

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2019] NZERA 727
3049976

BETWEEN MATTHEW TRITT
Applicant

AND DUNRITE DRAINAGE AND
LANDSCAPES LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Ashleigh Fechney for Applicant
Karen Leslie for Respondent

Investigation Meeting: 28 August 2019

Submissions received: 6 September 2019 from Applicant

Additional communications with the parties: Up to and including 3 October 2019

Determination: 20 December 2019

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Mr Tritt’s employment were affected to his disadvantage by the unjustified actions of Dunrite Drainage and Landscapes Limited. Dunrite Drainage and Landscapes Limited is ordered to pay to Mr Tritt the sum of \$10,000 under s 123(1)(c)(i) within 28 days of the date of this determination.**
- B. Mr Tritt was not constructively dismissed.**

- C. Dunrite Drainage and Landscapes Limited breached its statutory duty of good faith.**
- D. The counter-claim against Mr Tritt is declined.**
- E. Costs are reserved.**

Employment relationship problem

[1] Dunrite Drainage and Landscapes Limited provided services undertaking landscaping work including installing driveways and drainage on client properties. The company ceased trading in March 2019 and is taking steps to sell its assets.

[2] Mr Tritt started working for Dunrite on Thursday 13 April 2017 initially as a Labourer and then as a Foreman. On Tuesday 18 April 2017, following the Easter holidays, Mr Tritt signed an employment agreement setting out the terms and conditions of his employment.

[3] Mr Tritt says that during 2017 Dunrite embarked on a course of conduct designed to extract his resignation. He challenges the ending of the employment relationship which he says was a constructive dismissal. He also claims one or more conditions of his employment were affected to his disadvantage by the unjustifiable actions of Dunrite, and that Dunrite breached its statutory obligations of good faith.

[4] Dunrite denies the claims and has made a counter-claim against Mr Tritt alleging he breached the terms of the employment agreement and seeks damages.

Issues

- [5] In order to resolve Mr Tritt's application I must determine the following issues:
- a) Whether Mr Tritt was unjustifiably constructively dismissed and if so what, if any, remedies should be awarded;
 - b) Whether one or more conditions of Mr Tritt's employment were affected to his disadvantage by unjustified actions of Dunrite and if so what if any remedies should be awarded;

- c) Whether Mr Tritt is owed arrears of wages;
- d) Whether Dunrite breached its statutory obligations of good faith; and
- e) Whether Dunrite should succeed in its counter-claim against Mr Tritt.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result. It has not recorded all evidence and submissions received although all submissions and evidence have been carefully considered.

Offer of employment

[7] Mr Tritt attended an interview on 11 April 2017 with Ms Karen Leslie, the sole director and shareholder of Dunrite. During the interview Mr Tritt advised Ms Leslie that he suffered from anxiety.

[8] Mr Tritt says he told Ms Leslie that he may need to take leave from time to time as a result of his anxiety. Ms Leslie denies Mr Tritt told her he might need to take time off work. Ms Leslie says Mr Tritt told her his anxiety would not impact on his performance at all.

Absenteeism

[9] Mr Tritt was absent from work on a significant number of days during the employment relationship before he became entitled to any paid sick leave or annual holiday entitlements:

- 31 May 2017 (due to anxiety)
- 22 and 23 June 2017 (these days were paid as annual holidays in advance)
- 13 July 2017 (to look after his partner's child)
- 15, 19 and 21 July 2018
- 1 August 2017 (due to anxiety)
- 2 August 2017 (due to having had an argument with his partner)
- 9 August 2017 (due to seeing his lawyer)

- 22 and 23 August 2017
- 15 September 2017
- 20 September 2017 (ongoing)

[10] Mr Tritt did not return to work following his absence on 20 September.

Credibility

[11] There were only two witnesses at the investigation meeting. Mr Tritt and Ms Leslie. At times their evidence conflicted. In those circumstances I must decide whose evidence I prefer and this necessarily involves assessing credibility.

[12] In assessing credibility I have assessed what the witnesses said, how they expressed their evidence and how it was said. I have considered how reasonable, plausible and probable the evidence is and have taken into account what corroboration there is. In particular what documentation exists to support one version or the other.

[13] Overall I found Ms Leslie's evidence to be more credible and I have preferred it to Mr Tritt's. Ms Leslie's evidence appeared more consistent. Although both witnesses appeared reliable, Ms Leslie's evidence was more plausible and without placing too much weight on demeanour, I found Ms Leslie to be genuine.

Unjustified disadvantage

[14] Mr Tritt claims one or more conditions of his employment were affected to his disadvantage when Dunrite:

- a) Unilaterally reduced in his rate of pay from \$30 per hour to \$28 per hour;
- b) Unilaterally demoted him from foreman to labourer;
- c) Failed to provide a healthy and safe workplace;
- d) Issued a warning to him on 29 August 2017;

- e) Commenced an investigation into alleged misconduct and failed to complete the investigation in a timely manner.

Reduction in pay

[15] Mr Tritt claims Dunrite unilaterally reduced his rate of pay from \$30 per hour to \$28 per hour.

[16] In April 2017 Mr Tritt was offered and accepted employment on the basis that he would be paid an hourly rate of \$25 per hour. On 1 May Mr Tritt threatened to leave his employment unless his hourly rate was increased. By agreement, his rate was increased to \$27 per hour.

[17] On 5 May the parties signed a new employment agreement and Mr Tritt was offered a further increase to \$28 per hour. This was recorded in the new employment agreement.

[18] On 30 May Mr Tritt again advised Dunrite that he would leave unless his hourly rate was further increased. By agreement Mr Tritt's rate of pay was increased to \$30 per hour.

[19] Mr Tritt says his rate of pay was then reduced after he met with Ms Leslie on 3 August 2017 when she raised an issue about his rate of pay being too high. Mr Tritt's hourly rate was reduced to \$28 per hour. Mr Tritt says he did not agree to this change.

[20] Ms Leslie told me she asked Mr Tritt to meet with her at 10 am on 3 August 2017 to discuss his ongoing absences and to offer her support and assistance. Ms Leslie also wanted to discuss the imminent employment of Mr Mike Sutton as the new overall Manager and new policies that had been developed for the business.

[21] Ms Leslie told me that during their discussion Mr Tritt was highly critical of a number of employees and told her he did not like working with two particular employees because in his view they were no good at their jobs. Mr Tritt told Ms Leslie he was highly anxious because of private issues but assured her this would not impact on his work.

[22] Ms Leslie says that during this discussion it was Mr Tritt who suggested he take a pay reduction to \$28 per hour and told her he wanted to step back from the foreman role.

[23] Ms Leslie and Mr Tritt met with their respective representatives on 6 October 2017. During that meeting the parties traversed a number of issues that had occurred in the workplace including the discussion between Mr Tritt and Ms Leslie on 3 August 2017. The notes from the 6 October 2017 meeting show the parties discussed the reduction of the hourly rate on 3 August 2017. The notes record:

[Mr Tritt] asks if [Ms Leslie] would like to reduce the rate. [Mr Tritt] agreed/accepted that his wages would go back from \$30 to \$28 per hour.

[24] There is nothing in the notes that indicate Ms Leslie's description on 6 October about the 3 August meeting was not correct. This is in contrast to other parts of the discussion on 6 October 2017 where issues were disputed.

[25] I have concluded there was a mutual agreement that Mr Tritt's rate would reduce to \$28 per hour.

Demotion

[26] Mr Tritt claims he was unilaterally demoted from foreman to labourer. Ms Leslie told me she was concerned about the amount of time Mr Tritt had been taking off on sick leave and wanted to take the pressure off him. While Ms Leslie says the discussion about a change from foreman to labourer occurred on 3 August I am not satisfied any agreement about the change was reached.

[27] Mr Tritt was absent from work on 22 and 23 August 2017. During 24 August Mr Sutton undertook performance reviews on all staff including Mr Tritt. Ms Leslie told me that during Mr Tritt's performance review Mr Sutton raised, in a generic way, improvements Mr Tritt needed to make. During the meeting Mr Sutton became concerned by Mr Tritt's description of his health issues and asked him to provide medical information so that Dunrite could be certain that the work he was involved in was safe.

[28] Mr Tritt says after the meeting he met with Ms Leslie and Mr Sutton and was presented with a new employment agreement describing his role as Labourer. Mr Tritt told me he refused to sign the agreement because he did not agree with the changes. He told me Ms Leslie told him if he didn't sign the agreement "...there's the gate".

[29] Ms Leslie denies Mr Tritt was offered a new employment agreement and the comments attributed to her.

[30] Ms Leslie confirmed that she did remove Mr Tritt from his foreman duties and only required him to carry out tasks as a labourer. She told me she thought she was doing him a favour given his high level of anxiety.

[31] I have concluded Ms Leslie changed Mr Tritt's position without any agreement from Mr Tritt.

Failure to provide a healthy and safe workplace

[32] Mr Tritt says he raised concerns about a new employee with Ms Leslie on 1 August. Mr Tritt told me he told Ms Leslie that the employee had frequent aggressive outbursts at him due to the employee's perception that Mr Tritt was unable to do the work properly.

[33] During the meeting on 3 August 2017 Ms Leslie and Mr Tritt discussed his concerns. Mr Tritt says that during this meeting Ms Leslie suggested he go on a sickness benefit due to his anxiety and his partner's recent miscarriage. Mr Tritt was shocked at the suggestion as his anxiety had never affected his ability to work and the purpose of the meeting was to discuss his concerns about the new employee.

[34] Mr Tritt says that despite him raising the issues about the new employee with Ms Leslie she failed to undertake any form of investigation.

[35] Ms Leslie acknowledges Mr Tritt raised concerns with her about the employee. She says she facilitated a meeting between Mr Tritt and the employee concerned on 3 August after their meeting. Both men shook hands and they agreed to "start again".

[36] Ms Leslie says she did not see the need for an investigation because the two men had agreed to move on.

Warnings

[37] During his employment Mr Tritt says he was issued with three warnings on 29 August 2017 and 18 and 20 September 2017.

1st warning

[38] Mr Tritt attended a meeting with Mr Sutton, the new manager, on 29 August 2019 where he says he was issued with a warning. He says he was given no notice that the meeting was a disciplinary meeting, what the allegations were that needed to be discussed and was not told a potential outcome was a warning.

[39] At the meeting Mr Sutton told Mr Tritt that he had falsified information relating to a vehicle check sheet. Mr Sutton explained the oil levels in one of Dunrite's trucks was too low, contrary to an entry made by Mr Tritt on the vehicle check sheet.

[40] Mr Tritt told Mr Sutton that when he checked the oil levels, he believed they were fine. Mr Tritt acknowledged that it was dark and he may have made a mistake but the truck was driven by another employee and it was that other employee's responsibility to check the oil levels.

[41] I was unable to interview Mr Sutton to get his side of what happened during and leading up to the meeting on 29 August. Written confirmation of the verbal warning was given to Mr Tritt on 15 September. The warning records that Mr Tritt had falsified information on a document relating to a vehicle check sheet.

[42] The events set out in the written confirmation include:

- a) Mr Tritt had been observed doing a vehicle check on a five ton tip-truck;
- b) After he had completed the checklist Mr Sutton asked Mr Tritt to remove the dipstick. When he did, the dipstick indicated there was no engine oil. The truck required approximately 12 litres of engine oil which was stored in the yard shed;
- c) A review of the check sheet signed by Mr Tritt indicated that he had ticked next to the engine oil indicating there was no issue with the level of engine oil.

[43] There is no reference to Mr Tritt being told of the purpose of the meeting, that he could be represented at the meeting, or that he had been told of the possible consequences of the meeting. In the absence of any evidence to the contrary I have concluded none of these procedural steps were followed.

[44] Ms Leslie told me Mr Tritt accepted the verbal warning as being appropriate and that he told her he believed it was deserved and fair. That may be so, however, Mr Tritt is now challenging the warning and I have concluded the process leading to the warning was unfair, making the warning unjustified.

2nd warning

[45] On 18 September 2017 Mr Tritt attended a meeting with Mr Sutton about a soak pit that had failed. Mr Tritt says he was accused of giving an employee incorrect directions for undertaking the work which had resulted in work being redone.

[46] During the meeting on 18 September Mr Tritt explained that when he arrived on site the works were already underway and he had not been involved in the initial planning stage of the works. Mr Tritt says he checked his diary and this confirmed he was not on site during the planning stages of the works. Mr Tritt says he raised several concerns about the works being carried out incorrectly but he was assured the works were under control.

[47] Mr Tritt says he was issued with a verbal warning at the end of the meeting. This is denied by Ms Leslie.

[48] Ms Leslie says the conversation on 18 September was tense because the staff disagreed about who was to blame for the failed soak pit. Ms Leslie made it clear that she intended to investigate the matter and so there was no need for staff to continue to debate where the fault lay.

[49] Ms Leslie says she completed her preliminary investigation into the failed soak pit on 19 September and she wrote letters to two employees including Mr Tritt inviting them to an investigation meeting. Ms Leslie intended giving the letter to Mr Tritt on 20 September but other events intervened and Mr Tritt left the workplace and did not return.

[50] Mr Tritt has not established that he was issued with a warning on 18 September 2017.

3rd warning

[51] Mr Tritt says he approached Mr Sutton on 20 September and told Mr Sutton he was upset with the way he had been treated in the meeting on 18 September 2017 and that the warning was unfair.

[52] Mr Tritt says that without addressing his concerns Mr Sutton advised him he would be moving to another team and would be working with the employee with whom he had had disagreements in the past. Mr Tritt expressed concerns about working with this employee but Mr Sutton told him it wasn't his call.

[53] Mr Tritt says he asked if he could leave work. He was unhappy and wanted to seek legal advice. He says Mr Sutton agreed he could leave.

[54] Ms Leslie told me Mr Sutton met with Mr Tritt who approached him to discuss the soak pit issue. Ms Leslie says the two men discussed:

- a) The soak pit issue which Mr Sutton advised Mr Tritt was being investigated by Ms Leslie;
- b) Mr Tritt's anxiety. Mr Sutton asked Mr Tritt for medical documentation because he was concerned about whether Mr Tritt should be operating heavy machinery;
- c) In answer to a question from Mr Tritt about who he would be working with Mr Sutton told him he would be working with the two employees he had worked with the previous day. Mr Tritt did not want to work with them. Mr Sutton undertook to review the teams the following week but due to staff absences it was not practical to change the teams that day. Mr Tritt then left the site without given any explanations.

[55] I have accepted Ms Leslie's evidence that there was no agreement between Mr Sutton and Mr Tritt about him leaving the site. After he left the site, Mr Sutton text Mr Tritt twice asking for reasons why Mr Tritt was absent. Mr Tritt did not respond. If Mr Tritt and Mr

Sutton had agreed for Mr Tritt to leave the workplace the texts would not have been necessary.

[56] On 25 September 2017 Mr Tritt received a letter dated 21 September from Dunrite issuing him with a written warning for leaving the workplace early on 20 September. Dunrite accepts the warning was issued in the absence of any proper process. Ms Leslie told me it was issued out of frustration at Mr Tritt's pattern of absences and what appeared to be his refusal to work on 20 September.

[57] I have concluded the written warning issued to Mr Tritt on 21 September was unjustified.

Investigation into alleged misconduct

[58] While he was absent from work Mr Tritt received the letter dated 19 September from Ms Leslie advising him that a formal investigation was being undertaken relating to the installation of a soak pit. He was advised that the investigation was not a disciplinary process but that a decision would eventually be made as to whether any disciplinary action may be necessary.

[59] Attached to the letter was a report of the investigation undertaken as at that date including notes of interviews held with one other employee and Mr Tritt.

[60] The meeting took place on 6 October 2017 by agreement, while Mr Tritt was still absent due to health issues. Mr Tritt was represented at this meeting and his representative raised the disadvantage claims addressed in this determination.

[61] Mr Tritt is critical of Dunrite for its failure to complete its investigation into the soak pit issue in a timely manner. That criticism is misconceived. The investigation was commenced on 19 September and notified formally to Mr Tritt on 25 September 2017 when he received the 19 September letter.

[62] Mr Tritt had left the workplace on 20 September and did not return. The meeting on 6 October was set up ostensibly to deal with the investigation but dealt with other issues instead.

[63] On 6 November 2017 Mr Tritt was still absent and was advised that when he returned to work the investigation would continue.

Conclusion

[64] The onus of establishing whether one or more conditions of his employment were affected to his disadvantage lies with Mr Tritt in the first instance. If he establishes disadvantage the burden moves to Dunrite to establish on the balance of probabilities that the disadvantage Mr Tritt suffered was justified.

[65] The justification test in s 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Dunrite's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[66] I have found Mr Tritt agreed to the reduction in his hourly rate when it reduced from \$30 an hour to \$28 an hour. Mr Tritt has not established that his employment was affected to his disadvantage as a result of health and safety concerns or that Dunrite unnecessarily delayed its investigation into Mr Tritt's role in the failure of the soak pit.

[67] However, I have found Ms Leslie unilaterally demoted Mr Tritt from foreman to labourer and that the two warnings issued on 29 August and 21 September 2017 were unjustified. The demotion and the warnings were not actions an employer could fairly and reasonably have taken in the circumstances at the time.

[68] Mr Tritt has established that one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Dunrite and he is entitled to a consideration of remedies.

Constructive dismissal

[69] Mr Tritt claims the ending of the employment relationship was in law a constructive dismissal. A constructive dismissal is an apparent resignation which is, in reality an employee's response to an act or omission of the employer of such significance that it amounts to a repudiation of the contract of the employment and entitles an employee to accept that repudiation by resigning the employment.

[70] Included in the instances of employer conduct that may amount to constructive dismissal is a sufficiently fundamental breach of duty by the employer or a course of conduct with a deliberate and dominant purpose of causing an employee to resign.¹

[71] The nature of a claim for constructive dismissal is dependent on the events that preceded the employee leaving their employment; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty or other actions by the employer.²

[72] In deciding whether an employer's conduct amounted to a constructive dismissal it is essential to examine the facts of the case to see whether the conduct of the employer can fairly and clearly be said to have crossed the line between inconsiderate conduct causing some unhappiness from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.³

[73] Mr Tritt never actually gave notice or provided a resignation to Dunrite. On 6 November 2017 Dunrite advised Mr Tritt's representative that the employee with whom Mr Tritt had clashed had resigned and left Dunrite. Dunrite enquired about when it would be convenient to reconvene the investigation into the soak pit issue with Mr Tritt and requested a further medical certificate to confirm Mr Tritt's continued medical incapacity. In response Mr Tritt advised Dunrite that he was of the view that the employment relationship had come to an end.

¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA).

² *Commissioner of Police v Hawkins* [2009] NZCA 209.

³ *Wellington etc Clerical Workers Union IUOW v Greenwich*

[74] This notification came as a surprise to Ms Leslie because at the meeting on 6 October 2017 she made it clear that Mr Tritt was welcome to return to work at any time and she believed he would return after being notified that the employee with whom he had clashed had left.

[75] In his statement of problem Mr Tritt says the following actions by Dunrite led him to believe on 6 November that he had no option but to resign from his employment:

- a) Failure to respond to the matters raised in the meeting on 6 October;
- b) Failure to investigate his allegations of bullying;
- c) The notification that Dunrite intended to continue with the investigation into the soak pit failure;

[76] From this I have concluded Mr Tritt claims Dunrite embarked on a course of conduct with a deliberate and dominant purpose of causing an employee to resign or that Dunrite breached duties owed to him.

Failure to respond to issues

[77] At the meeting on 6 October 2017 Mr Tritt, through his representative, raised concerns which were then formalised in writing on 17 October as constituting a disadvantage claim. It is common ground that Dunrite did not respond to this letter.

[78] Mr Tritt was on sick leave during this time and Ms Leslie had made it clear to Mr Tritt at the meeting on 6 October, after he had raised all of the concerns set out in the letter dated 17 October, that he could return whenever he wished. Given that, I am not satisfied Dunrite's failure to respond was either a course of conduct aimed at achieving Mr Tritt's resignation or was a breach of duty such that its actions could be classed as dismissive or repudiatory and reasonably sufficient to justify termination of the employment relationship.

Failure to investigate bullying allegations

[79] I have addressed this issue under the disadvantage grievance where it was raised as a health and safety matter. Ms Leslie did not feel the need to investigate the bullying allegations because the two men had met, shook hands and agreed to move on.

[80] I am not satisfied Dunrite's failure to investigate the bullying allegations can be considered either a course of conduct aimed at achieving Mr Tritt's resignation or was a breach of duty such that its actions could be classed as dismissive or repudiatory and reasonably sufficient to justify termination of the employment relationship.

Notification of intention to continue with disciplinary process

[81] The failure of the soak pit caused the business to suffer loss. Ms Leslie embarked on an investigation into what had happened and wished to interview Mr Tritt as part of that investigation. Ms Leslie's letter to Mr Tritt made it clear that the meeting was not a disciplinary meeting but put Mr Tritt on notice that disciplinary action may follow. Before she could complete that investigation Mr Tritt left the workplace and did not return.

[82] An employer is entitled to investigate matters it considers may constitute serious misconduct. While the investigation had not progressed to a disciplinary process, that was a possible consequence as advised to Mr Tritt. I have concluded Dunrite acted reasonably when it notified Mr Tritt that when he returned to work the investigation would be completed.

[83] I am not satisfied Dunrite's intention to continue with its investigation into the soak pit failure can be considered either a course of conduct aimed at achieving Mr Tritt's resignation or was a breach of duty such that its actions could be classed as dismissive or repudiatory and reasonably sufficient to justify termination of the employment relationship.

[84] At best, and as set out in his statement of problem, Mr Tritt was disappointed Dunrite intended to continue with the investigation but this did not cross the line between inconsiderate conduct and dismissive or repudiatory conduct.

Conclusion

[85] For the foregoing reasons I find Mr Tritt was not constructively dismissed and his application for remedies under this heading is declined.

Remedies

[86] Mr Tritt has established a personal grievance for unjustified disadvantage and is entitled to a consideration of remedies. In his statement of problem he seeks various remedies including lost wages for the period of his reduced pay. I have found the reduction in his wage rate was an agreed reduction and so no loss arises from the reduced rate of pay.

[87] Mr Tritt seeks reimbursement for lost wages as a result of the ending of the employment relationship. I have found he was not constructively dismissed and so his claim is limited to compensation.

[88] Mr Tritt seeks a global payment of compensation of \$30,000 under s 123(1)(c)(i) of the Act. Any award for compensation is limited to the injury to feelings and distress suffered as a result of the disadvantage grievance.

[89] The evidence as to impact was limited and does not support an award at the level sought by Mr Tritt. I acknowledge the warnings would have had some impact on Mr Tritt, together with the demotion in his role.

[90] He clearly became unwell and was unable to work due to his medical condition. In setting an award of compensation I have taken into account that Mr Tritt had a pre-existing medical condition that has been exacerbated by Dunrite's actions.

[91] In all the circumstances of this case, subject to my findings on contribution, I consider an appropriate award to be \$10,000.

[92] Dunrite Drainage and Landscapes Limited is ordered to pay to Mr Tritt the sum of \$10,000 under s 123(1)(c)(i) within 28 days of the date of this determination.

Contribution

[93] As I have awarded remedies to Mr Tritt, I must now consider whether he contributed to the situation that gave rise to his grievance.⁴ When assessing if Mr Tritt's actions contributed to the situation that gave rise to his grievance I am looking for a causal link between his actions and the situation that gave rise to the unjustified disadvantage. That is the demotion and the two warnings.

[94] I am satisfied Mr Tritt contributed to the situation that gave rise the demotion and the warnings however, his contribution was not significant enough to warrant a reduction in the remedies awarded.

Breach of good faith

[95] Mr Tritt says Dunrite breached its statutory obligations to be active and constructive in maintaining the employment relationship. I am satisfied that the failure to follow fair and reasonable processes before issuing the two warnings, and the demotion to labourer without Mr Tritt's agreement, were breaches of Dunrite's statutory duty of good faith.

[96] Mr Tritt has not asked the Authority to penalise Dunrite for its breaches and I have not done so. For the sake of completeness, if Mr Tritt had applied for penalties his application would have been declined.

[97] The Employment Court has held that where remedies have been awarded for a successful grievance claim then to impose a penalty in respect of the same conduct amounts to double dipping and should be avoided, unless there are special facets of the breach which call for a punishment to be imposed on the employer on top of compensation to the employee.⁵

[98] Separate remedies have been awarded to compensate Mr Tritt for his grievance, so the imposition of penalties on Dunrite for any breach would amount to double dipping. In

⁴ Employment Relations Act 2000, s 124.

⁵ *Xu v McIntosh* [2004] ERNZ 448.

addition Mr Tritt has not established there are any special facets of the breaches which call for a punishment to be imposed on top of the remedies already awarded.

Counter-claim

[99] Dunrite claims Mr Tritt failed to follow lawful instructions and this resulted in the failure of the soak pit. Dunrite seeks damages for this breach in the amount of \$8,243.

[100] As set out earlier in this determination, Ms Leslie was undertaking an investigation into the cause of the failure of the soak pit and this investigation was not concluded.

[101] I am not satisfied Dunrite has established that Mr Tritt caused the failure in the soak pit and its claim for damages is declined.

Costs

[102] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Tritt shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Dunrite shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[103] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority