IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 75
5629396

	BETWEEN	WILLIAM COOMER Applicant
	A N D	JA McCALLUM & SON LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Riki Donnelly, Counsel for Applicant Leo Wenborn, Advocate for Respondent
Investigation Meeting:	13 and 14 March 2017 at Invercargill
Submissions Received:	25 March and 7 April 2017, from the Applicant 6 and 20 April 2017, from the Respondent
Date of Determination:	15 May 2017

DETERMINATION OF THE AUTHORITY

A. The applicant was not constructively dismissed.

B. The applicant was unjustifiably disadvantaged in his employment by the respondent to the extent set out in this determination and is entitled to the remedies set out in this determination.

C. The applicant is not entitled to payment in respect of his rehabilitative activities in the respondent's factory.

D. It is not appropriate to impose a penalty upon the respondent.

E. Costs are reserved.

Employment relationship problem

[1] Mr Coomer claims that he was unjustifiably constructively dismissed from his employment by the respondent and was subjected to unjustified disadvantage in his employment. This is denied by the respondent.

[2] Mr Coomer also claims payment for 254 hours of activities which he carried out at the respondent's premises during his period of rehabilitation. The respondent denies payment is due. Finally, Mr Coomer seeks that a penalty be imposed upon the respondent for failing to provide a written employment agreement.

Account of events leading to the termination of employment

[3] The respondent operates a linen and towelling rental and laundry service under the business name McCallums Group. Prior to his resignation, Mr Coomer had been employed by the respondent since 2005 as a delivery driver. No signed written employment agreement between Mr Coomer and the respondent was in place.

[4] In January 2015 Mr Coomer suffered a stroke. As part of his rehabilitative process, his doctor recommended that he start some work and he agreed with the respondent that he would "work on a voluntary basis" in its factory from 30 March 2015. Mr Coomer says that between that date and 15 February 2016 he worked a total of 254 hours voluntarily, without any pay.

[5] Mr Coomer's evidence is that, shortly after his stroke, he attended a number of meetings with the shareholder and director of the respondent, Wayne McCallum, to discuss his future employment. Mr Coomer says that Mr McCallum told him that if he was off work recovering for more than three months, the respondent would need to hire somebody to replace him. However, Mr Coomer says that Mr McCallum promised that, if they did have to hire someone, that person would be put on a fixed term contract to enable Mr Coomer to return to work once he was well enough to do so.

[6] It is the evidence of the respondent that it initially covered Mr Coomer's absence by juggling staff, but that after around three months, they recruited temporary staff to cover his runs. Finally, they recruited an individual on a fixed term contract, and another on a casual contract.

[7] Before his stroke, Mr Coomer drove both light vehicles, requiring a Class 1 licence, and heavier vehicles, requiring a Class 2 licence. These licences were revoked after his stroke, but in or around December 2015 Mr Coomer was given back his Class 1 licence, together with his motorbike and forklift licences, having been cleared medically to drive. It was around this time that Mr Coomer's occupational therapist decided that Mr Coomer would be ready to stop carrying out voluntary work and start back doing his delivery work on a gradual return-to-work basis.

[8] On 16 February 2016 Mr Coomer attended a meeting with his manager, Errol Proffit, to discuss his possible return to work. He was accompanied by his wife, Darlene, his occupational therapist, Jane Lyall, and the company administrator, Marcie Evans. Apparently, there had been amicable discussions between Mr Coomer and Mr Proffit prior to this meeting on an informal basis.

[9] According to Mr Coomer's evidence, he was very excited about the meeting as he wanted to get back into paid employment. He says, however, that during the meeting "every idea that was presented for me to return to work was met with negative responses by Mr Proffit". Mr Coomer says that he found the meeting hostile and aggressive and that he felt he was being bullied by Mr Proffit, especially as he requested Mr Coomer's resignation several times.

[10] Mr Coomer's evidence is that he and his wife walked out of the meeting because of the way he had been treated. He said that this experience knocked his confidence and self-esteem, and that his impression was that he was not going to be able to return to his job as a driver, even though he had been promised that he could return once he was well enough.

[11] The evidence of Mr Proffit is that, when he met with Mr Coomer and his wife on 16 February 2016, he had an open mind and was there to find out how Mr Coomer was progressing after having had his stroke. He said that some of the issues he wished to discuss with Mr Coomer included whether Mr Coomer had the confidence to drive the van, being able to deal with new work schedules that had been put in place over the past year, communicating with other staff and customers, being able to deal with issues that the customers and staff members raised without feeling pressure or stress, not having a Class 2 licence to service the Tiwai account and being able to pass the Tiwai medical induction.

[12] Mr Proffit said that he needed Ms Lyall to do a workplace assessment, but that when he tried to discuss this with Mr and Mrs Coomer, "the mood of the whole meeting changed". It is his evidence that he did not mean to come across aggressively or in an intimidating manner. He categorically denies that he asked Mr Coomer to resign several times during the meeting.

[13] Mr McCallum's evidence is that, prior to the meeting between Mr Proffit and the Coomers in February 2016, he and Mr Proffit agreed that they needed to work out whether Mr Coomer could return to his former role (or a variation of it) or work within the factory, provided that any option was within Mr Coomer's capabilities (based on the guidelines given by the doctor and the occupational therapist) and also were operationally viable for the company and its customers.

[14] Ms Evans took detailed notes of the meeting on 16 February 2016. Mr Coomer believes that the notes were accurate as far as he could tell, but Mrs Coomer believes that they are incomplete. The respondent accepts that they are not a verbatim account of what happened.

[15] The notes show that Ms Lyall explored the duties that Mr Coomer had been doing prior to his stroke, and also show that Mr Proffit explored with Ms Lyall how Mr Coomer would cope if he were to go back to a delivery job. The notes of the meeting record that Mr Proffit said that a major concern was the fact that Mr Coomer had not got his Class 2 licence back (there being a compulsory three year stand down period).

[16] The notes also record that Mr Proffit asked how Mr Coomer would cope in an "intense environment" given that he was the company's "front man". Mr Proffit stated during the meeting that if Mr Coomer did not have his Class 2 licence, he would not be able to deliver to Tiwai Point and would limit Mr Coomer's flexibility to do other jobs as he would not be able to deliver stock.

[17] There was also discussion about Mr Coomer carrying out a sales representative role if business in the respondent's Apparelmaster service increased in the future. It appears that Mr Proffit declined to allow Mr Coomer to return as a volunteer sitting alongside another driver, although no reason for this refusal is recorded.

[18] The notes record that discussion turned to Mr Coomer volunteering to deliver stock to the local hospital (the Calvary) for two months, which only required a Class 1 licence, with Mr Coomer initially driving 2 hours a day on a Monday, Wednesday and Friday. This was to be subject to review after two weeks and then on a week by week basis. The notes record that Mr Proffit was concerned about how long it would take for Mr Coomer to get back to his previous role and that if Mr Coomer could not get back to his previous role, he would have to go into another role.

[19] The notes record that Mr and Mrs Coomer left the meeting at this point (as Mr Coomer was upset) and that Mr Proffit and Ms Lyall had a quick discussion in which Mr Proffit said he did not want to put Mr Coomer in a position that he could not handle, to which Ms Lyall replied that "the only way to know was to test the situation out".

[20] The Authority saw a copy of a "Proposed Return to Work Plan" completed by Ms Lyall which proposed Mr Coomer trying the packing-up and delivery of clean linen, the retrieval of dirty linen and the processing of that order for the Calvary Hospital. This was to be subject to a clearer medical certificate being obtained confirming clearance for the proposed return to work plan and Mr Proffit and Mr McCallum reviewing the documentation and medical certificate before confirming that they would be able to offer this work trial.

[21] Ms Lyall's evidence is that she sent the Proposed Return to Work Plan to the respondent after the meeting, but both Mr Proffit and Mr McCallum were adamant in their evidence that they did not receive it. According to both of them, they were waiting for receipt of the Plan before deciding what to do next.

[22] On 2 March 2016 Mr Coomer obtained a certificate from his General Practitioner stating that Mr Coomer was able to undertake *"*a graded return to work with occupational therapy support starting 2 to 3 hours every second day, building up as possible with occupational therapist supervision."

[23] Mr Coomer then obtained legal advice from Community Law and returned to McCallums Group for a second meeting on 4 April 2016. This time, Mr Proffit was absent, but Mr McCallum took part instead. Mr Coomer was accompanied by his wife, Ms Lyall and his legal representative from Community Law. A detailed record

of the meeting was made by Ms Evans, a copy of which was seen by the Authority and, again, Mr Coomer did not assert that the notes were inaccurate.

[24] These notes record that Mrs Coomer stated that Mr Coomer would not consider alternative duties and Ms Lyall stated that they wished Mr Coomer to return gradually to his previous job. This would involve starting by working three days a week, and building on that.

[25] The notes record that Mr McCallum stated that it would be difficult to manage that transition operationally as Mr Coomer would need to be able to do his entire previous role. It appears from the notes that Mr McCallum was concerned that if Mr Coomer could only carry out a part-time role, job sharing, the other job sharer would also only have a part-time role which would lead him to leave. They would then be in a position where they would be short staffed as Mr Coomer would not be able to step up and do a full-time role. The notes record that Mr McCallum said that no-one was putting any pressure on Mr Coomer to resign.

[26] At this point, the discussion turned to talk about how Mr Proffit had made Mr Coomer feel during the last meeting, with Mrs Coomer stating that Mr Proffit had bullied Mr Coomer, so that they did not think it was an environment he could come back to. To a question as to whether Mr Proffit could stop being Mr Coomer's manager, Mr McCallum replied in the negative. Mr Coomer then stated that he would feel unsafe reporting to Mr Proffit. Mr Coomer, Mrs Coomer and the legal adviser all stated that they did not believe that the relationship with Mr Proffit could be repaired.

[27] The meeting also covered whether Mr Coomer could work in the factory. Mr Coomer stated that he could not because of the noise, which affected his concentration. It was at this point that Mr Coomer left the meeting, although Mrs Coomer remained.

[28] The meeting continued without Mr Coomer, and the notes record that, when Mr McCallum asked if Mr Coomer would consider coming to work on a trial period, the legal adviser said "no".

[29] Mr McCallum's evidence was that, right from the outset of the 4 April 2016 meeting, he felt ambushed as the content of the meeting had had very little to do with Mr Coomer's future employment, and was more focused on the previous meeting with Mr Proffit. Mr McCallum said that he felt that the entire meeting had been

"choreographed and rehearsed to stage an opportunity for a personal grievance on the grounds of constructive dismissal". He said that there was no attempt of reconciliation to allow all involved to progress things forward.

[30] Mr McCallum's evidence was that, during the meeting, Mr Coomer became increasingly agitated, with his speech and memory failing him, so that he had to leave the meeting. Mr McCallum said that this confirmed one of his major concerns about Mr Coomer's current suitability in a customer services role which, at times, could be unpredictable and challenging.

[31] Mr McCallum's evidence was that he felt that it was his duty as managing director to prevent Mr Coomer from being placed in a situation he was likely to fail in, and in an environment in which he had little control over, until he could become satisfied that Mr Coomer was ready for any further challenges. He also stated that Ms Lyall had indicated that Mr Coomer's return to work in any capacity would be at the company's risk.

[32] On 15 April 2016 Mr McCallum wrote to Mr Coomer offering him a position within the factory at McCallums, working 6am to 9am three days a week. The letter stated "..we will make every attempt that any possible noise within the area you are working in the factory will be reduced to a minimum by the use of PPE". The letter stated that there were no other positions that the company could offer him. The letter also stated "We look forward to helping with your rehabilitation back to full-time employment within McCallums."

[33] On 21 April 2016 Mr Coomer wrote a letter to Mr McCallum in the following terms:

> Dear Wayne,
>
> I wish to tender my resignation with McCallums Drycleaning & Apparelmaster effective immediately.
>
> At our meeting on 4 April 2016, I provided an explanation that I am unable to return to work for the following reasons:
>
> - I feel that for the last 12 months, I have been 'led up the garden path'. I returned to work on a voluntary basis to show my loyalty to the Company and to 'keep my foot in the door'. This included training another staff member. I offered to work voluntarily so I could gradually work towards returning to my previous position.

- I feel that the last 12 months disadvantaged me. Had I known that my previous position was no longer available, I would have looked at my options and other potential employment.

- The way I was treated at the meeting on 16 February 2016 was demeaning and [sic]

- Errol's attitude and behaviour were hostile and he demanded that I hand in my resignation. My wife and Jane Lyall also confirmed this with you at our meeting on 4 April 2016.

- I assumed that the meeting with Errol was to discuss a 'return to work' plan, however, it was the opposite. At the meeting I had no inclination or desire to resign from my employment.

- Since my stroke, I have worked hard through rehabilitation to get myself ready to return to work. Instead, I am left feeling shaken and my confidence has been shattered. I feel that I am back to square one.

For the reasons stated above, and our discussion at the meeting on 4 April 2016, I am unable to work under the management of Errol.

I have always been honest and kept the Company informed of my progress. I have read over your recent correspondence with an offer of employment. The position I have been offered is not an option for me. We explained at the meeting that the noise would cause me issues and this was also explained to you by the Occupational Therapist.

Whilst employed as a 'driver' I thoroughly enjoyed this position and the people I met made it even better. I am disappointed that I have been left with no other option but to resign after giving the company 10 years of service.

Regards,
William Coomer

[34] On 12 May 2016 Mr McCallum wrote to Mr Coomer stating that he wanted him to reconsider his resignation, and that Mr Coomer had misinterpreted the respondent's actions. He restated a willingness to offer Mr Coomer a position in the factory and to work with Mr Coomer's occupational therapist. He also stated that Mr Coomer's comments about Mr Proffit were unjustified and that the respondent would never place Mr Coomer "in a position that could be considered untenable".

The issues

[35] The Authority must determine the following issues:

a. Whether Mr Coomer was unjustifiably constructively dismissed from his employment;

b. Whether Mr Coomer suffered unjustified disadvantage in his employment;

c. Whether Mr Coomer should be paid for 254 hours of activities he carried out in the factory after his stroke; and

d. Whether a penalty should be imposed upon the respondent.

[36] In considering the first two issues, it is necessary to consider the extent to which the respondent had a duty to allow Mr Coomer to return to his driving duties on a part-time basis driving Class 1 vehicles only and, if it had such a duty, whether it was in a position to do so.

Was Mr Coomer unjustifiably constructively dismissed?

[37] The fundamental legal principles relating to the law on constructive dismissal were enunciated in the Court of Appeal case of *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*[1], which set out three non-exhaustive categories of constructive dismissal:

(1) Where the employee is given a choice of resignation or dismissal;

(2) Where the employer has followed a course of conduct with a deliberate and common purpose of coercing an employee to resign;

(3) Where a breach of duty by the employer leads a worker to resign.

[38] Mr Donnelly does not expressly identify which of these categories are claimed to apply in Mr Coomer's case but I infer that Mr Coomer's case is that the respondent breached a duty owed to Mr Coomer, which led him to resign. With respect to this category of constructive dismissal, the Court of Appeal elaborated on it in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc*[2]. The Court of Appeal stated at [172]:

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1 [1985] 2 NZLR 372 (CA) at 374-375
2 [1994] 2 NZLR 415 (CA)

> *In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

Did the respondent have a duty to allow Mr Coomer to return to work doing part time driving duties?

[39] The Employment Relations Act 2000 (the Act) prohibits discrimination on the grounds of, inter alia, disability. Section 106 of the Act refers to exceptions in relation to discrimination which are set out in the Human Rights Act 1993. Section 29 of the Human Rights Act deals with exceptions in relation to disability, which is expressly incorporated into the Act. Mr Coomer has not asserted that he was discriminated by reason of a disability, but s 29 of the Human Rights Act refers to different treatment being justified based on disability where the person could perform the duties of the position only with the aid of "special services or facilities" and it is not reasonable to provide those services and facilities.

[40] Section 35 of the Human Rights Act is also incorporated into the Act by virtue of s 106(1)(l). Section 35 of the Human Rights Act, which is a qualification on s 29, provides:

> **35 General qualification on exceptions**
> No employer shall be entitled, by virtue of any of the exceptions in this Part, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

[41] This section arguably provides a positive duty on employers to make adjustments to its activities, where reasonable, so that another employee could carry out duties that (in this case) a disabled person could not carry out by reason of the disability. However, the Authority does not have jurisdiction to enforce the Human Rights Act directly. In addition, the incorporation of s 35 of the Human Rights Act

into the Act is only in relation to acts of discrimination. There is no stand-alone set of express duties in the Act which requires an employer to make reasonable adjustments to accommodate a disabled person who is otherwise unable to carry out his or her duties.

[42] Whilst I believe he probably was a disabled person in the months following his stroke, Mr Coomer has not alleged discrimination and has not raised a personal grievance about discrimination. Therefore, I do not believe that the incorporation of s 35 of the Human Rights Act into the Act can assist Mr Coomer in these proceedings.

[43] However, s 4 of the Act does provide a clear set of duties upon the respondent. This provides:

> **4 Parties to employment relationship to deal with each other in good faith**
> (1) The parties to an employment relationship specified in subsection (2)—
> (a) must deal with each other in good faith; and
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
> (i) to mislead or deceive each other; or
> (ii) that is likely to mislead or deceive each other.
> (1A) The duty of good faith in subsection (1)—
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
> (ii) an opportunity to comment on the information to their employer before the decision is made.

[44] It is trite law that an employer who is contemplating the dismissal of an employee for incapacity caused by sickness or injury is obliged by virtue of the duty of good faith, and the obligations of s 103A of the Act, to first make enquiries of the employee as to likely prognosis, and to discuss with the employee ways of avoiding the dismissal, such as a gradual return to duties.

[45] It is not an unreasonable stretch to interpret the duty of good faith as requiring an employer to give genuine consideration to ways of enabling a sick or injured employee to return to work when the employee is assessed as medically fit to do so, even if dismissal is not immediately contemplated. The duty will encompass, as a minimum, an informed assessment of the capabilities and limitations of the employee, a likely prognosis for a full or partial recovery, an assessment of the operational needs of the business and of any risks associated with the employee's return. Expert assistance may well be required in making these assessments, although the resources of the employer will need to be taken into account when assessing whether a failure to do so was reasonable.

[46] When I read the notes of the meeting with Mr Proffit, I believe that they indicate a significant reluctance on Mr Proffit's part to take risks in relation to allowing Mr Coomer to resume a delivery run, driving a van, in a restricted capacity, but that he did not close his mind entirely to the possibility.

[47] I note, for example, that the notes stated:

> Errol has to work out what Willie can do, what's available and what's required.

and

> Errol said he has to be sure Willie is able to do that (eg Calvary). If Willie can do Calvary that will be an indicator. Errol said the unknown is the factor.

[48] I do not accept that the notes show that Mr Proffit was demanding that Mr Coomer resign. I believe that he was saying that Mr Coomer would have to change his role with the respondent because he could no longer legally drive class 2 vehicles. This was literally true, as Mr Coomer was prohibited from driving a class 2 truck for a significant time, and so would not have been able to revert to his old role. A careful reading of the notes of the meeting show, in my view, that Mr Proffit was willing to explore what else Mr Coomer could do within the respondent, but that he had doubts about him doing deliveries.

[49] I accept Mr Proffit's evidence that he was waiting to review the return to work plan and the medical certificate before the company was able to confirm a return to work trial.

[50] I accept that Mr Coomer was upset by what he saw as a largely negative reaction by Mr Proffit. However, I must take into account that Mr Coomer was still in the stages of recovery, and easily tired and frustrated. I also see from the meeting notes that the meeting was not a well-structured or scripted event, but a free flowing conversation which Mr Coomer would probably have found hard to follow at times.

[51] I do not find objectively that the respondent, by Mr Proffit's actions at the meeting, acted in fundamental breach of its duty of good faith in relation to exploring a return to work for Mr Coomer. In particular, I believe that Mr Proffit was willing to wait to see the further medical certificate and the back to work plan, even though he was sceptical.

[52] Turning to the meeting of 4 April 2016, the notes show that Mr McCallum commenced the meeting by trying to explore ways of getting Mr Coomer back to work, referring to alternate duties or a gradual return to work. When Mrs Coomer said that Mr Coomer would not consider alternative duties, Mr McCallum asked about the hours that Mr Coomer would be available for.

[53] My analysis of the notes indicate to me that the meeting quickly went off track largely because of Mrs Coomer's insistence that Mr Coomer would not return to work under Mr Proffit and that the relationship could not be repaired. Mr McCallum appears to have tried on more than one occasion to get the meeting back on track, and to explore a return to work and reconciliation with Mr Proffit, but to no avail. He stated expressly that there was no intention of asking Mr Coomer to resign.

[54] Whilst Mr McCallum was stating in the meeting that he had some doubts about a gradual return to work driving, because of the impact upon the other drivers, he did not state outright that Mr Coomer could not undertake such a return. I am satisfied, on balance, that Mr McCallum did not receive the back to work plan from Ms Lyall, as it was not referred to in the meeting of 4 April. If it had been received, I expect it would have been central to Mr McCallum's discussion. Had the meeting not gone off track, the non-receipt of the plan would likely have been discovered and discussed.

[55] I do not see any action by Mr McCallum during this meeting which indicates a fundamental breach of duty by the respondent which would have made it reasonably foreseeable that Mr Coomer would resign. Mr Coomer's evidence was that he was

very focussed on returning to driving, and on the promise that he understood had been given that he could return to his driving role. Both Mr Proffit and Mr McCallum were expressing doubt, even scepticism that the business could accommodate a gradual return to driving. Because of his avowed singlemindedness to return to driving duties, Mr Coomer saw these expressions of doubt as reneging on the promise to allow him to return to work.

[56] However, the doubt, and scepticism demonstrated by Messrs Proffit and McCallum, although possibly insensitive given Mr Coomer's fragility, did not objectively amount to a fundamental breach of duty, entitling Mr Coomer to treat himself as constructively dismissed. I accept Mr McCallum's evidence that a number of steps needed to be taken before the respondent could agree to Mr Coomer returning on a gradual basis to a driving role. This would have included, at least, a health and safety assessment, the agreement of the customer, provision of a suitable vehicle and finding alternative duties for the driver who had been servicing Calvary Hospital up to Mr Coomer's return.

[57] Was it a breach of duty for Mr McCallum to say that Mr Proffit had to be Mr Coomer's supervisor if Mr Proffit returned to driving? Mr McCallum explained in evidence that it would have caused significant operational problems for the company if only one driver reported to another manager, because of the way the runs were arranged. Mr McCallum also pointed out that Mr Coomer would have initially required more supervision than usual if he had returned to driving, and it would have been difficult for Mr McCallum to have provided that extra supervision. On balance, I accept this evidence and accept that the respondent's requirement for Mr Coomer to report to Mr Proffit in a driving role was not unreasonable.

[58] Mr McCallum explained in evidence that he decided to offer Mr Coomer a return to work role in the factory because he wanted to establish his capabilities, and assess the risks in case an adverse situation arose. He said that Mr Coomer's previous voluntary activities in the factory had been for rehabilitative purposes, and he had had no expectations imposed on him in relation to his performance. By contrast, upon returning from sick leave, Mr Coomer would have been subject to performance expectations.

[59] Mr McCallum also explained that the respondent could have controlled the environment better in the factory, than if Mr Coomer had been driving and attending a

customer site. By asking Mr Coomer to work in the factory, the respondent would have been creating a track record for him, which would have assisted in getting Mr Coomer back on the road at a later date. Mr McCallum said he did not mention returning to a delivery run in the letter of 15 April as he had not wanted to create expectations which Mr Coomer may not have been able to fulfil.

[60] Regarding the issues Mr Coomer had with the noise in the factory, Mr McCallum said that he had not realised the extent of the problems that Mr Coomer had been having, as described in his evidence to the Authority. He had also not realised the measures that Mr Coomer had already tried to mitigate the effects of the noise. It does appear that Mr Coomer took these measures without formal reference to the respondent.

[61] I cannot find that offering Mr Coomer a return to work role within the factory was a fundamental breach of duty by the respondent given its willingness to explore solutions to the noise issue. The decision was not irrational and, given Mr Coomer's adamant refusal to work under Mr Proffit, who supervised the drivers, it was a practicable solution to getting Mr Coomer back to work.

[62] In conclusion, no actions by the respondent amounted to a fundamental breach of the duty of good faith. The problem arose because of Mr Coomer's single minded wish to return to driving, based upon a promise made by Mr McCallum over a year before. That promise, however, was not an unconditional promise; nor could it reasonably have been. It was a promise to keep his job open for a limited period, until Mr Coomer could return to his role. His stroke had more serious consequences for Mr Coomer's ability to return to work than Mr McCallum had initially anticipated, and Mr Coomer was simply unable to return to work without considerable limitations.

[63] I am unable to find that the respondent acted in such a way as to amount to a fundamental breach of contract, entitling Mr Coomer to treat his employment as at an end. I cannot, therefore, find that he was unjustifiably constructively dismissed.

Did Mr Coomer suffer an unjustified disadvantage in his employment?

[64] Section 103A of the Act sets out the test of justification when determining whether an action of the employer was justified. It provides:

Section 103A Test of justification
(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
(3) In applying the test in subsection (2), the Authority or the court must consider—
(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
(a) minor; and
(b) did not result in the employee being treated unfairly.

[65] The actions that I understand Mr Coomer to be relying upon are, as stated in the letter of personal grievance:

a. Being given the impression that his previous position would be available when he returned to work;

b. Being "led up the garden path" by being allowed to work in the factory on a voluntary basis;

c. Mr Proffit's conduct at the meeting of 16 February; and

d. The respondent failing to allow Mr Coomer to return to a driving position.

Being given the impression that his previous position would be available when he returned to work

[66] I do not accept that a bald and open ended promise was given by Mr McCallum that Mr Coomer would be allowed to return to his role when he returned to work, whenever that would be and without any conditions. I do not accept this because Mr McCallum is an experienced manager who said he had dealt with several cases of injured and ill employees before, whom the respondent company had rehabilitated back into the workplace. Mr McCallum would have known that such a promise was unsustainable.

[67] It is my finding that Mr McCallum actually promised that Mr Coomer's full role would be held open if he could walk back into it within the following three months, and that changed to a period of six months when it became clear that Mr Coomer would not be able to return after three months.

[68] I have no doubt that Mr Coomer genuinely believed that an open ended promise had been given, but that was not because of deliberately misleading conduct by the respondent. I also do not believe that the respondent flatly refused to allow Mr Coomer to return to work as a delivery driver, on a graduated basis. It was prepared to consider such a return, provided it could be satisfied that certain reasonable conditions were fulfilled. It was not given that opportunity to be so satisfied as Mr Coomer resigned.

[69] Therefore, I do not find that Mr Coomer was disadvantaged by a breach of a promise.

Being "led up the garden path" by being allowed to work in the factory on a voluntary basis

[70] I do not accept that Mr Coomer was in any way given to understand that working in the factory on a voluntary basis was to enable him to return to work as a delivery driver. It was rather for rehabilitative purposes, to enable him to spend some time in a structured environment where he could regain the skills he had lost due to his stroke. Therefore, he was not "led up the garden path" and has suffered no disadvantage.

Mr Proffit's conduct at the meeting of 16 February

[71] Mr and Mrs Coomer described Mr Proffit's conduct at the meeting as hostile and bullying. Ms Lyall described his conduct at the meeting as "negative", and "not really listening". Ms Lyall's description is more likely to be accurate, as she was more objective than Mr and Mrs Coomer. However, even if Ms Lyall's description is accurate, being "negative" and "not listening" in a meeting with Mr Coomer is likely to have caused him disadvantage in his employment, as it led to a sense of frustration and a belief that Mr Proffit wished to "get rid" of him. Was this an unjustified action, or simply the clumsy actions of a manager who was probably not experienced in dealing with stroke victims?

[72] I have already found that Mr Proffit's actions did not amount to a breach of the duty of good faith which was sufficiently serious to entitle Mr Coomer to treat himself as constructively dismissed. However, given that Mr Proffit was the respondent's representative in a meeting to discuss a possible return to work of a vulnerable employee who had suffered a fairly significant brain injury, a careful and clear communication style which did not antagonise or confuse Mr Coomer was called for. On balance, I find that Mr Proffit's approach did not satisfy that requirement.

[73] On balance, I believe that Mr Proffit's actions, in his role as the respondent's representative, were not what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. In other words, they did not fall within the range of reasonable actions of a fair and reasonable employer.

[74] I therefore find that Mr Coomer was unjustifiably disadvantaged in his employment by the way that Mr Proffit conducted the meeting of 16 February 2016.

The respondent failing to allow Mr Coomer to return to a driving position

[75] Whilst I accept that Mr Coomer felt he had been disadvantaged by the respondent not offering him a driving position as part of his gradual return to work, I also accept as credible and reasonable Mr McCallum's explanation why a factory position was offered. It was appropriate for the respondent to be reasonably confident that Mr Coomer was ready and able to return to a structured, performance oriented working environment, and the factory offered a better place to assess that than on the road.

[76] I therefore find that the respondent's actions were justified.

Should Mr Coomer be paid for 254 hours of activities he carried out in the factory after his stroke?

[77] Mr Donnelly submits that Mr Coomer was an employee while he was carrying out activities in the factory as part of his rehabilitation. This is not denied by the respondent, as Mr Coomer remained an employee during his period of sick leave; his employment did not come to an end. Therefore, there is no need to undertake an analysis, as contemplated in s 6(2) of the Act, to determine the real nature of the relationship between Mr Coomer and the respondent during his rehabilitative activities in the factory. He was clearly an employee.

[78] The more pertinent question, then, is whether Mr Coomer should have been paid for the rehabilitative activities he carried out in the factory. This question is answered by reference to statute and contract law. The Minimum Wage Act 1983 states, at s 6:

> **6 Payment of minimum wages**
> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[79] Did Mr Coomer perform "work" during his rehabilitative activities in the factory? The Minimum Wages Act does not define work, but this question was examined in detail by the full Employment Court in *Idea Services Limited v Dickson*[3]. The Court held that each case will turn on a factual inquiry as to what is required by an employer of an employee and whether that constitutes "work" for the purposes of s 6[4]. The Court then identified three factors that are to be taken into account when deciding whether an employee's activities are work for the purposes of the Minimum Wage Act[5]. These are:

a. Constraints on the employee.
b. Responsibilities of the employee.
c. Benefit to the employer.

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[3] [2009] ERNZ 116
[4] At [63].
[5] At [64] to [69].

[80] The Court expanded on these factors as follows:

> [65] The first important factor is the extent to which the employer imposes constraints on the freedom the employee would otherwise have to do as he or she pleases. The greater the degree of constraint, the more likely it is that the period of constraint ought to be regarded as "work"…
>
> [66] The second factor is the nature and extent of responsibility on the employee. The greater and more extensive the responsibilities, the more likely it is that the period in question ought to be regarded as "work"….
>
> [69] The third broad factor is the benefit to the employer of having the employee assume the role in question. The greater the importance to the employer and the more critical the role is to the employer, the more likely it is that the period in question ought to be regarded as "work"…

[81] Applying these factors to the activities that Mr Coomer undertook in the factory, my conclusion is that Mr Coomer's activities did not constitute "work" to the extent necessary to entitle him to be paid under the Minimum Wage Act. First, I understand from the evidence that Mr Coomer effectively chose when he would turn up and that he did not clock in or otherwise record his hours. Second, I understand that Mr Coomer was effectively a supernumerary, and that his presence was not necessary for the respondent to carry out its economic activities. Third, while Mr Coomer's activities (scanning, and folding linen) did contribute to the output of the respondent, it was not necessary for him to do the work, in that other staff were contracted and available to do it.

[82] The principal reason for Mr Coomer's presence in the factory was to enable him to undertake activities which assisted in his rehabilitation. These activities incidentally assisted the other workers, rather than the respondent. Accordingly I also find that there was no contractual obligation upon the respondent to pay Mr Coomer during his activities in the factory. The arrangement was to make the factory available to Mr Coomer to assist him in his rehabilitation.

[83] In addition, I do not accept that the evidence supports Mr Donnelly's submission that Mr Coomer undertook the activities in return for the promise that he would be reemployed.

[84] In conclusion, Mr Coomer is not entitled to be paid for carrying out the rehabilitative activities in the factory.

Should a penalty be imposed upon the respondent for failing to provide a written employment agreement?

[85] Mr Coomer seeks that a penalty be imposed upon the respondent pursuant to s 64(4) of the Act. Section 64(1) of the Act provides that an employer must retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of employment.

[86] Section 64(2) of the Act provides that, if an employer has provided an employee with an intended agreement under section 63A(2)(a), the employer must retain a copy of that intended agreement even if the employee has not signed the intended agreement or agreed to any of the terms and conditions specified in the intended agreement. Section 64(4) provides that the employer is liable to a penalty for a failure to comply with these two subsections.

[87] I find that the respondent has not breached either of the sub sections. Mr Coomer did not sign the agreement he was given because of some concerns about it. It seems it never was signed. Therefore, there was no signed copy to retain. However, the unsigned copy of the intended agreement was retained by the respondent, and was shown to the Authority. Therefore, no breach has occurred and no penalty can be imposed.

Remedies

[88] Mr Coomer has been successful in respect of his allegation of unjustified disadvantage arising from the actions of Mr Proffit in meeting on 16 February 2016. He is therefore entitled to be considered for an award of remedies.

[89] Section 123(1) of the Act provides as follows:

> (1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
>
> …:
>
> (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:
>
> (c) the payment to the employee of compensation by the employee's employer, including compensation for—
>
> (i) humiliation, loss of dignity, and injury to the feelings of the employee; and

> (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.

[90] Mr Coomer did not suffer any direct financial loss as a result of the unjustified disadvantage. He did, however, suffer humiliation, loss of dignity, and injury to his feelings and so should be awarded a sum of compensation under s 123(1)(c)(i) of the Act. This is evident from his reaction to the meeting at the time, his concerns about Mr Proffit as expressed at the second meeting and his evidence to the Authority. Mr Coomer said that the meeting "really affected my mental and physical health" and that his confidence had been impacted by what happened.

[91] I believe that a large part of this reaction to Mr Proffit's approach was due to Mr Coomer's health at the time, where he evidently felt a heighted feeling of frustration. However, the disadvantage arises from Mr Proffit's approach at the meeting which failed to take into account Mr Coomer's health at the time. Therefore, I do not believe it is appropriate to downplay or reduce the effects when assessing compensation. I assess an appropriate sum of compensation as $8,000.

[92] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act). However, Mr Coomer did not contribute in any blameworthy way to the situation that gave rise to his personal grievance, and so I do not make any reduction in the award.

Order

[93] I order the respondent to pay the sum of $8,000 to Mr Coomer pursuant to s 123(1)(c)(i) of the Act.

Costs

[94] I reserve costs. I direct the parties to seek to agree how costs are to be dealt with. However, if they are unable to do so within 14 days of the date of this determination, then any party wishing to apply for a costs order may serve and lodge a

memorandum within a further 14 days, and any reply shall be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority