

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 242  
3225559  
3225600

BETWEEN                      JOHNNY WYND  
   Applicant in 3225559

AND                              SAMUEL COBHAM  
   Applicant in 3225600

AND                              RM CIVIL LIMITED  
   Respondent in 3225559 and 3225600

Member of Authority:       Nicola Craig

Representatives:             Robert Morgan, advocate for the applicants  
   Simon Greening and Kylie Hudson, counsel for the  
   respondent

Investigation Meeting:       22 November 2023 in Hamilton  
   18 December 2023 by audio-visual link

Submissions Received:       21 December 2023 and 25 January 2024 from the applicants  
   15 January 2024 from the respondent

Date of Determination:       26 April 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problems**

[1]     In July 2022 Johnny Wynd worked as an operator/site supervisor at a Cambridge site for RM Civil Limited (RMC or the company). His son in law Samuel Cobham joined him for a week as a site drain layer/machine operator. The work involved preparing a former farm site for subdivision construction.

[2]     RMC is part of the Hamilton based Stratton Group.

[3] A large landfill or rubbish hole of around 500 square metres had been discovered on the property before Mr Wynd started. Once he was working for RMC some discord developed about whether the site, particularly the hole, might be contaminated and how to proceed. RMC was confident it had undertaken all the assessment and advice steps when getting the development approved but was prepared to arrange for further testing.

[4] RMC did not take steps as quickly as Mr Wynd expected so without informing RMC, he arranged for an environmental consultant to visit, who took samples. Mr Wynd put RMC on notice of his belief that due to on-going asbestos finds on the site all operations needed to stop to allow a thorough investigation.

[5] Later the samples tested positive for asbestos, although RMC was not aware of this at the time. The company decided to dismiss both Mr Wynd and Mr Cobham under probationary periods, saying it could not afford to keep them.

[6] Mr Wynd and Mr Cobham say they were unjustifiably dismissed. RMC identifies strong concerns about their behaviour, particularly that of Mr Wynd.

### **The Authority's investigation**

[7] It was agreed that Mr Wynd and Mr Cobham's situations were intertwined, and their grievances should be heard together. Although there were references in documents to the wider Stratton Group all parties were willing to proceed with RMC as the respondent.

[8] The investigation meeting began in Hamilton on 22 November 2023. Evidence was heard under oath or affirmation from Mr Wynd, Mr Cobham, an asbestos and demolition contracts manager from Mr Wynd's former workplace (referred to as T), an environmental consultant and RMC's directors Ryan Mason and Matt Polzleitner.

[9] The meeting was reconvened on 18 December 2023 by audio-visual link to hear evidence under affirmation from an RMC manager, Mike Sutton. Written submissions from all parties were later received.

[10] There was some difficulty getting a precise timing of events, with text messages between Mr Sutton and Mr Wynd being the primary written source available.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded everything received from the parties but have stated findings, expressed conclusions and specified resulting orders.

## **Issues**

[12] The issues for investigation are:

- (a) Was Mr Wynd unjustifiably dismissed by RMC, including consideration of safety issues?
- (b) If so, what remedies (if any) should he receive, including consideration of a bonus and contribution?
- (c) Is Mr Wynd entitled to what he refers to as a bonus in his employment agreement?
- (d) Did RMC improperly deduct the cost of speeding tickets from Mr Wynd's pay and should he be reimbursed for that?
- (e) Was Mr Cobham unjustifiably dismissed by RMC, including consideration of safety issue?
- (f) If so, what remedies (if any) should he receive, including consideration of contribution?

## **Appointments**

[13] Mr Wynd describes himself as experienced in site management, excavation, and demolition work. He had less experience in subdivision development. He was headhunted by the Stratton Group and offered a higher pay rate than he received in his previous job.

[14] Mr Wynd's employment agreement contained a three month probationary period in clause 9, including:

9.2 During the probationary period, your performance will be closely monitored. The review will provide the opportunity to assess your progress and determine any areas that may require further support, training or assistance. ...

9.4 ... if either party considers that the employment relationship is not satisfactory, and/or your performance does not meet the standards required, either party may terminate the employment relationship at any time during, or at the end of, the probationary period in accordance with notice period provided by the Termination of Employment clause of this Agreement.

[15] There is no specific notice period identified in the probationary clause. The termination clause provides for four weeks' notice to be given.<sup>1</sup>

[16] Mr Wynd started working for RMC on 4 July 2022 with most of his dealings being with RMC's project manager for the site, Mr Sutton. Mr Wynd was told that he could bring former associates to help him with the project. He did so, including appointing Mr Cobham who was an experienced digger driver. Mr Sutton was involved in Mr Cobham's appointment and aware of the family connection.

[17] Mr Cobham had the same probationary period in his employment agreement as Mr Wynd. He was supposed to begin work on 25 July 2022 but was able to arrange an earlier time, starting on 18 July.

[18] In Mr Wynd's first few weeks of work there was heavy rain, making the site difficult to work. Mr Sutton was based elsewhere but came to the site around every second day.

### **Concern about contaminants**

[19] Mr Wynd became concerned about possible contaminants on site, particularly in the hole, initially paint chips in the soil and a burn pit. There was also old concrete which could have contained asbestos. Mr Polzleitner reports the site was previously owned by a contractor who had put his work waste in the hole.

[20] By at least 15 July 2022 Mr Wynd raised his concern with RMC. At some point RMC told him there had been reports done earlier, meaning an engineer's walk over report and geotechnical reports as part of the approval process. From the evidence at the investigation meeting there was no contamination testing done earlier or immediately when the rubbish hole was discovered.

[21] A staff breakfast BBQ was held at RMC's Te Rapa depot on Friday 15 July 2022. Mr Polzleitner recalls Mr Wynd expressing strong concerns about contamination to him, particularly given the casual context.

[22] After the BBQ a meeting was held between Mr Polzleitner, Mr Sutton, Mr Wynd and at least one supervisor from another site. There was RMC evidence that this was to discuss

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<sup>1</sup> Mr Wynd's employment agreement, clause 30.1.

progress concerns with Mr Wynd. If RMC were trying to convey concerns about Mr Wynd's role in a slow progress these were not clearly articulated as such to Mr Wynd.

[23] On Saturday 16 July Mr Wynd asked Mr Sutton to ring as he was very interested about what was said that afternoon with soil testing on the rubbish hole.

[24] On Tuesday 19 July Mr Sutton and Mr Wynd messaged, with Mr Wynd asking whether there was word on the hole being tested. Mr Sutton replied they had already spoken with geotechnical engineers who are going to conduct the test. He asked when Mr Wynd thought would be a good time for the test. Mr Wynd tried to ring that day or the next with Mr Sutton messaging he could not talk right now.

[25] On Wednesday 20 July Mr Wynd messaged for Mr Sutton to ring when he was free, with it being important. It appears there had been no discussion about when the engineers would come.

[26] Mr Sutton's witness statement referred to Mr Wynd and Mr Cobham messaging but there is no evidence of Mr Cobham ever texting Mr Sutton.

[27] At one or two points that week Mr Polzleitner and Mr Sutton came on site and walked around with Mr Wynd. Mr Wynd recalls pointing out objects of concern to Mr Polzleitner and/or Mr Sutton – old concrete (which appeared to have asbestos on it), paint chips and oil.

[28] Mr Polzleitner asked Mr Wynd to arrange for a drainage trench to be built near the hole. There was suggestion this was not immediately feasible due to the wetness of the site. RMC acknowledges it was a challenging time on site with everything wet.

[29] Mr Wynd was concerned to get the site tested because they did not know what they were dealing with. Particular procedures were required when dealing with contaminated soil. Mr Wynd accepts he may have indicated work could not be done in that area. Mr Sutton tried to be reassuring but found Mr Wynd focused on only one thing (the possible contamination).

[30] Mr Polzleitner's impression was of Mr Wynd expressing unexpectedly high levels of concern and (perhaps with the benefit of hindsight) felt it reflected Mr Wynd's long experience in the demolition of old buildings and the (urgent) asbestos procedures in that context. By the time the Authority's investigation meeting was held, Mr Polzleitner accepted that Mr Wynd's fixation potentially came from a good place. In the context of an outdoor site RMC did not

see the same need for immediate action as Mr Wynd did. Also, there was a sense of frustration that the site work was not progressing as expected with Mr Wynd focused on the hole, rather than moving forward on to work elsewhere on the site.

[31] Mr Wynd recalls Mr Polzleitner saying that someone would come onsite to test. Mr Wynd was not very trusting at this point as nothing had been happening.

[32] By or around this time the hole was fenced off. Mr Wynd told the Authority that he still had concerns that contamination may have spread more broadly across the site, not just in the rubbish hole. Excavation had started with no controls in place, according to him. Mr Wynd recalls mentioning this to Mr Sutton or Mr Polzleitner.

[33] Both Mr Wynd and Mr Polzleitner recalled a number of discussions about the hole occurring within maybe a week or so, also involving Mr Sutton. It was hard to fully pin down the circumstances of these. Mr Polzleitner is confident RMC had tried to reassure Mr Wynd but recognises that Mr Wynd may not have believed them.

[34] RMC had discussion with a consulting company they had used previously, which I refer to as G.

### **Warnings**

[35] Witness statements for RCM referred to Mr Wynd getting several verbal warnings. Having questioned the witnesses, it is apparent that these were incidents of RCM being concerned about lack of progress over a week or so and talking to Mr Wynd about getting back on track and taking the next directed steps. "Follow the instructions from your manager" was Mr Polzleitner's description. They did not amount to anything in the nature of disciplinary incidents with Mr Wynd warned that his employment was in jeopardy. Mr Wynd did not receive any warnings. Neither did Mr Cobham.

### **Involvement of others**

[36] Large bins were needed for soil to be removed from the site. Mr Wynd made contact with his former employer T, which dealt with waste, including contaminated waste. Full bins were returned to T, which was concerned the site's soil appeared contaminated, including with asbestos, oils and charcoal. RMC had asked Mr Wynd to arrange for bins but later expressed

concern that Mr Wynd had used his former employer. RMC saw it as a competitor although Mr Wynd saw T's business as focused on waste.

[37] Mr Wynd describes himself as not having any malicious intent, just trying to protect everyone. He did not want RMC to get into trouble nor for himself to be the fall guy if anything went wrong about the hole or the site more broadly. He also described Mr Sutton not always getting back to him but this may be a reflection of Mr Sutton's usage of an automatic "Sorry, I can't talk right now" text response option.

[38] T's asbestos and demolition contracts manager and his boss discussed what to do and the manager was asked to go to the site and talk to Mr Wynd. He did so and the two walked some points of the site. The manager was shocked at the asbestos debris observable, to the extent he did not consider they should keep walking. The manager strongly advised Mr Wynd to arrange for an independent consultant to visit, with the environmental consultant recommended.

#### **Friday 22 July 2022**

[39] Mr Wynd called the environmental consultant and asked him to come urgently to the site. No report was commissioned as such but Mr Wynd thought he needed help. The environmental consultant visited the same day, visually identifying what he assessed to be a contaminated site. He saw what appeared to be asbestos and took samples. The samples were sent to an independent laboratory for testing.

[40] At 1.59pm Mr Wynd messaged Mr Sutton concerned about inadequate staff numbers and that a lot more asbestos had been found today. He indicated that they were done for the day, needing the other worker there to make more happen. Mr Wynd told the Authority it was also a difficult day, weatherwise.

[41] An hour later Mr Sutton messaged back with "apologies it has been a big day sorting out logistics for the site". A labour solution had been identified. Mr Sutton notes that G would be there on Monday for testing. No surprise is expressed about Mr Wynd and Mr Cobham finishing for the day.

[42] Adding to Mr Wynd's worries, he was unable to identify a business of G's name in this area of work from searching the internet. It now appears G was a more general consultant RMC had used earlier who did not end up undertaking the actual assessment.

[43] Mr Wynd did not tell anyone from RMC on Friday that the environmental consultant had visited and samples been taken.

[44] After the environmental consultant visited but before samples were tested, that afternoon, at 4.23pm, Mr Wynd messaged that he was sending this to Mr Sutton:

... for my own protection...it is my belief due to ongoing finds on this site we need to stop all operations and have a thorough investigation of this site due to what we are pulling out of the ground...?metals asbestos a burn pit paint chips etc we need to talk Monday.

[45] From their evidence to the Authority, RMC saw this as a refusal to work or a stop work notice. Mr Wynd did not accept that saying he was prepared to work elsewhere. No attempt was made by RMC to clarify that with him. No reply was received to his message that afternoon or over the weekend.

### **The weekend**

[46] On Sunday 24 July 2022 the environmental consultant told Mr Wynd that the laboratory analysis showed asbestos present. A written report confirming this was later provided.

[47] The consultant emailed advising that as a Worksafe licenced assessor and environmental scientist he had a duty of care to recommend the immediate stop of all excavation operations (until it was Council assessed).<sup>2</sup> A detailed investigation was recommended. The consultant notified WorkSafe.

### **Monday morning**

[48] At 7.18am on Monday 25 July 2022 Mr Wynd messaged Mr Sutton that he needed to get down to the site as soon as possible as they needed to talk. Having received no response, Mr Wynd messaged at 7.41am:

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<sup>2</sup> Health and Safety at Work Act 2015, Health and Safety at Work (Asbestos) Regulations 2016, and Approved Code of Practice for the Management and Removal of Asbestos (November 2016, WorkSafe).



Before any works happen we need to talk. I have an email here that is in your best interest to read... from an independent inspector...

[49] No response from Mr Sutton was received. Mr Wynd, Mr Cobham and the other worker present began work in another area. Mr Cobham was not aware of the test result at this stage. Mr Wynd thought there would be a discussion with the directors and Mr Sutton where he could pass on the test result and consultant's email. That was not to be.

### **Dismissals**

[50] A decision had likely been reached on Friday the 21<sup>st</sup> or over the weekend. RMC thought Mr Wynd was saying no work would occur. Things were seen as going backwards with delays being very costly. RMC decided to terminate with the decision makers thinking Mr Wynd and Mr Cobham were on 90-day trial periods or that 90-day trial periods and probationary periods were the same thing.

[51] The plan was for Mr Sutton to talk to Mr Wynd and Mr Cobham on Monday but Mr Sutton had an emergency, so Mr Mason stepped in. Mr Mason was not aware of the asbestos test result.

[52] Around 7.45 am Mr Wynd got a brief call from Mr Mason. This call was more likely than not after Mr Wynd's text to Mr Sutton at 7.41am. Mr Wynd's recall is Mr Mason saying he was taking control (of the site) with Mr Wynd and Mr Cobham being made redundant due to financial reasons. The other worker present was to stay. Mr Mason's recollection was that he said that given the situation the company could not progress forward with Mr Wynd because he could not listen to instructions, they had made the call 'his way was not their way' so they were finishing under the 90-day trial period.

[53] As Mr Mason did not have Mr Cobham's contact details he asked Mr Wynd to let Mr Cobham know. The message Mr Cobham got was that RMC could not afford him.

[54] Midmorning RMC's office manager phoned Mr Wynd saying she would send a letter through. She then emailed a termination letter to Mr Wynd. The letter from Mr Polzleitner and Mr Mason included:

We wish to invoke the Probationary cause in your individual employment agreement ... and give you notice that we will employment with us with (*sic*) cease effective immediately.

We request all Stratton property be returned to the office ... by end of business today...

In good faith and in lieu of notice period, we will place you on garden leave for the next 4 weeks, as per clause 30.9 and 30.10 ....

[55] Mr Wynd emailed back that he would like his redundancy paid in full along with his hours worked. This led to another letter from RMC:

...Unfortunately, the 90 day clause does work differently to redundancy in way of pay out. The company is offering "garden leave" of 4 weeks as an act of good faith to give you income over the next 4 weeks.

Unfortunately the company is not in a position to be able to make allowances at this time.

[56] RMC also sent Mr Cobham two 25 July letters advising the probationary period was invoked and his employment would cease immediately. Further, he was placed on garden leave for the next four weeks.

[57] Given the messages from Mr Wynd to the office manager and Mr Cobham it is more likely than not that Mr Mason's dismissal message was along the lines of the company could not afford to keep them and so was letting them go. I do not accept there was mention of Mr Wynd not following instructions.

### **Further points**

[58] Some RMC witnesses regarded the acceptance of garden leave by Mr Wynd and Mr Cobham as being an indication of their agreement with the termination or lack of impact on them. It is hard to see the provision of garden leave as a favour to these employees. The company had informed them that their employment was to cease effective immediately. It should then have promptly paid them four weeks' wages in lieu of notice. Garden leave was a way of spreading out the payment obligation.

[59] Mr Mason's witness statement identified that Mr Wynd had informed "all local authorities, Waikato Regional Council, WorkSafe and Waipa District Council to shut the site down". At the investigation meeting Mr Mason acknowledged that was their assumption. On the basis of what is before the Authority, it was an incorrect assumption.

[60] Mr Sutton had indicated G would visit on 25 July but another consultant actually visited the following day. The subsequent report refers to not taking any samples for testing with no

asbestos containing material (visually) identified. RMC witnesses advised it took a week or two for Worksafe to clear the site to resume work - an extremely costly delay.

[61] At the investigation meeting there were comments about the qualification or appropriateness to the job of the environmental consultant in comparison to that of the consultant who reported to RMC. I do not need to decide that point. I did not have the advantage of hearing evidence from RMC's consultant. I accept the environmental consultant who gave evidence did take a sample and it was tested by an independent laboratory as asbestos.

### **Mr Wynd's dismissal**

[62] Turning now to the dismissal claims.

[63] Did RMC act as a fair and reasonable employer could have done, including considering the elements of fair process in s 103A(3) of the Act?<sup>3</sup>

[64] A few initial comments. Neither Mr Wynd nor RMC communicated in an ideal manner in the critical period. These events occurred in the context of a new employment relationship with trust not yet cemented.

[65] It is not fair to say RMC did nothing in response to Mr Wynd's concerns. It indicated a previous geotechnical assessment was fine but failed to provide it directly to Mr Wynd or point him in its direction. RMC then sought advice from a consultant it had used earlier but it is not evident Mr Wynd was informed of this. The hole was fenced off as a precaution.

[66] RMC then said it would get someone in to test but did not confirm for maybe two or three days who or when that would be. With a longer serving or more experienced subdivision site supervisor that might have been satisfactory. But Mr Wynd was new and known to be highly concerned that what looked very much like asbestos being found at multiple points, let alone the other identified products. He was understandably worried about the health implications and his and RMC's responsibilities. Not seeing urgent action from RMC, he then received the concerns expressed by T and sought advice from the recommended environmental consultant.

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<sup>3</sup> The Act, s103A(1) and (2).

[67] The trigger event for RMC was Mr Wynd's message of 4.32pm Friday 22 July 2022 which refers to his "belief" that they needed to stop all operations. That statement is not categorical that work will stop. I also note the background of workers being entitled to cease work if exposed to serious risks, without making a finding that this was the situation here.<sup>4</sup>

[68] RMC were understandably concerned but decided to dismiss without making any attempt to clarify Mr Wynd's position, put its concerns or give him chance to comment. These are not minor matters.<sup>5</sup> A short period of work was in fact undertaken on the morning of Monday the 25<sup>th</sup>, before Mr Mason called to say Mr Wynd and Mr Cobham were being dismissed.

[69] Instead of seeking Mr Wynd's position, RMC simply decided it had had enough and relied on what it thought was a 90-day trial period, enabling it to dismiss without process with impunity. It had not done enough to meet the probationary period clause requirements of close review of performance, with the opportunity to assess Mr Wynd's progress and determine areas for further support and assistance.<sup>6</sup>

[70] I note Mr Sutton's evidence was that the main concern was Mr Wynd going off and getting his own report but a close examination of the RMC directors' evidence and the timing of text messages and calls does not fit well with that being a concern at the time the dismissal decision was made. It was not evident that Mr Wynd had told RCM about that until, at the earliest, the text reference at 7.41 am on Monday whereas the decision to dismissal was made earlier. Mr Mason was not aware of the testing when he informed Mr Wynd of the dismissals. It seems the later outrage over discovering Mr Wynd had made his own testing arrangements and the difficulties caused by the site being temporarily closed have influenced Mr Sutton's sense of the contemporaneous main area of concern.

[71] Garden leave is provided for in the employment agreement at clause 30.9 although that concept of extended leave on pay does not sit comfortably with the section of the dismissal letter specifying Mr Wynd's employment is to cease effective immediately.

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<sup>4</sup> Health and Safety at Work Act 2015, s 83.

<sup>5</sup> The Act, s103A(5).

<sup>6</sup> Employment agreement, clause 9.2.

[72] Closing submissions for RMC accepted for the first time that given the mistaken belief regarding the 90-day trial period, the dismissal was unjustified because a fair process was not followed.

[73] In conclusion RMC did not act as a fair and reasonable employer could have done. Mr Wynd was unjustifiably dismissed by RMC.

### **Mr Wynd's remedies**

#### *Lost wages*

[74] In terms of lost wages, Mr Wynd minimised these by being taking up work with his previous employer T. It was however at a lower pay rate than at RMC and without his previous leave accruals. He seeks \$865.38 gross being the difference for a nine week period. Subject to consideration of contribution that would be granted.

#### *Compensation*

[75] Mr Wynd also seeks compensation for humiliation, loss of dignity and injury to feelings starting from \$15,000.

[76] The RMC job was an exciting prospect for Mr Wynd – a site supervisor role with a pay increase and the ability to recruit a team he wanted to work with. It hurt him to lose that, especially for actions which he saw as being concerned about the Stratton Group's interests. It was embarrassing for him to have to go back cap in hand for a job to his previous employer. There were tensions at home.

[77] Compensation of \$15,000 is the appropriate point before the contribution assessment.

#### *Contribution*

[78] Did Mr Wynd contribute to the situation leading to his dismissal in a way that was causative of the dismissal and blameworthy? RMC mentions breaching of company policy. Which policy was breached is not identified and policies were not provided to the Authority. I am not satisfied on what is before me that there were delays which Mr Wynd can be seen as blameworthy for, given that it was legitimate that he had some contamination concern and the state of the weather and workforce.

[79] I have seriously considered Mr Wynd's arrangement for an independent assessor to come onto RMC's site and test, described by the company as surreptitious. However, to be contributory the actions must be causative of the dismissal and in this regard they were not. The decision to dismiss was made without knowledge of the environmental consultant's visit and testing.

[80] In any event, Mr Wynd made sufficient efforts to let RMC know he was very concerned about the safety around the hole. RMC had notified him they would get someone in to test the site. Having waited days for a response he was then told about a company G who he could not identify as being experts in this area. On the evidence before me I cannot conclude, in light of what several experienced people saw as asbestos on site, Mr Wynd was blameworthy in expressing his belief on 22 July 2022 that operations should not continue in those circumstances. No deduction for contribution is warranted.

### *Conclusion*

[81] RMC is to pay Mr Wynd \$865.38 gross as lost wages and \$15,000 as compensation within 28 days of the date of this determination.

### **Bonus**

[82] Mr Wynd sought payment of a portion of the additional remuneration which was payable on his five months' anniversary with RMC. He regarded it as a bonus but there was performance element identified in the employment agreement. There is not a sound basis for his claim. The payment was due at that anniversary with no pro rata arrangement included. This arrangement was Mr Wynd's choice rather than inclusion within his regular salary.

### **Speeding tickets**

[83] RMC deducted money for two \$40 speeding tickets from one of Mr Wynd's last pays. They related to the work ute he had but he refers to the tickets being from before his time with the company. Mr Polzleitner accepted that at the investigation meeting that if they did not relate to Mr Wynd they should be repaid. The Authority has not been informed of that happening.

[84] RMC is to pay Mr Wynd \$80 for the deduction within 28 days of the date of this determination.

### **Mr Cobham's dismissal**

[85] RMC made some attempt to paint Mr Wynd and Mr Cobham as collaborators on the asbestos concern. There is little basis for that view. The reality is that Mr Cobham got caught up with RMC's dissatisfaction with Mr Wynd. Mr Cobham had not been directly involved with raising concerns about contamination on the site. He was new to detecting asbestos although he had come across it as an issue before. He was simply doing what he was told to do by the site supervisor.

[86] Mr Wynd confirmed he had not received any concerns from RMC about Mr Cobham's work nor had any of his own. Other than in a general way about getting on with the job, RMC did not attempt to tell Mr Cobham that he should not follow the supervisor but do something else.

[87] Mr Cobham did not refuse to work and was ready, willing and able to work.

[88] Ironically from Mr Cobham's perspective he was dismissed on the day he was supposed to have started work with RMC. RMC did not comply with the probationary period requirements, closely review his work, assess progress and offer further support, training or assistance.

[89] RMC accepts that given its misunderstanding about the 90-day trial period, the dismissal was unjustified given the lack of procedural steps taken.

[90] Mr Cobham was unjustifiably dismissed by RMC, with the company failing to act as a fair and reasonable employer could have done.

### **Mr Cobham's remedies**

[91] Mr Cobham had a young family and felt the pressure to take up work as quickly as possible, starting a farm job on 1 August. The new job was at a lower rate of pay than that with RMC. He seeks the difference between the two rates for a period of 13 weeks. That equates to the three month lost wages reimbursement period in s 128(2) of the Act.

[92] Compensation under s 123(1)(c)(i) of the Act starting at \$15,000 is sought. Mr Cobham had given up a good job to work for RMC, only to find himself dismissed a week later. He was shocked. Telling his family in those circumstances was hard. It was a job which

potentially offered career expansion. Mr Cobham was hurt to have been dismissed when he had not done anything wrong, in the absence of attempt to raise any concerns with him.

[93] Mr Cobham's life was significantly impacted by his dismissal. He had to uproot the family in an unplanned way to move to his new job. Also Mr Cobham had to sell his ute as he could not keep up the payments on it. It has been a significant transition for the family which put a lot of pressure on them. I accept RCM's point that any award is not to compensate Mr Cobham's family but he suffered considerably seeing what his family were going through. Mr Cobham and his wife are grateful to the farmer who took him on and has supported him.

[94] Submissions for RMC did not argue there was any contribution by Mr Cobham. He was in a difficult position with his boss, who was also his father in law, leading the charge about contamination. Mr Cobham's actions were not blameworthy.

[95] RMC is to pay Mr Cobham \$4,302.45 net in lost wages and \$17,000 compensation within 28 days of the date of this determination.

### **Summary of orders**

[96] RM Civil Limited is to pay the following within 28 days of the date of this determination:

- (a) To Johnny Wynd - \$865.38 gross lost wages, \$15,000 compensation and \$80 for deductions from wages; and
- (b) To Samuel Cobham - \$4,302.45 net lost wages and \$17,000 compensation.

### **Costs**

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

[98] If the parties are not able to reach an agreement on costs then Mr Wynd and/or Mr Cobham should lodge and serve a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum RMC would then have 14 days to lodge any reply memorandum. Extensions of time will be considered if requested.



[99] The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would be considered.<sup>7</sup>

Nicola Craig  
Member of the Employment Relations Authority

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<sup>7</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).