

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 15
3031571

BETWEEN	JAMES LUHRS Applicant
AND	WHITEHOUSE BUILDERS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Alex Kersjes, Advocate, for applicant Amy Keir, Counsel, for respondent
Investigation Meeting:	30 October 2018 at Christchurch
Submissions Received:	12 December 2018 from Applicant 12 December 2018 from Respondent
Date of Determination:	15 January 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Luhrs claims that he was unjustifiably dismissed from the employment of the respondent on 4 October 2017. He also claims that he was unjustifiably disadvantaged in his employment by having his pay and hours unilaterally reduced.

[2] The respondent denies unjustifiably dismissing Mr Luhrs and denies that he was disadvantaged in his employment.

Brief account of the events leading to the dismissal

[3] The respondent is a residential design and building company based in Christchurch. Mr Luhrs was hired in June 2017 as a salesperson and his first day of

work was 19 June 2017. Two other people were employed as sales people at the same time, one being Warwick Rose.

[4] Both Mr Luhrs and Mr Robert Whitehouse, the sole director and shareholder of the respondent company, agree that, at the interview stage, they negotiated over Mr Luhrs' starting salary. As Mr Luhrs was building a house and needed earnings at a certain level to get finance, Mr Whitehouse agreed to pay him a base salary of \$50,000, together with commission, but with a deferred trigger point for the payment of that commission compared to other employees who were paid a lower base salary. Mr Luhrs said in his written evidence that, during the job interview, Mr Whitehouse asked him not to tell the other staff that he was on a higher salary than them.

[5] Mr Luhrs signed the employment agreement on 28 June 2017.

[6] Mr Luhrs said that, on 30 August 2017, he was told by Mr Whitehouse that the designers were too busy, so he did not want any more sales leads coming in. Mr Luhrs said that Mr Whitehouse told him that Mr Luhrs had to work part-time, and that he was going to reduce his salary from \$50,000 a year to \$40,000 a year "to be in line with the other two [sales] staff". Mr Luhrs said that he tried to negotiate for the wage to stay the same because of his mortgage commitments but that, as he was still within the 90-day trial period, he felt that he could be easily dismissed. During his oral evidence, Mr Luhrs agreed that he had reluctantly agreed to have his pay reduced.

[7] According to Mr Whitehouse, he was disappointed with Mr Luhrs' performance from the outset and, although he spent considerable time training him, Mr Luhrs struggled to move away from a retail sales mind set. Mr Whitehouse said that, in addition, Mr Luhrs appeared to be distracted by his own building project and did not appear to be completing his expected 40 hours a week.

[8] Mr Whitehouse said that, as the end of Mr Luhrs' 90-day trial period was approaching, he met with Mr Luhrs in the week of 4 September 2017, and told Mr Luhrs that there was no way the company could continue paying him more than the other sales people because his performance suggested that he was not worth it. Mr Whitehouse says that he was reluctant to dismiss Mr Luhrs because he had some skills that he could work with, and so he discussed modifying Mr Luhrs' salary in line with the other sales staff by giving him commission at an earlier point. Mr Luhrs agreed to this, according to Mr Whitehouse. Mr Whitehouse says that he and Mr Luhrs also

agreed that some KPIs and expectations would need to be set. Accordingly, Mr Whitehouse advised the pay clerk to modify Mr Luhrs' salary.

[9] Mr Whitehouse says that he and Mr Luhrs met again on 13 September 2017 to discuss expectations. Mr Whitehouse says that Mr Luhrs told him that his wife was putting pressure on him to complete their home build, and also agreed that he was struggling to meet Mr Whitehouse's expectations. Mr Whitehouse said that he and Mr Luhrs therefore agreed that Mr Luhrs would work reduced hours until his home build was finished, and that they would revisit the matter then.

[10] The Authority saw a copy of a memorandum from Mr Whitehouse to Mr Luhrs dated 13 September 2017 in which Mr Whitehouse referred to conversations that they had been having about Mr Luhrs' performance and stating that his performance to date had been disappointing. It referred to the need to set KPIs and basic communication rules and stated that Mr Whitehouse wanted to discuss those and agree them with Mr Luhrs on the understanding that, if they were not met, the company was "not able to offer [Mr Luhrs] continued employment with our company". The letter ended with Mr Whitehouse asking Mr Luhrs to sign the document to confirm his understanding. Mr Luhrs confirmed that he did sign the document.

[11] Mr Whitehouse says that, from that point on, Mr Luhrs appeared happy with the new arrangement, continuing to work and submitting timesheets showing his hours, which varied depending on the work he did on his own home. He was getting paid hourly, based on a pro-rated salary of \$40,000.

[12] Mr Whitehouse denies that he reduced Mr Luhrs' hours because the designers were too busy and says that he asked Mr Luhrs to focus on hot leads and converting them to sales, rather than focusing on new lead generation.

[13] On 3 October 2017 Mr Luhrs and Mr Rose were having a drink after work during which both were complaining about their conditions of employment. Mr Luhrs then disclosed to Mr Rose that he had been earning \$50,000 a year. I shall say more about that conversation below.

[14] Mr Whitehouse says that, on the morning of 4 October 2017, Mr Rose approached him, saying that he was very unhappy to have learned that Mr Luhrs had

been paid more than him when, in Mr Rose's opinion, Mr Luhrs had been performing worse than him. Mr Whitehouse says that Mr Rose felt that he had been misled. Mr Whitehouse says that Mr Rose did raise other issues too, but that the salary differential between him and Mr Luhrs was a "big thing" for him. This was denied by Mr Rose in his evidence to the Authority.

[15] Mr Whitehouse called Mr Luhrs into the meeting with Mr Rose to ask Mr Luhrs to confirm that he was no longer earning \$50,000 a year but, despite this assurance, because Mr Whitehouse refused to pay Mr Rose a significantly bigger salary than he was currently on, Mr Rose resigned almost immediately afterwards. Mr Whitehouse says that Mr Rose was very upset and would not be persuaded to stay.

[16] According to Mr Whitehouse, he was very angry and upset that Mr Luhrs had broken the confidence regarding his pay arrangements, so he called Mr Luhrs into his office to explain why he had shared his pay information with Mr Rose. He said that Mr Luhrs "looked at me, shrugged and said that he was 'just venting'".

[17] Mr Whitehouse said that Mr Luhrs refused to say what he meant by that and Mr Whitehouse understood him to be saying that he simply wanted to create trouble. Mr Whitehouse says that he was very angry and needed to create some space to cool off and so said to Mr Luhrs "I can't deal with this right now, you need to go, and we will deal with it later".

[18] Mr Whitehouse says that Mr Luhrs left his office but then came back two or three minutes later and Mr Whitehouse said to him "We are done here", Mr Luhrs responded "Define done" and Mr Whitehouse replied "I thought you had gone, just go". Mr Whitehouse says that his intention was to give both Mr Luhrs and himself space to prevent the situation from escalating as he did not want to have a confrontation with him.

[19] Mr Luhrs' evidence is somewhat different. He said that, on 3 October 2017, he had drinks with Mr Rose out of work and noted that Mr Rose was upset about a number of things. Mr Luhrs' evidence is that, during the conversation, he asked whether it was legal to reduce his hours, to which Mr Rose said no. He then said to Mr Rose:

Hey look keep this between you and me but is it legal for Robert to reduce my wage from \$50k to \$40k?

[20] Mr Luhrs says that Mr Rose said it was illegal and he assumed that Mr Rose would not tell Mr Whitehouse. Mr Luhrs says that Mr Rose and Mr Whitehouse had a meeting the following morning which he could hear was getting heated. He was then asked by Mr Whitehouse to explain to Mr Rose how much he was currently getting paid, to which he said “I’m on 40k now ... I was on 50k”. Mr Luhrs then left the room and Mr Rose shortly afterwards emerged and sent his resignation letter to all staff.

[21] Mr Luhrs says that he was then called into the office by Mr Whitehouse and was asked to explain what had been said between him and Mr Rose during drinks the previous night. Mr Luhrs said that he felt uneasy answering that question as it had been a private discussion and so he replied “Well, he was venting and so was I”. Mr Luhrs says that Mr Whitehouse then replied “You have caused all kinds of problems ... that’s it, we’re done”.

[22] Mr Luhrs says that he then asked “Define done” and Mr Whitehouse replied “You’re gone”. He said that he was then ushered to his desk and was asked whether his timesheet was filled in and told to give up his timesheet and his SIM card. Mr Luhrs says that he straight away believed he was being fired. He denies going back into Mr Whitehouse’s office to confront him.

[23] Mr Luhrs says that, the following day, 5 October, he missed a call from Mr Whitehouse at 5:32pm and that he then received a text from him at 5:36pm stating:

Hi James I have tried calling you but not been able to speak with you. I would like to offer you the opportunity to explain your actions of Wednesday evening [sic]. Please let me know if you do and I will arrange a time that is suitable. Robert.¹

[24] Mr Luhrs says that he did not answer at the time as he knew it was going to be confrontational and he was not in the right mind set to answer the phone. When asked about what he believed Mr Whitehouse intended by his text, he says he believed that Mr Whitehouse had wanted to find out more about the conversation between him and Mr Rose.

¹ Crucially, the text did not state, as had been asserted in the statement in reply, “At this point your employment had not been terminated”. I presume that this is either a typographical error, or arises out of a misunderstanding on the part of counsel when she took Mr Whitehouse’s instructions.

[25] On 10 October 2017, Mr Luhrs emailed Mr Whitehouse to give him details about some clients. The beginning of this email stated as follows:

Hi Robert

I got your message asking if I would like to explain my actions on Wednesday evening. I assume you meant to say Tuesday evening as you terminated my employment on Wednesday morning. I don't feel that I need to explain my actions.

Since my employment was unexpectedly terminated I didn't get an opportunity to tie up any loose ends with clients and I don't want my clients to feel I have let them down.

[26] Mr Whitehouse denies that Mr Luhrs was required to return company property before he left the office on 4 October. He said he tried to call Mr Luhrs several times on 5 October to arrange a time to meet and discuss things, but that Mr Luhrs did not answer the phone. Mr Whitehouse says that, at that point, he was completely clear that Mr Luhrs had not been dismissed. He says that Mr Luhrs did not respond to him until 10 October. He said that when he got that he first realised that Mr Luhrs thought his employment was ended.

[27] During cross examination, Mr Whitehouse initially said that he believed that the letter indicated that Mr Luhrs had resigned, but later conceded that the letter could only signal one of two things; either Mr Luhrs believed himself to have been dismissed or he was confused. Mr Whitehouse did not chase up a reply to his text of 5 October, and he did not reply to Mr Luhrs' letter of 10 October, saying in evidence that he had been very busy. It is fair to say that, by that point, all three of his salespeople had left, the third having been dismissed a short time before.

[28] Mr Luhrs wrote a personal grievance letter to Mr Whitehouse on 5 November 2017 in which he stated that he had been unjustifiably dismissed. He sent a follow-up letter chasing a reply on 23 November 2017. Mr Whitehouse responded by way of an undated letter which was received by Mr Luhrs on 24 November 2017 in which, amongst other things, he said that Mr Luhrs' employment had not been terminated on 5 October 2017. In his responses to cross examination, Mr Whitehouse said that he regarded Mr Luhrs' employment to have ended when Mr Luhrs had written on 10 October saying that he did not need to explain his actions.

The issues

[29] The following issues are to be determined by the Authority:

- (a) Whether Mr Luhrs was dismissed by the respondent;
- (b) If he was dismissed by the respondent, whether that dismissal was unjustified; and
- (c) Whether Mr Luhrs suffered an unjustified disadvantage in his employment.

Was Mr Luhrs dismissed by the respondent?

[30] In the Employment Court case of *Iritana Horowai Ngawharau v The Porirua Whanau Centre Trust*² His Honour Judge Ford reviewed New Zealand and Australian case law in respect of what constitutes a ‘dismissal’. The Court of Appeal subsequently found³ that the Employment Court had not erred in adopting the dicta from the earlier New Zealand Court of Appeal case of *E N Ramsbottom Ltd v Chambers*⁴, to the effect that, on an ordinary use of language, ‘dismissal’ is a unilateral act by the employer which terminates the employment contract, and that a dismissal was ‘the termination of employment at the initiative of the employer’.

