IN THE EMPLOYMENT COURT
AUCKLAND

AC 30/09
ARC 36/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MASONRY DESIGN SOLUTIONS LIMITED Plaintiff
AND	NICHOLAS BETTANY Defendant

Hearing: 12 and 13 August 2009
(Heard at Auckland)

Appearances: Paul Wicks, Counsel for Plaintiff
John Cox, Counsel for Defendant

Judgment: 21 August 2009

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This employer's challenge to a determination of the Employment Relations Authority both seeks to set aside a finding of unjustified dismissal and compensatory monetary remedies, and to establish a claim for damages for breach by Nicholas Bettany of his employment agreement.

[2] The Employment Relations Authority found that Masonry Design Solutions Limited (MDSL) dismissed Nicholas Bettany unjustifiably but made modest compensatory awards to reflect his contribution to the circumstances that gave rise to his dismissal. For lost wages the Authority awarded $2,681.25 and $2,500 as compensation for hurt and humiliation. Mr Bettany was also directed to pay to his former employer the sum of $109.37 for the cost of personal telephone calls made in breach of his employment agreement.

[3] Dismissing MDSL's claim for $18,000, being the claimed cost of rectification of deficient work performed by Mr Bettany, the Authority concluded that three elements had to be established by the employer. The first was said to have been conduct by the employee in breach of the employment agreement. The Authority was satisfied that this had been proved and, in particular, that Mr Bettany had not performed his duties with reasonable skill and diligence or devoted the whole of his time and attention to carrying out his duties. The second consideration was that the breach must have caused the employer's loss. The Authority also found this proven. It did not, however, accept MDSL's damages calculation methodology. It held the company's claim was to lost revenue and not the cost to it of the breach. Based on the former methodology, the Authority found established a loss of almost $13,000. The Authority then added an unheralded fourth consideration. It wrote:

> *The final element to be established is that the consequences of the breach would have been apparent to any person of reasonable intelligence contemplating whether or not to engage in that conduct. The test here is sometimes expressed by asking whether the employee engaged in the conduct in question knowing that it would cause loss to his or her employer.*

[4] The Authority found that the employer's counterclaim failed this test. It said that the employer had not established that Mr Bettany engaged in the conduct complained of knowing that it would cause loss to the respondent and that although Mr Bettany was *"…unpunctual, sloppy, distracted, and slow in his work …"*, the Authority was not satisfied that he realised his work was so bad that it would need to be redone completely.

[5] MDSL's claim for damages is again to the full $18,000 so that the challenge raises issues of what losses may be claimed by an employer against an employee for breach of the employment agreement, and also whether the particular forseeability found by the Authority to have been lacking was a required element of the employer's claim and, if so, was established.

Relevant facts

[6] Only a brief summary of these is necessary to consider the legal issues.

[7] By mid-2006 Mr Bettany was a well qualified and experienced computer-aided design (CAD) draughtsperson on the lookout for employment. MDSL had sufficient CAD design drawing work for a full-time draughtsperson but was apprehensive about a prospective downturn in the building industry. The company therefore offered, and Mr Bettany accepted, a three-month fixed term period of employment. It was understood that if there was still sufficient prospective work at the end of this period and if Mr Bettany's work met his employer's standards, he might expect to be engaged further as what is sometimes known as a permanent employee or, more correctly, an employee of indefinite duration.

[8] Although Mr Bettany was qualified in and experienced with a number of CAD programs, MDSL's was new and different and Mr Bettany spent the first week of his employment learning and training on that system. Thereafter, he began work on a number of the company's projects consistent with his skill in, and experience of, the CAD program. Mr Bettany operated a computer used by him exclusively that both remained switched on constantly and had access to the internet including email services at all times.

[9] Towards the end of the three-month term of his employment, MDSL became concerned about Mr Bettany's time keeping and work output. On a number of occasions over the past 2½ months and without explanation or excuse, Mr Bettany had arrived at work more than slightly late or, on some occasions, had failed to arrive at all. On 17 November he was warned that this would have to improve if he was to continue in employment after 4 December 2006. Mr Bettany promised to fulfil his employer's expectations. However, following a meeting or meetings between the parties on 29 November 2006, Mr Bettany was dismissed summarily for serious misconduct, being the breaches by him of his employment agreement relating to time keeping and also to unreasonable use of the email and internet system. After Mr Bettany's dismissal, the company discovered that some of his work had been of such poor quality that it had to be redone at a significant cost to the company. The plaintiff also concluded that he had exceeded the permitted reasonable private use of his company cell phone for which it had paid.

[10] Mr Bettany issued proceedings in the Employment Relations Authority alleging that he had been dismissed unjustifiably and seeking monetary compensation. The company counterclaimed for damages for breach of the employment agreement relating to the cost of rectification of Mr Bettany's work and for cell phone charges.

The employment agreement

[11] The individual employment agreement between the parties provided materially as follows. The emphases by underlining relating to matters at issue in the case are mine.

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4.2 Obligations of the Employee

The Employee shall:

(i) Comply with all reasonable and lawful instructions provided to them by the Employer;

(ii) Perform their duties with all reasonable skill and diligence;

(iii) Conduct their duties in the best interests of the Employer and the employment relationship;

(iv) Deal with the Employer in good faith in all aspects of the employment relationship;

(v) Comply with all policies and procedures (including any Codes of Conduct) implemented by the Employer from time to time.

(vi) Take all practicable steps to perform the job in a way that is safe and healthy for themselves and their fellow employees.

…

6 HOURS OF WORK

The Employee's hours of work shall be between the hours of 9.30am – 6.00pm, Monday to Friday inclusive. The Employee may also be required to work over and above these hours in order for the Employee to properly perform their duties.

…

11 EMPLOYEE OBLIGATIONS

…

11.3 *During normal working hours Employees shall devote the whole of their time, attention and abilities in carrying out their duties.*

11.4 *Employees shall carry out their duties well, faithfully and diligently, providing the Employer the full benefit of the Employee's experience and knowledge.*

11.5 *Employees shall use best endeavours to promote, develop and extend the Employer's business interests and reputation and not do anything to its detriment.*

…

12.4 Use of Internet and Email

The Employee will have access to email and the Internet in the course of their employment. The Employee shall ensure that at all times their use of the email and Internet facilities at work meets the ethical and social standards of the workplace. Whilst a reasonable level of personal use is acceptable to Masonry Design Solutions Ltd, this must not interfere with the Employee's employment duties or obligations, and must not be illegal or contrary to the interests of Masonry Design Solutions Ltd. The Employee shall also comply with all email and Internet policies issued by Masonry Design Solutions Ltd from time to time.

…

14.2 Termination for Serious Misconduct

Notwithstanding any other provision in this agreement, the Employer may terminate this agreement summarily and without notice for serious misconduct on the part of the Employee. Serious misconduct includes, but is not limited to:

(i) theft;
(ii) dishonesty;
(iii) harassment of a work colleague or customer;
(iv) serious or repeated failure to follow a reasonable instruction;
(v) deliberate destruction of any property belonging to the Employer;
(vi) actions which seriously damage the Employer's reputation.

Justification for dismissal -Timekeeping

[12] Mr Bettany asserts that he was penalised unjustifiably for poor time keeping because he claims that his terms and conditions of employment allowed him considerable flexibility about when he started and finished work.

[13] I do not accept that position. The company's standard hours of work are from 9 am to 5.30 pm. Mr Bettany was able to persuade the employer to vary these in his case to 9.30 am to 6 pm and this is recorded expressly in the parties' employment agreement. Although there will inevitably be occasional lateness for a variety of reasons that an employer will excuse and a reasonable expectation that if an employee is to be late or absent on a particular day, the employer will be so advised as soon as reasonably possible, that is not the position here.

[14] Despite being reminded of his 9.30 am start time obligations on a number of occasions throughout his employment, Mr Bettany arrived at later times of the day without exemption or excuse and, on a number of other days, failed to attend work at all. Although there were not infrequent occasions when Mr Bettany signed in a little before 9.30am, these do not cancel out the lengthier, unexplained and un-excused latenesses. He was in breach of his employment agreement and, having been advised frequently of his obligations and warned that the employer would not tolerate repetitions, Mr Bettany was clearly at risk of the fixed term agreement not being renewed or converted to employment of indefinite duration.

[15] In addition to timeliness being a contractual requirement, there were good reasons in practice for Mr Bettany to be punctual. Although Mr Bettany's work as a CAD draughtsperson was undertaken independently of others, there was, nevertheless, a need for him to interact with them, both within and beyond the office. Mr Bettany was answerable to the company's senior architectural draughtsman, Matthew Ebbett, and to its owner, Mark Wilson. Mr Bettany was also expected to meet and otherwise communicate with others from time to time including clients, engineers, and all of the other persons or organisations involved in masonry construction of buildings of which his design role was an essential preliminary part.

[16] In these circumstances it was reasonable both to expect Mr Bettany to be present and available at work between his agreed hours of 9.30 am and 6 pm, and for the employer to have regarded seriously his apparently wilful failures or refusals to do so on these occasions. A fair and reasonable employer in all these circumstances would have held significant concerns about the consequences of Mr Bettany's non-compliance with his agreement and the apparent absence of any prospect of real improvement in this. The fair and reasonable consequences of these failures would have included dismissal and/or refusal by the employer to renew or continue the fixed term employment.

Justification for dismissal - Internet/email use

[17] Breach of the employment agreement's provision allowing "*a reasonable level of personal use"* of these facilities was the second of the two grounds for

dismissal. The company's reliance is on the contractual requirement that email and internet use "*must not interfere with the Employee's employment duties or obligations, and must not be … contrary to the interests of Masonry Design Solutions Ltd.*" Although there was a requirement on Mr Bettany to "*comply with all email and Internet policies issued by [the employer] from time to time*", no evidence of any such policies was produced and in these circumstances I assume there was none. This case throws up an assessment of what was, in all the circumstances of this particular case, a reasonable level of personal use of the employer's computer system. As with personal mobile phone use, there was no definition of "*reasonable*" use of these employer-provided facilities.

The grounds for and process leading to dismissal

[18] Mr Bettany was dismissed summarily for serious misconduct in employment. That phrase was defined in his employment agreement, albeit not exhaustively. The company had two grounds that it said amounted to serious misconduct. The first was Mr Bettany's time keeping. The second was said to have been his excessive private use of email and internet facilities during working hours. Although each of these breaches, had they been established to the requisite standard, may have amounted, individually and collectively, to misconduct, it is difficult to categorise them as serious misconduct unless, in terms of clause 14.2(iv), they amounted to a serious or repeated breach of a lawful and reasonable employment instruction.

[19] Mr Bettany's was fixed term employment of three months. There is no challenge to the employment agreement's compliance with s66 of the Employment Relations Act 2000 ("the Act") and it follows that unless extended or converted to employment of indefinite duration, his job was scheduled to finish on 4 December 2006.

[20] What happened at the parties' meeting on 17 November 2006 is crucial to the establishment by Mr Bettany of his claim to unjustified dismissal. He says that although Mr Wilson did remind him that he should both keep to his contracted hours and increase his work output, the managing director nevertheless said that Mr Bettany could regard himself thereafter as a "permanent" employee and that he

would be rewarded by a Christmas bonus of a night's accommodation at a luxury country lodge. Mr Bettany says that he, in turn, promised to meet the company's time and productivity expectations by working at least two hours longer each day, beginning work at about 6.30 am and by forgoing any pay for those additional hours, at least until his productivity had improved.

[21] Mr Wilson, on the other hand, asserted that the meeting he arranged with Mr Bettany on 17 November was for the purpose of bringing to the employee's attention the company's concerns about his time keeping. Mr Wilson says that although he advised Mr Bettany that the company had determined to retain the position he held for the long term, Mr Bettany's compliance with his employment agreement was expected if he was to continue as an employee. Mr Wilson says that he referred to the Christmas bonus as a form of incentive for Mr Bettany in the sense that the latter might look forward to it if his work performance improved. The company's position was that continued employment was conditional on compliance and improvement.

[22] Also discussed at the meeting on 17 November was Mr Bettany's wish to undertake his own draughting work for clients in his own time. Not surprisingly in my view, because of Mr Wilson's concerns about Mr Bettany's work performance for the company, he declined to agree to Mr Bettany having his own customers as the employer was entitled to do under the employment agreement. I do not infer, as the Employment Relations Authority appears to have concluded, that this was an indication that Mr Bettany had been appointed permanently to the company's staff. Rather, the agreed outcome to the defendant's request was consistent with the employer's dissatisfaction with his performance and the resolution of both parties to improve on this.

[23] I accept Mr Wilson's account of this conversation and the parties' agreements where it conflicts with Mr Bettany's. Mr Wilson had a better recollection of this and other relevant events. His account impresses me as inherently more likely to have been correct than Mr Bettany's in all the circumstances. I regret to conclude that Mr Bettany was not a witness on whom I could rely for an accurate account of important relevant facts.

[24] Having made a number of promises to improve his performance, including to start work earlier each day, it is remarkable that Mr Bettany not only did not adhere then to his contracted hours but defaulted even more frequently than in the past. On three of the six working days between 17 and 29 November, Mr Bettany was significantly late to work and gave his employer neither warning of, nor explanation for, these defaults. This was not merely a failure by Mr Bettany to make good his promise to his employer to start work earlier, but a frequently repeated failure to even adhere to the original contracted start time of 9.30 am.

[25] It was understandable in these circumstances that Mr Wilson called Mr Bettany to discuss this and other performance matters on the afternoon of 29 November. Although Mr Wilson did not presage precisely the nature and content of this meeting, he did say that it was to discuss serious concerns about Mr Bettany's employment. The latter could not have failed to be aware that it would deal with the matters they had discussed on 17 November and his failure to improve as he had promised he would on that occasion only six working days previously.

[26] Mr Wilson asked Mr Bettany twice whether he wished to be represented or otherwise supported at the meeting and only continued with it when assured by Mr Bettany that he did not seek to have any assistance and wished to proceed. Mr Wilson would have been prepared to have delayed the meeting had Mr Bettany so requested.

[27] A couple of days before the meeting on 29 November Mr Wilson had become sufficiently concerned about Mr Bettany's performance of his job and arranged to search some electronic records on the computer used by Mr Bettany. These appeared to reveal very extensive private email and internet use including live radio streaming that used significant amounts of the company's electronic band width. Mr Wilson obtained hard copies of screen shots confirming and detailing this private use of the work computer by Mr Bettany for the purpose of discussing this with him on 29 November. For example, the information obtained by Mr Wilson seemed to show that on 27 November Mr Bettany accessed websites or otherwise undertook electronic transactions that were non-work related on more than 180 occasions.

[28] On 29 November, Mr Wilson initially put to Mr Bettany his excessive private use of the computer. The latter denied this. When, however, Mr Bettany was shown the hard copies of the screen shots, he admitted to Mr Wilson that he had developed some *"bad habits"* at work. Mr Bettany admitted, in effect, his unreasonable and excessive use of his employer's computer systems during working hours. After considering the position, Mr Wilson dismissed summarily Mr Bettany for serious misconduct.

Justification for dismissal

[29] The test whether Mr Bettany was dismissed justifiably is contained in s103A of the Act. The Court must determine whether the dismissal, and how the employer went about it, were what a fair and reasonable employer would have done in all the circumstances.

[30] Significant among the relevant circumstances was the contractual expectation that the three-month period of engagement would end on 4 December 2006. Although the company had made and conveyed its decision that it would continue to employ a draughtsperson in the role Mr Bettany held, that position would not have been his unless he improved his time keeping and productivity as was made clear to him, and he assured the company he would, on 17 November. So Mr Bettany had a legitimate expectation of a continuation of his employment after 4 December 2006 but only if he met the employer's reasonable conditions.

[31] In the area of timeliness, Mr Bettany clearly did not do so. I have concluded that in these circumstances a fair and reasonable employer would have dismissed Mr Bettany for serious misconduct. That is because his serious or repeated failure to follow reasonable instructions to begin work on time amounted to serious misconduct under clause 14.2(iv) of the employment agreement. Even if it had not done so, but simply amounted to misconduct, dismissal would still have been justified although on two weeks' notice provided in the agreement. Because, however, this took place less than two weeks before the expiry of the agreement, Mr Bettany could only legitimately have expected a payment for the balance of the term. The evidence did not establish whether that payment had been made, although Mr

Wicks assured me that it had, as appears to have been confirmed in email correspondence between the parties shortly after dismissal.

[32] As to the manner in which Mr Bettany was dismissed, that must be assessed independently for justification under s103A. Mr Wicks argued that although perhaps less than perfect, the company's investigation of Mr Bettany's breaches of contract and the process that led to his dismissal were sufficiently fair and reasonable in all the circumstances to meet the statutory test.

[33] I agree with that assessment. Although not formally in writing, Mr Bettany was warned on 17 November that his time keeping was seriously deficient and that he was expected to keep to the contracted work hours of 9.30 am to 6 pm. It must have been obvious to him, even if it was not spelt out in so many words by company representatives, that failure to meet these reasonable expectations in the immediate future would put in jeopardy any chance of his permanent appointment to the draughtsperson role after 4 December. I have concluded, for reasons earlier set out, that he was not appointed permanently to the position on 17 November but, rather, told of the employer's expectations for that to occur. Mr Bettany was well aware of the fixed term nature of his employment.

[34] Nor could it have been unknown to Mr Bettany, when he was called to the meeting with his employer on 29 November to discuss serious questions about his employment, that his failures on three occasions over six working days to be at work on time or to explain his lateness on those days, would be the subject of that meeting. Even if, however, Mr Bettany could claim to have been taken by surprise, Mr Wilson's repeated offer of postponing the meeting, together with his inquiries of Mr Bettany about whether he wished to be represented, ensured that Mr Bettany was not disadvantaged unfairly going into that meeting.

[35] The question of Mr Bettany's internet use was new in the sense that it was first raised by Mr Wilson at that second meeting. Even then, however, Mr Bettany had an opportunity to seek advice about this new issue or otherwise delay its consideration but chose not to do so. He admitted, in effect, to Mr Wilson that his internet use had been unreasonable. Ideally, the company ought to have made its

concerns about internet use known to Mr Bettany long enough before it determined these issues to have enabled him to know about them and respond. However, I do not consider that deficiency to be sufficient to cause the employer's process to have been unfair and to cause in turn the dismissal to have been unjustified.

[36] In this regard I disagree with the Employment Relations Authority's assessment of the fairness and reasonableness of the process engaged in by the employer. The Authority's conclusion of unjustified dismissal rested solely on what it assessed to have been an unfair process leading to dismissal rather than on the existence of circumstances that would in themselves have justified dismissal. More particularly, the Authority found that the employer's *"… failure to warn Mr Bettany that a failure to improve would place his job in jeopardy renders the termination of his employment procedurally unfair and hence, unjustified."*

[37] It is not insignificant that the company representatives took time to consider the position after hearing from Mr Bettany and to take advice before announcing to him his dismissal. Any unreasonable email and internet access, as I am satisfied has been established subsequently, could not be said to have been serious misconduct, although it was, as a breach of the employment agreement, misconduct. However, Mr Bettany's time keeping failures were serious misconduct in the sense of being repeated following a warning about them: see clause 14.2(iv) of the employment agreement set out in paragraph [11].

[38] It follows that the plaintiff has established that its dismissal of Mr Bettany meets the statutory test under s103A. Dismissal was justified. The plaintiff's challenge is allowed and the Employment Relations Authority's determination, finding that dismissal was unjustified and granting remedies, is set aside.

Counterclaim for loss from poor workmanship

[39] This is for $18,000 said to be the cost to the plaintiff of rectifying errors in Mr Bettany's work that were breaches by him of his employment agreement. I accept, and agree with the Authority also, that Mr Bettany's CAD draughting, in respect of jobs known as "Day" and "Sprosen", was error ridden. The vast majority

of these errors were attributable not to lack of knowledge or other innocent explanation. Rather, they are attributable to carelessness, inattention to detail, and otherwise for reasons that amounted to breaches by Mr Bettany of his contractual requirements to perform his duty with all reasonable skill and diligence (clause 4.2(ii)) and to devote during his normal working hours the whole of his time, attention, and abilities in carrying out his duties (clause 11.3). The carelessness of this work was also in breach of clause 11.4 which required Mr Bettany to carry out his duties well and diligently including providing his employer with the full benefit of his experience and knowledge. Mr Bettany did not deny the errors established in evidence: rather, he sought first to deny that they were his, next to assert that it had not been proven that they were his, and finally to claim that if they were his, inexperience through lack of training by his employer was their cause.

[40] The CAD designs so created by Mr Bettany were forwarded by him to a consulting engineer intending them to form the basis of the engineer's report and advice about such vital elements of construction as spans and loadings.

[41] I agree with the Employment Relations Authority, and have determined for myself on the evidence heard in this Court, that Mr Bettany worked very carelessly so that much of his draughting, particularly in the latter part of his employment, was mistake ridden. I do not accept Mr Bettany's assertions that someone else may have made these errors or that the company has not proved to the requisite standard that he did so. I am well satisfied on the balance of probabilities that the draughting work the subject of the counterclaim was done by Mr Bettany and not by any other person within the company.

[42] Nor do I accept Mr Bettany's assertions that he was not sufficiently trained on the CAD software package. He was well familiar with a variety of CAD software packages. Although the company's was one he had not used before, he undertook a week's training at the start of his employment on a program that was developed from one with which he was familiar. He made no complaint that he was not then proficient in its use. While he was naturally slower in completing work on this program in the beginning, I am satisfied that if Mr Bettany had considered his

knowledge or skill to be deficient, he would have brought this to the attention of the company but did not do so.

[43] I agree with the company's assessment of the position that Mr Bettany was simply very careless about the quality of the work performed by him. He was negligent in the errors that he made and in his failures to check and correct his work. Although it is unnecessary to attribute a cause to this carelessness, I tend to agree with the company that it was probably Mr Bettany's almost constant distraction with his personal business and other interests conducted on the internet that caused his failure to meet the standards of work performance for which he had contracted. But irrespective of its cause, I am satisfied that Mr Bettany's performance of his draughting work failed to meet the minimum standards to which he had agreed in his employment agreement.

[44] Nor do I accept Mr Bettany's assertion that the company's losses came about as a result of its failure to check his work after completion. Although he was supervised in an overall sense by the senior architectural draughtsman, Mr Ebbett, it was reasonable in the circumstances for the company to expect Mr Bettany alone to produce drawings that were substantially accurate. I do not accept Mr Bettany's assertion that the house plans sent to the engineers that required redrawing, were earlier checked and passed by Mr Ebbett. Rather, I accept Mr Ebbett's evidence that the only check that he performed was that the correct sorts of plans were being sent on by Mr Bettany to the engineers. Mr Ebbett did not check the accuracy of the detail of Mr Bettany's drawings before their dispatch and could not have reasonably been expected to do so.

[45] Checks made immediately after Mr Bettany's dismissal on the quality of his work revealed a substantial number of errors. Fortunately for the plaintiff, it was able to recover the house plans from the engineer before they had been acted upon. It was nevertheless necessary for accurate sets of these plans to be resubmitted to the engineer as a matter of some priority and it was appropriate for Mr Ebbett do so himself in the circumstances.

[46] I am not satisfied, however, that it was necessary for the defective plans to be recreated from scratch which would have been a more time-consuming and therefore more costly exercise than the inspection and correction of Mr Bettany's plans. Although the company was, of course, entitled to rectify these defects in the manner it considered best, in the circumstances of claiming the cost of doing so from Mr Bettany, it was obliged to mitigate its loss by doing that in the most economical fashion.

[47] A number of factors from the evidence have brought me to this conclusion. Although substantial accuracy of drawings sent to an engineer for approval and advice was expected, so too was a certain level of inaccuracy that could either be corrected by the engineer or would be the subject of a process known as "marking up" or final checking and correction by the plaintiff before the plans went further for local authority approval, quantity surveying, pricing for contracts, and other subsequent steps in the building process. Mr Ebbett was able to identify easily and accurately Mr Bettany's defects and inaccuracies on his drawings. Although I accept that closer examination by Mr Ebbett may have revealed more errors than he did in the course of three hours or so of evidence in Court, I consider that the estimate of six hours undertaken by Mr Ebbett to do so was probably accurate.

[48] Computer-aided draughting is an efficient process but still demands repetitive activity and attention to detail by the draughtsperson. It is an incremental process so that while both accurate details and errors made in early stages or layers of a design will be repeated unless changed or corrected, errors are probably correctable incrementally in the same manner. An error, once corrected in an initial draft, will not require subsequent correction in later versions.

[49] As Mr Ebbett conceded in evidence for the company, some of those errors would have been immaterial to the engineer's requirements and others so obvious that the engineer would have realised their erroneous nature and either corrected them or returned them to the company for correction. However, Mr Bettany's design drawings were so inaccurate that they could not reasonably have been expected to be sent on to the engineer or otherwise preserved and developed by the company, as they had been drawn by Mr Bettany. It was both reasonable and foreseeable,

including to Mr Bettany, that they would have not merely to be revised but substantially amended, such was the number and important nature of the errors.

[50] Also reasonable was the necessity for the company's senior draughting technician, Mr Ebbett, to do that work. It would not have been reasonable in the circumstances to have engaged another draughtsperson to do so or to have contracted out the draughting in an attempt to reduce the cost of rectification. The plaintiff was responsible to the client and to the engineer for the accuracy and professionalism of its designs and in all the circumstances it was reasonable that Mr Ebbett should rectify these to a proper standard at the appropriate cost to the company. The real question for decision is its loss and the quantification of that.

[51] I should address briefly the Employment Relations Authority's conclusion (on which it rejected the company's counterclaim) that it had failed to prove that the consequences of the breach would have to have been apparent to any person of reasonable intelligence contemplating whether or not to engage in the conduct. The Authority framed this test, in the alternative, as whether the employee engaged in the conduct in question knowing that it would cause loss to his or her employer.

[52] This is a matter of foreseeability. In this jurisdiction the principle was re-stated by the Court of Appeal in *Attorney-General v Gilbert* [2002] 2 NZLR 342 at 361-362 as follows:

> *The loss must be "sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances" (*McElroy Milne v Commercial Electronics Ltd *[1993] 1 NZLR 39 at p 41 per Cooke P). Loss of the type suffered will usually be sufficiently linked to the breach if within the contemplation of the parties as a not unlikely consequence of breach. That is how the question of remoteness of damage in contract was addressed in the context of the employment contract in* Mahmud v Bank of Credit and Commerce International SA *[1998] AC 20 at p 37 per Lord Nicholls of Birkenhead:*
>
> > *"… if it was reasonably foreseeable that a particular type of loss of this character [in that case, impairment of employment prospects] was a serious possibility, and loss of this type is sustained in consequence of a breach, then in principle damages in respect of the loss should be recoverable."*

[53] Applying these principles I conclude that it was foreseeable that if an employee such as Mr Bettany produced such poor quality work, it would both need

to be rectified and doing so would be at a cost to the employer. Thus causation and foreseeablity are required to be, and are, established in this case.

[54] The plaintiff has made out the legal elements of its principal claim for damages for breach of contract. Mr Bettany breached his employment agreement. The defendant suffered financial loss. That loss was attributable to the breaches. It was reasonably foreseeable that inadequate performance of his employment agreement to the appropriate standard by Mr Bettany would result in loss to his employer.

[55] The plaintiff's calculations of its loss are based on a claim that Mr Ebbett spent 150 hours correcting and redrawing Mr Bettany's work, 61 hours in respect of the Day house and 89 hours in respect of the Sprosen townhouses. That 150 hours is multiplied by an hourly rate of $120 which the plaintiff says is less than the equivalent for a fixed price job as most of the company's are.

[56] If it took Mr Ebbett 150 hours to redraw all Mr Bettany's plans, I conclude that it would have taken him less time to have corrected the errors on Mr Bettany's plans. There is a significant element of estimation in how long this would have taken because it was not done or addressed in the hearing. Based on the evidence of the time taken to identify the errors by inspection, as against the time taken to redesign the drawings from scratch, I have concluded that it would probably have taken Mr Ebbett about 100 hours of work to have brought Mr Bettany's drawings up to a sufficient standard for their re-submission to an engineer. By doing so, Mr Ebbett was unavailable to the company to undertake productive and remunerative work at his hourly charge out rate of $120. Multiplying 100 hours by $120 leads me to the conclusion that the company's loss for which it is entitled to reimbursement by Mr Bettany ought to have been $12,000. I award this sum as special damages against the defendant.

Counterclaim for unreasonable private use of employer's cell phone

[57] I deal with this element of the case in somewhat more detail than the money at issue would alone warrant because it concerns the question of reasonable private

use of employer-provided cell phones where that use is not otherwise more defined. Mr Bettany was provided with a cell phone the property of his employer and on which all charges were met by it. Although not referred to expressly in the parties' employment agreement, Mr Wilson, the plaintiff's director, conceded that employees including Mr Bettany could have reasonable personal use of such cell phones at the employer's cost. Just what was reasonable use was not defined, even generally.

[58] The employer claims against Mr Bettany for the cost of all personal use of the cell phone. The claim is for the sum of $109.37. This is taken from the cell phone provider's invoices for the two-month period from 2 October to 1 December 2006. Calculated on a daily basis, this is equivalent to the sum of approximately $1.80. At the rates (including GST) of 20 cents per SMS message and 40 cents per minute of mobile calling, this would equate to nine SMS messages per day, four to five one-minute calls per day or, in combination, say, two one-minute calls made and five SMS messages sent per day.

[59] The employer appears to have accepted the reasonableness of Mr Bettany's private use of its cell phone at this level, at least for the period from 2 October to 1 November 2006 before their employment relationship deteriorated. That is a strong implicit indication of acceptance of reasonableness of such private use on the part of the employer. There is no material difference between Mr Bettany's use of the employer's cell phone in that period and during the next month at the end of which he was dismissed.

[60] The absence of any other evidence of a reasonable level of such charges, the company's failure to specify what amounted to reasonableness and the company's apparent condonation of these charges being incurred by Mr Bettany throughout his employment, all indicate a tacit acceptance of their reasonableness. In these circumstances, I am not prepared to determine that this was unreasonable private use of the cell phone. Although the company complains particularly about three calls to overseas numbers made by Mr Bettany on one day, the charges for these amount in aggregate to less than $2 and I do not consider that the overseas nature of the destination of the calls is determinative of their reasonableness or certainly the reasonableness of the defendant's use of the cell phone in general. A better guide to

assessing reasonableness of private cell phone use is the monetary cost to the employer.

[61] The Authority determined:

> *… that Mr Bettany made lengthy personal calls to overseas numbers after hours. I am satisfied that this use was not authorised and accept that he is obliged to repay the cost of these calls to the respondent.*

[62] That is an erroneous finding in several respects because analysis of the evidence discloses that only within the space of less than 20 minutes on 24 November 2006, Mr Bettany attempted or made calls twice to the same number in Australia which lasted less than the minimum period of one minute on each occasion and cost 44 cents on each. The third call was to a number in Indonesia, again lasting less than the minimum period of one minute and cost $1.23. The majority of the other calls made, and SMS messages sent, were apparently to Mr Bettany's partner. The Authority went further than its erroneous conclusion (above) that Mr Bettany was liable for the overseas calls and ordered the reimbursement by him of all private calls and SMS messages. Even on the company's case, some of these were incurred lawfully by Mr Bettany and indeed I have found that all were, in total, reasonable as the company had agreed.

[63] The claim for reimbursement of private cell phone use is not upheld. The Employment Relations Authority's decision allowing that sum to the employer was wrong and is set aside.

Wash up

[64] For the sake of completeness I record, for the reasons stated during argument, that the defendant's counterclaim was a matter within jurisdiction (s161) having been raised in the Employment Relations Authority at first instance.

[65] At the end of his evidence-in-chief and having followed the plaintiff, Mr Bettany sought to claim additional damages for the alleged effects on him of his dismissal and for the effects of the plaintiff's counterclaim against him. These claims do not appear at all in the statement of defence and even if I had found for Mr

Bettany on his personal grievance, they would even then have been raised too late to have been dealt with. Finally, and in any event as I understood the basis of some of these claims, general damages are not able to be awarded for the inevitable disadvantages of being a defendant to proceedings.

[66] Consequent upon the setting aside of the Authority's personal grievance determination, the monies held on interest bearing deposit, being the condition of a stay of execution of the Authority's determination, may now be released to the plaintiff.

[67] The Employment Relations Authority awarded costs of $2,000 to Mr Bettany. The outcomes in the Authority having been reversed on this challenge, it follows that the Authority's costs award must likewise be set aside.

[68] As I indicated to counsel at the conclusion of the hearing of the challenge, questions of costs in this Court (including costs reserved on interlocutory applications) together with costs in the Authority are reserved. If these cannot be settled between the parties then the plaintiff may apply by memorandum filed and served within one month of the date of this judgment with the defendant having a like period within which to file a memorandum in opposition.

GL Colgan
Chief Judge

Judgment signed at 12.30 pm on Friday 21 August 2009