IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE

[2023] NZERA 25
3161422

	BETWEEN	CODIE SEATON Applicant
	AND	TISDALL CONTRACTING LIMITED Respondent

Member of Authority:	Antoinette Baker
Representatives:	Katherine McDonald, counsel for the Applicant Andrew More, counsel for the Respondent
Investigation Meeting:	16 August 2022 at Invercargill
Submissions received:	30 August 2022 and 19 September 2022 from the Applicant 13 September 2022 from the Respondent
Determination:	20 January 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent (TCL) employed Mr Seaton as a machine operator, from April 2019, subject to a written employment agreement (IEA).[1] The directors of TCL are Mr and Mrs Tisdall. Mr Seaton's time and wage records show Mr Seaton's final day of employment was 29 January 2021. Mr Seaton's work was to almost always operate TCL's larger excavator on its clients' farms carrying out various jobs that require such machinery. If there was ever a break between clients Mr Seaton was employed to do maintenance work in the workshop or he may operate the digger usually used by Mr Tisdall.

[1] Dated and signed on 7 April 2019.

[2] The IEA describes the hours and days of work as not guaranteed and when required. However, it was stated in evidence by all parties that Mr Seaton was 'full time.' The time and wage records produced by TCL are consistent with this description showing most weeks of the employment period were over 40 hours and many over 50 hours per week. The exceptions were where there were public holidays, sick leave or during the March 2020 COVID-19 lockdown in New Zealand. Mr Seaton was quite clearly a full-time permanent employee of TCL.

[3] Mr Seaton claims that TCL unjustifiably dismissed him. He says that during a disciplinary meeting and in communications after this he was told by TCL there was no job for him in the position he was employed to do because TCL's clients did not want him on their properties and that he would have to find work elsewhere. TCL's directors did not give any details of the client complaints to Mr Seaton because the clients did not want to be involved.

[4] Mr Seaton says he was also told that TCL were selling the large excavator he regularly worked on, although this is disputed. He says he was then not offered further work on the excavator beyond the days immediately after the disciplinary meeting which was pre-arranged work on a rural station. He says after asking where his next work would be Mr Tisdall said he'd get back to him, that a job wasn't ready and then that the job would not be offered because that client did not want Mr Seaton to work on his property. TCL sent Mr Seaton to another business run by Mr Cleaver for what Mr Seaton thought was a TCL job. Upon arrival, Mr Cleaver interviewed him for a full-time job and offered one to him which surprised Mr Seaton. He worked at least two days for Mr Cleaver's business and sought further confirmation from Mr Tisdall about ongoing work with TCL. When it was reiterated that there was no work because TCL clients did not want him, Mr Seaton made a decision to work for Mr Cleaver and leave TCL's employment.

[5] Mr Seaton submits through his counsel that TCL's course of conduct led him to decide to work for another business, being an unjustified constructive dismissal. Alternatively, he was unjustifiably dismissed outright at the 25 January 2021 meeting or that if the reason TCL had no work for him because it was downsizing by selling the big excavator he worked on, then the process of telling him he had no further work was a flawed restructuring that amounted to an unjustified dismissal.

[6] Mr Seaton claims lost wages (two weeks' notice); compensation for hurt and humiliation and that he should be paid the value of annual holiday pay at termination for days previously paid as annual leave during his employment when he says that snow prevented work from happening.

[7] TCL says Mr Seaton was not dismissed and that he resigned of his own accord independent of any actions by TCL in that he freely chose to work for another business before issues relating to performance had been concluded. Based on his resignation, TCL says Mr Seaton is liable under the IEA to pay back employment related course costs. It also claims the return or compensation for value of a TCL water blaster in Mr Seaton's possession. In response to these set off claims Mr Seaton says it was TCL's decision to end his employment and the clause in the IEA does not therefore apply to reimbursement of course costs; that the water blaster was given to him by TCL as a bonus for work performance while the Tisdalls were dealing with recuperation from an accident.

[8] Mr Seaton raised a personal grievance within the requisite time with TCL through his first representative and this was then reiterated by his second representative.

The Authority's investigation

[9] At the investigation meeting I heard evidence from Mr Seaton and his partner Ms Parata; and from Mr and Mrs Tisdall, the co-directors of TCL. Mr Cleaver was issued with a summons to appear at the Authority investigation meeting. This step was taken at the request of counsel for the applicant and because I decided that Mr Cleaver's evidence would benefit the investigation. At my request an Authority officer phoned Mr Cleaver on the morning of the investigation meeting to confirm that he was aware of the summons to appear and to reiterate the time and place to appear as shown in the summons. Mr Cleaver indicated he was aware of the summons and that he did not intend to appear. Mr Cleaver provided two letters to the Authority which were considered in the investigation meeting and will be considered as part of this determination. Written submissions were received after the investigation meeting.

[10] 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.

[11] This determination has been issued outside the timeframe provided in s 174C(3)(b) of the Act with the permission of the Chief of the Authority under s 174C (4) of the Act.

The issues

[12] The issues requiring investigation and determination are:

a. Did Mr Seaton resign?
b. If Mr Seaton resigned, was he constructively dismissed based on TCL following a course of conduct with the purpose of getting Mr Seaton to resign?
c. If a dismissal, was TCL justified to dismiss?
d. What if any remedies are to be awarded for:
    i. Lost wages due to lack of payment for two weeks contractual notice
    ii. Compensation under s123(1)(c) of the Act?
e. Should any remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mr Seaton that contributed to the situation giving rise to his grievance?
f. Did TCL wrongly take five days of annual holiday leave entitlement off his final holiday pay in circumstances where Ms Seaton was unable to work due to snow?
g. Is the water blaster in Mr Seaton's possession likely the property of TCL and if so, is Mr Seaton directed to return it or keep it and compensate its value back to TCL?
h. Is Mr Seaton to pay TCL for employment related course fees it paid on his behalf during his employment?
i. Should either party contribute to the costs of representation of the other party?

Did Mr Seaton resign?

[13] Mr Seaton was party to a written individual employment agreement which provided that either party may terminate the employment by giving two weeks' notice in writing. Mr Seaton did not give notice in writing and there is no evidence of any written acknowledgement from TCL that he resigned.

[14] TCL says that Mr Tisdall resigned in a phone call on 3 February 2021 when Mr Seaton told Mr Tisdall that he was going to accept a job offer from Mr Cleaver because he would be paid more and would get a vehicle he could use without restrictions as to use. Mr Seaton denies he resigned in this call and says the purpose of calling Mr Tisdall was to find out what further work he had.

[15] Having heard from them both and after considering the evidence I find it likely that Mr Tisdall and Mr Seaton had an informal and likely "less words than action" way of communicating. The relationship is one of long standing. The older Mr Tisdall has known Mr Seaton since he was a very small boy. Mr Tisdall was likely in an avuncular role as well as being the person who directed Mr Seaton's work. At the investigation meeting both men smiled about a memory of Mr Seaton wanting to get onto Mr Tisdall's farm vehicle from an early age. I also find that after their dispute arose both have likely learnt more about how the terms 'resignation' and 'dismissal' may fit into a legal framework. My impression was that each in giving their evidence was trying to say the right thing about these concepts rather than trying to mislead with inconsistencies in their evidence. Bearing this in mind I find it likely Mr Seaton resigned from his employment at TCL but I will deal later with what this means in terms of whether this was due to the conduct of TCL.

[16] I cannot be exactly sure when Mr Seaton resigned from his employment, but it is artificial to say he did not give the indication to Mr Tisdall he was leaving, because he clearly had communicated he would accept the offer of employment made to him by Mr Cleaver at some time after it was made (likely 1 February 2021) and by the time he returned his work gear to the Tisdall residence on 8 February 2021, the day before he started full time employment for Mr Cleaver's business. There is a dispute about whether Mr Seaton asked the Tisdalls, at this informal outside the house interchange between two couples, for a dismissal letter to be sent to him. If it was asked for I am satisfied the Tisdalls said nothing to respond about dismissal. When it was asked for again in a message later that day the response was then to say there had been no dismissal. There is no dispute about this interchange when Mr Seaton returned his employment gear being a cordial meeting between two couples. Mr Seaton recalled Mr Tisdall saying he was "bummed" he could not offer Mr Seaton more work but something to the effect that working for Mr Cleaver was a good choice. In these circumstances I find that there were all the appearances of a resignation even though I accept

Mr Seaton felt he was given no choice as evidenced at the very least by him then asking for his dismissal letter that same day.

[17] While Mr Seaton says he did not accept the job with Mr Cleaver until after the 8 February 2021 return of his work gear, he started full time work with Mr Cleaver's business on the 9 February 2021. I find some likelihood that he had at the very least decided to accept Mr Cleavers' offer, if not communicated it to his prospective employer, by the time of returning the work gear and this remains in my view consistent with the appearance of a resignation by Mr Seaton.

[18] Overall, I find that while it is difficult to be sure when Mr Seaton communicated to Mr Tisdall that he was he would accept Mr Cleaver's offer of employment and therefore leave TCL, I find he did this and it was a resignation from his employment.

If Mr Seaton resigned, was he constructively dismissed based on TCL following a course of conduct with the purpose of getting Mr Seaton to resign?

[19] The Court of Appeal[2] has listed three non-exhaustive situations where constructive dismissal might occur:

- Where the employee is given a choice of resignation or dismissal
- Where the employer has followed a course of conduct with the deliberate and dominant purpose or coercing an employee to resign
- Where a breach of a duty by the employer leads a worker to resign

25 January 2021 meeting

[20] On 24 January 2021 TCL sent Mr Seaton a letter inviting him to a disciplinary meeting ('the meeting'). The issues were listed as follows:

> - We are concerned about your performance, and the effect it is having on customer relationships, and our company

[2] Cooke J in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited* (1985) 2 NZLR372 (CA) at 374 following an approach previously taken in the former Arbitration Court in NZ.

- Time spent on telephone when operating machinery, after being verbally requested to only use your phone at 10,12, and 3 with the machine turned off
- Your safety, and others working alongside you

[21] The meeting was held the following day starting at 7.30am at Mr and Mrs Tisdall's home. Mr and Mrs Tisdall were present along with Mr Seaton and his partner Ms Parata and their baby daughter. Mrs Tisdall left the meeting about 9.30am and says that she believed the meeting was finished at that stage. Mr Tisdall continued talking with Mr Seaton and Ms Parata beyond that time. Mr Tisdall says the meeting was over by the time his wife left but that he and Ms Parata continued talking with Mr Seaton because he was upset. Mr Tisdall described this 'post meeting' discussion as mainly about "feelings". I did not take Mr Tisdall's meaning in his oral evidence to be positive about this and took it that he did not value the need for the discussion. Ms Parata says they left the Tisdall's home about 10.00am - 10.30am.

[22] Mr Tisdall's evidence is that she used an application on the phone she had at the time to record 'voice to text' of the meeting while she was present. She confirms she did not tell Mr Seaton or Ms Parata about this and did not understand she needed to. Sometime later she says she edited the text. She says she does not recall when she did this. She says the original version is no longer available as she no longer has that phone. The Tisdalls confirm that they did not show Mr Seaton the notes that Mrs Tisdall edited. Mr Seaton and Ms Parata both say that notes were not taken of the meeting.

[23] I find that Mr Tisdall has confirmed in his oral evidence that he told Mr Seaton at the meeting:

a. that TCL's clients did not want him working on their farms and effectively, there was no work available
b. that Mr Seaton would have to find other places to work, and made suggestions
c. that if Mr Seaton did not want to do other things then there are other places he could go to work.

[24] In his oral evidence Mr Tisdall said that another option for work offered was wood splitting but Mr Seaton had refused to do this because it was 'shitty'. Whether or not this was

offered (Mr Seaton says that no other options were offered) I find that 'wood splitting' was not what Mr Seaton was employed to do and could not have been in the category of being the sort of activity that Mr Seaton might have done in between booked client jobs to ensure full time hours were provided.

[25] In other oral evidence Mr Tisdall said that he was looking at other options to run the TCL business including downsizing through the sale of the excavator that Mr Seaton used. Mr Tisdall in oral evidence said an option for Mr Seaton could have been to use a different digger had he stayed on in his employment, but he confirmed this was not discussed with Mr Seaton at the time because Mr Tisdall was still 'working this through'. I accept Mr and Mrs Tisdall were also dealing with a family tragedy that may have impacted this 'working through.' However, I take from this evidence that it is unlikely Mr Seaton was offered any real alternatives to consider if the core of his job was no longer available because clients did not want him. This meant that the message was, as Mr Seaton has consistently said he understood it was, his employment with TCL was at an end at the very earliest in the 25 January 2021 meeting.

Course of conduct after the 25 January 2021 meeting

[26] After the 25 January 2021 meeting, I find there was conduct by Mr Tisdall for TCL that further reinforced the message that TCL had no further work for Mr Seaton and he should get another job:

a. It did not offer him any further work on the excavator after the 25 January 2021 meeting;
b. Mr Tisdall was likely unclear about the purpose of sending Mr Seaton to Mr Cleaver. It was understandable that Mr Seaton simply understood it was further work for TCL with a client because this was likely in response to Mr Seaton asking about further work. I find a likelihood that this lack of clarity was deliberate on the part of Mr Tisdall to encourage Mr Seaton to meet Mr Cleaver who he had previously had a discussion with and who he says he knew would offer Mr Seaton a job. In short this was a way to exit Mr Seaton from TCL's employment by sending him to what was a likely prospect of getting another job.

c. Mr Seaton worked (according to Mr Cleaver) on 2 and 3 February 2021. Mr Seaton says he also did some work on 1 February 2021 although that date is not referred to in Mr Cleaver's letters. I accept that there was later some confusion about who would pay Mr Seaton for this work and eventually Mr Cleaver's business did. This confusion further satisfies me that Mr Tisdall was not clear about the motivation for sending Mr Seaton to Mr Cleaver as Mr Seaton says.

d. As above, I find it likely that Mr Seaton would have told Tisdall he had been offered a job with Mr Tisdall given the nature of their relationship. I find a likelihood that the older more confident Mr Tisdall encouraged Mr Seaton to accept the job offer made to him by Mr Cleaver.

e. That Mr Seaton continued to check what ongoing work he had with TCL supports that he was wanting to work for TCL and supports his evidence that he was really hoping Ms Tisdall would have a change of heart.

f. I accept a submission for Mr Seaton that an interpretation is that by the time of the 5 February 2021 call after which I accept Ms Parata says Mr Seaton was significantly distressed, Mr Seaton perhaps finally accepted the words that had been said to him since 25 January 2021 meeting that there was no work for him with TCL and in this context likely concluded he should accept Mr Cleaver's offer. Mr Seaton denies saying to Mr Tisdall he would take the job because it was paid more, and he could use a work vehicle for private use. However, I understand that the position does have these aspects to it and Mr Seaton in his evidence defends Ms Parata using TCL's vehicle and denies curiously in my view that this was something raised with him before. At the very least the IEA supports that he was not to use the work vehicle for private use. That Mr Cleaver's offer included this private use would have been attractive. However, I do not find that the added benefits satisfies me that accepting the job with Mr Cleaver was a deliberate free choice by Mr Seaton in the circumstances of the consistent message from TCL that it had no work for him in the work he had been up until then been doing on a full time basis.

[27] Standing back and considering all the above I find it likely that TCL through Mr Tisdall actively encouraged a resignation from Mr Seaton through:

a. a clear message given at the 25 January 2021 meeting that TCL had no work for him in his employed position due to client complaints and that he would have to find somewhere else to work, giving suggestions
b. reinforcing this message in discussions with Mr Seaton when he was asking for clarity about ongoing work
c. sending Mr Seaton to another business known to Mr Tisdall to want a worker to employ, based on the previous discussion he had with the business owner
d. not offering further work or reasonable options of alternatives for Mr Seaton which at the very least affected his ongoing financial security and ability to support his family.

[28] It has been submitted for TCL that Mr Seaton cannot bring up a constructive dismissal argument if he had not indicated this at the commencement of the proceedings. I accept as correct the submission for Mr Seaton that s 160 (3) of the Act applies. Most employment relationship problems have a factual matrix that has to be considered retrospectively against a legal framework. The factual matrix here allows me to consider whether there was a constructive dismissal. TCL has had an opportunity to provide what it wanted to say about this in submissions and I see no injustice in considering this as an outcome here.

[29] All of the above satisfies me that TCL constructively dismissed Mr Seaton by a course of conduct that led to him resigning. I have not then considered the alternatives submitted for him that he was dismissed outright or resigned due to breach of duty.

If a dismissal, was TCL justified to dismiss?

[30] Having found Mr Seaton was constructively dismissed I need to consider whether TCL was justified in constructively dismissing Mr Seaton.

[31] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the decision and whether the procedure the employer followed in making the decision was fair. Minor defects

in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[32] Under s103A(3) of the Act the following factors are considered to measure an objectively reasonable employer's fair process leading to a decision to dismiss:

> (a) whether subject to resources available, the allegations against an employee were sufficiently investigated
> (b) whether the allegations were raised with the employee
> (c) whether the employee was given a reasonable opportunity to respond to the allegations
> (d) whether the employer genuinely considered feedback.

[33] I am satisfied that TCL has not provided me with sufficient evidence to show it was justified to dismiss Mr Seaton. The basis for not having work to offer and not then offering further new work after this was based on the ground that clients had complained. This was referred to in the broadest of terms in the invitation to the disciplinary meeting letter dated 24 January 2021. The Tisdalls also confirm they provided no details of the complaints to Mr Seaton which meant he had no ability to consider and respond to any allegations about his performance on those properties and then to have that genuinely considered by TCL.

[34] Even if it can be said that issues about phone use, vehicle use and having the baby on the excavator were things that TCL did discuss at the 25 January 2021 meeting, and even if the phone use was likely raised previously, even informally as Mr Seaton accepts, and even if the IEA clearly says the work vehicle was for work use only and this was ignored, as were other reminders about Ms Parata using the vehicle, TCL's own evidence shows it would only have concluded a Final Warning outcome and not a dismissal. However, I find there was no apparent investigation of the client complaints that sat at the heart of the decision to effectively bring Mr Seaton's employment to an end, and this cannot be said to be a minor defect in the disciplinary process.

[35] To compound this, TCL's note taking about what was said in the 25 January 2021 meeting was far from a fair process even if it was based on Mr Tisdall not clearly seeking advice about what this may be. It is understandable that Ms Parata and Mr Seaton say that no notes were taken and that they question the reliability of those notes. This is especially so

because these notes record a final warning when the Tisdalls acknowledge Mr Seaton was told at this meeting there was no work for him in the work that he was employed to do.

[36] I acknowledge and am very sorry for what the Tisdalls were dealing with in their lives during the time of Mr Seaton's employment. However, the respondent is a company that employed an employee. How to treat that employee fairly was something TCL could have better considered. It would also not require being a lawyer to understand a fair approach does not include the actions that TCL took in this matter. IT has been submitted that TCL should not be penalised for not following a 'textbook' approach. I take this to mean the defects in process to be minor. To that end I do not agree they were minor.

[37] If anything, and perhaps given the context of the older Mr Tisdall having known Mr Seaton for so long he may have been trying to soften the blow of bringing the relationship to an end while at the same time protecting what were TCL's business interests with clients. I can understand this context. I will return to this when considering remedies. However, Mr Tisdall under cross examination said he felt he could not do anything more about the situation when the clients did not want Mr Seaton. I took his evidence and that of Mr Tisdall's similar evidence to be that they saw TCL had no responsibility as the employer to have fairly investigated the performance issues being raised by its respective clients.

[38] I do not accept the submission that as a small business with one employee that the Tisdalls could have not understood TCL's obligations when considering an employee's performance. The letter inviting to a disciplinary meeting is formal and of the type regularly seen in these processes. Other letters provided in the Tisdall's evidence similarly reflect that TCL had the ability to get assistance or the directors likely understood a process was necessary in any disciplinary matters. What I find likely happened is that there has been a show of written documentation which does not likely match what in reality what the key message at the 25 January 2021 meeting that Mr Seaton's employment was at an end and he needed to find another job.

[39] Accordingly, I find that the constructive dismissal was unjustified and will now consider remedies and the set offs claimed.

Lost wages due to lack of payment for two weeks contractual notice

[40] The last day of paid work for Mr Seaton was the 29 January 2021 according to TCL's wage records. Mr Seaton was told at the 25 January 2021 meeting that there was no further work for him and that this was a message saying that his employment was effectively at an end. After this date he continued to work and was paid for another four days by TCL with his last day of employment being 29 January 2021. I find it fair that Mr Seaton should be paid two weeks' notice less these four days of pay. This leaves six days pay to be paid to Mr Seaton which I calculate as follows noting that holiday pay will also be awarded as a percentage of this amount in my summary at the end of this determination:

a. $14,465.30 total gross earnings (including leave) for 12 working weeks before weeks ending 24 January 2021 divided by 61 days (as recorded in the wage records as worked during that time or taken as any form of leave) is a daily average pay of $237.13 gross (rounded).
b. 6 x $237.13 gross is a total of $1,422.78 to be paid to Mr Seaton for the balance of a contractual notice period.

Compensation under s123(1)(c) of the Act?

[41] It is submitted for Mr Seaton that he should receive compensation of $20,000.00. I find a lesser amount of compensation is appropriate.

[42] While I have been referred to case law suggesting this matter sits at a level where there was significant loss of dignity and injury to feelings caused by the dismissal, the distress that Mr Seaton likely suffered was transitory across a relatively short time. While I accept the process by which Mr Seaton was exited from his employment by TCL caused Mr Seaton likely confusion and distress and hurt feelings given his long-term relationship with Mr Tisdall, it was just under two weeks. I accept there may have been what Ms Parata explains was a gap in pays which caused financial problems with a mortgage payment. However, Mr Seaton lost few days of work before starting full time with Mr Cleavers' business on a higher pay and I have acknowledged his lack of contractual notice above. Mr Cleaver referred to Mr Seaton being well regarded in his new employment. Mr Seaton confirmed he was happy in

that employment. I understand he drives the same excavator at that employment (as at the time of my investigation meetings) that he drove at TCL because TCL sold it and Mr Cleaver bought it either directly or through an intervening entity.

[43] Ms Parata gave evidence that there was a longer-term effect on Mr Seaton. She has referred to panic attacks, lack of sleep and being afraid of getting things wrong in the workplace if his employer asked for a meeting. While Ms Parata may well have observed these things, they are normally in the realm of things diagnosed and evidenced by medical evidence which I do not have. They can also be multi causal.

[44] Taking the above into account and that I find some likelihood that Mr Tisdall's motivation was in part based on trying to soften the blow of a direct dismissal I find that compensation of $6,000.00 is appropriate.

Should any remedies be reduced (under s 124 of the Act) for blameworthy conduct by Mr Seaton that contributed to the situation giving rise to his grievance?

[45] I do not find after considering the evidence that Mr Seaton was blameworthy to the extent that remedies should be reduced under section 124 of the Act.

Did TCL wrongly take five days of annual holiday leave entitlement off his final holiday pay in circumstances where Mr Seaton was unable to work due to snow?

[46] I have not made an award related to reinstating this leave to be paid out. As I understood the evidence, Mr Seaton says that he presumed he would be paid out for snow days and should not have had to use annual leave. He appears not to have clarified this situation at the time with TCL. The days he claims were in August 2020 and the wage records show ten working days of annual leave paid. There would therefore have been a choice he made to take at least half of that time as paid annual leave. Going against Mr Seaton's claim is that he appears not to have raised an issue about this until this employment relationship problem occurred and TCL says he chose to take the leave on the snow days when he could have worked. Paid annual leave has two components. It is not just money but actual time off work as well. Mr Seaton had both. I also had no evidence that had annual leave not been paid he would have been entitled under his IEA to be paid for not working that week.

[47] The claim to be repaid five days of annual leave is dismissed.

Is the water blaster in Mr Seaton's possession likely the property of TCL and if so, is Mr Seaton directed to return it or keep it and compensate its value back to TCL?

[48] The evidence about ownership of the water blaster is disputed. I find on balance that an item like this is used to clean work vehicles and farm machinery and was to be used in Mr Seaton's employment coming as it did in the work vehicle. This leans towards it being an item owned by TCL. Mr Seaton's evidence does not support him being told it was his to keep by anyone from TCL. That Ms Parata took Mr Seaton's photo with the new water blaster and posted it on social media does not in my view alter that he has simply made an assumption that something for use in his employment was to transfer to his personal ownership. On balance, while I find TCL could have done more to confirm the expectations about the use of the water blaster including raising the issue earlier at around the time the employment ended, it is likely the water blaster was a tool of employment and ought to have been returned once that employment ended irrespective of how the employment ended.

[49] I find some likelihood the water blaster has been well used over the six months from receipt to termination of employment and on basic principles its retail price of $644.00 is not a realistic claim for TCL to make for compensation loss. I find a pragmatic set off value in all the circumstances before me should be $150.00 and the item should remain in Mr Seaton's ownership. I will not order the return of the water blaster given the time that has passed since the termination and the need to bring an end to this overall employment relationship problem.

Is Mr Seaton to pay TCL for course fees it paid on his behalf during his employment?

[50] The IEA contains clauses relating to reimbursement for various courses relevant to employment, the cost of which are to be reimbursed to the employer should the employee terminate their employment within 24 months of starting work for the employer.[3] TCL has demanded reimbursement training costs totalling $7,109.86 from Mr Seaton on the basis he resigned. I find these are not costs that TCL can claim back from Mr Seaton because I have

[3] Clause 8 of the IEA.

found it was TCL that ended the employment through an unjustified constructive dismissal. The clauses in the IEA refer to the situation where the employee ends the employment. I do not find they are applicable in this situation and have not awarded any money to be paid back by Mr Seaton to TCL.

[51] Accordingly, Mr Seaton is declared not liable to TCL for the $7,109.86 cost of employment related courses that TCL claims from him.

Summary of orders

[52] Tisdall Contracting Limited is ordered to pay Codie Seaton:

a. **$1,422.78** gross under s 123(1)(b) of the Act for the balance of two weeks contractual notice
b. **$113.82** gross being 8% holiday pay under s 25 of the Holidays Act 2003 on the above notice period balance
c. **$6,000.00** compensation under s 123(1)(c)(i) of the Act.

[53] Codie Seaton is to pay **$150.00** in set off to the above to Tisdall Contracting for its water blaster that he has retained in his possession.

[54] Codie Seaton is not liable to pay Tisdall Contracting for $7,109.86 of employment related course costs.

Should either party contribute to the costs of representation of the other party?

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

[56] If they are not able to do so and an Authority determination on costs is needed Mr Seaton may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum TCL would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[57] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[4]

Antoinette Baker
Member of the Employment Relations Authority

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