[31] On balance, I prefer the evidence of Mr Luhrs in respect of the events on 4 October 2017. Whilst there was a difference in evidence between him and Mr Rose as to whether or not he had seen Mr Rose immediately after the dismissal, (and I believe that Mr Rose is correct in that respect) I attribute that difference in evidence to Mr Luhrs’ shock at being dismissed, and the passage of time.

[32] My reasons for accepting Mr Luhrs’ version of events are as follows:

- (a) Mr Whitehouse was angry that Mr Luhrs had evidently told Mr Rose what he had been paid, which had evidently upset Mr Rose.
- (b) Mr Whitehouse did not follow up his sending away with any letter or email to say that he was suspending him, or sending him home to give them both a chance to cool down. This is despite the fact that Mr

² [2015] NZEmpC 89, at [67] et seq.

³ *Porirua Whanau Centre Trust v Ngawharau* [2015] NZCA 585, [2015] ERNZ 93 at [7]–[8]

⁴ [2007] NZCA 183, [2000] ERNZ 97, at [19]–[20]

Whitehouse said in evidence that he was aware of the fair process to follow in a disciplinary process.

- (c) Early the following day Mr Luhrs wrote notes of the occurrences and exchanges between him and Mr Whitehouse on 4 October (produced to the Authority in the form of an email sent to himself from his wife's email account on 5 October at 1.08 am). These notes, which were almost contemporaneous, support Mr Luhrs' evidence that Mr Whitehouse dismissed him. In particular, it refers to Mr Whitehouse asking for, and taking the SIM card to Mr Luhrs' phone. Mr Whitehouse would not have done that if he had simply been sending Mr Luhrs away so he could cool down. I do not accept Mr Whitehouse's evidence that he found the SIM card many days later.
- (d) Although Mr Luhrs stated unequivocally in his email of 10 October that he had had his employment terminated on the morning of 4 October, Mr Whitehouse did not contradict that statement. It was only when Mr Luhrs had raised a personal grievance that Mr Whitehouse denied dismissal, in late November.

[33] Even if I am wrong in concluding that Mr Whitehouse actively dismissed Mr Luhrs, and even if Mr Whitehouse did not intend to dismiss Mr Luhrs on 4 October, when he read Mr Luhrs' letter of 10 October stating he had been dismissed, Mr Whitehouse did nothing to disabuse him of his misunderstanding. If Mr Whitehouse had said, effectively, that Mr Luhrs had got hold of the wrong end of the stick, and that he wished to hold an investigation meeting to find out more about the incident, he could have possibly salvaged the situation even at that stage. Not to have done so is a breach of the duty of good faith, as his silence would have misled Mr Luhrs into thinking he had, indeed, been dismissed.

[34] I do not find that the text sent on 5 October offering Mr Luhrs the opportunity to explain his actions was unambiguous enough to clearly signal to Mr Luhrs that he had not been dismissed. Mr Luhrs is not an expert in employment law and would not have known necessarily that an employer cannot seek to investigate a matter after dismissal. The communication needed to have expressly stated that Mr Luhrs had not been dismissed in order to have sought to revoke the actions dismissing him. I do not

accept that Mr Luhrs knew that there was a difference in understanding, if indeed there was, as to the events of 4 October.

[35] I respectfully do not agree with Ms Keir's submission that the fact that Mr Luhrs spent time creating handover notes casts doubt on his claim that he had been dismissed. He was a sales professional and his action could equally be explained by his loyalty to his customers, even after dismissal. He was selling properties, a significant purchase for most people, and I suspect he will have developed close relationships with some of his customers.

[36] I also do not infer, as Ms Keir invited me to, that Mr Luhrs and Mr Rose had collaborated on a plan on the night of 3 October. I suspect it is much more likely that they were simply two unhappy employees grumbling about matters.

[37] In conclusion, Mr Luhrs was dismissed by Mr Whitehouse on 4 October 2017.

Was the dismissal of Mr Luhrs unjustified?

[38] In order to determine this specific issue, it is necessary to set out the test against which the Authority must judge whether the actions of the respondent were justified or not. This test of justification is set out in s 103A of the Employment Relations Act 2000 (the Act), and 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.

