

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 114  
5550606

BETWEEN	WAYNE RUSH Applicant
A N D	JSB CONSTRUCTION LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Barry Nalder, Counsel for Applicant Katherine Taurau, Counsel for Respondent
Investigation Meeting:	7 and 8 April 2016 at Whangarei
Submissions Received:	9 February and 8 April from Applicant 11 February and 8 April 2016 from Respondent
Date of Determination:	15 April 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The Applicant, Mr Wayne Rush, claims that he was unjustifiably dismissed by the Respondent, JSB Construction Limited (JSB), on 26 April 2014.

[2] JSB denies that it unjustifiably dismissed Mr Rush whom it claims abandoned his employment as a result of his not reporting for work on 22, 23 and 24 April 2014 despite being scheduled to work on those days.

**Note**

[3] Mr Anthony Read, JSB Foreman, provided a medical certificate to excuse his absence at the Investigation Meeting, but also provided evidence in affidavit format to assist the Authority. The affidavits are dated 27 January 2016, 8 April 2016 and 11 April 2016.

**The issues**

[4] The issues for determination are whether or not:

- Mr Rush was unjustifiably dismissed by JSB
- If Mr Rush was unjustifiably dismissed, should later discovered misconduct relating to his behaviour preclude and/or reduce any remedies being awarded to him

### **Background facts**

[5] Mr Kerry Lupi and Mrs Susan Lupi are shareholders of JSB which is an earthmoving business. They both work in the business; Mr Lupi operates as General Manager and Mrs Lupi as the Office Manager and Health and Safety Representative. JSB currently employs approximately 60 employees.

[6] Mr Rush commenced employment with JSB as a Machine Operator after an interview with Mr Lupi on or about 10 January 2011. Mr Rush was not presented with a written employment agreement at the commencement of his employment and said that no hours or days of work were mentioned by Mr Lupi, but that he had worked 5 days a week.

[7] Mrs Lupi said she provided Mr Rush with an induction programme shortly after he commenced employment when she explained health and safety procedures and presented him with a file containing JSB policies and procedures. This included a written employment agreement.

[8] Mr Rush did not recall the induction programme, and Mrs Lupi had not retained a copy of the employment agreement she said had been provided to Mr Rush on that occasion.

[9] Mr Rush said that he had not been aware that Sunday working was expected until after he had commenced employment and he had been asked to work on a Sunday. He had declined to do so as he required Sundays off so as to spend time with his wife who worked on a Saturday.

[10] Some 20 months after Mr Rush commenced employment with JSB, he was presented with a written individual employment agreement (the Employment Agreement). The Employment Agreement was dated 1 October 2012 and was signed by both Mr Rush and Mr Lupi on 24 September 2012.

[11] The Employment Agreement stated at:

*Clause 4.2: Days: Sunday to Friday – No work to be undertaken on Saturday.*

*Clause 9.3: Annual holidays shall be taken at a time to be agreed by the employer and the employee. Generally annual*

*leave is to be taken between May and September. Four weeks' notice is required for employees taking leave over these times.*

*Clause 26: Abandonment of employment: When an employee is absent from his or her place of work for a continuous period of three working days the employee shall be deemed to have abandoned their employment.*

[12] Mr Rush had signed beneath clause 31 which stated:

*Clause 31: Variation of employment agreement: This agreement may only be amended or varied by written consent signed by both parties. I, understand the conditions of employment set out above and accept those terms and conditions.*

[13] Mr Rush said that he had made it clear to Mr Lupi after reading the Employment Agreement that there were some clauses in it with which he did not agree and in particular clause 4.2 which set out his times and hours of work as being Sunday to Friday with no work to be undertaken on Saturday.

[14] He had told Mr Lupi that he did not want to sign something which he did not believe accurately reflected his conditions of employment, based on his previous 20 months employment with JSB. Mr Lupi assured him that all of the clauses did not apply to him and on that basis; Mr Rush signed the Employment Agreement.

[15] Mr Lupi confirmed that Mr Rush had been reluctant to sign the Employment Agreement, that they had discussed Sunday working and he had told Mr Rush that he was not required to work every Sunday, but would need to do so when necessary.

[16] Throughout his period of employment with JSB, Mr Rush said that he had only worked on five Sundays when he had either agreed or volunteered to work if JSB needed work completed urgently or the work was on a contract basis where every machine hour was crucial to JSB's profit. The worked Sundays all pre-dated the date of signing the Employment Agreement.

[17] Following the signing of the Employment Agreement, Mr Rush did not work on any Sunday.

*Annual leave 22, 23, 24 April 2014*

[18] Mr Rush explained that because in 2014 Easter Monday fell on Monday 21 April 2014 and Anzac Day fell on Friday 25 April 2014, he and his wife had decided that he should apply for three days' annual leave for 22, 23 and 24 April 2014. They had made some

tentative arrangements to go on holiday subject to the three days' annual leave being approved.

[19] On 27 January 2014, he submitted a timesheet as he was required to do, and wrote on the back of it asking for three days' annual leave:

*Marlene/Sue,*

*Hi, could you please "pencil me in" for the three days annual leave for the following days please;*

*April 22nd 2014*

*April 23rd 2014*

*April 24th 2014.*

*If there is a problem with these dates, please contact me ASAP. As I have made arrangements and will have to make alternative plans.*

*Cheers. Wayne*

[20] At the Investigation Meeting Mr Rush confirmed that despite having stated he had made arrangements on the back of the timesheet, he had not in fact done so.

[21] Mrs Lupi said that at the beginning of 2014 she and Mr Lupi had already recognised that there would be no leave granted for the period between Easter and Anzac Day as JSB was contractually obliged to complete a lot of work during that period, however they were aware that some employees might wish to have an extended period of leave at that time. Mrs Lupi said she received Mr Rush's request for annual leave on 28 January 2014.

[22] When Mrs Lupi received Mr Rush's request for three days' annual leave on 22, 23 and 24 April 2014, she said she had advised him by telephone that same day, 28 January 2014, that he could not take leave at that time due to the pressure of work. She said that Mr Rush's response had been: "I am going to *take them off anyway*", and she had been surprised by his defiant attitude.

[23] Ms Lupi confirmed to Mr Rush in writing in a memorandum dated 28 January 2014 that his leave was refused. The memorandum stated:

*Dear Wayne*

*LEAVE REQUEST FOR 22nd 23rd and 24th of APRIL 2014.*

*As per our telephone conversation this morning 28th of January 2014, I just wanted to confirm with you in writing that your request for annual leave for above mentioned days has been refused.*

*If you wish to discuss this please contact Kerry.*

[24] Mr Rush said a week or so after 28 January 2014, all employees received a letter with their payslips advising that no leave would be granted over the period he had applied for

between Easter and Anzac weekend. This letter was dated 28 January 2014. The letter was headed *Staff Note for 28 January 2014*” and stated:

*Hi again everyone,  
We are at the end of January already ...*

***EASTER WEEKEND:***

*It may be tempting to want to take three days extra annual leave between Easter Monday and Anzac Day (Friday) in April (22nd, 23rd, 24th). However, with the current workload for the season, management will NOT be authorising any staff members to have this time off.*

[25] Mr Rush said he decided to discuss the matter with Mr Lupi and tried to set up a meeting with him over the following two weeks but was unable to do so. However, in March 2014 he had heard Mr Lupi speaking on the radio transmitter (RT) and understood he was going to Murchison Quarry, so he travelled there to meet with him.

[26] It is agreed by Mr Rush and Mr Lupi that they had a meeting at Murchison Quarry during which a heated discussion took place.

[27] Mr Rush and Mr Lupi both agreed that Mr Lupi had told Mr Rush that if he agreed to work three Sundays, JSB would allow him to take the time off he required.

[28] Mr Rush said he had refused to work on the three Sundays and drove off, however he had returned to apologise to Mr Lupi, who Mr Rush alleges then told him he could take the three days’ leave he had requested.

[29] He said he had then left Murchison Quarry and retold the conversation between him and Mr Lupi to other employees.

[30] Mr Jeffrey Insley, Truck Driver, said he had been one of a group of employees to whom Mr Rush had spoken after his meeting with Mr Lupi, and he had told them that Mr Lupi had agreed to give him the time off, telling them that: “*I’ve won. I’ve won*”. When questioned at the Investigation Meeting, Mr Insley confirmed that as a result of that conversation, he believed Mr Lupi had given Mr Rush the three days leave.

[31] Mr Lupi said that that he had agreed to allow Mr Rush to take the three days leave, but only on the basis that he worked on three Sundays prior to that. He had done so because he had refused leave to other employees who had also requested leave over the period 22, 23 and 24 April 2014, and he required justification for allowing Mr Rush to take it. However Mr Rush had told him his working on Sundays was not negotiable and had stormed off.

[32] Mr Lupi said he had then told Mr Read what he had said to Mr Rush immediately afterwards. In his affidavit evidence, Mr Read stated that Mr Lupi had spoken to him shortly after his discussion with Mr Rush, and indicated that he had told Mr Rush that if he required the three days leave, he would have to work three Sundays.

[33] Mr Read stated that Mr Rush had also spoken to him following his (Mr Read's) discussion with Mr Lupi and told him: "*If I take 3 days off, he wants 3 Sundays*".

[34] Mr Lupi said that after the discussion between them, Mr Rush did not work on any Sundays; and he had failed to turn up for work on the days for which he had sought leave, being 22, 23 and 24 April 2014. He said he had not known that Mr Rush had not come into work until 22 April 2014 when Mr Read had called him to say that Mr Rush was not at work.

[35] Mrs Lupi said she had tried to make contact with Mr Rush's wife at her workplace on 22 and 23 April 2014 and had been informed that Mrs Rush was on leave.

[36] Mr Rush said consistent with his belief that Mr Lupi had agreed to him having the leave, he had taken annual leave on 22, 23 and 24 April 2014. He said Mr Dillon Read who normally gave him a lift to work each day had not called to pick him up on 22 April 2014 as he believed that Mr Dillon Read was aware that he was on annual leave on those dates.

[37] Mr Dillon Read confirmed at the Investigation Meeting that he had not picked up Mr Rush on 22, 23 and 24 April 2014 as Mr Rush had told him he would be on leave.

[38] Mr Rush said despite being contactable on his mobile telephone during the period he was on leave, he received no calls or communication from JSB.

[39] Mr Read in a supplementary affidavit stated in answer to a question posited by Counsel for the Applicant that Mr Lupi had told him on or about 24 April 2014, although he was not sure of the exact day or date, that Mr Rush was no longer employed by JSB and there was no need for Mr Dillon Read to pick him up on 28 April 2014.

#### *Termination of employment 26 April 2014*

[40] Mrs Lupi said that once she was aware that Mr Rush was not at work on 22 April 2014, she had tried to make contact with Mrs Rush at her place of work on that date and the following day, 23 April 2014. She had been advised by someone at Mrs Rush's place of work that she was on leave.

[41] Mr Lupi said that once he and Mrs Lupi realised that Mr Rush had taken leave without approval they had consulted the Employment Agreement and it had seemed clear to

them that Mr Rush had abandoned his employment in accordance with clause 26 of the Employment Agreement.

[42] They allege that they had contacted the then Department of Labour on 24 April 2014 to seek advice and confirmed that clause 26 of the Employment Agreement was in place. They had understood from the advice they received that they were entitled to terminate Mr Rush's employment on the grounds of his abandonment of the job.

[43] Both Mr and Mrs Lupi confirmed at the Investigation Meeting that they had not explained the full circumstances surrounding Mr Rush's absence when speaking to the Department of Labour.

[44] Whilst I accept that a telephone call may have been made to the Department of labour, there is no evidence relating to the telephone call and neither Mr nor Mrs Lupi can recollect the name of the person giving the advice. Also I note that the telephone call was made on Thursday 24 April 2014, before Mr Rush had been absent for 3 days.

[45] Mr Lupi said he had telephoned Mr Rush on 26 April 2014 and confirmed that his employment was terminated.

[46] Mr Rush said he was at home on the evening of Saturday, 26 April 2014, having dinner when his mobile telephone rang. He did not answer the call in time to speak, but a message had been left on the phone by Mr Lupi. The message stated:

*Wayne, Kerry here, Kerry Lupi from JSB Construction.*

*Just to inform you that your employment with us has been terminated.  
No one will be picking you up on Monday morning mm*

*... If you want to get in touch with me give me a call and we'll discuss  
it.  
Thank you, bye.*

[47] Mr Rush said he had telephoned Mr Lupi back after listening to the message in order to clarify the meaning of the message. Both Mr Wayne and Mrs Lupi made a transcript of that call. Although there are some differences, both transcripts confirm the following exchanges:

- Mr Lupi "you no longer have a job with us, you abandoned your position".
- Mr Rush: "What? How is that possible I'm on holidays"
- Mr Lupi responded that Mr Rush's holiday request had been declined in writing.

- Mr Wayne asserted that Mr Lupi had agreed he could have the days off following their discussion at Murchison quarry,
- Mr Lupi responded that he had agreed that Mr Rush could have the days provided he worked three Sundays.
- Mr Rush stated that Mr Read had known that he was on holiday, that *“everyone knew I was on holidays”*.
- Mr Lupi had replied *“everyone, including management did not know you were on holiday”*.

[48] Mr Rush’s employment with JSB was terminated summarily on 26 April 2014.

*Later discovered misconduct*

[49] Once he realised Mr Rush had been dismissed, Mr Les Vincent, Truck Driver, said he had decided to make JSB aware of verbal threats Mr Rush had allegedly made during his employment with JSB.

[50] Mrs Lupi said that after becoming aware of Mr Vincent’s verbal allegations about Mr Rush, she and Mr Lupi had received a letter from Mr Vincent in July 2014 setting out his allegations about Mr Rush. The conduct complained of included Mr Rush bullying and intimidating Mr Vincent, threatening to damage JSB equipment and that, should he be dismissed, that he would, in regard to Mr and Mrs Lupi: *“stab them both in their beds while they slept and burn the house down on them”*.

[51] Mr Vincent said he had not passed these alleged threats on to Mr and Mrs Lupi during Mr Rush’s employment as he had not taken them seriously at the time since he had not been dismissed, nor had he mentioned them to Mr Read. However after Mr Rush was dismissed he said he would have felt responsible if the threats had been carried out by Mr Rush and he had not spoken out.

[52] Mr Jeffrey Insley, Truck Driver, said he had discussed the alleged threats with Mr Vincent; however he also had not taken them seriously, and had not reported them to Mr Read, or to Mr and Mrs Lupi.

[53] Mr Rex Taylor, Machine Operator, said that during Mr Rush’s employment with JSB he had discussed RT usage with him as he believed he used it inappropriately sometimes, and that there had been a heated exchange between them about it on one occasion, during which



Mr Rush threatened to punch him. However he had not regarded this as a serious threat and had not reported it.

[54] When questioned at the Investigation Meeting Mr Taylor agreed that Mr Rush had not been the only employee to behave inappropriately on the RT on occasion.

[55] Mr Peter Lineham, ex-employee Machine Operator, said he had been approached by Mr Lupi some time after Mr Rush's dismissal and asked to make a statement about Mr Rush's behaviour during the course of his employment.

[56] In particular in the statement he had alluded to a period of sick leave Mr Rush had taken in March 2014 which he had not believed to have been genuine at the time, to alleged misuse of the RT system by Mr Rush, and to Mr Rush's bullying attitude to other employees without stating names or specific incidents..

[57] Mr Taylor said that he and Mr Rush had worked together: "*reasonably well*" and Mr Insley said that he and Mr Rush got on: "*most of the time*".

[58] Mr Read stated that Mr Rush was a good employee and good at his job. He stated that in his 30 years of experience as a Foreman he would talk to the employees and if they had any problems they would tell him about them, however he had not been aware of any problems between Mr Rush and the other employees

[59] Mr Dillon Read said that he had a good relationship with Mr Rush whom he described as: "*a good bloke*". He said that he was not aware of any threats Mr Rush had made regarding damage to JSB property, or harm to Mr and Mrs Lupi.

[60] Mr and Mrs Lupi said that as a result of Mr Vincent's allegations and their subsequent approach to other employees to elicit statements about Mr Rush's behaviour, they had reported the matter to the police in July 2015, some twelve months following the termination of Mr Rush's employment with JSB.

[61] Mr Lupi said he had visited a police station and made a report to a family member who was a serving police officer some months after Mr Rush's employment with JSB had been terminated. Mr Lupi stated in his evidence that: "*We were very disappointed that the Police did not follow through*" and rather than await action by the police Mrs Lupi stated that she and Mr Lupi had requested that trespass notices be issued against Mr Rush.

[62] Mr Rush said that in July 2014 he became aware that allegations had been made against him in regard to alleged misconduct whilst he was employed at JSB. He had been

made aware that the allegations were that he had threatened to kill Mr and Mrs Lupi, and this matter had been reported to the police.

[63] On 6 October 2015, some 18 months after his employment at JSB had ended; he had been served with trespass notices.

[64] Mr Rush said that on 17 January 2016, two police officers had called at his home, parking their police car in his driveway. They had spoken to him on his doorstep, told him his rights, and said they had come to issue a warning in relation to the allegations.

[65] Mrs Rush said she had been present at the time and was very concerned that Mr Rush was going to be arrested.

[66] Mr Nalder advised that subsequent investigations have established that there is an ongoing police investigation to ascertain why there appears to have been no details of any complaints having been received by the police from JSB about Mr Rush, or any police investigation into that matter.

[67] A Statement of Problem was lodged with the Authority on 28 July 2015. The parties subsequently attended mediation but this did not resolve the employment relationship problem.

## **Determination**

### **Was Mr Rush unjustifiably dismissed by JSB?**

[68] The Employment Agreement which had been issued to Mr Rush and which he had signed stated at clause 26:

26      *Where the employee is absent from his or her place of work for a continuous period of three working days the Employee shall be deemed to have abandoned their employment.*

[69] Mr Lupi sought to rely on this clause when advising Mr Rush on 26 April 2014 that his employment had been terminated.

[70] In *Cross v Onerahi Hotel Ltd*<sup>1</sup> Judge Inglis stated:<sup>2</sup>

*An employee may be deemed to have abandoned their employment if they fail to attend work for a consecutive number of days without good*

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<sup>1</sup> [2014] NZEmpC 26

<sup>2</sup> Ibid at [32]

*cause or communication with his or her employer. In such circumstances, the employee has essentially unilaterally terminated the employment agreement and there is no dismissal.*

[71] However the Court of Appeal in *E N Ramsbottom Ltd v Chambers*<sup>3</sup> accepted a submission that an employer must be cautious in drawing the inference that an employee has abandoned their employment and that it faces a high threshold if contending that the employment ended at the employee's initiative. The Court stated:<sup>4</sup>

*... the employer should be cautious in drawing that inference and must face a high threshold if contending that the employment ended on the employee's initiative in that way. There is substantial force in that submission and clearly the need for trust and fair dealing in the employment relationship should encourage the employer to make inquiries of the employee where the employee has not clearly evinced an intention to finally end his or her employment*

[72] Whilst Mr Lupi may have considered that Mr Rush had taken annual leave without authorisation, which may have given him grounds to embark upon a disciplinary investigation, I consider that it was unreasonable in the circumstances for him to conclude Mr Rush intended to abandon his employment. These circumstances included:

- Mr and Mrs Lupi's awareness that Mr Rush had sought leave to take three days annual leave between the Easter Monday and ANZAC Day 2014;
- Mrs Lupi's evidence that she was aware that Mr Rush had said he intended to take the three days whether leave was authorised or not;
- Mr Lupi and Mr Rush's conversation at the Murchison Quarry about the three day leave request;
- Mr Rush's having informed other employees that he had been given leave and in the case of Mr Dillon Read, that he would be on leave and did not require a lift to work on those three days, information available to Mr Lupi upon enquiry; and
- Mr Lupi having requested Mr Read to inform Mr Dillon Read not to pick up Mr Rush on Monday 28 April 2014, which I find adds weight to the conclusion that Mr Lupi was aware Mr Rush intended to return to the workplace after the ANZAC Day weekend.

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<sup>3</sup> [2000] 2 ERNZ 97

<sup>4</sup> Ibid at [26]

[73] I find that the mutual requirements laid upon both employers and employees in accordance with s 4 of the Act to deal with each other in good faith required Mr Lupi in these circumstances to make further enquiries of Mr Rush to ascertain his intention regarding ongoing employment before safely concluding that abandonment had taken place. I observe that this was particularly important given that there was no evidence from, or suggestion by, either party that Mr Rush did not intend to report for work following the ANZAC weekend. He had not clearly evinced an intention to finally end his employment.

[74] I find that the good faith requirements to be even more important given Mr Rush's satisfactory employment throughout the previous more than three years with JSB in which there had been no disciplinary issues, and Mr Lupi's own evidence that he regarded Mr Rush as a good employee.

[75] I determine that Mr Rush did not abandon his employment and was unjustifiably dismissed by JSB.

**Should later discovered misconduct preclude any remedies being awarded to Mr Rush?**

[76] Remedies awarded to an employee who has been unjustifiably dismissed by an employer may be reduced if there has been contributing behaviour by the employee pursuant to s 124 of the Employment Relations Act 2000 which states:

*Where the Authority of the court determines that an employee has a personal grievance, the Authority of the court must, in deciding both the nature and extent of the remedies to be provided in respect of the personal grievance,-*

*(a) Consider the extent to which the actions of the employee contributed towards the situation which gave rise to the personal grievance; and*

*(b) If those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[77] In this case it is submitted on behalf of JSB that the later discovered alleged misconduct of Mr Rush by Mr and Mrs Lupi should have the effect of reducing any remedies awarded to Mr Rush by 100%.

[78] The leading case in the area of subsequently discovered misconduct is *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* <sup>5</sup>. In that case the Court of

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<sup>5</sup> [2008] NZCA 128

Appeal stated: <sup>6</sup> “... subsequently discovered information could not be taken into account under s. 124, but could and should have been taken into account when determining wages reimbursement and humiliation compensation under s 123”.

[79] The Court of Appeal referred to the common law principle that a wrongdoer should not benefit from his or her own wrong, citing the comment by Judge Palmer in *Carlton and United Breweries (NZ) Pty Ltd v Bourke*<sup>7</sup> at page 7 that:

*To adopt Mr Bumble's aphorism "The law [would indeed be] an ass" if, in an employment setting, the Tribunal - and now this Court upon appeal - was to ignore as irrelevant deliberate and serious misconduct by an employee committed against and significantly affecting his employer, which inherently comprises a very grave/destructive abuse of the basic level of confidence and trust which underpins the employment relationship simply because such misconduct was not known to the employer at the time it dismissed the particular employee for unrelated alleged misconduct and/or non-performance occurring in the course of his/her employment.*

[80] Accepting therefore that subsequently discovered misconduct may in certain circumstances affect remedies awarded; I move to consider whether the allegations of misconduct made against Mr Rush should do so. I note that the allegations of subsequently discovered misconduct are unrelated to the reasons for Mr Rush's unjustifiable dismissal.

[81] There is no doubt that the alleged misconduct is of such a serious nature as to constitute a grave abuse of the employer's trust and confidence if true

[82] In determining the credibility of such allegations, noting that by their very nature there has been no proper process conducted in regards to them, I note that prior to his dismissal, Mr Rush was regarded as a good employee by Mr Lupi and Mr Read, his Foreman. During his more than three years of employment there had been no disciplinary issues and his performance reviews had been very good.

[83] The work environment has been described by Mr Read in his affidavit evidence as unique, with 60-70 employees working in a forestry environment in which there was always 'banter' and 'cheeky remarks' between them.

[84] The evidence at the Investigation Meeting established that it was a 'robust' working environment in which comments between the employees were of a more strenuous nature and regarded as not to be taken as seriously than they would otherwise be in a different working environment.

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<sup>6</sup> Ibid at [104]

<sup>7</sup> [1994] 2 ERNZ 1

[85] The evidence of Mr Dillon Read and Mr Read was that Mr Rush had a good sense of humour; they liked him and had not heard him making any threats. Mr Read said despite his talking to the employees on a regular basis, there had been no complaints of any nature made to him regarding Mr Rush's behaviour.

[86] Mr Vincent, despite having stated that he had not made the alleged threats known to Mr and Mrs Lupi until after Mr Rush was dismissed because he felt intimidated by him, nonetheless said he had had a reasonable relationship with Mr Rush.

[87] Mr Insley also said he had had a reasonable relationship with Mr Rush "*most of the time*".

[88] I also take into account the fact that despite the serious nature of the allegations made by Mr Vincent, namely of Mr Rush threatening damage to JSB property and to kill them if he was dismissed, Mr and Mrs Lupi took no steps towards safeguarding themselves and their property against Mr Rush's alleged threats for over a year after his dismissal.

[89] There is no evidence that Mr Rush threatened Mr and Mrs Lupi or JSB's business since his dismissal.

[90] Further, despite Mrs Lupi's statement that they (Mr and Mrs Lupi) made a complaint to the police relating to threats made by Mr Rush, the Police Support Officer, Whangarei Police station confirmed, in writing, to Mr Nalder that "*There are no formal complaints of this nature reported to NZ Police against your client Wayne Rush.*"

[91] I find that this indicates that they did not regard the allegations as sufficiently credible as to take any preventive action.

[92] Taking all these considerations into account, I determine that there is no reliable evidence of subsequently discovered misconduct which would give rise to a reduction in remedies.

### **Remedies**

[93] Mr Rush has been unjustifiably dismissed and he is entitled to remedies.

#### *Lost Wages*

[94] Mr Rush obtained alternative employment on 1 August 2014.

[95] Also, pursuant to s 128(3) of the Act I order that JSB pay to Mr Rush lost wages from 26 April 2014 until the date he obtained alternative employment on 1 August 2014 based upon his average weekly earnings.

[96] From the total sum of lost wages awarded an amount equal to two weeks' pay shall be deducted by JSB in respect of the notice period already paid to Mr Rush.

[97] JSB is also to pay to Mr Rush the relevant holiday pay to which he would have been entitled had his employment continued throughout the period 26 April to 1 August 2014.

[98] I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

*Compensation for Hurt and Humiliation under s 123 (1) (c) (i).*

[99] As a result of the termination of his employment, Mr Rush said he had felt humiliated. He had also faced significant financial stress in circumstances in which he and his wife had just purchased a home, and they had had to seek financial assistance from family members in order to meet their financial commitments.

[100] I further observe that the unproven allegation of JSB that he had threatened to kill Mr and Mrs Lupi, and the subsequent events connected with the allegations regarded his threatening behaviour including the police visit to his home - despite the police stating that no official complaint had been received - had the effect of exacerbating the hurt, humiliation and injury to feelings that Mr Rush had experienced as a result of his unjustifiable dismissal.

[101] I order that JSB pay to Mr Rush the sum of \$15,000.00, pursuant to s 123(1) (c) (i) of the Act.

*Contribution*

[102] I am required under s. 124 of the Act to consider the extent to which the actions of Mr Rush contributed towards the situation that gave rise to the personal grievance and may influence the remedies awarded.

[103] It is common ground between the parties that Mr Rush's application for leave on 22, 23 and 24 April 2014 had been declined by Mrs Lupi, and that during the later discussion

between himself and Mr Lupi, Mr Lupi stated that he had granted the requested leave conditional upon Mr Rush working three Sundays prior to taking the leave.

[104] In circumstances in which JSB had informed all employees by way of a notice on 28 January 2014 that there would be no leave granted between the Easter Monday and ANZAC Day, I accept that Mr Lupi made a stipulation that Mr Rush should provide something to JSB to justify his being granted the leave, in this case the working of three Sundays when it was well known that Mr Rush did not work on Sundays.

[105] Mr Read confirmed in affidavit evidence that shortly after Mr Lupi's meeting with Mr Rush, Mr Lupi had told him of the leave being granted to Mr Rush.

[106] Mr Read also confirmed in affidavit evidence that Mr Rush had informed him of the conditional nature of the leave after his (Mr Read's) discussion with Mr Lupi.

[107] Mr Rush said that he considered the stipulation for Sunday working had been unreasonable given that he had already accrued the leave and he did not work, and after signing the Employment Agreement had not worked, on a Sunday.

[108] Having considered the nature of the evidence, I find that it is more likely than not that leave was granted conditional upon Mr Rush working three Sundays in advance. He did not do so.

[109] I therefore conclude that Mr Rush took the three days leave on 22, 23 and 24 April 2014 knowing that the leave was unauthorised knowing that leave had to be approved pursuant to clause 9.2 of the Employment Agreement.

[110] I find contributory fault on the part of Mr Rush and reduce the remedies awarded by 30% pursuant to s 124 of the Act.

### **Costs**

[111] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.



[112] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**