

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 9  
3165601

BETWEEN

RUBEN SPOTSWOOD  
Applicant

AND

CONCRETE STRUCTURES  
(NZ) LIMITED  
Respondent

Member of Authority: Rowan Anderson

Representatives: Hayley Johnson, advocate for the Applicant  
Kevin Badcock, counsel for the Respondent

Investigation Meeting: 12 September 2023 in Napier

Submissions and further information received: 11 October 2023 from the Applicant  
18 October 2023 from the Respondent

Determination: 11 January 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ruben Spotswood commenced employment with Concrete Structures (NZ) Limited (Concrete Structures) on 4 August 2021. Mr Spotswood claims that he was unjustifiably dismissed by way of email on 24 November 2021 and seeks compensation for humiliation, loss of dignity, and injury to feelings, and for lost wages.

[2] Concrete Structures says that Mr Spotswood was not dismissed from his employment, and instead contend that he abandoned his employment by failing to report for work between 20 November 2021 and 24 November 2021. Concrete Structures deny Mr Spotswood's claims and additionally seeks the imposition of penalties against Mr Spotswood for 'wasted costs' relating to an adjournment and delay of the investigation meeting.

## **Issues**

- [3] The issues identified for investigation and determination are:
- (a) Did Mr Spotswood abandon his employment?
  - (b) If Mr Spotswood did not abandon his employment, was Mr Spotswood unjustifiably dismissed?
  - (c) If Concrete Structures' actions were not justified, what remedies should be awarded, considering:
    - (i) Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
    - (ii) Compensation under section 123(1)(c)(i) of the Act.
  - (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Spotswood that contributed to the situation giving rise to his grievance?
  - (e) Has Mr Spotswood delayed or obstructed the Authority's investigation in terms of s 134A of the Act? If so, should any penalty be imposed upon Mr Spotswood?
  - (f) Should either party contribute to the costs of representation of the other party?

## **The Authority's Investigation**

[4] An investigation meeting was scheduled to take place on 2 May 2023 in Napier. The investigation meeting was adjourned following advice from Mr Spotswood's representative at the time that Mr Spotswood was unable to attend having contracted COVID-19. At an urgent case management conference on 2 May 2023, I granted the adjournment on the basis that Ms Spotswood was to provide information in support of the adjournment request. A Minute dated 3 May 2023 was subsequently sent to the parties recording that.

[5] On 12 July 2023 Concrete Structures lodged submissions seeking the imposition of penalties against Mr Spotswood alleging that he had delayed or obstructed an Authority investigation pursuant to s 134A of the Act. A further case management conference was held on 15 August 2023 to discuss that application and I recorded in a Minute a process for dealing with the matter, including providing all parties the

opportunity to lodge any relevant submissions in conjunction with the investigation of Mr Spotswood's claims.

[6] Concrete Structures lodged an application for a compliance order dated 24 August 2023. That application sought an 'unless order' seeking that the Authority dismiss Mr Spotswood's application with costs in the event a further adjournment was sought, and alternatively if he failed to appear at the rescheduled investigation meeting. On 11 September 2023, having received submissions from the parties as to the compliance orders sought and an affidavit from Mr Spotswood, I issued a Minute containing a procedural decision declining to make the compliance orders sought. I recorded in that Minute that the adjournment sought may be a matter properly dealt with in the context of any costs application.

[7] Written witness statements were lodged prior to the investigation meeting from Mr Spotswood and another person in support of Mr Spotswood's claims. That other person did not attend the investigation meeting, and as I informed the parties at the investigation meeting that person's evidence would not be considered by the Authority. There was no objection to that approach. Matthew Garret, Precast Manager, Kevin McCoy, Factory Manager, and Murray McCoy, Foreman, provided written witness statements for Concrete Structures.

[8] The investigation meeting was rescheduled and ultimately proceeded on 12 September 2023. With the exception of Mr Spotswood's second witness, all witnesses attended the answered questions under oath or affirmation.

[9] At the investigation meeting, I indicated that I would issue a further Minute seeking further information from the parties. That Minute was issued on 13 September 2023 and further information was subsequently provided by the parties. A timetable for the provision of final submissions was agreed as between the parties and adopted as directions of the Authority. Written submissions were received from both parties.

[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.

## **Did Mr Spotswood abandon his employment, or was he dismissed?**

### *Background*

[11] Mr Spotswood claims that he was dismissed from his employment, whereas Concrete Structures contend that Mr Spotswood abandoned his employment.

[12] Mr Spotswood's individual employment agreement (IEA) signed on 3 August 2021 contained an abandonment of employment provision as follows:

#### **11 Abandonment of Employment**

In the event the Employee has been absent from work for three consecutive working days without any notification to the Employer, this Agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

[13] Concrete Structures contends that Ms Spotswood abandoned his employment in that he failed to attend for work, without notification, on Saturday 20 November 2021, Monday 22 November 2021, Tuesday 23 November 2021, and Wednesday 24 November 2021. To the extent Mr Spotswood was did not attend work, there is no dispute that he did not notify Concrete Structures.

[14] Prior to the contested period, Mr Spotswood had been off work because of a non-work-related injury that occurred on 6 November 2021. He provided a work capacity certificate, dated 10 November 2021, declaring he was fully unfit for work between 8 November 2021 and 14 November 2021.

[15] Concrete Structures submitted that Mr Spotswood was issued a written warning for "consistent lateness" on 17 November 2021, the day prior to the toolbox meeting. It also submitted that he was issued a formal verbal warning on 4 November 2021 in relation to "consistent lateness". Mr Spotswood confirmed in questioning that he recognised the verbal written warning notification dated 4 November 2021, confirmed that the relevant incident involved him being approximately 10 to 15 minutes late to work, and that the warning had been handed to him.

[16] Mr Garrett gave evidence as to having received a call from Mr Spotswood's father on 19 November 2021 who he said was aggressive, abusive, and threatening. Mr Garrett subsequently made a complaint to the Police. Mr Garrett said that he spoke to Mr Spotswood after that incident and that he assured him that it would not affect his employment.

[17] Whilst it forms part of the background, I do not consider the provision of warnings regarding lateness, the alleged abusive and threatening phone call from Mr Spotswood's father, nor Mr Spotswood's earlier absence due to injury to be critical in terms of whether Mr Spotswood abandoned his employment.

[18] Mr Spotswood, at the investigation meeting, explained his absences from work from 22 November 2021 as relating to his prior injury. In terms of notification, his evidence was that he had no credit on his mobile phone and otherwise couldn't remember whether he notified Concrete Structures of his absence.

[19] On 24 November 2021, at 9.11am, an email was sent by Concrete Structures to Mr Spotswood simply referring to an attachment. The attached document, dated 24 November 2021, was a letter addressed to Mr Spotswood which provided as follows:

Dear Ruben

**RE: TERMINATION OF CONTRACT**

You have been absent from work since 19/11/2021 with no contact having been made from yourself to management at Concrete Structures (NZ) Ltd for more than 4 consecutive days.

We advise that your employment with Concrete Structures (NZ) Ltd has been terminated on the basis of "Abandonment of Employment" as per Clause 11 of your Employment Agreement.

Your final pay will be paid Thursday 24/11/2021

....

*Was Mr Spotswood absent from work for three consecutive working days?*

[20] Clause 11 of Mr Spotswood's IEA required that he be absent without notification for three consecutive working days in order for his employment to be considered abandoned. There is no real dispute that Mr Spotswood was not at work, and did not notify Concrete Structures of his absence, on Monday 22 November 2021, Tuesday 23 November 2021, and Wednesday 24 November 2021. On the morning of 24 November 2021, prior to the end of the working day, Mr Spotswood was issued a letter advising him that his employment had been terminated on the basis of abandonment. Whether Mr Spotswood was required to work on Saturday 20 November 2021 is contested.

[21] Mr Spotswood's IEA provided that the hours of work each day would be at the discretion of the employer, but that mutual agreement would be required for work between 5.00am and 7.00am. The IEA was otherwise silent as to any requirement to work on weekends and as to overtime. Mr Spotswood's evidence was that he was required to work Monday to Friday between 7.00am and 5.00pm. However, he accepted that he might be asked to work on weekends, although said that never occurred.

[22] Concrete Structures did not contend that Mr Spotswood had worked on any other weekend day during his employment. It submitted that, in its view relevant to the issue of whether Mr Spotswood could be required to work Saturdays, there were statements made in an employment application form suggesting Mr Spotswood would work overtime if required.

[23] Concrete Structures also relied upon what was said to have been an ability to require Mr Spotswood to work on Saturdays, and his attendance and receipt of an instruction to do so at a toolbox meeting held on 18 November 2021. Concrete Structures provided the Authority a record of minutes relating to the toolbox meeting.

[24] Those minutes contain notes made under various headings including "safety equipment/training requirements", "hazard identification", and "productivity from previous week". It was under the last of those headings that, after recording various production figures, an entry was recorded stating "...work this Saturday". Mr Spotswood is recorded as having been present at the meeting and signed next to his name on a subsequent page.

[25] Kevin McCoy gave evidence that he was present at the toolbox meeting on 18 November 2021 and that it was confirmed at the meeting that all staff would be working on Saturday 20 November 2021. He said that he would talk at the toolbox meetings and that the Saturday requirement was communicated as a general statement with staff being asked to let him know if they could not work. He also said that Saturday work was "pretty much voluntary". He confirmed that he did not seek to contact Mr Spotswood on Saturday 20 November 2021 despite his not being at work.

[26] Murray McCoy's evidence at the investigation meeting was that 90 percent of staff would work the weekends if required, but that it was normally voluntary. He knew that Mr Spotswood was not at work on Saturday 20 November 2021 but was not aware as to whether there was any attempt to contact him to find out why he was not at work.

He said that if someone was due to be at work but were absent, that normally someone would try and call them. He said that was left to management.

[27] Mr Spotswood confirmed at the investigation meeting that he had not been required to work on Saturdays at any other time during his employment. Mr Spotswood confirmed that he would attend a toolbox talk each Thursday, and accepted he was at the relevant meeting. However, he said that he had not been notified that he was required to work on Saturday 20 November 2021 and that his understanding was that Saturday work related to finishing of the concrete and that other staff performed that work.

[28] I am not satisfied that Mr Spotswood's employment agreement required him to work on Saturday 20 November 2021. The IEA contained no provision as to the performance of overtime, nor explicitly as to the performance of work on the weekend. Mr Spotswood had not been required to work any Saturday prior to 22 November 2021. I am also not satisfied that clause 11 of the IEA can be properly read such as to include in the relevant period of absence a half day of voluntary overtime.

[29] Even if I were wrong about that, I accept Mr Spotswood's evidence that he was not aware, regardless of attendance at the toolbox meeting on 18 November 2021, that he was required to work on that particular Saturday. I do not consider Mr Spotswood signing of the minutes, which I find was to acknowledge attendance at the meeting, to amount to an acknowledgement that he was required to work the Saturday. The minutes of the toolbox meeting contain a reference to "work this Saturday". However, I am not persuaded that there was a clear instruction to Mr Spotswood personally requiring him to work that day. I find that Mr Spotswood was not aware that he was being instructed to work that Saturday, nor that Mr Spotswood was reasonably put on notice of the purported requirement.

[30] I find that Saturday 20 November 2021 was not a working day for the purposes of clause 11 Mr Spotswood's IEA. I also find that Mr Spotswood was not clearly instructed to work on Saturday 20 November 2021. As such, I find that Concrete Structures notified Mr Spotswood of the termination of his employment prior the expiry of three working days absence. Mr Spotswood did not abandon his employment.

*Attempts to communicate with Mr Spotswood*

[31] Given the findings I have made as to clause 11 of the IEA, it is not strictly necessary to consider the attempts made by Concrete Structures to contact Mr Spotswood. However, for the sake of completeness, and as it may be relevant to the issue of contribution, I set out my findings.

[32] At 11.40am on Tuesday 23 November, Mr Garrett sent the following to Mr Spotswood:

Hey Ruben can I ring you when your free to talk.

[33] Phone records provided by Mr Garrett record a phone call having been made to Mr Spotswood's mobile phone on the same day, 23 November 2021, at 11.40.08am. I conclude that this was the extent of the attempted communications with Mr Spotswood such as are relevant to the dismissal. I do not accept that the attempts to contact Mr Spotswood, and to ascertain his intentions or the reasons for his absence, were consistent with Concrete Structures good faith obligations.

[34] I consider that more was required. Such as the text message of 23 November 2021 is concerned, it provides no real insight as to Concrete Structures concerns, nor as to the forthcoming correspondence as to the alleged abandonment.

[35] Some evidence was given as to the alleged abusive and threatening phone calls from Mr Spotswood's father and a consequential reluctance to contact Mr Spotswood at the home address on record. I accept that evidence. However, I find that other obvious and reasonable steps were not taken. This could have included communication by email and/or by post or urgent courier. It was not necessary, for example, that Mr Garret personally attend any property at which Mr Spotswood's father might be present. Curiously, no attempt was made to contact Mr Spotswood by email, despite the termination notice ultimately being sent to his email address.

