

ATTENTION IS DRAWN TO
THE ORDER PROHIBITING
PUBLICATION OF CERTAIN
INFORMATION REFERRED TO
IN THIS DETERMINATION.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 17
3073012

BETWEEN SCOTT WELLS
 Applicant

A N D MILLSON PLUMBING &
 DRAINLAYING LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Matthew McGoldrick and Michelle Bowen, counsel for
 the Applicant
 Kay Chapman, advocate for the Respondent

Investigation Meeting: 10 and 11 September 2020

Submissions Received: 11 September 2020 from the Applicant
 11 September 2020 from the Respondent

Date of Determination: 18 January 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Scott Wells moved to Nelson from England in August 2016 to work for Millson Plumbing & Drainlaying Limited having secured employment with Millson Plumbing through an international recruitment agency, CanStaff.

[2] Mr Wells started work with Millson Plumbing on 15 August 2016. Unfortunately Mr Wells' performance at Millson Plumbing did not meet Millson Plumbing's expectations over the first two weeks. Millson Plumbing held a meeting with Mr Wells on the afternoon of Friday, 26 August 2016 to discuss its concerns about his performance. After the meeting Mr Wells left Millson Plumbing and just over a week later he returned to England.

[3] Mr Wells says he left Millson Plumbing because he had been dismissed in the meeting of 26 August 2016 and as he no longer had work in New Zealand he decided to return to England. In contrast, Millson Plumbing says it did not dismiss Mr Wells in the 26 August meeting, rather it raised its concerns with him and started a process of discussing options for Mr Wells. Millson Plumbing then thought Mr Wells resigned or abandoned his employment on 27 August 2016 when he told them he was leaving to return to England, then leaving Nelson on 28 August 2016.

[4] Mr Wells raised a personal grievance for unjustified dismissal on 31 August 2016 through an employment advocate. There was an exchange of correspondence between the advocate and solicitors instructed by Millson Plumbing and various attempts were made by the advocate to progress the grievance including trying to obtain information from CanStaff. Ultimately the grievance was not resolved and at some point, any action in respect of Mr Wells' grievance lapsed, although it is not clear to me when this occurred or why. It was not until a new representative was engaged for Mr Wells (his current counsel) that the grievance was progressed again by the lodging of a statement of problem with the Authority on 30 August 2019.

[5] Mr Wells' statement of problem seeks remedies for unjustified dismissal and, in the alternative, remedies for unjustified action causing disadvantage. Millson Plumbing denies any liability for unjustified dismissal and unjustified disadvantage. It is these two grievances that form the employment relationship problem that I investigated.

[6] My investigation of this employment relationship problem took place over two days. I heard a significant amount of evidence about negotiations over Mr Wells' employment, the offer made to him, his relocation to New Zealand and what occurred during the first two weeks of his employment, including in particular the last couple of days he spent in Nelson. As I have worked through my determination on this matter I have found it appropriate to

focus on the evidence relating to the events that comprised and caused Mr Wells to leave Millson Plumbing, with the additional evidence providing the context for those events.

[7] I note that in accordance with s 174E of the Employment Relations Act 2000 (the Act), this written determination sets out findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and makes orders accordingly but for the reasons stated above, it does not record all of the evidence and submissions received.

[8] I also record that this determination has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. When I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

Non-publication

[9] As part of my investigation I received and reviewed a significant amount of information relating to Mr Wells' health and ongoing medical condition. This information is personal and wider publication of it has potential cause harm and/or embarrassment to Mr Wells so I am satisfied that it is appropriate to prohibit from publication this information.

[10] Pursuant to clause 10 of the Second Schedule of the Act I prohibit from publication the details of Mr Well's medical information provided as evidence except for anything that I specifically set out in this determination.

Unjustified dismissal

Events

[11] Mr Wells is a fully qualified plumber in the UK, having obtained his formal plumbing qualification in 2015. From 2015 through to 2016 when Mr Wells moved to New Zealand he worked as a plumber on a self-employed basis.

[12] Mr Wells contacted CanStaff in April 2016 in response to an advertisement he saw about skilled tradespeople being recruited to work in New Zealand. Mr Wells then spoke to a

CanStaff agent in the UK and completed various CanStaff requirements to become a candidate with it.

[13] In May 2016 Janine Dunbar, a CanStaff agent based in New Zealand, contacted Mr Wells about two possible placements in New Zealand, including the role for a qualified plumber with Millson Plumbing in Nelson.

[14] Over the course of a couple of months Ms Dunbar worked with Mr Wells and Millson Plumbing and eventually Mr Wells accepted an offer of employment with Millson Plumbing, obtained the necessary work visa and made arrangements to relocate to Nelson to commence work with Millson Plumbing.

[15] The key aspect of Mr Wells' employment with Millson Plumbing was that he was employed to fill a qualified plumber role. As Mr Wells was a qualified plumber in the UK he would need to obtain New Zealand plumbing qualifications by sitting an exam. So, it was agreed that Mr Wells would start employment as a labourer, albeit a labourer with plumbing skills and qualifications; this meant he would not be able to sign off or certify the plumbing work he undertook. Mr Wells would work for three months during which time he might obtain a temporary plumbing licence but ultimately at the end of the three month period he would sit the necessary New Zealand plumbing qualification exam, to obtain a New Zealand plumbers licence.

[16] The other aspect of Mr Wells' employment was that his employment agreement contained a 90 day trial period. Mr Wells had been concerned about the trial period provision and he raised this concern with Ms Dunbar. Ms Dunbar had advised him it would not apply to him but the trial period provision remained in the employment agreement that Mr Wells signed. From Millson Plumbing's perspective they believed Mr Wells' employment was subject to a 90 day trial period.

[17] When Mr Wells arrived in Nelson he lived with Stephen and Vicki Millson, both directors and shareholders of Millson Plumbing. This was a temporary arrangement so that Mr Wells could start work and settle into Nelson before he found somewhere more permanent to live.

[18] Mr Wells started work for Millson Plumbing on 15 August 2016. Mr Wells' first couple of days of employment covered off his induction and familiarising himself with Millson Plumbing.

[19] During the first week of work for Mr Wells, Mr and Mrs Millson attended a conference from 17 August to 21 August and Mr Wells worked with other employees of Millson Plumbing.

[20] Early in the second week of Mr Wells' employment, Mr Millson says he received a number of complaints about Mr Wells' performance including that he had often been late and expressing concerns about his skill level. In particular, a regular building client of Millson Plumbing complained to Mr Millson advising him that they did not want Mr Wells back on any of their sites.

[21] Mr Millson says he then worked with Mr Wells over the second week and assessed his skills. He says it became clear to him that Mr Wells did not have the skills of a qualified plumber and this was not just as a result of the differences between UK and New Zealand plumbing requirements, it reflected a more fundamental ability concern.

[22] By the end of the second week of Mr Wells' employment, Mr Millson was so concerned that he discussed with Mrs Millson what they might do with Mr Wells. Mr Millson says his real concern at that stage was that based on Mr Wells' skill level he believed Mr Wells would not pass the New Zealand qualification test to obtain his New Zealand plumbers licence.

[23] Mr Millson and Mrs Millson both say they were concerned about Mr Wells not working out and whilst they considered options such as dismissing him under the trial period provision or changing his role to an apprentice so he could retrain, they had not decided what the best outcome would be but they believed they needed to discuss their concerns with Mr Wells.

[24] So on the afternoon of Friday 26 August 2016, Mrs Millson sent Mr Wells a text message asking him to come to the Millson Plumbing office. Mr Wells arrived at the Millson Plumbing office around 2:00 pm that Friday afternoon. A meeting then took place between Mr Wells and Mr and Mrs Millson.

[25] The meeting consisted of Mr and Mrs Millson telling Mr Wells of their concerns in terms of his lateness and performance, discussing some of the jobs Mr Wells had completed. Mr Millson also asked Mr Wells a couple of questions about plumbing.

[26] Mr Wells says that after discussing his performance at work, Mr Millson told him he could not see things working out as Mr Wells was not fulfilling the role he was employed in. There was some discussion about the cost of employing him in terms of the agency fees and a brief reference to Mr Wells not being paid enough if he was an apprentice. Mr Wells says Mrs Millson then said we're going to call it a day and the meeting concluded with Mr Millson telling him if he gets another job not to be late for it and that was it, it was not going to work out.

[27] Both Mr Millson and Mrs Millson accept that Mr Millson said to Mr Wells he could not see it working out, but they say this was in reference to Mr Wells becoming licenced to work as a plumber in New Zealand given his level of performance. They deny either of them saying they were going to call it a day, rather Mrs Millson said that was enough for today and told Mr Wells to think things over and they would come back and have another discussion later. They both say, it was clear they were not dismissing Mr Wells.

[28] All three agree that at the end of the meeting, Mrs Millson told Mr Wells he should contact Ms Dunbar. Once Mr Wells had left, Mrs Millson sent an email to Ms Dunbar, which included the following:

Hi – we have had [Mr Wells] in the office with us for the last hour.

Have made it fairly clear that working as he is we have no position for him. I think he understands our point of view, and we were very clear about needing a qualified person when we interviewed him.

...

We will not leave him in the lurch job wise and have told him this, however we've also pointed out it's difficult to find enough work for staff needing supervision as we already have 2 guys like that.

I'll hand this back to you now to talk with [Mr Wells].

He's a nice guy, it's a shame.

[29] Mr Wells then spoke to Ms Dunbar. Mr Wells says the telephone call with Ms Dunbar was strange; he expected her to provide more information about what was happening

but she was abusive and kept telling him it was all his fault. She told him Mr and Mrs Millson did not want him anymore as he did not have the skills, was not up to scratch and no good at his job.

[30] Ms Dunbar did not provide any written or oral evidence in my investigation. However, after her telephone call with Mr Wells she sent an email reply to Mrs Millson's email setting out what she had discussed with Mr Wells. This email recorded:

OK yes he just rung.

...

So he did not understand when you said go way and think things over in the weekend. He said about what? I said you clearly are not accepting there is a real issue. You are not meeting the clients needs and do not seem to have the capability to do so.

It was not until I said look its not personal they like you as a person we all wanted it to work however it is clear you are not working out and you will no doubt have to return home. Then he said but I spent a lot of money to come out here. I said we have all invested a lot of time and money on you however if your not meeting the clients needs its unfortunate however that's the problem.

Anyways in the end I wished him all the best and the penny has dropped. He gets its not personal however someone of his age needs to be accountable more for his actions or lack of.

...

On a brighter note.... I will carry on trying to find a replacement!

[31] Following the call with Ms Dunbar, Mr Wells called his uncle, Nicolas Greet, to tell him what had happened. Mr Greet says that in this call Mr Wells told him that his employers had told him they did not feel he was up to standard and so they had let him go.

[32] Mr Wells then spoke to Sam Millson, Mr and Mrs Millson's son who also worked for Millson Plumbing. Sam Millson says that in that conversation Mr Wells told him he had been let go and he didn't have a job.

[33] The following morning on 27 August 2016, Mr Wells had decided he needed to leave Nelson and would return to England. Mr Wells began packing and he asked Mrs Millson for some tape. Mr Wells and Mrs Millson had a conversation about Mr Wells leaving. Mr Wells says he told Mrs Millson that he was going home as he had no choice with no job and no

money. Mrs Millson says Mr Wells never said he had been dismissed or did not have a job rather he simply talked about having made up his mind to return home.

[34] Mr Wells then left Nelson on 28 August 2016.

Dismissal

[35] The first issue for Mr Wells' unjustified dismissal claim is: did Millson Plumbing dismiss him?

[36] The onus of proving a dismissal in this case rests with Mr Wells.

[37] Dismissal is the termination of employment at the initiative of the employer. It is an unequivocal act, which amounts to a sending away.¹

[38] In most cases of dismissal, an employer's statement of termination is straightforward. However, there are cases where the employer may say it did not intend to dismiss an employee but the language used in an exchange with an employee can still be unequivocal and amount to a dismissal.²

[39] The assessment of whether the employer's statement is an unequivocal sending away is a question of fact based on an analysis of not just the statement but also the circumstances giving rise to it. And, as stated by Judge Holden in *Cornish Truck & Van Limited v Gildenhuis*:³

[45] The test is an objective one: was it reasonable for somebody in Mr Gildenhuis' position to have considered that his or her employment had been terminated?

[40] So putting the case law together, I am applying an objective test in deciding if Mr Wells was dismissed. That test is to decide if the actions were such that it would be reasonable for a person in Mr Well's position to interpret them as a sending away by Millson Plumbing?

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

² See for example, *No 1 Autohaus Ltd v Wrigley* EmpC Auckland AEC75/97, 18 July 1997 where the words "Good God, look at you, you can just go" were held to be a dismissal.

³ *Cornish Truck & Van Limited v Gildenhuis* [2019] NZEmpC 6 at [45].

[41] In this case the first step in applying this test is to establish what occurred on 26 August 2016 as the evidence is conflicting.

[42] When faced with conflicting evidence, I must decide which evidence I prefer based on an assessment of credibility. As I have done in the past when assessing credibility, I have relied on the guidance provided by Judge Harding in the District Court in *R v Biddle*⁴ that was cited with approval on appeal to the High Court.⁵ And the guidance from the Employment Court in *Lawson v New Zealand Transport Agency*⁶ and *Cornish Truck & Van Limited*.⁷

[43] Overall I come to the conclusion that I prefer evidence from Millson Plumbing and in particular the evidence supported by cotemporaneous documents.

[44] I am satisfied from the evidence I have reviewed that Mr and Mrs Millson's view was that Mr Wells was not working to the standard expected, he was not meeting their expectations of a qualified plumber and they could not see it working out in terms of Mr Wells getting to the required standards in order to get his New Zealand plumbing licence in three months. They had already decided that Millson Plumbing could not keep Mr Wells on in the role he was employed in as they needed a qualified plumber and they could not afford to pay Mr Wells at his wage rate if he was not acting as or going to become a qualified plumber; however, they were not going to dismiss Mr Wells immediately, rather they wanted to look at options. I suspect they were hoping he would move on by finding another job but they did consider having to terminate his employment under the 90 day trial period.

[45] It is against this back drop that Mr and Mrs Millson engaged with Mr Wells on 26 August 2016. And in this meeting Mr Millson did tell Mr Wells that he couldn't see it working out but this was a reference to Mr Wells achieving the necessary performance level to obtain a New Zealand plumbing licence. However, I am not satisfied that a person in Mr Wells' position would have taken what Mr Millson said to be a sending away. This is because Mr and Mrs Millson discussed options and left the outcome in terms of Mr Wells employment open at the end of the meeting, in particular as Mrs Millson told Mr Wells to think about things and that they would discuss further later.

⁴ *R v Biddle* [2015] NZDC 8992.

⁵ *Biddle v R* [2015] NZHC 2673 at [21].

⁶ *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165.

⁷ *Cornish Truck & Van Limited v Gildenhuys*, above n3.

[46] In contrast, I believe the conversation between Ms Dunbar and Mr Wells was a sending away, particularly given the circumstances of that call. The relevant circumstances for Mr Wells included:

- (a) He had just had a conversation with his employer about things not working out in terms of his level of performance.
- (b) Mr and Mrs Millson had discussed various options in response to this but had not provided any assurance of an ongoing role; in fact the couple of options discussed such as working as an unqualified plumber or being an apprentice had effectively been ruled out as not being suitable for Millson Plumbing or Mr Wells.
- (c) Mr Wells was told to speak to Ms Dunbar by Mrs Millson.
- (d) From Mr Wells' perspective, Ms Dunbar was the agent for Millson Plumbing who dealt with his employment – in this context Ms Dunbar had advised Mr Wells in an earlier email that his employment with Millson Plumbing was guaranteed by CanStaff for six months, such that if he did not meet Millson Plumbing's expectations CanStaff would replace him under that guarantee and as a result she would be checking in with him and Millson Plumbing over that six month period.
- (e) Mr Wells expected some further information from Ms Dunbar about what would happen with his role at Millson Plumbing.

[47] In these circumstances Mr Wells was then told by Ms Dunbar that he was not meeting Millson Plumbing's needs, he did not have the skills and he had not upheld his end of the bargain. She went on to say it was clear things were not working out, Millson Plumbing did not want him anymore and he would have to return home.

[48] It is clear to me that in these circumstances a person in Mr Wells' position would see Ms Dunbar as acting on behalf of Millson Plumbing in terms of his employment⁸ and she would therefore provide information on what was to happen in light of Millson Plumbing's

⁸ To this extent Ms Dunbar was held out as having ostensible authority to act, see *Freeman v Lockyer* [1964] 2 QB 480.

views on his employment over the first two weeks of work. And it is clear to me that a person in Mr Wells' position would take the things Ms Dunbar said as being a dismissal – a sending away as he was not working out, that was his fault and Millson Plumbing did not want him anymore.

[49] From a subjective perspective that Mr Wells thought he had been dismissed after speaking to Ms Dunbar was confirmed by two witnesses, Sam Millson and Mr Greet.

Conclusion on dismissal

[50] In all of the circumstances, I conclude that Millson Plumbing did dismiss Mr Wells, albeit through Ms Dunbar who was held out as acting with its authority.

Was Mr Wells' dismissal justified?

[51] The next issue for Mr Wells' unjustified dismissal claim is the question of whether the dismissal was justified; justification is assessed in two parts. First, whether the employer carried out a fair process in coming to the decision to dismiss and second, whether the decision to dismiss was substantively justified

[52] In terms of process, this is assessed by applying s 4(1A) and s 103A of the Act. Based on the sections in order to carry out a fair process when dismissing Mr Wells, Millson Plumbing needed to:

- (a) investigate the concerns it had with Mr Wells' work;
- (b) outline the allegations and explain its concerns to Mr Wells for him to respond to it;
- (c) give Mr Wells a reasonable opportunity to respond to the information and the allegations before it made its decision to dismiss – this includes ensuring Mr Wells had the information with enough time to consider it and formulate some responses and this generally requires an employer to provide the information before the meeting being held to discuss it; and
- (d) consider any explanations given by Mr Wells before it decided to dismiss him.

[53] It is clear from this that Millson Plumbing did not carry out a fair process.

[54] And it follows that as the process was so flawed there was no basis to decide that dismissal was appropriate.

[55] Therefore Mr Wells' dismissal was unjustified.

Remedies

[56] As Mr Wells was unjustifiably dismissed I may award any of the remedies provided for under s 123 of the Act; Mr Wells seeks compensation and reimbursement.

Compensation

[57] Turning to compensation, this is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and is made pursuant to s 123(1)(c)(i) of the Act.

[58] My task is to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings. In doing this I must consider the effects of the dismissal on Mr Wells, identifying the harm caused to him and the loss he suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed and where that corresponds to the spectrum of quantum awarded as compensation.⁹

[59] Mr Wells has had an extremely adverse reaction to his dismissal. I have reviewed extensive medical information and consider Mr Wells' written and oral evidence. Given the sensitive nature of the evidence and the non-publication orders I have made, I am going to take the unusual approach of not outlining my findings in terms of identifying the harm suffered. Rather I record that I accept counsel for Mr Wells' written submissions in relation to compensation, particularly paragraphs [49] – [57] and paragraphs [64] – [70] except I do not believe this warrants an award as high as counsel suggests.

[60] Based on this assessment I award compensation of \$35,000.00.

⁹ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

Reimbursement

[61] Mr Wells also seeks reimbursement for the earnings he has lost as a result of her unjustified dismissal pursuant to s 123(1)(b) of the Act.

[62] As I am satisfied that Mr Wells has a personal grievance and he has lost remuneration as a result, then pursuant to s 128 of the Act I must award Mr Wells at least the lesser of his lost remuneration or three months ordinary time remuneration.

[63] Mr Wells' actual loss is significant. In short he has not been able to work since his dismissal and therefore has lost over four years of remuneration. Clearly three months ordinary time remuneration is the lesser amount and this is my starting point – that is \$12,480.00.

[64] As Mr Wells' actual loss is greater than the three month remuneration starting point, I can exercise my discretion to award more up to this full loss under s 128(3) of the Act.

[65] The exercise of the discretion under s 128(3) was considered by the Court of Appeal in *Sam's Fukuyama Food Services Ltd v Zhang*¹⁰ stating:

[24] We now deal briefly with the applicable principles. In *Telecom New Zealand Ltd v Nutter*, this Court approved the principle that compensation for lost remuneration is discretionary and that there is no automatic entitlement to an award reflecting the balance of the expected working career of an employee. The Court said:

... it is now well-established in New Zealand that a “full” assessment of the financial loss suffered by an employee as a result of an unjustifiable dismissal merely sets the upper limit on an award of compensation (in that no award can be for more than has been lost) and there is no automatic entitlement to “full” compensation.

[25] The Court said that moderation is appropriate in setting awards for lost remuneration because:

...

- 1. The discretionary nature of the remedy is obviously inconsistent with any principle requiring “full” compensation to be awarded.

¹⁰ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

- 2. The concept of unjustifiable dismissal is flexible and a full compensation approach may be disproportionate to the nature of the wrong.
- 3. Full compensation may be unnecessarily and inappropriately damaging to the employer (and indirectly to the position of other employees of the same employer).
- 4. Rules of thumb as to appropriate measures of compensation can facilitate both the efficient dispatch of litigation and reasonably predictable outcomes ...
- 5. A community expectation of “full” compensation extending to compensation for years of foregone remuneration could discourage employment and personal rehabilitation.

[26] The Court said that the employee’s actual loss “sets an upper ceiling on any award and it is plainly a logical starting point for assessment”. The assessment of compensation in any particular instance “must be individualised to the circumstances of the case”, and the assessment “must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee’s employment” (that is, counter-factual analysis).

...

...

[36] It is axiomatic that the full financial losses suffered by the respondent as a result of the unjustifiable dismissal merely set the upper limit on an award of compensation. But there is no automatic entitlement to full compensation. As the decision of this Court in *Nutter* makes clear, moderation is required in setting awards for lost remuneration. Any award of compensation in a particular case must have regard to the individual circumstances of the particular case. Having said that, as with any awards of compensation which involve a discretionary element, precision is difficult and the award will inevitably involve a broad brush approach.

[66] So, there is no automatic entitlement to full loss. This loss merely represents the upper award. I must decide whether I should exercise my discretion to award more than three months ordinary time remuneration and if so how much more, up to the actual loss. In doing this I should recognise that moderation is appropriate, my assessment should be individualised to the circumstances of the case and I must allow for any contingencies that might have resulted in termination of the employee’s employment such that they would not have earned the total amount of the claimed loss.

[67] In this case I do not think it is appropriate to award any more than three months ordinary time remuneration. The key reason for this is I am satisfied that Mr Wells would most likely have left Millson Plumbing within three months; given Millson Plumbing’s view

on Mr Wells' work and its reluctance to keep him employed in a qualified plumber role, Millson Plumbing would have dismissed Mr Wells under the trial period provision or some alternative work would have been found for him within the three months and he would have left Millson Plumbing.

[68] So, I award Mr Wells \$12,480.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Act.

Expenses

[69] Mr Wells seeks reimbursement of various expenses arising out of his dismissal, mostly relating to his return to England. In the normal course of a dismissal expenses relating to living costs and relocation costs for an employee are not warded as remedies – this is because often these expenses are not directly attributable to the dismissal, such as ongoing living costs that would have been incurred in any event or relocation costs where an employee chooses to relocate rather than look for further employment where they are. Given the unusual combination of circumstances for Mr Wells, which I accept as essentially leaving him with no choice but to return to England, I am satisfied that it is appropriate to award him some of his relocation expenses pursuant to s 123(1)(b) of the Act. I do not include some of the expenses as they represent costs he would have incurred these in any event and I do not include the medical expenses as this is a disbursement that should be dealt with as part of any costs application should one be made.

[70] I quantify the expenses to be paid by Millson Plumbing to be \$4,269.27.

Contribution

[71] As I have awarded remedies to Mr Wells, I must now consider whether he contributed to the situation that gave rise to his dismissal.¹¹

[72] This assessment requires me to determine if Mr Wells behaved in a manner that was culpable or blameworthy, and this behaviour contributed to his grievance.¹²

¹¹ Section 124 of the Act.

¹² *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

[73] I have reflected on what occurred to Mr Wells and how he reacted. I am satisfied that Mr Wells did not act in a blameworthy or culpable manner. And, therefore, there was no contributory behaviour from Mr Wells that warrants a reduction in remedies.

Conclusion

[74] Millson Plumbing unjustifiably dismiss Mr Wells. In settlement of this grievance Millson Plumbing must pay Mr Wells:

- (a) \$35,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) \$12,480.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000.
- (c) \$4,269.27 for expenses incurred arising out of the unjustified dismissal pursuant to s 123(1)(b) of the Employment Relations Act 2000.

Costs

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

[76] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority