

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 180
3026071

BETWEEN MICHAEL NICOL
Applicant

A N D CANTERBURY CONCRETE
CUTTING NZ LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Robert Thompson, Advocate for applicant
John Shingleton, Counsel for respondent

Investigation Meeting: 17 August 2018

Submissions Received: 27 August 2018 and 12 September 2018 from Applicant
10 September 2018 from Respondent

Date of Determination: 6 December 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A Michael Nicol was unjustifiably dismissed from his employment.**
- B Canterbury Concrete Cutting NZ Limited is ordered to pay the following
to Mr Nicol taking contribution into account:**

(i) The sum of \$9,126.64 gross being reimbursement of lost wages under s 123(1)(b)(i) of the Employment Relations Act 2000.

(ii) The sum of \$18,750.00 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

C Michael Nicol is to pay a penalty of \$2000 to the Authority for payment to the Crown for a breach of good faith by 30 January 2019.

D Costs are reserved and a timetable set for an exchange.

Employment Relationship Problem

[1] Michael Nicol was employed as a concrete cutter and driller with Canterbury Concrete Cutting NZ Limited and received \$28 per hour for work undertaken.

[2] Canterbury Concrete Cutting NZ Limited (ConCut) is a duly incorporated company having its registered office in Christchurch and providing concrete cutting and drilling services. ConCut had an individual employment agreement with Mr Nicol dated 2 February 2015.

[3] Mr Nicol was dismissed on 4 December 2017 for breaching the express obligation under his employment agreement to act in good faith when he covertly recorded a disciplinary meeting.

[4] Mr Nicol says that his dismissal was unjustified.

[5] Mr Nicol also says that he was disadvantaged by a failure on the part of ConCut to provide information requested prior to a meeting on 16 November 2017.

[6] He seeks reimbursement of lost wages for a period of 15 weeks and 3 days, \$50,000 compensation for his dismissal and \$5,000 for disadvantage.

[7] ConCut do not accept that Mr Nicol was unjustifiably dismissed or disadvantaged.

[8] ConCut seeks in the statement in reply a penalty of \$7,000 for a breach of good faith from Mr Nicol payable to the Crown.

The issues

[9] The Authority needs to determine the following issues:

- (a) Was there an unjustified action on the part of ConCut by the failure to provide sufficient information about a complaint?
- (b) If the failure to provide information was unjustified then did it cause disadvantage to Mr Nicol?
- (c) What were the reasons for dismissal?
- (d) Was there a full and fair investigation undertaken into the covert recording?
- (e) Could a fair and reasonable employer conclude in all the circumstances that covertly recording a disciplinary meeting was serious misconduct?
- (f) Could a fair and reasonable employer have reached the decision to dismiss?
- (g) If Mr Nicol was unjustifiably dismissed or disadvantaged then what remedies is he entitled to, and are there issues of contribution and mitigation?
- (h) Did Mr Nicol breach his good faith obligations in his employment agreement and, if so, should there be an award of a penalty?

The test of justification

[10] The Authority is asked in this matter to determine whether Mr Nicol was unjustifiably disadvantaged and dismissed. In determining this it is required to apply the justification test which is set out in s 103A of the Employment Relations Act 2000 (the Act). The Authority does not determine justification by considering what it may have done in all the circumstances. It is required under the test to consider on an objective basis whether the

actions of ConCut and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the action and dismissal.

[11] The Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether the allegations against Mr Nicol were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to them and whether such explanations were considered genuinely. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly. ConCut could be expected as a fair and reasonable employer to comply with the good faith obligations in s 4 of the Act. In this matter ConCut says that Mr Nicol breached his obligations of good faith.

Material provisions of the employment agreement

[12] Clause 1.4 of the employment agreement provides

The employer and employee agree that they wish to build a productive employment relationship based on mutual trust and confidence and that they will deal with each other in good faith.

[13] Clause 7 deals with the formal disciplinary process and provides amongst other matters in clause 7.4 that *The employee shall be entitled to be represented at all stages of the enquiry.*

Was there a failure to provide information prior to the disciplinary meeting?

[14] The managing director of ConCut is Stephen Duff. On 16 November 2017 Mr Nicol was asked to go and see director and co-owner of ConCut, Fiona Duff. Mrs Duff handed Mr Nicol a letter that provided as follows:

Dear Mike,

It has been alleged that you have been badmouthing the company in front of a staff member and in particular claiming that the company is trying to screw [previous employee named] or words of that effect.

If these allegations are correct, then it would be deemed serious misconduct and could lead to summary dismissal or other disciplinary concerns.

Therefore, I invite you to attend a disciplinary meeting on Monday 20 November 2017 at 10 am at the meeting room to respond to the allegation. I encourage you to bring a support person or lawyer to the meeting.

Please confirm you will attend.

Stephen Duff
Managing Director

[15] A meeting then took place which was covertly recorded by Mr Nicol. Mr and Mrs Duff were present with Mr Nicol attending by himself. The transcript of that meeting supports that Mr Nicol thought at least at the outset that comments that caused concern arose following his knowledge that Mr Duff had been involved in a car crash. The transcript of the recording commences with Ms Duff stating to the effect that she was referred to as a c....

[16] Mr Nicol responds “Nah, nah, nah” and then refers to having heard a rumour that Mr Duff had been driving drunk and crashed his car. Mr Nicol had lost a close family member to a drunk driver. He said toward the start of the meeting to Mr Duff amongst other matters *I've never been so disgusted in my life to hear that. You're meant to be the leader, we look at you for guidance. And that's the guidance that I've got.*

[17] Mrs Duff attempted to draw the conversation back to a discussion about the previous employee who I shall call “J”, and states that the issue had nothing to do with Mr Duff. Mr Nicol then asked for further clarification about what he said, and Mrs Duff stated that Mr Nicol had made comments to another staff member about J leaving and what the company was doing with J. More specifically *how we're screwing him over and how you're sick of working for a bunch of c.... like us.*

[18] It was not in dispute that the meeting got out of hand although there was some more constructive dialogue toward the end of the meeting.

[19] Mr Nicol's evidence is that he did not want to go to the meeting but was told to do so. Mrs Duff did not accept that Mr Nicol was forced to attend the meeting. Rather she said

he was confused by the letter and needed clarification about what they had been told he had said. She said given there were a number of staff present at the front of the office where the letter was provided and she suggested that they go out the back for a meeting.

[20] I find on the balance of probabilities Mr Nicol was not provided enough information to be able to understand what the badmouthing allegation was from the letter. The name of the person who reported what he overheard Mr Nicol saying may have assisted in putting the conversation and concerns into context. An approximate date or location of the conversation could equally have assisted. The information in the letter did not make it clear whether there were one or more conversations. There was some attempt to particularise what the discussion was about but no reference to the c--- word in the letter. The information about who overheard the conversation was also not supplied at a second disciplinary meeting when it was requested by Mr Nicol's then representative advocate, Chrissy Gordon.

[21] It may not have been an unjustified action to describe the allegation reasonably generally if Mr Nicol had not, on receipt of the letter, immediately attended a meeting with Mr and Mrs Duff. That is because he would in all likelihood have sought further clarification before the disciplinary meeting scheduled for 20 November 2017 and before he was required to give his explanation. It may not have been unjustified if the meeting was limited to clarifying the allegation without further discussion but it wasn't and there was discussion about the allegations and Mr Nicol gave explanations.

[22] It was the combination of the insufficient information and the nature of the subsequent meeting that was unjustified. That is because with insufficient information Mr Nicol's explanation was not directed to the actual concern Mr and Mrs Duff had. What Mr Nicol said in that meeting and how he said it, when he attributed the complaint to his disapproval of the actions of Mr Duff, then became an additional allegation that he had been insubordinate and intimidating for the subsequent disciplinary meeting.

[23] Mr Shingleton submits that the defect was minor and did not result in Mr Nicol being treated unfairly. I do not find that to be the case for the reasons set out above. I

conclude that Mr Nicol was treated unfairly and the defect was not simply a technical one, even weighing the fact that Mr and Mrs Duff proceeded on that occasion without legal or human resource advice.

[24] Mr Shingleton also places some weight on Mr Nicol's denial that he referred to his employers as "c...s" in the meeting on 16 November 2017. The Authority heard from the employee who said that he had overheard a conversation in which Mr Nicol had said *I'm sick of making these c...s money and the way they treat J*. In his evidence Mr Nicol did not deny such a conversation.

[25] Mr Shingleton said that Mr Nicol lied to Mr and Mrs Duff. The Authority weighs at that time Mr Nicol did not have the specific statement that was subsequently presented for the purposes of the Authority investigation, or the identity of the person who reported it. In those circumstances the dishonesty that Mr Shingleton refers to cannot, on the balance of probabilities, fairly be concluded.

[26] I find that Mr Nicol was disadvantaged in the unplanned meeting as a result of the insufficient information. He raised confronting issues with Mr Duff to attempt to defend or explain the allegation that in turn impacted on the relationship between them. Mr Duff became angry. The meeting got quite out of control. Mr Nicol tendered his resignation at the end of the meeting and gave two weeks' notice. He said in his evidence this was because of the discussion about, and resulting feelings from, his family member's death.

[27] These confronting matters would not have been raised in such a way had the allegation been clearer and/or the meeting not been held.

[28] I find that the failure to provide more specific information about the allegation in circumstances where there was an immediate meeting at which Mr Nicol attempted to explain was unjustified. It caused disadvantage to Mr Nicol in all the circumstances at the time.

[29] I will consider the issue of remedies for the unjustified action causing disadvantage after determining the second issue about whether the dismissal was justified.

Reasons for dismissal

[30] I find the reason for the dismissal is contained in an email from Mr Shingleton dated 4 December 2017. Mr Nicol had initially faced three allegations. There was one of covertly recording a disciplinary meeting on 22 November 2017. There was an allegation that Mr Nicol had played the recording to both an ex and current employee, and further that he had provoked Mr Duff to anger deliberately. The allegation about covert recording was upheld and found to be the reason for dismissal along with a lack of regret, contrition or apology for the action.

[31] Mr Shingleton wrote that there was no evidence to support that the recording had been played to third parties and therefore that allegation had been disregarded.

[32] He wrote about the allegation of provocation that whilst Mr and Mrs Duff were adamant that Mr Nicol was smirking at Mr Duff to provoke him they accepted there is a subjective element to the concerns and therefore focussed on the act of covert recording. It was written that Mr and Mrs Duff would not have taken any further action if the issue was the smirking alone.

Was there a full and fair investigation undertaken into the covert recording?

Email of 20 November 2017 to Mr Duff and response from Mr Duff

[33] After the meeting on 16 November 2017 Mr Nicol thought about his resignation but was worried about what to do with no job.

[34] On Monday 20 November he sent an email to Mr Duff. He wrote that he was *forced to take part in a disciplinary meeting on Thursday 16 November at 7.20am*. He advised that he would not be able to attend work that day as his children were sick. In his

evidence Mr Nicol said that this was not true but he could not explain his feelings at that time. He wrote that he felt frightened and intimidated after the Thursday meeting and the outcome. He also told his job manager John that he would not be in because his children were unwell.

[36] Mr Duff wrote back and advised that, amongst other matters, he accepted that Mr Nicol resigned in haste and has therefore disregarded his resignation. He did advise that he wanted to proceed with the disciplinary meeting and further discuss Mr Nicol's behaviour at the meeting on 16 November. He stated in his letter:

Instead of attending the meeting as scheduled, you confronted me without warning, after receiving my letter and started shouting at me. Fiona tried to calm you down and explain that what you were shouting at me about was not connected to the issues of concern. You told me that you did not see me as a leader and that you could not work for a man like me. You then said you were resigning. I accepted your resignation.

[37] A meeting was then arranged for 22 November 2017. That meeting was called to discuss two allegations, the first being the comments that Mr Nicol had made about the company, and the second being his conduct at the meeting on 16 November.

Meeting 22 November 2017

[38] Mr Nicol attended at this meeting with Ms Gordon and Mr Shingleton attended with Mr and Mrs Duff

[39] Mrs Duff described the meeting as "bizarre." She said Mr Nicol sat directly opposite Mr Duff and she referred to Mr Nicol's body language and that Mr Nicol smirked. I have a recording and transcript of the meeting but those matters are obviously not evident. There are some statements from Mr Duff about Mr Nicol smirking that I shall refer to later in this determination.

[40] Mr Shingleton outlined the two issues of concern. The first was from the original letter of 16 November 2017 about badmouthing the company, and the second about Mr Nicol's conduct at the 16 November 2017 meeting.

[41] There was quite a lot of disagreement about the meeting on 16 November and what was said and how it was said. Mr Duff left the meeting before it concluded. After discussion about the allegations Ms Gordon asked Mr Shingleton if there was a computer. Mr Shingleton was surprised and Ms Gordon then advised that the 16 November meeting was recorded. Mr Shingleton suggests at that point that his client was set up which Mr Nicol did not accept. At one point Mr Nicol explained that he had recorded the whole thing from him walking in the door and said *I mean you really put your foot in it time and time again.*

[42] Mr Shingleton then asked whether Mr Nicol was recording now and Ms Gordon said no and Mr Nicol said he was. For completeness, it is clear Ms Gordon consistently denied any knowledge of the recording of the 22 November meeting in correspondence at that time. Mr Shingleton then declared the meeting over and asked Ms Gordon and Mr Nicol to leave.

Raising of new allegations about covertly recording a disciplinary meeting

[43] After the meeting had ended Mr Shingleton raised new allegations by email to Ms Gordon that his client was dismayed that after about 10 – 15 minutes there was advice that the meeting was being recorded and that a previous meeting had been recorded. There was a further allegation that Mr Nicol was trying to provoke Mr Duff by smirking and needling him.

[44] Mr Shingleton wrote that before his clients consider whether to further investigate the previous allegations they now wished to consider whether it was good faith to covertly record a confidential meeting and provoke Mr Duff. Mr Singleton asked for an explanation and said that if the explanation is not satisfactory then trust and confidence issues arise and dismissal could be an outcome.

[45] He suggested that further communication be in writing given the allegations. A response was asked for by 24 November 2017.

Mr Nicol remains on sick leave

[46] On 22 November Mr Nicol provided a medical certificate that advised he had been unable to attend work since 21 November 2017 and should be able to return on 5 December 2017. Mr Shingleton advised that a response was not required until the fit to return date and that as Mr Nicol had no sick leave left annual leave could be used. Those were fair measures to take in the circumstances.

Further allegation raised

[47] On 23 November 2017 Mr Shingleton raised a further allegation that Mr Nicol had played the recording to an ex and current employee.

Explanations

[48] Ms Gordon wrote that Mr Nicol was prepared to engage in the disciplinary process while on stress leave.

[49] The explanations were set out in an email from Ms Gordon dated 1 December 2017. An earlier email had stated that Ms Gordon and Mr Nicol's doctor were the only people Mr Nicol had played the recordings to. This denial was repeated in the 1 December email and there was advice that he had no intention of playing the recording to anyone else. Some case law was set out in Ms Gordon's email about covert recordings. There was a denial that the meeting was confidential or off the record and that all parties who attended were taking notes or likely to take notes. Ms Gordon wrote that it was difficult to understand how the recording is a breach of trust or good faith. She requested further information including statements, emails or notes taken during the meeting and advice as to how the recording could be a breach of trust and confidence and *the concerns held by your client regarding this point*.

[50] The new allegation of the provocation of Mr Duff was not really answered. Instead Ms Gordon's email refers to Mr Duff having a volatile temper and that he verbally abused Mr Nicol and was seen to be giving him *the finger* during the meeting before Mr Duff chose to

leave. Ms Gordon wrote that she became concerned for her physical safety and that of her client and that Mr Nicol felt recording interactions was required.

[51] Mr Nicol was then dismissed in the email dated 4 December 2017 for the reason set out above.

[52] Mr Thompson submits that the dismissal was procedurally unfair. I have considered the factors in s 103A of the Act. I find that the concern raised of covert recording was clear enough and given the conduct was not denied there can be no criticism of a lack of investigation.

[53] I have then considered the unanswered requests for information by ConCut. I am unclear what information there could be in the form of statements and emails. There may be situations where notes may have been material. In this case however Mr Nicol had a recording of the meeting including any opening statements.

[54] I have focussed in considering procedural fairness on one main issue. That is the lack of a response from Mr Shingleton about how the recording could be a breach of trust and confidence and the concerns held by Mr Shingleton's clients about this. Mr Shingleton submits that the mere fact of recording a meeting whilst trying to provoke a reaction is enough to question trust. What was asked for however was clarification about how the recording could be a breach of trust and confidence and the specific concerns held by his client.

[55] Mr Nicol was entitled to a reasonable opportunity to explain with that knowledge. If for example the concern for Mr and Mrs Duff that Mr Nicol was setting them up for a legal case and/or was he intending to play the recording to others then that could have been put.

[56] Mr Shingleton's email of 4 December 2017 advising of the dismissal specifically referred to Ms Gordon's email not reassuring Mr and Mrs Duff about its trust and confidence in Mr Nicol. There is also reference to it doing the opposite *displaying neither regret not*

contrition for the deceitful behaviour. A concern advanced by Mr Thompson is that there was no opportunity for comment on a perceived lack of remorse. I see that however as part of the above procedural unfairness rather than a separate matter. Had there been some further information then Mr Nicol could have responded to the specific concerns and he may have in understanding the nature of the concerns expressed remorse. I find that the failure to advise how the recording was a breach of trust and confidence and the concerns of Mr and Mrs Duff was unfair and not merely in a technical or minor way.

[57] Mr Thompson raised an issue of predetermination of outcome. This was on the basis that very shortly after the end of the 22 November meeting two staff members came to Mr Nicol's home and collected his work van.

[58] Mrs Duff said that she made the decision to dismiss although consulted with Mr Duff. She does not accept that the decision to dismiss was predetermined. She said that she did not initially conclude that she should terminate the employment but wanted to understand Mr Nicol's thinking.

[59] The almost immediate collection of the van on 22 November 2017 was unusual. The employment agreement in clause 17.2.8 refers to the supplied work vehicle being returned immediately on termination of employment but that had not occurred. There was a medical certificate placing Mr Nicol on leave until 5 December 2017. There was no prior request for collection or return of the van which could be expected if it was required for work purposes even if just as a courtesy.

[60] Mr Thompson goes further and submits that the whole meeting on 22 November was a sham designed to terminate the relationship. He submits that Mr Nicol believed the concerns had been resolved due to what Mr and Mrs Duff told him at the earlier meeting.

[61] I accept that when the transcript is read of the 16 November meeting it does suggest that Mr Nicol's denial of using the c... word is accepted by Mrs Duff. Overall however the

meeting was so unsatisfactory that little weight can be placed on what was said. I do not find I can conclude predetermination or that the subsequent meeting was a *sham*.

[62] Objectively assessed and having heard from Mrs Duff I find that the collection of the van was in all likelihood an angry knee jerk reaction to conduct Mrs Duff considered deceitful and dishonest rather than a premediated intention to dismiss summarily. I cannot be satisfied that Mrs Duff closed her mind to explanations on Mr Nicol's part.

[63] In conclusion aspects of the process were fair. The procedural unfairness was the failure to provide information when requested before dismissal about how the recording could be viewed as a breach of trust and confidence and the concerns held by Mr and Mrs Duff about this. The failure to provide this information then impacted on the opportunity Mr Nicol had to respond to the concerns before dismissal as required under s 103A (3)(c) of the Act.

Could a fair and reasonable employer conclude in all the circumstances that covertly recording a disciplinary meeting is serious misconduct?

[64] Serious misconduct is conduct that deeply impairs or is destructive of the basic confidence or trust that is an essential of the employment relationship.¹

[65] There is no dispute that Mr Nicol covertly recorded the meeting on 22 November 2017. He was represented at that meeting as was ConCut. He did not ask at the outset of the meeting if the meeting could be recorded.

[66] Mrs Duff in her evidence said that she did not see the covert recordings of the first meeting on 16 November 2017 as serious misconduct because Mr Nicol did not have representation. That recording therefore was not taken into account in reaching the decision to dismiss. There was representation at the second meeting so Mrs Duff saw that as a different situation. Mrs Duff in her evidence also said that she felt that Mr Nicol was *egging*

¹ *Northern Distributors Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

Mr Duff on. She said that she felt violated that the conversation was recorded and that the recording was deceitful.

[67] Mr Shingleton urges the Authority to adopt the approach of the Fair Work Commission in a case called *Schwenke v Silcar Pty Limited t/a Silcar Energy Solutions*² in reaching findings about substantive justification. In that case it was held that the employee was justifiably dismissed for secretly recording a meeting on 27 November 2017 with his employer, related to disciplinary and performance issues. Mr Shingleton sets out several statements from the Commissioner in that case.

[68] The Authority needs to apply the test of justification in s 103A of the Act. The New Zealand cases on covert recording have focussed more on admissibility than whether covert recordings can amount to a breach of trust and confidence.

[69] The Court of Appeal in *Talbot v Air New Zealand Ltd; Bamber v Air New Zealand Ltd*³ considered the issue of admissibility of a transcript from a tape recording of a telephone discussion in proceedings before the Employment Court. Judge Colgan as the former Chief Judge was then, ruled inadmissible in an interlocutory judgment a transcript claimed to have been made from a tape recording. The appeal was allowed and the Court of Appeal was unanimous that the transcript could be admitted.

[70] All three Judges in the Court of Appeal indicated that the circumstances in which the appeal had been allowed was on the basis that it was understood that participants could make notes of the conversation and that there had not been an indication that the conversation was intended to be confidential or off the record. There are statements in the judgment that support that there may be occasions when tape recording undermines confidence and trust.

[71] The President of the Court of Appeal, Cooke P., found three significant factors in the particular circumstances of the recording. The first was that there was no suggestion that the

² *Schwenke v Silcar Pty Limited* [2013] SWC.

³ *Talbot v Air New Zealand Ltd* [1995] ERNZ 356 at 366.

telephone conversation was intended to be confidential or off the record. Nothing was said to suggest that both sides were not free to make whatever record they preferred. There was advice given at the time about who was listening to the speaker phone and there was no evidence of complaint or that recording would have not been expected or regarded as unfair.

[72] *Talbot*⁴ therefore supports that unless the conversation was understood to be confidential or off the record, or in some other way restricted, covertly recording a telephone conversation with an employer was unlikely to be in breach of the duty of mutual trust and confidence. There was recognition in the judgment by Thomas J⁵ that there was no suggestion in that case of an attempt to obtain an unfair advantage and the ostensible reason for taping the discussion was to obtain an accurate recoding of what was said.

[73] *Talbot* does not close the door to the possibility of covert recording significantly impairing trust and confidence in an employment relationship. It does under s 103A require a careful assessment of all the circumstances.

[74] The covert recording in this case was undertaken in circumstances where there were very real issues within the relationship. Mr and Mrs Duff considered Mr Nicol had made statements undermining the company and Mr Nicol had not held back on 16 November 2017 with expressing his views about Mr Duff. The evidence supported that Mr Nicol had questioned whether he could continue to work for Mr Duff.

[75] Mr Nicol was aware that Mr Duff could be volatile. Elements of recording support that Mr Duff considered Mr Nicol to be provocative. He asks him at one stage why he is smiling. Mr Nicol says he is a *happy guy*. Mr Duff complains at the meeting and Mr Nicol responds with *I'm smiling*. Mr Duff responds that Mr Nicol is smirking and says *you little shit*. Mr Nicol responds *wow that is inappropriate*. Ms Gordon also makes comments that suggest that Mr Duff's behaviour is problematic as well.

⁴ *Talbot v Air New Zealand* above n 3

⁵ Above n 3 at p371

[76] Some level of privacy can be expected about what is said at a disciplinary meeting. The meetings are usually held away from other employees so the conversations that occur are not overheard. Equally further investigation is often undertaken with other employees/witnesses using the information gathered from a disciplinary meeting which impacts on the level of confidentiality expectations. If there are subsequent proceedings then what occurred at the disciplinary meeting can be disclosed to the employment institutions so that there can be an objective assessment of justification issues.

[77] There was no evidence to support that it was agreed that the discussion would be confidential or off the record. It was the sort of meeting where it would be expected that notes would be taken by the representatives. Ms Gordon, from the correspondence, did not regard it as confidential. The recording does not disclose a statement to that effect. It was not clear that had a request to record been made that it would not have been agreed to. It was suggested in evidence that a different level of care would have been taken if there had been that knowledge. The meeting from the recording was well managed by Mr Shingleton and the odd heated exchange is not unheard of in disciplinary meetings. Generally however there could be an expectation overall of reasonable behaviour at disciplinary meetings recorded or not. The meeting is to provide a fair opportunity for explanation to allegations. I cannot conclude with certainty that it was intended the meeting was to be confidential.

[78] The explanations at the time about why Mr Nicol felt that he should record was that he felt recording his interactions with Mr Duff was required. Mr Nicol however was represented as was ConCut. Mr Nicol should have advised that he was recording at the outset of the meeting. There is a duty not to mislead or deceive or do anything that is likely to do so. Further there is an obligation to be responsive and communicative. The covert recording was a breach of the duty of good faith on the part of Mr Nicol.

[79] Mr Shingleton dismisses as self-serving a submission that there was no policy that covert recording was not permissible. As in many disciplinary matters the absence or otherwise of a policy is a factor that could be taken into account in an assessment about

whether Mr Nicol was clear that such conduct could be viewed as serious misconduct and acted with that knowledge. The action of recording the disciplinary meeting at which Mr Nicol was present was not unlawful. Mr Nicol had undertaken exactly the same conduct a few days earlier but in different circumstances.

[80] Objectively assessed the recording did support Mr Duff felt provoked into reacting the way he did. I do not find that the recording of the 22 November meeting though was particularly harmful to ConCut or that Mr Nicol could really gain any advantage from it even if he thought that he might.

[81] Mr Thompson refers to an Authority determination in *Cliff v The Bay of Plenty District Health Board*⁶ in which there had also been covert recording. Member Tetitaha did not conclude in that case that it was conduct that was necessarily serious misconduct even though one recording appeared to be an attempt to ambush.

[82] I accept in determining the seriousness of the conduct, that Mr Nicol's immediate acknowledgement when asked if he was recording the meeting has to be weighed in looking at whether the conduct was destructive of trust and confidence.

[83] The conduct could be considered a breach of good faith but not every such breach is destructive of trust and confidence whether on the part of an employee or an employer.

[84] In all the circumstances I am not satisfied that the covert recording of a disciplinary meeting, whilst impacting on trust and confidence, was conduct of the type that deeply impaired or destroyed trust and confidence in Mr Nicol.

[85] A fair and reasonable employer could not in all the circumstances in which it was undertaken conclude that Mr Nicol's covert recording of the conversation was serious misconduct.

Could a fair and reasonable employer have reached the decision to dismiss?

⁶ *Cliff v The Bay of Plenty District Health Board* [2015] NZERA Auckland 187 Member Tetitaha

[86] I have found that there was procedural unfairness, and not in a minor way, in the failure to respond to a request for further information about why the recording was considered a breach of trust and confidence and the concerns Mr and Mrs Duff had about it.

[87] I have not found that the covert recording was serious misconduct.

[88] In those circumstances a fair and reasonable employer could not have reached the decision to dismiss.

[89] Mr Nicol has established a personal grievance that he was unjustifiably dismissed and is entitled to a consideration of remedies.

Remedies

Lost Wages

[90] Mr Nicol did not actively search for other roles as he said that he was too unwell. He said that he undertook treatment and improved and started a full time role on 21 March 2018. There was some evidence to support that the role may have started on 19 March including Inland Revenue documentation.

[91] Mr Nicol seeks reimbursement of lost wages from 4 December 2017 to 21 March when he obtained new employment. That is a period of 15 weeks and 3 days.

[92] Mr Shingleton submits that the only mitigation step that Mr Nicol attempted was counselling but agreed that work was available and he could have walked into another role immediately following his dismissal. He submits that the Authority should decline to award any lost wages or award less than the statutory three months.

[93] In assessing reimbursement of lost wages I accept that there is evidence to support depression and I agree that would have had an impact on motivation and the ability to look for and undertake work. By 19 February 2018 the Consultant Psychiatrist Professor Roger

Mulder recorded that Mr Nicol felt his symptoms had significantly improved and that he was planning a return to work at that stage part time.

[94] The employment relationship was not without significant issues of trust and confidence from both parties. Mr Nicol was questioning whether he could continue to work for Mr Duff, and Mr and Mrs Duff believed Mr Nicol to be bad mouthing the company. I cannot be satisfied on an objective assessment that had this relationship continued it would have been for a three month period. On that basis I find it appropriate to limit any assessment of lost wages to a period of ten weeks which also accords with the period Mr Nicol felt most unwell as reported in Professor Mulder's report.

[95] The earnings for Mr Nicol were variable. I have averaged gross earnings for the six months of April to August and then November 2017. ACC compensation was paid in September and October 2017 so I have not included those months. Gross earnings for the six months aside from September and October were \$31,639. I have divided that figure of \$31,639 by 26 weeks to arrive at a weekly gross sum of \$1216.88 gross. Subject to issues of contribution wages to be reimbursed are \$12,168.85 being \$1216.88 multiplied by 10 weeks.

Compensation

[96] Mr Nicol seeks under this head the sum of \$50,000. I accept Mr Shingleton's submission that there should be a global compensatory award for the two grievances found of unjustified action causing disadvantage and unjustified dismissal, as they arise out of the same factual matrix. The Authority heard from Mr Nicol, his partner Kim Drummond, Colette Woolcock Clinical Psychologist and Professor Mulder about this claim.

[97] The reports prepared by Ms Woolcock and Professor Mulder were not expert reports. They were prepared for ACC purposes. It was accepted that neither Ms Woolcock nor Professor Mulder completed a DSM-5 assessment of Mr Nicol but there was a questionnaire undertaken by Mr Nicol which did involve a measure of self-reporting.

[98] Ms Woolcock concluded that Mr Nicol presented on 10 January 2018 with a major depressive disorder and Professor Mulder confirmed that diagnosis in his report. Both attributed that to the work situation and referred to verbal abuse and bullying from Mr Duff at the 16 November meeting and the dismissal. There was reference in Professor Mulders report about the picking up of the van and humiliation about that.

[99] Mr Nicol presented it was reported with motivation issues, guilt about not being able to provide for his family, rumination and worry, insomnia and weight variation. He reported less pleasure in life and not able to respond to his children in the usual way. Ms Drummond, Mr Nicol's partner, confirmed she was concerned about Mr Nicol, leaving him alone and there were also financial concerns which necessitated her returning to full time work.

[100] Mr Shingleton submits that the Authority should conclude that the episode was mild. The Authority was not provided with sufficient evidence to conclude the severity of the depressive episode. I do however weigh that Professor Mulder in his report states that following the work events Mr Nicol was *perplexed by the onset of a number of physiological and psychological symptoms which persisted for around ten weeks*. I also weigh that Mr Nicol with the assistance of therapy was recorded by Professor Mulder as having *significantly improved* within two and a half months following dismissal.

[101] Mr Shingleton submits that Mr Nicol was prescribed anti-anxiety medication. Anxiety and depression are often seen as inter-related and I do not place significant weight on that. Mr Shingleton submits that evidence support that Mr Nicol's claims are self-serving and exaggerated. I do accept Mr Shingleton's submission that there were other factors that could have caused distress and did not appear to be explored in any depth by Ms Woolcock or Professor Mulder.

[102] In particular there was the departure of one of Mr Nicol's co-workers who was also his friend, J from ConCut. There was a dispute between J and ConCut and some evidence to suggest that Mr Nicol was upset with J's treatment by Mr Duff. There was Mr Duff's driving charge and Mr Nicol's strong view about that because of the tragic death of his family

member. There were the feelings and emotions generated from that. There could have been other issues as Mr Shingleton sets out but to reach a conclusion about them would be speculative. For example Mr Nicol had had a challenging start to life but there was no evidence of any impact on mental health as a result of that. Objectively assessed Mr Nicol had successes in life and showed resilience.

[103] In determining the level of compensation I find on the balance of probabilities that Mr Nicol was diagnosed with a major depressive episode that was considered to have arisen primarily as a result of the work events. The impact on him was significant. He attended nine therapy sessions and found them beneficial. I weigh that there was an improvement in mental health within about two and a half months and a return to work after three and a half months. It is not within the high mark of cases where the Authority where the recovery period is many months or even years and I weigh that. Professor Mulder referred to a requirement for medication for minor tranquilisers for sleep and anxiety. Fortunately no suicide ideation was present although there was some vague questioning as expressed by Professor Mulder.

[104] Considering the spectrum of similar cases and subject to contribution I find a suitable award under this head is the sum of \$25,000.

Contribution

[105] Mr Shingleton submits that contribution should be 100%. I do not accept that. I find a causal link between the covert recording, the knowledge that Mr Duff could be provoked to anger and the dismissal. Mr Nicol should have advised an intention to record at the outset of the meeting and the failure to do so was blameworthy conduct. This is particularly so where there were already issues of trust and confidence between the parties that needed to be discussed and resolved and not exacerbated if the relationship was to be productive and ongoing.

[106] I want to record although there is not a causal link with the grievance found it should have been disclosed at the outset of the 22 November meeting that the earlier meeting had been recorded. Employment law is even handed. To fail to disclose information such as that to an employee before discussion about the events would also have been unacceptable.

[107] There was no outcome about the bad mouthing of the company at the time of dismissal and therefore I am unable to conclude that it was a causal link in the grievances. It has been recognised as an issue of trust and confidence between the parties and as such has been weighed in limiting reimbursement to ten weeks.

[108] I find that the above remedies should be reduced by 25%.

Orders made

[109] Taking contribution into account I order that Canterbury Concrete Cutting NZ Limited pay to Michael Nicol the sum of \$9126.64 gross being reimbursement of lost wages under s 123(1)(b)(i) of the Act.

[110] Taking contribution into account I order that Canterbury Concrete Cutting NZ Limited pay to Michael Nicol the sum of \$18,750.00 without deduction being contribution.

Penalty for a breach of good faith

[111] By covertly recording the disciplinary meeting Mr Nicol breached his duty of good faith. Under s 4A of the Act a penalty is available for certain breaches of good faith including if the failure was intended to undermine an employment relationship.

[112] I have assessed the issue of a penalty under s 4A(b)(iii) of the Act and whether the failure was intended to undermine the employment relationship.

[113] I find that there was an intention to covertly record. The employment relationship had sustained some damage from the 16 November meeting and the suspicion of Mr Nicol bad

mouthed the company. There is a feature that takes this matter beyond recording for accuracy and a simple lack of courtesy in advising that there was recording.

[114] There was a level of provocation on Mr Nicol's part during the meeting in the clear knowledge that Mr Duff could become angry. The employment relationship had been tested at the meeting on 16 November, at times significantly, and such covert recording I find was intended to undermine it further.

[115] Although Mr Shingleton in the statement in reply asked for a penalty of \$7000 this increased in final submissions to \$10,000. Mr Thompson submits that if a penalty is to be awarded it should be \$400.

[116] There was one breach of the duty of good faith and the maximum penalty therefore is \$10,000 for an individual.

[117] I have assessed the matters set out in s 133A of the Act that the Authority must have regard to in determining the amount of the penalty.

[118] I have regard to the object of the Act in s 3 to promote the obligations of good faith and mutual trust and confidence. Mr Nicol's conduct undermined those obligations and the objective in s 3.

[119] The breach was limited to the covert recording on 22 November 2017 and was a breach of good faith. Mr Nicol I accept in all likelihood considered he was able to record the meeting. To do so was not unlawful but there was an intentional covert recording and elements of provocation which undermined the relationship. Mr Nicol did admit immediately that he was recording. If however he had denied it he would not have been able to then use the recording in any subsequent dispute about his employment relationship without it being obvious that he had not told the truth.

[120] Disclosure of the covert recording clearly had an impact on Mrs Duff and her confidence to continue with the meeting. She felt that the relationship had been undermined

and describes feeling violated by the recording. Mr Nicol was not remorseful when asked at the Authority investigation meeting about his action but there is no evidence to support previous conduct of this nature in proceedings before the Authority or Court.

[121] There is a need for deterrence of this conduct and for the Authority to promote good faith conduct in all aspects of the employment environment and employment relationship because that is the object of the Act.

[122] I have had regard to one other case⁷ in which a penalty was ordered where an employee has secretly recorded a meeting with the management team over a period of time for guidance. There were express contractual terms prohibiting such conduct. The penalty awarded was \$4000. I find that conduct was potentially more serious because of its repeated nature and express provision in the employment agreement than this.

[123] In terms of financial circumstances Mr Nicol has received awards in respect of his grievance. The Authority should also recognise some overlap in making a penalty for a breach of good faith with the contribution assessed.

[124] Standing back and looking at all matters I find an appropriate award for a penalty in all the circumstances is \$2000.

[125] I order that that sum be paid by Mr Nicol into the Authority by 30 January 2019 and must then be paid by the Authority to the Crown.

Costs

[126] I reserve the issue of costs. Mr Thompson has given the Christmas break until 16 January 2019 to lodge and serve submission as to costs and Mr Shingleton has until 30 January 2019 to lodge and serve submissions as to costs.

⁷ *Andrew Simpson v IBM New Zealand Limited* [2014] NZERA Auckland 321

Helen Doyle
Member of the Employment Relations Authority