

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 438
3047072

BETWEEN DAWN LANGDON
Applicant

AND MIKE PINK TRADING AS
JUNCTION HOTEL
Respondent

Member of Authority: Helen Doyle

Representatives: Dawn Langdon self -represented
Mike Pink self-represented

Investigation Meeting: 23 May 2019 in Blenheim

Determination: 23 July 2019

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A Dawn Langdon was unjustifiably constructively dismissed and unjustifiably disadvantaged when her KiwiSaver deduction and employer contributions were not made.

B Mike Pink is ordered to pay to Dawn Langdon the following:

- (i) Reimbursement of lost wages in the sum of \$8,232 gross.**
- (ii) Compensation in the sum of \$18,000 without deduction.**
- (iii) Payment of the lost benefit of the employer's contribution to KiwiSaver in the sum of \$849.44.**
- (iv) Payment for two alternative days not taken in the sum of \$224 gross.**

- (v) **Payment of holiday pay in the sum of \$1232 gross.**
- (vi) **Interest under the Interest on Money Claims Act 2016 on the combined amounts of the alternative days and holiday pay in the sum of \$69.16.**

C Costs are reserved and a timetable for an exchange of submissions provided.

Identity of the respondent

[1] Dawn Langdon commenced employment at The Junction Hotel Blenheim on 1 August 2017 as a bar manager. Ms Langdon did not consider she was employed by a company but understood that Mike Pink and his wife Hazel owned and operated the Hotel that traded as The Junction Hotel. The employment agreement entered into by the parties referred to the employer as The Junction Hotel.

[2] The Authority treated an email received from Mr Pink on 10 January 2019 following service on him of the statement of problem as the statement in reply. Mr Pink did not state in that email that he was not the correctly identified employer and he did not attend an Authority case management conference on 19 February 2019. Mr Pink was served with the notice of direction that followed the telephone conference but did not lodge statements of evidence that were timetabled.

[3] When Mr Pink gave evidence at the Authority investigation meeting he suggested that The Junction Hotel was owned and operated by a company. There does not appear to be any limited liability company on the companies register relating to a Blenheim establishment with the name The Junction Hotel or Junction Hotel. Letters sent to Ms Langdon simply referred to Junction Hotel Spring Creek without indication of limited liability and the pay slips similarly were in the name The Junction Hotel.

[4] The parties did not attend mediation.

[5] I am satisfied that Ms Langdon was unaware of her employer being other than Mr and Mrs Pink. If there was a company then that was never identified and disclosed to her.

Employment Relationship Problem

Statement of problem

[6] Ms Langdon's employment with The Junction Hotel (the Hotel) ended on 4 March 2018. She wants the Authority to resolve several employment relationship problems arising from her employment with the Hotel as follows:

- (a) That her resignation on 4 March 2018 was in the nature of a unjustified constructive dismissal;
- (b) That she was unjustifiably disadvantaged when her roster was changed and her hours reduced and when employee deductions and employer contributions for KiwiSaver were never made when she had signed a form consenting to those deductions being made;
- (c) That she is owed payment for public holiday entitlements for working on Marlborough Anniversary day; and is unclear if alternative days for working on public holidays were taken or not.
- (d) That she was not paid her annual leave entitlements when the employment relationship ended.

Statement in reply

[7] Mr Pink's email dated 10 January 2019 was treated as a response to the statement of problem. Mr Pink states that Ms Langdon was taken on as a part-time bar manager for 12 to 15 hours per week and stated on her IR330 that this was Code S for secondary employment.

[8] Further that he then asked Ms Langdon if she could stand in until his wife who was undergoing surgery was fully recovered. When his wife recovered he wrote that he advised Ms Langdon that she would have to revert to her initial hours, and he issued another roster.

[9] He does not accept that Ms Langdon provided consent for KiwiSaver and says that she received payslips and could see that there was no mention of KiwiSaver deductions.

[10] Mr Pink refers to Ms Langdon having problems with other employers and says that there were issues at the Hotel as well. He does not accept that Ms Langdon was dismissed but rather that she chose to leave and says that each time she was off sick she received a payment.

Remedies sought

[11] Ms Langdon seeks reimbursement of lost wages from 4 March 2018 to 29 May 2018 when she obtained other employment, compensation for the grievance claims, reimbursement for public holiday entitlements, payment of annual leave entitlements and reimbursement for the loss of the KiwiSaver benefit.

The issues

[12] The Authority needs to resolve the following issues in this case:

- (a) What are the material provisions of the employment agreement?
- (b) What hours did Ms Langdon work at the Hotel?
- (c) What were the reasons for Ms Langdon's resignation?
- (d) Was the resignation caused by breaches of Ms Langdon's employment agreement with the Hotel. This will require an assessment of the following:
 - (i) Were her complaints about alleged bullying adequately investigated?
 - (ii) Was Ms Langdon treated in good faith and fairly following the raising of her complaints about bullying and during a disciplinary process?
 - (iii) Was there a change to Ms Langdon's rostered hours?
 - (iv) Was there consultation with her about the change and was Mr Pink responsive and communicative about the changed roster in the circumstances.
- (e) If there were breaches by the Hotel, were they of a serious nature that would mean it was reasonably foreseeable that Ms Langdon would not be prepared to continue to work;
- (f) If there was a constructive dismissal then was it justified?
- (g) If there is found an unjustified constructive dismissal then what remedies should flow?
- (h) Is money owed for working on Marlborough Anniversary Day and was it clear alternative days for public holidays worked were taken?

- (i) Was there an unjustified action in not deducting KiwiSaver and is Ms Langdon entitled to a loss of the benefit of employer contributions for KiwiSaver?
- (j) Is Ms Langdon entitled to annual leave payments or payment for alternative days for public holidays worked?
- (k) Should a penalty be awarded for a breach of the duty of good faith?

Material provisions of the employment agreement

[13] The employment agreement provided that Ms Langdon would commence working for Mr Pink on 1 August 2017. The hours of work were set out as follows:

The employer will roster the employee each week. The timeframe for these work sessions will be 12am until close. The timing of working hours will be set out in a roster.

The employer may offer more hours, and the employee can decide whether to accept the offer of extra hours.

The employer will let the employee know at least 1 week in advance of the new roster, unless there are exceptional circumstances. The employer will make sure the employee has days off within a reasonable period when the roster is set.

[14] Ms Langdon was to be paid \$16 gross per hour and that hourly rate did not change throughout her employment.

[15] There was a provision in the employment agreement about resolving employment relationship problems. It provided that if the employee has any concerns about their employment, or how they are treated at work, they should tell the employer as soon as possible so these can be resolved. The first step set out is for the employee and employer to talk about the problems and try to find possible solutions.

What hours did Ms Langdon work at the Hotel?

[16] When Ms Langdon commenced her employment she was working at a bakery in Blenheim. She was looking for additional work and was advised by a colleague that the Hotel was looking for a part-time bar manager.

[17] Ms Langdon was interviewed by Mr and Mrs Pink and offered the position. From 1 August 2017 she worked from 5:30 pm until closing for two to three nights a week at the Hotel.

[18] After a week or so, Mr Pink asked Ms Langdon if she could work on a Sunday but that created difficulties as she was also working at the bakery that day. Ms Langdon said there was a discussion with Mr Pink that if she could work the same amount of hours as she worked at the bakery at Junction Hotel then she would resign from the bakery.

[19] Ms Langdon said that Mr Pink came back and said he could guarantee 33 hours a week and Ms Langdon then resigned from the bakery position on Sunday 13 August 2017. Mr Pink did not accept that he guaranteed Ms Langdon 33 hours per week.

[20] From the pay record provided by Mr Pink on 11 May 2019 for the duration of Ms Langdon's employment I am able to conclude that for the first two pay periods for weeks ending 6 and 13 August 2017 Ms Langdon was paid for 7 and 13 hours worked and then for the week ending 20 August 2017 she was paid for 42.25 hours.

Hours worked until October 2017

[21] Ms Langdon worked the following rostered hours until October 2017. For each day Monday to Friday she worked 3:00 pm until closing which could be between 8:30pm and midnight. She did not work Saturdays. She worked Sundays from 12:00 pm until 8:30 to 9:00 pm. From the pay records the average hours worked by Ms Langdon for the 10 week period from 20 August until 29 October 2017 was 45.7 hours per week.

Hours worked after October 2017

[22] In October 2017 Ms Langdon gave her Tuesday shift to another employee who I shall refer to as D and that was the only change to her hours until a new roster was presented to Ms Langdon on 26 February to commence from 5 March 2018.

[23] From the pay records the average hours worked by Ms Langdon for the 16 week period from 29 October 2017 until 18 February 2018 was 43.15 hours per week.

Advice of change to hours with attached roster from 5 March 2018

[24] On 26 February 2018 whilst Ms Langdon was on sick leave Mr Pink emailed to her a new roster. His covering email provided as follows:

As there has been no definite date given by you for your return to work Paula has been taken on to cover your shifts.

Advise us when you are returning.

I am still not in possession of a valid doctors certificate which is needed to validate your 'abandonment of employment'.

Your hours of employment have had to be changed to to (sic) facilitate my incapacity starting from 5th March 2018.

Mon, Tues, Wed, Thurs, Fri, 12 noon to 3 pm.
Sunday 12 noon to close.

[25] Ms Langdon calculated the hours that she was rostered dropped from over 40 hours per week to about 25 hours per week.

What was the reason for Ms Langdon's resignation?

[26] Ms Langdon resigned from her employment. A resignation may be a dismissal in the nature of a constructive dismissal if the employee feels compelled to leave employment because of the conduct of the employer.

[27] The Court of Appeal in *Auckland Shop Employees Union v Woolworths*¹ listed three situations noting that these were not exhaustive where a constructive dismissal might occur.

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty leads a worker to resign.

[28] Ms Langdon relies on the third of these situations that a breach or breaches of duty lead her to resign.

¹ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 37 (CA) at 374.

[29] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc*² held that the correct approach in constructive dismissal cases is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer. In determining that matter all of the circumstances of the resignation have to be examined not simply the communication of the resignation. The Authority needs to then assess whether the breach of duty by the employer was of sufficient seriousness to make resignation reasonably foreseeable.

[30] On 4 March 2018 Ms Langdon sent to Mr Pink an email that provided amongst other matters that she believed she had no choice but to resign her employment effective immediately. Her concerns are contained in the first paragraph in the email and matters set out below:

Despite a number of attempts to bring my concerns to your attention, you have ignored my requests regarding the two very important employment related issues at stake. These relate to my claims that I am being treated in a bullying manner in my employment, and have had unsubstantiated allegations put to me. I have endeavoured in good faith to attend meetings with you to get resolve on that level. Secondly, last week my consistently worked 40 hours per week have been reduced without any prior consultation with me. I have sought your explanation as to why this situation has arisen, but you have not been forthcoming in a way that is consistent with your good faith obligations to be responsive and communicative. Further, I have made requests for my wages from last week to be paid and unexplainably (sic) this still has not happened. On that level I have also been denied my correct sick leave entitlements, after I informed you that I had a medical certificate endorsing my absence from work on grounds of workplace stress.

[31] At the last paragraph of the email Ms Langdon added ...”I am extremely upset and humiliated over the way I have been treated, when measured against the commitment and loyalty I have shown your business during my employment.”

[32] Ms Langdon when questioned at the Authority investigation meeting about the reasons for resignation stated that she felt Mr Pink was not interested in clearing issues up and that he did not tell her what decision had been made after a disciplinary meeting. She said that he ignored bullying claims and constantly referred to her previous jobs and made her feel like a “complete failure.”

² *Auckland Electric Power Board* [1994] 1 ERNZ 168

[33] The Authority needs to assess whether the resignation was caused by a breach or breaches of duty on the part of Mr Pink.

Were there breaches of the employment agreement?

[34] The employment relationship proceeded without serious issue until in or about January 2018 when Ms Langdon's relationship with another employee D began to deteriorate and this included being subjected to shouting and swearing in front of customers. She said that she brought this to Mr Pink's attention a number of times but there was no change to the behaviour.

[35] Ms Langdon made notes of meetings and events that she says she prepared shortly after the meeting. They were not shared at the time with Mr Pink and he was not in complete agreement with the nature of the meetings. I have relied therefore additionally on the emails and correspondence sent at the time between Ms Langdon and Mr Pink.

Meeting 25 January 2018

[36] A meeting took place on 25 January 2018 between Ms Langdon, Mr Pink, his wife Hazel and D. Ms Langdon understood the purpose of the meeting was to try to resolve the issues of concern between her and D. She felt that Mr Pink accused her of being the cause of the problem. Ms Langdon said that issues about her involvement with the till not balancing were raised with her but she was not given specific information to be able to respond sufficiently. She said that she was not the only one who could access the till in the course of a shift.

[37] Ms Langdon said that after the meeting on 25 January 2018 her relationship with D did not improve and she felt it deteriorated.

[38] After another incident on 12 February 2018 with D and another employee, Ms Langdon called Mr Pink and asked if she could meet with him and Mrs Pink to talk about problems she was experiencing with D. Mr Pink advised Ms Langdon that they were not available until 14 February at 10.30am for a meeting.

Meeting 14 February 2018

[39] On 14 February 2018 Ms Langdon went to the Hotel to meet with Mr and Mrs Pink. Mrs Pink said that she was too busy to attend the meeting and they went upstairs to the apartment to see Mr Pink. Ms Langdon said that when told by Mrs Pink that she had arrived for the meeting Mr Pink responded “It’s not happening.” He stated that he would leave a letter for her and they would meet the following Tuesday which was 20 February 2018. Mrs Pink saw Ms Langdon out and told her to “start looking for another job.” Ms Langdon said that upset her and she took two days’ leave on the basis of workplace stress.

[40] Ms Langdon wrote an email to Mr and Mrs Pink that same day noting her concerns about the workplace interaction with D and advising that she “would dearly like to resolve this issue to the best for everybody concerned.” The email set out some of the concerns with respect to the interactions with D. It also emphasised that Ms Langdon enjoyed working at the Hotel for Mr and Mrs Pink and her interactions with the customers. Ms Langdon wrote that she got upset when Mrs Pink told her to start looking for another job and that she was going to see her doctor on 15 February 2018. I conclude that it is likely, given that reference in the email sent that same day, that a statement was made to Ms Langdon to look for another job. This foreshadowed in all likelihood the knowledge that Ms Langdon was to be asked to answer disciplinary allegations.

Invitation to a disciplinary meeting about potential serious misconduct received 17 February 2018

[41] On 17 February 2018 Ms Langdon was required to go into work for a social club meeting in the afternoon. Mrs Pink met her and handed her a letter dated 13 February 2018 which invited her to attend a disciplinary meeting about potential serious misconduct.

Nature of the concerns

[42] The letter referred to wanting to meet to discuss an ongoing matter about serious altercations which have led to customers walking out and “making complaints and things that you have said that are incorrect.” The letter made reference to the latest episode but did not describe it further than saying it was observed by customers and could be “construed as serious misconduct and constitute possible instant dismissal.” There was reference to having

lost customers and in one case a company has “discontinued to lodge and eat here” with a loss of up to \$1000 per week.

[43] A meeting was to take place at the Hotel on 20 February at 11:00 am and it was stated that D would be at the meeting. The letter advised that Ms Langdon’s views would be heard, and she would be given an opportunity to respond. Further that her response would be considered, and any further investigation undertaken. Ms Langdon was invited to bring a representative or support person.

[44] There was reference to a meeting on 25 January 2018 being about a similar altercation and Mr Pink asked Ms Langdon to sort the problems out or disciplinary action would be taken if the matter was not resolved to his satisfaction.

Disciplinary meeting 20 February 2018

[45] Ms Langdon attended the meeting on 20 February 2018 with her godson Gavin as support because he had had experience working in restaurant management in the United Kingdom. Mr and Mrs Pink attended as did D. Ms Langdon said in her evidence that she felt surprised about D attending the meeting.

[46] Ms Langdon said that she made notes about the meeting as soon as she got home. No other record of the meeting was provided to the Authority. I have placed some reliance on the notes.

[47] The notes and the evidence support that there was discussion about the loss of customers and discussion with customers by Ms Langdon that she was unhappy with her role. The notes reflect that Mr Pink refused to give her information about who the customers were. There was discussion that Ms Langdon told customers she was unhappy in the role, moaned about her job and was rude to patrons. Ms Langdon, the notes reflect, did not accept those matters and said she always tried to treat everyone she came into contact with as she would like to be treated and had positive interactions.

[48] Ms Langdon said statements were raised by Mr Pink at the meeting that she had had “problems” in her previous jobs. She was concerned about that being said particularly in front of D. Mr Pink did not accept in his evidence that during the meeting he referred to Ms Langdon’s previous employment issues because he said that would not be appropriate in front of D.

[49] Having heard the evidence and read the notes I find it more likely than not that Mr Pink did refer to Ms Langdon's previous employment at the meeting. It seemed to me highly unlikely that she would make something up about her previous employment and write that in her meeting notes. Ms Langdon set out in her notes her answers to each matter raised and the notes record the comments were made in the context that Mr Pink stated that she should stop blaming others and take responsibility. Later the notes record that he told her she had a "superiority complex". Ms Langdon said that Gavin was not allowed to speak at the meeting and was "closed down" by Mr Pink when he attempted to do so.

[50] There was also a suggestion put to Ms Langdon that there were continued discrepancies with the cash register. Ms Langdon accepted that at the beginning of her employment there could have been a couple of issues but she put this down to getting familiar with the till and said that she was always honest and showed integrity in handling money.

[51] Ms Langdon was asked at the meeting if she would swap jobs with D but responded that she was not a cook and her notes record she asked if "she was fired or did she still have a job." It was confirmed that she still had a job.

[52] Ms Langdon walked out of the meeting asking for a decision.

20 February 2018 letter

[53] Ms Langdon was provided with a letter from Mr Pink after the morning meeting. The letter provided amongst other matters that Mr Pink wanted Ms Langdon to look at her attitude with respect to interactions with other staff members. He wrote that he would not tolerate any more of these actions and that Ms Langdon was on no account to relay any matters relating to her current employment with the customers.

[54] In the letter Mr Pink set out that he wanted to see a "vast improvement" in Ms Langdon's attitude to all staff members and more attention paid to the recording of sales. He referred to the loss of customers due to Ms Langdon talking to them about her "so called problems" and giving false information to them. Mr Pink also requested that Ms Langdon give up her social club office as this was interfering with her duties behind the bar and this was unacceptable. Ms Langdon said that she had agreed to do this at the meeting on 20 February.

[55] There was also reference to “continual discrepancies on the cash registers” and that this cannot be allowed to continue.

[56] Mr Pink also wrote that he was changing the roster in the near future and would give her requisite notice when this occurs. She was concerned to read this as she could not afford a drop in her paid hours. He also advised that he was taking further advice including from an employment lawyer and would relay any of their “remarks and recommendations” to her.

After the 20 February letter

[57] Ms Langdon said that after reading the letter she did not feel well enough to return to work and on 22 February sent a text to Mrs Pink to inform her that she had visited her doctor and he had endorsed her absence from work on grounds of work related stress until 26 February 2018.

[58] On 24 February 2018 Mr Pink wrote to Ms Langdon by way of email asking for clarification about her intention with regards to her current employment and referring her to the employment agreement clause “abandoning employment.”

[59] Ms Langdon responded to Mr Pink by letter dated 24 February 2018 and advised that her doctor had put her off on work related stress leave until 28 February 2018 and she had notified Mrs Pink of her absence on sick leave and that she had provided Mrs Pink with a medical certificate. Therefore she wrote that she had not abandoned her employment. Ms Langdon also sought clarification from Mr Pink about his reference in the 20 February letter to making roster changes.

Letter dated 26 February from Mr Pink advising of roster changes

[60] Mr Pink sent a further email on 26 February advising Ms Langdon that as there was no definite return to work date another employee was covering her shifts.

[61] He also set out that her hours of employment have had to be changed “to facilitate my incapacity starting from 5th March 2018.” As set out earlier in the determination this was effectively a reduction in the hours to about 25 from 42 per week.

[62] The attached roster to the email supported that D appeared to have received the additional hours.

2 March 2018 email

[63] On 2 March 2018 Ms Langdon wrote to Mr Pink asking for an urgent response to the bullying by D she brought to his attention three weeks ago. She attributed that to her stress leave in the email. She also referred to the rostered hours which Ms Langdon said were not discussed with her before they were reduced. She asked for an urgent response.

[64] On the afternoon of 2 March Ms Langdon received an email from Mr Pink advising that another employee had been appointed general manager of the Junction Hotel.

4 March email from Mr Pink and resignation email

[65] On 4 March 2018 Mr Pink wrote to Ms Langdon by email attaching a letter in a format she was unable to open on her computer. When Ms Langdon eventually managed to open it, she said that she found it difficult to make sense of what Mr Pink was saying. The letter provided as follows:

Dawn,

I view of the constant e-mails, personal meetings and other contacts you have bombarded me with since you commenced employment with us and the amount of time expended by me in trying unsuccessfully to resolve your problems I feel it only fair that I should be recompensed for the time wasted unnecessarily.

I have had to spend hours in replying to your tirades which has kept me away from doing my normal work and as I am partially incapacitated at present, I find this totally unacceptable.

I think that a figure of \$500 is fair and I expect to receive this within 7 days.

I would like you to bear in mind that you receive a free meal each time you are on duty and even get paid for the half hour plus that you have each break.

I have also been informed that you request a sandwich on Sundays when you start your shift.

We still have not resolved the constant large discrepancies that you have on the cash registers most times you are on duty, almost all are of a negative nature.

MJP
Copy to J&S Ass

[66] Ms Langdon said that she did not accept that there were constant emails or that she had requested sandwiches. She was unclear who the letter had been copied to. She said she had reached a point that she felt so stressed by the situation that she had little choice but to resign. She then wrote the letter resigning from her employment.

Conclusion about whether the resignation was caused by a breach of duty on the part of Mr Pink

[67] Parties to an employment relationship are to be active and constructive in maintaining a productive employment relationship. The parties should be responsive and communicative to each other.

[68] Ms Langdon had concerns about her interactions with D that she said were in the nature of bullying. Mr Pink had concerns about Ms Langdon. He set out in his oral evidence the dates of concerns about Ms Langdon. Ms Langdon felt the allegations that were actually put to her before the meeting on 20 February 2018 were vague and not substantiated as she complained in her resignation email.

[69] Mr Pink was also concerned about the volume of communications Ms Langdon was having with him but I was not satisfied that was put to her clearly before the 4 March letter. Mr Pink had a number of documents in front of him at the Authority investigation meeting. He said that they were “complaining emails” from Ms Langdon during her employment but he was not prepared to show them to me.

[70] I take into account that Mr Pink was essentially dealing with matters on his own with Mrs Pink. He is not expected to carry out a perfect process or investigation. Good faith obligations do require though that an employer should not without good reason behave in a manner calculated or likely to destroy or seriously damage the employment relationship. Objectively assessed Mr Pink did behave in a manner that was either calculated or likely to destroy or seriously damage the employment relationship in breach of his obligations.

[71] His evidence was that he was “fed up with answering Ms Langdon’s emails.” He accepted that he did not take steps to respond to the email from Ms Langdon of 2 March 2018 and in straightforward way said that he “lived in hope that Ms Langdon would resign.”

[72] There was no investigation and outcome into Ms Langdon’s concerns about her interactions with D. When Ms Langdon had a further concern about continued bullying after

the 25 January meeting she was told by Mrs Pink to start looking for another job and then there was a disciplinary meeting on 20 February. The evidence objectively assessed supports that at least after 25 January Mr Pink had concluded Ms Langdon was the one responsible for the relationship difficulties. He said in evidence that he was attempting to be even handed. I could not be satisfied of that from the evidence of the meeting on 20 February. When Ms Langdon asked for her concerns relating to D to be addressed on 2 March Mr Pink asked for recompense for wasted time in trying to resolve her problems. That response was not in accordance with good faith obligations or the steps in the employment agreement for resolving employment relationship problems.

[73] As well as the failure to properly investigate her concerns about working with D and then discouraging the raising of any further complaints I find there were other breaches of good faith that seriously damaged the relationship and the trust in Mr Pink as her employer. There was D's presence at what was essentially a disciplinary meeting to listen to explanations from Ms Langdon to allegations. Mr Pink also referred in a critical manner to Ms Langdon's earlier employment in front of D. Her notes of the meeting on 20 February 2018 make mention of "a one sided personal attack" and being "in front of her abuser".

[74] I find that there was a breach of good faith obligations about the changed roster. A change to the roster had been foreshadowed in the 20 February 2018 letter from Mr Pink together with advice that "the requisite notice" would be given. The new roster was presented to Ms Langdon on 26 February as a fait accompli. It reduced Ms Langdon's hours significantly from a stable pattern, after the first two weeks of employment, of at least 40 hours per week and had a financial impact. Ms Langdon was also concerned to note that the reduction in her hours had correspondingly increased D's hours. Mr Pink referred to the change being required in the 26 February email to facilitate his incapacity from 5 March 2018 however in the email sent by way of reply to the statement of problem it appears to refer to the reason being that Mrs Pink was fully recovered.

[75] Ms Langdon asked in her email to Mr Pink dated 2 March 2018 for an urgent response to what she stated was the breach of contract regarding her rostered hours and the reduction in the hours. The only response was the 4 March email from Mr Pink to Ms Langdon that discouraged any concerns being raised under some threat of an economic consequence.

[76] Ms Langdon reached a point after the 4 March email where she felt that she had no choice but to resign from what she considered to be destructive behaviour on the part of Mr Pink with no resolution of the concerns likely. I find that the resignation was caused by breaches of the duty of good faith as set out above.

Were the breaches of a serious nature and was it was reasonably foreseeable that Ms Langdon would not be prepared to continue to work for Mr Pink?

[77] The breaches by Mr Pink of the good faith obligations to be responsive and communicative to Ms Langdon about her complaints of bullying and reduction of hours were serious. There were other actions by Mr Pink in breach of good faith obligations that seriously damaged the employment relationship. It was reasonably foreseeable to Mr Pink I find when the breaches are viewed as a whole that Ms Langdon could not be expected to put up with them and would resign.

[78] Ms Langdon has made out her personal grievance of constructive dismissal.

Was the constructive dismissal unjustified?

[79] The Authority in assessing justification is required to apply the test in s 103A of the Act. Mr Pink's conduct at the time of Ms Langdon's dismissal was not what a fair and reasonable employer could have done in all the circumstances. Accordingly the Authority is not satisfied that the dismissal was justified.

[80] Ms Langdon's constructive dismissal was unjustified and she is entitled to an assessment of remedies. I find that the claim for unjustified actions causing disadvantage about the rosters is effectively absorbed into the finding that there was an unjustified constructive dismissal. The failure to make KiwiSaver deductions was raised as an unjustified action that caused disadvantage in the letter raising the personal grievance dated 25 May 2018. That will be considered separately.

Remedies

Lost wages

[81] Ms Langdon explained that she applied for a number of jobs shortly after 4 March 2018 but was unsuccessful until 29 May 2018 when she obtained employment at a supermarket.

[82] I accept that there were adequate attempts to mitigate her loss.

[83] Subject to any issues of contribution Ms Langdon is entitled to reimbursement of lost wages between 4 March and 29 May 2018 which is 12 weeks.

[84] The claim is appropriately made on the basis of 42 hours of wages lost per week over that 12 week period. Ms Langdon has asked for the hourly rate to be assessed at \$16 per hour. I note from 1 April 2018 the minimum wage increased to \$16.50 per hour. It is therefore appropriate to assess the weeks from 1 April 2018 to 29 May 2018 at that higher rate as that would have been the minimum wage Ms Langdon would have been entitled to from that time.

[85] Subject to any issues of contribution Ms Langdon is entitled for the first four weeks until 1 April 2018 to be reimbursed for lost wages in the sum of \$2688 gross. For the remaining eight weeks Ms Langdon is entitled to be reimbursed for lost wages in the sum of \$5,544 gross. That is a total sum of \$8,232 gross arrived at when \$2,688 and \$5,544 are added together.

Compensation

[86] The evidence supported that the events leading to the dismissal and the dismissal caused Ms Langdon humiliation and loss of dignity. That is evident from her resignation letter and strengthened by the evidence. She said that her doctor referred her to counselling to deal with issues of low self-esteem because he was worried about her mental wellbeing. Ms Langdon confirmed in her oral evidence counselling commenced from 21 March 2018. In her oral evidence Ms Langdon said that she had no self confidence that she had the ability to do any job and felt that she was a “complete loser” who was ruining her family’s life. Ms Langdon’s new employment has assisted in improving her state of mind because confidence has been expressed in her abilities.

[87] Ms Langdon had contracted shingles in 2017 and during the period leading to her dismissal could feel the symptoms again and shingles started to appear on her face.

[88] Ms Langdon also experienced financial difficulties in servicing mortgage payments after the dismissal and that brought about a “premature decision to sell the house.” This also disrupted Ms Langdon’s mother’s living situation because her mother and her partner lived in accommodation on the section owned by Ms Langdon and her husband. Alternative accommodation therefore had to be obtained for Ms Langdon’s mother. I accept that the timing of the selling of the house can be attributable to the dismissal however I do not conclude that sale of the property at some later stage may not have been inevitable. Ms Langdon and her husband are currently living in a caravan at a motor camp in Blenheim.

[89] I find that Ms Langdon was significantly impacted by the dismissal. Weighing all matters and subject to any issues of contribution an appropriate award for loss of dignity and humiliation is \$18,000.

Contribution

[90] The Authority is required to consider the issue of contribution under s 124 of the Act if it finds there is a personal grievance. Mr Pink had a number of issues with Ms Langdon. He was entitled to raise those but to do so in a manner that did not seriously damage or destroy the employment relationship. Allegations had to be clear and substantiated and outcomes needed to take into account Ms Langdon’s explanations and this was not apparent from the evidence and documentation. Mr Pink may have felt overwhelmed with the situation but he could have taken advice or suggested an attendance at mediation. Instead by his email of 4 March he effectively closed down any further discussion about significantly reduced hours and Ms Langdon’s concerns. I do not find that Ms Langdon contributed to the situation that gave rise to the personal grievance in any blameworthy way and the above amounts for lost wages and compensation are not reduced.

KiwiSaver

[91] Ms Langdon says that she signed a form for KiwiSaver payments to be deducted from her wages at 4%. She then became aware that that was not happening in February 2018 when she received a letter from IRD but given matters were difficult between her and Mr Pink it was not a matter she advanced until the grievance was raised.

[92] Mr Pink in his evidence said that he did not recall such a form.

[93] There have been no employee or employer contributions made for the period of Ms Langdon's employment with Mr Pink.

[94] Mr Pink cannot recall a form on which Ms Langdon confirmed that she wanted to make contributions to her existing scheme at 4%. Objectively assessed I find it more likely than not that Ms Langdon provided her details of her KiwiSaver scheme and the deduction that she wanted at the same time as she provided her tax and other employee information to Mr Pink.

[95] I have reached that view because that seems to accord with the requirements and employer obligations under the KiwiSaver Act 2006 for those employees with an existing KiwiSaver scheme at the time of employment. There was no evidence of any opt out form.

[96] I understand that Ms Langdon has asked the Inland Revenue Department to investigate this matter further. The failure to make deductions and pay employer contributions clearly disadvantaged Ms Langdon and cannot be justified given my findings on the balance of probabilities. The appropriate remedy is to award the loss of benefit for the employer contribution.

[97] I find that Ms Langdon is entitled to the loss of benefit of the employer contribution for total gross earnings received multiplied by 4%. As at 4 March 2018 the gross earnings were \$19,780.24 however this figure may need to be adjusted for public holiday entitlements and holiday pay about which findings are yet to be made.

Public Holiday entitlements

[98] Although Ms Langdon did not consider she had been paid correctly for sick leave in her resignation letter she did not maintain that argument at the Authority investigation meeting. Pay records had been produced shortly before the investigation meeting by Mr Pink and she had only then been able to assess payments made.

[99] There was a remaining issue about payment for the Marlborough public holiday which fell that year on 30 October 2017. The payslip for that period did not show payment for that day at time and a half. In her evidence Ms Langdon said that she had not been paid at time and a half for that day. On the payslip however for the period ending 19 November 2017

there is a payment beside public holiday of \$56.00 which I found was accepted by Ms Langdon as being payment for the Marlborough Anniversary as written on the bottom “MA finally paid.”

[100] I am not satisfied for that reason that Ms Langdon is owed additional money for working on Marlborough anniversary.

[101] What I cannot be satisfied is whether Ms Langdon took alternative holidays for public holidays worked. It was unclear to me that two public holidays referred to as taken in the pay period ending 31 December 2017 were alternative days.

[102] In those circumstances I find that Ms Langdon is owed payment for public holidays worked on Labour Day and Marlborough Anniversary as Mr Pink had not satisfied me to the correct standards that they were taken.

[103] I have calculated an average daily rate on the basis of 42 hours multiplied by 16 and divided by 6 to arrive at a daily rate of \$112 per day. Ms Langdon is owed payment for two alternative days being \$224.00 gross.

Holiday pay

[104] Ms Langdon said in her evidence that she is owed 11 days holiday pay. I accept her evidence about that in the absence of any holiday and leave record. Mr Pink does not deny that Ms Langdon has not been paid her annual leave but maintained that he had a cheque available to pay her for the annual leave at an earlier stage. Ms Langdon did not accept that. Mr Pink’s figure for the amount owing for annual leave is \$1054.70 although it was not clear to me if that was net or gross. Using the same average daily rate that I have set out above of \$112 I find the amount owing for annual leave is \$1232 gross.

Adjusted KiwiSaver

[105] The amount on which the employer’s contribution to KiwiSaver is to be assessed is adjusted to take into account the alternative days’ payment and the annual leave. That is a figure of \$21,236.24 gross which multiplied by 4% for an employer contribution is \$849.44.

Interest

[106] Ms Langdon has been deprived of the use of the money for holiday pay and alternative days. She is entitled to be paid interest on the combined amount for the alternative days and holiday pay under the Interest on Money Claims Act 2016 of \$1456. Interest on that sum is \$69.16.

Penalties

[107] A penalty is claimed for breaches of good faith by Mr Pink. There may be a penalty awarded under s4A of the Act if the failure to comply with the duty of good faith was deliberate serious and sustained or if it was intended to undermine an employment relationship.

[108] There were serious breaches of good faith.

[109] I could not be satisfied that the KiwiSaver failures were deliberate and may have been overlooked because of the other employment at the bakery for two weeks. I am also conscious of the Inland Revenue Department investigation. The other breaches of good faith were considered in the finding of an unjustified constructive dismissal and I do not intend to impose a penalty for those same breaches in all the circumstances of this matter.

Costs

[110] I reserve the issue of costs. Ms Langdon was not represented at the investigation meeting however Ms Anjela Sharma assisted her up to the investigation meeting but was unavoidably unable to attend the meeting itself. Ms Langdon is therefore entitled to claim for a contribution towards her costs. These are usually awarded on the basis of a daily tariff. I have recorded the meeting commenced at 9.30am and concluded at 12.10pm.

[111] Ms Langdon has until 6 August 2019 to lodge and serve submission as to costs and Mr Pink has until 20 August to lodge and serve submissions in reply.

Orders made

[112] Mike Pink is ordered to pay to Dawn Langdon the sum of \$8232 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.

[113] Mike Pink is ordered to pay to Dawn Langdon the sum of \$18,000 without deduction being compensation for humiliation, loss of dignity and injury to feelings under s 123(c)(i) of the Employment Relations Act 2000.

[114] Mike Pink is ordered to pay to Dawn Langdon the employer contribution towards KiwiSaver at 4% which is \$849.44.

[115] Mike Pink is ordered to pay alternative days not taken as leave in the sum of \$224 gross and holiday pay in the sum of \$1232 gross to Dawn Langdon.

[116] Mike Pink is ordered to pay interest to Dawn Langdon on the combined amounts for alternative days and holiday pay in the sum of \$69.16.

[117] There is no order made for a penalty.

[118] Costs are reserved and a timetable set for an exchange of submissions.

Helen Doyle
Member of the Employment Relations Authority