IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 178
EMPC 381/2017

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	GRANT JOHNSTON Plaintiff
AND	THE FLETCHER CONSTRUCTION COMPANY LIMITED Defendant

Hearing:	29-31 October 2018, 18-21 February and 25 February 2019 Further submissions on 5 July and 12 July 2019
Appearances:	T Drake and M C Donovan, counsel for plaintiff P Skelton QC, R Upton and M Greenop, counsel for defendant
Judgment:	4 December 2019

JUDGMENT OF JUDGE K G SMITH

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[1] Grant Johnston was employed by The Fletcher Construction Company Ltd from February 1988 until he resigned with immediate effect on 25 May 2017. He gave two reasons for resigning. The first one was a claim that the company had not complied with the employment agreement, because it had not terminated his employment for redundancy. The second reason was that he was compelled to resign because of what he said was the inappropriate handling by the company of certain financial information that risked compromising his professional standing as a chartered accountant.

[2] Fletcher Construction does not accept that Mr Johnston's job was redundant and says he continued to be employed by it until he chose to resign. It maintains the

financial information that concerned him was handled appropriately; its half-yearly accounts were the subject of an independent audit review, the full year accounts were audited and all material information about its finances was provided to the New Zealand Stock Exchange.

[3] Special leave was granted to remove this proceeding to the Court to be heard without an investigation in the Employment Relations Authority.[1]

Employment and restructuring

[4] This dispute has its origin in a decision by Fletcher Construction to restructure its financial services where Mr Johnston worked. He is a chartered accountant and a member of the New Zealand Institute of Chartered Accountants (NZICA) and had been employed by the company for about 29 years when he resigned. Before Fletcher Construction began this restructuring he was one of four senior accountants who reported to the General Manager – Finance.

[5] Three of those senior accountants had responsibilities for separate business units in the company, called Building + Interiors (B+I), South Pacific and Infrastructure. Mr Johnston was the company's Financial Controller – Group Services. His role was different from the other senior accountants because, instead of managing accounting services in a business unit, he was responsible for providing a financial overview across the company.

[6] In March 2016 Fletcher Construction announced proposed changes to its financial services. The proposal was to remove all four senior accounting positions and to replace them with seven new positions, all continuing to report to the General Manager – Finance. If implemented, these proposed changes would create knock-on effects for other staff, but they are not material to this proceeding.

[7] The new structure was designed to streamline financial information for the company by creating one service for all accounting purposes, whereas previously the business units had duplicated some accounting functions. The new service was to be

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1 *Johnston v The Fletcher Construction Company Ltd* [2017] NZEmpC 157 at [42].

called Construction Group Finance Shared Services (Shared Services). A phased introduction of this revised structure was proposed, contingent on implementing an enterprise resource planning system known as the JD Edwards (JDE) software system.

[8] The company's decision to proceed with the proposal was communicated to Mr Johnston in a letter on 24 June 2016. At the same time he was informed that his job as Financial Controller was to continue until the JDE implementation affected his business unit at which point a "transition into the new structure" would occur.

[9] Three days later, on 27 June 2016, Mr Johnston was informed that JDE would "go live" in his work area in early October 2016. The next day, 28 June 2016, he was sent copies of job descriptions for the new roles created by the restructuring and was invited to apply for any of them he wished to be considered for.

[10] More information was provided to staff affected by these changes at the end of August 2016. Mr Johnston received confirmation JDE would "go live" in this work area on 1 October 2016. That date was a Saturday, so he treated the effective date for the software to be operative as the following Monday, 3 October 2016. On that day he received another email confirming that the software was operative.

[11] At the time JDE was declared to be operative, Mr Johnston was waiting to be appointed to a new position. In July 2016 he had successfully applied for the new role of Business Performance Manager – Construction Division. However, no further steps had been taken by Fletcher Construction to complete his appointment; specifically, he had not been provided with an employment agreement to consider. It was only after Philip King became General Manager – Finance, on 20 September 2016, that a job offer was formally made to Mr Johnston and a draft employment agreement provided to him for consideration. Mr Johnston was not alone in this situation.

[12] Mr Johnston received the job offer and draft employment agreement on 28 September 2016. They combined individual terms and conditions with Fletcher Challenge's standard employment agreement. A commencement date for the new job of 3 October 2016 was nominated.

[13] While Mr Johnston wanted the new job the draft agreement was not acceptable to him. Shortly after receiving the offer he informed Mr King of two issues that he had. The first issue was that the draft agreement did not provide for redundancy compensation, whereas the employment agreement for the Financial Controller's job did. At the time the offer was made Mr Johnston had an accrued entitlement of about 44 weeks' pay for redundancy compensation if he was dismissed for redundancy. Accepting the company's offer would have resulted in that entitlement being lost. The second issue was about not treating his service as continuous for the purposes of long service leave.

[14] Mr Johnston communicated with Mr King on 3 October 2016, the same day JDE became operational in his work area. They met shortly afterwards to discuss these issues. During the meeting Mr King said he would ask the company's human resources department to assist in resolving them because he did not have authority to alter the offer.

[15] Mr Johnston's issues were taken up with Anna Morris, who was Fletcher Construction's senior employee in its human resources department. Mr King raised with her whether it was necessary for Mr Johnston to sign another employment agreement at all, because the new job he had been offered was essentially the same as the Financial Controller's job.

[16] In mid-November 2016 Ms Morris received authority to make a revised offer to Mr Johnston. She was authorised to offer him his choice of two alternatives. The first choice was that he accept the new job as Business Performance Manager – Construction Division with revised terms and conditions. The revised offer included a provision for redundancy compensation, to be capped at 26 weeks, and a further increase in the proposed salary. The second choice was to maintain the status quo by staying in his old role, as Financial Controller. Accepting the second choice would mean ongoing employment without any change to his terms and conditions of employment and his redundancy entitlement would be unaffected.

1 December 2016 meeting

[17] Mr Johnston and Ms Morris met on 1 December 2016 and she offered him the choice of alternatives just described. While he knew the purpose of the meeting was to talk about the issues he had raised over the job offer, advance notice that a choice was to be offered was not given to him.

[18] The meeting was short. Mr Johnston's response was to take time to think about what he had been offered, but he expressed disappointment about not being dismissed for redundancy and paid compensation. Eventually, he responded to the choices offered to him when his lawyer wrote to Fletcher Construction on 23 December 2016 rejecting them and raising a personal grievance on his behalf.

Personal grievance

[19] The lawyer's letter alleged a failure by Fletcher Construction to comply with the existing employment agreement. That was because it had not terminated Mr Johnston's employment for redundancy when the role of Financial Controller became redundant which was said to have happened on 3 October 2016.

[20] The letter stated that Mr Johnston would continue working "without prejudice" to his rights. The relevant part of the letter reads:

> For the time being Mr Johnston will continue to attend at the office and carry out work he is asked to do, however this is entirely without prejudice to all rights he has in relation to his personal grievance notified in this letter and his right to pursue claims relating to the breaches of the employment agreement and the good faith obligations under the Employment Relations Act. He does however expect that the company will act promptly to remedy this matter and comply with the termination of employment provisions referred to above.

[21] Ms Morris responded on 16 January 2017 confirming Mr Johnston had ongoing employment and that his job title, and terms and conditions of employment, remained unchanged.

[22] Mr Johnston began sick leave on 13 February 2017 and never returned to the workplace before resigning on 25 May 2017.

The on-going work

[23] Despite JDE becoming operative in early October 2016, Mr Johnston continued to perform the work he usually undertook as Financial Controller for a short time afterwards. He did so while waiting for a response to the issues he had raised with Mr King about the offer for the new job. From about 21 October 2016, by agreement, he was seconded to work as Business Performance Manager - B+I, replacing its previous manager who had been dismissed for redundancy following the introduction of JDE. Mr Johnston relied on the dismissal of that manager to support his claim by showing the restructuring had been implemented and could not be unilaterally reversed by the company.

[24] The secondment was temporary while a permanent replacement was recruited. During the secondment Mr Johnston knew the Financial Controller's job would be temporarily staffed by another person, engaged as a contractor.

[25] The vacancy for Business Performance Manager - B+I was filled from 16 January 2017. While there was a transition, during which Mr Johnston assisted the new manager to become familiar with the job, this appointment ended the secondment.

The pleadings

[26] Against that background the second amended statement of claim pleaded seven causes of action. The first three were alleged breaches of contract being: a failure to comply with the redundancy provisions in the employment agreement; a breach of an implied term not to damage Mr Johnston's reputation or to damage the relationship of trust and confidence; and, breach of an incorporated term of "good faith". The fourth and sixth causes of action were personal grievances for constructive dismissal and unjustifiable action causing disadvantage. The fifth cause of action was for recovery of unpaid money including holiday pay, the employer's KiwiSaver contribution and redundancy compensation. The final cause of action was for the recovery of penalties to be imposed. There was considerable overlap in the causes of actions pleaded.

The issues

[27] The following issues are raised by this proceeding:

(a) Was Mr Johnston's position as Financial Controller redundant so that he was entitled to receive notice of termination of his employment and compensation for redundancy as provided for in the employment agreement?

(b) If the answer to (a) is yes, did Fletcher Construction breach the employment agreement by not giving notice terminating his employment and paying compensation?

(c) Was Mr Johnston constructively dismissed because:

(i) Fletcher Construction did not give notice to terminate his employment and pay compensation; and/or

(ii) of the way the company dealt with certain financial information?

(d) Was Mr Johnston unjustifiably disadvantaged?

(e) Was there a breach of the duty of good faith?

(f) If the answer to (e) is yes, is that duty incorporated into the employment agreement?

(g) Was Mr Johnston prevented from claiming the position of Financial Controller was redundant, or that he was constructively dismissed, by continuing to work?

(h) If Fletcher Construction breached the employment agreement, is Mr Johnston entitled to damages and, if so, in what amount?

(i) Is any money owing to Mr Johnston for his final pay up to 25 May 2017 and, if so, what amount?

(j) If Fletcher Construction breached the Employment Relations Act 2000 (the Act), the Holidays Act 2003 or the Wages Protection Act 1983 should penalties be imposed? If so, what amount should the penalties be and should any of them be payable to Mr Johnston?

Was the Financial Controller position redundant?

[28] Mr Johnston and Fletcher Construction signed an employment agreement in November 2000. The agreement intended to state the duties and responsibilities of the job but the schedule, that would have contained them, was left blank. Throughout Mr Johnston's employment his duties and responsibilities were not recorded, except on one occasion when he made a list of them when completing a performance review.

[29] The rest of the agreement was clear. He was entitled to one month's notice in writing if his employment was to be terminated and redundancy compensation was payable when the "position or employee" became superfluous to the company. The relevant clause read:

> **REDUNDANCY**
>
> > Redundancy is where a position or employee has become superfluous to the needs of the company.
> >
> > If we terminate this agreement due to redundancy, as above, then you WILL be entitled to redundancy compensation. The amount of compensation will depend on your length of service with the Company at the time of your redundancy and will be calculated as a number of weeks of your base salary as follows; 6 weeks for your first year of service, plus 2 weeks for each additional year of service (pro rated), up to a maximum of 20 years service.
> >
> > However, as in the Termination paragraph above we would give you one month's written notice of termination.
> >
> > (emphasis original)

[30] Mr Johnston's first cause of action pleaded a breach of contract by Fletcher Construction. The claim was that the company was obliged to give him notice of

termination of his employment within a reasonable time after implementing the new business structure, pay him compensation and advise the administrators of a share purchase plan he belonged to that he was a "good leaver". The significance of being a "good leaver" was that it entitled Mr Johnston to certain benefits he may not otherwise have been eligible to receive.

[31] Central to this cause of action, and to almost the whole of Mr Johnston's claim, was that the Financial Controller position became surplus at the beginning of October 2016 when JDE became operative. His claim was that many of the tasks formerly undertaken by him were allocated elsewhere once the restructuring took effect, either to other positions in the new structure, or to Fletcher Construction's parent company. He also said that two of the four senior accountants who had reported to the General Manager – Finance were dismissed for redundancy illustrating that the restructuring had been given effect to and could not be undone.

[32] In summary, Mr Johnston's case was that the restructuring represented a classic example of redundancy. His former position no longer existed, and the employment agreement did not provide the company with an ability to decline to end his employment just because another job was suitable, and available, for him.

[33] Mr Drake, in his submissions for Mr Johnston, relied on a conventional definition of redundancy, that the position was surplus to the employer's needs.[2] Once that was established, it was argued, Fletcher Construction had no option but to comply with the employment agreement. It followed that, when the offer of a new job was declined the company had to dismiss him for redundancy. From Mr Johnston's perspective, failure to dismiss him, and pay compensation, meant the employment agreement was breached.

[34] Mr Drake drew analogies between Mr Johnston's situation and the situation of the employees in *Auckland Regional Council v Sanson* and *Wills v Goodman Fletcher*

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[2] Relying on *GN Hale & Sons Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151 (CA) affirmed on this point in *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494. *GN Hale* was concerned with interpreting s 210 of the Labour Relations Act 1987 (repealed) at 155.

New Zealand Ltd.[3] In *Sanson*, the employment agreement referred to the position being "rendered redundant" and that was what had happened.[4] In a reorganisation the employee's previous job had been allocated to another employee. His position was, as a matter of fact, rendered redundant and it was immaterial that the Council wanted to retain him and had not taken any of the steps necessary to end his employment.

[35] In *Wills*, the Court dealt with a claim of constructive dismissal that arose when a position ceased to exist. Mr Wills' job as a factory manager ended because of significant earthquake damage to the factory. While the employer delayed making a decision about rebuilding the factory Mr Wills was employed in temporary roles. He was left in limbo, caused by his employer's indecision that went on for some time. Eventually, Mr Wills' patience was exhausted and he resigned.

[36] In *Wills*, the Court held that the redundancy clause in the employment agreement was intended to benefit the employee who had been left without a suitable position. The employer's failure to address the situation in a timely way resulted in a constructive dismissal.

[37] Attempting to apply those cases, Mr Drake relied on material changes created by the introduction of Shared Services to say that Mr Johnston's former position was superfluous to the company. Material differences were said to exist between the duties and responsibilities of the Financial Controller position and the new role of Business Performance Manager – Construction Division, and the company could not unilaterally redeploy him. If that analysis is accepted, the company's desire to continue to employ Mr Johnston was irrelevant.

[38] The differences between the roles arose because, it was said, a significant part of the work of Financial Controller involved managing the company's insurance portfolio and construction bonds which was not part of the Business Performance Manager's job. Much of this work was said to have been transferred by the restructuring either to Fletcher Construction's parent company or to other new roles.

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3 *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597 (CA); *Wills v Goodman Fielder New Zealand Ltd* [2014] NZEmpC 233.

4 *Sanson* at [46].

Mr Johnston estimated that about 55 per cent of his former duties went elsewhere because of the restructuring and were not incorporated into the new role he was offered. His assessment was that up to 25 per cent of his time was spent on insurance-related issues, another 15 per cent was spent on construction bonds, parent company guarantees and providing financial information for tenders. He said another 15 per cent of his time was spent on other tasks including reviewing capital expenditure proposals, liaising with external auditors and preparing statutory accounts. On the basis of these differences the situation was likened to *Sanson*.

[39] Mr Johnston also considered the new structure involved unsatisfactory changes including the job he was offered not having the same service-related entitlements, but having an increased working week from 37.5 hours to 40 hours, and a restraint of trade clause in the draft agreement that had not previously been part of the terms and conditions of his employment.

[40] Fletcher Construction's case was that notice terminating Mr Johnston's employment was not given because it had not come to an end by reason of redundancy or otherwise. If that proposition is accepted, the decision to resign was a choice he made and was not caused by any action, or inaction, by the company

[41] Mr Skelton QC submitted that the redundancy clause in the employment agreement needed to be interpreted according to its plain wording.[5] That meant two conditions had to be satisfied before Fletcher Construction was required to pay compensation:

(a) it had to terminate his employment; and

(b) the termination had to be due to redundancy as defined in the agreement.

[42] Acknowledging that termination of employment may happen constructively, Mr Skelton sought to distinguish *Sanson* and *Wills*, on the basis that those decisions

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[5] Relying on *Porteous v Chief Executive of the Department of Building and Housing* [2010] NZEmpC 67, [2010] ERNZ 108 at [59]-[61].

turned on the wording of the redundancy clause in each agreement. In *Sanson*, the clause referred to a situation where the employee was "rendered redundant", obviating any need to look at the requirement to give notice.[6] In *Wills*, the employment agreement incorporated a company policy describing redundancy as being where the work available disappeared, was significantly diminished or altered, "…to such a degree that the position no longer exists".[7] The submission was that those cases did not mirror what happened here.

[43] According to Fletcher Construction, the Business Performance Manager – Construction Division job offered to Mr Johnston was substantially the same as the Financial Controller position. If that was correct, it meant he was never confronted by a situation resembling what happened to Mr Sanson and Mr Wills, where no semblance of the work they had performed remained.

[44] The company said that, viewed objectively, the differences between the old and new roles were not such that Mr Johnston's original position could be described as having disappeared, significantly changed, diminished, or altered to such a degree that it no longer existed. Additionally, Fletcher Construction relied on Mr Johnston having applied for this position, indicating his desire to remain employed and suggesting that he considered the job was suitable to him. A difference in the terms and conditions of employment between the two positions was acknowledged, but that was said not to be enough to lead to the same outcome as in *Sanson* and *Wills*.

[45] I accept that Fletcher Construction's decision to reorganise its financial services would lead to some jobs being surplus and to redundancies. The plan the company intended to implement was for the position of Financial Controller to be replaced. The company informed Mr Johnston, and other employees, about its decision in mid-2016 but the change did not happen immediately. The old structure was being phased out over time.

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6 *Sanson*, above n 3, at [46] where the Court noted that the position filled may be superfluous to the needs of the employer irrespective of termination of the employment.

7 *Wills*, above n 3, at [58] and [60].

[46] The transition to the new structure, as it affected Mr Johnston, did not occur abruptly on 3 October 2016 and there was no indication in the correspondence with him that it would. He continued to work as Financial Controller, while negotiating the terms and conditions of the new job he was offered and before beginning the secondment in B+I. While some of the work he had performed as Financial Controller was earmarked to go elsewhere it was not immediately removed from him at the beginning of October. As well as continuing to work as he had done previously, he knew the position continued to exist in fact, because Mr King sent a memorandum to staff informing them about the secondment to B+I and recorded the Financial Controller's job would be temporarily filled by a contractor. He returned to the Financial Controller's job once the secondment ended and continued to perform its tasks until going on sick leave.

[47] I am also satisfied that the positions of Financial Controller and Business Performance Manager were sufficiently similar that a conclusion could not reasonably be reached that Mr Johnston's original position had, as a matter of fact, disappeared or sufficiently diminished, or been altered, to such a degree that it no longer existed. Mr Skelton submitted a comparison could reliably be made by taking into account a number of factors such as whether the positions involve the same pay and benefits, provided for work to be performed in the same location, had the same hours of work, were equivalent roles within the organisation's structure, whether there was any difference in status and if they require similar managerial credentials and experience.[8] He also drew on the *Wills*, where Judge Corkill had observed that the appropriateness or the suitability of a proposed position needed to be tested against the characteristics of the former position. In that case the Court observed that the assessment would involve an objective consideration of fact and agree which would include the characteristics of the employee.[9]

[48] Turning to this case, Mr Skelton submitted that Mr Johnston's self-assessment of the differences between the jobs was not determinative and that what he said should be weighed against what had been said by both Mr King and Ms Morris.

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8 Relying on *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [50].
9 *Wills*, above n 3, at [78].

[49] Mr Johnston acknowledged similarities between the two roles, including responsibility for overseeing financial statements for the division and reporting to the same line managers as before, but concentrated on the percentage of work on insurance and bonds he said the Financial Controller position had as illustrating a substantial difference in the roles. In contrast, both Mr King and Ms Morris described Mr Johnston's work differently. While Mr King accepted that the new role did not involve insurance and bonds, he did not consider that change to be a significant difference, because it would have freed up time to provide further financial analysis and support. He considered what Mr Johnston said about insurances and bonds to have been an overstatement. Ms Morris agreed with Mr King that the core responsibilities and skills were financial oversight which task remained constant between the two jobs.

[50] Mr Skelton submitted that, objectively, the two roles were sufficiently similar that they indicated ongoing work of the same nature and to the same extent as Mr Johnston had previously undertaken. He noted that the Business Performance Manager's role was for work in the same location, reporting to the same manager, holding the same status in the company, requiring the same skills and experience and involving similar tasks. I agree with that submission. I prefer Mr King's and Ms Morris' description of Mr Johnston's work as Financial Controller over what he said about it. I consider that Mr Johnston overstated the amount of time and effort required by him to deal with insurance and bonds. It is far more likely that the preponderance of his time was spent on providing divisional accounting advice sought or relied on by Mr King. That much was certainly evident when Mr Johnston was involved in the recoding and provisioning issues which confronted the company in mid to late 2016. They are discussed later in this decision, but it is appropriate to note, at this stage, that Mr Johnston took the initiative to raise his concerns about those matters as would be expected of a senior accountant with financial oversight. These circumstances mean that the decisions in *Sanson* and *Wills* can be distinguished from this case.

[51] Both parties accepted that Fletcher Construction had a duty to consider alternatives to dismissal before Mr Johnston's employment ended, particularly when a suitable position existed.[10] They agreed that there was another position for which he

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[10] See *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142, [2010] ERNZ 468.

had the required skills and experience. The negotiations over that new job proceeded very slowly, presumably because neither party was overly anxious about the need to conclude them given that employment was ongoing. Those negotiations did not end until 23 December 2016, when Mr Johnston rejected the offers made to him. Meanwhile, he continued to work on the tasks he had previously performed including providing financial oversight.

[52] I do not accept that the redundancy clause in the employment agreement for the Financial Controller job was activated merely because Mr Johnston received notice that JDE would be operational from early October 2016. What stands out is that Fletcher Construction was attempting to satisfy its legal duty to consider alternatives to dismissal. At least until late December 2016, Mr Johnston was prepared to participate in attempting to find an alternative.

[53] That leaves for consideration whether an analogy can properly be drawn between this case and what happened to the employees in *Sanson* and *Wills*. In those cases there was no doubt that the jobs the employees undertook had ceased to exist. That is not the situation which confronted Mr Johnston. It does not automatically follow from a restructuring that staff must be surplus to requirements or that jobs have ceased to exist.[11] I am satisfied that the Financial Controller role had not ceased to exist in October 2016 or before Mr Johnston resigned.

[54] I accept that Mr Johnston was entitled to have the employment agreement performed, but the issue is whether the point had been reached where the position of Financial Controller had become redundant under that agreement. That point had not been reached. It follows the company did not breach the agreement because it was not required to give notice of termination and to pay compensation.

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[11] See *GN Hale*, above n 2, at [47].

Constructive dismissal?

[55] In *Auckland Shop Employee's Union v Woolworths (NZ) Ltd* the Court of Appeal accepted that a constructive dismissal was capable of arising in situations such as where:[12]

(a) an employer had given an employee the option of resigning or being dismissed;

(b) an employer had followed a course of conduct with a deliberate and dominant purpose of coercing the employee to resign; or

(c) a breach of duty by the employer leads an employee to resign.

[56] Mr Johnston claimed he was constructively dismissed, because of breaches of the employment agreement, breaches of the Act, and Fletcher Construction failing to act as a fair and reasonable employer. Those breaches were said to be causative of the decision to resign to make his resignation foreseeable.[13]

[57] Mr Drake correctly submitted that a constructive dismissal might arise even if the employer was not seeking the employee's resignation and might want to retain that person's employment.[14] Part of this submission was a reference to *Wills*, where the company was criticised for incorrectly focussing on the employee's skills that it wanted to retain rather than on whether the contracted position had become surplus to requirements. In *Wills*, because the company placed its interests ahead of the employee's contractual rights, the groundwork was laid for a breach justifying the employee's resignation and subsequent claim.[15]

[58] Mr Johnston's statement of claim pleaded that breaches occurred in the following ways:

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12 See *Auckland Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA).
13 See *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).
14 *Hwang v Boyne Co Ltd t/a Goodday Newspaper* [2004] 2 ERNZ 412 at [23].
15 *Wills*, above n 3, at [112] and [115].

(a) By the company failing to comply with the redundancy and termination of employment provisions in the employment agreement and failing to notify the administrators of the employee share purchase plan that Mr Johnston was a "good leaver".

(b) The company breached the employment agreement through instructions given by its senior management that resulted in financial information being dealt with inappropriately. As a result it was said to have conducted itself in a manner calculated or likely to destroy or serious damage Mr Johnston's reputation and the relationship of trust and confidence between him and the company. The pleading was that the alleged breach:

(i) caused him to suffer undue anxiety, humiliation, loss of dignity or injury to feelings; and

(ii) put him in a position where he was unable to continue to attend the workplace from 13 February 2017.

(c) The company breached an "incorporated term" of the employment agreement; that was a claim that the statutory duty of good faith had become incorporated into the employment agreement.

[59] The claim that the company failed to comply with the employment agreement essentially repeats the first cause of action. The second part of this pleading, about financial information, requires further elaboration. The claim was that, during 2016 and early 2017, the company dealt with financial information inappropriately because its senior management requested Mr Johnston to carry out accounting work that:

(a) was not in accordance with generally accepted accounting principles; and

(b) was contrary to the standards and requirements of the NZICA Code of Ethics.

[60] Supplementing those claims Mr Johnston pleaded that:

(a) from about July 2016 some accounts staff in the company's finance division were:

(i) allocating financial costs and expenses in ways that were not in accordance with his training as an accountant and the past practice over his years of employment by the company; and

(ii) making projections of half-yearly and end of year profit forecasts on an extremely optimistic basis, which was not in accordance with generally accepted accounting practice.

(b) he was instructed by senior management to adopt financial audits and projections that were not a true or fair view of the actual financial performance; and

(c) those instructions continued throughout "…the rest of 2016 and led to the January 2017 internal financial reports…", that he disagreed with and caused him concern for his professional standing.

[61] Mr Johnston pleaded that when he saw the internal financial reports he was compelled to take sick leave from the next ordinary business day, which was 13 February 2017.

[62] Mr Johnston's claims concentrated on two areas where he said the company's finances were not being handled or reported appropriately. The first of them was the practice of capitalising bid costs; that is, the treatment of certain head office expenses in bidding for projects by allowing some of them to be carried forward from one project into the next project. The second area of concern was about how the extent of losses incurred on several projects, particularly the Christchurch Justice and Emergency Services Precinct, were treated in internal reports. The allegation about capitalising bid costs was described as "recoding" and the handling of losses in internal reports was described as "provisioning".

[63] Mr Johnston claimed:

(a) he raised a concern about the recoding of $8.9 million of overhead costs. He said he did so first with the General Manager – Finance and with the Chief Executive of the company, and was dissatisfied with the responses he received;

(b) internal reports inaccurately gave the company's loss on the Justice and Emergency Precinct project for November 2016 as $23 million;

(c) the internal reports allowed for a recovery on the Justice and Emergency Precinct project of $10 million from the client, even though he had been told to stay away from analysing its financial aspects and was unable to assess if such a recovery was likely;

(d) the internal reports took the most optimistic financial view on every project regardless of whether that was financially prudent;

(e) a page in an internal financial report was removed without explanation; and

(f) he was pressured to sign a management representation letter about the half-yearly accounts which he considered not to be a true and fair statement of the financial position.

[64] These claims were very serious. Surprisingly, Mr Johnston did not call expert accounting evidence to explain how or why recoding and provisioning failed to meet generally accepted accounting principles or were contrary to the NZICA's code of ethics.

[65] Mr Johnston raised his concern about recoding in July 2016. He objected to the practice because he considered it ill-advised, describing it as "…kick[ing] the can down the road". While the pleadings suggested significant wrongdoing by recoding, that was not how Mr Johnston described his concern when giving evidence. He acknowledged, during cross examination, that his concern about capitalising costs not

about the appropriateness of this action, because it could be justified in certain circumstances. What he wanted, however, was confirmation that the amount to be capitalised was correct and that senior managers wanted the costs treated in that way.

[66] When Mr Johnston raised recoding with the Chief Executive he received an interim reply almost immediately. That was followed by a report from the (then) senior accountant at B+I, sent to Mr Johnston, and several other senior managers. In July 2016, the senior accountant from B+I confirmed that the recoding had been reconsidered and there were no major problems. The accountant described some minor problems being identified and addressed as a result of this further work. Importantly, the senior accountant advised Mr Johnston that the auditors were happy with the rationale for what had been done and the methodology used. He was asked to contact the accountant if a follow-up was necessary, but he took no further action.

[67] Mr Skelton summarised these events succinctly; Mr Johnston had a concern that he referred to senior management. That concern was investigated, and dealt with, at which point the matter came to an end. I agree. Given Mr Johnston's acknowledgment that recoding is an acceptable practice, it must follow that the company's handling of these costs could not be criticised as failing to be in accordance with generally accepted accounting principles or contrary to the NZICA's code of ethics. The recoding by itself, or in combination with anything else, could not have caused professional problems for Mr Johnston.

[68] This aspect of the claim faced a further hurdle. Mr Johnston did not explain why events in about July 2016 could have caused or contributed to his resignation in May 2017 or to have done so in a way that made the resignation foreseeable.

[69] The second claim was about provisioning; that is how the company's internal financial reports dealt with anticipated losses incurred primarily on the Justice and Emergency Precinct project. At a meeting with Mr King in early December 2016 Mr Johnston raised his concern about Mr King's decision not to change the company's provision for losses on that project in the company's internal reports for November 2016. Mr Johnston sought, and received, written confirmation that he was not to change the amount shown in the reports as a potential loss. He also sought and

received confirmation that senior managers were aware of the issue raised by him and agreed with Mr King's decision.

[70] The background to this claim requires further explanation. The company was predicting a $23 million loss on this project in November 2016, but anticipated that the loss would be partly offset by a recovery from the client of $10 million. The net financial position would be a loss of $13 million and that was the amount to be shown as a loss in the reports. Mr Johnston considered that financial position to be inaccurate so that if it was included in the reports they would be wrong and misleading. He thought the loss was far greater, at about $35 million, and that there was no justification for anticipating any recovery from the client.

[71] When Mr Johnston raised his concern about this provisioning emails from the Chief Executive, and Chief Financial Officer, advised him that the financial information about the project was to remain unchanged in the reports for that month. He said these responses placed him in a difficult position.

[72] Despite Mr Johnston's concern there was a straight-forward explanation for the management decisions about the internal reports in late 2016. In late September 2016, the Chief Executive of Fletcher Construction and Mr King had reported that a loss was expected on the Justice and Emergency Precinct project. Mr King explained that, given the complexity of the transition to JDE, the company decided that the October monthly results would be produced on an estimated basis. A decision was made that the October 2016 forecast for the Justice and Emergency Precinct project would be held at the same level as in the September 2016 report. That meant the company continued to expect to incur losses but the amount of them was uncertain.

[73] By 22 November 2016 it was apparent that there was a risk of further losses being incurred. The news of this bad result prompted the Chief Financial Officer to start a review. A team was assembled to investigate the financial position and it included several senior executives, Mr King, and Mr Johnston.

[74] Mr King said, and I accept, that the deteriorating financial position was reported to the Chief Executive of Fletcher Construction and to its parent company.

With that knowledge a decision was made that the status quo should be maintained in the internal reports until the review was concluded. That meant senior management were aware in September that losses were being incurred and were informed that they were ongoing. Fletcher Construction's senior management also knew the November reports might not be accurate because of the estimated position reported in October.

[75] The review was undertaken in late November and into December 2016. As part of that review the review team held daily meetings for about a week and a half. There was no suggestion that these meetings were inadequate, or that they failed to consider all relevant information to establish the correct financial position.

[76] Once the review was completed a decision was made to increase the provision for losses in the half-yearly accounts. By about 20 December 2016 the review team concluded it was appropriate to record a forecast loss of $35 million in the half year accounts. That was the amount included in the December internal financial reports, along with the continued assumption of a $10 million recovery from the client.

[77] Unfortunately things did not improve and losses continued to be incurred. During January and February 2017 Ernst & Young conducted a half-yearly audit review. Mr King and Mr Johnston met the auditors on 20 January 2017 to discuss the results. A decision was made, in late January 2017, to supply Ernst & Young with an external report, regarding the validity of the anticipated recovery from the client.

[78] A meeting took place on 13 February 2017 between members of the Audit and Risk Committee of Fletcher Construction's parent company, the Chief Executive of Fletcher Construction, Mr King and the auditors. One outcome of that meeting was an acceptance that a $35 million loss was a reasonable estimate.

[79] After the review was completed changes were made and the directors approved the half-yearly financial accounts on 21 February 2017. They were reported to the market the next day. The half-yearly accounts were subjected to an independent audit review by Ernst & Young before being published. The full year's financial reports were published in August 2017, after an audit by Ernst and Young. The auditors were satisfied that the published accounts were fair and proper.

[80] As things transpired, Mr Johnston's assessment was reasonably accurate. The provision in the internal reports for November 2016 did not accurately represent the losses incurred. That does not mean, however, that there was any deficiency in how Fletcher Construction handled the situation, or that Mr Johnston was exposed to any potential professional risks.

[81] The reports were for internal use only. Both before and after the review the reports had no bearing on Fletcher Construction's published financial accounts or its obligations to the New Zealand Stock Exchange. The company was not dismissive of Mr Johnston or the concern he raised. It promptly investigated the extent of the losses and he participated in that investigation without restriction. Maintaining an estimated position in internal financial reports, until more work was completed to ascertain the correct position, could not be said to be professionally compromising to Mr Johnston.

[82] That discussion is not the end of this assessment. Mr Skelton pointed out that Mr Johnston's concerns about recoding and provisioning were not raised with Fletcher Construction until after litigation had started. Mr Johnston began this litigation in the Authority and applied for an order removing the matter to the Court. He supported that application with an affidavit explaining why removal should be granted, but it did not mention recoding or provisioning. Had Fletcher Construction been engaged in activities capable of compromising his professional standing, a reasonable expectation would be for the subject to have been raised in his affidavit in the Authority or as part of his personal grievance. It was not raised in either of them. Mr Johnston did not explain why, if these subjects formed such an important part of his decision to resign, he had not raised them sooner than he did.

[83] Furthermore, Fletcher Construction operates a whistle-blower programme monitored by an independent accounting firm. Mr Johnston did not use it over his concerns about the recoding or provisioning. He was asked why, if these subjects were so significant, he had not done so. His answer was that he considered doing so but could not locate the contact details for the programme, so did not take the matter any further. I am not satisfied with that explanation. Information about the programme was displayed in signs in the company's premises and it was accessible on the company's intranet.

[84] Two other finance-related matters need to be touched on for completeness. The first of them was Mr Johnston's complaint that a page containing a schedule was removed from the September 2016 B+I monthly report. This action was said to be unusual and to support his contention that something untoward may have happened. Mr King said the page contained errors and more work needed to be done before it was presented. Whatever may have been the situation, the page was not written by Mr Johnston and he was not responsible for it being removed. By itself, or in combination with the other financial matters, this incident did not have any impact on his professional standing and could not have caused Mr Johnston to resign or make his decision to do so foreseeable.

[85] The final matter was Mr Johnston's claim that, while on secondment, he was being pressured by the company's auditors to sign a management letter of representation about the half-yearly accounts. The letter was intended to provide comfort to the company's directors about the accuracy of certain financial information being supplied to them. Mr Johnston said he refused to sign it because he did not think the accounts were a true and fair reflection of the financial position.

[86] I accept Mr Johnston was asked to sign the letter and did not want to do so. The reality was that he did not sign it, Mr King did. He never raised any concerns with Mr King about this event prior to resigning. I conclude that the request for him to sign the letter was not material to his decision to resign.

[87] I am satisfied that the recoding and provisioning undertaken by Fletcher Construction did not compromise Mr Johnston's professional standing and could not reasonably have been seen as compromising it. Fletcher Construction's actions did not fall below generally accepted accounting principles and were not contrary to the standards and requirements of the NZICA. There was nothing in the company's handling of either matter that could be said to be a course of conduct with a deliberate and dominant purpose of forcing Mr Johnston to resign, or to amount to the company breaching its duties to him. It follows that he was not constructively dismissed.

[88] Finally, for completeness, a brief comment needs to be made about a closing submission from Mr Drake touching on the claim of constructive dismissal. In support

of the pleading that Fletcher Construction was attempting to compel Mr Johnston to resign Mr Drake referred to a letter written by counsel for the company, Mr Upton, in April 2017. Whatever may be made of that letter, the amended statement of claim did not refer to it or seek to rely on it as part of this aspect of the claim and, consequently, it is not considered.

Unjustified disadvantage?

[89] Mr Johnston pleaded, as his sixth cause of action, an unjustified disadvantage pursuant to s 103(1)(b) of the Act. He was said to have suffered an unjustifiable action because Fletcher Construction failed to terminate his employment, pay redundancy compensation, and to notify the administrators of the share plan that he came within the definition of a "good leaver".

[90] While not addressed in the pleadings, Mr Drake submitted as part of this claim that there was a disparity of treatment between Mr Johnston and two management employees who reported to Group Manager - Finance and who were dismissed for redundancy.

[91] Having reached the conclusion that there was no breach of the employment agreement, it follows that this claim falls away. Had it been necessary to address the disparity claim I would have held that there was no disparity of treatment between Mr Johnston and the two managers. There was no doubt that the positions held by those managers were surplus to the company but their circumstances were not comparable to Mr Johnston's situation.

[92] This claim is unsuccessful.

Breach of the duty of good faith?

[93] Mr Johnston's third cause of action was an alleged breach of contract arising from not complying with the statutory duty of good faith, in s 4 of the Act. He pleaded that the statutory duty was an "incorporated term" of the employment agreement, and had been breached because the company:

(a) failed to be responsive or communicative with him from 3 October 2016;

(b) did not respond to letters from his lawyer dated 23 December 2016 and 1 February 2017 with "…any proposal for the parties to attend a meeting, or attend a mediation, or otherwise propose a practical means of resolving the employment relationship problem";

(c) initially delayed attending mediation after he had requested urgent mediation be arranged and attended;

(d) agreed to attend mediation on 3 March 2017 but on 1 March 2017 cancelled the mediation;

(e) continued to be unavailable to attend mediation from the period of 17 February 2017 to 6 April 2017;

(f) opposed an application for urgency to be granted by the Authority for this matter to be dealt with "…in the shortest time possible";

(g) opposed his application to remove the matter to the Court, in circumstances where, with cooperation between the parties, the Court could have heard and determined the matter in an expeditious manner;

(h) acted in the ways described, despite knowing that he was not receiving any income from 10 March 2017 (at which point his paid sick leave had expired) and would sometime after that date be unable to support his family and meet all his family's monthly outgoings; and

(i) failed to take any steps, from 13 February 2017 to 25 May 2017, to remedy his concerns about attending the workplace.

[94] These alleged breaches were pleaded as deliberate, serious and sustained and as being intended to undermine the employment relationship.

[95] I am satisfied that Fletcher Construction did not breach the duty of good faith. From 3 October 2016 until 1 December 2016, it was engaged in attempting to avoid terminating Mr Johnston's employment by finding suitable alternative employment and was negotiating with him over a new job. During that time it explored his response to the offer it had made to him in September 2016, addressed his concerns about that offer and proposed alternatives. Those actions were entirely consistent with the duty of good faith in s 4(1A)(b) of the Act; they were active and constructive in maintaining the employment relationship. They were also responsive to Mr Johnston's concerns about the job offer he received.

[96] The second alleged breach was pleaded as arising from Fletcher Construction's response to the lawyer's letters in December and February. The December 2016 letter arrived towards the end of the business year. It was responded to by Ms Morris on 16 January 2017, and she dealt with the substance of the grievance by stating that the Financial Controller position remained available. The company's position was clear from that response and it was not obliged to go any further. Mr Johnston was adopting a stance where the only solution he considered acceptable was notice of termination and payment, but the company disagreed and stated its position to him. The company did respond and I am not satisfied that it can be criticised for not making a proposal to Mr Johnston in those circumstances.

[97] I do not accept the claim that Fletcher Construction breached the duty of good faith by delaying, and then cancelling, mediation because that does not accurately capture what happened. Fletcher Construction agreed to mediation but scheduling it depended on the availability of persons with sufficient authority to conclude an agreement if that point was reached. That coordination took time, but there was no inordinate delay in making arrangements and no indication that possible dates for the mediation were irresponsibly, or wilfully, refused to inconvenience Mr Johnston. The mediation was cancelled because Mr Johnston lodged his statement of problem and an application for urgency in the Authority just before it was scheduled to take place. When the proceeding in the Authority was served on Fletcher Construction a draft application seeking to remove the matter to the Court was also served. If granted, that application would have resulted in the parties foregoing an investigation meeting and

a determination from the Authority. Fletcher Construction's decision to cancel the mediation was made while it prepared a response to the litigation.

[98] The mediation date was lost because of Mr Johnston's decision about the timing of his proceeding. That may have been a tactical decision, to attempt to persuade the company at the mediation. He was entitled to take action, but has to bear the consequences of doing so. One of them was cancellation of the March mediation date while the company responded. In any event the company did attend mediation, just over a month after it was originally scheduled. The company's decision to defend itself, and the resulting delay in mediation, could not reasonably be seen as a lack of good faith.

[99] The final pleading is a compendium, wrapping up the other pleadings and asserting that the company knew Mr Johnston's financial circumstances might be compromised and tried to take advantage of him. While the company knew that Mr Johnston's salary would cease when he exhausted his paid sick leave, deciding not to provide a further period of paid leave could not be seen as a breach of the duty of good faith. The financial consequences facing Mr Johnston on exhausting his paid sick leave were unfortunate, but that is not enough to lead to a conclusion that Fletcher Construction's was responsible for his predicament or was in some inappropriate way seeking to take advantage of him. It had done no more than decline to continue to pay his salary once his sick leave entitlement was exhausted. It would take the duty of good faith too far to hold that the company had to continue to pay him.

[100] I am satisfied that Fletcher Construction did not breach the duty of good faith it owed to Mr Johnston.

[101] Having found that the duty of good faith was not breached, only brief comments are required to address Mr Drake's submission that the duty in s 4 was "an incorporated term" of the employment agreement. He relied on the significance of the duty of good faith to all employment relationships as showing it was incorporated into the employment agreement.

[102] Mr Drake's submission was supported in three supplementary ways. He first noted that academic writers described the "doctrine of good faith" being implied into contracts as being an unsettled area of law.[16] He pointed out that, when this matter was removed to the Court, observations were made about an important issue that might arise relating to special or general damages possibly being available for an established breach of the duty. He noted that the issue of being able to pursue damages for breach of the duty was not ruled out in *New Zealand Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd*.[17] He was referring to the minority decision of Chambers J where a rhetorical question was asked about whether damages could be claimed in such a situation, while noting authorities on the point were divided.[18]

[103] Second, Mr Drake submitted that the Court had previously implied duties into an employment agreement such as an obligation of fair and reasonable dealing by an employer towards an employee, and good faith and fidelity on the part of the employee.[19] The fundamental nature of good faith to all employment relationships was said to be consistent with such a term being incorporated into all employment agreements. He submitted that it followed that, if the duty was incorporated into an employment agreement, an employee would have legally enforceable good faith rights independent of the Act. Inevitably that would mean access to remedies for breach of contract distinct from those provided in the Act for personal grievances.

[104] Finally, Mr Drake drew attention to the Court previously recognising other statutory terms having been incorporated into employment agreements. Two cases were mentioned: *Gallagher v Watercare Services Ltd* and *Electrical Union 2001 Inc*

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16 Referring to Burrows, Finn and Todd *Law of Contract in New Zealand* (5th ed, LexisNexis NZ Ltd, Wellington, 2016) and, in particular, passages appearing at paragraphs 2.2.6, and 6.3.3(a). Corresponding passages are in the 2018 edition.

17 *New Zealand Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd* [2011] NZCA 571, [2011] ERNZ 326 (CA) at [40].

18 At [75]. Chambers J commented that there is slight authority for the proposition damages might "be claimable", but pointed out that the Court in *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597 (EmpC) found that damages were not available as a remedy. The footnote to [75] approves the Employment Court's comment that damages might be indirectly available through successful personal grievances.

19 See, for example, *Auckland Shop Employees IUOW v Woolworths*, above n 13; *Tisco Ltd v Communication & Energy Workers Union* [1993] 2 ERNZ 779 (CA) at 782.

v Mighty River Power Ltd.[20] In the former case the reference was to the good employer provisions from the Local Government Act 1974. In the latter case the Bill of Rights Act 1990 was expressly referenced in the agreement.

[105] The hearing of this case was concluded before Judge Holden issued her decision in *Kazemi v RightWay Ltd*, which also dealt with a claim that the duty of good faith in s 4 was an incorporated term of an employment agreement.[21] A further opportunity was provided to counsel to make submissions about *Kazemi*. In particular, they were invited to comment on para [102] of that decision which reads:

> [102] It is unclear why [counsel for the plaintiff] refers to the section 4 duty of good faith as an incorporated term of the agreement. It is not enough that a party to an employment agreement has a statutory obligation, for that obligation to become an incorporated term. Generally, for an obligation that arises outside of the employment agreement itself to be incorporated into the agreement, it will exist in a form that parties are aware of prior to signing the employment agreement and will be referenced in the contractual documents. Common examples of incorporated terms are those found in workplace policies that are referred to in the employment agreement. Here there was nothing in the written employment agreement or surrounding offer documents that referenced or otherwise incorporated the statutory duty of good faith. That is not to say that the duty does not exist, but its existence does not make it an incorporated term of Ms Kazemi's employment agreement.
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> (footnotes omitted)

[106] Mr Drake sought to distinguish *Kazemi* by observing that the Court in that case did not have the benefit of the detailed submissions provided in this case and because the facts were different. *Kazemi* was said not to be authority for a general proposition that good faith obligations cannot be an incorporated term. That was because the comments at para [102] involved two previous cases about terms expressly incorporated into the agreement whereas Mr Johnston's case was that the duty was to be implied. The shift in these submissions from saying the duty of good faith was an incorporated term to be an implied term was not explained.

[107] Mr Skelton submitted that the claim that the duty of good faith was an incorporated term in the employment agreement was misconceived. That was because the duty is statutory and has specific remedies available for a breach, so it was not

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[20] *Gallagher v Watercare Services Ltd* [1994] 1 ERNZ 511 (EmpC) at 538-539; *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197 at [10] and [48].

[21] *Kazemi v RightWay Ltd* [2019] NZEmpC 73.

necessary to go any further. An analogy was drawn with the House of Lords decision in *Johnson v Unisys Ltd*.[22]

[108] In *Unisys*, the Court considered whether it was appropriate to recognise an implied term which would have the effect of developing the common law by allowing a remedy for a breach of the agreement and damages to be available that would operate in parallel to claims regulated by statute. The Court rejected the proposition, holding that such a step would be contrary to Parliament's legislative intention, was unnecessary and undesirable. The Court decided it was unnecessary to imply a term into a contract to give one of the parties a remedy that was already available under the legislation and where, if that happened, common law damages would exceed the statutory cap on compensation.[23]

[109] Mr Skelton argued that the Act contains both the statutory duty and a remedy for its breach, by providing for a penalty. It followed that no more was intended, necessary, or desirable. He submitted it would not be a proper exercise of the judicial function for the Court to imply a contractual term arising from the statutory duty of good faith, and to create a new remedy for breach of such a term, where Parliament had chosen not to do so. As to *Kazemi*, Mr Skelton submitted that the comments at para [102] were a correct statement of principle and should be applied.

[110] I have strong reservations that the significance of the duty of good faith in the Act translates into that duty being an incorporated term into an employment agreement so that a breach could give rise to damages. I consider it is unlikely Parliament intended to create a situation where damages for such a breach would be available to run in parallel with personal grievance claims, compliance orders and penalties.

[111] Finally, little support was provided to Mr Drake's submissions by *Gallagher* and *Mighty River Power*. In *Gallagher*, the statutory duty that formed part of the agreement was the "good employer" one from the Local Government Act, but the legislation was expressly referred to in the agreement.[24] In *Mighty River Power*, the

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22 *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] 2 All ER 801.
23 At [56], [58] and [80].
24 *Gallagher v Watercare Services Ltd*, above n 21.

collective agreement referred to the principles of the Privacy Act 1993 and to the New Zealand Bill of Rights Act so they were included by express agreement not by implication.[25]

Continuation of work

[112] In case I am wrong in holding that Fletcher Construction did not breach the employment agreement, it is necessary to discuss the company's affirmative defences. The first defence was that, by continuing to work after 3 October 2016, with the consent and approval of Fletcher Construction, Mr Johnston was prevented from alleging that he (or his position) was redundant and that he was entitled to notice of termination of his employment and to redundancy compensation. Mr Skelton submitted that by continuing to work Mr Johnston affirmed his employment and he lost the right to rely on the claimed breaches.[26]

[113] Mr Skelton submitted that, pursuant to s 37 of the Contract and Commercial Law Act 2017, a party to a contract has a right to cancel where a term has been breached by the other party. That is subject to s 38, which provides that a party is not entitled to cancel if, with full knowledge of the breach, that party has affirmed the contract. His point was that Mr Johnston had continued to work in the knowledge that a breach had occurred and had, therefore, affirmed the employment agreement.

[114] Mr Drake's response was that the role of Financial Controller had become superfluous, together with other affected positions, when the restructuring was implemented in October 2016. After that happened, Mr Johnston carried out other work, having materially different duties and responsibilities as directed while "… waiting for [Fletcher Construction] to comply with the redundancy and termination provisions in his employment agreement".

[115] I do not accept Mr Drake's submissions. Mr Johnston's decision to continue to work was fatal to his claim. By early October 2016 he knew the company intended

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25 *Electrical Union 2001 Inc v Mighty River Power Ltd*, above n 21.

26 Relying on *Jansen v Whangamata Homes Ltd* [2006] 2 NZLR 300 (CA) at [14]-[17]; see also Finn, Todd and Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis NZ Ltd, Wellington, 2018) at 18.3-18.3.2.

to implement changes to its financial services and he was taking steps to continue his employment. That is why he applied for a new role. From early October onwards he knew the company was taking steps to deal with his concerns and was not planning to dismiss him. Confirmation of that position, if it was needed, was given to him by Ms Morris at the beginning of December 2016.

[116] If Mr Johnston's claim was correct, notice of termination should have been given on or around 3 October 2016 or, potentially, in early December 2016 at the very latest. When notice was not given a breach occurred and he had an election to make; to end his employment or to continue to be employed. I accept that Mr Johnston did not need to make an election immediately, because he was entitled to a reasonable opportunity to consider his position. He did not, however, have the right to maintain an inconsistent position, by claiming that the employment agreement had been breached entitling him to cancel it, while continuing to work.

[117] He continued to work from October 2016 onwards before communicating his decision through his lawyer in late December. There are two problems with this passage of events. The first one is that the time taken from 1 December until 23 December has not been adequately explained. The second problem is that Mr Johnston's lawyer's letter did not make an election except by implication. Stating he would continue to work "without prejudice" was an attempt to hedge his bets. Mr Johnston could not claim that the company had breached the employment agreement, entitling him to cancel it and claim damages while remaining employed under the same agreement and continuing to enjoy its benefits such as a salary. The words "without prejudice" in the lawyer's letter do not convey any particular meaning in this context and did not provide protection from the requirement to make an election. The reality was that, by staying and working as required, Mr Johnston affirmed the employment agreement.

[118] Had it been necessary to do so I would have held that Mr Johnston affirmed the employment agreement. He, therefore, lost the right to rely on his claims that Fletcher Construction breached the redundancy provision in that agreement.

[119] As to the second affirmative defence, had it been necessary to decide it, I would have held that Mr Johnston did not have an obligation to accept the new employment offered to him as Business Performance Manager – Construction Division to avoid a claim that he had failed to mitigate his losses.

Money payable?

[120] The fifth cause of action was that Fletcher Construction was indebted to Mr Johnston for:

(a) unpaid holiday pay of $9,651.28;

(b) salary for the period from 7 April 2017 to 25 May 2017;

(c) all holiday pay up to the termination of his employment;

(d) $16,886.25 which is one month's notice period under the employment agreement;

(e) $171,460 for redundancy compensation under the employment agreement;

(f) the employer's contributions to his KiwiSaver scheme arising from the claims for unpaid salary, holiday pay, and notice; and

(g) annual holiday pay on the claims for salary, one month's notice, and redundancy compensation.

[121] Mr Johnston claimed that the company had refused to pay him holiday pay and, by doing so, was in breach of s 27 of the Holidays Act 2003, and s 4 of the Wages Protection Act 1983. The company was said to have made an unauthorised deduction from what was owed to him. The employment agreement did not authorise the company to make deductions from wages or salary due to Mr Johnston.

[122] Mr Johnston claimed that he had not been paid holiday pay of $9,651.28 when his employment ended. The company's response was that, by oversight, it had continued to pay his salary while he was on sick leave, in March and April 2017, resulting in an overpayment of $11,005.86. The narrow point is whether the company's response is a defence to a claim for payment of holiday pay, or an unauthorised attempt to make a deduction, achieved by setting off the mutual debts.

[123] I do not accept Mr Skelton's argument that the company's position about holiday pay is merely a defence. The Wages Protection Act applies. There can be no deduction from an employee's wages or salary except in very limited circumstances that do not apply here.[27] Mr Johnston was, undoubtedly, paid more than he was entitled to and he owes Fletcher Construction the amount he was overpaid. It could have issued proceedings for its recovery but elected not to do so. The net effect of Fletcher Construction's argument is that mutual debts were applied in an attempt to satisfy the statutory requirement to pay holiday entitlements. The consequence of what Fletcher Construction did was to deduct what Mr Johnston owed it from money it owed him and it did so without the consent required. Fletcher Construction is indebted to Mr Johnston for the unpaid holiday pay.

[124] The claim for salary, from 7 April 2017 to 25 May 2017, relied on Mr Johnston being entitled to continued pay while on sick leave. His claim was based on an assertion of a company practice to continue to pay salaried staff even when their sick leave entitlements had been used. He has not established that there was any term of his employment agreement entitling him to continued pay while absent on sick leave. This claim was misconceived because it assumed Mr Johnston enjoyed an entitlement to continue to be paid when his paid sick leave entitlement expired. This part of the claim cannot succeed.

[125] The claims for money represented by the notice and redundancy compensation payable under the employment agreement fail because those amounts are not due and owing to Mr Johnston.

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[27] Wages Protection Act 1983, ss 4-6.

[126] The claim for the value of the KiwiSaver contribution was misconceived. The claim was that the KiwiSaver entitlements are payable on the value of the redundancy compensation. Since I have already held that there was no breach of contract by the company, and therefore no obligation to pay that compensation, this claim cannot succeed. However, for the avoidance of doubt, the amount claimed would not be payable in any event. Under s 64(1) of the KiwiSaver Act 2006 the employer's contribution is fixed as a percentage of the employee's gross salary or wages. A contribution is only payable if it relates to money that is salary or wages as defined in the KiwiSaver Act.[28] The definition of salary or wages includes an extra payment, as defined in the Income Tax Act 2007, unless the amount is a redundancy payment for the purposes of the tax legislation.[29] The amount claimed relates to redundancy so it follows, pursuant to s 4 of the KiwiSaver Act, that the KiwiSaver contribution is not payable.

[127] The other sums claimed are also not payable to Mr Johnston because he has failed to demonstrate that they have become due and owing to him under the agreement or otherwise.

Penalties

[128] Penalties were claimed against Fletcher Construction in Mr Johnston's seventh cause of action. The basis of this pleading was that there had been breaches of his employment agreement, namely those in the first, second and third causes of action attributing to the company a failure to give notice under the employment agreement and to pay compensation and other breaches. Separately, he claimed that there were breaches of the Act, the Holidays Act and the Wages Protection Act.

[129] There has only been one finding out of the claims pleaded against Fletcher Construction where it has failed to meet its obligations to Mr Johnston. That was in relation to holiday pay. That breach happened against a backdrop of extensive and ongoing efforts to retain Mr Johnston's employment with the company followed by an overpayment of more than the statutory entitlement to holiday pay. Fletcher

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28 KiwiSaver Act 2006, s 4.
29 Section 4(1) Salary or wages, (b)(ii).

Construction was not entitled to withhold holiday pay, but I am satisfied that the circumstances surrounding what happened do not amount to the sort of egregious behaviour that should attract a penalty.

Outcome

[130] I find that Fletcher Construction did not breach its employment agreement with Mr Johnston, or constructively dismiss, or unjustifiably disadvantage him. With one exception, relating to unpaid holiday pay, each of Mr Johnston's causes of action are unsuccessful. As to the holiday pay, Fletcher Construction is indebted to Mr Johnston in the sum of $9,651.28. The rest of his claims, having been unsuccessful, are dismissed.

[131] Costs are reserved. If any party considers costs ought to be fixed and made payable submissions can be lodged within 20 working days. The other party may have a further 20 working days to respond and then there will be a brief period of 10 working days for any reply.

K G Smith
Judge

Judgment signed at 2.45 pm on 4 December 2019