

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 41
5419956

BETWEEN LAURIE DAVID HENDERSON
 Applicant

A N D THE FLOORING CENTRE
 LIMITED trading as THE
 FLOORING CENTRE SOUTH
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Jenny Guthrie, Counsel for the Applicant
 Andrew Riches, Counsel for the Respondent

Investigation Meeting: 10 February 2015 at Dunedin

Submissions Received: At the investigation meeting

Date of Determination: 1 April 2015

DETERMINATION OF THE AUTHORITY

- A. Laurie Henderson was unjustifiably dismissed during his notice period.**
- B. There is no award for lost wages.**
- C. The Flooring Centre Limited t/a The Flooring Centre South Limited is ordered to pay Laurie Henderson the sum of \$10,000 without deduction being compensation under s 123 (1) (c) (i) of the Employment Relations Act 2000.**
- D. There is no award of a penalty for a breach of good faith.**
- E. The counterclaim is dismissed in its entirety.**

F. Costs are reserved and a timetable set for submissions failing agreement.

Employment relationship problem

[1] Laurie Henderson commenced his employment with The Flooring Centre Limited t/a The Flooring Centre South Limited (The Flooring Centre) in Dunedin in March 2008. He was initially employed as a Commercial Manager although at the material time his position was Manager of the Dunedin branch. The relationship between the parties ended in December 2012.

[2] Mr Henderson says that he was unjustifiably dismissed from his employment and he has advanced two alternative arguments for that claim.

[3] Mr Henderson says that whilst he agreed to resign between 30 October and 1 November 2012, it was made clear to him by Stephen Musson, the Managing Director of The Flooring Centre that his resignation must be in writing. Mr Henderson says that he then changed his mind and did not resign. He says that his employment agreement required that his resignation be in writing and that was a condition precedent to resigning. He says that this condition was not varied by him or Mr Musson by agreement. Mr Henderson says that after attempts to get The Flooring Centre to attend mediation to discuss the issue his employment was terminated by a letter from Mr Riches dated 30 November 2012.

[4] Alternatively, Mr Henderson says that he was unjustifiably constructively dismissed from his employment with The Flooring Centre and that his resignation was caused by a breach of duty on the part of The Flooring Centre of sufficient seriousness to make it reasonably foreseeable he would no longer be prepared to work.

[5] Mr Henderson also says that The Flooring Centre breached its obligations of good faith and fair dealing by failing to be active and constructive in establishing and maintaining a productive employment relationship and that it failed to be responsive and communicative in the final months of the relationship, including refusing to attend mediation.

[6] Mr Henderson seeks reimbursement of lost wages in the sum of \$15,461.18, payment of \$10,000 compensation under the Employment Relations Act 2000 (the

Act) and payment of a penalty of \$5,000 for a breach of the statutory obligations of good faith.

[7] The Flooring Centre initially maintained that Mr Henderson was out of time for raising his personal grievance of unjustified dismissal but later accepted that it was no longer arguing that issue. Ms Guthrie, nevertheless, wants the Authority to record in the determination whether the personal grievance was raised within the statutory timeframe. I will address in my determination the date that Mr Henderson's employment was terminated and then formally record the number of days from that date until the grievance was raised and whether it was within the statutory timeframe. There was no dispute about the date that the grievance was raised.

[8] The Flooring Centre does not accept that Mr Henderson was unjustifiably constructively dismissed. It says that he resigned and not as a result of any pressure to do so and that his resignation was accepted. There was an attempt by Mr Henderson to withdraw his resignation but that was not accepted.

[9] The Flooring Centre says that it suffered loss as a result of Mr Henderson's breaches of his contractual obligations as an employee. It claims damages for these losses in the sum of \$105,999.00 together with GST.

The issues

[10] The Authority is required, in this case, to determine the following issues:

- (a) How did the employment relationship end?
- (b) If Mr Henderson resigned was his resignation able to be relied on?
- (c) Was Mr Henderson dismissed and, if so, was he actually or constructively dismissed and was the dismissal unjustified?
- (d) If Mr Henderson was unjustifiably dismissed actually or constructively then what remedies is he entitled to and are there issues of mitigation and contribution?
- (e) Was there a breach of the obligations of good faith and fair dealing during Mr Henderson's notice period after being advised by email

dated 13 November 2012 from Ms Guthrie that Mr Henderson was not resigning?

- (f) If there was a breach of good faith then should a penalty be awarded?
- (g) Were there breaches of duty on the part of Mr Henderson which caused losses to The Flooring Centre and was it reasonably foreseeable at the time the employment agreement was entered into that a breach would cause damage of the nature relied on?
- (h) Should there be an award of damages?

How did the employment relationship end?

[11] I will set out some brief background to Mr Henderson's employment relationship with The Flooring Centre. Both Mr Musson and Mr Henderson have considerable experience in the flooring industry. Mr Musson has been in the industry for over 20 years and Mr Henderson described himself in his evidence as having been employed in flooring his whole life both in business on his own and as an employee.

[12] After Mr Henderson's wife died of cancer at the end of 2006 he started looking for a longer term more secure plan for him and his three daughters. Towards the end of 2007, he spoke to Mr Musson about whether Mr Musson would be interested in starting up in Dunedin. Mr Musson agreed that he would be.

[13] A decision was made to expand the operations of The Flooring Centre into Dunedin and a new company was incorporated on 28 February 2008, The Flooring Centre South Limited. Mr Musson is the sole director of that company. The Flooring Centre South Limited and Mr Henderson entered into a written individual employment agreement dated 6 March 2008 in which Mr Henderson's role was described as Commercial Manager.

[14] At the start of the employment relationship, Mr Henderson concentrated on getting work for the new business. He described himself as successful in this regard and after a while two installers were employed by The Flooring Centre in Dunedin together with a part-time measurer.

[15] For the first year as an employee, Mr Henderson operated out of his home using his own car and trailer for transporting carpet and other flooring products and

then claiming reimbursement for expenses. Mr Henderson said that during this period he worked particularly long hours and his house had to be kept clean and tidy as there would frequently be visitors. After 12 months retail premises were obtained by The Flooring Centre and Mr Henderson was provided with a company vehicle.

Performance concerns

September 2011

[16] Mr Henderson and Mr Musson agreed that concerns were first raised about Mr Henderson's performance in September 2011. Mr Musson had become dissatisfied with aspects of Mr Henderson's performance. Some of these concerns had been raised with Mr Musson by Suzanne Chaplin who was undertaking administration work for The Flooring Centre in Dunedin. Mr Musson said Ms Chaplin had become concerned about difficulties with the Dunedin branch operation and a failure on the part of Mr Henderson to follow up on earlier jobs and other issues. In an email dated 7 September 2011 to Mr Henderson, Mr Musson set out the aspects of Mr Henderson's performance that he was concerned about.

[17] In responding in an email also dated 7 September 2011 to Mr Musson, Mr Henderson accepted the validity of some areas of concern, answered others to demonstrate that the issues had now been addressed and expressed some surprise about a concern that there was no team environment and that there were issues in the way he worked with staff. Mr Henderson wrote in his email to Mr Musson that the performance concerns had come out of left field and if there were issues with his performance there should be a discussion. In his written evidence supplied to the Authority for the purpose of the investigation meeting, Mr Henderson explained that he was working long hours at that time with limited administration support.

[18] Mr Henderson noted that the summary by Mr Musson following a subsequent meeting at the Dunedin branch in November 2011 was mainly positive and that by March 2012 he had earned over \$5m in sales since setting up in 2008 and was less than 1% off his budget. Mr Henderson noted that other sales staff were below budget.

June 2012

[19] On 13 and 14 June 2012 meetings took place with Mr Henderson, Mr Musson and the other director of The Flooring Centre Limited, Valerie Scobie in

the Dunedin office. Concerns were raised with Mr Henderson about his performance. Mr Henderson said that he addressed many of the concerns with the directors during the meeting.

[20] Following the meeting, on 15 June 2012, Mr Musson wrote to Mr Henderson by email and set out a formal record of the issues and concerns that had been discussed with him at the meeting on 13 June 2012.

[21] I do not intend to set out all of the concerns but the conclusion of the email is important. Amongst other matters, Mr Musson states in his email:

I feel that this has now come to a critical stage where some important decisions have to be made going forward. The outcome of these discussions will determine the continuation of The Flooring Centre's presence in Dunedin or the continuation under the present structure in Dunedin.

Close of Meeting

After much discussion regarding the above over the past two days in Dunedin, I confirm that an urgent, complete and immediate change is required in these areas as noted above. In order that there is no future doubt regarding your duties and responsibilities, I will follow this document with a clear and concise Job Description that better reflects your Branch Manager role, as has been the case since the implementation of the Dunedin Showroom 3 years ago after your proposal.

At this time I wish to confirm my earlier verbal advice that, should these key areas of your performance not be rectified immediately, then this will lead to your termination of employment at The Flooring Centre Ltd.

If you feel that any of the above is incorrect or unfair in anyway, please respond directly by return.

[22] Mr Henderson did not respond to the email from Mr Musson. His evidence at the Authority's investigation meeting was that he had already dealt with most of the concerns during the two days of discussion as they were raised with him.

[23] Mr Henderson said that after the email was received in June 2012, he put in long hours to deal with the various things that Mr Musson had raised. He said that he was struggling over that time with a lack of support and he had temporary administration staff. A new job description was provided to Mr Henderson as stated it would be in the email dated 15 June 2012.

30 October 2012

[24] There was a further meeting on 30 October 2012. It was attended by Mr Henderson and Mr Musson. It was Mr Musson's view at the time of the meeting and this is supported by notes he made for preparation before the meeting that there had been little progress by Mr Henderson since the earlier meeting in June 2014 and the raising of the concerns.

[25] There was a dispute about whether or not Mr Musson took the notes he provided to the Authority during the meeting. I find in all probability he either took notes at the time or made them at the end of the meeting. It was clear that Mr Musson had a practise of taking notes at or shortly after meetings and followed up earlier meetings with Mr Henderson with emails the contents of which were taken from the notes. Mr Musson accepted that the notes for 30 October 2012 are not a verbatim record of what was said. He also accepted, although not helpful to his case, that it was not until he knew Ms Guthrie had been instructed from 12 November 2012 that he had the handwritten notes typed up. The typed notes are more complete in nature. I find that I can use the handwritten notes as a guide to matters discussed.

[26] I find that amongst other matters Mr Henderson was advised (this was also in the June email) that the branch was facing a \$127,000 loss for the last financial year. He was also advised that if matters did not improve there was a chance the branch may have to close. Mr Henderson said he was told there was a 90% chance of that happening but Mr Musson was not sure whether he mentioned an actual percentage. Mr Musson talked about the concerns he still had about Mr Henderson's performance. He accepted that he told Mr Henderson that the staff did not wish to work with him.

[27] One of the areas of dispute is whether Mr Musson raised options at the meeting of a disciplinary or resignation path. Mr Henderson in his oral evidence said that Mr Musson told him there were two ways of doing this. One was for Mr Henderson to resign and the other was to go through a process and that neither wanted to go through a process. Mr Musson said that the meeting never got to the stage of mentioning termination or resignation. I am not satisfied that Mr Musson suggested that Mr Henderson resign as an option. Mr Henderson did not I find say that he would resign during the 30 October 2012 meeting although I find he asked Mr Musson if he wanted him to leave. Mr Musson would not be drawn into that but reiterated the seriousness of the situation. Mr Musson concluded the meeting with

Mr Henderson on the basis that it was likely there would have to be some drastic decisions about the future of the Dunedin branch and that he would like Mr Henderson to give that matter some thought.

[28] Mr Henderson said that he then spent a sleepless night considering what had been said. He said that he was concerned about the branch closing and people for whom he had created employment losing their jobs. He said that he also reflected about Mr Musson's advice that staff did not want to work with him.

31 October 2012

[29] Mr Henderson said that the following day when Mr Musson was still in the office there was another meeting and he agreed to resign that day. Mr Henderson's evidence was that on 31 October 2102 he asked Mr Musson whether he wanted him to resign and that Mr Musson responded it was up to him. Mr Henderson said that in order to preserve everyone else's job and save the business he agreed that he would go and gave notice of his intention to resign on 31 October 2012. He said he agreed with Mr Musson about what he would tell the staff. He said that Mr Musson told him to get back to him with a date that the resignation would occur and that he was flexible about the notice period which could be one or two months. He said that Mr Musson told him that he was going to Queenstown and to telephone him about the notice period to let him know how long he was going to work for.

[30] Mr Musson does not accept that Mr Henderson told him of his intention to resign on 31 October 2012 and said that it was not until 1 November 2012 that he received his advice that Mr Henderson intended to resign. His evidence was supported by his wife Lorna Musson. Mrs Musson said that she recalled after they arrived in Queenstown on 1 November 2012 for their wedding anniversary Mr Musson received a telephone call on his cell phone and looked rather surprised and shocked. When she questioned him about that he said that Mr Henderson had just resigned and seemed very taken back. She said Mr Musson had not told her prior to this that Mr Henderson has resigned.

1 November 2012

[31] Mr Musson said that it was on this date that Mr Henderson told him that he wanted to resign and that Mr Henderson felt his resignation may save the Dunedin branch and keep the rest of the team in employment. Mr Musson said that he was

rather surprised by the resignation and that he did not discuss the matter at any length with Mr Henderson over the telephone but said he would accept the resignation and they talked about timeframes for notice. Mr Musson said that he advised four weeks would be the normal period but he would be happy for Mr Henderson to see the end of the year out until Christmas if he wanted. The evidence supports that a termination date of 21 December 2012 was in all likelihood agreed on.

2 November 2012

[32] I find it likely that it was on Friday, 2 November 2012 that Mr Henderson advised Ms Chaplin and the two other sales employees that he had decided to resign from his position with The Flooring Centre. Ms Chaplin recalled him specifically stating that he had advised Mr Musson of this fact by telephone. Mr Henderson advised that Mr Musson had offered to have him work through until Christmas.

4 November 2012

[33] Mr Musson sent Mr Henderson an email dated 4 November 2012 in which he confirmed his verbal advice regarding his resignation received on the Thursday which was 1 November 2012. The email sets out Mr Musson's thoughts towards a plan of action including advice from Mr Henderson to the Dunedin team regarding his resignation. Mr Musson also wrote that:

Laurie, there is a lot to work through over the next 7 odd weeks until Xmas and I will likely be in constant contact with you by telephone and will undoubtedly be back down to Dunedin as soon as practical.

As mentioned by phone last Thursday I intend to assist you in every way possible over this coming period and I very much appreciate the timeframe that you have given in your resignation which should enable us to really get all current & future jobs and contracts highly organised through to completion. Also as mentioned, I have every intention of working closely with you over this time and ensuring that our relationship is amicable and that we part with a mutual respect that continues in to the future.

[34] At the end of that email, Mr Musson states:

Finally, As discussed by telephone, please forward your resignation letter in order that I can consider all options for the branch going forward. I will of course be meeting with you face to face in the coming weeks but in the interim, I wish to acknowledge and portray my sincere appreciation of everything that you have done for The Flooring Centre Ltd as well as me personally, over the past few years.

When did Mr Henderson advise Mr Musson of his intention to resign?

[35] There was a lot of focus in the evidence about the day Mr Henderson advised Mr Musson he was intending to resign. Mr Henderson was very clear it was 31 October 2012 and Mr Musson very clear that it was 1 November 2012.

[36] Although the meeting on 30 October 2012 was the reason Mr Henderson made a decision to resign he did not announce his intention to resign at the end of the meeting. If I accept Mr Henderson's evidence he told Mr Musson he intended to resign the day after the 30 October 2012 meeting on 31 October he then confirmed that intention the following day on 1 November when a notice period was discussed and agreed with Mr Musson to run from 1 November 2012. I do not find too much turns in this case on the date Mr Henderson first advised his intention to resign.

Resignation and seeking legal advice

[37] Clause 27 of Mr Henderson's employment agreement provides:

In the event that either the Employee or Employer wish to terminate the agreement, four weeks notice in writing must be given to the other party. This notice may be varied by mutual agreement.

Clause 1 of the employment agreement provides:

No waiver or variation to this agreement shall be effective unless it is in writing and is signed by or on behalf of the parties

[38] Mr Henderson said that although he had been asked to provide his resignation in writing, he could not bring himself to formalise it in that way. He said that The Flooring Centre had become his life and suddenly that was taken away from him. He made some inquiries of a contact about seeking some legal advice and on 8 November 2012 instructed Ms Guthrie. He wanted some advice before putting in a written resignation.

[39] On 12 November 2012, Ms Guthrie wrote to Mr Musson and advised amongst other matters as follows:

Over the last few months Laurie's employment relationship with the company deteriorated further to the point where there was a question mark over whether an ongoing relationship would in fact be sustainable in the present framework. You and Laurie talked about

this when you were down in Dunedin a couple of weeks ago. You referred to a termination process that could be followed and also suggested that another option would be for Laurie to resign. Laurie was pretty disillusioned about the whole situation and he said to you it was clear that the only option available to him would be resignation. At the end of the meeting, you said that Laurie needed to put his resignation in writing and confirm the date it would take effect. You said you were flexible as to when that finish date would be.

When he thinks about it and looks at the bigger picture, comparing the overall sales figures and budgets, looking at both the general company profile and what has been achieved in terms of market share, Laurie doesn't think he has been treated fairly. He feels that he is being treated as a scapegoat.

Laurie hasn't been able to come to terms with the magnitude of what has been asked of him and your definitive email sent on Sunday evening 4th November asking for a resignation letter leaves him wondering how best to deal with what he is now confronted with.

[40] Ms Guthrie suggested that the parties get together at mediation and that she could arrange a date straightaway as there was an unallocated half day in the last week in November and another in the first week in December at Mediation Services.

[41] This was the first indication I accept Mr Musson had that Mr Henderson was unhappy about his resignation and Mr Musson spoke to Mr Henderson by telephone directly after receiving that email.

[42] Ms Guthrie recorded this in an email to Mr Musson dated 13 November 2012 and confirmed that Mr Henderson was not resigning from his position at that point. She again referred to the possibility of mediation.

[43] By email dated 15 November 2012 Mr Musson advised that The Flooring Centre did not accept cancellation of Mr Henderson's resignation which it said had occurred on Thursday, 1 November 2012.

[44] By email also dated 15 November 2012 to Mr Musson Ms Guthrie wrote that she had spoken to Mr Henderson and that his clear view was that he had been forced into *agreeing to "resigning"* and that he had been told that morning by Mr Musson that he could not withdraw his resignation because none of the staff will continue to work with him if he stays on. Ms Guthrie referred again to mediation.

[45] By email dated 18 November 2012 to Ms Guthrie, Mr Musson advised it was not possible for Mr Henderson to retract his resignation as it was important to

maintain staff, supplier and client confidence and create certainty over the transitional period before Mr Henderson finishes up at The Flooring Centre. Mr Musson wrote that he was rather taken aback by the suggestion that Mr Henderson felt he had no option other than to resign because the goal of the meeting was to look at ways to improve his performance and ensure he fulfils all the obligations of his role. He stated that at no time did he suggest Mr Henderson resign or leave him with the impression that this option was on the table. Mr Musson stated that he agreed swift resolution is important but mediation in another city as well as the cost of employing legal representation made attendance a difficult and costly option. Mr Musson asked what Mr Henderson was seeking in circumstances where the company was not prepared to retract his resignation.

[46] By email dated 27 November 2012 Ms Guthrie wrote to Mr Musson and amongst other matters stated that it was four weeks that day since Mr Musson told Mr Henderson that he wanted him to go and that Mr Henderson had thought long and hard about it and he did not feel he should have to resign. Ms Guthrie referred to Mr Henderson's doctor having a view that he needed two weeks off but Mr Henderson felt for the sake of the business that he could not take the weeks off. Ms Guthrie noted that it was disappointing that Mr Musson did not agree to mediation at an early stage and the next available date would be in January 2013.

[47] On 30 November 2012 Mr Henderson received a telephone call from Mr Musson. Mr Henderson said that he was told by Mr Musson to go home on sick leave. Mr Musson said that he advised Mr Henderson that he understood he had not been well and placed him on garden leave and there was no discussion about sick leave. I accept Mr Henderson's evidence that he considered he had been sent home on sick leave. Mr Henderson said that he was told to go right away and did not pick up any of his tools or personal things. He never has retrieved his personal items.

[48] Mr Henderson said that a few hours after he left work to go home Ms Guthrie telephoned him and advised she had received a letter from Mr Riches terminating his employment.

[49] By letter dated 30 November 2012 Mr Riches wrote to Ms Guthrie and advised that he was now acting for The Flooring Centre. He stated that The Flooring Centre did not accept that there was any pressure placed on Mr Henderson to resign but that Mr Henderson after thinking matters through advised he wished to resign and

that resignation was accepted. Mr Riches set out in his letter why The Flooring Centre would not agree to a retraction of the resignation. He confirmed that his client did not wish to attend mediation. He wrote that upon receiving Mr Henderson's resignation Mr Musson detailed what was to occur between then and 21 December 2012 which he described as Mr Henderson's final day to ensure a smooth transition with suppliers, staff and clients. He noted that the fact Mr Henderson has now attempted to retract his resignation has caused some difficulties and concerns going forward. Materially Mr Riches stated the following:

We now wish to notify you that Mr Henderson is to be placed on "garden leave" effective from today, the 30th November 2012. Pursuant to Section 27 of Mr Henderson's contract his employment has ceased and The Flooring Centre Limited will be making a payment in lieu of notice up until the 21st December 2012 including his holiday pay in accordance with this section. Mr Henderson's employment will terminate on the day that payment in lieu is made.

[50] By email dated 3 December 2012 to Ms Guthrie, Mr Riches asked that Mr Henderson return all company property including the work vehicle, keys and company cell phone and that his final pay would be processed that week.

[51] Mr Henderson said that as best he could recall he returned the company property including the vehicle on the Tuesday before his final pay was deposited into his account on 6 December 2012.

[52] A personal grievance was raised on 28 February 2013.

[53] Clause 27 of the employment agreement provides that where notice of termination has been given by either party, the Employer may

Terminate the Employee's employment earlier than the expiry period of notice by making a payment of lieu of notice for the unexpired period of notice. If the Employer does so, the Employee's employment will terminate on the date that the payment in lieu is made.

Raising of the grievance

[54] I find that Mr Henderson was advised that his employment would terminate on the day when payment in lieu was made. Payment in lieu was made on 6 December 2012. The grievance was raised 84 days from and including 6 December 2012. It was raised within the statutory timeframe.

Was Mr Henderson's resignation effective when it was not given in writing?

[55] Ms Guthrie submits that Mr Henderson's advice that he intended to resign did not become an actual resignation because the resignation was not in writing as required by clause 27 of the employment agreement. She described the absence of a written resignation as an unsatisfied condition precedent because Mr Musson had made it clear on at least three occasions that the resignation needed to be in writing.

[56] I have considered therefore whether The Flooring Centre was able to hold Mr Henderson to his resignation when it was not in writing as required under the terms of the employment agreement. Normally resignation is a unilateral action that takes effect in accordance with how the intention to resign is advised to an employer and an employer is not required to accept or reject a resignation although in this case The Flooring Centre received and confirmed the resignation advice in an email of 4 November 2012.

[57] The effect of a resignation is to convert employment of undefined duration into that of defined duration. The notice period I find was agreed to verbally on 1 November 2012 and is longer than the four weeks in the employment agreement being from 1 November until 21 December 2012.

[58] Mr Musson asked Mr Henderson to put his resignation in writing during the telephone conversation on 1 November 2012 and in the email of 4 November 2012 to forward his resignation letter as discussed by telephone [1 November 2012] in order so that he can consider all options for the branch going forward. I could not be satisfied that he made such a request on a third occasion.

[59] The evidence supports that the parties notwithstanding that the resignation was never reduced to writing gave effect to the verbal resignation in the following ways. Mr Henderson advised key staff in the Dunedin Branch of The Flooring Centre that he was resigning on 2 November 2012 but would probably be there until Christmas. Mr Musson addressed issues such as *who does what* until Christmas and issues around *communication* of the resignation in his email of 4 November 2012.

[60] The advice given to staff and instructions around work and communication support that Mr Henderson's advice of the intention to resign and the consequences that flowed from that were intended to be effective from the time the resignation was given not when the resignation was received in writing.

[61] There have been cases in which there has been focus on the employment agreement and what it says about termination and notice. This is particularly in circumstances where words were not intended to be a resignation but taken in that way or were said as part of an emotional outburst. The Employment Court judgment in *Taylor v Milburn Lime Limited*¹ is such a case. The employer concluded that the employee by his words or actions resigned after a heated exchange. Judge Couch stated at [22] that there was a written employment agreement between the parties which provided it could be terminated by giving two weeks' notice in writing. In those circumstances anything Mr Taylor did on the day in question could not constitute a termination of the employment agreement on its terms. Rather, at most, it could only amount to a repudiation of the employment agreement which the employer could accept or reject. It was additionally found at [23] that Mr Taylor's words and actions were not sufficiently clear to constitute an unequivocal resignation or repudiation when he did not specifically say that he was resigning.

[62] In this case unlike the situation in *Taylor* there were unequivocal words of resignation by Mr Henderson. There was also evidence that supported agreement about the notice period which was longer than that in the employment agreement. The steps to be undertaken during the notice period by Mr Henderson were set out in the 4 November 2012 email in a manner which suggested without further response the resignation was intended to be effective and not delayed until written notice was received.

[63] Importantly it was 12 – 13 days from 1 November 2012 before there was any indication that Mr Henderson did not intend to resign. During that period Mr Musson understood that Mr Henderson was resigning and I do not find had any reason to doubt that Mr Henderson genuinely wished to end the relationship until Ms Guthrie advised Mr Musson that Mr Henderson was unhappy on 12 November and then that he was not resigning on 13 November 2012. I find that Mr Henderson also considered he had resigned from his position at that time (doc g attached to his first statement of evidence). The evidence did not support that there was agreement to postpone any reliance on Mr Henderson's advice that he intended to resign until it was in writing. Mr Henderson then had a change of heart.

¹ [2011] NZEmpC 164

[64] There was a request for the resignation to be confirmed in writing but I do not find that it was intended to be conditional on the same. The employment agreement requires any variation to it to be in writing but there are situations where the parties to a contract do not follow the form required by the underpinning employment agreement but nevertheless intend to be bound by the agreement entered into. I find that this is such a matter particularly when the unilateral nature of a resignation is considered and the passage of time before Mr Henderson advised he was not resigning.

[65] In conclusion I do not find that the parties intended the resignation would not be effective until it was received in writing. Mr Henderson's resignation was not able to be withdrawn without the agreement of The Flooring Centre which was not forthcoming after that time.

[66] I have considered what was then required of The Flooring Centre after Ms Guthrie advised that Mr Henderson did not want to resign.

[67] There are good faith obligations in s 4 (1A) (b) of the Act that require the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. Whilst The Flooring Centre was of the view that they could hold Mr Henderson to his resignation it would be consistent with good faith obligations under s 4 of the Act to have considered his view that he had not resigned and the reasons why. Mr Musson had some concerns about the effect of a retraction of the resignation on the maintenance of staff, supplier and client confidence and certainty over the transitional period. It was not a situation however where Mr Henderson had been replaced by another employee.

[68] Ms Guthrie sensibly suggested mediation as the appropriate forum at a time when Mr Henderson was still in employment but The Flooring Centre was not prepared to meet or discuss further. The Flooring Centre did not have to agree to mediation but should have been otherwise active and constructive in hearing and considering Mr Henderson's concerns.

[69] I do not find that appropriate consideration as required under good faith obligations was given to Mr Henderson's view that he felt pressured to resign and had subsequently changed his mind before he committed that resignation to writing.

Although a resignation cannot be withdrawn without an employer's agreement there may be circumstances in which a fair and reasonable employer after proper consideration of the reasons allows an employee to change his or her mind after they have given notice of resignation.

[70] That sort of proper consideration reflects the object of the Act as set out in s 3 which is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment. One of the ways in which this is achieved is by reducing the need for judicial intervention with the parties attempting to resolve matters short of that intervention. That did not happen in this case and led to a rather abrupt ending of the employment relationship which I shall turn to shortly.

Dismissal

[71] There are two claims under this head. There is a claim advanced as an alternative if I found that Mr Henderson's resignation could be relied on of unjustified constructive dismissal. The other claim is that there was an actual dismissal by virtue of Mr Riches letter which took effect on 6 December 2012.

Constructive dismissal

[72] The constructive dismissal is based on the third non-exhaustive category held by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*² to be a situation where a constructive dismissal may arise. Ms Guthrie submits that there was a breach of duty by the employer which caused an employee to resign.

[73] For completeness I have not found that there was a choice given to Mr Henderson of a choice between resigning and being dismissed, the first category of case referred to by the Court of Appeal in *Auckland Shop Employees Union*.

[74] Ms Guthrie sets out in her submission the correct approach to a constructive dismissal as a two stage process is described by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc.*³ There is a need to consider whether the resignation was caused by a breach of duty on the part of the employer and whether it was a breach of sufficient

² [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136

³ [1994] 1 ERNZ 168 at 172

seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing.

[75] The meeting on 30 October 2012 was a difficult one for Mr Henderson. He felt that the blame and responsibility for the situation in the Dunedin branch was being placed on him and he was told drastic decisions would have to be made about the branch and there was a high degree of likelihood it could close. He was also concerned to hear that staff did not want to work with him. I accept that meeting was the reason for his resignation.

[76] There can be a serious breach of duty when an employer stores up performance concerns and delivers them all up in a meeting to an employee. This was not I find such a situation. Most of the concerns had been raised earlier including issues with staff, the loss the branch had suffered in the previous financial year and that there could be decisions made that impacted on the continuation of the branch.⁴

[77] Mr Musson was entitled to discuss with Mr Henderson his concerns about the branch particularly when he was the manager of that branch. It was against the background of the June meeting. There had been some intervening concerns such as the failure to provide branch reports to Mr Musson. There was a view expressed that some drastic decisions may need to be made about the branch. I find it likely that the meeting ended with Mr Henderson to get back to Mr Musson with his views.

[78] I am not satisfied that there was a breach of duty on Mr Musson's part during the meeting. Even if there was a breach I do not find that it was of such seriousness that it would make it reasonably foreseeable Mr Henderson would no longer wish to work. This is particularly so when Mr Henderson agreed subsequently to work out an extended notice period and then advised he had not in fact resigned.

[79] I do not find that Mr Henderson was unjustifiably constructively dismissed.

Actual dismissal

[80] I find that the letter from Mr Riches to Mr Henderson dated 30 November 2012 advising that he was placed on *garden leave* effective from 30 November and that Mr Henderson's employment would terminate on the day a payment in lieu of notice was made amounted to a dismissal of Mr Henderson.

⁴ Email from Mr Musson to Mr Henderson dated 15 June 2012.

[81] While there was provision under clause 27 to terminate Mr Henderson's employment earlier than the notice period by making a payment of lieu of notice for the unexpired period of notice that was not what had been agreed to by Mr Musson and Mr Henderson. After Mr Henderson advised of his intention to resign there was agreement that he would work out his notice until 21 December 2012. Mr Riches' letter of 30 November 2012 makes that clear when he writes *Upon receiving Mr Henderson's resignation, Mr Musson detailed what was to occur between now and 21st December, which would be Mr Henderson's final day to ensure a smooth transaction with suppliers, staff and clients.*

[82] Having reached that clear agreement that Mr Henderson would work until 21 December 2012 I do not find reliance can then be placed on clause 27 of the employment agreement to terminate the relationship unilaterally without agreement by Mr Henderson by payment in lieu for the notice period.

[83] Although there was reference in the letter to garden leave that could only refer to the short period before the payment in lieu of notice was made. It was not placement on garden leave for the balance of the notice period. The employment was terminated on payment in lieu and Mr Henderson was also required to return his car and other work items.

[84] The only ground advanced in Mr Riches letter for the termination within the notice period was that Mr Henderson attempted to retract his resignation which *has caused some difficulties and creates some real concern for the way forward.*

[85] As found earlier the employment ended on the day payment in lieu was made which was 6 December 2012.

Justification of dismissal

[86] Under the test in s 103A of the Act the question of whether a dismissal was justifiable must be determined by the Authority on an objective basis by considering whether The Flooring Centre's actions and how they acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[87] There are four procedural factors described in s 103A (3) (a) to (d) of the Act that the Authority must consider in determining justification but it may consider other

factors. An employer is expected to comply with statutory good faith requirements. A failure to comply with statutory good faith requirements or the four factors set out in s 103A (a) to (d) will undermine the justification of a dismissal.

[88] Mr Henderson wanted to meet with The Flooring Centre about his view that he did not want to and had not resigned from his employment. Mediation was proposed as an appropriate forum to do so. Instead of Mr Henderson continuing to work out his notice as agreed he was sent home by Mr Musson on 30 November 2012 and on that same day advised that his employment would be terminated within the notice period on the day he was paid in lieu. He was required to return his car and company property early the following week.

[89] I do not find that the fact Mr Henderson wanted to retract his resignation could substantively justify his dismissal during the agreed notice period. There was no fair process or compliance with the good faith obligations to be active and constructive in maintaining a productive employment relationship including being communicative and responsive. Mr Henderson's consent to his employment ending in this way was not obtained as it should have been. There was no consultation with Mr Henderson about his health although it seems to have been relied on both in sending him home on 30 November 2012 and in Mr Riches' letter. I find that the dismissal was unjustified both substantively and procedurally. It was not an appropriate response to advice that Mr Henderson did not want to resign and that he felt pressured into doing so

[90] I find that the termination of Mr Henderson's employment within the notice period was unjustified under s 103A of the Act because the actions of The Floor Centre and how it acted were not what a fair and reasonable employer could have done in all the circumstances at the time.

[91] The employment ended not by virtue of the resignation but by unjustified dismissal when Mr Henderson was paid in lieu for the notice period when it had been agreed he would work it out.

[92] Mr Henderson has a personal grievance that he was unjustifiably dismissed and is entitled to consideration of remedies.

Remedies

Lost wages

[93] I have found that Mr Henderson agreed to resign. Although he subsequently changed his mind because he considered he had been pressured to resign, without The Flooring Centre's agreement, he was not able to withdraw his resignation.

[94] The employment was therefore converted into employment of fixed duration and was to end on 21 December 2012.

[95] Mr Henderson was paid up until 21 December 2012 and there is therefore no further award of lost wages.

Compensation

[96] The evidence of the humiliation and loss of dignity and injury to feelings Mr Henderson suffered in this case is compelling even though the dismissal was not in respect of ongoing employment.

[97] One of the most important matters for Mr Henderson was talking to Mr Musson about continuing on with his role rather than resigning. That never happened. Mr Henderson said that he felt he had put an enormous amount into the job over the years growing the business from nothing only to be treated very badly at the end.

[98] Mr Henderson said that when Mr Musson told him to go home on 30 November 2012 he had to leave right away without collecting his tools or personal items and then he received news of Mr Riches letter terminating his employment. He was required the next week to return the car and cell phone and said that suddenly he did not have a job, cell phone or vehicle and he was reeling with the shock of it.

[99] What was very clear from the evidence is that Mr Henderson who described himself as having spent his life in flooring has completely withdrawn from anything to do with the flooring trade and currently is a truck driver.

[100] The Authority heard from Mr Henderson's daughter, Beth Henderson. She supported that her father had become withdrawn and that as a family they had become quite isolated after his dismissal. Her evidence was compelling. Mr Henderson's

partner Pieta Holtzhausen said that since his job ended his anxiety socially and financially has got worse. Further that his personality completely changed and that he is embarrassed about mixing with anyone from Dunedin who might know he had been dismissed.

[101] My assessment of the evidence under this head is that a significant part of the humiliation and loss of dignity arose for Mr Henderson when The Flooring Centre did not deal with Mr Henderson's concerns about the resignation in a good faith manner including being communicative and responsive. Having raised concerns and evidence of the impact of those concerns on his health he was asked to leave the work place on 30 November immediately without prior discussion and consideration of his concerns he was then dismissed before the agreed notice period had expired.

[102] Mr Henderson has not been able to move on from that even with the considerable passage of time. He has withdrawn from those he previously dealt with in the flooring area even to the extent of leaving shops if he sees someone in there from the flooring industry. A great deal of the suffering of humiliation, loss of dignity and injury to feelings could have been prevented if his concerns had been considered by The Flooring Centre in a good faith manner when Ms Guthrie had raised them.

[103] I have taken into account that The Flooring Centre did not comply with good faith obligations and that this had a significant impact on Mr Henderson in assessing an appropriate award under this head.

[104] The Flooring Centre Limited trading as The Flooring Centre South Limited is ordered to pay Laurie Henderson the sum of \$10,000 without deduction being payment of compensation under s 123 (1)(c)(i) of the Act.

Contribution

[105] I do not find that Mr Henderson contributed to his personal grievance and there is to be no reduction to the remedy above.

Penalty for breach of the duty of good faith

[106] A penalty is claimed for a breach of good faith of \$5000 under s 4A of the Act on the basis that the failure to comply with the duty of good faith was deliberate, serious and sustained.

[107] The claim for a penalty was lodged within 12 months.

[108] I have found that there was a breach of the duty of good faith during the notice period. The Flooring Centre was not active and constructive in maintaining a productive employment relationship and was not responsive and communicative to Mr Henderson's concerns. The threshold though for a penalty is high and Mr Henderson is required to establish that a penalty is appropriate. The failure to respond and communicate was in this case sustained from the first correspondence from Ms Guthrie on 12 November 2012 to 30 November 2012 and was serious.

[109] The Flooring Centre focussed on a narrow legal issue as to whether Mr Henderson could retract his resignation rather than on the good faith obligations to be active and constructive in maintaining a productive employment relationship even if simply for the notice period. I could not be satisfied that this was a deliberate decision rather than a genuine belief in the legal position that no more was required. I also take into account the breach of good faith in my compensatory award.

[110] I do not make an award for a penalty in this case.

Counterclaim

Were there breaches of duty on the part of Mr Henderson that caused loss and was it reasonably foreseeable that the breach would cause the loss?

[111] The Flooring Centre say that Mr Henderson breached his duties as set out in his employment agreement as set out in clause 3 and 10.

3. Duties and Obligations of the Employee

During the continuance of this Agreement the Employee:

Shall at all times maintain a professional standard of conduct and performance in all matters relating to the services and operations of the Employer and at all times act in a manner which will protect and enhance the reputation of the Employer. In meeting these standards the Employee shall co-operate fully with the owners.

10. Performance

The Employee must use their best endeavours to promote and protect the Employer's interests and must not do anything that is harmful to those interests. The Employee must diligently and faithfully perform their duties and exercise such powers as may from time to time be assigned or vested in the Employee in relation to the conduct and management of the Employer's affairs.

[112] Reliance is also placed on key accountabilities in the job description around the accurate quantifying and pricing of all work and to ensure all work and contracts are effectively managed and administered from initial job assessment through to completion.

[113] The counterclaim is far reaching and alleges 12 separate breaches spanning a period of about three years of the employment relationship and damages are sought in the sum of \$105,000.

[114] I referred Ms Guthrie and Mr Riches to obiter in *George v Auckland Council*,⁵ an Employment Court judgment of Judge Inglis following discussion about the House of Lords judgment in *Lister v Romford Ice & Cold Storage Co Ltd*⁶ in which she stated that:

...Rather it is strongly arguable that in the modern context of employment relationships in New Zealand, and in light of the initial obligations conferred on the parties under the Act, an employer may not seek to recover damages from an employee arising from acts of negligence committed during the course of their duties. If it were otherwise it would have a chilling effect on the way in which employees undertake their duties, could lead to reactive claims or threats of claims against those taking personal grievances which would undermine the statutory timeframe for resolving employment relationship issues, and expose employees to significant potential financial liability for a breach even in circumstances that could never justify a dismissal.

[115] Judge Inglis noted that the Court of Appeal had expressly left open the issue of whether an employer can recover damages in such circumstances in *Katz v Mana Coach Service Ltd*⁷. Judge Inglis did not agree that other elements of a breach of contract claim such as foreseeability and loss provided an adequate safeguard once a breach however minor had been established.⁸

[116] Mr Riches relied solely on another 2009 judgment of the Employment Court in *Masonry Design Solutions v Nicholas Bettany*⁹ in which there was an award of special damages against an employee in the sum of \$12,000.

[117] Mr Henderson is facing a significant claim. He accepts that he made some mistakes during work but that they were unintentional errors. Mr Musson in his evidence did not disagree.

⁵ [2013] NZEmpC 179 at 147 - 150

⁶ [1957] AC 555, [1957] 2 WLR 158, [1957] 1 ALL ER 125 (HL)

⁷ [2011] NZCA 610, [2011] ERNZ 186.

⁸ At [150]

⁹ (2010) 9 NZELC 93,575, (2009) 6 NZELR 834

[118] A claim for damages in an employment relationship for performance issues and negligence requires a cautious approach on the part of the Authority for the very reason stated by Judge Inglis. Although the Employment Court had stated it is strongly arguable that damages are not able to be claimed the matter has not been finally decided.

[119] The need for caution is highlighted by one of the claims in this case concerning work undertaken for Cromwell College (Cook Brothers). It is in total a claim for \$12,742.50 plus GST. Part of that claim is the sum of \$1,397.50 plus GST for some additional work undertaken by Mr Henderson without first obtaining an order number or site instruction. Mr Henderson explained that there was a tight deadline and he had ordered additional product before the order came though and then the foreman had left the company so there was no order forthcoming.

[120] On 12 October 2012 Mr Henderson offered to pay the sum of \$1,397.50 himself recognising a degree of responsibility for the failure to obtain an order number. Mr Musson would not accept that cheque during the employment and asked Mr Henderson to ensure that he learnt from his mistake. The sum however is now part of the claim of damages.

[121] What has changed between then and now? I find that the change is that Mr Henderson pursued a personal grievance against The Flooring Centre. Mr Riches said that the fact Mr Henderson offered to pay supported that he considered he was responsible to do so. Equally though the fact that payment was declined by Mr Musson during the employment relationship supported that it was not usual or foreseeable that an employee would pay the company for any loss caused by mistakes rather that they would learn from them.

[122] Mr Henderson accepted that he had a duty to undertake work with reasonable care and skill but does not accept that he breached that duty.

[123] I shall address the 12 individual claims as below:

Early Settlers Museum (Lund South Project)

[124] There was a credit issued for \$5,641.38 plus GST by the Flooring Centre because Mr Musson said that Mr Henderson did not deal with the queries on the many progress claims put forward for payment. Mr Musson said he asked Mr Henderson to

address these issues on many occasions. Mr Henderson said that other people were also dealing with this issue in the office. An email dated 13 August 2012 from Mr Henderson to Early Settlers stated there had been what numerous meetings/discussions with the previous project manager Glenn Forrester who he had no idea had moved on.

[125] One of the difficulties with these sorts of damages claims is that it is very difficult with the passage of time to obtain sufficient evidence to satisfy the Authority that there was a breach of duty. Mr Henderson may have been tardy in responding to requests about invoices which could be a breach but he says that there was some confusion exactly who from The Flooring Centre was dealing with Early Settlers and providing this information. There is a possibility that there were discussions/meetings and supply of information but Mr Forrester moved on and things may not have been communicated at Early Settlers end. Mr Musson was open to that possibility in August 2012 - see doc 2(a) of applicant's documents in response to counterclaim. I could not be satisfied that there was a breach of the employment agreement by Mr Henderson on this occasion rather than a combination of a perception that someone else was dealing with the queries and a change of project manager.

South Otago High School

[126] The allegation was that Mr Henderson artificially changed the standard pricing within the computer which resulted in pricing the job at \$40 per metre rather than \$49 per metre resulting in a loss of \$592 plus GST. Mr Henderson could not really answer this or rule out the possibility that he made a mistake. If there was a mistake then I find it was it was simply a mistake. It seemed likely that that he had priced for a material called Classic Mystique which he said was commonly used. He could not rule out a change in specifications but had no access to information about that. If there was a breach I am not persuaded Mr Henderson should be liable for any damage that flows from it.

St Mary's School Mosgiel

[127] This was a claim that Mr Henderson incorrectly priced carpet at \$7.92 per sq metre when the actual cost was \$24 per square metre resulting in a loss to The Flooring Centre of \$7,525.44 plus GST. This claim was a little confusing because it appeared that only vinyl had been priced to supply and install and not carpet. The

evidence fell somewhat short of establishing exactly what the breach was and what damage flowed. Mr Henderson could not I find sensibly answer this claim and I could not be satisfied of the breach.

Countdown Anderson Bay (Calder Stewart)

[128] The allegation was that Mr Henderson quoted a price of \$91.50 net per sq metre for vinyl tiles but the ultimate invoice was for \$143.30 and the client refused to pay resulting in a credit of \$4,947.50 plus GST being given. Mr Henderson said that it was unfair just to show a credit when it was possibly because of labour and floor preparation. He said that from what he could recall of the job it was installed during the night and the floor was bad. He said that he was encouraged to charge full rates for extras and if knocked back then it did not have a true reflection on the overlap gross profit. This was a job undertaken in 2011. I could not be satisfied that there was a breach in the quoting but if there was then I am not satisfied that the loss was caused by that breach and that it was reasonably foreseeable.

Nicola Wong

[129] It was claimed that Mr Henderson forgot to cost in the Thinline board required for installation and there was a credit to the client for \$223.36. Mr Henderson explained that he priced this job at the same time as there were issues with other vinyl tile jobs and after some complaints the product was replaced and the supplier said that chipboard floors would have to be overlaid with Thinline board before installation. He could not recall if he had overlooked this but said that Christchurch was doing the invoicing at the time and often they went out without discussion. Mr Henderson said that Ms Wong is his niece and if it had been raised with him he would happily have paid the difference rather than putting her through the embarrassment of complaining about the account. If there was a breach then it was a minor mistake. I am not persuaded he should be liable for any damage.

Owheo (Lund South Limited)

[130] There was some dispute as to whether additional carpet tiles were delivered to site and stored separately. Mr Henderson was adamant that they were delivered to the site by the carpet installer and the foreman directed where they were to be left. I accept on the balance of probabilities that they were ordered and delivered. The only breach could concern what happened then.

[131] The issue was then that some carpet tiles went missing and a credit was given of \$5054.27 plus GST in September 2011. Mr Henderson said that he went to site and found some boxes and took photos of what was left. He said that the mistake was the installer not getting a signature for delivery so The Flooring Centre could not prove delivery. Mr Henderson said that this was something attended to after this incident. Mr Henderson noted that the installer was overseas so I could not hear from him regarding delivery. It is clear from email traffic that Mr Musson and Mr Henderson did discuss this matter when it arose. I could not be satisfied that there was a breach of duty by Mr Henderson. There was there is a duty on The Flooring Centre to mitigate its loss and it seems surprising that more attempts were not made to establish delivery where there may be the possibility theft and possible insurance claims. Mr Musson says that Mr Henderson did not follow up in a timely manner. Mr Henderson says that he did. I do not have enough evidence to satisfy me that his attempts to follow up were inadequate so as to amount to a breach.

Crawford Street Development (Lund South Limited)

[132] The claim is that Mr Henderson failed to breakdown contract variations as requested on numerous occasions and failed to attend to remedial work in a timely fashion forcing a payment credit of \$1,935.37 plus GST.

[133] Mr Henderson refers the Authority to an email sent by Mr Musson to him on 19 May 2011 about Crawford Street and the credits they wanted that stated amongst other matters that *this is definitely unfair*. The email goes on to say that the only item they could possibly charge is the glass removal and reinstatement but even this was because there had been a delay in installation due to the disorganisation of the site foreman. Mr Henderson was advised to advise David [from Lunns] that Mr Musson could verify this through the many site visits. There was no suggestion at that time that there had been a breach by Mr Henderson and I do not at this time find a breach made out.

Cromwell College (Cook Brothers)

[134] The claim is that Mr Henderson was required to price the job and overlooked the need for Thinline Board and then a subcontractor undertook the work but The Flooring Centre was forced to replace the whole job at a cost of \$12,742.50 plus GST.

There is also the claim I referred to earlier for \$1,397.50 plus GST for not obtaining an order number or site instruction.

[135] Mr Henderson accepted that he had made a mistake in the pricing by missing out the supply and installation of the hardboard but he does not accept that the issues resulting in the replacement of the floorcovering were caused by that. That is because he spoke to the flooring contractor before the contractor started on the job and advised him of the mistake and the flooring contractor made an assessment that the flooring could be successfully installed over the existing vinyl. Mr Henderson said that he relied on that advice and that Mr Musson agreed with the approach. Emails support Mr Musson then taking over negotiations when the approach did not work and the vinyl had to be uplifted. Mr Henderson did make a mistake. There was some loss but even if there was a breach I am not satisfied that the loss was attributable to the breach in all the circumstances and it was not reasonably foreseeable because of reliance on advice by the flooring contractor.

Dunedin Town Hall

[136] The claim is for a write off of \$41,452.18 on this job. In particular it is alleged that Mr Henderson ordered a considerable number of the wrong carpet tiles for the job and then The Flooring Centre had to purchase the right colour tiles. It was also said that the job was poorly priced and managed from the outset by Mr Henderson.

[137] Mr Henderson said that this was a complex and large project which was initially priced by him and then the full set of tender documents were sent to Christchurch where a quantity surveyor confirmed his price. He said that he tried to look at the possibility of a quantity surveyor taking over the pricing and control of the variations because he was not trained in the area but no-one was available. Mr Henderson said that he was not aware there was a problem until he got the counterclaim and noted one of Mr Musson's own emails dated 3 August 2011 copied to Mr Henderson in which he talks positively about the project.

[138] I am not satisfied that there was a breach by Mr Henderson. It seemed to me that he was overwhelmed by the project and had inadequate assistance. Other people though were also involved at an early stage and they had checked and approved early pricings. There was inadequate evidence about the project for any conclusions to be

drawn. Even if I had found a breach the evidence on loss any breach caused was quite inadequate.

Golden Centre – Cook Brothers

[139] This claim for a credit of \$9000 plus GST was because a tiling subcontractor had produced defective workmanship. When this job was priced for stage 2 by Mr Henderson it was found that The Flooring Centre was not the cheapest price using the same tiling subcontractor as in stage 1. Mr Musson said that Mr Henderson advised he had found a cheaper tiling contractor and Mr Musson wanted background checks undertaken before he was engaged to undertake the role. Mr Henderson says that the tiler had already been used to lay tiles in the new Dunedin shop and for other installation including The Early Settlers Museum and that he had remained Mr Musson of this before the job was started. Mr Musson did not recall having any earlier interaction with the tiler and did not agree he had previously laid tiles.

[140] I could not be satisfied that the tiler whose work was so defective had not previously been engaged with The Flooring Centre and performed tiling work on those occasion to a satisfactory standard. I cannot find a breach by Mr Henderson in the engagement of the tiler. There is some evidence about concerns Mr Henderson delayed in responding about the Golden Centre but I am not satisfied that that caused loss.

Countdown Mosgiel

[141] The claim under this head was that Mr Henderson failed to provide a sample for installation and when it was provided it was three times the quoted sum of the supply of tiles. The client though accepted the increased costs and was prepared to wear the increased price. It was not prepared to pay the excessive costs invoiced for laying the tiles as a result. A credit was made in the sum of \$1123.50 plus GST.

[142] There was a delay by Mr Henderson in forwarding the sample of tiles but Countdown agreed to pay the higher costs. If there was a breach and it caused loss I do not find that it was reasonably foreseeable that the breach would result in a credit for excessive costs for laying tiles.

Chatsford Rest Home

[143] This was a claim that Mr Henderson priced the job and allowed for the carpet to be covered up the walls to 100mm high to all areas and all perimeters. However this was deficient as the requirement was for 300mm. The cost to The Flooring Centre was \$14,364.00 plus GST.

[144] Mr Henderson says that this job was priced in Christchurch and Mr Musson accepted that but there is a standard clause that the price is subject to on site measure and Mr Henderson was responsible for that.

[145] There was no invoice supplied in relation to this job and no other information so that I could determine in any conclusive way whether Mr Henderson had breached his duties. I was not supplied with any plans or other information.

Conclusion on Counterclaim

[146] In conclusion I find that the counterclaim fails in its entirety for the reasons set out above.

Costs

[147] I reserve the issue of costs. The parties are encouraged to try and reach agreement as to costs. Ms Guthrie has until 24 April 2015 to lodge and serve submission as to costs and Mr Riches has until 15 May to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority