

ATTENTION IS DRAWN TO THE  
ORDER PROHIBITING  
PUBLICATION OF CERTAIN  
INFORMATION REFERRED TO IN  
THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 381  
3078714

BETWEEN TODD LONGSON  
Applicant

AND INSIGHT NEW ZEALAND 2007  
LIMITED  
Respondent

Member of Authority: Philip Cheyne

Representatives: Jeff Goldstein and Linda Ryder, counsel for the Applicant  
Tim McGinn, counsel for the Respondent

Investigation Meeting: 16 & 23 June 2020

Date of Determination: 24 September 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Pursuant to clause 10 of Schedule 2 to the Employment Relations Act 2000, I prohibit from publication any evidence that would tend to identify the name or the residence of the person in this determination referred to as “G”.**
- B. Insight New Zealand 2007 Limited is to pay Todd Longson \$15,000.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.**
- C. Insight New Zealand 2007 Limited is to pay Todd Longson \$16,750.00, pursuant to s 123(1)(b) of the Employment Relations Act 2000.**

**D. I reserve costs, subject to the set timetable for submissions if required.**

**Employment relationship problem**

[1] Insight New Zealand 2007 Limited provides residential care support services to clients under contracts with the Ministry of Health and ACC. Rebecca Knowles is the company's sole director and shareholder. Todd Longson worked as a community residential support worker for Insight NZ from 2010 until his summary dismissal on 11 January 2019.

[2] There are some evidential disputes about aspects referred to in the following overview, but it is not presently necessary to set out or resolve them.

[3] Mr Longson was one of the support workers for a client ("G"), the sole resident in a property. When Mr Longson finished his shift on 28 November 2018 he handed over to Debbie Pedersen, another support worker. Only Mr Longson, Ms Pedersen and G were in the home. During the morning hand-over there was an incident between Mr Longson and Ms Pedersen, following which Mr Longson sent Ms Knowles an email asking her to call him. Ms Knowles did not call. Mr Longson and Ms Pedersen had a further exchange later in the day after Mr Longson came back on duty. A daybook is used to record observations about G. Both Ms Pedersen and Mr Longson made some notes.

[4] Cara Stewart is a residential support manager who manages three of Insight NZ's homes for 12 clients supported by 11 support workers, including G's home. On 29 November, as part of a txt exchange with Ms Stewart, G expressed concern about the incident the previous morning. Ms Stewart discussed this and G's other concerns when they met on 30 November. Ms Stewart then phoned Ms Knowles to discuss G's concerns. They agreed that Ms Stewart would discuss them with Mr Longson. Ms Stewart phoned Mr Longson but Mr Longson declined to discuss matters with her, saying that he would meet Ms Knowles. Mr Longson rang and left a message for Ms Knowles to call him. After Ms Stewart reported the exchange to Ms Knowles, she rang Mr Longson. Mr Longson said he would not meet with Ms Stewart present.

[5] Ms Knowles sent an email to Mr Longson on 3 December saying that she was seeking legal advice following which she would get back to Mr Longson. On 4 December Mr Longson replied saying that he had sought mediation assistance. Ms Knowles responded that there needed to be a formal disciplinary meeting with Mr Longson to investigate allegations of serious misconduct, mediation was not an appropriate forum for that and a letter setting out the concerns would follow in the next few days.

[6] Mr Longson left work on 4 December and on 5 December was certified as medically unfit for work from 4 December and should be fit to resume work on 14 December.

[7] Ms Knowles wrote to Mr Longson on 6 December setting out alleged serious misconduct and requiring his attendance at a meeting at her office on 12 December. Ms Knowles' letter included letters to her from Ms Pedersen and Ms Stewart setting out their accounts of recent matters. Mr Longson instructed a lawyer (Ms Tait) to act for him on 10 December. Ms Tait advised Ms Knowles of this and alerted her to Ms Tait's unavailability at the meeting time proposed for 12 December. Exchanges between the parties' lawyers followed and there was a disciplinary meeting on 7 January 2019.<sup>1</sup> The meeting was followed by a further exchange, then on 10 January Mr McGinn for Insight NZ sent Ms Tait a letter setting out Insight NZ's factual findings with the proposed outcome of summary dismissal. Comment on that penalty was sought before 3.00pm on 11 January when Insight NZ would announce its decision.

[8] On 11 January, Mr McGinn advised Ms Tait of Insight NZ's decision that Mr Longson was summarily dismissed as:

...the behaviour exhibited by [Mr Longson] through the incidents occurring 28 and 30 November to be destructive of the trust and confidence needed for the employment relationship to continue on any basis. [Insight NZ] feels that there has been a pattern of behaviour established ...that renders him unsuitable to be an employee in [Insight NZ's] workplace given the key relationship breakdowns and the sensitive nature of the workplace.

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<sup>1</sup> Counsel for Insight NZ pressed for a meeting before Christmas without success. It is not necessary to set out the exchanges or make any findings about the passage of time.

[9] By counsel's 3 April letter, Mr Longson raised his personal grievance of unjustified dismissal. The dismissal on 11 January was said to be substantively and procedurally unjustified and not a decision which a fair and reasonable employer could have made. Mr Longson claimed he was unjustifiably disadvantaged by Insight NZ breaching its good faith obligations. Mr Longson's concerns had been ignored, causing him to be unjustifiably disadvantaged. Mr Longson was required to work with "staff members who regularly shouted at him and with management who ignored his concerns." Insight NZ encouraged staff to complain, ignored his concerns but treated its concerns as disciplinary matters. This was said to create an unsafe working environment, distressing Mr Longson and meaning he was "unable to remain at work from 4 December 2018." Remedies of reimbursement, interest, holiday pay, Kiwisaver contributions, compensation, costs, general and special damages, penalty for breach of contract and penalty for breach of good faith were specified. Claims were later lodged with the Authority by a statement of problem.

[10] All the claims emerged in response to Insight NZ's decision to dismiss Mr Longson so I will first consider whether Insight NZ can show whether its actions and how it acted in dismissing him were what a fair and reasonable employer could have done in all the circumstances at the time. I will then consider the claims of unjustifiable disadvantage and whether Insight NZ failed to meet its good faith obligations rendering it liable to the imposition of a penalty for breach.

[11] More should be said about the alleged serious misconduct resulting in the dismissal before considering the statutory test for justification.

### **Alleged serious misconduct**

[12] The following are allegations from Ms Knowles' 6 December letter. On 28 November Mr Longson raised his voice during handover with Ms Pedersen. He closed the staffroom door, leaned over Ms Pedersen and spoke in a raised voice and behaved in an intimidating manner. There was a history of similar behaviour. The resident was upset and complained to Ms Stewart. When Ms Stewart spoke to Mr Longson to arrange a meeting, Mr Longson was argumentative, spoke over her and refused to meet with her but would only meet off site with

Ms Knowles. Later, Mr Longson told Ms Knowles that there was a vendetta against him so that she should tell Ms Stewart (his manager) not to communicate with him. Mr Longson spoke over Ms Knowles and in a raised voice. Mr Longson had refused to attend a staff meeting.

[13] The 6 December letter included Ms Pedersen's written complaint. Ms Pedersen said she felt unsafe as a result of Mr Longson's behaviour. There is a description of the 28 November handover where Mr Longson intimidated her by leaning over her, telling her to stop yelling and talking over her. Mr Longson closed the door and held it shut. Ms Pedersen felt unsafe especially in the small confined room. When she left the room Ms Pedersen saw that G was distressed. G asked her "if Todd was being a dick again"? Ms Pedersen says that Mr Longson leant over her again later in the day when he returned to work, to talk about the morning incident. Ms Pedersen referred to a history of such behaviour by Mr Longson.

[14] There was also Ms Stewart's 4 December letter alleging recent matters involving Mr Longson. Ms Stewart says that G had sent her a text message about not being happy working with Mr Longson. She next received the message about the morning handover incident which G characterised as Mr Longson yelling at Ms Pedersen. Ms Stewart met G on 30 November to hear the concerns and then spoke to Ms Knowles, who agreed that Ms Stewart would speak to Mr Longson. When they spoke, Mr Longson claimed it was Ms Pedersen who yelled, not him. Mr Longson declined to meet with Ms Stewart to discuss the issue, demanding that Ms Knowles ring him. Mr Longson said the meeting with Ms Knowles needed to be off-site. Mr Longson referred to an earlier issue and claimed that Ms Stewart was out to get him. He was argumentative and spoke over Ms Stewart, causing her to feel intimidated. Ms Stewart went to end the call telling Mr Longson that Ms Knowles would call. Mr Longson characterised this as Ms Stewart hanging-up on him.

[15] Ms Tait for Mr Longson responded by letter on 18 December. An outline is sufficient currently. Mr Longson disputed that he was at fault in the exchange with Ms Pedersen, referring to his email to Ms Knowles shortly afterwards. Mr Longson explained and justified the view he expressed to Ms Stewart that he would talk to Ms Knowles, referring to earlier

exchanges. He said he was entitled to speak to Ms Knowles as both Ms Pedersen and Ms Stewart had complained to her about him. Mr Longson questioned the veracity of Ms Pedersen's whole account, said to contain "wild allegations many of which are simply implausible". Mr Longson's hand-over note was enclosed as support for his account. Evidence and better detail of G's complaint to Ms Stewart were sought before any response. Mr Longson claimed that Ms Knowles refused or neglected to hear his complaint about a vendetta. Ms Knowles' approach was "designed to cause Todd further stress and to exacerbate his concerns". Ms Longson was entitled to insist the meeting be off-site. Matters described as the "Fourth Allegation" and "Fifth Allegation" were rebutted and there was a stipulation that they be removed as part of the allegation. Mr Longson asked whether Ms Pedersen was subject to any action in respect of another matter. Reference was made to the time of the year and delay on the employer's part, so any meeting would probably have to wait until the New Year.

[16] On 19 December counsel for Insight NZ advised that the "fourth allegation" and "fifth allegation" would not be pursued as they added nothing to the primary concern that there appeared to be a break-down in the employment relationship arising from Mr Longson refusing to acknowledge that Ms Stewart was his manager and to take direction from Ms Knowles. The latter concern was based on Mr Longson allegedly "refusing" to meet with and "shouting over the top of" Ms Knowles.

[17] There was a disciplinary meeting on 7 January, part of which was recorded. There is now a transcript of the recording. The circumstances under which the recording was made are disputed, but it is not necessary to deal with that. I treat the recording and the transcription as the best evidence of what was said during that part of the meeting. I deal more fully with the meeting below.

[18] Following the meeting, counsel for Insight NZ sent Ms Tait the txt exchange between G and Ms Stewart referred to in Insight NZ's 6 December and Ms Stewart's 4 December letters, particularly seeking comment on the txt from G which reads:

OK CARA YESTERDAY MORNING TODD WAS ANGER AT DEBBIE AND IT NOT GOOD I HAVE TO HEAR IT AND IT PISS ME OFF AND I DON'T HAVE TO HEAR IT...

[19] Ms Tait responded, asserting that it was Ms Pedersen who was annoyed with Mr Longson during the hand-over incident and attributing G's description that "TODD WAS ANGER" to a mistake, given circumstances which were described.

### **The Dismissal decision**

[20] On 10 January 2019 counsel for Insight NZ wrote to counsel setting out "findings of fact in relation to the outstanding allegations", as follows.

[21] Regarding the 28 November exchange between Ms Pedersen and Mr Longson, Insight NZ concluded that Ms Pedersen's account was more probably correct. The 6 December letter had summarised that as follows:

...it appears that you didn't like the answer Debs gave to one of your questions and you raised your voice at her. You then closed the door to the staff room and leaned over Debs within the room's small and confined space, continuing to speak to her in a raised voice and behaving in an intimidating manner towards her. There appears to be a history of such behaviour by you towards Debs and other Insight employees. G... became visibly upset because of this incident.

[22] Regarding the phone exchange between Ms Stewart and Mr Longson on 30 November, Insight NZ noted that there did not appear to be material differences except Mr Longson's denial that he talked over the top of Ms Stewart in an intimidating fashion. Insight NZ reached the view that:

...[Mr Longson] would not meet with Cara insisting on meeting with Rebecca. [Insight NZ] considers it noteworthy that ...Cara was ...simply wishing to discuss a resident's concerns with him as part of the day to day job. [Mr Longson] has seemingly immediately become defensive and aggressive in his demeanour from that point. [Insight NZ] accepts that it is likely that [Mr Longson] did adopt an overbearing

demeanour in this conversation and talked over the top of Cara while she was trying to communicate with him in a reasonable manner...to the point where she had to end the discussion. Again an apparent pattern of behaviour on your client's part points to this likelihood.

[23] Regarding the phone exchange between Ms Knowles and Mr Longson, Ms Knowles was confident that her recollection was accurate on the key points:

- That [Mr Longson] did not accept that [s]he was [his] manager
- Asking that Cara not call him on the telephone
- That [Mr Longson] viewed attempts to interact with him as part of management as a vendetta against [him]
- Refusing to meet unless it was offsite
- Talking over the top of Rebecca to the point where she had to end the discussion

[24] The letter said Ms Knowles's was "comforted" in her recollection to the extent disputed, given the account of another employee (Ms Wilson) who had been able to hear the conversation between Mr Longson and Ms Knowles on speaker phone. Ms Wilson's typed notes were attached to the letter.

[25] Insight NZ did not accept that Mr Longson was the victim of a vendetta but considered where he does not like what he hears, he reacts by using his size and voice to shout over the top and drown out the message and intimidate to achieve his own way. It considered this was deliberate and calculated or showed a complete lack of self-awareness that was damaging to the workplace environment. Mr Longson was thought to be unmanageable and "this pattern of behaviour has destroyed the employment relationship." Insight NZ did not consider that its concerns could be addressed through mediation or counselling. It considered summary dismissal as a "possible outcome".

[26] The 10 January letter was sent by email to Ms Tait that day shortly before 3.00pm. Any "input on the proposed penalty" only was sought before 3.00pm 11 January, following which Insight NZ would announce its decision.

[27] There was no response from counsel and on 11 January at 3.45pm counsel for Insight NZ sent Ms Tait a letter conveying Mr Longson's summary dismissal that day. The letter set out arrangements for his final pay and requested the return of company property. It stated:

Unfortunately my client considers the behaviour exhibited by your client through the incidents occurring 28 and 30 November to be destructive of the trust and confidence needed for the employment relationship to continue on any basis. My client feels that there has been a pattern of behaviour established on your client's part that renders him unsuitable to be an employee in my client's workplace given the key relationship breakdowns and the sensitive nature of the workplace.

### **Justification for the dismissal**

[28] I summarise Insight NZ's investigation of the allegations. Insight NZ had the accounts from Ms Pedersen and Ms Stewart of their interactions with Mr Longson. It also had Ms Knowles' recollection and Ms Wilson's note. The txt from G was corroborative of Ms Pedersen's account. Ms Pedersen's note written on 28 November partly supported her account. Mr Longson disagreed in writing and during the meeting with the accounts and recollection. He later suggested G probably mistook whose voice was raised and that G might have been led to express the concern in the txt. Insight NZ did not put to Ms Pedersen or Ms Stewart Mr Longson's account for their response but there was some interchange between Ms Knowles and Mr Longson about their own respective recollections. Insight NZ did not question G about whether there was a mistake or whether Ms Pedersen had led G's description.

[29] In G's circumstances which are understood by the parties, Insight NZ owed Mr Longson no duty to further investigate with G the doubts raised for Mr Longson about the possibility of a mistake or being led. The investigation in that respect was sufficient.

[30] Insight NZ also sufficiently investigated Ms Pedersen's and Ms Stewart's allegations about Mr Longson's conduct. In substance Mr Longson's explanation was to dispute the accounts given by Ms Pedersen and Ms Stewart. No significant detail was provided by Mr

Longson to cause a need for Insight NZ to test their accounts against his by questioning them further.

[31] No further investigation was required of Ms Knowles' allegations.

[32] I next consider whether Insight NZ raised its concerns with Mr Longson before his dismissal.<sup>2</sup> I also consider whether Insight NZ provided Mr Longson with access to information relevant to those concerns.<sup>3</sup>

[33] Concerns about Mr Longson's behaviour in the morning exchange on 28 November and during the phone calls on 30 November were raised by Ms Knowles' letter dated 6 December with the enclosed statements. The letter included other matters which it is not necessary to canvass. Insight NZ clarified<sup>4</sup> its primary concern was Mr Longson's "stated refusal to acknowledge that Cara Stewart" is his manager and his "refusal" to take direction from Ms Knowles to meet at her office and "shouting" over the top of her.

[34] The recording of the 7 January meeting only covers part of the meeting. Concerns regarding Mr Longson's 30 November phone exchanges with Ms Stewart and Ms Knowles were raised with Mr Longson. The first part of the meeting was not recorded. Ms Knowles' evidence is that there was a discussion about Mr Longson's interaction with Ms Pedersen and the initial part of the discussion about concerns arising from the 30 November exchange with Ms Stewart. Ms Knowles also says that the recording does not cover some exchanges at the end about the txt messages between Ms Stewart and G.<sup>5</sup> There is no reason to doubt Ms Knowles' evidence about what occurred before and after the recorded part of the meeting. I find that concerns regarding Ms Longson's 28 November exchange with Ms Pedersen, his exchange with Ms Stewart on 30 November and his exchange with Ms Knowles the same day were raised with Mr Longson through the meeting, as they had been in writing beforehand.

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<sup>2</sup> Employment Relations Act 2000 s 103A(3)(b).

<sup>3</sup> Employment Relations Act 2000 s 4(1A)(c).

<sup>4</sup> Letter of 19 December 2018.

<sup>5</sup> The recording (and transcript) produced in evidence excludes a legal privileged exchange. The discussion described by Ms Knowles was not privileged.

[35] The recording includes Mr Longson being questioned about an earlier exchange with another manager (Christine Wade). The earlier exchange was mentioned in Ms Stewart's account of the phone call, although it is not mentioned in Ms Knowles' 6 December letter setting out the allegations. The discussion about the earlier exchange with Christine is noted in the 10 January letter. It is part of the conclusion that "There appears to be a pattern of behaviour...involving [Mr Longson] talking over the top of Cara, Rebecca and Christine as well as Debbie." The "pattern of behaviour" is said to render Mr Longson unsuitable to be an employee in Insight NZ's workplace.

[36] In evidence Ms Knowles expressed the position that Mr Longson had difficulty taking directions from women. However, the concern was not raised in this way with Mr Longson during the disciplinary investigation.

[37] Connected to this, Ms Stewart gave evidence about earlier exchanges between her and Mr Longson in 2014 when she had taken up various matters with him. This included Mr Longson's work at a different residence coming to an end. The 2014 interaction with Mr Longson affected Ms Stewart's confidence in her role as a manager. After then, Mr Longson did not work in a residence managed by Ms Stewart until she was appointed to manage G's residence in about April 2018. Ms Stewart gave evidence about Mr Longson's response to advice from a (female) psychologist in a training situation to show a "pattern in how Todd responds to a direction from a woman in authority, which was to later become a serious issue in November 2018." This is a reference to Ms Stewart's 30 November exchange with Mr Longson. Ms Stewart's perspective and the specific reasons for it helped to inform Ms Knowles' view that Mr Longson had difficulty taking directions from women. It was part of why Ms Knowles did not accept Mr Longson's account of his exchanges with Ms Pedersen and Ms Stewart on 28 and 30 November. As above, the concern that Mr Longson had difficulty taking directions from women was not raised in that way with him.

[38] Ms Stewart sent her written account of the 30 November exchange to Ms Knowles on 5 December at 10.13pm. It differs from the account in her name which was disclosed to Mr Longson. There is a minor wording change at the end of the third paragraph which is not

material. The words “and his behaviour towards me in the past” are added at the start of the fourth paragraph of the disclosed account. The following statement at the end does not appear in the disclosed account:

It’s my belief that the relationship between Todd and the management of Insight New Zealand 2007 Limited has broken down completely, as I no longer believe that Todd is willing to take instruction or respect the management structure – something that would take a huge amount of time to repair, if it is not already broken beyond repair.

[39] The 5 December 10.13pm version of Ms Stewart’s letter was produced during the investigation meeting and had not previously been disclosed to Mr Longson. Ms Stewart’s belief about the relationship breakdown and its prospects for repair was not included in Ms Knowles’ 6 December letter. The breakdown in the employment relationship is described as Insight NZ’s “primary concern” but that belief is not attributed to Ms Stewart. The comment about the time required for relationship repair, if repairable, was not raised with Mr Longson. Rather, the conclusion that Mr Longson had become unmanageable, that his pattern of behaviour had destroyed the relationship and that Insight NZ considered its concerns could not be “addressed” was conveyed in the 10 January “findings of fact” letter.<sup>6</sup>

[40] Ms Knowles arranged for her office manager (Ms Wilson) to be present when she phoned Mr Longson on 30 November using a speaker phone. Ms Knowles did not alert Mr Longson to Ms Wilson’s presence. If Ms Knowles had, the exchange might have been better. Ms Knowles’ evidence, which I accept, is that she anticipated the call might not go well, wanted a “third party to transcribe” and did not make notes herself. I also accept Ms Knowles’ evidence that Ms Wilson typed up her notes straight after the call. Ms Wilson’s presence and her typed notes were not disclosed to Mr Longson until the 10 January letter advising Insight NZ’s “findings of fact in relation to the outstanding allegations”.

[41] At the 7 January meeting, Mr Longson was closely questioned, based on phrases in Ms Wilson’s undisclosed notes, that he had said he did not “consider Cara to be his manager”,

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<sup>6</sup> No material dispute arose over what was said during the 7 January meeting, so I do not consider that Mr Longson had a good faith duty to provide a copy of the recording at this point.

did not want to deal with her and asked Ms Knowles to tell Ms Stewart not to contact him. Mr Longson was put in the position of relying on his recollection of the call from more than a month earlier against Ms Knowles' account reinforced by Ms Wilson's undisclosed notes made on 30 November. His recollection was that he said "I don't see how she is", he denied saying that she was not his manager and mentioned the absence of interactions with Ms Stewart that might normally be expected of a direct manager.

[42] In summary, Insight NZ did not directly put to Mr Longson for a response Ms Knowles' view that he had difficulty taking direction from women, did not disclose Ms Stewart's view expressed to Ms Knowles that she no longer believed Mr Longson was willing to take instruction or respect the management structure, did not disclose Ms Stewart's view that the relationship, if repairable, would take a huge amount of time to repair, and did not disclose Ms Wilson's attendance during and recollection of his call with Ms Knowles.

[43] I turn to consider whether Insight NZ's actions were what a fair and reasonable employer could have done at the time.

[44] Insight NZ was entitled to prefer Ms Pedersen's recollection of her exchange with Mr Longson. His behaviour including his tone and body language in a small office and holding the door shut left Ms Pedersen feeling very unsafe. Both raised their voices. Hearing the exchange upset G. Insight was entitled to prefer Ms Stewart's account of her exchange with Mr Longson. Their conversation started well but Mr Longson declined to meet with her and demanded to meet with Ms Knowles. Ms Stewart's attempt to continue the exchange resulted in Mr Longson becoming argumentative and talking over her. Ms Stewart ended the call as she started to feel intimidated by Mr Longson's tone of voice.

[45] Insight NZ could not fairly conclude that Ms Knowles' recollection of the exchange was accurate as the notes made by Ms Wilson who listened as a "third party to transcribe" were relevant to Ms Knowles' recollection but had not been disclosed. However, not disclosing Ms Wilson's notes, without more, might be regarded as a minor defect<sup>7</sup> in light of the probability that it accurately recorded the exchange.

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<sup>7</sup> Employment Relations Act 2000 s 103A(5).

[46] The difficulty for Insight NZ is that a fair and reasonable employer could not have concluded that Mr Longson's behaviour had become "unmanageable" so as to destroy the employment relationship. Insight NZ had taken no steps to manage his perceived difficulty taking instruction from women. His conduct on 28 and 30 November towards Ms Pedersen, Ms Stewart and Ms Knowles, although unacceptable, could not reasonably be regarded as serious misconduct entitling Insight NZ to terminate his employment without notice. Mr Longson had not earlier been warned for misconduct. A concern that Mr Longson had difficulty taking instruction from women is something that could reasonably have been raised through a performance appraisal process. The intimidating effect experienced by colleagues and managers caused by his size, tone and mannerisms could also have been raised. These steps could have maintained a productive employment relationship.

[47] I am referred to *Walker v Procare Health Ltd*.<sup>8</sup> There, the employer took substantial steps over a period of time to manage an incompatibility in working relationships but it was irreconcilable. The employer dismissed the employer due to irreconcilable incompatibility. Insight NZ cannot show it took such steps. There is evidence to establish that the employment relationship was positive and productive in large measure.

[48] I recognise the circumstance of the workplace being G's residence. Only the exchange with Ms Pedersen affected G. That incident alone would not have been sufficient to justify a dismissal. The nature of the workplace makes no difference to the assessment of whether Insight NZ's actions resulting from Mr Longson's exchanges with Ms Stewart and Ms Knowles were those of a fair and reasonable employer. I do not accept that *Fuiava v Air New Zealand Limited*<sup>9</sup> is analogous.

[49] I find that Insight NZ's decision to dismiss Mr Longson was not justifiable. Mr Longson has a personal grievance.

### **Personal grievance of unjustified disadvantage**

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<sup>8</sup> [2012] NZEmpC 90.

<sup>9</sup> [2006] ERNZ 806.

[50] To paraphrase s 103(1)(b) of the Act, Mr Longson has a personal grievance if his employment was affected to his disadvantage by an unjustified action by Insight NZ. The test for justification is whether an employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time. In applying the test I must consider the factors set out in s 103A(3) of the Act and other factors which I consider are relevant.

[51] Following the cessation of his medically certified leave, Mr Longson was stood down on pay pending the outcome of the disciplinary investigation. The paid stand-down is mentioned in the 3 April letter raising grievances and in the statement of problem. It is not otherwise detailed as the basis of a separate grievance. In any event, there is no evidence to establish that Mr Longson suffered disadvantage related to Insight NZ's decision to stand him down from work. No grievance arises from this action and it is not necessary to separately consider the statutory test for justification.

[52] The 3 April letter says that Mr Longson attempted to raise "serious concerns" with Insight NZ which were ignored with Insight NZ instead choosing to deal with its allegations against Mr Longson. This is said to have caused Mr Longson to be unjustifiably disadvantaged.

[53] The statement of problem asserts that Ms Pedersen became agitated and started yelling at Mr Longson after he raised his concern with her that G had been become very upset following a trip the previous day. Mr Longson says that he sent Ms Knowles the email at 7.54am on 28 November asking her to call him so he could discuss Ms Pedersen's conduct. There was a second matter he learnt about after the email and intended to raise that too. Ms Knowles did not call Mr Longson until after his exchange with Ms Stewart on 30 November.

[54] Ms Knowles' evidence is that she was in the midst of a demanding issue when the email arrived and intended to follow it up later but forgot. I accept Ms Knowles' evidence.<sup>10</sup>

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<sup>10</sup> Mr Longson does not believe that Ms Knowles "forgot", saying it is inconsistent with her earlier statement to him. Ms Knowles first heard about the hand-over incident on 30 November from Ms Stewart. Ms Knowles either forgot, or deliberately had not responded. It is implausible that a person in Ms Knowles' position would deliberately not respond.

I further accept Ms Knowles' evidence that it jogged her recollection about the email when Ms Stewart spoke to her on 30 November and she thought that Mr Longson must have intended to discuss the matters mentioned by Ms Stewart. Mr Knowles left it for Ms Stewart to initiate the discussion with Mr Longson. That was followed by the phone call between Mr Longson and Ms Knowles, and the exchange of emails between Ms Knowles and Mr Longson about legal advice and mediation. Insight NZ then raised the alleged misconduct by letter dated 6 December.

[55] Mr Longson suggested mediation and the employment agreement stipulates mediation as the primary problem solving mechanism, consistent with the Act. However, Insight NZ acted reasonably in declining mediation as inappropriate for a disciplinary investigation.

[56] Assuming that Mr Longson could establish some disadvantage caused by Ms Knowles forgetting then calling him two days after his email, having initially left it to Ms Stewart as manager to follow up, I find that Insight NZ's actions were justifiable. Insight NZ's actions and how it acted were what a fair and reasonable employer could have done. Mr Longson's email did not convey any sense of urgency and it is common enough for a company director to delegate staff management tasks to the direct manager. Mr Longson's employment agreement included "Residential Manager" as part of his reporting line. Ms Stewart as Residential Manager was Mr Longson's direct manager. Insight NZ acted as a fair and reasonable employer could act when Ms Knowles arranged for Ms Stewart to initiate contact with Mr Longson, thinking that the purpose of his email was to discuss issues which had come to Ms Stewart's attention through contact with G and from Ms Pedersen.

[57] After the call between Ms Knowles and Mr Longson and on advice, Insight NZ decided to initiate a disciplinary investigation into allegations about Mr Longson's conduct. That too was a justified decision as Insight NZ's actions and how it acted were what a fair and reasonable employer could have done. In that process, Mr Longson had a reasonable opportunity to raise his "serious concerns" about the interaction with Ms Pedersen by asserting that she became agitated and started yelling at Mr Longson. He took that opportunity as part of responding to Ms Pedersen's allegation.

[58] The 3 April letter includes the assertion that Mr Longson was required to work with other staff who “regularly shouted at him” with the result that it was an unsafe working environment. Facts to support a grievance on this basis are not set out in the statement of problem. Mr Longson gave evidence of his interactions on 28 November and 30 November with Ms Pedersen and Ms Stewart. There is mention of some earlier episodes extending to other staff as well. Although not directly raised in the statement of problem as a grievance I deal with the work environment point as part of his unjustified disadvantage grievance claim.

[59] I prefer Ms Stewart’s evidence and Ms Knowles’ evidence about the phone calls, to the extent they differ from Mr Longson’s evidence. That leaves me treating with caution his evidence to the extent it differs from Ms Pedersen’s account of the 28 November interactions. I place some reliance on G’s txt message that “TODD WAS ANGER AT DEBBIE”.<sup>11</sup> It does not support Mr Longson’s evidence. A better view can be gained from Ms Pedersen’s daybook note that “G a bit upset this morning due to voices being raised (Deb & Todd)”.

[60] Mr Longson did not produce any documentation to support having earlier raised a concern that staff “regularly shouted at him”.

[61] I find that Mr Longson has not proven that he was required to work with other staff who regularly shouted at him. I do not question the 5 December medical certificate that Mr Longson was “extremely stressed at present because of work place difficulties” but he has not shown that this is attributable to an unsafe working environment.

[62] I find that Mr Longson does not have a personal grievance under s 103(1)(b) of the Act.

### **Remedies for the unjustifiable dismissal**

[63] Mr Longson seeks compensation for humiliation, injured feelings and loss of dignity resulting from the personal grievance.

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<sup>11</sup> I take nothing from the use of capitals but rely on the meaning of the words used.

[64] Mr Longson's evidence is that he was too depressed to work for three or four months following his dismissal. However, as explained below, most of that time is attributable to an accident on 5 February 2019. Mr Longson says he lost wages and incurred significant legal costs. The relevance for present purposes is the significant financial impact of legal costs for Ms Tait and loss of wages on Mr Longson and his family. Ms Baird says that they both became anxious about their financial situation, having to borrow money from family sources to survive. There is no reason to doubt and I accept the evidence that the financial impact of the dismissal has been significant. The financial impact continues as Mr Longson earns less from his subsequent permanent employment than at Insight NZ. The resulting anxiety for Mr Longson is a loss covered by the present award.

[65] Mr Longson says he found it humiliating having to disclose to Work and Income that he had been summarily dismissed. I accept this evidence. When applying for subsequent employment, Mr Longson had no references or referees to cover the preceding 8 years when he had been employed by Insight NZ. I find that this added to the loss currently being assessed.

[66] Mr Longson was prescribed medication on 5 December. The circumstances described in the history note include the events which precipitated the dismissal. However, Mr Longson's evidence is that he had been taking this medication for 15 years and the dose prescribed in December was not an increased amount. I accept this evidence. Insight NZ says that the known side effects of the medication are sleeplessness, nausea and loss of appetite. Mr Longson and Ms Baird both in their evidence describe his sleeplessness, nausea and loss of appetite, attributing these effects to the dismissal. Additional medication was prescribed on 4 February after the dismissal. Mr Longson says this was to assist him to sleep.

[67] I accept that Mr Longson must prove that the personal grievance was causative of the loss for which compensation is claimed. While sleeplessness, nausea and loss of appetite are known side effects of the medication that Mr Longson had been taking for many years, his evidence is that the dismissal exacerbated his anxiety and depression. Ms Baird's evidence is that that these conditions "came back". I accept Mr Longson's evidence that the 4 February

prescription was to assist him to sleep, as there is no expert evidence that it could not be utilised for that purpose. That supports the evidence that the onset of sleeplessness followed rather than pre-dated the dismissal. Effects such as sleeplessness and loss of appetite are not uncommon reactions to a personal grievance. There is no reason to distinguish between the sleeplessness and the two other effects as to when Mr Longson began to suffer from them. This leads me to conclude that the sleeplessness, nausea and loss of appetite described by Mr Longson and Ms Baird were caused by the unjustified dismissal.

[68] Ms Baird's evidence is that Mr Longson went into a shell, rarely spoke or ate, looked visibly upset and confused, was shocked and was despondent following the dismissal. Ms Baird says she had not seen that side of Mr Longson before. I accept this evidence.

[69] No expert evidence to establish the extent of the loss for which compensation is claimed was provided. I find that the unjustifiable dismissal exacerbated but did not cause Mr Longson's medical condition. Compensation needs to be assessed on that basis. The proven effects are remedied by an award of \$15,000.00 compensation.

[70] Mr Longson by his statement of problem sought reimbursement of lost remuneration and benefits to the date of the investigation meeting and future losses. Later, Mr Longson sought to amend his claim to seek compensation for a loss of benefit under s 123(1)(c)(ii) of the Act. Insight NZ opposed the amendment, however I allowed it so the claim in that form could be properly considered as part of the investigation. Mr Longson lost remuneration from 11 January to 4 February 2019 because of the dismissal. The amendment is because Mr Longson was certified unfit for work on 5 February 2019 after a non-work injury.<sup>12</sup> Mr Longson was later certified as only fit for light duties until 13 July 2019.

[71] Mr Longson sought compensation for lost earnings through ACC. The claim was declined because, taking account of the holiday pay he received when his employment was summarily terminated, ACC assessed that his earnings from employment ceased on 31

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<sup>12</sup> I accept Mr Longson's evidence that he was able to participate in the activity which resulted in his injury because he had been dismissed so was not at work. However, the dismissal did not cause that injury or his medical incapacity.

January 2019. He was not eligible for ACC compensation for lost earnings because he was not earning from employment at the date of the accident.

[72] To paraphrase the relevant provision,<sup>13</sup> where I determine that the employee has a personal grievance, I may in settling the grievance, provide for the payment to the employee of compensation by the employer for loss of any benefit which the employee might reasonably have expected to obtain if the personal grievance had not arisen. Insight NZ says that the statutory prohibition on bringing proceedings independently of the Accident Compensation Act 2001 for damages arising directly or indirectly out of personal injury prevents an award to compensate Mr Longson for not receiving earnings related compensation following the 5 February 2019 accident.<sup>14</sup>

[73] For Mr Longson, I am referred to *McKendry v Jansen*.<sup>15</sup> The Employment Court held that s 123(1)(b) and s 123(1)(c)(ii) permit the Authority to order compensation to cover the loss of a statutory entitlement to paid parental leave. In that case the employee could not claim the statutory entitlement because she had been unjustifiably dismissed before completing the qualifying service. The judgment resolved a difference of view about whether the loss of a statutory benefit or payment not provided by the employment agreement was covered by the remedies for a personal grievance. The Court accepted that the loss was a direct and foreseeable consequence of the unjustified dismissal.

[74] The statutory prohibition on awarding compensation in personal grievance proceedings for damages arising directly or indirectly from personal injury did not arise in *McKendry*. Here, Mr Longson did not receive earnings related compensation because it was determined under the Accident Compensation Act 2001 that he was not entitled to that form of compensation, despite the personal injury by accident. Although under that Act Mr Longson obtained no earnings related compensation, the statutory prohibition still operates in these proceedings. I find that the statutory prohibition prevents me from compensating Mr Longson for that loss between 5 February and 13 July 2019.

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<sup>13</sup> Employment Relations Act 2000 s 123(1)(c)(ii).

<sup>14</sup> See *Jennings v University of Otago* [1995] 1 ERNZ 229 and (now) Accident Compensation Act 2001 s 317.

<sup>15</sup> [2010] NZEmpC 128.

[75] Under s 128(2) of the Act, I must order Insight NZ to pay Mr Longson the lesser of his lost remuneration or 3 months' ordinary time remuneration. Putting aside the period where the loss is attributable to the Mr Longson's personal injury, his loss between 11 January and 5 February 2019, and from 13 July 2019 exceeds 3 month's ordinary time remuneration. I accept Mr Longson's evidence that he had been earning \$67,000 per annum. He worked a mixture of on duty and sleepover shifts paid at ordinary time rate. 3 months' ordinary time remuneration totals \$16,750.00.

[76] Insight NZ argues that the injury broke the chain of causation so that Mr Longson's loss after he was fit for work was not the result of his personal grievance.<sup>16</sup> However, it was not suggested that an absence from work for the duration of the injury would probably have resulted in the justifiable termination of the employment. Mr Longson was a long serving employee. He might have returned to work when fit for light duties and would have returned when fully fit. He might not even have suffered the injury if he had not been dismissed.

[77] The argument is partly that Mr Longson did not seek to mitigate his loss, given the injury. I am referred to a note in a medical certificate "Back injury. Was not able to seek work because of this." The note is dated 5 February 2019. At that point Mr Longson was fully unfit for work. However, Mr Longson's evidence is that he was too depressed to work for the first three or four months following his dismissal. I do not accept this evidence as the sole reason, but accept that it probably operated alongside the physical incapacity to mean that Mr Longson did not initially seek replacement employment. I do not accept the argument for Insight NZ that the chain of causation was broken. Mr Longson mitigated his loss, receiving income from casual employment in early September and obtained replacement permanent employment from October 2019. Even taking account of these earnings, 3 months' ordinary time loss is the lesser of the two amounts under s 128(2) of the Act.

[78] I have discretion to order compensation for lost remuneration greater than 3 months' ordinary time remuneration applicable under s 128(3). Mr Longson claims lost remuneration to the date of the investigation meeting and future loss. His evidence is that his loss to the

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<sup>16</sup> I am referred to *Hill v Cantec Services Ltd* [1993] 1 ERNZ 51 and *Argosy Imports Limited v Lineham* [1998] 3 ERNZ 976.

date of the investigation meeting was nearly \$55,000.00. I decline to exercise the discretion provided by s 128(3). Mr Longson's views about Ms Stewart and more generally about a vendetta mean that his continued employment beyond the period for which he had been compensated would have been uncertain.

[79] Mr Longson has established a right to reimbursement limited to 3 months' ordinary time remuneration, under s 128(2) of the Act.

[80] In deciding both the nature and extent of the remedies to be provided, I must consider the extent to which Mr Longson's actions contributed to the situation giving rise to the grievance and if those actions so require, reduce the remedies accordingly.

[81] Only Mr Longson gave direct evidence about the exchanges on 28 November with Ms Pedersen. However, Ms Pedersen's complaint, supported by her daybook entry and G's txt message, leads me to conclude that Mr Longson during the handover did raise his voice and display body language which Ms Pedersen found intimidating, causing her to feel unsafe. His conduct upset G. I find this is blameworthy behaviour which contributed to the situation giving rise to the grievance.

[82] Ms Stewart and Mr Longson gave evidence about their phone exchange. I accept Ms Stewart's evidence about the exchange to the extent of any conflict. In summary, Mr Longson refused to meet or discuss with her the issues she raised, saying he would only meet with Ms Knowles. Mr Longson should not have responded in that fashion to his direct manager. I accept Ms Stewart's evidence that Mr Longson went into a "bit of a rant", talked over the top of her and that she found the tone and volume of his voice intimidating. Mr Longson should not have conducted himself in that fashion. I find that Mr Longson by these actions contributed in a blameworthy manner to the situation giving rise to the grievance.

[83] Ms Knowles and Mr Longson gave evidence about their phone exchange. I accept Ms Knowles' evidence about the exchange, supported by Ms Wilson's notes, to the extent of any conflict. Mr Longson raised his voice and talked over the top of Ms Knowles. I find this is blameworthy behaviour which contributed to the situation giving rise to the grievance.

[84] Mr Longson told Ms Knowles that he considered that Ms Stewart was not his manager and did not want to deal with her. I find his point was that Ms Stewart had not had the engagement with him that Mr Longson expected from a direct manager. His comment expressed his view about Ms Stewart's performance as a manager. The evidence does not support Mr Longson's critical view but nonetheless he was entitled to hold and express it. Mr Longson spoke of a vendetta against him, attributing that to Ms Stewart, Ms Pedersen, Christine Wade (Quality Manager) and Ms Knowles. The evidence does not support a vendetta against Mr Longson, but he was nonetheless entitled to hold and express that view. I do not include these statements by Mr Longson as blameworthy actions contributing to the circumstances giving rise to the personal grievance.

[85] There is evidence directed at showing a pattern of behaviour pre-dating the exchanges on 28 and 30 November. I take none of this into account in assessing Mr Longson's blameworthy contribution to the circumstances giving rise to the grievance. Insight NZ did not raise these issues with Mr Longson at the time. If it had in an appropriate way, there is a reasonable prospect that the exchanges on 28 and 30 November would have been different.

[86] There is a health issue which if disclosed might have affected Insight NZ's decision to dismiss him. However, the non-disclosure, even if it contributed to the situation giving rise to the grievance, is not blameworthy. Mr Longson owed no duty to Insight NZ to disclose the information. The employment agreement included a general disclosure obligation but I do not accept that it created an obligation on Mr Longson to disclose an existing health condition.

[87] Overall, Mr Longson contributed to the circumstances to a moderate extent. His conduct was such as could properly have supported a warning or other corrective action by Insight NZ. Mr Longson's blameworthy actions are a contributing factor to the finding not to exercise discretion under s 128(3) of the Act to order a sum greater than required under s 128(2) of the Act. I find that the reduction in remedies resulting from that finding fully meets the Authority's obligation under s 124 of the Act. No further reduction is required.

### **Penalty for breach of good faith obligations**

[88] A penalty for breach of good faith obligations is sought but the basis not specified, despite the point being canvassed during case management conferences. I am asked to direct that any penalty recovered is paid to the applicant. The claim was not referred to during submissions for the applicant but was not abandoned.

[89] A person who breaches a provision of the Act for which a penalty is provided in the particular section is also liable for a penalty in the Authority: see s 133(b). The present claim is for a penalty for breach of s 4A(a) of the Act.

[90] It is only available on proof that the failure to comply with the duty of good faith was deliberate, serious and sustained.<sup>17</sup> Parliament has set a high threshold before a breach of good faith renders a party potentially liable for the imposition of penalty.<sup>18</sup> The circumstances here although resulting in a personal grievance fall well short of showing a deliberate and sustained breach of good faith. A penalty under s 4A is not available.

[91] While the established grievance includes a breach of good faith, the imposition of a penalty with it to be paid to the applicant along with grievance remedies is in substance double jeopardy and double recovery. I would have declined to impose a penalty, if it had been available.

[92] The claim for a penalty for breach of good faith obligations must be dismissed.

### **Summary**

[93] Mr Longson was unjustifiably dismissed. To remedy that grievance, there will be orders that Insight NZ is to pay Mr Longson compensation of \$15,000.00 under s 123(1)(c)(i) of the Act and reimbursement of \$16,750.00 under s 123(1)(b) of the Act.

[94] Mr Longson's other personal grievance claims and his penalty claims are dismissed.

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<sup>17</sup> Employment Relations Act 2000 s 4A(a).

<sup>18</sup> *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* [2016] NZEmpC 112.

[95] The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Philip Cheyne  
Member of the Employment Relations Authority