

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 455
3117859

BETWEEN STEVEN DOBBS
Applicant

AND TANIWHA RETAIL LIMITED
Respondent

3138521

BETWEEN TANIWHA RETAIL LIMITED
Applicant

AND STEVEN DOBBS
Respondent

SWITCH ELECTRICAL SERVICES
(HAMILTON) LIMITED
Respondent

ADAM JURISICH
Respondent

Member of Authority: Peter van Keulen

Representatives 3117859: Applicant in person
Bryce Ede for the Respondent

Representatives 3138521: Bryce Ede for Applicant
Erin Burke counsel for Respondents

Investigation Meeting: 23 September 2021 and 18 May 2022

Submissions Received: 27 May 2022 and 10 June 2022 for Taniwha Retail Limited
3 June 2022 for Steven Dobbs, Switch Electrical Service
(Hamilton) Limited & Adam Jurisich

Date of Determination: 12 September 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] These two matters are, at their core, the product of a complex and difficult professional working relationship between Steven Dobbs and Bryce Ede. Their business relationship never progressed past Mr Dobbs being employed to work in a business that Mr Ede essentially owned and operated. However, that relationship became too fractious and in response to that Mr Dobbs resigned; the fallout of that resignation led to these claims and counterclaims in the Authority.

[2] Mr Dobbs was employed by Taniwha Retail Limited as a System Design Consultant from July 2018. Mr Dobbs worked in the Listening Post in Hamilton, a business owned and operated by Taniwha that provides entertainment and automation in the residential, business and marine sectors.

[3] Mr Ede is the director of Taniwha and through a holding company a shareholder of Taniwha. Mr Ede is the equivalent of the CEO of the Listening Post business.

[4] Reviewing the history of Mr Dobbs and Mr Ede's professional relationship there was mutual respect for their technical and business skills but each complained of the other having negative traits. Mr Ede says Mr Dobbs was not focused enough on the business and spent too much time doing his own work which included sound and light engineering for concerts and assisting with promotion and production of various entertainment endeavours; Mr Dobbs says Mr Ede was a bully and a racist, who harassed him at work to the point he believed Mr Ede wanted him to leave and gave him no choice but to leave, so he resigned.

[5] Mr Dobbs resigned from Taniwha on 25 May 2020. He says:

- (a) He was treated in an unjustified manner by Taniwha during his employment which included bullying behaviour and racist comments and Taniwha trying to dismiss him when there was no basis for that, in order to force him out of the business.
- (b) Taniwha did not pay his accrued and untaken holiday pay and his final pay for time worked and the notice period.

- (c) He was not given his mobile telephone number back, which was an important and crucial tool for Mr Dobbs' ongoing personal business and social endeavours.
- (d) He was not paid for damage to his car that occurred whilst he was using it for work.
- (e) He was continually harassed by Mr Ede after he resigned, with various allegations including that he owed Taniwha money for speakers he had purchased and that he had solicited one of its employees to join him at his new employer.

[6] Taniwha says that when Mr Dobbs resigned:

- (a) That was his choice and not as a result of anything it had done that was unjustifiable, rather it was in response to a legitimate disciplinary process relating to allegations that Mr Dobbs had breached Covid-19 Level 4 lockdown requirements.
- (b) He had taken more annual leave than he had accrued during his employment and as a result Mr Dobbs owed Taniwha \$2,476.28 in overpayments.
- (c) His final pay for hours worked was deducted from the overpaid annual leave.
- (d) He was not owed any money for his notice period as he did not work the notice period; he resigned with immediate effect.
- (e) He still owed Taniwha money for speakers he had purchased during his employment.
- (f) Given that Mr Dobbs owed it money for the overpaid annual leave and the speakers, it withheld transferring his mobile telephone number to him.

[7] Taniwha also says that in September 2020, Mr Dobbs encouraged an employee of Taniwha, Adam Jurisich, to leave and take up a job Mr Dobbs' new employer, Switch

Electrical Services (Hamilton) Limited. Taniwha says this is a breach by Mr Dobbs of the non-solicitation provision in the employment agreement he had with Taniwha.

[8] In the end these matters in issue between Mr Dobbs and Mr Ede escalated and Mr Dobbs lodged a statement of problem in the Authority against Taniwha claiming payment of wage arrears and holiday pay, the return of his mobile telephone number, payment for the damage to his car, and compensation for the way in which he had been treated by Mr Ede.

[9] Taniwha responded to Mr Dobbs' statement of problem explaining the position in respect of overpaid holiday pay and the payments that had been withheld, claiming it was owed for stereo speakers, admitting that Mr Dobbs' mobile telephone number should be returned to him but this was being withheld due to money owed to it and that it had not acted unjustifiably.

[10] Taniwha then lodged a statement of problem in the Authority against Mr Dobbs for breaching the non-solicitation provision in his employment agreement and against Mr Jurisich and Switch Electrical for aiding and abetting that breach by Mr Dobbs. All three responded to that claim denying that Mr Jurisich had been solicited by Mr Dobbs, stating he had simply applied for a job in response to an advertisement placed on a recruitment website.

The Authority's investigation

[11] The parties were unable to resolve their respective claims and they progressed through the Authority. Initially I was going to consolidate both Mr Dobbs' claim against Taniwha and Taniwha's claim against Mr Dobbs, Mr Jurisich and Switch Electrical and hold one investigation meeting. However, I was persuaded to keep the two claims separate as Taniwha's claim was not a direct counterclaim and it involved other parties than just Mr Dobbs and Taniwha.

[12] So, the two claims were set down for separate investigation meetings with the intention that they would be investigated separately but resolved jointly as I believed evidence in both meetings would inform both matters by way of a single determination. And because, crucially, Mr Dobbs and Mr Ede each accuse the other of case building and bringing claims in order to inflict harm on the other; Mr Dobbs seeking to destroy Taniwha's business as he was

unable to purchase it as he wanted to and Mr Ede seeking to take everything Mr Dobbs has in retaliation for his claims against Taniwha.

[13] The investigation meeting for Mr Dobbs' claim proceeded as scheduled in September 2021. Unfortunately, there was a delay in holding the investigation meeting for Taniwha's claim due to Covid-19 restrictions and this led to this determination being issued later than I would have anticipated, particularly as that relates to Mr Dobbs' claim but, in the end it was appropriate.

[14] So, there are two matters that I have investigated (3117859 and 3138521) and in summary the claims are:

- (a) Mr Dobbs' claim for wage arrears and holiday pay.
- (b) Mr Dobbs' claim for the return of his mobile telephone number.
- (c) Mr Dobbs' claim for payment for the cost of repairs to his car which was damaged on work business.
- (d) Mr Dobbs' claim that Taniwha acted in an unjustified manner during his employment.
- (e) Taniwha's claim that Mr Dobbs owes it money for speakers purchased by him.
- (f) Taniwha's claim against Mr Dobbs for breach of his employment agreement by soliciting Mr Jurisich to work for Switch Electrical.
- (g) Taniwha's claim against Mr Jurisich and Switch Electrical that they aided and abetted Mr Dobbs' breach of his employment agreement relating to the solicitation of Mr Jurisich.

[15] I investigated these claims by receiving written evidence and documents, holding the two investigation meetings I have referred to and receiving submissions from the parties.

[16] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my

findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

[17] I will set out my determination on the various claims in three parts:

- (a) Money owed between Mr Dobbs and Taniwha and the withholding of the mobile telephone number.
- (b) Mr Dobbs' personal grievance relating to the alleged unjustified actions by Taniwha.
- (c) Taniwha's claim that Mr Dobbs breached the non-solicitation provisions in his employment agreement and that Mr Jurisich and Switch Electrical aided and abetted such breach.

Was there any money owed between Mr Dobbs and Taniwha at the end of Mr Dobbs' employment?

Wage arrears and holiday pay

[18] Mr Dobbs says he was not paid his final pay which included payment for hours worked up until his resignation, payment for his notice period and accrued and unpaid holiday pay.

[19] The wages and time records produced by Taniwha record that Mr Dobbs took and was paid for more time off by way of annual leave than he was entitled to. These records show that Mr Dobbs was paid \$11,471.40 in annual leave but in the course of his employment he only accrued \$8,995.12 in annual leave – therefore there was an overpayment of \$2,476.28. Taniwha deducted Mr Dobbs' final pay of \$585.00 from that leaving a balance owing to it of \$1,891.28.

[20] For completeness, Taniwha says Mr Dobbs is not entitled to notice pay as he did not work any notice period.

[21] Mr Dobbs says the record of leave he took and was paid for is not accurate and he did not take the amount of leave Taniwha's records indicate.

[22] I have considered carefully what Mr Dobbs and Mr Ede have said about the time away from work that Mr Dobbs took as that relates to the issue of annual leave. My conclusion is that there may be some inaccuracy in what Taniwha attributed as annual leave to Mr Dobbs but I am persuaded that there was more annual leave taken than had accrued – so Mr Dobbs has been overpaid annual leave but I cannot properly quantify that on the evidence I have received.

[23] I will turn to the implications of this at the conclusion of this section when I address the outcome for this group of claims.

The return of Mr Dobbs' mobile telephone number

[24] Mr Dobbs transferred his personal mobile telephone number to a Taniwha mobile account when he worked at the Listening Post. This was because Taniwha would provide Mr Dobbs with a mobile telephone and pay the cost as part of the terms of employment; it appears that for convenience and practicality reasons Mr Dobbs decided to use his own personal number on the Taniwha phone. Mr Dobbs' employment agreement recorded that this mobile phone number remained his property at the termination of employment.

[25] Taniwha did not transfer Mr Dobbs' mobile telephone number back to him at the termination of employment. It says it did not do this as it was owed money for the overpaid annual leave and the stereo speakers.

[26] My conclusion on this aspect is straight forward. Mr Dobbs had a contractual right to the return of his mobile telephone number at the end of his employment. Taniwha had no right to withhold the transfer on the basis of some sort of set off or leverage for payment of money it says it was owed. So, Taniwha has breached the terms of Mr Dobbs' employment agreement and Mr Dobbs is entitled to an order for compliance in respect of the transfer of the mobile phone number and may be entitled to damages as a result.

[27] I will consider any damages as part of my assessment of the outcome for this group of claims.

Payment for damage to Mr Dobbs' car

[28] Mr Dobbs says his car was damaged when he was on work business. Taniwha says Mr Dobbs was not on work business when his car was damaged and it should not pay for the repairs.

[29] I have considered carefully what Mr Dobbs and Mr Ede have said about this matter and their evidence is inconclusive so I am not persuaded that Mr Dobbs is owed any money for damage to his car.

Money owed for stereo speakers

[30] Taniwha says Mr Dobbs purchased stereo speakers from it during his employment and has not paid the full purchase price. Mr Dobbs denies this saying he does not owe any money for the speakers – he paid the full amount for the speakers at the time.

[31] I accept Mr Dobbs' evidence on this matter and conclude that he does not owe any money for stereo speakers purchased from Taniwha.

Conclusion and outcome for claims relating to money owed

[32] I am satisfied that Mr Dobbs has been overpaid some of his annual leave. The quantum is not clear on the evidence I have as I do not accept that Taniwha's records of leave taken are accurate.

[33] I do not consider it appropriate to call for more evidence and believe a non-technical approach based on the substantial merits of the situation is best.¹ I conclude that Taniwha can retain the final wages owed to Mr Dobbs of \$585.00 and not pay him for any notice period as an off set against what it may be owed. Mr Dobbs is not required to pay any more overpaid annual leave given my subsequent conclusions on remedies in relation to the breach of his employment agreement.

[34] Taniwha had no right to keep Mr Dobbs' mobile telephone number and it should have been transferred to him. I make an order for compliance requiring Taniwha to comply with Mr Dobbs' employment agreement and transfer the mobile telephone number to him.

¹ Section 157 of the Employment Relations Act 2000.

[35] However, I am not persuaded that Mr Dobbs suffered any financial loss as a result of Taniwha's breach. In contrast Mr Dobbs may have suffered some non-financial loss due to the impact of the refusal to transfer of his mobile telephone number.

[36] Adopting a non-technical approach based on the substantial merits I find the appropriate outcome is that the compensation for non-financial loss is to be cancelled out by any overpayment of annual leave, which I have determined need not be quantified and paid by Mr Dobbs.

[37] That is not to say Taniwha was right to withhold transferring the mobile telephone; it was not. But applying equity and good conscience to the claims relating to overpayment between the parties, the fair and correct outcome is that neither is to pay any additional money to the other.

Did Taniwha act in an unjustifiable manner toward Mr Dobbs and if so, what are the consequences of such actions?

[38] Mr Dobbs' personal grievance relates to the following actions by Mr Ede that Mr Dobbs says were unjustified:

- (a) Various exchanges in late 2019 with Mr Ede that Mr Dobbs says were aggressive toward, and critical of, him. These exchanges arose out of an initial discussion about Mr Dobbs purchasing the Listening Post business and involving unnecessary and unsubstantiated allegations about Mr Dobbs' work commitment.
- (b) Various exchanges in early to mid-2020 with Mr Ede and Sonia Ede relating to work during and after the Covid-19 alert level lock downs. These exchanges revolved around work practices, criticism of Mr Dobbs' work, criticism of Mr Ede's behaviour and the work relationship between the two.
- (c) Conducting a disciplinary process in relation to false accusations of working on Taniwha's premises during one of the Covid-19 alert level lock downs without consent.

- (d) Disconnecting Mr Dobbs' email account and phone connection, which was also used as his personal mobile telephone, without notice and without justification.

[39] I am satisfied that the events complained of did occur. These events are set out in Mr Dobbs' personal grievance letter, Taniwha's response to the claims and is evidenced by many of the communications which were by email.

[40] My conclusions about the events are:

- (a) Mr Ede was not racist in his approach to Mr Dobbs. Mr Ede made inappropriate comments at times but these were not directed at Mr Dobbs.
- (b) Mr Ede was aggressive in his communications with Mr Dobbs and the effect was intimidatory and threatening. Mr Ede made sweeping statements about Mr Dobbs' work which were not supported by examples – I doubt whether Mr Ede's concerns were properly investigated by Taniwha. It is clear that Mr Ede had concerns about how Mr Dobbs' other work impacted on his employment but these were never substantiated nor were there clear boundaries set out by way of expectations. The end result was that Mr Ede's communications were unnecessarily inflammatory, containing unsubstantiated criticism that was aggressive and intimidating.
- (c) I am not satisfied that Taniwha properly investigated the concerns it had about Mr Dobbs' alleged breach of Covid-19 National lockdown requirements. Given the timing and the way it was commenced, the disciplinary process appeared to be retaliatory and part of a course of conduct to intimidate Mr Dobbs.
- (d) Mrs Ede attempts to intervene in the deteriorating relationship between Mr Ede and Mr Dobbs were, at first, productive resulting in clearer communication and practical approaches to setting some standards and expectations. However, her actions were inconsistent with Mr Ede's approach which in turn compounded the effect on Mr Dobbs as he received mixed messages.

(e) Taniwha did disconnect Mr Dobbs' email and mobile telephone without warning. Taniwha did so because it believed Mr Dobbs had taken steps with its social media accounts which were unacceptable and suggested he was going to take steps that would be adverse to Taniwha.

[41] Reflecting on these events as a course of conduct by Taniwha I am not satisfied that it was a deliberate attempt to make Mr Dobbs resign, nor was it meant to be bullying. It was however unjustified in that much of it was unnecessarily aggressive and based on assumptions or conclusions that had not been properly articulated and discussed with Mr Dobbs.

[42] These unjustifiable actions did cause a disadvantage to Mr Dobbs' employment – he felt intimidated and bullied by what was expressed and his employment was less secure as a result of the exchanges.

[43] Further, these unjustified actions were a breach of duty Taniwha owed to Mr Dobbs to not, without proper cause, act in a manner calculated to, or likely to, destroy or seriously damage the relationship of trust and confidence; this duty is implied into the employment relationship.²

[44] And Mr Dobbs resigned as a result of this breach of duty and it was foreseeable that he would resign in the circumstances. This means Mr Dobbs was constructively dismissed by Taniwha and that dismissal was not justified.³

Remedies

[45] As Mr Dobbs has been successful with his personal grievances, I must turn to consider what remedies he may be entitled to. In this regard, I may award any of the remedies provided for under s 123 of the Act. Mr Dobbs seeks compensation and has asked for \$10,000.00.

[46] Compensation 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.

² *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA); and *Rodkiss v Carter Holt Harvey Limited* [2015] NZEmpC 34.

³ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

[47] My task is to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of Taniwha's unjustified actions.⁴

[48] From the evidence, I find that Mr Dobbs suffered harm and loss in the form of, stress and anxiety over the way he was treated, and anger and frustration at the actions taken against him. Mr Dobbs refers to this overall as being a decline in his mental health and enjoyment of life.

[49] I quantify this harm and loss at the lower end of the spectrum – I acknowledge that Taniwha's actions had an impact on Mr Dobbs but there was a certain amount of robustness shown by Mr Dobbs and an ability to detach from what was occurring and respond and deal with it objectively. What is apparent is that the most significant impact on Mr Dobbs in terms of Taniwha's actions occurred after Mr Dobbs resigned, particularly the fall out of the resignation and then the claims brought by him and Taniwha. And these things do not inform the compensation I can award.

[50] In conclusion I quantify the compensation for the loss suffered due to hurt and humiliation to be \$8,000.00.

[51] As I have awarded remedies to Mr Dobbs, I must now consider whether he contributed to the situation that gave rise to his grievance.⁵ This assessment requires me to determine if Mr Dobbs behaved in a manner that was culpable or blameworthy, and this behaviour contributed to his grievance.⁶

[52] In the circumstances I find Mr Dobbs did not contribute to the situation which gave rise to his grievance in a way that requires a reduction to his compensation.

Breach of non-solicitation provision in Mr Dobbs' employment agreement

[53] Taniwha says Mr Dobbs offered one its employees, Mr Jurisich, a job at Switch Electrical; this being a breach of clause 24.2 of Mr Dobbs' employment agreement. Clause 24.2 (the restraint clause) provides:

⁴ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; and *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

⁵ Section 124 of the Employment Relations Act 2000.

⁶ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

Non-solicitation – The Employee shall not, whilst employed by the Employer, or for a period of six months after his/her employment has ended with the Employer, persuade or attempt to persuade: any client of the employer, or any employee of such clients, or any other of the Employer’s employees, to abandon their employment with the Employer, or relationship with the Employer as the case may be, in favour of:

- a) A contract for service, or a contract of service with the Employee; and/or
- b) Participation in a business venture, either by partnership, shareholding, or other such arrangement, with the Employee; and/or
- c) Employment or business participation (as above) with a close associate of the Employee (including a life partner), or subsequent Employer, partner, co-shareholder or suchlike.

[54] The prima facie position is that the restraint clause is unenforceable. However, it will be enforceable if Taniwha can show that it has legitimate proprietary interests that it seeks to protect and that the restraint clause is no wider than what is reasonably necessary to protect that interest.⁷

[55] In the circumstances I am satisfied that Taniwha has a right to protect its employees and that a non-solicitation provision in place for six months is reasonable, i.e., the restraint clause is enforceable.

[56] So the question becomes a factual analysis to determine if Mr Dobbs has breached the restraint clause and if he has, whether Mr Jurisich and/or Switch Electrical aided and abetted that breach by Mr Dobbs.

[57] Taniwha says the relevant evidence shows:

- (a) Mr Dobbs and Mr Jurisich met regularly for coffee and lunch after Mr Dobbs left Taniwha.
- (b) Mr Jurisich asked Mr Dobbs, on numerous occasions, if there were any jobs going at Switch Electrical.
- (c) On 10 September 2020, within the six-month non-solicitation period in the restraint clause, Mr Jurisich told Mr Ede and others at Taniwha that he was

⁷ *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at paragraph 23.

meeting Mr Dobbs for lunch, which Mr Dobbs was paying for as he had something important to tell him.

- (d) At the lunch meeting on 10 September 2020 Mr Dobbs offered Mr Jurisich a job at Switch Electrical – or at the very least told him of a job opportunity at Switch Electrical.
- (e) After lunch on 10 September 2020 Mr Jurisich returned to work at Taniwha and told Mr Ede that he had been offered a job and once he had received the terms of the offer, he would let Taniwha know so it could consider making a counteroffer to him.
- (f) Switch Electrical gave Mr Jurisich a formal offer of employment on 12 October 2020.
- (g) Mr Jurisich resigned from Taniwha on 19 October 2020 and commenced work at Switch Electrical on 2 November 2020.

[58] Taniwha says Mr Dobbs' pursuit of Mr Jurisich was part of his plan to damage Taniwha's business and is the only credible explanation for Mr Jurisich changing jobs – there was no reason why he would take a lesser role in status, duties and remuneration, particularly when he was happy in his role at Taniwha.

[59] In contrast Mr Dobbs says Taniwha has seized upon a perfectly normal and acceptable situation of Mr Jurisich taking a job available at Switch Electrical in order to create a claim against him in retaliation for his own claim against Taniwha.

[60] In this regard, Mr Dobbs, Mr Jurisich and Switch Electrical say that:

- (a) Whilst Mr Jurisich and Mr Dobbs met for lunch on 10 September 2020, this was not uncommon and was not so that Mr Dobbs could offer Mr Jurisich a job or even advise Mr Jurisich of a job vacancy at Switch Electrical.

- (b) Mr Jurisich did not tell anyone at Taniwha that the reason he was having lunch with Mr Dobbs was because he had something important to tell him, nor did he tell anyone on returning from lunch that Mr Dobbs had offered him a job.
- (c) Switch Electrical advertised for an AV Technician on SEEK, in the normal way in which it advertised any vacancies, it just happened to be listed on 10 September 2020.
- (d) Mr Jurisich applied directly to Iain Colville of Switch Electrical when he saw the SEEK listing. He received a notification of the vacancy from SEEK after he had had lunch with Mr Dobbs. Mr Jurisich received the notification as he was registered with SEEK and actively looking for a new role.
- (e) In terms of the process of recruitment that followed, Mr Jurisich dealt only with Mr Colville at Switch Electrical.
- (f) Mr Dobbs did not discuss the AV Technician vacancy with Mr Jurisich at any time because, amongst other things, he believed it was not a role Mr Jurisich would be interested in; and Mr Dobbs had no authority to hire anybody for Switch Electrical so discussing roles or offering jobs was not something he did.

[61] The question for me then is whose evidence do I prefer on what occurred in relation to Mr Jurisich applying for and accepting a role at Switch Electrical.

[62] 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* that was cited with approval on appeal to the High Court.⁸ And the guidance from the Employment Court in *Lawson v New Zealand Transport Agency* and *Cornish Truck & Van Limited v Gildenhuis*.⁹

⁸ *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21].

⁹ *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165; and *Cornish Truck & Van Limited v Gildenhuis* [2019] NZEmpC 6.

[63] I conclude that I prefer evidence of Mr Jurisich and Mr Colville. Both witnesses were credible and consistent and their evidence made sense – neither relied on implying ulterior motives to others.

[64] In particular, when I stand back and review the evidence there are two key points:

(a) I accept that Mr Dobbs had no ability to offer anyone any job at Switch Electrical; this was Mr Colville's domain and in the case of Mr Jurisich he did this without any input from Mr Dobbs. This makes sense from a business perspective and is a simple and credible proposition that Mr Colville expressed clearly.

(b) I do not accept that Mr Dobbs actively pursued Mr Jurisich in order to create issues for Taniwha's business as Mr Ede suggests. This proposition requires Switch Electrical to be complicit in this plan; at its simplest the suggestion implies that Switch Electrical was prepared to employ Mr Jurisich because Mr Dobbs wanted it to. And that is not a conclusion I can draw from the evidence.

[65] I find that Mr Dobbs did not breach the restraint clause; he did not solicit Mr Jurisich from Taniwha or encourage him to leave Taniwha to take up a role with Switch Electrical. It follows that Mr Jurisich and Switch Electrical can not have aided or abetted any breach by Mr Dobbs.

Summary

[66] Taniwha has overpaid Mr Dobbs' annual leave but Mr Dobbs need not pay back any further money other than the amount deducted by Taniwha in his final pay.

[67] Taniwha has breached Mr Dobbs' employment agreement by not transferring Mr Dobbs' mobile telephone number to him at the termination of his employment. Taniwha must comply with its obligations by transferring the mobile telephone number to Mr Dobbs.

[68] Taniwha acted in an unjustified manner and constructively dismissed Mr Dobbs. In settlement of this grievance Taniwha must pay Mr Dobbs \$8,000.00 for compensation pursuant to s 123(1)(c)(i) of the Act.

[69] Taniwha's claims against Mr Dobbs for breaching the restraint clause and against Mr Jurisich and Switch Electrical for aiding and abetting such breach are dismissed.

Costs

[70] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Dobbs, Mr Jurisich and/or Switch Electrical may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Taniwha will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[71] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.¹⁰

Peter van Keulen
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.