have been able to have carried out the Equipment Co-Ordinator role successfully. The evidence of Mr Batchelor, which was not challenged, was that the role was very complex from a compliance point of view, and heavily administrative, and that Mr Lim's experience both in the respondent, and previously as indicated in his CV, was completely different. In my view, the respondent was entitled to reach a considered view on this, given its knowledge of the roles and Mr Lim's experience. This is not the same situation as in *Wang v Hamilton Multicultural Services Trust*⁷, where there was no issue that Mr Wang could perform the duties of a new role following some further training. I accept that, in Mr Lim's case, the available roles in question were not suitable roles to offer to Mr Lim.

⁷ [2010] NZEmpC 142

[79] In addition, I accept that without the Wells work, there was only around one day's work a week in aggregate remaining that Mr Lim could have done, which did not justify retaining Mr Lim. I also accept that it would not have been practicable to have let Mr Lim carry out work on a single job which did not require Well's approval, but have another worker do work which did.

[80] In conclusion, I do not find that the respondent unreasonably failed to redeploy Mr Lim to other tasks.

Conclusion on procedural fairness

[81] I am satisfied that the flaws with the procedure adopted by the respondent were sufficiently serious to enable me to conclude that the dismissal was procedurally unjustified. However, was the dismissal substantively justified?

[82] The situation that Mr Lim found himself in was unusual, even by the standards of most tripartite situations. He was effectively in a quadripartite relationship, where Wells Limited could not allow him to work under their Test House unless Vector AMS also approved.⁸ It is clear that the respondent could not force Wells Limited to allow Mr Lim to work under its ATH.

[83] It was also clear from Mr Borowicz's evidence that Wells could not force Vector AMS to allow Mr Lim to work on its equipment under its ATH. So, how likely is it that these two entities could have been persuaded to change their corporate minds?

[84] First, Mr Borowicz had formally passed Mr Lim both in his training and in his live field assessment, so any residual misgivings from his observations of Mr Lim have to be put aside. I infer that he would have allowed Mr Lim to have worked under the ATH if he had not been influenced by what he had heard from Vector AMS.

⁸ More accurately, it was a multipartite relationship, because Alpine Energy Limited also had to approve Mr Lim, although that complication does not impinge on his situation.

[85] Vector AMS's position seems to have been based upon what it heard about Mr Lim from his previous employer, Delta. Mr Lim did not have a chance to comment on that and, if the respondent had waited for Mr Well's reply of 18 August, Mr Lim could have made enquiries of Vector and Delta, possibly under the Privacy Act 1993, and then made representations to the respondent, and possibly also to Wells Limited and Vector AMS. Therefore, the result could have been different.

[86] I believe that a different outcome could have eventuated in particular when I take into account Mr Lim's explanation for being removed from BAU work by Delta which, not being contested, I accept. This was, essentially, that Mr Lim had had problems when he first started at Delta with operating the PDA⁹ which he had been assigned and also was not able to complete all of his jobs because of the wide area he had to work in. I note that Mr Lim was removed from BAU work onto deployment work (changing legacy meters to smart meters) and stayed at Delta for another 13 months. He left Delta of his own volition, and the respondent took up references with Delta, to its satisfaction. In addition, Mr Batchelor said that he did not consider BAU work to be very different from deployment work.

[87] In other words, whilst Mr Lim clearly did encounter difficulties at Delta, he was not dismissed, and was not barred from working on the MEO's or MEP's equipment. Therefore, the material chance exists that, if he had had the opportunity, he could have persuaded Vector AMS, and in turn Wells, to change its views.

[88] There is enough uncertainty in this matter due to the procedural flaws to prevent me from concluding on a balance of probabilities that Mr Lim's dismissal was substantively justified. In conclusion, Mr Lim was unjustifiably dismissed.

Remedies

[89] Having been unjustifiably dismissed, Mr Lim is entitled to remedies. The material part of s 123 of the Act provides as follows:

⁹ A palmtop computer

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[90] Section 128 of the Act provides:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[91] Mr Lim seeks reimbursement of his complete loss of earnings since his dismissal in August 2017 as he has been unable to find alternative employment. Three months' loss of ordinary time remuneration is \$19,531.12 gross. He seeks \$64,933.89, which he says is 37 weeks of lost remuneration.

[92] The Authority may award more than the lesser of actual loss and three months' ordinary time remuneration if it believes it is just and reasonable to do so. Mr Lim is 58 years old and, having been denied approval by Wells to work under its Test House, he has understandably found it difficult to find alternative employment in his specialist field. Therefore, there are some grounds for awarding more than three months' ordinary time remuneration.

[93] However, I also need to take into account the fact that Mr Batchelor had decided to stop providing retail metering work to Wells in August 2017. The catalyst for that was not just the withholding of permission by Wells to let Mr Lim work under its ATH, but also the suspension of another worker (who was subsequently dismissed) and the resignation of the third worker.

[94] In addition, Mr Batchelor stated that retailer driven metering work was not core business for the respondent and Wells had indicated an interest in growing its own resources in Timaru.

[95] There is therefore a material possibility that, if Mr Lim had not been dismissed, the work he was primarily employed to do would have ceased in any event. Under such circumstances, I believe it would not be just to order the respondent to pay Mr Lim his full loss. I restrict his award of lost wages to three months' ordinary time remuneration. In addition, he is entitled to holiday pay in respect of that sum, at 8%, which amounts to \$1,562.49 gross.

[96] Turning to an award of compensation for humiliation, loss of dignity and injury to his feelings, Mr Lim says that he had suffered significant distress by having been dismissed. He had obviously spent a considerable amount of time turning over in his mind what he may have done wrong on the job he did for Wells on 31 May 2017. It turns out that he had done nothing materially wrong during that job, and he only found out later that Wells' concerns stemmed from what Vector AMS had told it. If he had known this, he may have been less distressed as he could have made enquiries of Vector and Delta.

[97] Part of Mr Lim's distress also stems from the fact that he realises that he is in the latter part of his career and he may not be able to work in his chosen field again. That, however, cannot wholly be laid at the door of the respondent as, ultimately, the decisions lay with Vector AMS and Wells.

[98] My assessment of the effects caused by the respondent's actions on Mr Lim is that they are moderately severe, and that an award of \$20,000 is appropriate.

[99] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[100] Ms Keir submitted that it was arguable that Mr Lim contributed to the situation that gave rise to the personal grievance by not declaring to the respondent that Delta had removed him from BAU work. However, she also said that she did not wish to push that argument "too hard". I do not accept that Mr Lim's omission in that regard contributed in any way to the situation that led to his dismissal.

[101] If there was any contribution, it stemmed from his work at Delta which is too remote to be taken into account in assessing whether a reduction is due. I decline to reduce the remedies awarded to Mr Lim.

[102] In addition, Mr Lim seeks reinstatement. Section 125 of the Act provides as follows:

125 Remedy of reinstatement

(1) This section applies if—

- (a) it is determined that the employee has a personal grievance; and
- (b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)).

(2) The Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so.

[103] The Employment Court recently summarised in *Keith Hayashi v Skycity Management Limited*¹⁰ the approach to be taken when the Authority is considering reinstatement:

Inssofar as the remedy of reinstatement is concerned, s 125(2) of the Act requires the Authority and therefore the Court on a challenge, to consider reinstatement only if it is practicable and reasonable to do so. There is no specific onus applying either way on the issue. The Employment Court, sitting as a full Court in *Angus v Ports of Auckland (No 2)* stated that if reinstatement is claimed, and the employer opposes it, the employer “will need to provide the Court with evidence to support that claim”. The Court, in its discussion, stated that the requirement of reasonableness “invokes a broad enquiry into the equities of the parties’ cases so far as the prospective consideration of reinstatement is concerned”. The Court added:

... The reasonableness referred to in the statute means that the Court or the employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.

[104] Mr Batchelor gave evidence of a major restructure that had occurred at the respondent company since Mr Lim’s dismissal. He said that there were a number of vacancies but that none were roles which Mr Lim had the experience or qualifications to do. He identified five lines mechanic roles, two trainee linesmen roles, one electrical fitter role, one cable jointer role, a digger operator and an arborist.

¹⁰ [2018] NZEmpC 14, at [76]

[105] Of the electrical roles, Mr Batchelor said that they all needed between 18 months to two years' training, and that there was little, if any, cross crediting of qualifications between Mr Lim's former role and expertise and that required by the existing vacancies. In addition, each of the roles required a different 'strand' of EWRB registration.

[106] Mr Batchelor said that there was no longer any electrical inspection work carried out in Timaru and, although it was still carried out in Tekapo and Twizel, the respondent already has employees to do that work.

[107] Ms Nicola Bentley, acting HR Manager for Alpine Energy Group, gave evidence that she would have concerns about reinstating Mr Lim because of the effect on the morale of the other staff who were going through a restructure. She also expressed reservations about Mr Lim's level of English.

[108] Addressing Ms Bentley's evidence first, if Mr Lim were to be reinstated, it would be part of the respondent's obligation to ensure the reinstatement succeeded, including addressing any morale issues from other staff. I do not regard that as an impediment. In any event, the evidence was speculative. With regard to Mr Lim's English, the respondent was well aware of his English when it recruited him in the first place, so I disregard that.

[109] However, I do find that it would not be practicable for the respondent to reinstate Mr Lim when it has no suitable positions. The evidence of Mr Batchelor about the training steps that would be needed to reinstate Mr Lim to one of the positions currently vacant was not challenged. These training requirements are not trivial, but major, effectively requiring Mr Lim to change his specialism. They would not be simply refreshing skills that Mr Lim already has, or coaching to address concerns, as in *Jason Nathan v Broadspectrum (New Zealand) Limited (formerly Transfield Services (New Zealand) Limited)*¹¹. The retraining requirement goes beyond the scope of the reinstatement sections of the Act in my view.

¹¹ [2016] NZEmpC 135

[110] It would also not be reasonable to reinstate Mr Lim to his former position, as that no longer exists, and I accept the evidence of the respondent that there remains little work that Mr Lim could do. To reinstate Mr Lim to his former position would likely result in Mr Lim being dismissed by reason of redundancy.

[111] Finally, the Authority does not have the power to order that other companies within the Alpine Group structure reinstate Mr Lim.

[112] Accordingly, I decline to order the respondent to reinstate Mr Lim.

Orders

[113] I order the respondent to pay to Mr Lim the following sums:

- a. The gross sum of \$19,531.12 pursuant to s 123(1)(b) of the Act;
- b. The gross sum of \$1,562.49, being holiday pay due on the lost wages at [113](a);
- c. Compensation in the sum of \$20,000, pursuant to s 123(1)(c)(ii) of the Act.

Costs

[114] I reserve costs. The parties are to seek to agree how costs are to be dealt with, but if they are unable to do so with 14 days of the date of this determination, any party seeking a contribution to their costs must serve and lodge a memorandum setting out what contribution they seek, and the basis of it, within a further 14 days, and any response must be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority