

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 233
5586184

BETWEEN

LIAN CHING OH
Applicant

AND

FLETCHER CONCRETE AND
INFRASTRUCTURE
LIMITED (T/A FIRTH)
Respondent

Member of Authority: Vicki Campbell

Representatives: Aishleen Suiters for Applicant
Rebecca Rendle for Respondent

Investigation Meeting: 20 May 2016

Submissions Received: 27 May 2016 from Applicant
3 June 2016 from Respondent

Determination: 7 July 2016

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Mr Lian's employment were affected to his disadvantage by an unjustifiable action by Fletcher Concrete and Infrastructure Limited.**
- B. Fletcher Concrete and Infrastructure Limited is ordered to pay to Mr Lian the sum of \$6,000 under section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Lian Ching Oh claims one or more conditions of his employment were affected to his disadvantage by unjustifiable actions of Fletcher Concrete and Infrastructure Limited (Firth), and that Firth has breached its statutory obligations of good faith.

[2] Firth denies the claims and says that Mr Lian failed to raise aspects of his claims, in particular his allegations of bullying, in accordance with the group Discrimination, Bullying and Harassment Policy.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Lian and Firth 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.

Background

[4] Mr Lian commenced employment with Firth on 2 April 2013 in the position of Sales Engineer (Retaining Wall Systems). The terms and conditions of his employment were set out in an individual employment agreement dated 26 March 2013.

[5] In or about April 2014 Mr Jason Glennon, Head of Human Resources, and Mr Steve Crossland, Technical and Specifications Manager, met with Mr Lian to discuss with him concerns raised by two female employees about comments Mr Lian had made to them. The two employees did not wish to make a formal complaint but they found some comments made by Mr Lian to be offensive. Mr Glennon and Mr Crossland told Mr Lian that the comments were inappropriate. Mr Lian apologised.

[6] On 9 April 2015 Mr Johnston also had cause to speak with Mr Lian about a complaint made by another female employee regarding Mr Lian's conduct. This was treated informally and no action was taken against Mr Lian.

[7] On 11 August 2015 Mr Lian met with Mr John Johnston, Head of Masonry, Dricon and CSP Pacific. Mr Johnston raised concerns about Mr Lian's performance, in particular his attendance at work and notification of absences. Mr Lian raised

concerns about his manager, Mr Crossland and requested a change in reporting line. At this time Mr Crossland was addressing performance concerns with Mr Lian.

[8] Mr Johnston, who was aware of some friction between Mr Lian and Mr Crossland considered Mr Lian's request but declined to move his reporting line on the basis that the discussions Mr Crossland was having with Mr Lian were about performance concerns and were within his rights as Mr Lian's manager.

[9] The performance concerns being raised by Mr Crossland included:

- a) Communication – failing to communicate verbally with Mr Crossland;
- b) Hours of work – Mr Lian had been arriving at work late, leaving early and working from home without notification or permission;
- c) Performance reporting – Mr Lian was requested to log projects and enquiries onto Firth's Sales Force system. Mr Lian had undertaken training in the system on 22 June 2015 and as at 17 August 2015, Mr Lian had logged on only three times and had not entered any projects;
- d) Risk management – Mr Lian was asked to obtain a copy of the software for the ERF database, determine its suitability and, if suitable, to start using it. This did not appear to have happened.

[10] On 17 August 2015 Mr Lian received a letter inviting him to attend a meeting with Mr Crossland and Mr Glennon. The purpose of this meeting was to discuss an allegation that Mr Lian had been seen in the female bathrooms and to continue the discussions regarding concerns about Mr Lian's performance. Mr Lian was advised that a decision had been made to suspend him until such time as the investigation had been completed.

[11] Mr Lian met with Mr Crossland and Mr Glennon as scheduled in the letter, on 18 August 2015. He provided a written response to the allegation regarding the bathroom incident which he denied, requested that it be retracted and requested more information about the allegation.

[12] Mr Lian received a letter dated 27 August 2015 containing a new allegation of serious misconduct. The allegation related to information Mr Crossland had discovered while searching for a photo of Mr Lian on the internet. The information was from the Companies Register and showed that Mr Lian had made an annual return for his company Ground Anchorage Limited (Ground Anchorage). Mr Crossland was concerned that Mr Lian may be undertaking work for Ground Anchorage while he was employed to work for Firth. Mr Lian was requested to provide documentation evidencing the company's earnings during the period of Mr Lian's employment with Firth.

[13] Mr Lian met with Mr Crossland and Mr Glennon on 1 September 2015 to discuss the second allegation. At this meeting Mr Lian was advised that the allegation that he had been in the female bathroom was no longer being pursued. Notwithstanding his assurances, Mr Lian requested Firth confirm this notification in writing to him.

[14] In relation to the new allegation Mr Lian assured Firth that he was not working in the business and that he only filed a tax return because of a patent for a formulation system that might one day turn into a business opportunity for him. Mr Lian was requested to provide financial information relating to the business.

[15] On 2 September 2015 Mr Lian provided a further written response to the new allegation together with a copy of the 2015 tax return for Ground Anchorage.

[16] Mr Crossland was not satisfied with the information he received and requested further information from Mr Lian which he provided on 9 September 2015. Mr Lian provided Firth with copies of Inland Revenue documentation for the years 2013, 2014 and 2015. These documents demonstrated that Ground Anchorage had not incurred any tax liability between 2013 and 2015 and was not trading.

[17] Mr Lian remained suspended from his employment and on 24 September 2015 he requested Firth attend mediation and that he be reinstated to his position and the suspension be lifted. Firth agreed to attend mediation and confirmed its verbal notification of 1 September 2015 that the allegation about him being seen in the female bathroom had been dropped.

[18] On 5 October 2015 Firth confirmed again that the initial allegation for which Mr Lian had been suspended had been dropped on 1 September 2015 and that Mr Lian's suspension continued due to the allegation that Mr Lian may have been operating his own business in competition with Firth. Mr Lian was advised that given the highly competitive market and his access to sensitive and confidential information, suspension was considered an appropriate precautionary measure.

[19] On 8 October 2015 Mr Lian was invited to attend a disciplinary meeting which was to take place on 20 October 2015. The meeting was to discuss the allegations about Mr Lian's performance that had been raised in August and the continuing concerns that Mr Lian was operating a business in competition with Firth. Mr Lian was asked to provide a summary of his personal earnings.

[20] Mr Lian's personal tax summaries for the period from 2013 to 2015 were provided to Firth on 13 October 2015. The following day Mr Lian, through his lawyer, raised concerns about Mr Crossland continuing to be a decision maker in the disciplinary process and raised concerns that he was subjected to bullying by Crossland and was being victimised by him. Despite Firth's view that Mr Crossland would be fair and impartial, Mr Johnston, was appointed decision maker.

[21] The disciplinary meeting proceeded on 20 October 2015 as scheduled. Mr Johnston commenced the meeting by confirming that Firth was satisfied with Mr Lian's explanations regarding the operating of Ground Anchorage and advised Mr Lian that that allegation was being withdrawn.

[22] The meeting resulted in a warning being issued to Mr Lian relating to his performance and it was agreed that Mr Lian would return to work the following day. The warning has not been challenged and is therefore not part of these proceedings.

Issues

[23] The issues for determination are:

- a) Whether one or more conditions of Mr Lian's employment were affected to his disadvantage by an unjustified action by his employer; and

- b) Whether Firth has breached its statutory obligations of good faith.

Relevant policies

[24] Firth has documented a number of policies germane to this matter and I have set out below the relevant parts of those policies.

Code of Conduct

[25] Firth has documented the standards it expects from its employees and has set out examples of misconduct which it considers to be serious and less serious. Included in the list of actions and types of conduct which are not acceptable under any circumstances are:

- o) The display of any form of sexual or other harassment towards another staff member on Company premises.
- ...
- r) Conflict of interest – an employee of Fletcher Concrete and Infrastructure Limited who is engaged in any activity which prejudices his/her ability to carry out his/her responsibilities in the best interest of Firth or benefits others in competition with the Company is considered to have a ‘conflict of interest’. Conflict may include:
- Purchasing goods at staff rates for the purpose of resale and personal gain.
 - Disclosing information to others about production methods, pricing or other matters which should remain confidential to Firth.
 - Working or having an interest in another business or organisation that competes with Firth.
 - Having a close relative working for/with a competitor of Firth.
 - Accepting gifts, including loans, entertaining etc from customers or suppliers of Firth without prior permission from your manager.

Bullying, Discrimination and Harassment Policy

[26] Firth has defined bullying in the workplace as a form of harassment and as behaviour directed towards a person or group of people by another person or group of people within Fletcher that is repeated, unreasonable and which creates a risk to health and safety. The policy states:

Repeated behaviour refers to the persistent nature of the behaviour and can involve a range of behaviours over time.

One-off incidents of unreasonable behaviour are not generally considered to be workplace bullying. However, a single serious incident may constitute harassment and/or a breach of company policy, and accordingly such behaviour is not acceptable.

The behaviour(s) do not have to be directed towards just one person.

Unreasonable behaviour means behaviour that a reasonable person, having considered the circumstances, would see as unreasonable; including behaviour that is victimising, humiliating, intimidating or threatening.

...

Bullying behaviour can range from obvious verbal or physical assaults to subtle psychological abuse.

However, it is *not* workplace bullying for managers or supervisors to take reasonable steps to direct and control the operational requirements of the business...

[27] The policy sets out the steps to be taken by employees who believe they have been subjected to bullying. The policy states that Firth prefers to resolve the situation by using its own resources but acknowledges that employees may choose to seek advice and assistance externally to Firth.

[28] A formal complaint will arise where a complainant provides details of the issues for Firth to investigate and to take appropriate action including disciplinary action. The policy states:

The details of the complaint will generally be recorded in writing. Formal complaints cannot be made anonymously except in the most serious of situations i.e. where there are reasonable and credible threats of violence or significant harm to the individual. If a complainant does not want to have their identity and/or details of their complaint provided to the person complained of, we are unlikely to be able to take any action.

Unjustified disadvantage

[29] Mr Lian claims one or more conditions of his employment were affected to his disadvantage as a result of unjustified actions by Firth when it suspended him on 17 August 2015, when he was subjected to bullying by his manager Mr Crossland and when Firth breached its statutory obligations of good faith.

[30] Pursuant to section 103A I must be satisfied on the balance of probabilities that one or more conditions of Mr Lian's employment were affected to his disadvantage due to the employer's unjustified action. This requires a two-step process, firstly I must be satisfied of the disadvantageous actions and then I must determine whether those actions were justifiable.

[31] The statutory test of justification contained in section 103A of the Act provides for the question of whether an action was justifiable to be determined on an objective basis, having regard to whether the employer's action, and how the

employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[32] In applying the test in section 103A of the Act, the Authority must consider the non-exhaustive list of factors outlined in section 103A(3) of the Act:

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

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

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

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[33] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.¹

[34] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[35] As a full Court observed in *Angus v Ports of Auckland Ltd*²

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

¹ Employment Relations Act 2000 (the Act), section 103A(5).

² [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

Suspension

[36] There is no dispute that Mr Lian was suspended on 17 August 2015. Mr Lian was notified of the decision to suspend him in the letter inviting him to attend a disciplinary meeting.

[37] The employment agreement provides for suspension in the following terms:

- 30) Suspension
 - a) In the event of a serious issue, the Company may consider it necessary for the protection of its operational and business interests, to suspend you from work on pay, while it conducts an investigation into your conduct or performance. While suspension is usually on pay, the Company has the right to suspend without pay if it decides it to be appropriate.

[38] The employment agreement allows for suspension where it is necessary for the protection of Firth's operational and business interests.

[39] Where an employer is proposing to make a decision, such as to suspend an employee, which will or is likely to have an adverse effect on the continuation of the employee's employment, an employer is obliged to consult prior to making that decision.³

[40] Mr Lian says that framing the allegation that he had been seen in the female bathroom as sexual harassment elevated the allegation to a level of seriousness that was unnecessary and unwarranted in the circumstances. Mr Lian also says that there was no need to suspend him, he had been in the workplace between the date the allegation was made (13 August 2015) and the date of his suspension (17 August 2015) and this wasn't viewed as problematic.

[41] At the meeting on 18 August 2015 the allegation regarding Mr Lian being in the female bathroom was explained to him and he was advised that if the complaint was substantiated, it could amount to sexual harassment/serious misconduct and could result in summary dismissal. Mr Crossland also raised concerns about Mr Lian's performance and information was provided to him about those concerns. Mr Lian was asked whether he agreed with the intention to suspend him. In response Mr Lian nodded. Firth says it was after this that the suspension was then confirmed.

³ The Act, section 4.

[42] Mr Glennon acknowledged at the investigation meeting that there was no operational or business need for Mr Lian to be suspended on 17 August 2015 and there was no risk that he would interfere in the investigation.

[43] I have concluded the allegation that Mr Lian may have been in the female bathroom does not fit Firth's definition of sexual harassment. There was no allegation that Mr Lian had made any request for sexual intercourse or other form of sexual activity, and neither was there any allegation that he had used language, physical behaviour or visual material of a sexual nature. At the investigation meeting Mr Crossland and Mr Glennon both acknowledged that the allegations, even if proven, did not fall into the definition of sexual harassment.

[44] Firth says it consulted with Mr Lian on its proposal to suspend him when it was put to him at the meeting on 18 August 2015. I am not satisfied that was the case. Certainly a proposal to suspend Mr Lian was put to him for his response on 18 August 2015 but this was after Mr Crossland had informed Mr Lian in writing, in unequivocal terms that he had made the decision to suspend him. I am not satisfied that the evidence that he nodded his head during the 18 August 2015 meeting constituted Mr Lian's agreement to a proposal to suspend him. Besides by 18 August 2015 Mr Lian was already suspended, the decision having been made on or before 17 August 2015.

[45] Firth says that the allegation was deemed serious because of the April 2014 and April 2015 incidents which had been raised with Mr Lian. As well as the discussions in April 2014 with Mr Glennon and Mr Crossland, Mr Johnston had spoken to Mr Lian on 9 April 2015 about complaints that Mr Lian had inappropriately conducted himself towards a female employee.

[46] Reliance on the previous concerns raised with Mr Lian to justify escalating the bathroom incident to sexual harassment ignores the fact that no action was taken against Mr Lian for the previous actions. Further, Firth acknowledged at the investigation meeting that full information relating to one of the incidents from 2014 had never been provided to Mr Lian and he therefore had no opportunity to properly respond to that incident.

[47] The allegation of sexual harassment was withdrawn on 1 September 2015. Mr Lian remained on suspension because Mr Crossland had discovered information which led him to be suspicious that Mr Lian was conducting his own business in competition with Firth.

[48] Mr Lian says he was suspended twice, once on 17 August then again on 1 September 2015. I am satisfied Mr Lian was suspended once. The initial suspension related to allegations of sexual harassment and became continuous when the new allegations were raised on 27 August 2015.

[49] I am satisfied the suspension of Mr Lian on 17 August 2015 was unnecessary and unwarranted in the circumstances of the allegation made about him. Firth's actions of suspending Mr Lian were not the actions an employer acting fairly and reasonably could have taken in all the circumstances at the time.

[50] The allegation that Mr Lian may have been working in competition with Firth while employed by it was understandable given Mr Lian's absences and tardiness in arriving at work.

[51] However, Mr Crossland acted despite Firth being fully aware that Mr Lian had a registered company and that he had used the company as a vehicle for business prior to starting work with Firth. If Mr Crossland had taken the time to discuss the matter informally with Mr Lian he would have discovered that Mr Lian had been advised to keep the company registered to protect intellectual property developed through his business and that the annual returns were effectively "nil returns" due to the company not trading.

[52] There has been no satisfactory explanation from Firth as to why, following receipt of all information requested by Firth regarding Mr Lian's business, he was not allowed to return to work as early as 10 September 2015. As held in *Frank v Air New Zealand Limited*⁴ a suspension that continues beyond a reasonable time period reaches a stage where the suspension is a punishment. At that stage it is no longer an operational suspension but a disciplinary one. As in the *Air New Zealand* case Mr Lian's suspension had reached the stage of punishment when it had not yet been established that Mr Lian deserved to be punished.

⁴ AEC65/95, Employment Court, Auckland, 5 July 1995.

[53] Firth has not satisfied me it was justified in first suspending Mr Lian on 17 August and then continuing the suspension until 20 October 2015. I am satisfied one or more conditions of Mr Lian's employment were affected to his disadvantage as a result of the unjustified suspension. He is entitled to a consideration of remedies for this unjustified disadvantage.

Bullying

[54] Mr Lian claims one or more conditions of his employment were affected to his disadvantage as a result of being bullied by Mr Crossland. Mr Lian says the bullying arose during the disciplinary process and in the context of actions he took in 2014.

[55] The issue of bullying was raised with Firth on 24 September 2015. Mr Lian says that the allegations of serious misconduct were raised against a background of tension between himself and Mr Crossland, in particular actions taken by Mr Lian in 2014 when he raised concerns with Mr Crossland in respect to the sale of Keystone Compac IV units.

[56] Mr Lian's oral evidence at the investigation meeting confirmed that he was treated fairly after the incident over the Keystone product. In particular he confirmed that during two performance assessments undertaken by Mr Crossland he was rated fairly.

[57] It was common ground that when Mr Lian met with Mr Johnston on 11 August 2015 and Mr Lian asked for a change in reporting line, he did not raise with Mr Johnston any concerns that he was being bullied or had been subject to any bullying behaviour by Mr Crossland. However, Mr Johnston was aware from 11 August 2015 that the relationship between Mr Crossland and Mr Lian was strained.

[58] Mr Lian failed to turn up for work on 7 August 2015, instead he worked from home without any prior approval and he was then late to work on 10 August 2015. Mr Crossland raised these concerns with Mr Lian on 10 August before Mr Lian then met with Mr Johnston on 11 August 2015 and requested a change in manager.

[59] It was a reasonable conclusion by Mr Johnston that Mr Lian raising his relationship with Mr Crossland was related to the performance concerns being raised by Mr Crossland.

[60] I am satisfied Mr Crossland was working through performance concerns with Mr Lian during his employment and that this was not bullying in nature but consisted of genuine concerns he held about Mr Lian's performance.

[61] Mr Lian says that he was bullied by Mr Crossland when he commenced the disciplinary process against him just days after Mr Lian had raised concerns about his strained relationship with Mr Johnston. Mr Johnston confirmed that he advised Mr Crossland of his discussion with Mr Lian, in particular Mr Lian's request to have a different manager.

[62] Mr Lian says Mr Crossland used the disciplinary process to intimidate and threaten him and that it was unwarranted and unreasonable. Mr Lian says also that the allegation that he had been seen in the female bathroom was unreasonably elevated to an allegation of sexual harassment. Mr Lian says Mr Crossland was purposefully elevating the allegation so that he could threaten Mr Lian with dismissal. Mr Lian says this action was unwarranted, unduly oppressive and added unnecessary humiliation and intimidation to the disciplinary process.

[63] I am not satisfied Mr Crossland embarked on the disciplinary process with the intention of humiliating and intimidating Mr Lian. Mr Crossland was under an obligation to raise the allegation with Mr Lian and based on the previous concerns raised with Mr Lian about his conduct he believed he had done the correct thing in raising the issue in the context of serious misconduct.

[64] When Mr Crossland discovered that there was a possibility Mr Lian was working for his own company in competition to Firth he was also entitled to raise that matter and to put Mr Lian on notice of the seriousness of the allegation should it be proven.

[65] Mr Lian has not established to my satisfaction that Mr Crossland's actions in pursuing the disciplinary process as he did constituted bullying conduct.

[66] Even if I had found there was bullying by Mr Crossland the factors raised regarding the allegation of bullying are also the factors relied on by Mr Lian to support his claim that his suspension was unjustifiable. It is not appropriate for there to effectively be a double jeopardy approach applied. The fact that Firth got the

suspension wrong has already been dealt with and remedies for that action by Firth will be dealt with when the Authority deals with remedies.

Breach of good faith

[67] Mr Lian claims one or more conditions of his employment were affected to his disadvantage when Firth breached its obligations of good faith. Mr Lian says Firth deliberately failed to:

- provide Mr Lian with all relevant information during a disciplinary process;
- end Mr Lian's suspension when there were no valid grounds for an ongoing suspension;
- advise Mr Lian of the investigations undertaken in respect of historic allegations of sexual harassment; and
- provide Mr Lian with the complaints provided by staff.

[68] The duty of good faith is set out in section 4(1) of the Act which states:

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

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

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

...

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

Failure to provide all relevant information during a disciplinary process

[69] Mr Lian says Firth failed to provide to him the identity of the complainant in relation to the alleged bathroom incident, a statement or notes from discussions with the complainant and meeting minutes.

[70] After Mr Lian sought legal advice his lawyer requested several times for documentation relating to the allegation of sexual harassment. After reviewing all the documents I am satisfied the requests for further information were made after Mr Lian had been notified that the allegation was withdrawn. In those circumstances there was no breach of good faith when Firth did not provide the information.

Failure to end the suspension

[71] Mr Lian says Firth failed to end his suspension when the allegation of sexual harassment was not being pursued and/or immediately he had provided the information showing that he was not actively operating Ground Anchorage.

[72] The factors raised under this heading are also the factors relied on by Mr Lian to support his claim that his suspension was unjustifiable. As stated earlier it is not appropriate allow a double jeopardy approach. Remedies for that action by Firth will be dealt with when the Authority deals with the compensatory award in relation to the unjustified disadvantage for the suspension.

Historic allegations of sexual harassment and failure to provide complaints from staff

[73] Mr Lian says he learned of the historic allegations of sexual harassment when disclosure for the preparation of these proceedings was made. Firth denies this and says Mr Lian was advised verbally of complaints made by three female employees in April 2014 and 9 April 2015. I am satisfied Mr Lian was aware of the historic allegations prior to 17 August 2015. While full information may not have been provided to him at the time I have accepted Mr Glennon's evidence that he and Mr Crossland discussed the first two complaints with Mr Lian in April 2014 and I have accepted Mr Johnston's evidence that he discussed a further complaint with him on 9 April 2015.

[74] Firth has acknowledged that it obtained statements from at least two employees involved in the historic complaints. However, I am satisfied the statements were not considered as part of the disciplinary process relating to the initial allegations of sexual harassment and were only obtained after Mr Lian had filed these proceedings in the Authority.

[75] I find overall that except to the extent I have found Mr Lian has established a personal grievance in respect of his suspension, Firth has not breached its obligations

of good faith toward Mr Lian. Mr Lian has not established a personal grievance as a result of any breaches of good faith and no penalty or other remedies will be imposed.

Remedies

[76] I have found Mr Lian has a personal grievance for unjustified disadvantage in relation to his suspension. Mr Lian is entitled to a consideration of remedies for that personal grievance.

[77] Mr Lian seeks payment of compensation for humiliation, distress and loss of dignity and claims reimbursement of his legal expenses either by way of lost benefit⁵ or by way of special damages.

Compensation for humiliation, distress and injury to feelings

[78] When Mr Lian returned to work on 21 October 2015 he had been suspended from his employment since 17 August 2015. A period just over nine weeks.

[79] Mr Lian told me that when he returned a new employee was working at his desk utilising his computer and laptop. Mr Lian said this employee had been working for Firth since the date of his suspension and that when he returned to work he discovered a number of his files had been deleted from the system during his suspension. Mr Lian told me that when he discussed this with the new employee, he was told that he [Mr Lian] was not expected to return to work.

[80] I am satisfied the employee who started work on 17 August 2015 was appointed as a Graduate Engineer, a new position which had been approved during 2014. I am satisfied that his appointment had been confirmed in July 2015, prior to these events arising. I have also accepted Mr Glennon's evidence that he spoke with the Graduate Engineer who confirmed he had got it wrong and had in fact been told Mr Lian was on leave. This information was conveyed to Mr Lian together with an apology from the Graduate Engineer.

[81] Mr Lian says that during the period of time he was suspended his reputation was damaged and that all his emails were left unattended and not responded to. Mr Lian has produced no evidence to support his contention that his reputation has suffered any damage.

⁵ Employment Relations Act 2000, section 123(1)(c)(ii).

[82] I have accepted the evidence of both Mr Crossland and the Graduate Engineer that Mr Lian's work was covered promptly and professionally in his absence and that his emails and calls were attended to on a daily basis.

[83] Mr Lian returned to work on 21 October 2015 and the investigation into his applications was conducted on 20 May 2016. That is a period of seven months. Given that timeframe I would have expected Mr Lian to be in a position to produce some clear evidence of reputational damage and Firth's failures to respond to emails during his absence. He had not done that.

[84] Mr Lian gave evidence that in early October 2015 he attended his doctor who prescribed sleeping medication. This was to address issues Mr Lian was experiencing with insomnia.

[85] Taking all of the circumstances into account, including the length of the suspension and Mr Lian's evidence as to the impact the suspension had on him an appropriate award of compensation is \$6,000.

[86] Fletcher Concrete and Infrastructure Limited is ordered to pay to Mr Lian the sum of \$6,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Compensation for lost benefit

[87] Mr Lian seeks reimbursement of the legal fees he incurred in relation to the disciplinary process under section 123(1)(c)(i) of the Act which allows for an award of compensation for the loss of any benefit which the employee might reasonably have been expected to obtain if the personal grievance had not arisen. Mr Lian says the money spent on legal fees was money he would otherwise have expected to retain had the personal grievance not arisen.

[88] There may be limited circumstances in which an employee can claim legal expenses associated with an employment investigation.⁶

[89] I agree with Mr Lian that Firth failed to follow its own processes with respect to the allegation of sexual harassment. There is no dispute that the complainant had

⁶ *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 at [114].

not put anything in writing about her complaint and she wished to be anonymous. At the investigation meeting the evidence established that if Mr Crossland has spoken to the complainant he would have discovered that she did not wish to have her complaint dealt with formally and was not even sure that it was Mr Lian she saw in the bathroom.

[90] Mr Lian sought legal advice on 17 September 2015. At that stage the allegation of sexual harassment had been dropped and the only misconduct issue being investigated related to concerns that Mr Lian had competed with Firth while he was an employee. By 17 September 2015 Mr Lian had provided full information to Firth which showed that his business was not trading and no money had been received by the company or Mr Lian outside of his normal salary payments from Firth.

[91] I am not satisfied Mr Lian has established that the circumstances of this case are of the limited type envisaged by the Court in *Hall v Dionex*. The claim for compensation under section 123(1)(c)(ii) for legal fees incurred prior to lodging the statement of problem in the Authority is declined.

Special damages

[92] Mr Lian claims as an alternative to the section 123(1)(c)(ii) claim, special damages. Again, this claim is a claim for pre-litigation costs. Such claims have been consistently rejected by both the Employment Court and the Authority.

[93] In the most recent case of *George v Auckland Council*⁷ the Court agreed with the approach of the Court in *Harwood v Next Homes Ltd*⁸ holding that it was not appropriate to classify costs incurred prior to the filing of a Statement of Problem as special damages.

[94] The claim for special damages for legal fees incurred prior to lodging the statement of problem in the Authority is declined.

Costs

[95] Costs are reserved. Given the success achieved by both parties, I am of a mind to let costs lie where they fall. Notwithstanding that, the parties are invited to resolve the matter between them. If they are unable to do so Mr Lian shall have 28 days from

⁷ [2013] NZEmpC 179 at [128].

⁸ [2003] 2 ERNZ 433 (2003) 1 NZLR 53.

the date of this determination in which to file and serve a memorandum on the matter. Firth shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell

Member of the Employment Relations Authority

