Note: An order prohibiting publication of some evidence applies to this determination.

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 266
5518662

	BETWEEN	KERRY STACE Applicant
	AND	AURORA LAW LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Dean Organ, Advocate for the Applicant Andrew Schirnack and Jeremy Ansell, Counsel for the Respondent
Investigation Meeting:	22 and 23 February 2016
Submissions and further correspondence from the parties:	Between 4 March and 13 May 2016
Determination:	8 August 2016

DETERMINATION OF THE AUTHORITY

A. The employment relationship between Kerry Stace and Aurora Law Limited (ALL) ended because of actions by ALL that were unjustified.

B. In settlement of Mr Stace's personal grievance for unjustified dismissal, ALL must pay him the following sums within 28 days of the date of this determination:

(i) $60,576 in reimbursement of lost wages; and

(ii) $7,000 compensation for humiliation, loss of dignity and injury to his feelings.

C. ALL did not establish Mr Stace had breached duties owed to it and its application for a penalty for such breaches is declined.

D. Costs are reserved, with a timetable set if a determination by the Authority is required.

Employment Relationship Problem

[1] Kerry Stace claimed he was unjustifiably dismissed from his position as a consultant solicitor to Aurora Law Limited (ALL), a law firm based in Waiuku. He said his dismissal by Mandy Rusk, ALL's principal and director, occurred during a meeting on 15 August 2014 and was confirmed by her during a telephone conversation with him on 17 August 2014. During that phone call and in a letter delivered to Mr Stace on 18 August Ms Rusk told him the locks at ALL's premises had been changed.

[2] The business of ALL incorporated the business of von Sturmer Ringer, a firm of barristers and solicitors in which Mr Stace was a partner for 41 years. From March 2013 he had been its sole remaining partner.

[3] In mid-2013 Mr Stace and Ms Rusk arranged for the firm's business and assets to be sold to her or her nominee. Ms Rusk then began work as a solicitor of the firm until the sale was complete. Her purchase was settled on 31 March 2014 and Ms Rusk arranged for the business to operate through her nominee, ALL.

[4] Under a term of the sale agreement Mr Stace also entered an employment agreement with ALL on 1 April 2014 in a position described as a consultant solicitor. Clause 6A of his employment agreement stated his employment "shall be up to three years but a minimum of two years".

[5] ALL denied Ms Rusk had dismissed Mr Stace in August 2014. Instead ALL said Ms Rusk along with Mark Potter, her personal partner and an ALL shareholder, met with Mr Stace on 15 August to discuss various concerns about his work and conduct. During the discussion they suggested Mr Stace might wish to consider retiring from his employment. In a telephone conversation on 17 August Ms Rusk had advised Mr Stace he should remain away from work while she took legal advice about concerns she had raised on 15 August. ALL said Ms Rusk and Mr Potter then

met with Mr Stace and his employment advocate on 26 August to clarify that he had not been dismissed. Ms Rusk proposed addressing her concerns with Mr Stace through a disciplinary process but Mr Stace refused to take part in such a process. He arranged to collect his belongings from ALL premises on 27 August 2014 and had not worked for it since. ALL's position was that Mr Stace's employment had thereby ended by his actions rather than as a result of any unjustified action by ALL.

[6] In responding to Mr Stace's allegations about the end of his employment, ALL made its own claims that he had breached his duties as an employee. It sought an order for a penalty to be imposed on him for those breaches. ALL alleged Mr Stace had required payment in cash from clients for work done as a notary public and some legal services but had then not properly accounted for and passed on that money to ALL. It also said he had "accessed inappropriate websites" while at work. Mr Stace denied those claims.

Order prohibiting publication of some evidence

[7] Publication is prohibited, in relation to this proceeding, of the names of any clients of von Sturmer Ringer and ALL referred to in the evidence given in the investigation. The names of those clients have not been used in this determination.

Issues

[8] From the parties' respective claims the following issues arose for investigation and determination:

(i) Were notarial services (carried out by Mr Stace in his capacity as a Notary Public) part of the business sold by him to ALL so that his employment as a consultant solicitor required him to account to ALL for fees paid to him for work done as a notary?

(ii) Did clause 6A of Mr's Stace's employment agreement with ALL create fixed-term employment of at least two years?

(iii) Did Mr Stace breach his duties as an employee of ALL by:

  (a) Accessing inappropriate websites while at ALL's offices; and

  (b) Wrongfully keeping fees paid in cash by some clients for notary public work rather than accounting to ALL for such payments; and

  (c) Wrongfully keeping fees paid in cash by some clients for legal services rather than accounting to ALL for such payments?

(iv) Did ALL's employment of Mr Stace end by his refusal to continue the employment relationship on 26 August 2014 or by earlier unjustified acts amounting to dismissal by ALL?

(v) If Mr Stace was unjustifiably dismissed, what remedies should be awarded considering:

(a) Lost wages, subject to reasonable endeavours to mitigate his loss; and

(b) Compensation for hurt and humiliation (subject to evidence)?

(vi) Should any remedies awarded to Mr Stace be reduced due to blameworthy conduct by him contributing to the situation giving rise to his grievance?

(vii) If Mr Stace was found to have breached his duties to ALL as an employee, should a penalty be imposed and, if so, should some or all of such a penalty be awarded to ALL?

(viii) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[9] In determining those issues I took account of evidence from the following witnesses, given in written witness statements and orally in answers to questions asked of them at the investigation meeting: Mr Stace, Ms Rusk, Mr Potter, Mr Stace's accountant Lynda McConnell, ALL's practice manager Bronwyn Sloane, and Roger Eades, a lawyer and notary public. Mr Eades' evidence concerned the work and practice of notaries. He had conducted training for candidates seeking appointments as a notary and had compiled a handbook on notarial practice.

[10] Ashley Balls, a legal consultant who brokered the sale of the business by Mr Stace to Ms Rusk, also provided a witness statement and answered questions at the investigation. His evidence proved to have a number of inconsistencies and lapses in recall that rendered it of no assistance in resolving an important dispute of evidence between Mr Stace and Mr Rusk as to whether the provision of notary services by Mr Stace formed part of the business sold to Ms Rusk. Instead that dispute had to be resolved from the evidence of Mr Stace and Ms Rusk and what could be discerned about their intentions from the terms of the sale and purchase agreement and Mr Stace's employment agreement with ALL.

[11] The parties' representatives provided detailed closing submissions, both orally at the investigation meeting and later in writing, on the factual and legal issues. Subsequently ALL proposed further evidence should be adduced in respect of some evidence Mr Stace gave about his dealings with the Law Society. It then took some time to explore with the parties and the Law Society what the prospects were for getting such evidence. Ultimately ALL sought not to further its proposal.

[12] While I have closely reviewed the extensive oral and written evidence of witnesses, relevant documents and the parties' closing submissions, this determination has limited its account of that material to what appeared necessary to explain conclusions reached. As permitted by 174E of the Employment Relations Act 2000 (the Act) findings of fact and law are stated, conclusions on issues necessary to dispose of the matter are expressed and orders made are specified.

Notarial services – part of the business and part of Mr Stace's duties to ALL?

[13] In addition to being a lawyer Mr Stace was also a Notary Public. The answers to two initial questions about his work as a notary were relevant to then determining subsequent issues of whether ALL treated Mr Stace fairly over its allegations about the fees he took for notarial work and whether he was in breach of duties owed to it in respect of such work (with the prospect of a penalty being awarded if he was). Those two questions have consequently been addressed first in this determination.

[14] The usual principles of contractual interpretation guide consideration of the terms of the sale agreement and the employment agreement. Broadly those principles required examination of the actual and ordinary meaning of the words used in those documents and cross checking provisional views reached against other evidence about the context in which those agreements were made. If the language used appeared ambiguous, its meaning had to be determined on the basis of what the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Evidence of what was objectively apparent about the parties' intentions at the time was relevant to that assessment but evidence of what each party subjectively intended or understood was not.[1]

[1] *New Zealand Professional Firefights Union v The New Zealand Fire Service Commission* [2011] NZEmpC 149 at [17].

(i) Were the provision of notarial services by Mr Stace discussed as part of the sale?

[15] Ms Rusk's evidence contrasted sharply with that of Mr Stace about whether the provision of notarial services were expressly discussed as part of negotiations for sale of the business. She had a firm view that Mr Stace had talked about continuing to provide notary services because it brought clients into the firm and that he had not indicated he would continue to do notary work separately from the business she was buying. Mr Stace was of an equally firm view that notary work was not discussed at meetings held in May and June 2013 to negotiate his sale of the business to Ms Rusk. There was no sufficient basis to favour the recall of either witness over the other about what was or was not said on that subject in their negotiations.

(ii) Did the sale agreement and the employment agreement include notarial services?

[16] The subjective accounts of Ms Rusk and Mr Stace revealed clearly different assumptions. She had assumed Mr Stace's notarial work was meant to be part of the business she bought, for the period of between two and three years that he had agreed to keep working for it. On the contrary Mr Stace had assumed his role as a Notary Public was personal and not part of the consultant solicitor role he would carry out in the business under Ms Rusk's ownership. Neither subjective account, offered in hindsight, could determine that issue. Rather the arrangements regarding notarial work needed to be ascertained on basis of what the agreements, and the context in which they were made, objectively indicated about the intention of the parties.

[17] The von Sturmer Ringer practice had promoted itself on the basis that notarial services (such as verifying the authenticity of documents for overseas property and other transactions) were available. The signage on the window of its premises and its letterhead referred to the firm as "lawyers and notary public". The small annual fee for Mr Stace's membership of the Society of Notaries, of around $80 in 2013, was paid from firm funds.

[18] From the establishment of ALL the firm's letterhead and Mr Stace's business card referred to him as a consultant and Notary Public. Ms Rusk arranged for a local newspaper to publish an article about the firm in July 2014 which referred to Mr Stace as its consultant solicitor and the only Notary Public in Waiuku. Mr Stace arranged for the allowances paid to him under his new employment agreement with ALL to

include payment of his annual "notarial fees". The phrase referred to the Society of Notaries membership fee.

[19] The sale agreement was drafted from a standard template for the sale of a law firm that Ms Rusk had obtained at a Law Society seminar. As lawyers who also hold the office of Notary Public are found at only a small portion of law firms the template's standard terms did not include any express references to notarial work. ALL submitted however that the agreement to buy the business and its assets as a going concern, in the context of Mr Stace providing notarial services in that business at the time, meant that work and his conduct of it fell within the agreement's definition of the business. That definition referred to the business as the provision of legal "and other ancillary services". I was not persuaded that a reasonable observer, with all the background knowledge available to the parties, would have understood those words to have the meaning that ALL had submitted should be attributed to it. The word "ancillary" related to the provision of "legal services", a term that could be expected (objectively in the particular context used) to have the same meaning as the same phrase used in the Lawyers and Conveyancers Act 2006. In that Act legal services are defined as services provided by a person carrying out "legal work" for any other person. While such work is defined as including the "review of any document", its meaning could not reasonably be stretched to include what a Notary Public does in authenticating documents. It is an independent task that is not necessarily in support of or additional to legal work being done for the person who seeks notarial assistance.[2]

[20] Ms Rusk had drafted Mr Stace's employment agreement with ALL. It defined the duties he was to carry out as a consultant solicitor as "those required of a Barrister and Solicitor of the High Court … within the limits of the consultant solicitor's competencies as required". He was also required to act on behalf of clients "referred to him on legal matters" and not to undertake "any additional engagements" that would interfere with performance of his duties to ALL.

[21] The Notary Public role was not one required of a barrister and solicitor as it has a distinct and different basis of appointment. The phrase "legal matters" similarly does not extend to what is done in the capacity of a Notary Public (although notaries

[2] See definition of "ancillary", Concise Oxford English Dictionary (11th edition, 2004).

are generally also lawyers). The notary work was not an additional engagement interfering with performance of his duties to ALL. Rather, the argument was only over whether the fees for any such work should have gone to ALL and not Mr Stace personally.

[22] The payment of the Society of Notaries annual membership fee, as a term of the employment agreement, did not confirm notarial work was to be done for the financial benefit of ALL. The payment was one of three allowances sought by Mr Stace – for a newspaper subscription, a contribution to mobile telephone and internet costs, and the society's fee. Each of those allowances was arguably to provide a personal benefit rather than reimburse Mr Stace for activities carried out as part of his employment duties.

[23] As a cross check to those views on the interpretation of the sale agreement and the employment agreement, it was useful to consider how Mr Stace carried out his notary work both before and after the sale of the business. In oral evidence Ms Sloane, ALL's practice manager and previously von Sturmer Ringer's practice manager for 12 years, said callers seeking notarial assistance were typically transferred directly to Mr Stace. He made the appointments to see those people himself, not the firm's administrative staff. No files were opened for notarial work done by Mr Stace. Ms Sloane did not know of any fees for notary work paid to the firm in her 12 years of service for von Sturmer Ringer. Mr Stace's evidence was that his records of that work comprised a copy of the documents authenticated and of documents confirming the identity of the person for whom the work was done. The fee, typically around $65, was usually paid in cash which he kept. He estimated he saw between eight and 12 people a year in his capacity as a Notary Public. The work had never comprised part of the firm's legal work or accounting. No income from notarial work was included in the financial information provided to Ms Rusk prior to her purchase of the business.

[24] From the evidence and interpretation of the agreements I concluded Mr Stace's work at a Notary Public was not part of the business purchased by Ms Rusk or his duties under his employment agreement with ALL.

The term of employment

[25] A further point of interpretation concerned the reference in Mr Stace's employment agreement being for "up to three years but a minimum of two years". Mr Stace accepted the term did not mean he could not be dismissed for serious misconduct earlier than two years or that his employment could not end by mutual agreement in less than two years. However the term's meaning was relevant if he were successful in his allegations about his employment being ended unjustifiably after less than five months. This was because Mr Stace claimed the term's wording would require payment to him of 19 months in lost wages for the remainder of the period of two years from when his employment by ALL had begun on 1 April 2014.

[26] ALL submitted no fixed term employment was created because the employment agreement did not meet the requirements for such an arrangement set by s 66 of the Act. There was arguably a specified date and a genuine reason for such a term (relating both to Mr Stace's preference for a minimum and maximum of ongoing employment and to ALL's interests in having a period of continuity for the transfer of client business). However, contrary to the requirements of s 66(4) of the Act, no reasons and no procedure for the end of the employment in that way were stated in writing in the agreement.

[27] But that conclusion was not the end of the necessary analysis. The agreed term clearly involved an intention to create a certain period of expectation and obligations for both parties. It would enforceable on the principle that such agreements are made to be kept.[3] ALL could expect at least two years' service from Mr Stace but not require more than three years. He could expect at least two years' income, unless matters such as serious ill-health or wrongdoing intervened. If for reasons beyond his control (such as serious illness) Mr Stace lost the capacity to perform the contract or for reasons of serious misconduct or professional malpractice ALL could legitimately have ended the employment relationship and did so fairly, the enforceability of the service obligation and expectation would change. However, absent good cause for ALL to repudiate the application of the clause, its terms were a relevant factor in assessing the period of actual loss arising from an unjustified dismissal, if one was found to have occurred.

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[3] *Fuel Espresso Ltd v Hsieh* [2007] NZCA 58 at [21].

Did Mr Stace breach his duties to ALL?

[28] The evidence traversed three ways in which Mr Stace was said by ALL to have breached his duties as its employee. Firstly, he was said to have made inappropriate use of internet access at the workplace, contrary to instructions not to do so. Secondly, he was said to have wrongfully kept cash paid by people to whom he had provided services as a Notary Public. Thirdly, he was said to have wrongfully sought or kept cash from clients for legal services.

[29] On each of the three categories of alleged breach I have found, on the balance of probabilities and for reasons that follow, that Mr Stace had not committed the breaches of duty alleged by ALL.

(i) Internet use

[30] The employment agreement included a term requiring the employee to ensure their use of internet facilities at work met "the ethical and social standards of the workplace". It said a "reasonable level of personal use" was acceptable but must not interfere with the employee's duties or be contrary to the employer's interests.

[31] In a letter given to Mr Stace on 18 August after their 15 August meeting Ms Rusk said she was aware he was "accessing sex related web sites" which was "highly inappropriate in the workplace of a law firm". She also said he had downloaded material "of a highly personal nature" from "dating sites". She said Mr Stace had twice jammed the office printer with downloaded material and she had twice left "significant bundles of this printed matter" on his desk. Ms Rusk referred to a log report from the firm's IT provider that showed Mr Stace had tried to use his office computer to access "at-risk web sites from an IT perspective".

[32] Once in July and once in early August Mr Stace and Ms Rusk discussed measures she had the IT provider put in place to block access to websites that were "not work related".

[33] The evidence did not support the allegation that Mr Stace was accessing "sex-related" websites from his office computer. A forensic report to ALL dated October 2015 confirmed no pornographic websites were accessed from Mr Stace's workplace computer. He did access social websites such as Linked In, Facebook, and internet

dating sites. He said he accessed the dating sites because he had recently become single and that was "how people meet each other these days". He had not made a secret of doing so. Mr Stace submitted his internet use at work, including time outside the 22 hours a week he was required to work, was within his contractual entitlement to a reasonable level of personal use.

[34] While ALL was entitled to put in place internet security measures to protect its IT system and trust account from unauthorised access, its evidence did not establish that Mr Stace had breached his duty by making unreasonable use of internet access or that his internet use interfered with duties that he should have been carrying out of ALL at the time of such use. While some disruption may have been caused by the jamming of the printer, no evidence confirmed that fault arose directly from Mr Stace's use or was anything other than co-incidental.

(ii) Cash for notary work

[35] For reasons already given in this determination, Mr Stace was not required to account to ALL for fees taken for notary work he carried out. Evidence from him and his accountant, Ms McConnell, suggested he may not have previously accounted properly for such fees in his tax returns for personal income in earlier years but he had recently made disclosures to the Inland Revenue Department about that situation. Any issues arising from those disclosures were a matter for IRD to resolve, not the Authority.

[36] In light of that conclusion it was not necessary to set out the details of the two particular instances Ms Rusk identified in her evidence that were said to amount to Mr Stace wrongfully having taken or asked for cash in return for providing notarial services only. One instance was known to her before she confronted him with the allegation on 15 August. The other instance came to her attention in October 2014.

(iii) Cash for legal services

[37] Ms Rusk's evidence identified two instances where Mr Stace was said to have wrongfully asked for payment in cash for legal services or had not properly accounted to ALL for money received. One instance, concerning the signing of a will by a client, was said to have occurred on 9 May 2014 and was known to Ms Rusk before 15 August. The other instance occurred on or some days before 14 August but only

came to Ms Rusk's attention when she was looking through records in Mr Stace's office after he was locked out of the premises from 17 August. That second instance concerned a request to Mr Stace from a foreign citizen to prepare a deed of power of attorney and to notarise the deed so it could be sent to a family member in the citizen's home country.

[38] For the following reasons I was not satisfied the evidence about those two instances established as more likely than not that Mr Stace had either kept or intended to keep cash given to him by clients in relation to legal work which should have been paid to ALL.

[39] In the first instance Mr Stace was asked to see a client who had called in to the office unexpectedly to see another solicitor about signing her will. Mr Stace attended to the signing, witnessed Ms Sloane. He then arranged for the client to pay cash. According to information Ms Rusk said she had later got from talking to that client herself, the client had gone and got from an ATM at a nearby bank. Ms Rusk said she happened to be nearby in the office when the client then gave the cash to Mr Stace and Mr Stace had "appeared to be putting the cash in his pocket". She said Mr Stace saw her, came up to her, gave her the cash and said "I suppose this is yours now". She also said Mr Stace then told her that he and a previous partner had kept such cash payments without putting them through the firm's books.

[40] In his written witness statement Mr Stace emphatically denied Ms Rusk's account of taking cash from the client that day. However his evidence was contradicted by a document from the client file that bore a note that he agreed was in his handwriting. The note read: "Paid cash. $130. 9-5-14 Didn't want bill sent out". The handwriting had been photocopied from the front of a coloured folder and was difficult to discern on the largely black copy provided in evidence for the Authority investigation. In cross examination Mr Stace said he would not have denied getting cash from the client if he had been able to clearly read the document provided in evidence but he did not appear to really recall the actual interaction with the client that day at all.

[41] However Mr Stace's handwritten note also undermined Ms Rusk's interpretation of events. If Mr Stace had intended to take the cash and keep it for

himself rather the firm, he would not have written a note on the front of the client file for a matter that was being handled by another solicitor. It would have created a difficulty for him in explaining to that solicitor, for whom he had unexpectedly stepped in that day, what had happened to the money and to any administrative staff checking the file for later billing to the client.

[42] The second instance was not immediately germane to the events between 15 and 18 August but was at least in Ms Rusk's mind by the time of meeting with Mr Stace on 26 August and could potentially be relevant in relation to remedies as after-discovered conduct.

[43] Enquires made by Ms Rusk on 18 August established that Mr Stace had asked a secretary to draft the power of attorney deed requested by the foreign citizen. The citizen, when contacted by Ms Rusk, told her Mr Stace had asked him to bring $110 in cash to the office and he would be provided with the document as well as notarial services. In her note about the amount asked for, Ms Rusk included the phrase "as I recall it".

[44] Mr Stace accepted Ms Rusk's account was substantially correct. He asked for cash because the person was not known to the firm and it was a small amount. However he said he split the cost for legal services from the notary component. His evidence was supported by a note in his handwriting on an email from the person dated 14 August. It showed a figure of 100 with a figure of 65 below it. Sixty five was an amount Mr Stace typically charged for notarial work.

[45] While there is a difference between figures adding up to $165 and the $110 Ms Rusk recalled the person mentioning, ALL's evidence did not establish that Mr Stace intended to keep all of whatever cash he might have got from that person.

How did the employment end – by Mr Stace's refusal to continue the relationship or by unjustified acts by ALL?

[46] In early August 2014 Ms Rusk scheduled a meeting with Mr Stace to discuss an issue regarding work in progress on files following her purchase of the business. It concerned how the value of that work would be calculated and what payment might be due to Mr Stace for it. Her evidence was that she also told him that concerns about his use of the internet would be discussed. She did not tell him that she wanted to

discuss her concerns about him taking cash for notary services or legal work. She said she did not tell him about that issue because she "did not want to jeopardise our chances of finding out exactly what was going on". In response to a question at the Authority investigation she said she had not told him because of the risk that "he would have cleared the decks" in order to "protect himself".

[47] Ms Rusk also arranged for Mr Potter and Ms Sloane to attend the meeting. It began with Ms Rusk and Mr Stace debating the value of the work in progress on various files. They were not able to agree on what amount might be due to him for it. Ms Rusk then reiterated her concerns about Mr Stace's internet use at work, including the risk of compromise to the security of the trust account but Mr Stace did not agree his use was excessive or inappropriate. Ms Rusk then raised her allegation about Mr Stace getting cash for providing notarial services and queried whether it met their professional obligations as lawyers. Mr Potter's evidence was that Ms Rusk told Mr Stace that "these types of arrangements amounted to stealing from ALL as she saw it". Mr Stace reacted angrily to her allegation. He questioned her ability to run the business properly. Ms Rusk responded by telling Mr Stace that she felt their working relationship had deteriorated and that if he felt that way about her conduct of the business, it was in the interest of both parties for him to consider taking early retirement. Mr Potter described Ms Rusk as telling Mr Stace that if he took that option, "clients would be notified of his departure over a respectful period of time and a leaving function could be scheduled". Mr Stace's evidence was that Ms Rusk had referred to a one month period of notice. He told her that his employment agreement provided for two to three years of employment with ALL and he would sue for two years' pay if he was dismissed. Ms Rusk ended the meeting by saying she would put its outcome in writing to Mr Stace. After she and Ms Sloane left the room Mr Potter and Mr Stace spoke briefly with Mr Stace repeating his intention to sue ALL if he were dismissed.

[48] Although Mr Stace's subsequent written evidence was that he regarded himself as dismissed at that meeting, his oral evidence did not support such an unequivocal conclusion. He said he told his son that evening: "I think I have been fired". He accepted in answer to questions at the investigation meeting that he had still been uncertain at that point.

[49] The respective evidence of Mr Stace and Ms Rusk about a telephone call that she made to him on Sunday, 17 August did not firmly resolve any doubt. Ms Rusk's account was that she told Mr Stace that he was suspended from work until further notice while she took legal advice. She said she also told him she was changing the locks at the premises so she could preserve the integrity of files. Mr Stace's account was that he had specifically asked Ms Rusk during that call to confirm whether or not his employment was terminated and she said he had been dismissed. Ms Rusk emphatically denied she had said that to him. She insisted she referred only to suspension.

[50] I considered the status of Mr Stace's employment could best be determined by considering the letter that Ms Rusk had delivered to him on 18 August. The letter was dated 15 August. Her evidence was that she began drafting the letter immediately after their 15 August meeting ended and finalised its contents on 18 August. Three-and-a-half pages of the five page letter set out Ms Rusk's account of her concerns and the responses Mr Stace gave on 15 August. The remaining page-and-a-half comprised seven paragraphs setting out her conclusions on the situation and what should happen next. Those seven paragraphs were a clear communication from Ms Rusk to Mr Stace that his employment relationship with ALL was at an end, with the only question being about how that would formally occur (bold emphasis added, not original):

> 15. On the facts of what has transpired, it is very apparent that you have unlawfully taken money from [ALL] that rightfully belongs to it. You will be aware that in terms of clause 12.2 of the Employment Contract we have together **I am entitled to dismiss you summarily from your employment** as a result.
>
> 16. Notwithstanding the above, I note that at the conclusion of our meeting on 15 August 2014, I advised you I would put these matters in writing to you so you could review your situation appropriately. I wished for you to do that as you will be aware that **I did at the meeting offer you the opportunity to take early retirement over the period of the next month**. I made that offer in an effort to maintain our relationship on a respectful footing and so that you could hand over your files appropriately as was called for in the Agreement for Sale and Purchase of von Sturmer Ringer & partners to [ALL]. I have a strong desire to ensure that you are treated with respect and honour and **wish to enable you to retire from the practice in a fitting way with the appropriate notification to clients and a leaving function**. I note your response to that offer at the meeting which was to the effect that you would not avail yourself of that opportunity and you would instead sue me for two years pay. You then complained that I have not been respectful to you since taking over the firm and had not included you in, or consulted you on, any of the changes that I have made.

17. I need therefore to further record that I have tried to talk to you about changes to systems since I have taken over the firm and include you in what is happening, I have included you in recent advertising and I have endeavoured at all times to be respectful and considerate of you. In fact, I have protected your reputation whenever it has been brought into question and I have done that on a number of occasions since returning to live in Waiuku. In response, you have at varying times been abusive to me personally, i.e. swearing at me over billing requirements that I introduced recently, undermining my decision making processes by leaving meetings early and ignoring my requests for information about work priorities as well as specific instructions to refrain from utilising the internet for personal gratification to excess. I have accepted your apology over the swearing incident and advised you that I was not one to bear a grudge as I wanted us to get on and make the very best decisions together for the future of the firm.

18. However, in the end I have struggled with your attitude towards me. I sincerely regret that you have now placed me in the impossible position you have by your not being honest with me about your activities at work, particularly the non-adherence to firm practices relevant to taking cash from clients coupled with that your failure to advise me that you were operating a side-line business from my own premises. I note your advice to me at the meeting on 15 August 2014 to the effect that your notarial work brings in customers to my firm but they are customers that you are taking money from.

I accept and trust that you may have reassessed your position over the weekend in light of the above stated matters and I would be happy to hear from you in that regard, i.e. **so that we can make arrangements for your retirement from the firm in an appropriate manner**. However, if you still do not wish to avail yourself of the opportunity described in paragraph 16 above, I now confirm my telephone advice to you given on Sunday evening 17 August 2014 that you are suspended on full pay until further notice and you are not to attend work until advised otherwise.

I am happy to make arrangements with you so that you can collect your personal items from your office in the meantime. As the legal tenant of the premises, I have had the locks changed so you will need to liaise with me if you wish to collect any items. I will also communicate with you about the outstanding matters relevant to the Agreement for Sale and Purchase of the business which I confirm will continue to be honoured.

I will **await your further advice which I trust will be worthy of the integrity of us both**.

[51] On the objective standard of what a reasonable person with the necessary background knowledge of the context would conclude I am satisfied Ms Rusk intended Mr Stace to understand at the time that he received that letter that he had only one choice: to agree to retire or be fired.

[52] If it were correct that he had not actually been dismissed by what was said to him by Ms Rusk on 15 and 17 August, ALL's intention of ending his employment

was confirmed by Ms Rusk's letter delivered on 18 August. He confirmed his understanding of his employer's initiative by his response to it. He had his employment advocate raise a personal grievance for unjustified dismissal on his behalf. That was done on 21 August.

[53] From that point, at the latest and at least, Mr Stace's employment had ended by constructive dismissal. The 18 August letter confirmed ALL was pursuing a course of conduct with the deliberate and dominant purpose of coercing him to resign.[4] ALL had also breached duties owed to him by proceeding on the basis that its allegations of possible dishonesty were already conclusively established (as shown by Ms Rusk's statement in her 18 August letter that she was "entitled" to dismiss him summarily). It had effectively 'ambushed' him at the meeting on 15 August with the allegation about taking cash, had not yet thoroughly investigated the basis of the allegation, and had put its 'retire or be fired' option without providing him with a proper opportunity to respond to its concerns. In such circumstances an employer could have reasonably foreseen that Mr Stace would treat his employment at an end.

[54] The situation was not subsequently 'remedied' or undone when, after seeking specialist employment law advice, Ms Rusk met with Mr Stace and his advocate on 26 August and suggested his employment had not been terminated.[5] His refusal to return to work to participate in a disciplinary process, and the arrangements he then made to collect personal belongings from ALL's premises, occurred after the end of the employment rather than being the acts whereby he ended the employment.

[55] Mr Stace's employment had already come to an end as the result of actions by ALL that were not what a fair and reasonable employer could have done in all the circumstances at the time. He was entitled to an assessment of remedies for his personal grievance for unjustified dismissal.

Remedies

Reimbursement for lost wages

[56] By 18 August 2014 Mr Stace was 20 weeks into the two years of employment that was the minimum he could have expected to work to ALL. He claimed lost

[4] *Auckland Shop Employees Union v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136 at 139.
[5] *Buckland v Bournemouth University Higher Education Corp* [2010] EWCA Civ 121 at [40]-[44] per Lord Justice Sedley: no doctrine of cure for completed fundamental breach, absent prior amendment and affirmation.

wages for "the sum of two years less the total sum of ordinary pay earned while employed by [ALL]".

[57] His employment agreement provided for an annual salary of $75,000. I have taken his lost wages claim to be for the remaining 84 weeks of the two years, with a total value of $121,153.84.

[58] That starting point for an assessment of the total loss had to be subject to two further factors before reaching an amount that could be awarded for lost wages – firstly, a factual assessment of what efforts Mr Stace had made to mitigate his loss and, secondly, a counterfactual assessment of the effect of contingencies that might otherwise have intervened to change what income he would have received in that period in any event.[6]

[59] Mr Stace's evidence of what he did to mitigate his loss by seeking other work and income was not sufficient to support an award of lost wages for the total period of the loss. However I have not accepted ALL's submission that Mr Stace's evidence was such that no reimbursement for the loss should be awarded because the Authority would have to speculate as to the actual loss he sustained. The submission was not consistent with the express discretion granted to the Authority to order compensation for economic loss and with the case law that acknowledges such an assessment required the asking and answering of some hypothetical questions, as best as could be done from available evidence.

[60] After his employment at ALL ended Mr Stace made no effort to set himself up as a sole practitioner, seek locum work or contact legal recruiting agencies. He was subject to a two year restraint of trade within 30 kilometres of the Waiuku business but, assuming it was an enforceable restraint, this left him free to provide legal services north of Papakura, so it was possible he could have worked for clients throughout the most populous parts of the greater Auckland area. He did not renew his practising certificate in January 2015 as he did not consider the expense was warranted at the time and he could easily renew it if needed. He also submitted that, at the age of 72, he could not reasonably be expected to set up a new business. He adopted what was described in closing submissions as "a personal approach" to

[6] *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 (CA) at [73].

seeking further employment by visiting and speaking to partners of six law firms with whom he had longstanding connections. Those meetings and discussions did not result in any job offers or income.

[61] However Mr Stace's evidence was that he also "had a lot going on at the time". He was involved with previously made plans to sell and then move from his house in the Waiuku and arranging the renovation of a town house in Ellerslie to which he moved. In August 2015 he also went on a six week visit to Europe for a family wedding and a holiday, a period during which he could not then mitigate his loss by working. He also described himself as "not of the right state of mind mentally" to have gone into business on his own account.

[62] Turning to the counterfactual assessment of contingencies, it could not safely be assumed safely Mr Stace would have continued to work for and earn his salary at ALL for the remainder of the two year period anyway. Both his evidence and that of Ms Rusk established there was considerable tension between them which, realistically, may have resulted in him leaving the practice before their originally intended earliest date of 31 March 2016. Mr Potter's evidence disclosed a relevant observation he had made when he and Mr Stace spoke briefly alone together after the 15 August meeting. Mr Potter said he had told Mr Stace then that he felt Mr Stace was "struggling to make the transition from being the boss to being an employee". It was clear from Mr Stace's evidence that he was uncomfortable with changes Ms Rusk, as the new owner, had made to business systems and methods and he resented what he saw as being told what to do in front of other staff. Ms Rusk, in turn, resented Mr Stace querying or challenging her directions in those situations. It was a dynamic that was more than likely to have led one or both parties to seeking an earlier end of the employment relationship. Realistically that would have required some level of 'pay-out' to Mr Stace but it was also unlikely that Ms Rusk either had the funds from her newly purchased business or would otherwise have agreed to pay Mr Stace the equivalent of his salary for the remainder of a two-year term.

[63] On the evidence no allowance was needed for other contingencies that could have ended the employment relationship before the end of the two year period, such as dismissal for serious misconduct on other grounds or an early retirement due to ill-health.

[64] Allowing for the contingencies of life that might otherwise have intervened and the shortfall in Mr Stace's mitigation efforts, I concluded the period of lost wages could not be assessed as more than 42 weeks, about half of what he claimed.

[65] In *Telecom New Zealand Limited v Nutter* the Court of Appeal accepted a 78 week period of lost remuneration was appropriate for a 61-year-old man with specialist skills and where the circumstances of his dismissal also compromised his ability to get another job in the same field. However, in that case the former employee would likely have worked for a further four years (but for his unjustified dismissal) and had made "sustained but unsuccessful" efforts to obtain employment. Mr Stace's mitigation endeavours were not comparable with those efforts but his age and stage of career, realistically, would have compromised his ability to secure a position in another firm.[7]

[66] A 42 week period of loss was also consistent with the notion, as a contingency of life, that the tensions between Mr Stace and Ms Rusk, due to difficulties adjusting to their new relative positions in the business, would have seen them seek to end the employment relationship by at least early in its second year.

[67] On the basis of that assessment of a 42-week period of loss, Mr Stace was entitled to an award of $60,576 in reimbursement of salary lost as a result of his grievance under s 123(1)(b) and s 128 of the Act.

Compensation for hurt and humiliation

[68] Mr Stace sought an order for $30,000 as compensation for humiliation, loss of dignity and injury to his feelings arising from his personal grievance. His evidence did not support an award of such magnitude.

[69] He suggested a skin allergy he had suffered since June 2015 resulted from stress due to his unjustified dismissal. However there was no medical evidence to support Mr Stace's view about that or to connect his dismissal with his reported need to take a course of anti-depressant medication. His evidence did not adequately discount other potential contributors to his health symptoms, such as the major life changes of selling his business and moving house and the stresses related to various family matters, including his daughter's wedding.

[7] *Nutter*, above n 6, at [87].

[70] Mr Stace said he was upset by what he believed to be the negative effect on his reputation among clients he had known for up to 40 years in the Waiuku district. However his evidence did not establish any such effect. Two instances he gave, where he suspected he was shunned by former clients due to the circumstances of his departure from the business, proved to be speculation by him with no supporting evidence.

[71] Two other events did, however, support an award of compensation for humiliation, loss of dignity and injury to Mr Stace's feelings.

[72] Firstly, Mr Stace suffered the shock and 'sting' of Ms Rusk's allegation on 5 August 2014 that he was "stealing" from the ALL. His feelings were injured by such a serious accusation which, on the evidence available to the Authority, was not established to any satisfactory evidential level.

[73] Secondly, Ms Rusk announced to ALL staff at a meeting on 18 August that Mr Stace's employment was suspended. Ms Sloane's evidence was that Ms Rusk told her and other staff present that she had spoken to Mr Stace on the previous day, that he "was not willing to go down a disciplinary path", and that he was suspended while she sought further advice. Her announcement was damaging to Mr Stace's dignity in relation to other employees with whom he had worked with at ALL and who, in some instances, were his former employees when they had worked for the previous firm.

[74] An award of $7000 was an appropriate but modest sum for ALL to be required to pay Mr Stace under s 123(1)(c)(i) of the Act to compensate him for loss of dignity and injury to his feelings resulting from those actions by Ms Rusk.

Contribution

[75] ALL submitted any remedies awarded to Mr Stace should be reduced by 100 per cent under s 124 of the Act due to conduct by him that was blameworthy and had contributed to the circumstances giving rise to his grievance.

[76] Two of the four grounds advanced by ALL for that proposition related to the alleged breaches of duty by him in receiving cash from clients. Those breaches were

not established by the evidence. I was not persuaded the instances referred to should nevertheless be considered blameworthy conduct.

[77] The other two grounds ALL said supported a finding of blameworthy conduct were Mr Stace's use of its internet resources at work, in breach of instructions regarding internet security, and his "confrontational and disrespectful manner" towards Ms Rusk in their 15 August meeting.

[78] Mr Stace accepted he had contributed to the situation and had "probably offended" Ms Rusk by arguing with her about internet use arrangements. However the evidence did not establish his use was excessive in light of the employment term allowing a reasonable level of personal use. And, while Mr Stace may have exercised poor judgement in disagreeing with Ms Rusk about the issue in the presence of other staff, it was not sufficiently blameworthy conduct to reduce a reduction of remedies.

[79] Neither could his behaviour in the 15 August meeting be considered blameworthy conduct in light of the finding of this determination that ALL had acted unjustifiably in the arrangements for and conduct of that meeting.

[80] No reduction of the remedies awarded to Mr Stace was required under s 124 of the Act.

No award of penalty for breach of duty

[81] As no breach of duty owed by Mr Stace to ALL was found, the penalty sought by ALL on the grounds of the alleged breaches could not be ordered.

Costs

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

[83] If they are not able to do so and an Authority determination on costs is needed Mr Stace may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum ALL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[84] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[8]

Robin Arthur
Member of the Employment Relations Authority

[8] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 (EC) at 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].