

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 530
3148261

BETWEEN	JOHN WILSON Applicant
AND	TRANSPORT REFINISHERS LIMITED Respondent

Member of Authority: Sarah Kennedy

Representatives: Joshua Pietras, counsel for the Applicant
Michael Gould, counsel for the Respondent

Investigation Meeting: 31 May 2022 at Wellington

Submissions Received: At the investigation meeting

Date of Determination: 13 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] John Wilson was employed as an apprentice transport refinisher at Transport Refinishers Limited (Transport Refinishers) from 27 October 2020 until his resignation in May 2021. Mr Wilson says that he was disadvantaged by the actions of Transport Refinishers and constructively dismissed when Transport Refinishers breached its duties to him through the events and interactions set out in the statement of problem, causing him to resign.

[2] The events and interactions that form the basis for the claims of disadvantage and constructive dismissal include allegations by Mr Wilson that he was unjustifiably suspended from work on one occasion, and removed from spray painting duties which amounted to a demotion from apprentice to general labourer and prevented him from finishing his apprenticeship modules.

[3] Transport Refinishers say the facts do not support a claim for constructive dismissal, there was no demotion because there was no change in his position and Mr Wilson chose to resign at the time that he did. It says Mr Wilson was not suspended but if there was a suspension, it was justifiable because Mr Wilson was medically unfit to work for at least two weeks at that time.

The Authority's investigation

[4] For the Authority's investigation, written witness statements were lodged from John Wilson, Phillip Wheelans, General Manager, and Klaus Arpe, a former employee of Transport Refinishers. John Tuau, a current employee was summonsed and gave written and oral evidence. All witnesses answered questions under affirmation from me and the parties' representatives. The parties also gave oral closing submissions.

[5] Having regard to s 174E of the Employment Relations Act 2000, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[6] As permitted by 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

The issues

[7] The issues requiring investigation and determination were:

- (a) Should the resignation of Mr Wilson be treated as a constructive dismissal caused by Transport Refinishers breaching its duties towards him, such as the duty of fair treatment, a breach of the employment agreement or a breach of good faith, through the events and interactions set out in the statement of problem?
- (b) If not constructively dismissed, was Mr Wilson nevertheless unjustifiably disadvantaged by how he was treated following an injury to his wrist that he alleges resulted in suspension from work for medical reasons and a demotion?
- (c) If Transport Refinishers is found to have acted unjustifiably (by disadvantaging and/or constructively dismissing Mr Wilson), what remedies should be awarded

to him, considering lost wages and compensation under s 123(1)(c)(i) of the Act?

- (d) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Wilson that contributed to the situation giving rise to his grievance?
- (e) Is Mr Wilson owed the arrears of wages claimed for the period of the annual shutdown?
- (f) Should either party contribute to the costs of representation of the other party?

Background

[8] Before joining Transport Refinishers, Mr Wilson had already completed 18 months of his automotive refinisher apprenticeship. He was excited about joining Transport Refinishers as he was keen to get back into the workforce after his previous employment ended due to the Covid-19 lockdown and he wanted to finish his apprenticeship. His rostered hours were 7.30 am to 4.10 pm and this was set out in the employment agreement between the parties.

Annual closedown

[9] On 26 November 2020, all staff received an annual shutdown notice, advising that Transport Refinishers would be closing from 24 December until 10 January 2021, equating to four public holiday days and eight annual leave days. This was provided for in the employment agreement between the parties.

[10] By the time of the Christmas break, Mr Wilson had only been working at Transport Refinishers for two months and had not yet accrued any annual leave. He was only paid for the four statutory holidays. He now understands that Transport Refinishers was required to pay out eight percent of his gross annual earnings at the start of the annual closedown and his anniversary would then be shifted to 23 December for annual leave purposes. Mr Wilson says this never happened and he had to draw on his personal savings to carry the family through to the New Year's break.

[11] Transport Refinishers says this was paid to Mr Wilson at the termination of his employment. Mr Wilson accepts the money was paid but asked the Authority to consider interest for the period the money was outstanding.

Injury at work

[12] Mr Wilson returned to work on 11 January 2021 after the annual shutdown. On his second day back at work, he sprained his right elbow and forearm while masking up a truck in the spray-painting booth. Not wanting to make a fuss he carried on working as best he could, but the pain got progressively worse throughout the day and the next day he left work around midday after the pain in his right arm had become unbearable. He then took a half day's sick leave to attend a doctor's appointment and his doctor provided a medical certificate for two weeks.

ACC

[13] On 26 January 2021, Mr Wilson was placed on ACC for a workplace injury. ACC was required to pay 80 percent of his wages during his first week of ACC. Mr Wilson says that although Transport Refinishers paid eighty per-cent of his wages, the calculation was based on a 32-hour week rather than his usual 40-hour week. He says that he has raised this issue with Transport Refinishers, but he is yet to receive the twenty percent difference which should equate to \$124.80 (gross). I did not understand Transport Refinishers to disagree that this amount was owed.

Initial return to work

[14] Mr Wilson returned to work on 15 February 2021, having been medically cleared for light duties. He says he spent 30 minutes doing a clean-up around the workshop but there were no other light duties available. On 18 February he met with his physiotherapist, James Smith, to develop a return to work plan in consultation with Transport Refinishers. The plan involved Mr Wilson taking a further two weeks off work to focus on his rehabilitation and attend physiotherapy. If everything went well, his injury would be reassessed prior to 7 March and he would return to work on 22 March, working four hours per day moving up to six hours per day the following week. The initial return to work plan anticipated that Mr Wilson would resume full time hours and his normal duties work by 5 April 2021.

[15] On 19 February, Harry Wheelans, Phil Wheelans' son, who was acting manager at that time, confirmed with Mr Smith by email that he was happy with the plan and there was agreement it would be regularly revised. Mr Smith advised Harry Wheelans he would reassess Mr Wilson during the week of 3 March and advise Transport Refinishers of his progress.

[16] On 9 March, Mr Smith advised Harry Wheelans of a revised return to work plan based on Mr Wilson's progress after an assessment that day. The revised plan was four hours a day starting from 15 March, moving up to six hours per day on 22 March with a full return to work planned for 29 March, which had Mr Wilson returning to full time duties a week earlier than the previous planned.

Second return to work

[17] On 15 March 2021, Mr Wilson returned to work in accordance with the plan working four hours a day, Monday to Friday. He started out on light duties around the workshop including spray painting and preparation work on the side.

[18] On 18 March 2021, Mr Smith emailed both Harry and Phil Wheelans to alert them to the fact that after seeing Mr Wilson in the clinic that day there had been a set back and he was recommending no further increase in hours for a further 2 weeks. This was a variation to the agreed return to work plan, so they were asked to comment.

[19] Mr Whelan's replied by email:

there is nothing else we can provide him. I have checked on him daily and tried to work with him. I do not think he is able to work in this industry as it involves a lot of arm and hand work. I suggest he should look to change his occupation as we are now 3 months into the year and no better result. I will discuss this with him tomorrow.

[20] That discussion took place and Mr Wilson says he was left with the impression that he was not wanted but nevertheless he worked from 15 March to 25 March. He had a cortisone injection on 24 March as part of his treatment. It transpires that a period of rest was recommended following the cortisone injection that was overlooked by Mr Wilson who was keen to get back to work.

[21] Then on 25 March, Mr Wilson says he felt like he was thrown in the deep end in that he was climbing up scaffolding, doing excessive hand sanding and masking up on trucks, and unfortunately these activities aggravated his injury and made it too painful for him to carry out his normal duties.

[22] On 26 March 2021, as a result of how Mr Wilson's day had gone on 25 March, Mr Smith sent another email to Mr Wheelans about the physical difficulties Mr Wilson was now experiencing at work. There is an email trail between Mr Wheelans and Mr Smith with a

recommendation from Mr Smith that Transport Refinishers put Mr Wilson on the lightest duties possible until further notice. Mr Smith was clear that from his perspective Mr Wilson would improve but it would take a period of four to six weeks rehabilitation. He also mentioned that after the cortisone injection a period of seven days relative rest was recommended so he strongly recommended that Mr Wilson's hours remain at four per day with reduced climbing and lifting duties. Mr Smith asked Mr Wheelans to advise whether Transport Refinishers could accommodate this. There was also a phone call between Mr Smith and Mr Wheelans around that time.

[23] On 29 March, Mr Wheelans replied to Mr Smith advising there were no other light duties available and that he could not afford to continue carrying Mr Wilson because it had been over 3 months since the injury but that he would be happy to re-employ Mr Wilson once he was 100 percent fit.

[24] Later that day Mr Wheelans and Mr Wilson spoke. Mr Wilson said he was completely honest and said that he needed to come up with some strategies to ensure that he was able to complete tasks without making his injury worse. He suggested a couple of ideas such as sanding an area of the fire truck and masking it up rather than doing all the sanding in one go. He says that Mr Wheelans did not seem particularly interested and brushed it off.

[25] Mr Wheelans, however, says there were no other light duties any lighter than what Mr Wilson was already doing, and he disputes that Mr Wilson had to climb up high scaffolding. If he did, it was to a work platform approximately 2 metres off the ground and only once or twice during the sanding and masking operation but it was not done in a way intended to throw him in the deep end which is what Mr Wilson was alleging.

[26] Mr Wilson recalls Mr Wheelans making a comment to him about whether he was in the right career and whether he should consider a career change. He says this was a repeat of an earlier comment that Mr Wheelans had made in an email addressed to Mr Smith and Mr Wilson on 18 March 2021. Mr Wilson took this to mean that he was no longer wanted at Transport Refinishers and was upset about this.

[27] Mr Wheelans accepts he said those things but says it has been taken out of context. He says he had a genuine concern for Mr Wilson and for any other employee who is injured and the reason he had that discussion was because the whole of the industry involves using your

hands. Mr Wheelans thought this was the time for Mr Wilson to think about this, if the injury was ongoing and Mr Wilson continued to be in pain.

[28] During the conversation Mr Wilson also says that Mr Wheelans told him that he had to be at work for nine hours a day or not at all. Mr Wheelans denies making that comment but said he would have said something like he wanted him (Mr Wilson) back at work a hundred percent because that would mean that he was fit to work. Later that afternoon Mr Wilson sent Mr Wheelans an email about that conversation and asked him what he would like him to do because of the view that Mr Wheelans had formed.

[29] Mr Wheelans replied by email on 29 March that he would like Mr Wilson to keep coming to work for four hours each day, gradually increasing his hours until he was fully recovered:

Thanks for your email. I will talk to the parties involved and get back to you with the best outcome for both of us. Keep coming in for the 4 hours a day building up to 6 hours a day until we resolve the issue.

[30] Mr Wilson appreciated Mr Wheelans' response and believed that he would be supported as he transitioned back to full time hours.

Suspension from work

[31] Then on 31 March, Mr Wheelans contacted Mr Smith to say that he could not really find any lighter duties for Mr Wilson and could not continue to carry him. Mr Smith responded by email saying Mr Wilson was still suffering considerable pain in his forearm with climbing and repetitive upper limb tasks. He recommended Mr Wilson take a further two weeks off work particularly as he was still needing to rest his arm following the cortisone injection.

[32] Mr Wilson became aware of that conversation after he received a phone call from Mr Smith and was copied into the email from Mr Smith to Mr Wheelans.

[33] Mr Wilson says on that day, he was suspended from work because he was advised through Mr Smith that Mr Wilson had said he would not be allowed to return to work until he was a hundred percent fit. Mr Wilson was very surprised by Mr Wheelan's sudden change of heart. It seemed to him that Mr Wheelans was going back on the verbal agreement that they had made just two days earlier. It is Mr Wilson's position that the decision to put him off work was one that was already made by Mr Wheelans because the conversation with the physio did

not appear to impact on Mr Wheelans' decision making. Mr Wilson said the physio was only trying to come up with the best plan based on what Mr Wheelans had said he was going to do. Mr Smith made a request for Mr Wilson's GP for a further medical certificate for the next two weeks based on Mr Smith's assessment.

Rehabilitation

[34] Mr Wilson spent the next two weeks focusing on his recovery. He attended physiotherapy and hand therapy sessions and received another cortisone injection to reduce the inflammation in his right forearm.

[35] On 16 April, Mr Smith emailed Mr Wheelans to update him. Mr Wilson still needed a few more weeks before he was fully fit for work. On 30 April, Mr Smith sent an updated return to work plan suggesting that he would only need another two weeks rehabilitation before he was ready to return to full time duties. A new return to work date of 17 May was set.

Third return to work and demotion in duties

[36] On 17 May, Mr Wilson returned to work as planned with a full medical clearance. That morning Mr Wheelans came into the workshop and had a brief chat with him, saying Mr Wilson had already had quite a bit of painting time and that Transport Refinishers had just hired two new apprentices who needed training, leaving the foreman, John Tuau, overstretched. Because of that Mr Wilson would be taken out of the spray-painting booth to give the other apprentices a chance to get up to speed.

[37] Mr Wilson says as a result of that conversation he was put on what he calls manual jobs that were of no use to his apprenticeship. Mr Wilson had either completed the modules relating to these tasks or they were entirely irrelevant to his apprenticeship. Mr Wilson thought Mr Wheelans had completely ignored the fact that he only had several painting modules left to complete on his apprenticeship within a relatively short timeframe.

[38] Mr Wheelans told Mr Wilson that John Tuau would fill him in about what was going on later that day. By late afternoon when Mr Wilson had not heard anything he approached Mr Tuau himself. Unfortunately, Mr Tuau did not know what was going on either and he said he would follow up with their manager, Klaus Arpe.

[39] Mr Wilson says later that day he overheard a conversation between Mr Arpe and Mr Tuau during which Mr Tuau said that the two apprentices had been hired to replace Mr Wilson. Both Mr Arpe and Mr Tuau deny that conversation occurred and say there was a plan to hire new apprentices in motion before Mr Wilson started work at Transport Refinishers.

[40] Mr Wheelans gave evidence that the two apprentices were indeed taken on while Mr Wilson was having time off because of his injury. There was an existing plan to expand and the timing was a way to ensure that there was business continuity and that they had enough of a workforce to keep the business running.

[41] Mr Arpe came to talk to Mr Wilson and said that Mr Wilson would no longer be painting so that the others could have a chance. Mr Wilson asked him where he stood with the business as everything seemed to be all up in the air. His recollection was that Mr Arpe said to him “there is no painting job for you, do with that as you will”. During the investigation meeting Mr Arpe accepted that he did say words to that effect but that he had also said “at this time”, to indicate this was not a permanent arrangement.

[42] Mr Wilson says he was blindsided by what he said were sudden changes as he was returning to work fully fit and ready to pick up where he left off. Mr Wilson gave evidence that he felt as if he had been demoted from an apprentice to a general labourer and he was very worried that he would not be able to complete the rest of his apprenticeship modules if he was no longer working in the spray-painting booth.

[43] Mr Wilson raised these concerns in an email with Mr Wheelans on 18 May and stressed that the changes in his work duties would make it difficult for him to uphold his end of the training arrangement with MITO and therefore would disadvantage him. For this reason, he asked to be reinstated into his role as a transport refinisher apprentice.

[44] On 19 May, Mr Wheelans replied to the email saying that Transport Refinishers was busy training up the two new apprentices and due to the resourcing issues, there was not time to train Mr Wilson as well. Mr Wilson accepted that Mr Wheelans told him he would receive training at some point in the future once time and profits allowed. Mr Wilson said he remained concerned about Mr Wheelans’ stance because he was halfway through his apprenticeship and had been taught how to paint at his previous job. In his view in his first few months at Transport Refinishers he was already painting vehicles without much supervision and did not need much

further training, just some light mentoring around Transport Refinishers' own methods when it came to painting fire trucks.

[45] Mr Wheelans' reply email also referred to the uncertainty as to when Mr Wilson would be 100 per-cent fit and that his injuries had gone on for close to five months at this point. He said the business could not stand still for that period of time not knowing the future outcome of Mr Wilson's injury. He also explained the decision to take Mr Wilson out of the painting booth was because the company was struggling to make head way due to a combination of unskilled staff and time needed to train the new apprentices. He reiterated the conversation they had had, saying that at that time Mr Tuau did not have time to train Mr Wilson as well as the two new employees who had just started. Because Mr Tuau was the only qualified painter, Mr Wheelans needed Mr Tuau to be productive.

[46] Mr Wheelans also stated in his email:

I have given you a job as promised while you were recovering which covers exactly what you were doing prior to your arm issue, the only difference is that at the moment we are unable to train you in painting but are happy to do this in the future once the company time and profit allows.

[47] Mr Wilson immediately replied to Mr Wheelans' email, stated that he felt he was being shafted and reiterated his concerns about not being able to complete the remaining modules of his apprenticeship on time, and he also told Mr Wheelans that Mr Arpe had instructed him to put his apprenticeship on hold and said he thought Mr Arpe was hindering it. Mr Wilson said he only had nine assessments left if the one waiting was signed off. As part of a total of nine assessments, he only needed to do two more to finish level 3 panel beating and refinishing. The remaining seven were for his level 4 qualification.

[48] Mr Wilson also sent another email saying he had to take the remainder of the day off the day before due to stress after Mr Arpe told him there was no painting job for him at Transport Refinishers.

[49] Mr Wheelans replied saying that he would investigate the statement by Mr Arpe because that was the opposite of what Mr Wheelans said he discussed with Mr Arpe. Later that morning Mr Arpe sent an email to both Mr Wheelans and Mr Wilson about the issues that had been raised regarding his conversation with Mr Wilson. Mr Arpe said that Mr Wilson was the one who initially suggested putting the apprenticeship on hold, not Mr Arpe but he did not address the comment Mr Wilson alleged he had made about no painting work for Mr Wilson.

Mr Wilson emailed back and explained he was merely speaking out of frustration after raising concerns that Transport Refinishers was hindering him from finishing the rest of his apprenticeship. He also explained his thinking about his apprenticeship:

I do not want to put my apprenticeship on hold as this is something I would like to complete as soon as possible to help the business have more qualified skills. However if I am souly [sic] on prep as you have stated multiple times in my new job how can I complete my apprenticeship when I have already completed as [sic] passed the prepping assessment.

[50] Following this, Mr Wheelans sent Mr Wilson an email saying that he had not been repeatedly told he was on preparation only, he was not going to be placed on preparation tasks indefinitely and said that Transport Refinishers were happy to assist him in obtaining his qualification. He said it was great Mr Wilson had finished his preparation assessments as there was plenty of that work that he could do while they were waiting to take him through to teaching him painting, when they had time.

[51] Over the next week or so Mr Wilson was on light duties such as scrubbing down trucks and getting them ready for painting. Mr Wilson says these tasks were unskilled labour and they were not useful to his apprenticeship at all.

[52] Mr Wilson tried to catch up with Mr Wheelans to see how he was getting on with the investigation into Mr Arpe's comments, but he was rebuffed each time he tried to talk to him.

[53] Mr Wheelans says the comments about Transport Refinishers not signing off one of his modules were incorrect because that module was completed at Mr Wilson's previous employment and once he realised that he advised Mr Wilson to go back to them to have it signed off.

Resignation

[54] Mr Wilson says by this stage he had lost all trust and confidence in his employer. He was now doing a job that he had not been employed to do and would not be able to make any progress with his apprenticeship for the foreseeable future. He says that on 27 May he handed Mr Arpe his resignation as he felt that he had no other choice but to resign due to his demotion and the lack of support with his apprenticeship.

[55] Fortunately, he was able to secure another full-time apprentice role but he was already behind on his apprenticeship because Transport Refinishers had not signed off on the modules that he had completed while working there.

[56] Mr Wheelans says Mr Wilson never asked him for an estimate of time before he would be put back into painting. He said that he did tell him that they needed to keep John Tuau painting and teaching the new staff and he was asking him to bear with this situation while they got up to speed.

[57] Mr Wheelans says that he did speak to Mr Arpe but Mr Arpe recalled what was said slightly differently but denied hindering Mr Wilson's apprenticeship.

[58] In terms of the conversation that Mr Wilson says he heard Mr Tuau and Mr Arpe have about the apprentices replacing him, Mr Tuau says that that conversation never happened. He does recall asking Mr Arpe why Mr Wilson was in the office all the time. Mr Tuau was worried about Mr Wilson's ability to work because he needed Mr Wilson back on the floor. He found it hard retraining people over and over and he was responsible for training. He really needed Mr Wilson to be back to doing hands on stuff. He said it takes about 3.5 years to complete the apprenticeship and in his view, Mr Wilson was on track, but when he became injured, Mr Tuau did not see what was happening from that point on.

Constructive dismissal

[59] The doctrine of constructive dismissal concerns situations where an employer's conduct compels a worker to resign. Such a resignation may be held, in employment law, to be as much a dismissal as where an employer has actually dismissed the worker.

[60] One recognised category of constructive dismissal is where the resignation is caused by the employer's breach of duties owed to that worker. The resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee that a worker would resign rather than put up with such breaches.¹

[61] The actions of an employer can be unreasonable and cause an unjustified disadvantage, but not one serious enough to warrant constructive dismissal.

¹ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372.

[62] Mr Wilson alleged that Transport Refinishers committed such breaches through what it did and did not do, in three ways: firstly by taking away the painting duties associated with his job description and not consulting with him, secondly by suspending him from work unlawfully at a time when he was medically fit for work and thirdly by preventing him from completing his apprenticeship in transport refinishing.

(a) *Removal of painting duties*

[63] On 17 May, Mr Wilson thought that he was returning to his full duties when he returned to work after four months away from work rehabilitating his injury. On learning that he would not be painting and that there was no timeframe within which his original duties would be restored, Mr Wilson sent an email to Mr Wheelans on 18 May raising issues with this and what Mr Arpes had said to him. Mr Wheelans reassured him it was a temporary change in tasks for business reasons but agreed to investigate the concerns about Mr Arpe. After receiving no update and no resumption of his ordinary duties, Mr Wilson resigned 10 days later on 27 May 2021.

[64] Mr Wilson says these unilateral changes to his duties and the way it was explained to him by Mr Arpe were the cause of his resignation and points to a breach of clause 5 of his individual employment agreement which provides:

The employer may, from time to time, and following consultation with the employee, make reasonable changes to the particulars of the position and the duties set out in Schedule A hereto.

[65] While Mr Wilson's job description records "production painting" as a direct responsibility he says he was not consulted or given any forewarning to the changes. He had no opportunity to comment meaning there was unilateral changes to his role in breach of clauses 5 (above) and 21 (to deal with the employee in good faith) of the employment agreement and a breach of the employer's overriding duty of good faith under s 4 of the Act.

[66] Mr Wheelans' position was that there was no change in role because the transport refinishing process involved both preparation and painting and everybody, including the foreman, do all parts of the process so while Mr Wilson was not painting at that time, there were still many aspects of the job for which he was employed that he could carry out.

[67] There was a conflict in the evidence as to the exact word that Mr Arpe said to Mr Wilson, but Mr Wheelan's email confirmed that the move away from painting was temporary.

Mr Wheelan could have been more specific in his communications with Mr Wilson about the time frame in which Mr Wilson could expect to return to painting, however, Mr Wilson resigned 10 days after his return to work which did not give either party sufficient time to work through the issues.

[68] Most importantly Mr Wheelans was consistent in his communications with Mr Wilson that the change was only temporary. Noting the job description included carrying out tasks as directed by the directors, I do not find that there was a change in position or a demotion.

(b) Suspension

[69] Mr Wilson alleged he was suspended when he was medically cleared to return to work. While there was no suspension clause in the employment agreement between the parties, clauses 86 to 92 contained several provisions dealing with termination for illness and incapacity that required decisions to be based on sound medical evidence and to only be made after a fair and proper process, and Mr Wilson says none of these occurred in this case.

[70] I am satisfied the communications about Mr Wilson's progress and the modifications to the return-to-work plan did not amount to a suspension. Even if it did, the fact medical advice then recommended Mr Wilson needed a longer block of time off for his injury to heal, means ultimately Mr Wilson was then away from work for health reasons. I also note that the medical advice was to rest after the cortisone injection and there was some responsibility on Mr Wilson to have acted on that advice around the time he was returning to work.

[71] There are issues with the way in which Mr Wheelans approached this issue with Mr Wilson as the return-to-work plan was evolving and these will be discussed below in relation to whether Mr Wilson was disadvantaged by the actions of Transport Refinishers.

(c) Preventing completion of apprenticeship

[72] Mr Wheelans said he was unaware of any time limitations imposed on Mr Wilson by his MITO agreement and if there was such a time limitation then Mr Wilson did not advise Transport Refinishers of this. While the move away from painting delayed Mr Wilson's apprenticeship progress it did not prevent it. The wider picture was that the apprenticeship was already delayed due to the injury and before the injury delays had been caused by Covid -19 and Mr Wilson's redundancy.

[73] There is also an assertion that Transport Refinishers had refused to sign off modules completed during Mr Wilson's employment. However, this matter was dealt with at the investigation meeting. It transpired that although Mr Arpe could have signed it off, Mr Wilson was instead referred to his previous employer for that sign off because it was for work that he had completed at his previous employment.

[74] In these circumstances, there was no breach of duty by Transport Refinishers because the changes it sought to make did not prevent Mr Wilson from completing his apprenticeship.

Conclusion – constructive dismissal

[75] While I accept that the financial consequences of remaining on an apprenticeship were significant and prompted Mr Wilson to take steps to provide better security for his family, the test for constructive dismissal requires me to be satisfied that there were breaches of duties owed by the employer to Mr Wilson. I am satisfied the employer in this case has not breached its duties towards Mr Wilson.

[76] Even if I am wrong about that, the conduct complained of in constructive dismissal cases must be a repudiation of the contract. Unreasonable conduct is not enough. While Mr Wilson may have been justifiably disappointed by a shift away from painting, it was a reasonable decision to make to carry on with a plan to hire additional junior employees to train up, given Mr Wilson's recent absence and the commercial challenges the business was facing at that time. I do not find that these actions were a course of conduct with the dominant purpose of causing Mr Wilson to leave.

Disadvantage

[77] Mr Wilson also claims that he was disadvantaged by the alleged suspension and demotion. For a claim of disadvantage to succeed two things need to occur. The first is that the applicant must establish an event or action occurred and the second is to show it operated to the applicant's disadvantage. The claim will only succeed should the respondent fail to justify its actions

[78] The evidence shows Transport Refinisher's approach to Mr Wilson's return to work changed and operated to Mr Wilson's disadvantage. Having agreed to the return-to-work plan that would see a return to work for four hours a day initially, on 29 March without talking to Mr Wilson, Mr Wheelan's had a phone conversation and then entered into email

correspondence with Mr Smith, the physiotherapist. Mr Wheelans told Mr Smith and an email that there were no lighter duties and if Mr Wilson could not carry out those jobs then “there was no point in him coming in”. He went on to state that Transport Refinishers could not afford to carry Mr Wilson but would be happy to re-employ him when he returned to 100 per-cent fitness.

[79] When Mr Wilson caught up with the communications that had been had about him, he sent a very direct email to Mr Wheelan, whose response was very clear that he wanted Mr Wilson to continue with the return-to-work plan starting with four hours a day and building up to six hours until they could resolve the issue.

[80] Mr Wheelans was clear in his evidence that Mr Wilson was important to the business given his experience and he wanted to have him back at work as soon as possible that was contradicted by the comments he made to Mr Smith.

[81] I am satisfied that at the time Mr Wilson was returning to work in accordance with an agreed return to work plan, Mr Wheelans’ communications were confusing and indicated that Transport Refinishers was withdrawing its support. This was with no consultation and came after a period of leave and when Mr Wilson had medical clearance to return to work for four hours a day. Mr Wilson was clear about how this change in approach affected him causing additional distress on top of the injury he was recovering from and concern for his future.

[82] Transport Refinishers did not properly consult and I was left with the impression Mr Wheelans arbitrarily changed his mind but then changed it back, but with some additional contradictory comments in relation to whether it supported Mr Wilson’s return to work. A fair and reasonable employer would not have changed its approach without consulting with the employee and this caused significant distress to Mr Wilson. On the basis there was a change in position and no consultation, Mr Wilson has made out his disadvantage grievance.

Orders

[83] Transport Refinishers Limited is ordered to pay John Wilson the following:

- (a) The sum of \$10,000.00 as compensation for humiliation, loss of dignity and injury to feelings suffered by Mr Wilson under s 123(1)(c) of the Act.
- (b) The sum of \$124.80 (gross) in wage arrears.

[84] No order is made for lost wages of 10 minutes overtime each day because the evidence did not clearly establish that this was the case.

[85] No order is made for interest on annual shut down annual leave payment.

Costs

[86] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Wilson 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 Transport Refinishers Limited 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.

[87] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Sarah Kennedy
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1