

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 21  
3107013

BETWEEN            BRENDAN LIBEAU  
                                 Applicant

AND                    THE ELECTRICAL TRADING  
                                 COMPANY LIMITED  
                                 Respondent

Member of Authority:     Peter van Keulen

Representatives:         Mary-Jane Thomas, counsel for the Applicant  
                                 Natalie Tabb, counsel for the Respondent

Investigation Meeting:    21 April 2022 and 25 July 2022

Submissions Received:    25 July 2022 and 9 August 2022 from the Applicant  
                                 25 July 2022 and 1 August 2022 from the Respondent

Date of Determination:    18 January 2023

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]     Brendan Libeau started an apprenticeship electrician role with the Electrical Trading Company Limited (Etco) in June 2018; Mr Libeau did not complete his apprenticeship, resigning from Etco in March 2020.



[2] Mr Libeau has two areas of complaint about the way he was treated during the time he worked at Etco. First, he says he was bullied by the apprentice supervisor and Etco failed to respond to his complaints about this appropriately. And second, he says he was treated unjustifiably by Etco over his fitness for work arising out of him requesting a new chair, particularly Etco requiring a medical certificate and job task sheet to be completed by Mr Libeau's doctor and not paying him when these were not provided.

[3] Mr Libeau says the way he was treated by Etco caused him to resign in March 2020; he says he felt he had no choice but to resign given all of Etco's failings.

[4] Mr Libeau raised personal grievances of unjustified action causing disadvantage to his employment for ten different actions or groups of actions by Etco. And he raised a personal grievance for unjustifiable dismissal arising out of his resignation.

[5] Etco denied any wrongdoing in how it treated Mr Libeau and says there is no basis for his personal grievances:

(a) It says the alleged bullying did not occur and it investigated Mr Libeau's concerns.

(b) Etco accepts that it responded to information it received from Mr Libeau about what appeared to be a back injury by requiring a medical certificate and a job task sheet to be completed by Mr Libeau's doctor. And it accepts that this escalated to a point where Mr Libeau did not attend work and was not paid. However, it says this was all justifiable and ultimately resolved such that Mr Libeau could return to work.

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

[6] Mr Libeau lodged a statement of problem with the Authority based on his personal grievances and also claiming breaches of good faith and his employment agreement.



[7] I investigated Mr Libeau's claims by receiving written evidence and documents, holding an investigation meeting on 21 April 2022 and 25 July 2022, and assessing the oral and written submissions of the parties' representatives.

[8] I received witness statements from Mr Libeau and from Eteo. In my investigation meeting, under oath or affirmation, witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[9] 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.

[10] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief of the Authority this would occur he decided, as he is permitted by s174D(3) 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 s174D(2) of the Act.

### **Issues and steps for resolving the employment relationship problem**

#### *Unjustified action causing disadvantage*

[11] An unjustified disadvantage personal grievance is set out in section 103(1)(b) of the Act; an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.

[12] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustified action causing disadvantage personal grievance are:



- (a) What does Mr Libeau complain of in terms of Etco's actions and did Etco act as alleged?
- (b) If so, did the actions cause any disadvantage to Mr Libeau's employment or a condition of employment?
- (c) If so, were Etco's actions unjustified?

*Unjustifiable dismissal*

[13] The first issue for an unjustifiable dismissal grievance is, was the employee dismissed?

[14] In this case Mr Libeau was not dismissed by Etco; he resigned. Mr Libeau says that his resignation amounts to a constructive dismissal because he resigned in response to breaches of duty by Etco, i.e., his resignation should be treated as a dismissal.

[15] The relevant case law shows that for a constructive dismissal I need to be satisfied that:<sup>1</sup>

- (a) There was a breach, or breaches, of duty by Etco.
- (b) The breach of duty or the culmination of the series of breaches was sufficiently serious, i.e., repudiatory or dismissive, to warrant Mr Libeau's resignation.
- (c) It was reasonably foreseeable that Mr Libeau might resign in response to the breach or series of breaches.
- (d) Mr Libeau did resign in response to that breach of duty or the breaches of duty.

---

<sup>1</sup> *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).



[16] If these things are established and Mr Libeau was dismissed, I must then consider the second issue; was the dismissal justified?

*Steps for investigating Mr Libeau's claims*

[17] So in the first instance I will consider what it is that Mr Libeau complains of and whether Etco acted as alleged.

[18] Once I have established what occurred I will then consider whether the events give rise to an unjustifiable dismissal personal grievance and/or unjustified disadvantage personal grievances and/or breaches of good faith or the employment agreement which require penalties to be imposed.

**What happened?**

[19] Etco is a national company that recruits, trains and employs apprentice electricians. Etco does this through a group apprentice employment scheme employing over 900 apprentice electricians at any given time. Employed apprentice electricians are placed with host companies who provide them with the necessary on the job training; in addition, Etco manages and provides the necessary course or learning requirements for apprentices as well as other aspects of the apprentice scheme.

[20] It is clear from the evidence that I heard from Jeremy Sole, the CEO of Etco, that Etco prides itself in being one of the leading organisations for apprentice electricians in New Zealand and says it takes great care in selecting, training and managing apprentice electricians throughout the country, particularly as that relates to on the job placement with third party organisations.

[21] Mr Libeau commenced work as an apprentice electrician with Etco under an employment agreement dated 25 June 2018 (the IEA).



[22] From Monday 23 September 2019 Mr Libeau was at the Etco's Invercargill office as he had just completed a placement at a host company; Etco required apprentices who were not working on site with host companies to attend the local Etco office and work there.

[23] Russell Rohde, who at that time was the Southern Region Apprenticeship Coordinator, says Mr Libeau had plenty of work to do between his placements which included completing his on-job diary and job assessments and study for the course work he was required to complete. Mr Rohde says he also wanted to take Mr Libeau out to some electrical work he was undertaking to informally assess Mr Libeau's skills and provide training as required, as he had received some feedback about Mr Libeau's previous placement.

[24] On 24 September 2019 Mr Rohde took Mr Libeau with him to do a small a residential electrical job and then to inspect a larger non-residential job that Etco would be undertaking.

[25] Whilst driving between the two jobs Mr Rohde and Mr Libeau engaged in a conversation about religion and science. Mr Rohde and Mr Libeau's evidence about this conversation conflicts:

- (a) Mr Rohde says the conversation was prompted by a radio show they had been listening to that had mentioned "flat earthers" and the correlation between religion and science. Mr Rohde says the conversation was an open and free flowing exchange of ideas and during it he did ask Mr Libeau if he was religious. He says Mr Libeau was engaged throughout the conversation, initiated parts of it and seemed comfortable and content with the exchange.
- (b) Mr Libeau says the conversation was an attack on him. He says Mr Rohde asked him if he believed in God and when Mr Libeau said that he did Mr Rohde became argumentative against Christianity, accusing Mr Libeau of being anti science and an idealist. He described Mr Rohde as laughing and shaking his head at him throughout.



[26] On 26 September 2019 Mr Libeau and Mr Rohde had a discussion at work about health and safety, prompted by Mr Rohde asking Mr Libeau if there was anything making his apprenticeship difficult. Mr Libeau says they discussed concerns he had about his previous placement in terms of the type of work he did there and the chair he was using at Etco which was uncomfortable. That evening Mr Libeau sent a text to Mr Rohde stating:

Hey Russell I was thinking if I'm gonna (sic) be sitting down for ages tomorrow on a chair would you be able to get or bring another comfy office chair please – the other ones hurt my back (just sitting 6 – 7 hours on them chairs do ya back in)

[27] Mr Rohde spoke to Mr Libeau the next day about his request for a different chair. In this conversation Mr Libeau explained what had happened with the current chair he was using referring to the nature of the chair being problematic and his scoliosis, which had been recently diagnosed, as being a factor in the pain he was experiencing. Mr Libeau said he had been in pain from using that chair for some time, including during evening classes he attended and Mr Rohde should have been aware of that. Mr Rohde explained to Mr Libeau that he did not have a replacement chair to give to him and Mr Libeau was not happy about this.

[28] The impasse over the chair was not resolved and Mr Libeau and Mr Rohde went to visit the next company Mr Libeau was likely to be placed with from 7 October 2019. After returning to the Etco office, Mr Libeau decided he would go to see his doctor about his sore back and he left Etco without advising Mr Rohde. When Mr Rohde could not find Mr Libeau, he sent him text message asking him where he was. Mr Libeau responded with a text to Mr Rohde stating:

I have gone to see my dr (sic) for my back as its (sic) giving me too much grief I will need to have a decent chair or I cannot sit there all day as discussed earlier today I have a scoliosis which hurts on that chair for hours.

[29] Mr Rohde then replied:

Make sure you get a medical certificate. We will need to discuss this.



[30] Mr Rohde's explanation for asking Mr Libeau to get a medical certificate was that he asked because Mr Libeau had been in pain at work and as he had then left to go to the doctor Mr Rohde thought this might be a workplace incident that needed to be reported.

[31] After the text exchange with Mr Libeau, Mr Rohde spoke to two members of the Etko health and safety team. He says they told him to review Mr Libeau's medical certificate once it was received and have Mr Libeau complete an accident form - this was an Etko form but it was not clear from the evidence if this was to be completed for health and safety reporting and/or for any ACC claim.

[32] Mr Libeau was then on leave on Monday, 30 September 2019. On 1 October 2019 Mr Libeau was back at work and Mr Rohde met him to discuss the request for a different chair and his visit to his doctor. Mr Libeau and Mr Rohde's evidence conflicts over how the conversation developed but it is clear that the following matters were discussed:

- (a) Mr Rohde told Mr Libeau that he needed to get a medical certificate as Etko needed to be satisfied that Mr Libeau was fit to work. In response, Mr Libeau told Mr Rohde that he did not need to get one and he would not get one. He also told Mr Rohde that there would be a cost involved and he did not have the money to pay for another doctor's appointment. Mr Rohde told him there was an Etko health insurance scheme that he would be eligible to use and if he got receipts for his doctor's appointments, he would be able to get reimbursed for the cost.
- (b) Mr Rohde asked Mr Libeau to complete an accident form. Mr Libeau was not happy about completing the form as he did not consider his request for a replacement chair to be an accident but he completed the form as directed.
- (c) Mr Rohde told Mr Libeau that Etko would start an ACC process and the accident form would be used for this.





[33] Mr Rohde wrote a note for Mr Libeau recording what Mr Libeau would do as a result of the discussion. The note had three handwritten points:

1. Receipt for Friday's visit
2. Medical certificate for Friday afternoon
3. Start ACC process for Friday's incident.

[34] Following this discussion Mr Libeau left work. It appears that Mr Libeau was unhappy with the escalation of matters relating to his request for a different chair and wanted to get some advice about what he should do. In contrast Mr Rohde appears to have thought the conversation with Mr Libeau about his issues with obtaining a medical certificate had been satisfactorily concluded and Mr Libeau was going to get the medical certificate.

[35] Mr Libeau did not return to work on 2 October 2019. Mr Rohde sent Mr Libeau a text asking him for an update on the things he was organising – this was reference to the medical certificate and receipts for the appointments with his doctor. Mr Libeau responded later in the day saying he was seeking advice and he was available for work at any time.

[36] Mr Libeau did not attend work on 3 October 2019 so Mr Rohde called him that afternoon. Mr Libeau told Mr Rohde that he had not been back to his doctor to get a medical certificate and he did not want to progress an ACC claim. Mr Rohde told him he still needed to get a medical certificate and EtcO would pay the costs for this.

[37] Following this call Mr Rohde spoke to members of the EtcO health and safety team and HR team. Then when Mr Libeau did not turn up for work on 4 October 2019 EtcO sent an email to him that addressed a number of points:

- (a) That Mr Libeau had recently been diagnosed with scoliosis, as recorded in the incident report – this was the accident report form that Mr Libeau had completed.



- (b) That Mr Libeau had taken time off work to see his doctor but was not lodging an ACC claim.
- (c) In order that Etco fully understood and was aware of any potential limitations or workplace issues in relation to the diagnosis of scoliosis Mr Libeau was to have his doctor complete an Apprentice Electrician Job Task Sheet (JTS).
- (d) Etco would pay for the doctor's appointment.
- (e) Etco would pay Mr Libeau "Etco Time" whilst the process was being undertaken.
- (f) Because Etco was unclear about Mr Libeau's fitness for work it required the advice from his doctor before it would allow him to continue with his work duties.

[38] The JTS was an Etco form that had nine "work tasks/requirements" that a doctor (or medical practitioner) was required to indicate if the task could be completed by the employee and any time restrictions where appropriate. These tasks covered a range of things from cognitive ability relating to things like communication, memory and concentration and physical ability relating to things like lifting, operating tools and driving.

[39] Later in the day on 4 October 2019 Mr Rohde spoke to the next host company for Mr Libeau and advised it that Mr Libeau would not be starting work on 7 October 2019 as had been agreed.

[40] On 7 October 2019 Mr Rohde sent a text to Mr Libeau:

Good morning Brendan. Make sure you book yourself in to see your doctor as discussed. When you have, let me know the date and time and name of the practice so I can call and arrange payment. Once this is done and we have reviewed the paperwork we can move on and hopefully place you with a host and work towards completing your apprenticeship.



[41] Later, on 7 October 2019 Mr Libeau responded:

Russell I have still not found anything in my contract legally requiring this information – nor for this to be considered an incident which I withdrew consent for – I am willing and ready as I have said to start at my next host company – if you choose not to do so I will require an explanation as to why my apprenticeship is being held back – I have stated I am fit to work – my doctor has refused to claim under ACC as an accident or incident please destroy the report you made me fill out.

[42] On 7 October 2019 Mr Libeau also called his next host company and asked them if he was starting with them. The person Mr Libeau spoke to told him that Mr Rohde had told them his start would be delayed – Mr Libeau says that person said Mr Rohde had told them the delay was due to personal problems.

[43] The host company then spoke to Mr Rohde about the conversation with Mr Libeau, and Mr Rohde text Mr Libeau telling him not to contact any host companies.

[44] Mr Rohde then discussed what was happening with Mr Libeau with regional and senior management. A decision was made for John Whittaker, the Senior Apprenticeship Co-ordinator for the Southern region to meet with Mr Libeau on 11 October 2019. Mr Rohde sent Mr Libeau a text on 10 October 2019 inviting him to the meeting with Mr Whittaker.

[45] Mr Libeau attended the meeting with Mr Whittaker on 11 October 2019. It appears that not much was achieved in this meeting. Mr Whittaker took the view that Etco had an obligation to keep Mr Libeau safe at work and this meant it needed to know if scoliosis or any back injury could impact on his ability to work or be safe at work. On this basis he reiterated to Mr Libeau that he needed to provide medical clearance in order to return to work – in this regard he referred to Mr Libeau obtaining a medical certificate. Mr Libeau took the view that he was fit for work, the issue with his back related to the chair he was using and that could be fixed easily with an appropriate replacement chair. And this meant he was otherwise okay to resume work including being on placement and for this reason he did not need to provide the JTS nor was there any basis for Etco to require it in terms of his contractual obligations.



[46] It appears that both Mr Whittaker and Mr Libeau did not take time to understand the other's perspective and they simply talked past each other on the issue of Mr Libeau's ability to return to work.

[47] Mr Libeau did raise a concern about Mr Rohde and the incident regarding his religious beliefs. However, Mr Whittaker essentially dismissed this concern on face value, requiring a formal complaint to be made.

[48] Following this meeting on 11 October 2019 Mr Whittaker sent a text to Mr Libeau stating:

Hey Brendan, Brian Cleur H&S and [host company] would like you to visit your GP and complete the JTS before starting your new secondment so the sooner you can get that sorted the better

[49] By this time Mr Libeau had had enough and he decided to go to his doctor to get either the JTS completed or a medical certificate. He text Mr Whittaker and told him he would make an appointment to see his doctor.

[50] There was a delay for Mr Libeau in getting an appointment but eventually he was provided with a medical certificate on 17 October 2019. The medical certificate stated:

This is to state that Brendan is fit to be at work and resume all his usual duties. Brendan needs to feel safe at his work place and be provided with facilities required to work comfortably as per work place safety guidelines.

[51] Mr Libeau then brought the medical certificate into Etco and spoke to Mr Whittaker and there was another discussion about the JTS and this not being completed. Mr Whittaker told Mr Libeau he would discuss it again with the health and safety team but in the interim he should turn up at the Etco office for work the next day – Mr Libeau's placement had fallen through but Mr Whittaker told him there would be some work for him to do.

[52] Following this discussion Mr Whittaker emailed Mr Libeau's doctor directly asking him to fill out the JTS.



[53] On 18 October 2019 Mr Libeau sent a text to Mr Whittaker which stated:

I haven't slept at all last night due to all this stuff going on with etco I think I need to talk to someone else within etco as I feel I am not being listened to with regards to any work issues – I will also organize my own office chair as you have said I won't be getting one ....

[54] On Monday, 21 October 2019 Mr Libeau returned to work at the Etco office; he brought a suitable chair with him and set about doing his course work and work-related diaries. On 22 October 2019 Mr Libeau's doctor called him and told him about Mr Whittaker's email to him requesting him to complete the JTS.

[55] On 23 October 2019 Mr Libeau sent a text advising he was not coming into the office as he was seeking some advice and taking time to write to the CEO about his personal grievance which he wanted addressed. He stated in the text that he was not coming back until it was sorted.

[56] Then on 28 October 2019 Mr Libeau sent a personal grievance letter to Mr Sole (CEO of Etco). This email was comprehensive. It set out Mr Libeau's concerns about how he had been treated by Mr Rohde and Mr Whittaker in connection with his fitness for work and the Etco requirement that his doctor complete the JTS. And it set out Mr Libeau's concerns over bullying and harassment in connection with his religious beliefs.

[57] On 29 October 2019 Mr Sole respond to Mr Libeau. Mr Sole's response covered a number of points including:

- (a) That it appeared to him that there had been a number of miscommunications and misrepresentations which risked having a detrimental effect on his work relationships.
- (b) His doctor's medical certificate was considered by Etco to be conditional; it did not contain a definitive statement that Mr Libeau was fit for work.



(c) Because the medical certificate was conditional, he had been asked to have his doctor complete a JTS. The purpose of the JTS was to be able to advise a host company of any special requirements for Mr Libeau so that his back condition is not aggravated.

(d) Etco wanted to place him with a host company as soon as possible but the impediment was his refusal to have the JTS completed.

[58] Mr Libeau responded on 29 October 2019 advising Mr Sole that he had not been told where in his contract (a reference to the IEA) he was required to provide the JTS and that his medical certificate states he is fit to work. He asked to speak to a member of the health and safety team (Mr Cleur) to understand these issues and he wanted reassurances that none of the previous behaviours from Mr Rohde would be repeated.

[59] Mr Sole then wrote to Mr Libeau on 29 October 2019. He essentially told Mr Libeau that the instruction to have his doctor complete the JTS was a lawful instruction from Etco as his employer and the obligation on him to follow lawful instructions was contained in the IEA. He went on to say that Etco could not place him with a host company until it had either an unconditional medical certificate or a completed JTS. He concluded by stating that given that this matter was stretching out and costing money for Etco whilst he remained unplaced with a host company, he was required to provide the “completed document” within seven days.

[60] Then for a period of four weeks there was no communication between Mr Libeau and Etco. Mr Libeau did not return to his doctor to get a further medical certificate or the JTS completed; Etco continued to pay Mr Libeau and did not follow up with him on either getting the documents they required or him returning to work.

[61] On Monday 25 November 2019 Mr Whittaker visited Mr Libeau at home to deliver a letter to him that was from Etco, which was dated 21 November 2019. Mr Whittaker met Mr



Libeau and spoke to him about the content of the letter. In summary the letter addressed the issues between Etco and Mr Libeau and drew two key conclusions:

- (a) Mr Libeau was to have one last opportunity to provide the information regarding his fitness for work that Etco required – the deadline being by 28 November 2019 – failing which Etco would stop paying him.
- (b) Etco was not aware of what Mr Libeau’s personal grievance was or the basis for it, so he was invited to provide information to Etco on what the grievance was and how it arose so that Etco could attempt to resolve any issues.

[62] In response to this letter Mr Libeau’s lawyer sent a letter to Etco dated 5 December 2019. This letter set out fully the background giving rise to Mr Libeau’s complaints.

[63] For the week of 25 November 2019 Etco did not pay Mr Libeau and this continued through December 2019.

[64] On 9 December 2019 the lawyer for Etco responded to Mr Libeau’s lawyer advising that she was instructed and would obtain the necessary information so she could respond.

[65] There was then a meeting on 13 December 2019 between Mr Libeau, his lawyer and Mr Sole. Mr Libeau believed that in that meeting an agreement was reached that if he got the JTS completed he would get back pay. Mr Sole says no agreement was reached; Etco’s position remained that Mr Libeau needed to get the JTS completed and then he could return to work and be paid.

[66] Mr Libeau’s lawyer called the Etco lawyer on 18 December 2019. In that conversation the lawyer for Etco advised that Etco had undertaken an investigation into Mr Libeau’s bullying complaint.

[67] Mr Libeau’s lawyer then wrote, on 18 December 2019, requesting that Etco provide information relating to the investigation and a copy of the decision. The lawyer also recorded



that Mr Libeau had been suspended without pay and there was no basis for Etco to impose this so he should be paid including back pay from the week of 25 November 2019.

[68] As Mr Libeau had not been paid since 25 November 2019 and he faced the Christmas and New Year period without any income he felt he had no choice but to get his doctor to complete the JTS – he believed he would then get back pay. This was done on 20 December 2019 and forwarded to Etco on 20 December. The JTS recorded that Mr Libeau was fully fit to work. Despite this Mr Libeau was not paid over the Christmas and New Year period including for the statutory holidays.

[69] The next contact Mr Libeau had from Etco was being advised on 13 January 2020 that he was being placed with a host company and would start work there on 15 January 2020. Mr Libeau asked about his back pay at this time but was told that he should deal with the person he had previously dealt with over that.

[70] So, on 13 January 2020 Mr Libeau's lawyer wrote to Etco's lawyer recording that its previous correspondence had not been answered and they were still waiting for the information about Etco's investigation into Mr Libeau's personal grievance and payment of wages and back pay. This was followed up with a further letter on 16 January 2020 as no response had been received and no payment of wages had been made.

[71] Etco's lawyer responded on 17 January 2020. She wrote advising that Etco disputed the personal grievances raised by Mr Libeau, based on an initial internal investigation and that Etco wanted to conduct an external investigation. She also advised that Etco's view was Mr Libeau was not entitled to back pay but he would be paid his normal wages on the basis of the completed JTS.

[72] By 22 January 2020, just after Mr Libeau had started with a new host company, he was frustrated by the lack of progress and support he was receiving from Etco so he told his host company he had no option but to resign and he left work. However, he did not actually





resign from Etco and after an exchange of correspondence between the lawyers it appears he returned to work.

[73] The exchange between the lawyers continued through January and February 2020 but from Mr Libeau's perspective little progress was made and two things remained outstanding for him:

- (a) Resolving his personal grievances – this was being protracted as Etco would not attend mediation until an external investigation had occurred and it could not finalise the terms of that investigation.
- (b) Being paid for the period from 24 November 2019 until the week commencing 13 January 2020 (when he returned to work) – Mr Libeau believed he was entitled to be paid as Etco had no right to stop his pay in the first place and in any event it had agreed to pay him back pay for the period if he completed the JTS.

[74] In the end Mr Libeau resigned on 11 March 2020. In evidence Mr Libeau said:

I resigned because I had gone through so many disruptions to my apprenticeship, had experienced heavy discrimination, been through 9 weeks with no pay (which crippled me financially) and despite my earnest efforts to resolve this without resorting to legal representation, I was forced into a position where I felt I had no choice but to resign.

What's more, management ... had made up false allegations by saying that I had breached my employment obligations to my "host company". They had gone behind my back to my host company and jeopardised my potential employment with the company.

It was also clear by the lack of process undertaken during the initial investigation that [Etco] had insufficient procedures in place to deal with personal grievances and complaints. I felt that any future issues that could arise would be deal (sic) with in the same mishandled manner and I felt my employment was untenable as a result.

I felt powerless and hopeless. I struggled to see an end to the situation that did not end in my resignation. By 11 March, I knew that for my own health, I needed to get out of this employment relationship.



## **Etco breached some of the duties it owed to Mr Libeau**

*Mr Libeau was not bullied*

[75] Bullying is about behaviour that is repeated and unreasonable, which is directed at a worker (or a group of workers) and which can lead to physical or psychological harm. Etco's policy on bullying, harassment and discrimination records this accurately, defining bullying as:

Repeated and unreasonable behaviour towards a person or a group of people that can lead to physical or psychological harm.

[76] I am not satisfied on the evidence I heard that Mr Rohde acted as alleged in terms of comments he made generally about religion or directly to Mr Libeau. I accept there was a conversation about religion that occurred but I am not satisfied that it was as Mr Libeau alleges but even if it was there is no evidence to show it was repeated.

[77] So, there is insufficient sufficient evidence for me to conclude that Mr Rohde bullied (or harassed) Mr Libeau based on religious belief.

[78] And I do not find that the ongoing requests regarding Mr Libeau fitness for work amounts to bullying, the actions may have been unjustified – as discussed below - but they did not amount to bullying.

*Etco's response to Mr Libeau's complaints of bullying*

[79] Etco should have responded to Mr Libeau's complaints of bullying more effectively. Mr Whittaker appeared to simply dismiss Mr Libeau's complaints to him because there was no formal complaint. And Mr Sole appeared to simply ignore Mr Libeau's complaints.

[80] Mr Whittaker's position may have been tenable as the complaint was raised verbally and I have disputed evidence about the detail of what was discussed in the meeting where the complaint was raised. However, he did not follow up in circumstances where it appeared Mr



Libeau genuinely believed he had been bullied or harassed. Rather than simply leaving Mr Libeau's complaint unparticularised or without a formal complaint being made I think he should have done more to see if Mr Libeau wanted to progress the complaint – at least to avoid any misunderstanding about what was happening with the issues raised by Mr Libeau.

[81] Mr Sole's responses to Mr Libeau's letter of 28 October 2019 – in which his complaint about Mr Rohde's alleged behaviour is set out very clearly - do not address this at all. Then in the 21 November 2019 letter to Mr Libeau (delivered by Mr Whittaker on 25 November 2019) he sates that EtcO is not aware of the basis for the personal grievance Mr Libeau claimed to have – a position that is not credible given Mr Libeau's letter of 28 October 2019.

[82] After Mr Libeau's letter of 28 October 2019 EtcO should have met with Mr Libeau to consider his complaint and then conducted an investigation, rather than just ignoring it, which was effectively what it did.

*EtcO's actions in relation to concerns about Mr Libeau's fitness for work*

[83] Whilst EtcO may have had a legitimate concern about Mr Libeau's fitness for work arising out of what he had told it about his back and the pain he was experiencing whilst seated, EtcO did not act as a fair and reasonable employer could in the circumstances.

[84] First, when Mr Libeau left work for a doctor's appointment EtcO required him to obtain a medical certificate. In the first instance Mr Rohde, who made this request, did so because he was concerned about Mr Libeau's sore back being from an incident at work which would need to be reported. Then, after speaking to the health and safety team Mr Rohde advised Mr Libeau that he needed to get a medical certificate as EtcO needed to know if there were any limitations on his ability to do his job and if so what steps it needed to take to protect him, i.e. EtcO wanted to know he was fit for work and if not what needed to be put in place for him.



[85] Mr Rohde's concern about a workplace incident and having to report it being a basis for requiring a medical certificate is misplaced – an incident could be reported irrespective of a medical certificate if reporting was required.

[86] Requiring a medical certificate to assess fitness for work is more complicated. The difficulty for Etco is that it had a concern that Mr Libeau's sore back might be indicative of a condition or limitation that it needed to address under its health and safety obligations and it believed a medical certificate would do this. However, in my view that concern is not a basis on which Etco could unilaterally decide a medical certificate was required. This is similar to a scenario where an employer may believe an employee is impaired by alcohol or drugs at work – a concern about safety at work in this instance is not enough to enable an employer to require the employee to undertake a drug and alcohol test; the employer will need to have a policy or contractual provision dealing with the right to require testing in certain circumstances.

[87] In this case Etco did not have a contractual provision or a policy regarding fitness for work that enabled them to demand a medical assessment be undertaken. The IEA does not provide for Etco to be able to require an employee to get a medical certificate in these circumstances. The only provision in the IEA that deals with medical certificates applies to a situation where Mr Libeau is away from work for sickness or injury and Etco requires proof of sickness or injury – that was not the case here.

[88] In the absence of a contractual right to require a medical certificate to be produced, then Etco should have proceeded with a process. First, Etco should have investigated its concerns i.e. worked out, by discussion with Mr Libeau and through other enquiries, if there were any limitations on Mr Libeau's ability to perform his work tasks. Then it should have raised those concerns formally with Mr Libeau and given him an opportunity to respond to them. And then based on that response it should have determined the appropriate course of action, which may have been a suitable medical assessment being undertaken.



[89] To compound their failings Etco then escalated matters by recording in an email to Mr Libeau its concerns and its direction to Mr Libeau for resolving its concerns.<sup>2</sup> This had the effect of raising the concerns to a formal process without Etco conducting any process. And the solution, that Mr Libeau have his doctor complete the JTS, was unilaterally decided and implemented.

[90] This same analysis that I applied to the requirement imposed by Etco that Mr Libeau obtain a medical certificate applies to the requirement imposed on Mr Libeau to have the JTS completed. Simply having a concern about Mr Libeau's fitness for work did not enable Etco to require him to get the JTS completed – Etco did not have a contractual or policy provision that allowed that. So, again a process was the best way to proceed and this would have avoided what became a standoff between the two. On my assessment this was largely brought about by the fact that Etco had no right to seek the JTS and the JTS was too broad in terms of the medical information sought. That Mr Libeau may have had a back condition that impacted on his ability to sit all day had nothing to do with his cognitive functioning such as the ability to communicate or remember verbal instructions.

[91] It is clear that Mr Libeau was unhappy with the instruction that he have his doctor complete the JTS but Etco did not respond to this appropriately. Without consulting Mr Libeau it decided that he should meet with Mr Whittaker to discuss matters. The problem here was also compounded by Etco's actions, in that Mr Whittaker was not properly informed and provided mixed messages to Mr Libeau in the meeting about the medical certificate and being able to return to work. Mr Whittaker had to repair this by sending a text to Mr Libeau after the meeting advising him of the requirement to get his doctor to complete the JTS.

[92] It appears that Mr Libeau was forced into visiting his doctor and getting some form of clearance so he could return to work. He did this and obtained a medical certificate. However, Etco then responded to that by advising him it considered the medical certificate to be conditional. This was a decision that in my view, a fair and reasonable employer could not

---

<sup>2</sup> Email of 4 October 2019 from Mr Rohde to Mr Libeau.



come to. As counsel for Mr Libeau pointed out and as was accepted by Etco, any limitation or conditions attached to the medical certificate was merely a reference to Mr Libeau being provided with an appropriate chair. It is otherwise clear that Mr Libeau's doctor considered him able to return to work.

[93] Again, Mr Libeau was unhappy with the way he was being treated by Etco and he sought to raise his concerns with the CEO. Mr Sole's response was not objective and reinforced Etco's unreasonable position, resulting in Mr Libeau remaining off work for a further two months, some of that without pay. And it resulted in him being forced into having his doctor complete the JTS – an outcome that should not have happened.

[94] Standing back and looking at what occurred overall with regard to Etco's concerns about Mr Libeau's fitness for work, the actions of Etco were not reasonable:

- (a) This was a simple request by an employee for a more appropriate chair because they had a sore back from sitting in the current one. This did not give Etco the right to demand that a medical assessment be done on fitness for work in all areas of that employee's health; there is no basis for requiring that assessment.
- (b) The better approach would have been for Etco to ask the employee to get a medical practitioner to certify that a more comfortable (ergonomic) chair would relieve or prevent the employee's back pain and at the same time advise if any other steps should be undertaken by it to prevent ongoing or further back pain for the employee at work.
- (c) Or alternatively if there was some wider concern about the employee's ability to work without aggravating an existing medical condition, then the response would be to engage a process in which the employer investigates, communicates with the employee and proceeds, ideally with consent of the employee, to obtain an appropriate medical assessment that addresses the concern.



[95] Neither of these approaches were used by Etco with Mr Libeau and its actions were a breach of the duties it owed to him.

*Suspending Mr Libeau*

[96] As there was no basis to require Mr Libeau to obtain either a medical certificate or the JTS, the suspension imposed by Etco when he did not do either of these things was not reasonable nor was it justified. The suspension of Mr Libeau was a breach of duty by Etco.

*Etco's response to Mr Libeau's personal grievances*

[97] Etco should have done more in response to Mr Libeau's personal grievances.

[98] Mr Libeau formally raised personal grievances on 28 October 2019 in an email to Mr Sole. Mr Sole responded to the concerns raised by Mr Libeau regarding him being fit for work and Etco's requirements, however he did not address the concerns Mr Libeau raised about being bullied. Then on 25 November 2019, when Etco took further steps in regard to requiring Mr Libeau to get the JTS completed, Etco advised that it did not know the basis for Mr Libeau's personal grievance. This was not a credible position as the grounds were very clearly set out by Mr Libeau in his personal grievance letter.

[99] Then, when Mr Libeau provided information through his lawyer, Etco says it undertook an investigation however this investigation did not involve engaging with Mr Libeau either before or during any investigation so that he could provide input, nor did it involve Etco producing any notes of meetings or interviews or any conclusion by way of a report or summary of the findings. It appears that Etco simply discussed the concerns raised by Mr Libeau with Mr Rohde and perhaps Mr Whittaker and then dismissed those concerns without further enquiry or without discussing any of it with Mr Libeau. This was simply not enough.

[100] Then Etco agreed to attend mediation but not until an external investigation into Mr Libeau's bullying concerns had been completed. That may have been an acceptable response



if the investigation was to be undertaken promptly but when that was delayed, they should have agreed to go to mediation. The reason for this is Mr Libeau was, at that time still employed, and his concerns about bullying were only part of what EtcO needed to discuss with him.

### **EtcO's breaches of duty are the basis of personal grievances for Mr Libeau**

[101] The various breaches of duty outlined above give rise to personal grievances for Mr Libeau:

- (a) First, each of the breaches caused a disadvantage to Mr Libeau's employment and the actions of EtcO were not justified.
- (b) Second, the breaches were sufficiently serious to warrant resignation, it was foreseeable that Mr Libeau might resign in response to the various breaches and Mr Libeau did resign in response to those various breaches.<sup>3</sup>

### **Remedies**

[102] As Mr Libeau has been successful with his personal grievances I must turn to consider what remedies he may be entitled to in terms of the remedies provided for under s 123 of the Act.

#### *Compensation*

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

[104] This involves identifying the impact or effects of the actions on Mr Libeau, using this to identify the harm caused to him and the loss he suffered. Then I must quantify that harm and loss.<sup>4</sup>

---

<sup>3</sup> See paragraph [75] above.





[105] Mr Libeau's evidence shows that he suffered from the following effects of Etco's breaches and his dismissal:

- (a) He was stressed and suffered from anxiety.
- (b) He was depressed and had low self esteem.
- (c) He suffered physical symptoms such as sleeplessness and hair loss.

[106] These effects show that Mr Libeau suffered harm in the form of humiliation, loss of dignity and injury to his feelings. I quantify this harm and Mr Libeau's loss as being in line with cases where \$18,00.00 has been awarded. But in this case, I will increase the amount of compensation because of the number of grievances or extent of actions Etco carried out over time and therefore the ongoing effects suffered by Mr Libeau. I award Mr Libeau \$25,000.00 in compensation.

#### *Reimbursement*

[107] Mr Libeau seeks reimbursement in two parts:

- (a) Lost remuneration for the period in which he was suspended and not paid by Etco.
- (b) The earnings he lost as a result of his unjustified dismissal.

[108] As Mr Libeau's suspension was an unjustified action he is entitled to be paid for any income he did not receive during the suspension. Mr Libeau calculates this as \$4,410.00 and I accept this figure.

[109] Next, I am satisfied that Mr Libeau is entitled to be reimbursed for lost remuneration, that is, remuneration he lost as a result of Etco's unjustified dismissal. Pursuant to s 128 of

---

<sup>4</sup> *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.



the Act I must award the lesser of three months ordinary time remuneration or Mr Libeau's actual loss. However, if Mr Libeau's actual loss is greater than three months ordinary time remuneration I may exercise my discretion and award an amount up to the actual loss.

[110] Mr Libeau says his actual loss after his dismissal has been \$55,800.00 and this loss is greater than three month's ordinary time remuneration. So, the question becomes whether I should exercise my discretion to award more than three months ordinary time remuneration.

[111] When deciding whether to apply my discretion and award more than three months ordinary time remuneration my starting point is that there is no automatic entitlement to full loss. Whether I award more than three months ordinary time remuneration, and if so how much more (bearing in mind the actual loss merely represents the upper award) should be assessed based on to the circumstances of the case, allowing 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.<sup>5</sup>

[112] With all of this in mind and undertaking the various assessments in relation to Mr Libeau's circumstances I conclude that I will not exercise my discretion and three months is the appropriate amount for lost remuneration. There are two reasons for this: I am not convinced Mr Libeau would have stayed with Etco and finished his apprenticeship nor am I satisfied that he did enough to mitigate his loss after the initial three months post dismissal.

### *Contribution*

[113] As I have awarded remedies to Mr Libeau, I must now consider whether he contributed to the situation that gave rise to his dismissal.<sup>6</sup> This requires me to assess if Mr Libeau behaved in a manner that was culpable or blameworthy, and this behaviour contributed to his grievances.<sup>7</sup>

---

<sup>5</sup> *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

<sup>6</sup> Section 124 of the Act.

<sup>7</sup> *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.



[114] Mr Libeau did not act in a blameworthy or culpable manner; there was no contributory behaviour from him and therefore no reduction in remedies.

### **Breach of duty of good faith and the IEA**

[115] Mr Libeau also seeks two penalties. One for a breach of good faith due to Etco not providing information to him and one for a breach of his IEA by suspending him.

[116] In this case I am not satisfied those penalties are appropriate or necessary for the actions Etco undertook. Mr Libeau has been successful with his personal grievances, which amongst other things cover these breaches. In this case there are no additional factors that warrant penalties being imposed.

### **Conclusion**

[117] The Electrical Trading Company Limited unjustifiably dismissed Brendan Libeau. In satisfaction of these personal grievances The Electrical Trading Company Limited must pay Brendan Libeau, within 28 days of this determination:

- (a) \$25,000.00 without any deductions for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.
- (b) \$4,410.00 and three months ordinary time remuneration pursuant to s 123(1)(b) of the Employment Relations Act 2000.

### **Costs**

[118] 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 Libeau 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 Etco 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.



[119] 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.<sup>8</sup>



Peter van Keulen  
Member of the Employment Relations Authority

---

<sup>8</sup> For further information about the factors considered in assessing costs, see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).

