

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 297
3136105

BETWEEN

MATAUAINA NONU
Applicant

AND

CONSTRUCTION
INDUSTRIAL SERVICES
LIMITED
Respondent

Member of Authority: Sarah Blick
Representatives: Applicant in person
No appearance for Respondent
Investigation Meeting: 20 April 2022 at Auckland
Determination: 06 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Matauaina (David) Nonu, says he was unjustifiably dismissed by Construction Industrial Services Limited (CIS) in January 2021, following several months off work due to a back injury. In a statement of problem lodged on 12 April 2021, he sought reasonable compensation for hurt and humiliation.¹ During the course of my investigation it came to my attention that an issue exists as to whether Mr Nonu raised his personal grievance for unjustified dismissal within the relevant statutory timeframe. While CIS did not lodge a statement in reply or attend the investigation meeting, its contact with the Authority confirmed its view is that Mr Nonu was not dismissed, but resigned from his employment.

¹ Mr Nonu did not seek reimbursement of lost wages nor has he amended his claim to include any.

Authority's Investigation

[2] There is some procedural history to this matter to be recorded.

[3] As noted, the statement of problem in this matter was lodged on 12 April 2021. On 15 April 2021, a copy of the statement of problem was delivered by courier and signed for at CIS's address for service. I am satisfied CIS was properly served with the statement of problem. CIS's statement in reply was due to be lodged by 29 April 2021.

[4] On 10 May 2021, an authority officer emailed the email address for CIS that had been provided by Mr Nonu in his statement of problem. The email advised of the date the statement of problem had been served on CIS, and of the due date for lodging a statement in reply, which had passed. The Authority advised that because a statement in reply had not been lodged, CIS now required the leave of the Authority to defend the application. Mr Chrisco Oelofse, one of CIS's directors, responded on the same date stating "we have been recently hacked and put under immense pressure to resolve immediate risks to the business". Mr Oelofse then sought an extension of time to 17 May 2021 to provide a response. Counsel for Mr Nonu did not oppose the extension sought, and it was granted by consent.

[5] On 18 June 2021 the Authority emailed the parties noting that the extension to lodge a statement in reply had been granted, but to date one had not been received. The Authority reiterated that CIS would require the leave of the Authority to defend the application.

[6] On 15 November 2021 the Authority emailed the parties to set up a case management conference. Mr Oelofse did not respond advising of his or CIS's availability to attend. The conference was held by another Authority Member on 29 November 2021, with Mr Nonu and his former counsel in attendance.

[7] On 3 December 2021 the Authority attempted to call mobile numbers listed on CIS's website for JD Van Rensburg, CIS's other director, and Mr Oelofse. The Authority was unable to contact JD Van Rensburg, as his mobile number appeared unavailable. However, an authority officer contacted and spoke to Mr Oelofse again. Mr Oelofse explained his view of the situation, being that Mr Nonu had not been dismissed. He also stated that due to the COVID-19 situation, CIS was struggling. He said he had been working seven days a week and that he did not have time to reply to

the Authority's emails or anything until next year (being 2022). He stated his concern that if CIS goes under, 60 people would lose their jobs. The authority officer explained to Mr Oelofse that this matter was to be dealt with, and Mr Oelofse confirmed his email address to send him directions issued by the Authority. Mr Oelofse indicated that he may reply explaining the situation of CIS, and told the authority officer not to contact JD Van Rensburg because he had enough on his plate at the moment.

[8] On 3 December 2021 the Authority issued directions recording timetabling directions made at the case management conference held on 29 November 2021. The directions timetabled the filing of any intended statement in reply that CIS wished to file, together with an explanation of the delay in filing to date, by 31 January 2022. CIS was also directed to file a copy of Mr Nonu's written employment agreement. A notice of investigation meeting was issued setting the matter down on 20 April 2022, advising that if the respondent did not attend the investigation meeting, the Authority may, without hearing evidence from it, issue a determination in favour of the applicant. A copy of the directions and notice of investigation meeting were emailed to the address from which Mr Oelofse had previously corresponded.

[9] On 1 February 2022 the Authority attempted to contact Mr Oelofse and left him a voice message asking about the intended statement in reply that was due to be filed by 31 January 2022. On the same date, the Authority emailed Mr Oelofse advising that the due date for filing had passed as per the timetabling set by the Authority, and asked for confirmation of when it will be receiving the documentation. No response was received from CIS or Mr Oelofse.

[10] On 2 February 2022, the Authority emailed the parties advising of its COVID-19 requirements for those attending in person at the investigation meeting on 20 April 2022, and asking for confirmation of who would be attending.

[11] Counsel for Mr Nonu subsequently withdrew as counsel, by which time the filing of his evidence was overdue.

[12] On 18 March 2022 an Authority Officer spoke to Mr Oelofse again over the phone. He stated he did not have time to send any documents, and that he is trying to keep up with the business without his partner who was offshore. He stated that Mr Nonu had resigned from his job and that was all there was to say. The Authority Officer

agreed to send Mr Oelofse all relevant documents from the Authority file by email. On the same date, the Authority emailed both Mr Nonu and Mr Oelofse attaching the relevant documents. The email reminded Mr Oelofse that the Authority had not received a statement in reply, and that the next deadline for CIS was 25 March 2022, by which time it was to file witness statements and any additional documents. Neither recipient responded to the Authority's email.

[13] Subsequent telephone calls to Mr Nonu and Mr Oelofse prior to the investigation meeting date were unsuccessful.

[14] Mr Nonu did not file any witness statements or additional documents, nor did CIS.

[15] On 20 April 2022, Mr Nonu and his partner attended the investigation meeting. There was no appearance for CIS. I was satisfied that CIS had been served with the notice of investigation meeting. After a delay, the Authority proceeded with the meeting in the absence of CIS. I heard evidence from Mr Nonu who fully answered questions under affirmation from the Authority.

[16] At the request of the Authority, Mr Nonu later filed ACC records relating to a return to work plan to CIS following his back injury, and an IRD summary of his earnings for the relevant period. These documents were subsequently served on CIS at its address for service. CIS has not contacted the Authority acknowledging receipt of those documents.

[17] Additionally, at the Authority's request, information was received with consent from Mr Nonu's former counsel by email, which has assisted with establishing some key facts. The Authority sent that information by email to CIS, which has not replied or acknowledged receipt of that email.

[18] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence received, and fully considered, in the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[19] The following are the issues for investigation and determination:

- a. When and how did Mr Nonu raise a personal grievance with CIS about the ending of his employment?
- b. If a personal grievance claim is properly before the Authority, was Mr Nonu dismissed, or did he resign?
- c. Is a personal grievance established in light of the test for justification under s 103A of the Act?
- d. If Mr Nonu has a personal grievance, what remedy should be awarded?
- e. Should any remedy be reduced (under s124 of the Act) for blameworthy conduct by Mr Nonu that contributed to the situation giving rise to his grievance?
- f. Should either party contribute to the costs of representation of the other party?

Background

[20] Mr Nonu gave unchallenged evidence and I accept his general recollection of events is more likely than not to be correct.

[21] Mr Nonu was employed by CIS in around April 2018 on a fulltime permanent basis. He was employed as an asbestos removalist as part of a team. Mr Nonu did some asbestos removal work for CIS, but then was required to do cladding work for around a year, which he says was not what he was hired to do. CIS told Mr Nonu that asbestos work would become available, but to a large extent it did not. Mr Nonu was paid \$28.50 per hour for asbestos work, whereas he was paid only \$25 per hour for doing cladding work.

[22] While he received a written employment agreement, Mr Nonu does not have a copy of it. CIS did not file a copy of the agreement as directed by the Authority.

[23] Mr Nonu was injured on a CIS job site on 27 August 2020 and did not work for several months. The ACC records stated his injury type was a lower lumbar back sprain. Mr Nonu had become a supervisor not long before his back injury.

[24] After a number of months off work Mr Nonu was ready to return to work. The return to work process involved medical information being provided to CIS. The ACC

records show “Employer comments” from CIS regarding Mr Nonu’s return were as follows:

- a. there are no light or alternative duties available;
- b. Mr Nonu must be fully fit to return to completing his pre-injury job tasks;
- c. it was unable to accommodate a gradual return to work programme over the Christmas period; and
- d. it shuts down between 21 December 2020 until 4 January 2021.

[25] The ACC records do not state who from CIS provided these comments.

[26] Although Mr Nonu could not recall the date of the meeting, he met with a product manager from CIS and an ACC case worker and they agreed on his full return to work. Shortly prior to 14 January 2021, Mr Nonu called CIS and spoke to Mr Oelofse to confirm that 14 January 2021 would be the date of his return to work. During the call Mr Oelofse advised Mr Nonu not to go onto the job site but to come in for a meeting at CIS’s office.

[27] Mr Nonu’s evidence is that on 14 January 2021 he went to CIS’s office as requested, and met with Mr Oelofse. Mr Oelofse told Mr Nonu he had a few things to say to him. Mr Oelofse sat him down and laid out how he was seeing things on his side of the company. He said he could not afford to pay Mr Nonu at the asbestos pay rate, or \$30 per hour due to Mr Nonu holding a class B ticket. Mr Nonu explained his back injury and said he was now fit again. Mr Nonu told Mr Oelofse that he would not mind being paid \$28 per hour instead of \$30 per hour. Mr Oelofse told him to look for another job, and that if he needed help finding another job, CIS would try to help out with support letters. Mr Nonu felt he was being pushed out and told to leave the company.

[28] Mr Nonu says that a couple of days later, on 16 January 2021, he called and spoke to Mr Oelofse and resigned from his employment over the phone. Mr Oelofse told him that was okay, and said he was busy and would let Mr Nonu know about providing him with documentation confirming his credentials and letters. Mr Nonu has still not received credentials or support letters from CIS. When asked by the Authority why he gave notice of resignation, Mr Nonu said he felt he was being forced to resign and thought he needed to, as there was nothing he could do about the situation.

[29] Mr Nonu says that he has a friend who still works at CIS who has class A and B ticket now and who is still doing asbestos work.

Discussion

Did Mr Nonu raise his personal grievance within the statutory timeframe?

[30] Section 114 of the Act provides that a personal grievance must be raised with an employer within a period of 90 days.² The period begins with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised outside the statutory timeframe.

[31] In relation to s 114(2) and how a grievance is raised the Employment Court said in *Creedy v Commissioner of Police*:

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ... As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[32] Mr Nonu's evidence was that it was agreed with CIS that he would return to work on 14 January 2021. The ACC records, however, state:

David stated he completed a FRTW on the 04/01/2021 at the expiry of his medical certificate. He reported he was let go from his employer. David advised that the employer reported that they did not have enough work for him to complete. He stated that he is working part time for a friend in another asbestos company. Occupational therapist discussed discharge as he completed a FRTW from the 04/01/2021. Occupational therapist telephoned the employer and he reported that David came into work on the 04/01/2021 and handed in his notice effective from the 05/01/2021.

[33] The Authority understands "FRTW" means "full return to work". Despite the ACC records indicating his intended return to work was 4 January 2021, in both his statement of problem and in his evidence Mr Nonu was very clear that he was to return

² Section 114 Employment Relations Act 2000.

to work on 14 January 2021. He was equally clear that his in-person conversation with Mr Oelofse occurred on the latter date.

[34] The date Mr Nonu's employment ended is important. If it was on 5 January 2021 (being the date recorded in the ACC records) it appears his personal grievance was raised within 100 days, being the date the Authority served his statement of problem on CIS, namely 15 April 2021. This would mean Mr Nonu raised his personal grievance outside the 90 day timeframe in s 114 of the Act. If the date his employment ended was 16 January 2021 (a couple of days after his meeting with Mr Oelofse) his personal grievance was raised just within 90 days.

[35] Following the investigation meeting, the Authority made an inquiry with Mr Nonu's former counsel as to the date Mr Nonu's employment ended, and whether counsel or Mr Nonu had advised CIS of his personal grievance prior to filing the statement of problem.

[36] Counsel helpfully responded with Mr Nonu's consent. Counsel confirmed Mr Nonu's evidence is that he resigned on 16 January 2021. Counsel noted Mr Nonu does not have any proof of the date as it occurred by a phone call to CIS, and his phone call records would be in his old phone which unfortunately stopped working and has since been replaced.

[37] Counsel further advised that no issues were raised with CIS after Mr Nonu resigned on 16 January 2021 until the date the statement of problem was filed. The Authority and counsel's email correspondence was forwarded to Mr Oelofse's email address. No response has been received from Mr Oelofse or CIS disputing Mr Nonu's recollection.

[38] I am satisfied the statement of problem was served on CIS on 15 April 2021 and that its contents would have made CIS sufficiently aware of Mr Nonu's grievance. Based on Mr Nonu's direct evidence which has not been challenged by CIS, and the fact the ACC records have not been verified for their accuracy or completeness, I accept his evidence that he resigned from his employment on 16 January 2022. I am therefore satisfied that Mr Nonu raised his personal grievance with CIS just within the 90 day timeframe.

Was Mr Nonu unjustifiably constructively dismissed?

[39] Having found Mr Nonu has raised a personal grievance within time, I now consider whether he was constructively dismissed.

[40] It is well established that an employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- a. an employer gives an employee a choice of resigning or being dismissed.
- b. an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. an breach of duty by the employer causes an employee to resign.³

[41] Mr Nonu's unchallenged evidence shows his situation falls into the third category. If a dismissal is caused by a breach of duty, the questions for consideration are then whether:

- a. the breach of duty by the employer caused the employee's resignation, and if yes;
- b. whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.⁴

Did CIS breach a duty causing Mr Nonu to resign?

[42] Despite being off work for a number of months, Mr Nonu's employment continued throughout the period he received ACC payments. I find that CIS agreed to a date for Mr Nonu's return to work, then reneged on that agreement without making it clear why, and without giving Mr Nonu a fair opportunity to comment on that decision or provide further information which might be relevant. Based on Mr Nonu's unchallenged evidence, Mr Oelofse made it clear to Mr Nonu that CIS would not be offering him any further work, either on the day of his return to work, or subsequently. I am satisfied CIS breached its duty to allow Mr Nonu to return to work. This breach of duty compelled Mr Nonu to offer to accept less pay as a result.

³ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

Was Mr Nonu's resignation reasonably foreseeable given the nature of the breach?

[43] After agreeing to Mr Nonu's return to work via its previous interactions with him, reneging on that agreement, then declining his offer to accept less pay, Mr Nonu's resignation in the circumstances was readily foreseeable. He has established that he was unjustifiably constructively dismissed.

Remedies

[44] As Mr Nonu has established a personal grievance for unjustified constructive dismissal, he is entitled to a consideration of the remedy sought.

Compensation for humiliation, loss of dignity and injury to feelings

[45] Mr Nonu says he felt mistreated and used – CIS directed him to do cladding work for a long time, which involved a large amount of heavy lifting while waiting for the asbestos work he was meant to be doing. He says once he became injured doing the cladding work, he was pushed out by CIS. The ACC records show Mr Nonu reported feeling frustrated due to his loss of independence following his lower lumbar back injury. When he finally was fit to return to work, he was instead constructively dismissed. He says he lost confidence as a result of his treatment.

[46] Mr Nonu says he had been working hard to upgrade his tickets to class A and B while working at CIS, and that he would have upgraded his tickets by now. He says he struggles to stay on top of bills now, and is no longer in stable full time employment. He says he is doing general labour work at lower pay, which is not the work he wants to be doing. He says he did asbestos work for nearly four or five years, and is looking for more asbestos work. He says when he worked for CIS, he did not have to worry about pay and just got the mahi done.

[47] Mr Nonu says he has no proof or evidence of the work he carried out at CIS when he applied for jobs. The Authority strongly encourages CIS to now be proactive in providing Mr Nonu with documentation it holds relating to any certificates, qualifications or other credentials obtained by him during his employment with CIS.

[48] I accept that Mr Nonu was upset and distressed as a result of his dismissal. I award Mr Nonu the sum of \$18,000 as compensation under s 123(1)(c)(i) of the Act.

Contribution

[49] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[50] I find there was no contribution on Mr Nonu's part for the purposes of s 124 of the Act, and there are to be no deductions from the remedies awarded for reasons of contribution.

Costs and filing fee

[51] Mr Nonu says he did not pay legal fees to his former counsel except for a small amount associated with attending mediation. Costs associated with attendance at mediation are not normally recoverable in the Authority.

[52] Mr Nonu is entitled to recover the Authority's filing fee, being \$71.56. I accordingly order CIS to pay that amount to Mr Nonu within 28 days of the date of this determination.

Summary of orders

[53] Mr Nonu was unjustifiably constructively dismissed.

[54] Construction Industrial Services Limited is to pay Mr Nonu within 28 days of the date of this determination:

- a. \$18,000 under s 123(1)(c)(i) of the Act;
- b. \$71.56 being the Authority's filing fee.

Sarah Blick
Member of the Employment Relations Authority