[36] I find that the attempts made to communicate with Mr Spotswood were unreasonable and insufficient.

*Conclusion*

[37] I find that Mr Spotswood was dismissed from his employment by email at 9.11am on Wednesday 24 November 2021, prior to the expiry of the third consecutive

working day on which he was absent from work, and that Mr Spotswood did not abandon his employment in terms of clause 11 of his IEA.

### **Was Mr Spotswood unjustifiably dismissed?**

[38] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether Concrete Structures actions, and how it acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.<sup>1</sup> Also relevant to the Authority's consideration are the good faith obligations in s 4 Act.

[39] The onus is on Concrete Structures to justify its actions and justification requires the consideration of both substantive and procedural fairness.

[40] Having regard to my findings above, I conclude that there was no basis for the assertion of abandonment in terms of clause 11 of the IEA. I also find that no substantive justification for the dismissal has been made out, including given Concrete Structures reliance on the employment relationship having been ended by reason of abandonment.

[41] I have found that Mr Spotswood was dismissed by way of the letter sent to him on 24 November 2021. I find that that dismissal occurred absent any reasonable procedure being followed by Concrete Structures having regard to the factors I am required to consider at s 103A of the Act. That included a failure to raise concerns with Mr Spotswood prior to the dismissal and consequentially a failure to provide him an opportunity to respond to such concerns.

[42] I find that the dismissal was procedurally and substantively unjustified.

### **Is Mr Spotswood entitled to remedies?**

*Is Mr Spotswood entitled to compensation for lost wages?*

[43] Mr Spotswood seeks compensation for lost wages covering a total period of three weeks, submitted to amount to a total sum of \$5,844.99. Mr Spotswood's representative submitted that he was extremely proactive in seeking alternative employment following his dismissal and referred to records provided from Inland Revenue as evidencing the relevant period of lost wages.

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<sup>1</sup> Employment Relations Act 2000, s 103A.

[44] Concrete Structures submitted that no award for lost wages should be made and that any wages lost were attributable to Mr Spotswood's own actions. It was also submitted that the sum of \$5,844.99 in fact represented payment for approximately three fortnights, as opposed to three weeks. It submitted that alternative employment was obtained within two weeks based on a payslip recording a pay period commencing 6 December 2021, and that any award of lost wages should be limited to no more than \$1,953.00.

[45] Alternative employment was obtained quickly, and I am satisfied that Mr Spotswood took sufficient steps to obtain alternative employment. I am also satisfied that the correct calculation of Mr Spotswood's wages was as submitted by Concrete Structures, being \$1,953.00 per fortnight as opposed to per week.

[46] I am satisfied that Mr Spotswood lost wages as a result of his personal grievance. I am also satisfied that his loss was, considering the payments ultimately received from alternative work, equivalent to a period of at least three weeks. I am not satisfied based on the evidence provided that Mr Spotswood's loss was any greater than that and Mr Spotswood has not sought compensation in excess of three weeks.

[47] I order that Concrete Structures make payment to Mr Spotswood, within 28 days, of \$2,929.50 as compensation for lost wages.

*Is Mr Spotswood entitled to compensation for humiliation, loss of dignity and injury to feelings?*

[48] Mr Spotswood seeks compensation for humiliation, loss of dignity and injury to feelings. It was submitted that an order of compensation of \$20,000 would be appropriate.

[49] It was submitted for Mr Spotswood that he was new to the workforce, being 17 years of age, and that Concrete Structures actions had a detrimental impact on his confidence in seeking new employment. The second aspect of that submission is somewhat inconsistent with Mr Spotswood's appropriate and timely attempts to find alternative employment.

[50] Ms Spotswood also submitted that Concrete Structures was aware of Mr Spotswood's injury and that he felt betrayed and embarrassed as a result of the dismissal. I do not accept that Concrete Structures were aware that Mr Spotswood's

absence from the workplace was due to injury nor that such alleged knowledge contributed in any compensable way.

[51] Concrete Structures submitted that no compensation award should be made. It submitted that the circumstances involved were analogous to cases where compensation at the lower end has been awarded, as opposed to where larger awards have been made relating to significant impacts on vulnerable employees.

[52] I accept that the dismissal and Concrete Structures' actions had some impact on Mr Spotswood. However, I am not satisfied that the impact was such that would warrant an award of any more than a very modest sum of compensation.

[53] I would order, subject to any reduction on account of contribution, that Concrete Structures make payment to Ms Spotswood of \$14,000 as compensation for humiliation, loss of dignity and injury to feelings.

#### *Contribution*

[54] Section 124 of the Act requires that I consider the extent to which Mr Spotswood's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.<sup>2</sup>

[55] Mr Spotswood's response to the attempts to communicate with him was in effect to say that he could not contact Mr Garret because he had no credit on his mobile phone. Mr Spotswood also claimed that he could not access his savings to top up his phone due to a timing restriction on withdrawals from his relevant account. I do not accept that evidence and I do not consider there was a reasonable explanation for Mr Spotswood's failure to contact Mr Garret.

[56] Mr Spotswood provided account balances and the terms and conditions related to his accounts in response to my call for further information. The information provided was not that which was sought, and the balances appeared to be current as opposed to reflecting the balances at the applicable times. Such as the terms and conditions were provided, they do not reflect an outright inability to access funds from Mr Spotswood's savings account.

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<sup>2</sup> Employment Relations Act 2000, s 124.

[57] Regardless, I do not consider either issue critical as there were clearly other steps that could have reasonably been taken by Ms Spotswood. It was Mr Spotswood's responsibility to ensure he notified Concrete Structures if he was to be absent from work. I do not consider Mr Spotswood's explanations in any way mitigate his failure to contact Mr Garret. His conduct was culpable and blameworthy.

[58] Mr Spotswood appeared to explain his absence from work as being on account of injury. I find that he did not take any reasonable steps to notify his employer of the asserted basis for his absence.

[59] Having regard to the nature of the dismissal, I also consider Mr Spotswood's prior conduct relevant. Mr Spotswood was issued at least two warnings regarding lateness and attendance. I consider that conduct contributed to the situation giving rise to his personal grievance claim.

[60] I consider an appropriate reduction on account of contribution to be 25 percent. As such, I order that Concrete Structures make payment to Mr Spotswood of \$10,500 as compensation for humiliation, loss of dignity and injury to feelings.

**Did Mr Spotswood delay or obstruct the Authority's investigation?**

[61] Concrete Structures seeks a penalty be imposed upon Mr Spotswood for obstructing or delaying the Authority's investigation in terms of s 134 of the Act. That application related to an adjournment to the investigation following advice from Mr Spotswood's representative that Mr Spotswood was unable to attend the investigation meeting scheduled due to having contracted COVID-19.

[62] The issue taken by Concrete Structures is that Mr Spotswood, based on his own affidavit evidence, knew he had COVID-19 several days before the scheduled investigation meeting but that steps were not taken by him to advise the Authority until the afternoon or evening prior to the scheduled investigation meeting. Consequently, travel had been undertaken both by the respondent's representative and the Authority Member, prior to notification of the adjournment request being received by them.

[63] I accept Mr Spotswood's affidavit evidence as to having contracted COVID-19 and as to not being able to attend the scheduled investigation meeting. I find that there was a justified basis for Mr Spotswood being unable to attend the investigation meeting at the initially scheduled time. His actions in failing to have the matter brought to the

attention of the Authority in a timely manner were not prudent and may be relevant to the issue of costs. However, I do not consider that action as causative of the delay. The delay was attributable to Mr Spotswood's inability to attend due to COVID-19. On that basis, I find that Mr Spotswood did not delay the Authority's investigation without sufficient cause.

[64] Whilst not strictly necessary given my finding above, I record that I would in any event have declined to issue a penalty on the basis that Mr Spotswood's conduct was not such as would meet the required threshold for the imposition of a penalty, a penalty being quasi criminal in nature.

[65] Concrete Structures application for penalties is unsuccessful. Such as it may consider the issues raised as relevant to the issue of costs, they may be raised in that context should the parties be unable to agree on the issue of costs.

### **Summary of orders**

[66] Concrete Structures (NZ) Limited is ordered, within 28 days of the date of this determination, to make payment to Ruben Spotswood of:

- (a) \$2,929.50 as compensation for lost wages; and
- (b) \$10,500 as compensation for humiliation, loss of dignity and injury to feelings.

### **Costs**

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

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

[69] 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.<sup>3</sup>

Rowan Anderson  
Member of the Employment Relations Authority

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<sup>3</sup> For further information about the factors considered in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).