[39] Given that I have found that Mr Whitehouse dismissed Mr Luhrs on 4 October, with no process having been followed, it is but a short step to conclude that he was dismissed in breach of the test set out in s 103A. Mr Whitehouse's text of 5 October does not salvage the flawed process because Mr Whitehouse did not explain in it exactly what he wanted to investigate, what breach of discipline he suspected Mr Luhrs of, the process he was intending to follow, and what the possible outcomes could be. He also did not advise Mr Luhrs that he could have the benefit of a support person at the meeting.

[40] Was the dismissal substantially justified in spite of the procedural flaws? I am unable to reach that conclusion. Whilst there is little doubt that Mr Luhrs did breach his promise to keep confidential the fact that he was being paid more than Mr Rose, I cannot say on a balance of probabilities that, once Mr Whitehouse had heard the full explanation with a cool head, he would have reasonably concluded that dismissal was appropriate. After all, Mr Rose wanted a far bigger pay increase than the \$10,000 difference between \$40,000 and \$50,000, and reflecting on this may have led Mr Whitehouse to conclude that Mr Luhrs was not responsible for Mr Rose's resignation.

[41] Accordingly, I find that the dismissal was unjustified, as no fair and reasonable employer could have dismissed Mr Luhrs in the manner in which he did, in all the circumstances.

Was Mr Luhrs unjustifiably disadvantaged in his employment?

[42] Mr Luhrs says that he was unjustifiably disadvantaged by having his salary and hours reduced.

[43] Section 103(1)(b) of the Act provides that a personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of

the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[44] The meaning of “conditions” of employment in s 103(1)(b) of the Act includes all the rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of an employment agreement.

[45] The Schedule to the individual employment agreement between Mr Luhrs and the respondent states:

Salary is based on 40 hrs per week, flexible hours covering both evenings and weekends.

[46] For the first few weeks of employment, it seems that Mr Luhrs worked at least 40 hours per week, and so received full pay. However, around the beginning of August 2017 Mr Luhrs started to receive less pay, which was because he started to work less than 40 hours per week. Mr Whitehouse said that he had explained to Mr Luhrs at the interview stage that the pay was pro-rated in accordance with hours worked, so that the pay received reduced if fewer than 40 hours per week were worked but did not increase above \$50,000 per annum if more than 40 hours per week were worked.

[47] I accept that this was the arrangement that Mr Luhrs had agreed to, as he did not raise any complaints with Mr Whitehouse in August when his take home pay reduced. Did he agree to the reduction in his pay rate from \$50,000 to \$40,000?

Reduction in salary

[48] Mr Luhrs’ evidence was that he was presented with no choice but to accept the reduction in salary, as he needed to keep his job, and suspected that he would be dismissed if he did not agree, as he was still working under the 90 day trial period clause contained in the employment agreement. However, it is worth noting that the copy of the individual employment agreement presented to the Authority, signed by the parties, does not contain a valid trial period. It refers to a trial period in the schedule, but simply states “90 days from Commencement Date” and refers to a minimum of one week’s notice of termination during the trial period in the Notice Period section.

[49] This is not in accordance with of the requirements of s 67A(2) of the Act, as the agreement does not state that the respondent may dismiss Mr Luhrs during the trial period, and does not state that he is not entitled to bring a personal grievance or other proceedings in respect of the dismissal. However, I find that this fact does not change matters in the sense that both parties obviously believed that Mr Luhrs' employment was subject to a valid 90 day trial period.

[50] Therefore, Mr Luhrs' fear of being dismissed pursuant to the clause was real to him. In addition, I accept that Mr Whitehouse was genuinely dissatisfied with Mr Luhrs' level of performance, and believed that he was entitled to address it and, if necessary, dismiss Mr Luhrs under the purported 90 day trial period.

[51] Mr Luhrs agreed that he had accepted the reduction in salary "reluctantly". Ms Keir points out that this was still an agreement and that the circumstances do not amount to duress, as claimed by Mr Kersjes. The elements of duress⁵ are well known, and were summarised in *Pharmacy Care Systems Ltd v Attorney-General*⁶ as follows:

First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim's will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim's manifestation of assent. Fifthly, the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation.

[52] Although there was pressure upon Mr Luhrs to agree to the reduction in pay, I do not believe that that pressure was improper. The pressure came from his belief that he could be legally dismissed under a 90 day trial period, and his own financial pressures. Neither was improper, as he was not threatened with dismissal if he did not agree, and the financial pressures did not originate from the respondent. Therefore, this is not a case of duress.

[53] However, I note that clause 1 of the employment agreement states:

⁵ Now described by the Court of Appeal in *McIntyre v Nemesis DBK Ltd* [2010] 1 NZLR 463 at [22] as legal propositions of relevance to duress.

⁶ CA 198/03, 16 August 2004, at [98].

The Parties agree that the Employee is employed on the main terms set out in the Schedule and on the following general terms. The Parties agree that these terms below form the Employee's terms and conditions of employment with the Employer and can only be changed subsequently by written agreement between the Parties.

[54] No written agreement was entered into between the parties recording the reduction in pay. However, I agree with Ms Keir's analysis that this failing does not of itself cause an unjustified disadvantage in Mr Luhrs' employment. The variation was still acted upon by both parties.

[55] Ms Keir also submits that, as Mr Luhrs accepted the reduction in salary, albeit reluctantly, he cannot claim that he suffered an unjustified disadvantage in his employment.

[56] I find that there were two intertwined issues which need to be considered when determining whether Mr Luhrs suffered an unjustified disadvantage. The first is that he had his salary reduced by 20%, albeit with his reluctant agreement. The second is that Mr Whitehouse considered that Mr Luhrs' performance was unsatisfactory and, crucially, that it did not merit being paid \$50,000 a year. That is why he reduced the salary to \$40,000.

[57] The disadvantage in Mr Luhrs' employment arises because Mr Whitehouse acted upon his concerns about Mr Luhrs' performance without having first followed a fair process. This process would have entailed at least:

- (a) raising the concerns with Mr Luhrs;
- (b) considering Mr Luhrs' explanation;
- (c) giving Mr Luhrs a reasonable time to improve;
- (d) making clear to Mr Luhrs what the consequences of failing to improve were likely to be;
- (e) providing Mr Luhrs with any support that was reasonably necessary to assist improvement; and
- (f) reviewing the performance again at the end of a reasonable time period and hearing Mr Luhrs' explanations if there had been no acceptable improvement.

[58] Apart from telling Mr Luhrs that he was not happy with his performance, Mr Whitehouse took none of these steps. This has undoubtedly caused Mr Luhrs a disadvantage in his employment. Furthermore, it was unjustified, as no fair and reasonable employer could have failed to have followed a fair process in all the circumstances.

[59] Flowing from that failed process was the reduction in Mr Luhrs' salary. If Mr Whitehouse had followed a fair process, there is a reasonable chance that Mr Luhrs would have improved, and Mr Whitehouse would not have decided to reduce the salary.

[60] Accordingly, I find that Mr Luhrs' personal grievance in respect to the reduction in pay is made out.

Reduction in hours

[61] However, I do not find that the personal grievance in respect of the reduction in hours is made out. I believe that Mr Luhrs was spending a considerable amount of time on his house project, and I find that he agreed with Mr Whitehouse that he would work fewer hours so he could finish the project as soon as possible and concentrate again on his work. This may have been coupled with a desire on Mr Whitehouse's part for Mr Luhrs to concentrate on hot leads only, to give the designers time to catch up, but I do not find that the reduction on hours was forced on Mr Luhrs.

[62] Indeed, the timesheets submitted by Mr Luhrs show that he essentially came and went as he pleased between 4 September and 1 October 2017, with the exception of weekends.

Conclusion

[63] In conclusion, I find that Mr Luhrs was unjustifiably dismissed and suffered an unjustifiable disadvantage in his employment by having had his pay reduced unilaterally. He is, accordingly, entitled to remedies.

Remedies

[64] Sections 123 and 128 of the Act provide as follows:

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:

(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:

(d) if the Authority or the court finds an employee to have been sexually or racially harassed in his or her employment, recommendations to the employer—

(i) concerning the action the employer should take in respect of the person who made the request or was guilty of the harassing behaviour, which action may include the transfer of that person, the taking of disciplinary action against that person, or the taking of rehabilitative action in respect of that person:

(ii) about any other action that it is necessary for the employer to take to prevent further harassment of the employee concerned or any other employee.

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.

Shortfall in pay

[65] I shall deal first with the shortfall in pay due to Mr Luhrs arising out of the personal grievance for unjustified disadvantage leading to a reduction in pay. Mr

Luhrs is entitled to be reimbursed for that loss arising out of the personal grievance. If Mr Luhrs had been paid at a rate of \$24.04, equating to \$50,000 a year, between 4 September and when his final pay was paid, he would have earned an additional \$484.52 gross. To this should be added 8% in respect of final holiday pay due, which equates to \$38.76. In total, Mr Luhrs is entitled to \$523.28 in arrears of pay and holiday pay.

How much loss to compensate for?

[66] With respect to remedies in respect of his dismissal, Mr Kersjes argues that Mr Luhrs should be awarded his entire loss until the date he started new employment, on 3 April 2018. However, I decline to exercise the discretion in s 128(3) of the Act and award Mr Luhrs' entire loss because I have found that there were genuine concerns about his performance, and it is possible that Mr Whitehouse may have dismissed Mr Luhrs fairly, after following a fair process, within three months. Therefore, applying s 128(2), Mr Luhrs' loss should be calculated on the basis of three months' ordinary time remuneration.

Base rate of pay

[67] Ms Keir submits that the base rate for calculating loss of pay should be \$40,000 and not \$50,000. However, I have found that the reduction in salary resulted from an unjustified action by the respondent. It would not be just to base the loss of pay on a reduced rate under such circumstances.

Chain of causation broken?

[68] Ms Keir also submits that the chain of causation in respect of Mr Luhrs' loss of wages was broken when Mr Luhrs secured an offer of new employment in November 2017, although the job offer was withdrawn in December 2017, before he started working. Mr Luhrs did not recall during cross examination when the offer of employment was withdrawn. He said that he had not raised a personal grievance with the new employer when he had been told that the job offer was withdrawn.

[69] The concept of breaking the chain of causation when assessing loss was considered by the Employment Court in *Hjorth v Onesource Ltd*⁷ and by the Court of

⁷ [2005] ERNZ 618

Appeal in *Onesource Ltd v Hjorth*⁸. The Court of Appeal found that the Employment Court had correctly expressed the essential principle that, whether the causal link between a personal grievance and the lost remuneration is broken is a matter of fact and degree in each case.

[70] Examining the case law, one theme that emerges as relevant is whether the ex-employee took steps to mitigate loss. I refer to *Betta Foods (NZ) Ltd v Briggs*⁹, *Argosy Imports Ltd v Lineham*¹⁰, *New Zealand Language Centres Ltd (formerly Geos New Zealand Ltd) v Page*¹¹ and *Nath v Advance International Cleaning Systems (NZ) Ltd*¹². Also relevant, is the extent or degree to which the ex-employee has become embedded in the new enterprise. For example, it would be hard to argue that dismissal by a subsequent employer after 12 months' employment, say, did not break the chain of causation when calculating loss arising from an unjustified dismissal by the original employer.

[71] In this case, Mr Luhrs did not even commence employment with the new employer. He earned no money from it. He may or may not have been able to have successfully claimed unjustified dismissal, but the Authority did not hear enough evidence to judge that.

[72] On balance, I am satisfied that accepting an offer employment from Mr Luhrs' new employer did not break the chain of causation.

Calculation of loss

[73] It is difficult to assess what Mr Luhrs would have earned over the three months from his dismissal because his hours varied each week. Over the last five weeks of his employment, he averaged 18.4 hours per week. However, he also said that he had moved into his new build home by around the end of October 2017, so that his hours may have increased from November 2017. However, one cannot assume that he would have immediately gone back to 40 hours per week permanently because of the designers' backlog.

⁸ [2005] ERNZ 763

⁹ [1997] ERNZ 456 (EmpC)

¹⁰ [1998] 3 ERNZ 976 (EmpC)

¹¹ [2013] NZEmpC 100, [2003] ERNZ 226

¹² [2017] NZEmpC 101

[74] There was a Home Show in Christchurch between 13 and 15 October 2017 and, if he had not been dismissed, Mr Luhrs would probably have been employed fully between 5 October and 15 October to prepare for it and attend it, given that Mr Whitehouse said he had worked flat out during that period. Thereafter, one can only guess what Mr Luhrs' workload and hours would have been like, but I will assume, for simplicity's sake, that he would have averaged 30 hours per week, between 16 October 2017 and 5 January 2018, the end of the three months' period.

[75] Using these assumed hours as the basis of the calculation, and a base salary of \$50,000 (\$24.04 an hour) Mr Luhrs would have earned \$10,062.25 gross had he not been dismissed. Including final holiday pay of \$804.98, that equates to \$10,867.23.

Humiliation, loss of dignity and injury to his feelings for the dismissal

[76] Turning to compensation under s 123(1)(c)(i) of the Act, Mr Luhrs said he felt "awful, emasculated and depressed about the whole situation". He also said he was frog marched out and was unable to say goodbye to colleagues. This was denied by Mr Whitehouse, but I believe that Mr Luhrs was made to hand over his SIM card.

[77] Mrs Luhrs said in evidence that Mr Luhrs tends not to show anger or upset but that he is a proud person and that made it hard for him to be dismissed.

[78] Mr Luhrs' evidence was not very comprehensive about the effects on him of the dismissal, but he clearly did suffer an effect, which included humiliation, loss of dignity and injury to his feelings. I assess the effects as falling in the moderate range, and would fix compensation at \$15,000.

Humiliation, loss of dignity and injury to his feelings for the disadvantage

[79] Turning to compensation for the disadvantage of having had his salary reduced, that clearly did have an effect on Mr Luhrs, and I believe that he should be awarded compensation for those effects, as they were separate from having been unjustifiably dismissed. Mr Luhrs spoke about the financial stress the reduction in salary caused him, but not about the emotional effect. However, they can be inferred from his evidence, and I fix an award of compensation at \$10,000.

Reduction for contribution

[80] 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).

[81] First, I am satisfied that there should be no reduction in remedies for contribution in respect of the reduction in salary, as Mr Luhrs did not contribute to that in any blameworthy way. He did show a performance shortfall, but reducing his salary was not the appropriate response, as I have found.

[82] However, I am satisfied that Mr Luhrs contributed towards his dismissal in a blameworthy way. He said in his evidence that he did not want Mr Rose to tell Mr Whitehouse that he had told him what salary he had been earning. This shows that he knew that he had breached an agreement not to disclose that information. I also do not accept that Mr Luhrs was seeking the advice of Mr Rose when he mentioned his reduction in salary. He had said in evidence that he had been “venting”.

[83] Disclosing his former salary when he had agreed not to is a breach of the duty of good faith and the duty of trust and confidence owed by Mr Luhrs to his employer. His action would have no doubt caused Mr Whitehouse to wonder to what extent he could trust Mr Luhrs anymore. If he had not disclosed that information, he would not have been dismissed.

[84] I believe it is appropriate to reduce both the award of lost wages, including final holiday pay, and the award of compensation in relation to the dismissal, by 30%. I agree with Mr Kersjes that the 50% reduction suggested by Ms Keir is excessive.

Orders

[85] I order the respondent to pay to Mr Luhrs, within 14 days of the date of this determination the following sums:

- (a) \$523.28 gross for arrears of pay and final holiday pay in respect of the reduction in salary;

- (b) \$10,000 pursuant to s 123(1)(c)(i) of the Act in respect of the unjustified disadvantage caused by the reduction in salary;
- (c) \$7,607.06 gross pursuant to s 123(1)(b) of the Act, after reduction for contribution, in respect of the unjustified dismissal;
- (d) \$10,500 pursuant to s 123(1)(c)(i) of the Act, after reduction for contribution, in respect of the unjustified dismissal.

Costs

[86] I reserve costs. I invite the parties to seek to agree how costs are to be dealt with. However, if they are unable to agree within 14 days of the date of this determination, Mr Kersjes has a further 14 days within which to serve and lodge a memorandum setting out what contribution towards his costs his client seeks, and the basis for that. Ms Keir shall then have a further 14 days within which to serve and lodge a memorandum in reply.

David Appleton
Member of the Employment Relations Authority