

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 342
3291119

BETWEEN	SHANE RISELEY Applicant
AND	HUNTLY JOINERY 2000 LIMITED Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Philip Ross, counsel for the Applicant Danny Gelb, advocate for the Respondent
Investigation Meeting:	16 and 17 January 2025 in Hamilton
Submissions received:	7 February 2025 from Applicant 14 March 2025 from Respondent
Determination:	16 June 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Riseley was employed by Huntly Joinery 2000 Limited (HJL) initially as a joiner and then as a project manager from June 2019 until his resignation on 16 December 2023. Mr Riseley says his resignation should be treated as a constructive dismissal because the way HJL treated him meant he could not have been expected to continue working under such circumstances.

[2] HJL is a duly incorporated company having its address for service in Huntly and carries out the business of cabinet making and joinery. HJL says Mr Riseley's claims must fail. It acknowledged there were issues at work between the parties but

says these were mostly manufactured by Mr Riseley to attempt to justify a constructive dismissal claim. HJL says it took multiple steps to address these issues with the aim of finding an amicable resolution but says it was Mr Riseley who failed to engage in a fair and reasonable way to resolve the issues. HJL also says Mr Riseley resigned because he was intending to set himself up in business and that business was in direct competition with HJL.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Mr Riseley and Jessica Brittan. On behalf of HJL, Simon Curran, managing director, Marcus Strichen, project manager, John Flower, project manager, Geoff Davies, human resources manager, Rory Herbert, maintenance manager, and Jared Monk, Trade Me user, all provided written statements. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral and written closing submissions.

[4] 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.

The issues

[5] The issues requiring investigation and determination were:

- (a) What was the reason for Mr Riseley's resignation?
- (b) Was his resignation caused by a breach of duty by HJL?
- (c) If there was a breach of duty was it of a serious nature that would mean it was reasonably foreseeable that Mr Riseley was not prepared to work?
- (d) Has Mr Riseley contributed to the situation he found himself in?
- (e) Should any remedies be awarded.

Mr Riseley was employed by HJL

[6] Mr Riseley was employed by HJL in June 2019, initially as a joiner but he was subsequently promoted and transitioned to the role of project manager. There were two other project managers, John Flower and Marcus Strichen. There do not appear to have

been any significant issues in the employment relationship until March 2023 other than a privacy issue that touched on Mr Riseley but was related to another company of Mr Curran's and is not relevant to this matter. Mr Riseley had mostly worked with Mr Flower up until Mr Flower made the decision to semi retire in 2023. Mr Strichen was promoted in the sense he was the sole full time senior project manager and became responsible for managing the project management office. That meant Mr Strichen allocated work and Mr Riseley reported to him. A vacancy was also advertised for another project manager to join the team as part of the plan Mr Curran put in place following Mr Flower stepping back.

The advertisement

[7] Mr Riseley says he was blindsided by an advertisement for the role of project manager in October 2023 and Mr Curran accepts Mr Riseley was not told that was happening or the business reasons for it. Mr Riseley says he was asked by the staff member who showed him the advertisement if he had handed in his notice. At that point he was the only other full time project manager other than Mr Strichen and he says he became concerned he was being replaced. At that time Mr Riseley had a good relationship with Geoff Davies who was the human resources manager for HJL and another company Mr Curran was involved in. After speaking to Mr Davies some support was arranged for Mr Riseley.

The phone calls

[8] On 23 November 2023 there were two heated phone calls, one with Mr Curran and one with Mr Strichen. There is a slight conflict in the evidence in terms of what was actually said to Mr Riseley but there is general agreement Mr Curran and Mr Strichen were frustrated with Mr Riseley and Mr Riseley was equally frustrated in response.

[9] Mr Riseley says Mr Curran asked where he was and when he replied he was almost back at the factory after a client walk through, Mr Curran became angry, said he was "on his last chance" and asked why he was not with Mr Strichen. When Mr Riseley asked why he would need to be with Mr Strichen, he says Mr Curran got very angry and raised his voice and said "I want people to do what I fucking tell them to do" or words to that effect.

[10] Mr Riseley says he immediately called Mr Strichen to ask why he was in trouble with Mr Curran and Mr Strichen replied demanding Mr Riseley attend sites with him and said that if he did not like it, he could hand in his notice.

[11] Mr Strichen says he had called Mr Curran to express his frustration that Mr Riseley was not carrying out what Mr Curran had asked in terms of attending sites with a senior project manager for some oversight of his work. Mr Strichen accepts he told Mr Riseley resigning was his decision but this was after Mr Riseley bought up resignation and denies he demanded Mr Riseley attend sites with him. He denies he told him he could hand in his notice if he did not like it in those terms.

[12] The frustration on Mr Curran's part was that he says he had told Mr Riseley on several occasions to catch up on site with either Mr Flower or Mr Strichen so when Mr Strichen called him on 23 November saying that Mr Riseley was continuing to make excuses about going on site with him he became very frustrated with Mr Riseley. He accepts when he called Mr Riseley he told him he would give him one more chance before taking this matter any further but says this was only in relation to going out on site with the senior project managers. Mr Curran said Mr Riseley hung up angrily.

The emails

[13] The next day, after discussion with Mr Davies, Mr Riseley sent an email to Mr Curran via Mr Davies:

I'm just following up from yesterday's conversation where we discussed the incident with Marcus and whether I was told to hand in my notice and Simon said it was my last chance.

As I discussed with you I was not aware that there were any issues with my performance as nothing has been brought to my attention. If there are any issues I'm happy to go through my processes and see where I can improve but this should have been brought to my attention in a transparent and professional manner and that has simply not occurred.

...

I want to perform my best for Huntly Joinery and I want to be the best team player but the comments yesterday were concerning and I took them to mean that I am being forced to resign that is probably not the case but that is the way I took it.

[14] Mr Curran responded on 27 November as follows:

...

Firstly I want to make it abundantly clear that we do not wish you to resign from your employment. You are a valuable team member of Huntly Joinery.

It has come to my attention that in recent months you had had to return to some sites multiple times as you have either made some errors or not taken down some specific details. Some of the more recent jobs in question are:

...

I called you on the morning of Thursday 23 November to discuss with you about getting some re-training/fine tuning from the other more experienced Project Managers, this was done with the intention of reducing the amount of return trips to site. I have asked on more than one occasion for you to go out with Marcus to get some up-skilling which you have agreed to do, and to my knowledge this is yet to happen, and it is why I called you on Thursday.

I would like you to go out with both of the more experienced Project Managers (Marcus and John). I see this as an opportunity for you to continue to improve and therefore help the business.

I also want to use this response as an opportunity to remind you that about a month ago I put Marcus into a senior role within the Project Management team. He is now in charge of the Project Managers workload and the customers they work with.

[15] Mr Curran also set out a schedule in the email requiring six supervised site visits before 21 December and Mr Curran would catch up with him on 8 December to see how it was going. Mr Curran also thanked Mr Riseley for covering other peoples' roles but said he wanted the focus to be on improving in the role of project manager. Mr Curran ended the email reiterating he did not want Mr Riseley to resign because he was extremely important to the business and said what "we want is for you to get some re-training in order to reduce errors and return trips."

[16] Things deteriorated in the workplace fairly quickly after Mr Curran's email above and discussions with Mr Davies. Mr Riseley sent a further email explaining the reasons for the revisits for the four jobs Mr Curran had had concerns about and said they had all been discussed with Mr Flower. He said had he been given an opportunity he would have been able to discuss any issues but this had not happened and he felt he had been unfairly treated and blamed for things outside of his control.

[17] Mr Riseley and Mr Davies spoke on the phone after that email had been sent but Mr Davies had not seen the email. Unbeknown to Mr Davies Mr Riseley recorded that conversation. A review of the transcript shows Mr Davies urging Mr Riseley to meet with Mr Curran to clear the air but also suggested he would attend as Mr Riseley's support person. He also made concessions about Mr Curran and Mr Strichen and their communication styles. Mr Curran was unaware at that point that Mr Riseley had that additional information from Mr Davies.

[18] The next day Mr Riseley sent another email. Mr Davies had told Mr Flower Mr Riseley was going to take a personal grievance against the company. Mr Riseley was very upset about that and considered this to be a breach of his privacy. Mr Davies explained there was a plan devised with Mr Curran to bring Mr Flower on board to see if that would help to resolve things because Mr Flower and Mr Riseley had had a good relationship. Mr Davies says what he actually said was that he was concerned the situation was heading towards a personal grievance. He does accept he spoke to Mr Flower about Mr Riseley's employment matters but seeks to justify this on the basis he was trying to help resolve Mr Riseley's concerns.

[19] Mr Riseley advised he was taking a half days leave to seek legal advice. Mr Curran's response to both of Mr Riseley's emails was a very short response recording that the matter was important to him but that he did not think emails would help to resolve the issues and he would arrange mediation unless he heard from Mr Riseley by 5.00pm.

Mr Riseley removed as a client point of contact

[20] On 7 December 2023 Mr Riseley received a communication from a client asking why he had been removed as a point of contact for them. He says he was embarrassed by this because he had not been advised or provided an explanation but had been doing work for that client either under the guidance of Mr Flower or independently. At this point Mr Riseley formed the view he was not being allocated work and was being "nudged out". He says also that other staff stopped talking to him and a fishing trip was cancelled.

The fishing trip

[21] It transpired the fishing trip was arranged and hosted by Mr Davies and was not strictly a work trip. It still went ahead but Mr Davies told Mr Riseley he was not to come and refunded his money. Mr Riseley took this personally as he was entitled to do in circumstances where there had been a friendship of sorts outside of work and it was evident Mr Davies was now distancing himself from Mr Riseley as the employment relationship issues came to the fore.

[22] On 8 December 2023, Mr Riseley resigned and raised a personal grievance with HJL. The letter stated his position that he had been told during the phone calls to hand in his notice and that he was on his last chance, that no performance issues had been

brought to his attention in the past or any reasons why he should be worried about his job security. It was also recorded that although the email from Mr Curran stated he did not want him to resign from the company, the email turned into a list of performance concerns and a reminder to him that Mr Strichen had been elevated to a more senior role in the workgroup which Mr Riseley knew nothing about.

[23] Mr Riseley attended work the following Monday and Tuesday. On Wednesday 13 December he went to work but at 2.30pm Mr Curran came to the office and handed him a letter advising him he was not required to work out his notice and that he was to leave immediately and return all company items including the work vehicle. Mr Curran had decided he could not have an employee who was setting up in competition with him in the workplace which is why he decided not to let Mr Riseley work out his notice.

[24] Mr Curran walked him out and he was permitted to retrieve personal items from the work vehicle and then given a ride home by another employee. Along the way Mr Curran called and asked the other employee to uplift any company property at Mr Riseley's home. There were a series of communications between Mr Riseley's advocate at that time and Mr Curran including that Mr Curran threatened to make a theft complaint to police and withhold final payment of wages.

[25] Mr Flower's evidence explains why Mr Curran formed the view Mr Riseley was setting up a business in competition with HJL. On hearing of Mr Riseley's resignation Mr Flower said the penny dropped and it became clear to him what had been happening. He formed the view Mr Riseley was instigating his plan to start up his own business. Mr Flower told Mr Curran about a number of conversations about Mr Riseley wanting to set up his own business, discussing a lease and also purchasing a business. He suggested Mr Curran speak to Mr Monk who he knew Mr Riseley was purchasing an edge bander saw from on Trade Me.

Was Mr Riseley a point of contact for clients?

[26] The parties disagree on several matters. The first is whether Mr Riseley was ever a point of contact for clients of HJL. It transpired that Mr Flower was the one who sent a communication to all his clients at the point when he handed over to Mr Strichen and as such there was no intention to undermine Mr Riseley because this was simply a handover to Mr Strichen.

[27] Mr Curran's evidence went further than that though. He said Mr Riseley was never a point of contact for clients and only took overflow work from Mr Flower so should not have been upset when a client asked him why he was no longer a point of contact. He said Mr Riseley could not pick up new projects himself because all new work came in through a process via the company to the project managers who gave overflow work to Mr Riseley.

[28] Mr Flower's evidence was that until he discussed retirement with Simon Curran the project managers ran all their own jobs and all had their own groups of builders. Mr Flower's evidence was of very little in the way of management of the project manager's work. They worked mostly autonomously with no regular team meetings or reporting to Mr Curran. Mr Curran's evidence was consistent with this but he said he made calls and spoke to people as he needed to as the managing director.

[29] Mr Riseley's evidence was that he was starting to get direct contacts from clients. He had text messages from a large client, who ultimately had Mr Flower as a point of contact but because Mr Riseley had been taking on the overflow work, they were in the habit of contacting him directly.

[30] Given that Mr Riseley mostly worked with Mr Flower it is likely clients formed a view he was a point of contact. This is especially so as there was little formality with all project managers reporting to Mr Curran who left them to largely work autonomously. In these circumstances I find it likely that Mr Riseley was a point of contact for clients, even if Mr Curran had not intended that.

Was Mr Riseley told about the changes to the project management team?

[31] The parties also disagree about whether Mr Riseley was told about the changes to the project management team. Mr Curran said at the point he decided to make Mr Strichen the lead meaning he was in charge of the project manager team and would be the first point of contact for all customers as well as delegating work to Mr Riseley, he sat down with Mr Riseley and explained it.

[32] In the same conversation he says he told Mr Riseley about going to site with both Mr Flower and Mr Strichen for some tweaking/training. This was needed because firstly Mr Riseley was returning to site too often and he had made errors and secondly Mr Riseley would need to step up because Mr Strichen would be focussing on training the new project manager that was being advertised for.

[33] Mr Curran's view was that he did not need to tell Mr Riseley what he was doing with the business which is why he approached things in the way he did. In terms of his communication style Mr Curran accepted, and others confirmed this, that he was often brief. He did not see a need for Mr Riseley to be informed about recruitment of a new project manager but he did say he talked to Mr Riseley about revisits to sites and Mr Strichen's new elevated role in the team.

[34] Mr Curran's evidence was that he sat down and told Mr Riseley in October that Mr Strichen had been put into a senior role. Mr Riseley denies this happened and there is no earlier email or documentary evidence to support what Mr Curran says. However, Mr Curran also said he preferred to conduct his business by phone and in person so having no document to support does not sway things one way or the other.

[35] Mr Curran stated in his email to Mr Riseley on 27 November:

I also want to use this response as an opportunity to remind you that about a month ago I put Marcus into a senior role within the Project Management team. He is now in charge of the Project Managers workload and the customers they work with.

[36] Mr Riseley clearly accepts there was a conversation because in his email of 29 November he stated:

I am confused by your explanation as you told me Marcus was going to be delegating jobs to the project managers and you did not elaborate any further that he was actually being promoted to a leadership role. In fact you told me specifically that he was not going to be overseeing me in a leadership role other than delegating the jobs and I made you aware of my concerns in regards to this with Marcus' history of spreading misinformation.

[37] Mr Curran described his decision making in his evidence. He wanted to hire an additional project manager for when the work picked up again and at the time of this change with Mr Flower stepping back he saw the opportunity to put a manager into the role of being the first point of contact for customers, as well as delegating work load to the project managers. He wanted the designers to put all their work through Mr Strichen so there was more control and nothing got missed. Mr Strichen was given the title of manager. He agrees he told Mr Riseley Mr Strichen would be the point of contact for Mr Riseley in his role.

[38] The position I have reached after hearing from both parties is that something was communicated to Mr Riseley but this was not a full explanation of what Mr Curran intended. Telling Mr Riseley Mr Strichen was to be his point of contact did not fully

describe the intended changes. Mr Strichen became the manager of the project management team, Mr Riseley was no longer receiving just overflow work and he could no longer be a point of contact for clients. What was intended would impact on Mr Riseley because the way he received work and who he reported to was changing.

Relevance of the evidence to prove Mr Riseley was setting up his own business

[39] HJL also say Mr Riseley was heard to say on more than one occasion that he had had enough of HJL and was going out on his own or words to that effect. Mr Flower also passed on to Mr Curran that Mr Riseley had discussed a lease, communicated he was looking at buying a business and was purchasing equipment. HJL say this supports its position that Mr Riseley intended to resign to set up his own business and his personal grievance claims were all manufactured in order to justify a constructive dismissal claim.

[40] Mr Riseley denies all of that and gave evidence as did his partner that she was setting up a business and that while Mr Riseley was involved in the company, he was not setting himself up in business before leaving HJL.

[41] Regardless of HJL's strongly held position on this, there were no restraint of trade clauses in the individual employment agreement. There was a secondary employment provision whereby Mr Riseley would have been expected to inform HJL if he took on any secondary employment. However, this does not advance the position for HJL. The employment agreement and duties of fidelity and loyalty would not have prevented Mr Riseley from exploring alternative options and making plans for life post-employment with HJL.

Constructive dismissal

[42] Constructive dismissal refers to a situation where, as a result of an employer's action or inaction, an employee's job or workplace becomes untenable, and they are left with no option but to resign.

[43] The Court of Appeal in *Auckland Shop Employees v Woolworths (NZ) Ltd* set out three non-exhaustive categories of constructive dismissal:¹

¹ *Auckland Shop Employees v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, [1985] ACJ 963 (CA).

- (a) An employer gives the employee a choice between 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) A breach of duty by the employer leads an employee to resign.

[44] Mr Ross submits this matter falls into both the second and third of these categories. He submits breaches of the duty of fair dealing and good faith caused Mr Riseley to resign and also that HJL followed a deliberate course of conduct with the dominant purpose of coercing Mr Riseley to resign.

[45] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* held that the correct approach is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer. In determining that matter all of the circumstances of the resignation have to be examined, not simply the communication of the resignation. The Authority needs to then assess whether the breach of duty by HJL was of sufficient seriousness to make resignation reasonably foreseeable.²

[46] Mr Riseley has the burden of establishing his resignation was actually a constructive dismissal.

What was the reason for Mr Riseley's resignation?

[47] Mr Riseley says he resigned because the sequence of events leading up to his resignation starting with the vacancy which led him to believe he was being nudged out. The sequence of events was as follows:

- (a) Mr Strichen was put in a leadership role after Mr Flower semiretired;
- (b) Mr Curran decided to advertise for another project manager;
- (c) Two phone calls when Mr Curran and Mr Strichen were frustrated and particularly Mr Curran was angry with Mr Riseley;
- (d) Mr Riseley did not know why his work required improvement or why he was to go out on jobs with senior project managers;

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168.

- (e) By email Mr Curran required Mr Riseley to complete six jobs with supervision by the other two project managers;
- (f) Mr Davies disclosed to at least one other employee that Mr Riseley was planning to take a personal grievance;
- (g) HR told him not to put things in emails;
- (h) Mr Riseley was removed as a contact for clients with no discussion;
- (i) Staff were not talking to him and an invitation to attend a fishing trip was revoked;
- (j) Mr Riseley returned to the workplace after sick leave but was given no work.

[48] Submissions were made on HJL's behalf that what was communicated to Mr Riseley was reasonable in the circumstances because there was virtually no impact on Mr Riseley other than Mr Strichen would be Mr Riseley's point of contact in his role.

[49] I have already found above the changes were not communicated fully to Mr Riseley because the full plan involved more than that. HJL was in the process of advertising to appoint a new project manager to train up, all the designers and clients would go through Mr Strichen so Mr Curran had more control over the business. In addition, Mr Riseley would undergo some retraining to bring him up to a level he needed to be at with a plan to have Mr Riseley to attend customer sites with Mr Flower and Mr Strichen for this retraining. Mr Strichen was given the title of manager in relation to the project manager team.

[50] Regarding the retraining requirement Mr Curran says this was initially verbal discussions with Mr Curran either in person or by phone but in the email to Mr Riseley on 27 November this became a written plan requiring six visits before the 20 December with a catch up scheduled with Mr Curran to assess progress.

[51] The evidence from Mr Flower was of ongoing concerns discussed with Mr Curran and Mr Strichen about Mr Riseley. Mr Strichen's evidence about his level of frustration during the heated phone call was because he knew about the need to retrain and the reasons for that. He also knew Mr Curran had asked more than once and Mr Riseley was not co-operating.

[52] It was a surprise to Mr Riseley after the phone calls that Mr Curran recorded four specific jobs as the basis for his retraining concerns. When Mr Riseley looked at those jobs he explained his perspective to Mr Curran via email but that was never responded to. It is evident that what was discussed between Mr Curran, Mr Strichen and Mr Flower was much more than what was communicated to Mr Riseley about the need to retrain him.

[53] The communication about these two specific matters presents a difficulty for HJL in terms of justifying its actions. The tone and nature of the phone calls are also problematic. Considering also the vacancy being advertised with no intention of communicating with Mr Riseley about that, the dealings with HR and knowing others in the business were receiving confidential information about the employment issues Mr Riseley was talking with HJL about and then being informed via a client he was removed as a point of contact and feeling ostracised by others led Mr Riseley to resign.

[54] I am satisfied the cause of Mr Riseley's resignation was the actions of HJL.

Was resignation caused by a breach of duty by HJL?

The duties of fair dealing and good faith

[55] HJL had a duty to deal with Mr Riseley in good faith and be active and constructive in maintaining a productive employment relationship. There is also an implied duty on employers to be fair and reasonable. Other implied duties such as the duty not to damage the relationship of confidence and trust between and employer and employee and the duty to provide a safe workplace stem from that overriding duty.

[56] HJL does not accept anything other than minor changes were made and there was no material change to Mr Riseley's role so there was no obligation on HJL to consult.

Was there a material change to Mr Riseley's role?

[57] The evidence was the project managers worked autonomously when there were three of them and Mr Riseley did not report to Mr Strichen. No performance appraisals were conducted, there were no weekly or regular meetings or reporting requirements and the individual employment agreement does not identify who Mr Riseley reported to. Overflow work from Mr Flower's workload came to Mr Riseley rather than direct allocations in the same way the other two received work. Mr Flower talked to Mr

Curran about Mr Riseley's work and Mr Curran made the decision Mr Riseley needed retraining.

[58] The evidence points to Mr Riseley having reported directly to Mr Curran. Mr Riseley dealt with Mr Curran when he moved from his initial role of joiner to project manager. There was at least one issue to do with additional duties that Mr Curran resolved with Mr Riseley and there were emails showing Mr Riseley had spoken to Mr Curran about some issues in his personal life.

[59] That meant there had to have been a change in reporting line after Mr Strichen was appointed as manager of the team. While Mr Curran does not appear to accept Mr Riseley was operating relatively independently of Mr Flower other than taking overflow work, some clients thought that he was as did Mr Riseley. In addition, Mr Flower had limited oversight of Mr Riseley, evidenced by the fact he reported his concerns to Mr Curran without ever speaking to Mr Riseley about them. Mr Curran made the decision based on assessing Mr Riseley's work that retraining or re tweaking was required and he instructed Mr Flower and Mr Strichen to address that.

[60] The statutory good faith obligation in s 4 of the Act requires employers to deal with each other in good faith, not to do anything that is likely to mislead or deceive the other, to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are among other things responsive and communicative.

[61] These good faith obligations specifically apply to a proposal by an employer that might impact on the employer's employees.³ The appointment of a new member of the team, a change in reporting lines and becoming subordinate in a formal sense to one of the senior project managers would undoubtedly impact on Mr Riseley's employment. As would tightening up the client contacts so that only Mr Strichen could act as a contact. Mr Curran described deliberately making that business decision so he could maintain more control which he is entitled to do but the issue for HJL is that a change in reporting lines, the way work was allocated, the appointment of a new team member and having a single point of contact for clients were changes that impacted on Mr Riseley.

³ Employment Relations Act 2000, s 4(4)(d).

Managing employee performance

[62] Managing employee performance if not handled correctly can also result in findings of disadvantage or breaches of the duties of good faith and fair dealing. Given the evidence about the conversations between Mr Flower and Mr Curran regarding Mr Riseley, it was clear issues had been identified and corrective actions were considered necessary by Mr Curran. HJL said these were no more than a matter of continuous improvement and general upskilling and that everyone can always improve. However, the list of specific jobs provided in the email after the phone call and the plan of supervised visits puts Mr Curran's concerns about Mr Riseley into a category that is something more than general upskilling and more akin to performance concerns.

[63] In circumstances involving performance discussions communication and process are important. Employers can be expected to make employees aware of what concerns exist, what those concerns are and what they are based on with opportunities for the employee to respond. There was a lot of evidence about whether the returns to site in the jobs Mr Curran was concerned about could be sheeted home to the project manager raising the question as to whether or not the concerns were well founded or what it was that they were based on.

[64] While there is a conflict in the evidence as to whether Mr Riseley was ever told he had to attend sites with Mr Flower and Mr Strichen, what is clear is that he was not informed about the list of jobs Mr Curran had concerns about, why there were those concerns or what the overall plan to remedy the concerns actually was. Then he was spoken to harshly when he did not involve himself in site visits with the other two project managers and not responded to when he emailed Mr Curran about the list of jobs.

[65] Instead a schedule of visits to sites with the other project managers was put in place without discussion requiring six visits in a short space of time. Mr Riseley was also aware at this time he had been told in the phone call this was his last chance and that was not explained to mean just the supervised site visits during the phone call. It was also a heated phone call.

[66] I accept these concerns regarding Mr Riseley's returns to sites were not at the level of a formal conduct concern warranting an employment investigation, but it is clear they were concerns arising from specific jobs. Mr Riseley could have expected a

fair process be adopted to dealing with performance issues and an opportunity to respond before the phone calls and the email setting out the schedule of visits.

[67] All of this happened in the context of HJL's other actions, in particular his interactions with HR that led up to Mr Riseley's resignation.

[68] I find that HJL's failure to communicate did breach its duties of fair dealing and duty of good faith in s 4 of the Act. The information that was provided fell well short of the obligations to be responsive and communicative and the tone and timing of the phone call was not the actions of an employer seeking to be active and constructive in maintaining a productive employment relationship.

Was the dominant purpose of HJL's conduct to coerce Mr Riseley to resign

[69] It was submitted on behalf of Mr Riseley that HJL engaged in a further breach in that as an employer HJL had followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign. Given the multiple conflicts in the evidence, and the high threshold required for this limb of the test for constructive dismissal, I have not found this aspect of the claim to be made out.

Were the breaches so serious that resignation was reasonably foreseeable?

[70] In order for a claim of constructive dismissal to be successful, the breaches of duty complained of must amount to a repudiation of the contract rather than just be unreasonable. Breaches may be a breach of an express term of the individual employment agreement but may also be a breach of the employers general implied obligation not to act in a manner that will damage the relationship of confidence and trust between an employer and an employee. The Court of Appeal has expressed it in this way:⁴

Fair and reasonable treatment is so generally expected today of any employer that the law may come to recognise it as an ordinary obligation in a contract of service.

[71] What may also occur is a course of conduct that cumulatively induces and justifies the employee in resigning but no one part of the course of conduct is sufficient on its own. That is partly the situation in this case because Mr Riseley says as a result of a series of events and interactions together with a lack of communication about the changes to the team in which he worked and no process adopted in relation to the

⁴ *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378 (CA) at [383].

performance issues alleged he was left with the impression he could do nothing right and the company wanted him gone.

[72] The first issue to come to Mr Riseley's attention was the project manager advertisement. While the intention was to train a new project manager, and an employer is entitled to organise its business how it sees fit, the problem was the lack of communication. Mr Curran expressed clearly in his evidence his view that Mr Riseley did not need to know about his plans to recruit meaning the lack of communication about that was intentional.

[73] The phone calls present a difficulty for HJL in terms of the seriousness of the breaches. Management style such as expressing anger and swearing can form the basis for a constructive dismissal for example in the case of *Edmonds v Attorney General*⁵ the Court made the following comment about management style:

I am bound to say that the Court puts no limits upon management style. It is, however, clear that when a manager addressed an employee in such a manner that the employee is obliged to '*sling the same treatment back at him and use the same aggressive tone or language*' in order to keep the exchange even, then the manager may be acting outside normal management norms.

[74] Although there is a conflict in the evidence as to what was said exactly, Mr Curran accepted he was very frustrated, swore and said this was Mr Riseley's last chance. Although Mr Curran later said the last chance comment was a last chance to attend sites with Mr Strichen, even if that were so the fundamental issue was the lack of communication with Mr Riseley about a plan to lift his performance, the specific reasons why Mr Curran considered this necessary and the lack of any transparent process.

[75] Having raised his concerns with Mr Curran about the way he was spoken to and the fact he did not know what the performance issues were, he was directed to attend sites and given the list of jobs and told these were the jobs he had returned to when there was no need to. When he then reviewed those jobs and provided some feedback he received a direct instruction to attend a schedule of visits in a relatively short space of time with a catch up visit with Mr Curran about the visits also scheduled.

[76] Then Mr Riseley heard that Mr Davies had undermined his trust by speaking to others in the business about his confidential employment relationship matters that had

⁵ *Edmonds v Attorney General* [1998] 1 ERNZ 1.

been discussed with Mr Davies and Mr Curran and were continuing to be discussed. Enough information had been imparted that Mr Flower had the impression Mr Riseley either was going to or wanted to take a personal grievance. At that time Mr Davies was concerned that the situation was heading in the direction of a personal grievance but Mr Riseley had not formally communicated that and was actively engaging with HJL. Although enlisting the help of Mr Flower was described as well meaning by HJL it instead had the effect of further undermining the employment relationship. It is fundamental to the personal grievance process that employees are able to raise employment relationship problems confidentially.

[77] It is also asserted that Mr Riseley was told not to put things in emails, removed as a contact for clients, uninvited from a fishing trip, albeit not a work trip in a strict sense, and given no work on his return after sick leave. This sequence of events followed on from the phone call and the retraining issue and all led to Mr Riseley believing his employer no longer had confidence in him and was “nudging him out”.

[78] The changes to the work group and performance issues occurred against the background of the series of actions taken by HJL that led to a situation where resignation was foreseeable. This includes how matters were handled by HR, including the fishing trip. Even if that was not strictly a work trip, Mr Riseley and Mr Davies had previously enjoyed a good relationship that included activities outside of work. Mr Davies cancelling that trip at that time was significant given the pivotal role Mr Davies had in the company. Mr Riseley formed the view he was on the outer and in view of the sequence of events it was reasonable to form that view. Mr Davies had also made concessions about Mr Curran’s management style that did not assist matters.

[79] The breaches of duty by the employer were serious enough that resignation was reasonably foreseeable.

Was the constructive dismissal justified?

[80] Employees are entitled to be consulted with and given prior warning of changes to their role that will impact on them and to be informed about concerns. A fair and reasonable employer could be expected to consult with an employee about employment concerns and to speak appropriately in the workplace. An employee can also expect to have any employment relationship they may raise as a consequence of their concerns dealt with in a fair and reasonable manner and confidentially by their employer.

[81] Applying the test of justification in s 103A of the Act on an objective basis, the decisions made and process HJL followed in relation to the events leading up to Mr Riseley's resignation were not how a fair and reasonable employer could have acted in the circumstances.

[82] Mr Riseley's personal grievance claim for constructive dismissal has been successful.

Remedies

[83] Mr Riseley seeks compensation for humiliation, loss of dignity and injury to feelings caused by his grievance. The way in which he was removed from the workplace due to the belief that he was going into business in competition with HJL caused significant humiliation and loss of dignity. That came at the end of a series of events where he was given no opportunity to put his side across or respond to concerns about his work. He suffered a significant loss of trust and humiliation and injury to feelings by the way in which HR dealt with the issues he was raising.

[84] He was also particularly alarmed and upset by the aggressive approach taken by HJL at the end and this includes matters that were addressed by his then advocate including threats of criminal complaints and withholding wage and annual holiday payments. His final day at work and the way he was required to leave with no warning or discussion was particularly embarrassing and contributed to his loss of dignity in front of his former colleagues in the business with whom he had previously had good relationships with.

[85] As a consequence of HJL's actions and inactions, he says he suffered stress with impacts on his mental health. He sought advice from a medical practitioner and received treatment. His partner's evidence was consistent with Mr Riseley's in relation to the impact on him.

[86] Given my findings above, considering the finding of a constructive dismissal and the stress and humiliation experienced by Mr Riseley from the failures of HJL to comply with the duties of fair dealing and good faith, and the general range of awards in similar cases, I consider an appropriate award under s 123(1)(c)(i) of the Act to be \$20,000.00.⁶

⁶ *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [162] and

Lost wages

[87] Mr Riseley seeks 13 weeks lost wages. The Act permits reimbursement to the employee of lost wages in an amount that is the lesser of the sum equal to lost remuneration or to three months ordinary time remuneration. He was required to leave the premises on 13 December 2023 and his final pay was on 14 December.

[88] HJL submitted Mr Riseley was in fact setting up his own company so should not be entitled to lost wages and he has failed to show how he attempted to mitigate his loss. Noting it is not a requirement to provide direct evidence of all the steps taken to find work I accept reimbursement is appropriate in these circumstances where there has been an unjustified dismissal and the loss is a consequence of that.

[89] I was provided with IR records for the relevant period and there is no income in the form of salary or wages from the end of employment at HJL until October 2024 which was consistent with Mr Riseley's evidence.

[90] I consider an award equivalent to 13 weeks lost wages is appropriate.

Contribution

[91] Under s 124 of the Act, contribution to the situation that gave rise to the personal grievance must be considered. I have found above that Mr Riseley was not only not consulted about the changes, he was deliberately not provided with information about matters that impacted on him at work on the basis the employer has the right to run its business how it likes. He was also on the receiving end of an aggressive phone call and a management style that generally also featured poor communication. The combination of this and the way in which HJL chose to address Mr Riseley's concerns about what transpired is what led to Mr Riseley forming the view he was being driven out of the company and resigning.

[92] Mr Riseley has not contributed to his personal grievance.

Orders

[93] Huntly Joinery 2000 Limited is ordered to pay Shane Riseley within 28 days of this determination:

- (a) Compensation under s 123(1)(c) of the Act in the amount of \$20,000.00 for the constructive dismissal.

- (b) Lost wages under s 123(1)(b) of the Act in an amount equivalent to 13 weeks wages.

Costs

[94] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[95] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Riseley may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Huntly Joinery 2000 Limited will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[96] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁷

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁷ www.era.govt.nz/determinations/awarding-costs-remedies