IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 429
3078112

	BETWEEN	JOSHUA MCCLUNG Applicant
	AND	GARCIA CONTRACTING SERVICES LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Shima Grice and Lucy Nolan, counsel for the Respondent
Investigation Meeting:	2, 3 and 4 December 2020 in Tauranga
Further information:	15 December 2020 and 17 February 2021
Determination:	4 October 2021

DETERMINATION OF THE AUTHORITY

A. Garcia Contracting Services Limited did not unjustifiably disadvantage or unjustifiably dismiss Joshua McClung.

B. Costs are reserved with, if needed, a timetable set for memoranda to be lodged on any issue of costs.

Employment Relationship Problem

[1] Joshua McClung worked for Garcia Contracting Services Limited (GCSL) for a period of around seven months from November 2018 through to mid-2019. For most of that time he was employed as a supervisor.

[2] GCSL is in the business of providing picking and maintenance services for kiwifruit orchards in the Bay of Plenty.

[3] In his application to the Authority Mr McClung said he was unjustifiably dismissed, either directly or constructively, when GCSL refused to provide him with work after disputes arose over various workplace issues. His application also detailed more than 20 separate but interrelated instances where he said GCSL treated him unfairly during his employment.

[4] GCSL denied treating Mr McClung unfairly at any time during his employment or when it came to an end. It said Mr McClung had refused to go to an orchard where he was asked to work and, after Mr McClung had sent abusive or threatening messages to GCSL managers, the company had then followed the advice of Mr McClung's probation officer not to offer him more work. At the time he was working for GCSL Mr McClung was serving a sentence of home detention. Under his sentence conditions he had permission to leave his residence to attend approved employment. The Department of Corrections set out the terms of his permission to work for GCSL in a Direction Notice for Approved Absences.

The issues

[5] Following a three-day investigation meeting, and the subsequent provision of some additional documents, the issues requiring resolution in this determination were:

(a) Was Mr McClung unjustifiably disadvantaged by the actions of GCSL (through what its managers said or did) in instances or events he described in his statement of problem?

(b) How did the employment of Mr McClung end – was it by resignation, abandonment or by unjustified dismissal?

(c) Should either party contribute to the costs of representation of the other party?

[6] Due to conclusions reached on issues (a) and (b) in this determination, it was not necessary to consider any issues relating to remedies.

The Authority's investigation

[7] For the Authority's investigation written witness statements were lodged from the following witnesses:

- Mr McClung;
- Pola Meneses, a GCSL orchard manager;
- Jaquelini Lottermann-Laabs, GCSL's recruitment manager;

- Enrique Torres, GCSL's recruitment assistant;
- Luciano Garcia, the director and majority shareholder of GCSL;
- Graeme Rackham, a probation officer of the Department of Corrections; and
- Alex Magill, a Labour Inspector.

[8] Each witness attended the investigation meeting and answered questions, under oath or affirmation, from me and the parties' representatives. The representatives also gave oral closing submissions.

[9] Mr Rackham attended in response to a witness summons issued by the Authority. He had become the probation officer responsible for Mr McClung some months after Mr McClung had started work for GCSL. Mr Rackham had been reluctant to give evidence due to hostile behaviour towards him from Mr McClung. This arose from Mr McClung's views about Mr Rackham's involvement both in events around the end of his employment with GCSL and an incident, some weeks later, where Mr Rackham reported being verbally abused by Mr McClung during a routine home visit. The later incident resulted in Police visiting Mr McClung's home and charges being laid against him for breaching home detention conditions. The charges were later withdrawn and Mr McClung had pursued complaints against Mr Rackham with the Department of Corrections.

[10] Ms Magill, who also attended under summons, was the Labour Inspector who investigated a complaint Mr McClung made about GCSL after his employment ended. The complaint was about incorrect payments made to him and other workers for annual holidays and public holidays. The Inspector's investigation resulted in her issuing GCSL with an enforceable undertaking on 25 October 2019 to correct shortcomings in how the company calculated and paid public holiday pay for its employees. Her findings also led to Mr McClung being paid $110.73 as arrears for nine public holidays where his pay was not calculated correctly and payment of $381 due as final holiday pay.

[11] A summons was also issued for attendance by Andrew Haysom, a former operations manager for GCSL. Mr Haysom had supervised Mr McClung for some of his time with the company. I released Mr Haysom that summons as, at the time of the investigation meeting, he reported a need to attend to a family member who was

seriously ill and, after a discussion with Mr McClung and counsel for GCSL during the meeting, I was satisfied relevant matters were adequately addressed by the evidence of others.

[12] Following the investigation meeting two additional relevant documents were located. Firstly, at my request, the Department of Corrections had searched for and provided a copy of a Direction Notice for Approved Absence issued to Mr McClung on 6 November 2018. Secondly, Mr McClung subsequently located and provided a later version of the Direction Notice issued to him, dated 24 December 2018.

[13] At my request the Department also searched for any email correspondence sent to GCSL by the probation officer who initially dealt with Mr McClung's work release that may have indicated whether that officer had provided company managers with a copy of Mr McClung's direction notice. Through counsel the Department advised the requested search was made but no evidence was found of that notice having been sent to GCSL.

[14] A particular difficulty in investigating this matter arose from some strongly held views Mr McClung expressed regarding the nature and scope of his case. His complaints about how he was treated by GCSL expanded to include allegations about Trinity Lands Limited (TLL), a company which owned orchards serviced by GCSL. Mr McClung believed the end of his employment was influenced by directors or personnel of TLL because he had reported a food hygiene issue which occurred during picking at one of their orchards. He reported an incident where some kiwifruit were contaminated by cow faeces flicked up by the tyres of a passing tractor. He believed a subsequent investigation of the incident by Zespri was both inadequate and improperly influenced by TLL. Mr McClung considered he was subsequently marked as an "informant' because he reported the incident. He believed this then resulted in Zespri exerting some form of influence that in turn led to Mr Rackham reporting Mr McClung had breached his home detention terms.

[15] Throughout the course of the Authority's investigation Mr McClung also sent lengthy emails to the Authority setting out other strongly-held views. These included his belief that the Ministry of Social Development, the Department of Corrections, the Ministry of Business, some members of parliament, some government ministers and the Employment Relations Authority were, in various ways, corrupt and involved in a

"cover up" on behalf of or at the behest of Zespri, TLL and GSCL. Mr McClung's messages included abrasive or abusive comments about some people involved in his case, including Mr Rackham and Mr Garcia.

[16] Those messages largely proved irrelevant for the purposes of the Authority's investigation of the employment relationship problems raised by Mr McClung's application. They have been put aside from consideration. His propensity, however, to send strongly-expressed messages, including the tone and content of some messages he sent to or about Mr Garcia, was relevant in assessing what had happened during his employment, particularly about what occurred during the few weeks immediately before it came to an end.

[17] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[18] This determination has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed for the delay.[1]

The test of justification

[19] Mr McClung's claim that GCSL acted unjustifiably towards him in the various circumstances and instances identified in his application to the Authority has been determined by applying the test of justification set out in s 103A of the Act. The test considers whether GCSL's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time those actions occurred.

[20] Elements of that test include considering whether GCSL raised with Mr McClung any concerns it had about his conduct or other aspects relating to his employment, whether he was given reasonable opportunities to respond to those concerns and whether genuine consideration was given to any responses he gave before any action was taken against him. However GCSL's actions could not be determined to have been unjustified unless any defects in what was done were more than minor and had resulted in Mr McClung being treated unfairly.[2]

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[1] Employment Relations Act 2000, s 174C(4).
[2] Employment Relations Act 2000, s 103A(3) and (5).

[21] This assessment also takes account of the duty GCSL and Mr McClung each had to deal with one another in good faith. Those mutual obligations included not acting in ways likely to mislead or deceive the other party and to be active, constructive, responsive and communicative.[3]

[22] The Authority's role is to resolve the employment relationship problem, as raised in Mr McClung's grievances, according to the substantial merits, without regard to technicalities. In doing so the Authority is not bound to treat the matter as being of the type described by the parties.[4]

How Mr McClung got work with GCSL and became a supervisor

[23] In September 2018 Mr McClung was sentenced under the Misuse of Drugs Act 1975 to 12 months home detention on a charge of possession of cannabis for supply. His sentence conditions allowed Mr McClung to leave his home, with the prior approval of a probation officer, to seek or engage in employment. Through an employment agency Mr McClung was introduced to GCSL.

[24] Mr Garcia and Mr Torres interviewed Mr McClung on 31 October 2018. Mr McClung explained he was on a home detention sentence, wore an ankle bracelet for tracking purposes and was looking for a supervised job until September 2019 when his sentence finished.

[25] Mr Garcia recalled Mr McClung describing himself as hardworking, reliable, able to work well with others in a multi-cultural environment and was looking for a second chance.

[26] GCSL offered, and Mr McClung accepted, a position as a casual orchard worker. He began working for the company on 2 November 2018. He signed an employment agreement which included a term requiring him to perform duties "at orchards that the employer operates in Bay of Plenty" and to comply with reasonable instructions.

[27] Mr McClung was assigned to work under the supervision of Ms Meneses. His probation officer at the time (who was not Mr Rackham) also provided him with a Direction Notice for Approved Absences, dated 6 November 2018. Mr McClung had

[3] Employment Relations Act 2000, s 4.
[4] Employment Relations Act 2000, s 157(1) and s 160(3).

to carry the notice with him at all times that he was away from his home address and present it to a probation officer or a Police officer if asked to do so.

[28] The notice allowed him to leave home at 7am and return no later than 7pm for "employment with Garcia Contracting" and noted he would be monitored by GPS, time slips and "your sponsor Pola [Meneses]".

[29] Ms Meneses was impressed by Mr McClung's work during his first few weeks of employment. She recommended his promotion to a role as a casual supervisor to assist her with around 50 workers deployed on several orchards she was responsible for managing. Mr McClung accepted the supervisor role on 19 November 2018. It came with a small increase in his hourly pay rate.

[30] On 24 December 2018 a new version of his Direction of Notice for Approved Absences was issued to Mr McClung. The notice increased hours he could be away from home to between 6am and 7.30pm "to attend employment with Garcia Contracting Monday-Sunday". It also said the orchard address was "to be specified if out of the Athenree area" and he was to "remain in the company of Pola Garcia [sic] for the duration of the absence".

Becoming a permanent employee

[31] In late February 2019 GCSL entered a six-month long agreement with the Ministry of Social Development to provide permanent employment in Kiwifruit orchard maintenance for 29 pre-selected Work and Income clients who were already working as casual employees of GCSL. Their agreement included payments to GCSL for providing training to those employees. The training was to be linked to industry qualifications and include upgrading drivers' licenses and gaining First Aid certificates.

[32] Mr McClung was one of the workers covered by this agreement. He was provided with a written employment agreement offering him a permanent role. At the Authority investigation meeting Mr McClung produced the agreement he was given. It was dated 26 February 2019. Mr McClung had signed that copy of the agreement but he had not returned it to GCSL around that time because he disagreed with or had some queries about some terms in it.

[33] In respect of matters relevant in this determination, the agreement had terms similar to those in the casual agreement he had begun work under. It required him to

comply with all lawful and reasonable instructions of the employer and said his place of work "will be the place nominated by the employer due to the practicalities of the working environment".

[34] There were two significant differences. The casual agreement said there was "no obligation on the employer to offer work and no obligation on the employee to accept work". The permanent agreement, by contract, provided for a minimum of 60 hours work each fortnight but said "specific days and times of work are to be agreed from time to time by the parties, and will depend on weather conditions, picking clearances and similar considerations".

[35] The permanent agreement also provided for annual leave under the provisions of the Holiday Act, including four weeks' annual leave, rather than the pay-as-you-go payment of 8 per cent as holiday pay allowed for in the casual agreement.

[36] While Mr McClung had not handed back a signed copy of that agreement to the company, GCSL accepted that his employment had been on a permanent and ongoing, not casual, basis from February 2019 onwards. Mr McClung's dismissal grievance also relied on that classification of his employment as permanent. A corollary of the position taken by both parties was that the terms of Mr McClung's employment, regarding the location and direction of his work, were those in the permanent employment agreement.

February 2019 incident

[37] An incident at work in late February 2019, and Mr McClung's view of how Ms Meneses handled it, resulted in a significant change in his previously positive attitude to his employment with GCSL. He said this led to him resenting working for the company. In turn this contributed to the deterioration of the employment relationship, apparent in later events.

[38] The incident was a verbal confrontation between Ms Meneses and two orchard workers in the crew supervised by Mr McClung. Mr McClung considered Ms Meneses had too readily reconciled with the two workers who swore at her during their argument.

[39] Ms Meneses had become annoyed shortly beforehand when a prank by some other workers, elsewhere in the orchard, resulted in damage to a portaloo. When she arrived in the area where Mr McClung and his crew were working, she spoke sharply to a worker who she thought were not paying proper attention to his work. Another

worker, who was a friend of that worker, swore at her. The language then exchanged between them all became heated.

[40] Mr McClung was not directly involved, describing himself as a spectator or, when he asked the people arguing to calm down, as a referee. However he was disappointed when Ms Meneses ended the argument by apologising to the worker who had sworn at her and giving him a hug. The worker also apologised to her.

[41] Mr McClung thought both workers should have been subjected to disciplinary action for how they had behaved towards Ms Meneses. He considered his ability to control and direct his crew was undermined because Ms Meneses had not imposed a sterner outcome.

[42] Mr McClung said he was unjustifiably disadvantaged by the incident and how Ms Meneses, as GCSL's representative, had handled it. His statement of problem described what happened as being a violent confrontation. This description was not consistent with his oral evidence at the Authority investigation meeting. However he said he had subsequently become fearful of the two workers, who he described as having a 'gangster' attitude, and said GSCL had not taken his safety concerns seriously. He said Ms Meneses ignored his recommendation "to discipline my wayward team members" and the workers' behaviour subsequently became worse "with more unsafe and potentially violent situations cropping up".

[43] No finding that Mr McClung's safety concerns were ignored or that he was subjected to the risk of violence could be made on the evidence available to the Authority investigation. He was not directly involved in the verbal altercation on the particular day. Ms Meneses did later consider what he suggested about disciplining the workers. She decided not to take that approach because she recognised she had contributed to how that situation arose. As she put it in her oral evidence at the Authority investigation, it was "wrong to punish them for something I started". Ms Meneses' decision to de-escalate the situation on the day, and then subsequently to take no further disciplinary action on it, was not an instance of unfair treatment of Mr McClung. In her role as a manager for GCSL, her decision was within the range of responses Ms Meneses reasonably could have taken in those circumstances. While Mr McClung had different views about how the situation could have been handled and

concerns about the attitude of those workers to direction from him, no harm or real risk of harm to him was established.

[44] Through the following weeks Mr McClung remained upset about how Ms Meneses dealt with the situation that day. He made inquiries about moving to work elsewhere. Through the agency which had placed him with GCSL Mr McClung sought work at a packhouse for a different company in the district.

[45] In early April 2019 Mr McClung sent Mr Garcia a text message saying he was looking at taking some of his team and starting a new job at a packhouse for a different company. Mr Garcia tried but was unable to contact Mr McClung by telephone to discuss his concerns. He also sent Mr McClung a text asking him to return his call.

[46] Mr McClung did not phone Mr Garcia back but meanwhile the prospect of a job elsewhere had stalled. Mr McClung believed this was for two reasons. Firstly, he had ticked a box on the packhouse job application form answering 'yes' to a question about whether he had been involved in personal grievance litigation in any previous job.[5] Secondly, a query had been raised about whether the insulation in the packhouse chiller units meant his whereabouts could not be adequately monitored by the GPS technology used in the anklet he wore as part of his home detention conditions.

[47] As a result he remained working for GCSL. In the following weeks he was also dissatisfied with what happened in other events and how they were dealt with.

April 2019 issues

[48] In mid-April 2019 Ms Lottermann-Laabs needed an additional tractor driver to work with picking teams in the orchards she managed in the Pahoia district. She talked with Mr McClung while on a visit to an orchard in the Waihi district where he was working. She told him about the opportunity to work as a driver at Pahoia. Drivers were paid a higher base rate but did not get extra payments earned by pickers based on the number of bins filled each day. However drivers got longer, steadier hours of work so, according to Ms Lottermann-Laabs, generally earned more than pickers for what was a skilled but less physically demanding job.

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[5] See *Mc Clung v Fencing Worx (BOP) Limited* [2012] NZERA Auckland and paragraph [162] below.

[49] Mr McClung told her he had driven tractors before and was keen to do the job. Ms Lottermann-Laabs then arranged with Ms Meneses for Mr McClung to be assigned to work as a driver at the Pahoia orchards. The work there required a longer journey to and from work for him, of around 40 kilometres. The orchards in the Waihi district where he had worked until then were much closer to his home address.

[50] In the following weeks several points of contention arose from what Mr McClung said was unfair treatment of him while he worked at the Pahoia orchards.

[51] Firstly, he found he had been short paid for work on a public holiday and GCSL's pay records had not been properly adjusted to pay him the higher hourly rate he was supposed to get for his driving work.

[52] Secondly, GCSL initially declined a request he made to have his holiday pay "cashed up". He said this was inconsistent with arrangements made to provide loans or advances to other workers.

[53] Thirdly, GCSL refused to pay him for a day when he had not come to work because he considered the company was not adequately addressing the pay concerns he had raised.

[54] Fourthly, Ms Lottermann-Laabs sent Mr McClung what he considered was a hurtful message about not coming to work on the day he stayed away from work.

[55] Fifthly, Mr McClung said GCSL failed to reimburse him for two litres of oil he provided for a tractor.

[56] Sixthly, Mr McClung said he was entitled to but unfairly denied a travel allowance for driving to and from the Pahoia orchards.

[57] Seventhly, Mr McClung said he was disadvantaged when Mr Haysom unexpectedly left his employment with GCSL. This was of concern to Mr McClung because, by that time, Mr Haysom was acting as his workplace supervisor for the purposes of Mr McClung's home detention work release conditions.

(i) Short pay for a public holiday and the driver's hourly rate

[58] At 7.09am on 26 April Ms Lottermann-Laabs sent Mr McClung a WhatsApp message with his start time and work location, an orchard in Pahoia, for that day. Mr

McClung responded with a message saying he had a problem with the payslip he had received that week and did "not want to be travelling to Pahoia unless it can be fixed today". Ms Lottermann-Laabs responded with a message saying she would pass the problem to the company's office "to get it sorted during the day today". A further message she sent to Mr McClung a few minutes later confirmed she had done so.

[59] The short payments comprised having paid Mr McClung for seven hours instead of eight for work on Good Friday and underpaying his base rate for time he spent operating machinery. Both resulted from an administrative error GCSL fixed promptly when raised with it. Neither were sufficient grounds for grievances of disadvantage and discrimination claimed by Mr McClung.

(ii) Request to cash up holiday pay entitlements

[60] During 26 April Mr McClung also contacted a staff member in the company responsible for payroll matters to ask for payment of his holiday pay entitlement.

[61] In a WhatsApp message sent to Ms Lottermann-Laabs in the evening of 26 August he described the payment he sought as being "outstanding holiday pay". He said that if the amount was not paid into his account in full by the end of the day he would not being going to the Pahoia orchard to "work on the machinery".

[62] Earlier that day Mr Torres had sent Mr McClung a text message about the request for holiday pay he had made to the office staff member. Mr Torres' message explained that, as a permanent employee, Mr McClung was not entitled to payment of annual leave until he reached his first year anniversary. Mr Torres said the company could make a payment "as an advance, however we can't do it today".

[63] It appeared from Mr McClung's evidence that he had in mind the arrangements regarding holiday pay that had operated when he was employed on a casual basis, which was paid each week. This changed once he became an employee from late February. His payslip issued on 24 April noted his accruing holiday pay entitlement was worth $405.67. At the time Mr McClung has a finance payment due on his personal vehicle, a truck, which he used for transport to and from work. He wanted some of that holiday pay entitlement to meet that commitment.

[64] Under the Holidays Act 2000 Mr McClung could ask for up to one week of his holiday pay to be paid out in cash.[6] GCSL treated his request on 26 April as a request of that type. It paid $368.14 of his holiday entitlement to him on 28 April in a special pay roll payment credited directly to his bank account.

[65] There was no sound basis for Mr McClung's allegation that GCSL failed to meet its obligations under the Holidays Act by how it responded to his request or that the company unfairly discriminated against him by not giving him a personal loan of a type he understood GCSL had made to another worker.

[66] Another worker had told Mr McClung about getting a loan from the company but the circumstances of that other worker were different from those of Mr McClung. The evidence of Mr Torres and Ms Lottermann-Laabs made clear that the company had, from time to time, made loans to workers and they would have considered such a request from Mr McClung if it had been made with sufficient information about why it was sought and with a reasonable timeframe to consider and, if appropriate, approve and arrange it. The difficulty in this instance was the short, unnecessary and artificial deadline Mr McClung put on his requests. Despite this, GCSL had responded promptly and fairly by addressing his payroll shortfall on the same day it was raised and paying out on his holiday request within two days of it being made.

(iii) No pay for a day Mr McClung refused to work

[67] Because he had not been paid by the morning of 27 April for the annual leave payment he had asked for on 26 April, Mr Clung did not attend work at the Pahoia orchard on 27 April 2019. Instead he said he should be offered work at a Waihi orchard, reducing the travel time required for work that day.

[68] He subsequently claimed he was entitled to refuse to travel to work at Pahoia and "lawfully entitled to work at Waihi". On that basis he said he should get a day's pay for 27 April because he had been "locked out" that day.

[69] The unreasonableness of the timeframe Mr McClung had set for a response to his request on 26 April has already been addressed. He also incorrectly asserted he was entitled to choose his place of work. As already noted, the terms of the employment

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[6] Holidays Act 2003, s 28A.

agreement he had worked under since February set the location of his work as the place nominated by the employer due to the practicalities of the working environment. Another term allowed for variation of days and times of work, according to factors such as weather conditions and clearances to pick at certain orchards. However this did not refer to or limit the location of work nominated in any lawful and reasonable instruction by the employer. GCSL did what a fair and reasonable employer could have done in scheduling Mr McClung to work at Pahoia, as he had also earlier agreed to do. It did not discriminate against or disadvantage him by making those arrangements. Rather, his refusal to attend work that day was a breach of his employment obligations to GCSL.

(iv) Critical text message from Ms Lottermann-Laabs

[70] Mr McClung said he was unjustifiably disadvantaged by "a sarcastic, bullying text" Ms Lottermann-Laabs sent him on 27 April after he did not turn up to work that day. The text message she sent, set out in full below, is to be read in the context of the circumstances of 26 and 27 April already described in this determination:

> Thank you for not coming to work today. Your request about annual leave came 1:12pm on Friday. You know the payment is made on Thursday nights to be in your account Fridays the latest. Your request about payment mistake done first thing in the morning was sorted as we spoke. If you were short of money we were happy to help in find solutions but you never told me anything either about your annual leave request. Enrique [Torres] tried to contact you even after nobody was working at office to sort it with you. You didn't reply and ignored it. Andrew [Haysom] also passed the message as you wasn't reachable over the phone. We as company tried our best to work things out with you yesterday, even the owner Luciano [Garcia] tried to contact you after hours and no answer from you. And what we get from you? Not showing up for work compromising one operation.

[71] Ms Lottermann-Laab's message had an understandably exasperated tone. It showed she and two other GCSL managers had actively tried during the course of the previous day to address Mr McClung's concerns. He, by contrast, was not responsive or communicative in returning telephone calls from them.

[72] His refusal to go to work at Pahoia that day meant the orchard was short one tractor driver needed to efficiently move bins to and from the picking crews as they worked along the vines. It was, as he must have known, a disruptive action by him that limited what could be achieved that day. Ms Lottermann-Laabs, in the context she succinctly set out in her text, robustly put her point of view in a way that a GCSL manager could reasonably and fairly have done in all the circumstances at the time. It was not an unjustified action.

(v) No reimbursement for tractor oil

[73] Mr McClung said GCSL failed to reimburse him for two litres of diesel engine oil he provided himself for a tractor he used at the Pahoia orchards. The value of the oil he said he used was $32. He described failure to pay him as a "shocking, bad faith insult" for which he sought $5,000 distress compensation.

[74] The evidence disclosed a less straightforward situation. Mr McClung had purchased a ten-litre container of oil for use in his own truck. He decided the tractor he was using should be topped up with oil. He believed waiting for Ms Lottermann-Laabs to make arrangements to get oil would not be satisfactory. He discussed the situation with Mr Haysom and went ahead with putting some oil from his own container into the work tractor.

[75] When Mr McClung asked Mr Torres, by text message, for reimbursement for two litres of oil at $16 a litre Mr Torres promptly asked for the receipt. Mr McClung replied that he would "search for it". He did not provide a receipt and GCSL did nothing more to pay him. Resolution lay in Mr McClung's hands, with GCSL clearly prepared to refund him for the cost. There was not an unjustified action by GCSL.

(vi) Not receiving a travel allowance for travel to Pahoia

[76] Mr McClung said GCSL unjustifiably disadvantaged him by not paying him a travel allowance when it arranged for him to work at orchards in Paihoia rather than within the Waihi district. He said it took him more time to travel, cost more in fuel and he was discriminated against because another employee got a travel allowance.

[77] However, Mr McClung's employment agreement had no term providing for a travel allowance. And, as already noted, the terms of that agreement entitled the company to nominate his place of work.

[78] His claim of discrimination related to his understanding of the terms of employment for another employee who used a GCSL-provided van to drive workers from Rotorua to orchards elsewhere in the Bay of Plenty region each day. The role of that other employee was different. There was no discrimination in the sense that Mr McClung was not paid less and differently for the same work in the same role.

(vii) Being left without supervision required by his work release conditions

[79] Mr McClung said GCSL should be ordered to pay him $10,000 for stress and uncertainty caused by Mr Haysom "temporarily resigning" one day in April and leaving the Pahoia orchard. Mr Haysom later returned to work for GCSL.

[80] At that time Mr McClung understood Mr Haysom was the person nominated to meet a requirement of his direction notice for approved absences that he be under the day-to-day supervision of a GCSL manager.

[81] Mr Haysom had left work at the orchard one day in April because he was not happy with some GCSL work arrangements in place at the time. He did not tell Mr McClung he was leaving. Mr McClung heard that news from another worker and, as Mr McClung understood things at the time, Mr Haysom would not return.

[82] Mr McClung said GCSL was aware of the legal requirements for his supervision. He said GCSL therefore acted unlawfully by allowing a situation to eventuate whereby Mr Haysom left without alternative arrangements being put in place for Mr McClung's supervision.

[83] His argument was flawed for several reasons. Firstly, there was no evidence GCSL was ever provided with a copy of the Direction Notice containing the detailed conditions for Mr McClung's work release. It was aware from discussions, made at the start of his employment, that he had to have a supervisor. Secondly, the notice specifically referred only to Ms Meneses as supervising him but Mr McClung was content that the arrangement made for Mr Haysom to be his supervisor at Pahoia met the requirements of the notice.[7] No varied notice to that effect had been issued. Thirdly, Mr Rackham, in his evidence, said Mr McClung expressed no concern to him at the time about Mr Haysom's absence. There was nothing to indicate that, if appraised of the situation, Mr Rackham could not or would not have made suitable arrangements for an alternative supervisor to be nominated.

[84] There was no failure or breach of duty by GCSL in this event that unjustifiably disadvantaged Mr McClung.

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[7] Email from Mr McClung to the Authority, 17 February 2021.

May 2019 events

[85] From late April to late May Mr McClung continued to work but remained dissatisfied over various matters, including travelling from his residential address in Waihi to work at Paihoia. This led to him, by late May, again refusing to attend work unless issues he raised were addressed to his satisfaction.

[86] In early May Mr McClung sent Ms Meneses a long text message repeating his concerns about workers not being disciplined over the February incident and concerns about his payslips. He referred to "calling in the Labour Inspectorate" and pursuing a claim for unjustified disadvantage in the Employment Relations Authority.

[87] Ms Meneses passed Mr McClung's message on to Mr Garcia who attempted to contact Mr McClung by telephone. On 8 May Mr Garcia sent Mr McClung a text message explaining he had tried to call him to discuss his concerns. He asked Mr McClung to return his call. On 9 May Mr Garcia sent Mr McClung a further text:

> Joshua, you have raised concerns about your work. I would like to meet with you to understand what these are. I have tried to phone and text you to arrange a meeting but you have not replied. If you don't reply I cannot do anything to resolve your concerns. I will ring you now to arrange a time to meet. If you do not reply I will assume you do not want any further action taken.

[88] Mr McClung did not reply. Mr Garcia did not hear from Mr McClung again until he got a text message from Mr McClung on 23 May. The message said Ms Lottermann-Laabs had ruined Mr McClung's day at the orchard and he needed to go home because he was under stress and feeling sick.

[89] Mr McClung also sent a long text message to Ms Meneses that day. His message said he "had a very shitty day at work today and had to leave early as Jaquelini [Lottermann-Laabs] was messing up the team". He said he was holding Mr Torres and Ms Lottermann-Laabs to account and was "thinking about resigning and claiming constructive dismissal". In a reply message Ms Meneses asked if he had talked to, or tried to talk to, Mr Torres or Mr Garcia. Mr McClung's response included these comments: "No, I didn't want to talk with them" and "my only obligation was to let the employer know that there has been a personal grievance within 90 days of it happening or finding out about it".

[90] Ms Meneses sent Mr Garcia copies of her text exchanges with Mr McClung.

[91] Mr Garcia then asked Ms Lottermann-Laabs about what had triggered Mr McClung's concerns that day. She explained Mr McClung had expected to be working in one of four teams at an orchard on 23 May. However only three tractors were available and operating that day so Ms Lottermann-Laabs rearranged pickers into three teams. The work was usually arranged so that each team had a tractor to move their picking bins. Mr McClung was dissatisfied because he considered the team he was placed in was slower, so he would earn less that day.

Mr Garcia's conversation with Mr McClung on 24 May

[92] The following day, 24 May, Mr Garcia went to the orchard where Mr McClung was working and took him aside to talk about his concerns.

[93] In his statement of problem Mr McClung described Mr Garcia's discussion that day as "a non-notified, unlawful disciplinary meeting". He said the discussion was an "interrogation" in which Mr Garcia bullied and harassed him and made critical comments about mental illness which Mr McClung inferred were about him.

[94] Mr Garcia's evidence about that discussion, and why he went to speak to Mr McClung, was a more measured and credible account of what happened. He said he had told Mr McClung about trying hard to contact him to discuss his concerns. Mr McClung had then talked about the public pay holiday issue, which had been remedied on 26 April, and about having to travel to orchards outside the Waihi area without getting a travel allowance.

[95] Mr Garcia denied he made any critical comments about mental health.

[96] Contrary to Mr McClung's allegation, there was no disciplinary aspect to Mr Garcia going to the orchard to speak to him that day. It was an action a manager could reasonably have taken to try to understand the concerns Mr McClung had repeatedly and heatedly expressed in messages to Mr Garcia and other GCSL managers. It was also appropriate given Mr McClung's failure to answer telephone calls or return messages from Mr Garcia had made during the previous two months. It was an instance of Mr Garcia seeking to be active and communicative in addressing problems raised with him. As was clear from Mr McClung's response to Ms Meneses' query the previous day about speaking to Mr Garcia, Mr McClung had failed to meet his own good faith duty to be responsive in discussing his concerns.

[97] One other allegation about why Mr Garcia had sought out Mr McClung on 24 May also needed to be addressed.

[98] On 23 May a journalist for the *Stuff* news website had worked as a fruit picker for GCSL, on a casual and incognito basis, at the same orchard as Mr McClung. The journalist's article about his experiences that day was not published on the website until 17 June.[8]

[99] However the journalist had called Mr Garcia on 24 May with some questions arising from what he had observed on 23 May. His article, when published, said workers waited an hour after their notified starting time before work began but were not paid for that hour, drinking water was not readily available to the workers while working on the vines and proper processes for completing a health and safety induction and checking written employment agreements appeared not to have been followed. Mr Garcia was quoted in the article as having agreed to remedy the short-paid hour and to check why water had not been available.

[100] Mr McClung, in his evidence, said he knew nothing about the journalist being at the orchard on 23 May. However Mr McClung subsequently came to believe, as he looked back at events, that Mr Garcia's visit to speak to him on 24 May was prompted by being contacted by the journalist and that Mr Garcia thought Mr McClung was, in some way, responsible for the journalist spending a day working at the orchard.

[101] Mr Garcia, in his evidence, was adamant that his visit to Mr McClung was not prompted by discussion with the journalist because, as best as he could recall, he had not spoken to the journalist until after talking with Mr McClung that day.

25 May 2019

[102] On 25 May McClung raised another concern. Pickers at the orchard he worked at that day waited an hour for their supervisor to arrive. The supervisor then listed the starting time for those workers as being the time he arrived, not from the hour earlier when the workers were present and ready to work. Mr McClung talked to Mr Haysom and then Mr Torres about this. According to his evidence, they agreed with the concern he raised and the workers were subsequently paid for that hour in the pay they received

[8] *https://www.stuff.co.nz/business/113257301/kiwifruit-picking-hot-hard-work-that-nobody-wants-to-do*. See also paragraph [125] below.

that week. However Mr McClung believed his action in ensuring workers were paid for that hour was "the last straw" for GCSL and the company then "arranged my dismissal". His statement of problem said GCSL began his "constructive dismissal" by refusing him work from around 27 May.

27 May onwards

[103] Text messages Mr McClung exchanged with Ms Meneses and Mr Torres around these days suggest a different explanation of what happened around this time. Rather than GCSL refusing Mr McClung work, it was Mr McClung who said he would not work unless and until the company met conditions he set.

[104] Ms Meneses had a WhatsApp group she used to communicate with three supervisors, one of who was Mr McClung. On 27 May Mr McClung sent a series of messages to that group, addressed to Ms Meneses. His messages repeated earlier themes about the company's employment practices and managers. He said "the company has breached many laws". He criticised Mr Garcia as not having "a single clue" and being "away with the fairies". In a response to his messages Ms Meneses said Mr McClung had the telephone numbers for Mr Torres and Mr Garcia. She asked him to call them. Mr McClung replied: "I am sure I am wasting m[y] time with these guys". He also wrote that he would "fix the problems I have had but the process will involve a lot of negativity for Garcia".

[105] Ms Meneses copied the messages she had exchanged with Mr McClung to Mr Torres and Mr Garcia. The last message from Mr McClung in this exchange ended with some bellicose expressions which, as discussed further below, caused them considerable concern:[9]

> I will try my best to run this case in a civilised way but, notwithstanding the "good faith obligations" of both parties, these types of claim are allowed to be run in quite an aggressive way. Once I see idiots arguing with me I am prone to open fire with the Heavy Artillery. I don't take Prisoners of War. I have a Scorched Earth policy for the idiots, whoever they may be.

Work available on 28 and 29 May

[106] Although Mr McClung said he was refused work by GCSL over those days, messages in the WhatsApp group show he was advised of work start times on 28 May

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[9] See paragraph [160] below.

and on 29 May. According to his evidence rain prevented work on 28 May. However under a message from Ms Meneses about the start time on 29 May, Mr McClung sent a message to another supervisor which, in part, read:

> … Sorry I can't pick you up today. Enrique [Torres] didn't organise the reimbursement yet so I have no obligation to attend work under these negative circumstances.

[107] It was clear Mr McClung understood work with the company was available for him to do but he chose not to attend. Messages exchanged with Mr Torres from 27 May onwards showed his reasoning for not attending.

[108] On 27 May Mr McClung sent Mr Torres a text message saying he had "some problems with the company process and need to raise personal grievance claims to address this non-compliance." Mr Torres responded by providing Mr McClung with an email address and a physical address to send his personal grievance claims.

[109] In reply to further text messages Mr McClung sent the following morning Mr Torres wrote that the company was "completely open to talk with you, any moment, we can set up a date, time and you can bring to us all your concerns".

[110] Mr Torres also wrote that he was "not keen" for Mr McClung to explain his concerns through WhatsApp messages. However Mr McClung continued to do so, sending more than 20 detailed messages over the next four hours. These started with some listing his "more recent problems". Those problems included payment for waiting time on 25 May, payment for one bin he said he had missed out picking while Mr Garcia spoke with him on 24 May, and payment for Easter Monday which he said other workers were paid for but not him. One message said he also wanted reimbursement for "all other early finish/unworked days during picking where I have had to walk away in disgust, due to having a compromised picking team with idiots doing very little work".

[111] Other messages expressed his concerns about an expected First Aid course not being arranged, a worker making mistakes when asked to work on a forklift, the incident of some Kiwifruit being contaminated by cow faeces, a supervisor's relative being employed who was "unfit for picking duties", how Ms Meneses had handled the February incident, and Ms Lottermann-Laabs text criticising him for not coming to

work on 27 April. He also repeated his claim to be "reimbursed for this lost day of work".

[112] In another message Mr McClung requested payments be made to him that day:

> So I will be facing a loan default situation tomorrow, and I know what caused it. In an attempt to avoid this I am requesting all available sick leave and all hours worked along with any annual leave owing, and also any other outstanding monies owed to me to be paid into my account today. It is a reasonable request given the gravity of the situation.

[113] On the morning of 29 May Mr McClung sent the following message to Mr Torres at 9.39am:

> Good morning Enrique. I am not able to attend work until such time as the undisputed reimbursement is paid. It is regarded as a new Personal Grievance and so I am seeking reimbursement of lost wages today also. The loan default is happening today and I will be expecting maximum compensation for the negative credit rating which cannot be fixed.

[114] Four hours later Mr McClung sent a further message asking if Mr Torres was "any closer to having a decision on this matter". Mr Torres replied that he would "be writing to you formally regarding employment issues".

[115] Around 30 minutes later Mr McClung sent the following text to Mr Garcia:

> Good afternoon Luciano. Have you conducted an Unjustified Dismissal of myself today and if this is the case what is the reason for this decision?

[116] On 30 May Mr Torres sent the following letter by email to Mr McClung:

> You have raised issues in relation to your employment with Garcia Contracting. We also have serious concerns about your behaviour and attitude at work. Given that these are concerns on both sides, we would like to attend mediation with you to resolve all issues. Please confirm that you are willing to attend mediation and we will contact the Ministry of Business, Innovation and Employment to arrange a date.

[117] In a WhatsApp message sent on 31 May Mr McClung confirmed he had received the request regarding mediation and agreed to take part in it. Meanwhile two other developments relevant to the subsequent dispute about Mr McClung's employment status had occurred.

[118] Firstly, on 29 May Ms Meneses had closed the WhatsApp group she had used to communicate with three supervisors, including Mr McClung. She did so after Mr McClung used the group to send a message addressed to the two other supervisors

saying he was pursuing claims for each of them "although you did not request this". Both replied asking him not to include them in his claims and, as one put it, to "leave us out of it". Mr McClung then sent a message saying they were "cowards" and "happy to be treated like dogs bodies".

[119] Mr McClung claimed what Ms Meneses then did, by deleting the group in WhatsApp, was an unjustified action and "evidence of a constructive dismissal". It was not. The purpose of the group was communication with supervisors about work arrangements. Mr McClung had used the group message function to air his grievances and, when the other supervisors indicated they did not want him to advance claims on their behalf, to make abusive comments about them. Ms Meneses' action in deleting the group, set up for a specific work purpose, was within the range of responses that a fair and reasonable employer could have taken in the circumstances at the time. Mr McClung had other, more appropriate means and avenues of advancing his cause and was not entitled to use the group to harangue Ms Meneses and abuse other employees. Deleting the group was not an action changing his employment status with the company.

[120] Secondly, Mr McClung had contacted his probation officer, Mr Rackham, and asked if he would contact GCSL to ask about Mr McClung's employment status, including whether he had been dismissed. Mr Rackham did contact GCSL's office. Giving evidence more than 18 months after that telephone call, he could not recall who he spoke to but said he was told Mr McClung had made a complaint about his working conditions and there was no work for Mr McClung until after mediation was held.

[121] A message Mr McClung sent Mr Torres on the morning of 30 May suggests Mr Rackham had then spoken to him about that telephone call. He wrote his probation officer "contacted the company yesterday to ask what is happening, he was told that I am not dismissed". He asked whether this meant he had been suspended or stood down. Mr Torres responded by referring to the letter about mediation already sent to Mr McClung and said he was not willing to discuss matters Mr McClung raised until Mr McClung confirmed he was willing to attend mediation.

June 2019 events

[122] In the following week Mr McClung became concerned about whether he was able to meet a payment instalment for the loan on his truck. At Mr Rackham's

suggestion Mr McClung looked into whether he could get an emergency grant from Work and Income (WINZ). In preparation for making that application he asked Mr Torres, by text message on 7 June, to "please explain my current employment status". Mr Torres replied: "Good morning Joshua, we have not dismissed you so you still employed". Mr McClung responded saying he had spoken with MBIE about the timing of the mediation which he understood might be "a few weeks away" and was concerned about what would happen meanwhile. Mr Torres replied that all questions about Mr McClung's "status in the company" had to be addressed to Mr Garcia "from now on".

[123] Mr McClung then sent a message to Mr Garcia, attaching a GCSIL pay slip showing he had received $45 pay for the previous week, and saying he had a WINZ appointment at the being of the next week. He asked Mr Garcia to "explain for me my current employment status" as he would be expected to explain it to WINZ. He also wrote that "in all likelihood I will be giving a forced resignation next Monday".

[124] Mr Garcia responded: "I am sorry to hear that. Garcia did not dismiss you. You sent the company a txt message saying that you were not going to attend work".

[125] The next communication from Mr McClung was a message to Mr Garcia on 17 June. He sent a text containing a link to the *Stuff* article published that day with a message reading:

> It's disappointing to read this report in the news today. I am at meetings with the Government today. I will be returning to work tomorrow if the weather is clear. The mediation meeting is confirmed for 28/06/2019

[126] The following day Mr Garcia sent Mr McClung a message he had sent to some other employees as well: "Hi guys tomorrow please be at 443 state highway 33 paengaroa 9am".

[127] Mr McClung responded with a message asking if two other supervisors had been asked to be at the Paengaroa address the next day and, if not, why not? He also asked when winter pruning would start at the Waihi operation. Mr Garcia replied: "I do have work for you here at 443 state highway 33. I had some work plans to follow. Can you please come here? I also will be here."

[128] Mr McClung responded by asking if the two other supervisors were working at Waihi. He said he would raise a discrimination claim if they were working at Waihi while he was asked to travel to Paengaora. He also said he understood others were paid

allowances for long distance travel and asked if he would get an allowance for going to Paengaroa. Mr Garcia replied "no" to that question.

[129] The Paengaroa site was near Te Puke and within the area of the Bay of Plenty region where GCSL provided services. It was around 95 kilometres from Waihi, taking around 80 minutes to drive.

[130] Mr McClung did not attend work at the Paengaroa site on 19 June. He sent Mr Garcia a text saying it was illegal for him to work there.

[131] In a message to Mr Torres he said his probation officer had told him it was "unlawful" for him to travel to Paengaroa and that Mr Rackham would contact Mr Torres to confirm this.

[132] Mr Rackham's evidence was that Mr McClung had told him that "his employer expected him to travel a long distance out of district to work at his own expense". On that description Mr Rackham had agreed the request was not acceptable under Mr McClung's home detention terms and said he would talk about it with Mr McClung's employer.

[133] By the time Mr Rackham was able to contact Mr Garcia on the following day, 20 June, the antagonism Mr McClung expressed towards Mr Garcia and GCSL had escalated. He had sent Mr Torres and Mr Garcia messages saying Mr Garcia should leave New Zealand and go to Brazil. Mr Garcia is a native of Brazil and a citizen of New Zealand.

[134] Mr McClung's message to Mr Garcia on 20 June included a link to the *Stuff* article of 17 June and emojis of the New Zealand and Brazilian flags. It read:

> He is on to you Luciano.
> We all on your case now.
> Don't ever call this country your home [New Zealand flag emoji].
> [Brazilian flag emoji] This is your country.
> I suggest you arrange your affairs in order and head for home cowboy [Brazilian flag emoji].

[135] He copied then copied that message to Mr Torres along with a message which read:

> I will do my best to clean up Garcia, believe me, I will not stop until I am sure that lessons have been learned. Book him his plane ticket Enrique [aeroplane emoji] [Brazilian flag emoji]. Get him out of our country".

[136] Mr Garcia felt threatened by Mr McClung's messages and had also become fearful for his family's safety. He visited the local Police station and filed a complaint. He also had a trespass order prepared and arranged for installation of security cameras at his home.

[137] When Mr Rackham telephoned him that day Mr Garcia told him of his concerns and the messages received from Mr McClung. Mr Rackham then discussed the situation with his own manager and they decided to issue a non-association order to Mr McClung.

[138] The order, issued on 21 June, made two directions. The first, operating a provision in the Sentencing Act about the conditions for home detention, directed Mr McClung "to cease employment with Garcia contractors until further notice". The second directed him "not to associate with any person employed by Garcia Contractors or directors of Garcia Contractors". It also stated he "must not contact directly any person working at Garcia Contractors without prior written consent of a Probation Officer".

[139] Mr McClung signed a copy of the order, acknowledging its receipt, on 24 June. Mr McClung asked for, and Mr Rackham agreed to, an approved absence to attend the mediation with GCSL representatives scheduled at that time for 28 June.

[140] Mr Rackham had told Mr Garcia about the non-association order issued to Mr McClung. Mr Garcia asked to see a copy of it but Mr McClung, when asked to consent to this, refused. GCSL then advised MBIE's mediation service that the company representatives would not attend the scheduled 28 June mediation.

[141] On 1 July the terms of the non-association order were amended at Mr McClung's request. The order was altered so he was no longer prevented from contacting "any" employee of GCSL. Instead he was directed only not to associate with "the manager of Garcia Contractors or directors of Garcia contractors" and to "not contact the manager or directors of Garcia Contractors without prior written consent of a Probation Officer".

How did the employment end – resignation, abandonment or dismissal?

[142] In closing submissions GCSL's counsel provided a thorough analysis of the various concepts or legal frameworks that could be used to describe the end of Mr McClung's employment with GCSL. While those submissions have been carefully considered, the conclusions reached in this determination did not need to set out detailed discussion of the case law and principles regarding those concepts.

No unjustified disadvantages and no constructive dismissal

[143] Mr McClung's argument that his employment ended by constructive dismissal depended on a finding being made that he had resigned due to the company breaching duties owed to him or by conducting itself in a way intended to induce his resignation.

[144] The first difficulty with that claim was that Mr McClung had not expressly resigned from his employment. Rather he had refused to go to work on at least three days – 27 April, 29 May and 19 June – on the basis that he did not have to work unless the company agreed to demands he made for various payments. His own view was that the employment relationship remained on foot throughout.

[145] As apparent from extensive background described in this determination, refusing to work on a day or at a location required by the company was not a legitimate basis for pursuing such claims, even if they were made for good reason. He was not entitled to engage in what amounted to a 'one person strike' until the company did what he wanted it to do. It was not consistent with his own good faith duty to be active and constructive in maintaining a productive employment relationship.

[146] The second difficulty was that the concerns he raised did not meet the requirements for being found to be actions by GCSL that unjustifiably disadvantaged him. His claims regarding shortfalls in pay may, technically, have been breaches of duty owed to him by the company, for example getting the right hourly pay rate for driving the tractor. However this did not amount to an unjustified disadvantage because, when notified of the error, the company corrected it.

[147] The employer's duties are not a counsel of perfection. Rather their actions in meeting those duties are tested against the standard that applies to a fair and reasonable employer. Such an employer will consider concerns and correct errors where they are properly identified. The employer will be active, responsive, communicative and

constructive in doing so. The evidence, assessed overall, showed that was how GCSL behaved in dealing with concerns Mr McClung raised.

[148] Several matters he continued to pursue and repeat had already been dealt with soon after he raised his concern. For example, payment for what he might otherwise have earned from picking a bin while talking with Mr Garcia on 24 May was paid the following week. The concern about a short paid hour he raised on 25 May was, on his own evidence, fixed that week.

[149] Even if those matters were unjustified actions they did not meet the requirement of s 103A(5) that they were more than minor defects in the process followed by the employer and had resulted in him being treated unfairly.

No actual dismissal

[150] There was no instance where GCSL expressly dismissed Mr McClung. The only area of ambiguity concerned how the non-association order came to be made on 20 June and whether this could be seen as, indirectly, an action at the initiative of the employer amounting to a dismissal.

[151] GCSL, arguably, could have said Mr McClung had ended his employment by refusing to come to work from late May onwards. While it could have said he had repudiated his employment then, GCSL chose to affirm the relationship when asked by Mr McClung. The text messages sent to him on 7 June were unequivocal. As Mr Torres said, he was "still employed". As Mr Garcia's message to McClung on that same day made clear, Mr McClung was not dismissed but he was not attending work.

[152] By this time, and assessed realistically, there was clearly some element of deliberate manoeuvring or careful positioning apparent in the conduct and communication by both parties. Mr McClung wanted to be treated as dismissed, to advance his case, and GCSL was seeking to avoid the trap of having ended his employment without following a proper process.

[153] Whatever their respective motivations, both parties accepted they were still in an employment relationship. This state of affairs therefore governed the requirements on them when Mr McClung unexpectedly announced his wish to return to work on 18 June, Mr Garcia's advised work was available at Paengaroa on 19 June and Mr McClung did not attend work at that site on that day.

[154] In all the circumstances of Mr McClung's conduct to that date, Mr Garcia's decision to ask Mr McClung at a site where Mr Garcia was also present that day was one that a fair and reasonable employer could have made. As explained in Mr Garcia's oral evidence, winter pruning was about to get underway and Paengaroa was one of the sites where this usually started. There was work to be done and Mr McClung was asked to be there to do it.

[155] Mr Garcia was not aware of the detail of the arrangements for approved absences and whether the Paengaroa site fell within its scope. Even if he or another GCSL manager had seen and referred to the Direction Notice in effect for Mr McClung at that time, it said only that any orchard addresses out of the Athenree area (which is near Waihi) had to be specified. It did not say Mr McClung could only work in that area.

[156] Mr McClung himself had no initial concern that the terms of his Direction Notice would be breached by having to travel to Paengaroa, only that it was a long way to go. He demanded a travel allowance for it. He only took a different view when Mr Garcia made it clear that no allowance would be paid.

[157] In that light, the arrangement for work at Paengaroa was not an act that could be taken to amount to a dismissal.

[158] Similarly the chain of events which led to the Department of Corrections issuing its 21 June order directing Mr McClung to stop working for GCSL was not an action within the legal definition of a dismissal. It was not a termination of employment made at the initiative of the employer.[10] Neither had GCSL acted unfairly and unreasonably in providing Mr McClung's probation officer with the information which led to Corrections making its decision to issue the 21 June order.

[159] Mr Garcia's evidence established an honestly held belief that the nature and tone of Mr McClung's messages and other behaviour was threatening. Those were matters appropriately reported to the Police and Mr McClung's probation officer. It was something an employer, acting reasonably, could have done.

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[10] *EN Ramsbottom v Chambers* [2000] 2 ERNZ 97 at [19] and [20].

[160] The test of justification for considering an employer's actions refers to "all the circumstances". The circumstances here included two concerns Mr Garcia mentioned in his evidence. Mr McClung's text message in late May had referred to 'heavy artillery' and 'taking no prisoners'. While perhaps only figures of speech to Mr McClung, those words had alarmed Mr Garcia. He explained this alarm, in part, related to what was at that time the relatively recent terrorist attack in Christchurch in March 2019, carried out by a man with extreme nationalist views. In that context Mr Garcia was particularly sensitive to the text messages of 20 June which referred to his national origin and, as a New Zealand citizen, Mr McClung's texts which said Mr Garcia should go 'home' to Brazil.

[161] Those sensitivities were not unreasonable in light of Mr McClung's own evidence. Answering questions at the investigation meeting, Mr McClung said he regarded directors of company who preferred "foreigners to New Zealanders" as "traitors" and said New Zealanders were "thrown under the bus" by GCSL.

[162] Although Mr Garcia was unlikely to have known so at the time, Mr McClung had also been dismissed from a previous job by an employer who had reacted to being told that Mr McClung had made comments about killing that employer and his children.[11] In that earlier case Mr McClung was angry because his employer had declined a request to cash up some holiday pay entitlements, an issue echoed in his later dispute with GCSL.

The reality of how the employment ended

[163] GCSL's statement in reply to Mr McClung's application to the Authority said the company had "declined to offer more work" to Mr McClung "on advice from [his] parole officer". The evidence as it unfolded through the Authority investigation did not support that description of events.

[164] Rather, it showed Mr Rackham's conversations with Mr McClung and Mr Garcia on 19 and 20 June had revealed to him the extent that the employment relationship had become dysfunctional. When Mr Rackham and his manager reviewed that situation, they decided to issue the order which effectively put a formal end to the employment relationship with GCSL. It was not, on the available evidence, an action

[11] *McClung*, above n 5, at [7] and [34].

carried out at Mr Garcia's specific or implied request, so the employment could not be said to have ended at the initiative of GCSL. Rather it was the action of Department of Corrections officials attending to their responsibilities in implementing or supervising the conditions of Mr McClung's home detention sentence.

[165] Neither, however, was GCSL then "advised" not to provide more work to Mr McClung. This was simply prevented by the order. GCSL was not able to give him more work, even if it had wanted to.

[166] The order was made, as Mr Rackham said in his witness statement, for the sole purpose of keeping all parties safe given the hostility that was happening between them. However, as he said in his oral evidence, the reality by early June was that Mr McClung was not actually working for GCSL anyway.

[167] Mr McClung's actions in staying away from work on various days until his demands were met did not fall within the narrow scope of a term on abandonment in his permanent employment agreement. The term referred to the employee being absent "without notification to the employer". Mr McClung's frequent and extensive communication to GCSL about the days he refused to come to work, and why, meant he had notified the employer.

[168] However, the reality was that Mr McClung, by what he did through May and June 2019, clearly indicated that he had given up on observing the expectations and requirements of his employment relationship with GCSL.

[169] Ultimately, his employment ended because Mr McClung chose not to go to work. Its end was not imposed on him by an action of his employer. It was a consequence of him staying away and the nature and tone of his communication with Mr Garcia and Mr Torres then requiring the intervention of the Department of Corrections. There was no unjustified dismissal.

Other matters

[170] On 27 June 2019 Mr McClung lodged a complaint with the Labour Inspectorate. The Inspector's subsequent investigation established that shortfalls in payment of some holiday pay entitlements to Mr McClung were the result of a systemic flaw in the payroll programme used by the company. This was corrected by actions GCSL agreed with the Inspector through an enforceable undertaking.

[171] The Inspector's investigation did not disclose widespread failures by GCSL to meet minimum employment standards. In her evidence to the Authority the Inspector said Mr McClung's complaint was the only one she had received about GCSL.

[172] There was a delay in paying Mr McClung's annual leave for some months after it was clear his employment by GCSL was over. This was technically a breach of the Holidays Act. It occurred because, as the Inspector explained in her evidence, she had made the pragmatic suggestion to GCSL that it wait until she had finished her investigation so any payments made to Mr McClung were correct and final.

Outcome

[173] For the reasons given Mr McClung's personal grievance application is declined. He was not unjustifiably disadvantaged in his employment with GCSL. He was not unjustifiably dismissed.

Costs

[174] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed GCSL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter.

[175] From the date that memorandum is served Mr McClung would then have 14 days to lodge a reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. The parties could expect the Authority to determine costs, if asked to do so, on its usual daily tariff unless some particular circumstances or factors required upward or downward adjustment of that rate.[12]

Robin Arthur
Member of the Employment Relations Authority

[12] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].